3/22/19
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2019 Regional Meeting: Stockholm, Sweden
Outline: Emerging Issues in Ecommerce
Competition, Distribution, Data and Platform Power

Online Platforms: A Blessing from Heaven or the Curse of the Devil?

"The most innovative and valuable companies of our time are the leading 'technology platform' companies: Amazon, Apple, Facebook and Google – a group New York University Professor Scott Galloway simply labels 'The Four.' Except for Apple, none of these companies existed before 1990. That they have eclipsed in the public mind—in such a relatively short amount of time—such other tech giants as Microsoft, Oracle, Cisco and Intel is a testament to the remarkable acumen of the founders and leaders of The Four, their highly skilled workforces, and to the economy and society that have enabled them to flourish."

- Robert Litan, A Scalpel, Not An Axe (Sept. 2018), https://www.progressivepolicy.org/wp-content/uploads/ 2018/09/PPI_Antitrustand DataLaws_2018.pdf.

"What was once a rich selection of blogs and websites has been compressed under the powerful weight of a few dominant platforms. . . .

These dominant platforms are able to lock in their position by creating barriers for competitors. They acquire startup challengers, buy up new innovations and hire the industry's top talent. Add to this the competitive advantage that their user data gives them and we can expect the next 20 years to be far less innovative than the last."

- Sir Tim Berners-Lee, Open Letter (Mar. 12, 2018), https://webfoundation.org/ 2018/03/web-birthday-29/.

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I. Platform Access to Users

A. Platforms, such as Amazon, Apple, Facebook, and Google, service several groups of users, including product suppliers, advertisers, app developers, and end-users. The platform provider creates the terms of use or access, typically through a platform-established form arrangement (license or access agreement).

1. Because of the roles they play, platforms can be likened to "private governments".
    a. Regulatory: Deciding who receives access, the terms of by which products may be offered, and listing in search results.
    b. Discrimination: Platform preference over rivals, and favoritism among suppliers, including search or display positioning.
    c. Taxing power: Fees charge for access.
    d. Disciplinary: The circumstances in which, and procedures by which, access can be terminated.
    e. Surveillance: Monitoring supplier and user access.
    f. *See also*:
        i. Prepared Remarks of Commissioner Rohit Chopra, FTC Hearings on Competition and Consumer Protection 2, 3-4 (Oct. 15, 2018) ("Chopra Remarks") (comparing online platforms to public markets, regulated by cities and towns).
        ii. French Competition Authority, Press Release, "Online advertising by directory enquiry services" (31 Jan. 2019) (directing interim relief against Google for

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possible abuse of a dominance arising from its denial of platform access "under conditions that are neither objective nor transparent").

2. Access to platforms can be essential for start-ups to gain product visibility to users, and to establish the scale of use needed for meaningful entry and expansion. If platform-established access terms are onerous, should "essential facility" doctrine, or other competition law-based principles, have a role?

B. U.S.:

1. An essential facility claim has four elements:
   a. "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications v. American Tel. & Tel. Co.,* 708 F.2d 1081, 1132-33 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983).
   b. The claim's viability today is dubious: "We have never recognized such a doctrine, . . . and we find no need either to recognize it or to repudiate it here." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (citation omitted).
2. "Forced sharing of critical assets reduces the incentive to invest in innovation . . . . 'Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist,

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the rival, or both to invest in those economically beneficial facilities.'" Delrahim Remarks 14 (quoting *Trinko*, 540 U.S. at 407-08).

3. In *Mordy's Applicane Repair Service LLC v. Amazon Services LLC*, 17-cv-5376 (PKC) (S.D.N.Y. July 31, 2018), Mordy's, a would-be seller on Amazon, challenged the platform's standard terms of access and use, and proposed an alternative provision covering Amazon's ability to exclude it from sales. Mordy's alleged, among other things, that Amazon had excluded other sellers under its standard terms.
   a. The District Court dismissed the lawsuit because Mordy's was not an actual Amazon supplier, and thus lacked "standing" to sue: "a plaintiff cannot manufacture standing merely by inflicting harm on [itself] based on [its] fears of hypothetical future harm that is not certainly impending . . . . [H]ypothetical future harm—the wrongful removal of a product—upon which Mordy's Appliance based its decision to refrain from selling its unspecified products on Amazon.com is far from a 'certainly impending' harm." *Id*. slip op. at 3 (internal quotation marks and citation omitted), 4.
   b. The Court of Appeals upheld the dismissal, noting that Mordy's "allegations of potential, future harm are too speculative to confer standing," and that Amazon's failure to respond to Mordy's proposed modification to access and use was not anti-competitive: "there are innocent reasons why Amazon may have failed to respond to a unilateral demand to add undertakings to its standard contract." No. 18-2307, at 3, 4 (2d Cir. Feb. 28, 2019) (summary order).

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C. Europe:

1. The European Commission will consider these practices as an enforcement priority if all the following circumstances are present: (1) "the refusal [to afford access by a dominant firm] relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market", (2) "the refusal is likely to lead to the elimination of effective competition on the downstream market", and (3) "the refusal is likely to lead to consumer harm." European Commission Article 102 Guidance: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), ¶ 81.
2. *See also* "Competition: Antitrust procedures in abuse of dominance Article 102 TFEU Cases" (July 2013), http://ec.europa.eu/competition/publications/factsheets/antitrust_ procedures_102 _en.pdf: abuse of dominance includes "refusing to supply input indispensable for competition in an ancillary market . . . ."
3. The EC has fined Google €4.34B for restrictions associated with installing its Android operating system on mobile devices. Case AT.40099, *Google Android* (18 July 2018).
    a. Announcing the action, Commissioner Margrethe Vestager, in charge of competition policy, said:
        i. "Today, mobile internet makes up more than half of global internet traffic. It has changed the lives of millions of Europeans. Our case is about three types of restrictions that Google has imposed on Android device manufacturers and

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network operators to ensure that traffic on Android devices goes to the Google search engine. In this way, Google has used Android as a vehicle to cement the dominance of its search engine. These practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere. This is illegal under EU antitrust rules." Statement by Commissioner Vestager on Commission decision to fine Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (18 July 2018), http://europa.eu/rapid/press-release_STATEMENT-18-4584_en.pdf.

ii. The three practices:

(a) Google required manufacturers to pre-install Google search and a suite of browser apps, including Chrome and the Play Store.

(b) Google paid manufacturers and network operators for Google search exclusivity.

(c) Google barred manufacturers from installing a non-Google version of the Android operating system.

b. Google has appealed the decision.

c. In response to this decision and the EC's "shopping" decision (*see* p.18), Google recently announced that it will "ask[] users of existing and new Android devices in Europe which browser and search apps they would like to use." Kent Walker,

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"Supporting choice and competition in Europe", https://www.blog.google/ around-the-globe/google-europe/supporting-choice-and-competition-europe/ (Mar. 19, 2019).

D. Spotify recently filed a complaint against Apple with the European Commission.

1. Announcing this action, Daniel Ek, Spotify's founder CEO, said: "In recent years, Apple has introduced rules to the App Store that purposely limit choice and stifle innovation at the expense of the user experience—essentially acting as both a player and referee to deliberately disadvantage other app developers." "Consumers and Innovators Win on a Level Playing Field" (Mar. 13, 2019), https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/.
2. Commenting on the complaint, Commissioner Vestager emphasized Apple's "dual market situation" as both the platform (App Store) host and as a streaming music provider-competitor: "how do you behave when you yourself have gained some status in the market?" Natalie McNelis & Lewis Crofts, MLex, "Spotify's Apple dominance complaint will be taken 'very seriously,' Vestager says" (14 Mar. 19), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1073640&siteid=190&rdir.
3. Responding to Spotify's complaint, Apple noted (among other things) that: "the App Store is a safe, secure platform where users can have faith in the apps they discover and the transactions they make. And developers, from first-time engineers to larger companies, can rest assured that everyone is playing by the same set of rules . . . .

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After using the App Store for years to dramatically grow their business, Spotify seeks to keep all the benefits of the App Store ecosystem—including the substantial revenue that they draw from the App Store's customers—without making any contributions to that marketplace. At the same time, they distribute the music you love while making ever-smaller contributions to the artists, musicians and songwriters who create it—even going so far as to take these creators to court." Apple Statement, "Addressing Spotify's Claims" (14 Mar. 2019), https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/.

E. According to a recent U.K. report, "[s]elf-regulation by online platforms which host user-generated content, including social media platforms, is failing. Their moderation processes are unacceptably opaque and slow." House of Lords Select Committee on Communications, REGULATING IN A DIGITAL WORLD 5 (published 9 Mar. 2019). Should the government intervene by:

1. Applying competition law, including, potentially, a "break-up" to separate functions or to create smaller units? *See* Elizabeth Warren, Medium (Business), "It's Time to Break Up Amazon, Google, and Facebook" (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.
2. Directing regulatory oversight comparable to that imposed on a public utility, or under a regulatory structure developed for the digital space?
3. The UK's recent expert panel recommended "the establishment of a digital markets unit, given a remit to use tools and frameworks that will support greater competition and

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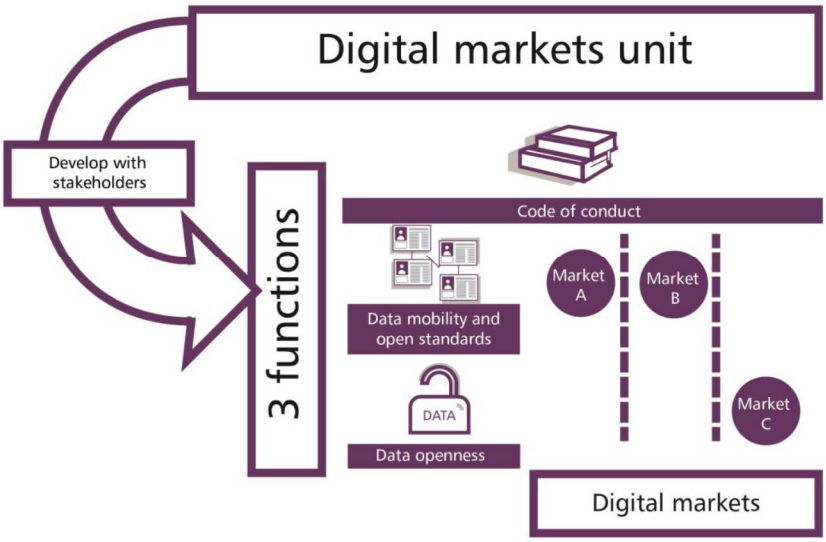
consumer choice in digital markets, and backed by new power in legislation to ensure they are effective." Jason Furman, "Unlocking digital competition—Report of the Digital Competition Expert Panel" 5 (Mar. 2019) ("FURMAN REPORT"); *see generally id*. at 8-10, 55-70, 77-82. As depicted in the Report (*id*. at 78):



4. The French Competition Authority similarly has plans for a digital task force. Arezki Yaïche, "Tech companies face French push for digital antitrust task force" (20 Mar. 2019), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1075555&siteid=190&rdir=1.

F. Is intervention on behalf of consumers (end-users) more justifiable than for business entities seeking access to reach consumers?

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1. Platform owners typically establish the rules under which consumers may purchase products available on the platform. The rules frequently are set using scroll-through licenses presented on a "take it or leave it basis"—in other words, they are contracts of adhesion that consumers rarely even read.
    a. Sometimes the terms limit the forum or location in which disputes can be resolved. In the U.S., for example, there is strong policy favoring enforcement of arbitration provisions—even those in non-negotiable agreements with consumers. *E.g., AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011) (the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*., over-rides a state law defense to arbitration).
    b. Similarly, a non-negotiable agreement with a consumer can prohibit the consumer from litigating a claim as a class (or collective) action. *E.g., American Express Co. v. Italian Colors Rest.,* 570 U.S. 228 (2013).
2. Given the global reach of online sellers, various jurisdictions can respond to non-negotiable restrictions on consumer remedies in different ways.
3. In December 2018 the Dutch Ministry of Economic Affairs and Climate started an internet consultation on competition law and online platforms. The aim of the consultation and accompanying discussion paper was to identify the challenges online platforms bring and to start the debate on the usefulness and necessity of additional regulation. Eighteen responses were received, including a response from Google. The consultation ended early February 2019.

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4. Mid-February 2019, the European Commission, European Parliament and Council of the European Union reached agreement on new rules designed to ensure a fair, transparent and predictable business environment to the benefit of both end customers and businesses using third party platforms for their business. The new rules, which will be implemented through an EU Regulation, include:
    a. Online platforms selling goods or services, in addition to offering access to business users for their sale of goods or services, will have to disclose how they treat and classify their own goods or services in comparison to other products or services (i.e. is there any preferential treatment?).
    b. Business users must be informed of how search results and rankings are influenced (commission payments, fees?).
    c. Terms and conditions between the online platform and business user must, among other things, detail the type of data the online platform shares with other commercial users and if any MFN clauses are applicable and if so, why.

II. Competition Between the Platform and Its Suppliers

A. Vertical integration: Firms operating at multiple levels of a distribution chain can promote efficient distribution of products to end-users. However, vertically integrated firms also can raise competitive concerns by foreclosing competition on the merits at either the supply (input) or resale (output) level, thus producing higher prices for and

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other restrictions on consumers. Vertical integration can also be a barrier to entry by firms unable to replicate the integration.

1. "[B]eing big is not a sin. Australian competition law does not prohibit a business from possessing substantial market power or using its efficiencies or skills to outperform its rivals.

   But the dominance held by each of Google and Facebook in certain markets does mean their conduct should be subject to particular scrutiny to identify whether it is creating competitive or consumer harm. This is particularly the case when the dominant businesses are vertically integrated . . . . . A supplier which is also a critical gateway has the ability and incentive to provide themselves with an advantage or, conversely, to discriminate against others." Rod Simms, "Examining the impact of digital platforms on competition in media and advertising markets" (27 Feb. 2019), https:llwww.accc.gov.au/speech/examining-the-impact-of-digital-platforms-on-competition-in-media-and-advertising-markets.

2. The DOJ's recent, albeit unsuccessful, challenge to ATT's acquisition of Time-Warner is illustrative. *U.S. v. AT&T, Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd*, No. 18-5214 (D.C. Cir. Feb. 26, 2019).

   a. ATT operates the distribution "pipes"—the access plumbing to persons who receive content from cable, satellites, wired and wireless phones and the internet—while

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Time-Warner provides content into not only ATT's pipes, but also those of competing distribution pipes.

b. The DOJ's argued that, by vertically integrating, ATT would gain negotiating leverage and be able to charge competing distributors more to license ATT's content, acquired from Time-Warner. Distributors, in turn, would charge subscribers more, thus harming consumer welfare.

c. The trial court held that the DOJ failed to offer enough facts to prove its case, and the Court of Appeals for the D.C. Circuit affirmed.

3. Other examples include:

a. Amazon and Netflix's production and distribution of video (movies and series's).

b. Facebook's development of user-specific news feeds.

c. Spotify's announced purchase of two podcast providers, Gimlet Media and Anchor, as its first step to offering original content.

4. Traditional and non-traditional content providers (the motion picture studios and companies such as Hulu and Netflix) need to go through the internet pipes to reach consumers.

B. Some platform providers not only offer access to suppliers, but also offer end-users products that compete with those offered by suppliers on the platform to those same end-users.

1. The monopolization case by the DOJ and the states against Microsoft after it "bolted" its Internet Explorer browser to its monopoly Windows operating system—and excluded

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Netscape as a competitor in the browser space—is an early illustration. *See United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

2. The European Commission brought a similar case. *See Microsoft Corp. v Commission of the European Communities* (17 Sept. 2007), ECLI:EU:T:2007:289.
3. Kaspersky Lab recently filed a complaint against Apple with Russia's competition authority arising from Apple's refusal to approve Kaspersky's Safe Kids app for distribution in the App Store.
    a. Apple's objection relates to parental control features that can be enabled to limit internet use by children.
    b. According to Kaspersky, Apple's decision "came on the heels of the Cupertino-based company announcing its own Screen Time feature as part of iOS 12. This feature allows users to monitor the amount of time they spend using certain apps or on certain websites, and set time restrictions. It is essentially Apple's own app for parental control." Kaspersky Daily, "Kaspersky Lab files antitrust complaint against Apple in Russia" (19 Mar. 2019), https://www.kaspersky.com/ blog/apple-fas-complaint/26017/.

C. In the brick and mortar world, this is known as "dual distribution." *E.g.*:

1. Amazon procures many products from manufacturers, and offers them even though third-party vendors using the Amazon platform offer competing products. As one platform critic has written: "Amazon's platform functions as a petri dish, where independent firms

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undertake the initial risks of bringing products to market and Amazon gets to reap from their insights, often at their expense." Lina M. Khan, "Sources of Tech Platform Power," 2 GEO. L. TECH. REV. 325, 330 (2018).

2. Apple developers create apps offered on the App Store in competition with apps created by third-party developers who also sell in the App Store.
3. Google delivers search results in response to user queries, which compete with websites offering targeted searches (for example, for hotel rates or nearby restaurants).
4. Amazon, "the world's largest book retailer . . . has built something else: Its own line of published books." Jeffrey A. Trachtenberg, "'They Own the System': Amazon Rewrites Book Industry by Marching into Publishing," Wall Street Journal (Jan. 16, 2019), https://www.wsj.com/articles/they-own-the-system-amazon-rewrites-book-industry-by-turning-into-a-publisher-11547655267.

D. Is dual distribution in the online world comparable to that in the brick and mortar world?

1. Describing a conference in Brussels earlier this year, Commissioner Vestager noted, :
   a. "[O]ne of the main concerns was how platform business that are also users of their own platform could deny rival users a chance to compete." "New technology as a disruptive global force" (21 Jan. 2019), https://ec.europa.eu/commission/ commissioners/2014-2019/vestager/announcements/ new-technology-disruptive-global-force_en.

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b. "It's not hard to see the temptation, in a situation like that, for a powerful platform business to undermine competition; for it to manipulate the way the platform works, to give its own services a head start, and to make it hard for others to compete." *Id.*

2. Conditions in the online world, however, could be seen as different. The platform provider collects data regarding the offerings of competing suppliers using the platform, which can afford competitive insights well beyond those obtainable in the brick and mortar world.

   a. These insights can include: offering and sale prices; customer demand and demand trends; emerging products trends; existing and emerging sales trends.

   b. Is competition between the platform and suppliers engaging in ecommerce on the platform "fair" when there is information asymmetry such as this?

E. U.S.: Rule of reason analysis typically applies. Therefore, a manufacturer may compete even with its own distributors for sales to end-users. *E.g., Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1340 n.15 (11th Cir. 2010).

F. Europe:

1. One of the key findings in the May 2017 "Final Report on the e-commerce sector inquiry" was that "a large proportion of manufacturers decided over the last ten years to sell their products directly to consumer through their own online retail shops, thereby ***competing increasingly*** with their distributors." *Id.* at 6 (emphasis added). http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

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2. Online sales are under the Commission's and National Competition Authorities' scrutiny, and current rules (Vertical Agreements Block Exemption Regulations) are under being evaluated.
3. Article 101 TFEU protects "not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such." Case C-501/06 P, *GlaxoSmithKline Services Unlimited v Commission* ¶ 63 (6 Oct. 2009), [2009] ECR I-09291.
4. Art. 102 TFEU prohibits abuse of dominance, including conduct "limiting production, markets or technical development to the prejudice of consumers." Art. 102(b).
5. Article 102(c) further prohibits a dominant firm from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."
6. This directive to assure an effective competitive structure affords greater flexibility for government intervention in Europe than in the U.S. in response to a range of activity by platforms. A dominant firm has "a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market." Case C-322/81, *Nederlandsche Banden-Industrie Michelin NV v Commission*, [1983] ECR 3461, ¶ 57.
7. As the General Court wrote in Case T-286/09, *Intel v. Commission* ¶ 105 (12 June 2014) : "the Commission is not required to prove either direct damage to consumers or a causal

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link between such damage and the practices at issue in the contested decision . . . . [Article 102 TFEU] is aimed not only at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure." (citation omitted).

a. In C-525/16, *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* ¶ 24 (19 Apr. 2018), the Court of Justice of the European Union held that 102(c) TFEU "is intended to ensure that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words, between suppliers or customers of that undertaking."

b. The Court further emphasized that "where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, [Article 102(c)] covers a situation in which that behaviour is ***capable*** of distorting competition between those trade partners. A finding of such a 'competitive disadvantage' ***does not require proof of actual quantifiable deterioration*** in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation." *Id*. ¶ 37 (emphasis added).

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c. *See also* Case C-8/08, *T-Mobile Netherlands* ¶¶ 37, 39 (4 June 2009), [2009] ECR I-4529: Article 101(1)(a) directs that "concerted practices may have an anti-competitive object if they 'directly or indirectly fix purchase or selling prices or any other trading conditions' . . . . [I]n order to find that a concerted practice has an anti-competitive object, there does not need to a direct link between the practice and consumer prices."

8. The EC fined Google €2.4B because "the more favourable positioning and display . . . in its general search results pages, of its own comparison shopping service compared to competing comparison shopping services" violated Article 102 TFEU. Case AT.39740, *Google Search (Shopping)* ¶ 1(2) (27 June 2017).

   a. The concern depicted, http://ec.europa.eu/competition/publications/infographics/2015_02_en.pdf:

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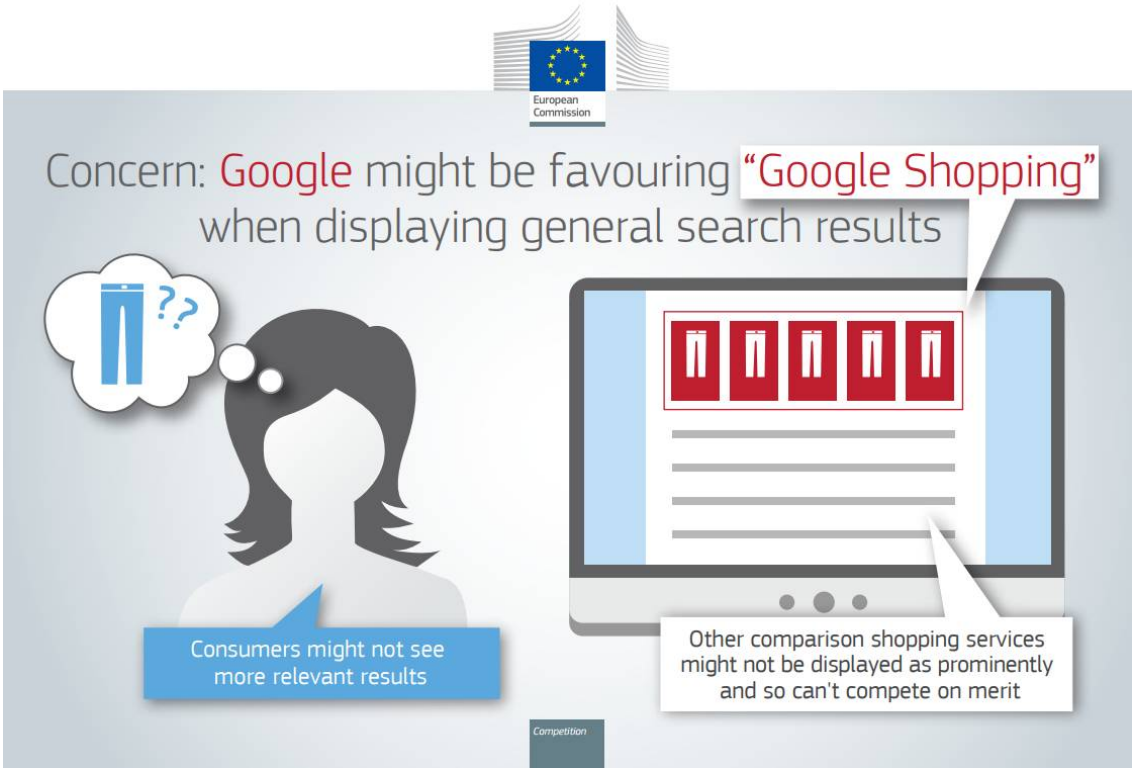

b. Google has appealed the decision.

9. Amazon's practices are under investigation by the EC, as well as in at least Austria and Germany.

10. Another key issue in relation to competition between platforms and their suppliers is so-called most-favoured nation (MFN) clauses that could, some argue, restrict competition between different platforms (wide MFN, such as the European-wide Hotel Booking cases, brought under 101 TFEU, and the Amazon E-books case brought under Article 102 TFEU). Also, some European national competition authorities (Bundeskartellamt)

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view narrow MFNs that limit competition between the platform and the supplier as anti-competive under 101 TFEU.

a. E-books (wide MFN under 102 TFEU), http://europa.eu/rapid/press-release_IP-17-1223_en.htm.

b. European hotel booking case—wide MFN under 102 TFEU, http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/.

c. Hotel booking—narrow MFN, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B9-121-13.pdf?__blob=publicationFile&v=2.

III. Data and Platform Expansion to "Adjacent" Markets

A. Major platforms can accumulate staggering amounts of data, which can be analyzed with increasing rigor. The analyses can provide insights into developing product offerings and their attractiveness to consumers. This creates opportunities beyond those typically available in the brick and mortar world. *E.g.*:

1. Dominant firms wish to avoid unsettling their user (or customer) base, and therefore tend not to innovate to add features that maintain that base. FTC Hearings, Competition and Consumer Protection in the 21st Century 203 (Oct. 16, 2018) ("FTC Hearings") (testimony of Daniel Rubinfeld).

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a. Often, the innovation takes "the form of integrating previously separate functions. *Id*. at 209 (testimony of Susan Creighton).

b. Platforms such as Amazon, Facebook and Google can identify would-be competitors in different lines of ecommerce. With that information, decisions can be made on acquisitions, or on competitive strategies. *E.g., hiQ Labs, Inc. v. LinkedIn Corp*., 273 F. Supp. 3d 1099, 1118 (N.D. Cal. 2017) (noting the ability of LinkedIn to use its platform data base to enter the market to compete with HiQ, which scraps publicly available LinkedIn data, in the adjacent market of data analytics).

2. Platforms can acquire emerging startups with a view to channeling their innovation or even suppressing it entirely. Innovation suffers.

   a. As Tim Wu testified, referring to applications developers in the late 1990s during the heyday of Microsoft's dominance: "Windows was a place where you were invited for dinner and ended up being dinner." FTC Hearings 206.

   b. "Venture capitalists . . . now talk of a 'kill-zone' around the giants. Once a young firm enters, it can be extremely difficult to survive. Tech giants try to squash startups by copying them, or they pay to scoop them up early to eliminate a threat." The Economist, "American tech giants are making life tough for startups" (June 2, 2018).

   c. "[T]he [Furman] Panel has heard concerns that, in some instances, large digital companies have acquired smaller innovative companies in spaces adjacent or

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overlapping with their main activity, as a so-called killer acquisition strategy, designed to eliminate potential future rivals." FURMAN REPORT 92.

3. "Over the last 10 years the 5 largest [online] firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinized by competition authorities." FURMAN REPORT 18 (bracketed matter added). Thus, the Furman Panel called for "a reset" with the Competition and Markets Authority "tak[ing] more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare . . . ." *Id.* at 93.
4. Data analysis can also identify features in which the platform may decide to expand.
    a. And the platform's power in one area can provide competitive advantage in expanding into complementary markets or product feature that non-platform companies, operating online, do not have.
    b. For example, "[a]s the dominant platform for third-party online sales, Amazon also has access to data it can use to decide what products to sell itself." Greg Ip, "The Antitrust Case Against Facebook, Google and Amazon," Wall Street Journal (Jan. 16, 2018), https://www.wsj.com/articles/the-antitrust-case-against-facebook-google-amazon-and-apple-1516121561?mod=article_inline.
5. The ability of a major platform to acquire and analyze data can entrench the platform and discourage innovation and challenge from start-ups. "[H]arm to innovation takes

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multiple forms in the digital context." Damien Geradin, "What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?" 9 ("Geradin Paper"), https://ssrn.com/abstract=3257967.

6. Innovation requires breathing space for competition on the merits to become vibrant.
    a. Options for start-ups: IPO or buy-out?
        i. As the Furman Report notes: "A broad range of stakeholders have also strongly emphasised to the Panel the importance of being acquired as a potential exit strategy for technology startups . . . . '[T]he potential to be acquired by a larger incumbent is an important driver of the expected returns [for investors]. Any steps taken by competition authorities that alter these expected returns may make it more difficult for start-ups to acquire early-stage investment in the future and may diminish the likelihood that they even get off the ground.'" FURMAN REPORT 91 (quoting submission by Uber; bracketed matter added and in original).
        ii. Is innovation with a view to buy-out welfare enhancing?
    b. Can competition law intervene effectively at the merger review stage?
        i. Speaking at a recent Stanford University conference, Tommaso Valletti, DG Comp's chief economist, suggested "a potential shift in the 'burden of proof' to oblige companies to explain their merger plans in more detail as a solution to more effectively review 'killer acquisitions' — a term for tech giants

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absorbing much smaller companies with untested potential, for instance in a market that may not yet be monetized. . . . It's a bit complacent when we say we don't have an antitrust problem . . . . [T]he fact is that we are underenforcing in some selected areas." Mike Smith, MLex, "EU competition economist calls for more scrutiny of tech mergers" (9 Mar. 2019), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1042208&siteid=190&rdir=1.

ii. Carl Shapiro, former chief economist for DOJ's Antitrust Division responded: "the position of the federal courts makes it highly unlikely that the DOJ or the US Federal Trade Commission could use antitrust law to remake the tech industry. New legislation would likely be necessary to make that happen . . . . 'If you're expecting an aggressive DOJ and FTC to significantly change the tech industry in the next few years, that seems pretty damn unlikely to me', Shapiro said." *Id.*

B. U.S.:

1. "Monopoly leveraging" in the U.S. has been used to describe a monopolization violation where uses monopoly power in one market to gain a competitive advantage in another complementary market:

"[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

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A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors . . . . " *United States v. Griffith*, 334 U.S. 100, 107 (1948). *See also, e.g., Virgin Atlantic Airways v. British Airways PLC*, 257 F.3d 256, 272-73 (2d Cir. 2001).

a. However, the Supreme Court seems since to have tried to limit the doctrine to circumstances where there is actual or attempted monopolization in the complementary market: "§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

b. Still, lower federal courts sometimes do not require these elements to uphold a leveraging claim. *E.g., AstroTel, Inc. v. Verizon Florida LLC*, No. 11-cv-2224-T-33TBM (M.D. Fla. May 4, 2012).

2. Section 5 of the FTC Act, provides that "[u]nfair methods of competition . . . are hereby declared unlawful." 15 U.S.C. § 45(a)(1).

a. "Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act." Statement of Enforcement

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Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) ("Section 5 Enforcement Statement"), https://www.ftc.gov/system /files/documents/public_statements/735201/150813section5 enforcement.pdf.

b. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972): The FTC,"like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." (footnote omitted).

c. Under the Section 5 Enforcement Statement, in considering whether to invoke Section 5, the FTC:

   i. Is "guided by" the policy of the antitrust laws: "the promotion of consumer welfare."

   ii. Will evaluate the conduct "under a framework similar to the rule of reason," taking into account likely "harm to competition or the competitive process, . . . any associated cognizable efficiencies and business justifications."

   iii. Is less likely to bring a Section 5 case "on a standalone basis" if the Sherman or Clayton Act is sufficient to address the competitive harm.

d. Although, conceivably, the FTC could challenge monopoly leveraging under Section 5, it has not done so.

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3. U.S. merger law, embodied primarily in Section 7 of the Clayton Act and Section 2 of the Sherman Act, has been invoked (albeit infrequently) where an acquisition may substantially lessen "potential", rather than actual, competition. As summarized in *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015), the elements that must be proven are:
    a. "the relevant market is highly concentrated,"
    b. "the competitor 'probably' would have entered the market,
    c. "its entry would have had procompetitive effects," and
    d. "there are few other firms that can enter effectively."
4. The Court ruled against the FTC in *Steris* despite seemingly strong evidence of likely entry.
5. U.S. courts have tended to apply the potential competition doctrine narrowly: "it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record." *BOC International, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977).

C. Europe:

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1. "The world's most valuable resource is no longer oil but data." The Economist (6 May 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.
    a. Can data be regarded as essential facility?
    b. Commissioner M. Vestager has noted that "there are worries that just a few companies could control the data you need and that make real competition impossible." January 2019 conference, "Shaping Competition Policy in the era of digitization", hosted by the European Commission.
2. With respect to market power: Sandeep Vahesan, Legal Director of the Open Markets Institute, compared Amazon to a sovereign state exercising its (quasi-regulatory) powers over retailers and end-customers accessing Amazon's platform. Dual roles—as platform supplier and product-reseller—imply potential conflicts of interest.
3. Discussing merger control and theories of harm, Johannes Leitenberger, Director General of the Commission's DG Comp has said: "The application of some of the existing theories, legal tests, analytical methods and investigative procedures needs to be reconsidered to ensure that they adequately address new phenomena." Callol/Coca, Competition Law Alert (Jan. 2019), http://callolcoca.com/wp-content/uploads/2017/05/Alert-Shaping-Competition-Digitization.pdf. Authorities must start considering network effects in multi-sided markets and the relevance of data in the

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competition law assessment. *E.g.*, Case COMP/M.8788, Apple/Shazam, and Case Comp/M.7217, Facebook/Whatsapp. *Id.*

4. The EC's decision regarding search bias by Google, noted above, is an example of enforcer action against platform expansion into the adjacent or complementary market for shopping. There is, of course, no comparable action by enforcers in the U.S.
5. The EC's action against Google's licensing restrictions relating to use of the Android operating system by cell phone manufacturers similarly illustrates extension of dominance into new markets. As the EC's press release stated: "Market dominance is, as such, not illegal under EU antitrust rules. However, dominant companies have a special responsibility not to abuse their powerful market position by restricting competition, either in the market where they are dominant ***or in separate markets***." Press release, Antitrust: Commission fines Google 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine" (18 July 2018) (emphasis added), http://www.pressreleasepoint.com/print/1343285.
6. In its most recent case against Google, the EC imposed a fine of €1.49 for including restrictions on publisher use of Google's search advertising intermediation services (AdSense). Press release, "Antitrust: Commission fines Google €1.49 billion for

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abusive practices in online advertising" (20 Mar. 2019), http://europa.eu/rapid/press-release_IP-19-1770_en.htm.

a. Initially, Google required exclusivity provisions, which prohibited the publisher from displaying search ads delivered by Google competitors on the search results pages of the publisher's website.

b. Google later modified the restriction to require the publisher to display Google-delivered ads on the most prominent parts of the publisher's website.

c. Still later, Google required publishers to secure Google's approval of changes in the display of ads delivered by rivals, which appeared on the publisher's website.

d. Google's restrictions prevented search competitors from competing on the merits for display of their search results on the websites of important publishers. In summary, either "there was an outright prohibition for [competitor-delivered ads] to appear on publisher websites or . . . Google reserved for itself by far the most

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valuable commercial space on those websites, while at the same time controlling how rival search adverts could appear." *Id.*

IV. Platform-imposed Pricing: Price Fixing?

A. The U.S. Supreme Court has said that: "Price is the central nervous system of the economy, . . . and an agreement that interfere[s] with the setting of price by free market forces is illegal on its face." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) (citations and internal quotations omitted).

B. Suppose that the platform requires supplier adherence to a platform-directed pricing structure as a condition of access? *E.g.*:

1. Apple requires AppStore developers to: (1) price in $.99 increments ($.99, $1.99, etc.); and (2) to pay Apple 30% of the price charged to users for downloads.
2. Uber requires car suppliers to accept a system-directed "dynamic" price, which takes account real-time demand and supply conditions.
3. Is this price fixing involving the platform and multiple supplier-competitors?
    a. Apple engaged in price fixing by enlisting publishers to change the structure for online book sales from a wholesale model to an agency model, the effect of which was to increase prices to consumers, and to decrease revenue to publishers. *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

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b. A U.S. district court held that Uber's pricing system could be challenged as price fixing, even though it involves thousands of drivers. However, the case was not decided on the merits. *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 825 (S.D.N.Y. 2016).

c. U.S. antitrust law has held such arrangements as price fixing in the brick and mortar world. *E.g.*:

i. *Interstate Circuit v. United States*, 306 U.S. 208 (1939) (movie theatre owner conspired with film distributors to restrict competition from other theatres).

ii. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (dominant retailer conspired with suppliers to restrain competition from "discount" rivals).

C. Europe:

1. In Case C-74/14, *Eturas v Lietuvos Respublikos konkurencijos taryba* (Jan. 21, 2016), Eturas, an online travel booking service, implemented a cap on discounts by travel agents via online notice to the agents using the system. The issue raised focused on whether the travel agents engaged in a concerted practice under Article 101(1) TFEU.

a. The Court of Justice noted that "passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 101 TFEU, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities,

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encourages the continuation of the infringement and compromises its discovery." Id. ¶ 28 (citation omitted).

b. Thus, the Court held that those travel agents who were aware of the notice could "be presumed to have participated in a concerted practice within the meaning of [Article 101(1) TFEU], unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of a systematic application of a discount exceeding the cap in question." Id. ¶ 50 (emphasis added).

2. *See also* Case C-194/14 P, *AC-Treuhand v. Commission* (22 Oct. 2015), where the Court of Justice held that AC-Treuhand, a consultancy firm, was properly held liable under Article 101 as a participant in a cartel whose other members were producers of heat stabilisers.

a. AC-Treuhand played "an essential" role in the cartel by "organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers of heat stabilisers data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration" Id. ¶ 37.

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b. Moreover, AC□Treuhand had "full knowledge of . . . the anticompetitive objectives in question, namely —price-fixing, market-sharing and customer-allocation and the exchange of commercially sensitive information. Id. ¶ 38.

V. Supplier-imposed Pricing: Resale Price Maintenance (Vertical price fixing)

A. Many online sites, including platforms such as Amazon or eBay, offer brick and mortar products for sale. Product suppliers may direct or suggest their retailer-customer's price on resale to end-users.

1. In the online world, distribution expenses tend to be less than in the brick and mortar world, and that means that online retailers may be able to resell at levels below that charged by their retailer counterparts in the brick and mortar world.
2. Brick and mortar retailers may complain to their supplier about online "discounting."

B. What, if anything, can the supplier do, and does it make any difference that the retailer does business online?

C. U.S.: Antitrust law is tolerant of restrictions arising from supplier-customer (vertical) arrangements. "Rule of reason" analysis applies, which, broadly speaking, requires that the anti-competitive effects of the restraint be weighed against its procompetitive benefits.

1. Vertical restraint cases, analyzed under the rule of reason cases, typically fail unless the business imposing the restriction has significant market power.

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a. "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

b. A supplier generally may stop dealing with a customer reselling at low prices even when the decision is made in response to a complaint by a competing customer. "To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. . . . Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

c. A supplier may prescribe its retailer's resale price and cease dealing if the retailer declines to sell at that price—subject to rule of reason review. *Leegin Creative Leather Prods. v. PSKS*, 551 U.S. 877 (2007).

2. These principles, established in the brick and mortar world, tend to be applied to ecommerce online as well.

3. U.S. states, however, can take a less tolerant approach to vertical price fixing, and some, such as California and Maryland, do.

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D. Europe: There is a greater willingness to limit vertical restraints. Resale price maintenance is much more likely to be held unlawful. *E.g.*:

1. In 2018, the Commission imposed fines totaling over €111 million on four manufacturers for RPM in e-commerce. Press release, "Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices" (24 July 2018), http://europa.eu/rapid/press-release_IP-18-4601_en.htm. *See, e.g.*, Case AT.40465, *Asus* (24 July 2018 EC).
    a. The cases were opened following the e-commerce inquiry, which highlighted issues relating to price-monitoring software used by manufacturers.
    b. This earlier group of cases was followed by another vertical restraints case on the blocking of cross-border sales. Press Release, "Antitrust: Commission fines Guess €40 million for anticompetitive agreements to block cross-border sales" (17 Dec. 2018), http://europa.eu/rapid/press-release_IP-18-6844_en.htm.
    c. It is likely that these cases will be followed by other Commission or NCA investigations into RPM or other types of vertical restraints in the near future.
2. The *Coty* case is also of interest in relation to e-commerce and online sales restrictions as it relates to the possibility to ban certain retailers from carrying a brand if that would deteriorate the image of the brand. The Court of Justice of the European Union's press release announcing the judgment notes: "A supplier of luxury goods can prohibit its authorised distributors from selling those goods on a third-party internet platform such as

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Amazon" (6 Dec. 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/ 2017-12/ cp170132en.pdf. *See* C-230/16, *Coty Germany GmbH v. Parfümerie Akzente GmbH* (6 Dec. 2016), https://eur-lex.europa.eu/legal-content/en/TXT/PDF/ ?uri=uriserv%3AOJ.C_ .2018.052.01.0005.01.ENG.

3. Also, the ongoing vertical block exemption regulation overhaul will likely spur a lively discussion on whether brick-and-mortar stores need to be protected to a greater extent to offset "free-riding"—where the potential customer sees and educates herself on the product in a brick and mortar store, but buys it online.

VI. Data Collection and Abuse of Dominance

A. Data collection can have significant pro-competitive benefits. As Assistant Attorney General Makin Delrahim has reminded, "'Start Me Up': Start-Up Nations, Innovation, and Antitrust Policy, Remarks as Prepared for Delivery at University of Haifa" 10 (Oct. 17, 2018) ("Delrahim Remarks"):

1. "The accumulation of data can benefit consumers by improving the quality of existing goods and services and by creating new ones. Platforms and apps pair large amounts of data with technology to create some of the economy's most important innovations, including in medical diagnoses, weather forecasts, transportation safety, and language translations."
2. "Online platforms also use data to help monetize their services, frequently through targeted advertising. As a result, platforms can offer their services to users at a low, often zero, price."

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B. Others, however, express concern that data collection amounts to private "surveillance." *See, e.g.*, Chopra, Remarks 2:

   1. "Marketplaces are monitoring individuals, families, and businesses, harvesting data in ways that we might not recognize or understand. This goes far beyond what buyers are looking at and can include where they were when they looked at offerings or content, who they were with, and more. For sellers, data about the prices they charge, the way they deliver goods and services, and many other attributes are ingested. This surveillance can include collection of data completely unrelated to what is needed to participate in the marketplace."
   2. "Marketplace operators develop software and algorithms to analyze this data at scale to make inferences about individuals and groups. Machine learning, including Bayesian network and deep learning, aid in the development of artificial intelligence, which helps to mimic the human brain and fully understand the habits, biases, and motivations for buyers and users on the marketplace."
   3. "This aggregation and analysis of data has huge value, and the information asymmetry built by first-movers raises a number of questions about the competitive landscape."

C. Europe: In February 2019, Germany's Bundeskartellamt (Federal Cartel Office) ruled that Facebook violated Germany's competition law by combining data from Instagram, WhatsApp and third-party websites using its "like" and "share" buttons with Facebook data

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to develop user profiles without obtaining express user consent to the collection and combining.

1. Announcing the decision, Federal Cartel Office President Andreas Mundt said: "In view of Facebook's superior market power, an obligatory tick on the box to agree to the company's terms of use is not an adequate basis for such intensive data processing . . . . The only choice the user has is either to accept the comprehensive combination of data or to refrain from using the social network. In such a difficult situation the user's choice cannot be referred to as voluntary consent." Bundeskartellamt prohibits Facebook from combining user data from different sources (7 Feb. 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568.
2. Facebook's practices have not only user privacy implications, but also raise competitive concerns:
    a. "As a dominant company Facebook is subject to special obligations under competition law. In the operation of its business model the company must take into account that Facebook users practically cannot switch to other social networks." *Id.*
    b. "As social networks are data-driven products, access to such data is an essential factor for competition in the market. The data are relevant for both the product design and the possibility to monetise the service. If other companies lack access to comparable data resources, this can be an additional barrier to market entry." Bundeskartellamt

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prohibits Facebook from combining user data from different sources: Background information on the Bundeskartellamt's Facebook proceeding (7 Feb. 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=4.

3. Facebook must come up with a plan requiring user consent to its practices, which satisfies the Bundeskartellamt.
4. Facebook disagrees and has appealed. Press Release, "Why We Disagree With the Bundeskartellamt" (Feb. 7, 2019), https://newsroom.fb.com/news/2019/02/bundeskartellamt-order/ :
   a. "We face fierce competition in Germany, yet the Bundeskartellamt finds it irrelevant that our apps compete directly with YouTube, Snapchat, Twitter and others."
   b. "Facebook has always been about connecting you with people and information you're interested in. We tailor each person's Facebook experience so it's unique to you, and we use a variety of information to do this – including the information you include on your profile, news stories you like or share and what other services share with us about your use of their websites and apps. Using information across our services also helps us protect people's safety and security, including, for example, identifying abusive behavior and disabling accounts tied to terrorism, child exploitation and election interference across both Facebook and Instagram."

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5. Importantly, the case was only brought under national law and not under Article 102 TFEU, which could have been applied but was not. This is a good indication that the German approach met with some resistance within the ECN and that Facebook's actions would not be viewed as an abuse in other jurisdictions in the EU and specifically not by the Commission.
6. *See generally* Geradin Paper 6-8 (discussing exploitation as an abuse of dominance).

D. U.S.: There is no decision comparable to the German Federal Cartel Office's Facebook decision.

1. "Abuse of dominance" is not itself a violation of U.S. antitrust law.
2. Under Section 2 of the Sherman Act, monopolization requires the acquisition or maintenance of monopoly power by means of anticompetitive conduct (most commonly, exclusionary or predatory activity).
    a. Typically, a market share of at least 65% would be required for a monopolization claim, and about 30-40% for an attempted monopolization claim. *See generally In re Pool Products Distribution Market Antitrust Litig.*, 940 F. Supp. 2d 367, 382-87 (E.D. La. 2013) (recognizing 70% as sufficient for monopolization and 33% for attempt).
    b. The presence or absence of entry barriers also can require adjusting the required shares upwards or downwards.

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c. Market power sometimes can also be shown by proving direct upward price effects. *E.g.*, *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986).

VII. Data Analytics and Price Discrimination

A. Data derived from user online activity can be used not simply to target advertising, but also to discriminate in the prices offered to consumers. Companies track online history and analyze it to infer consumer desires, including urgency in product selection, such as travel or recreational endeavors. Platforms and cell phone service companies similarly users' physical movement. User IP addresses can also identify the consumer's likely physical shopping area, and the businesses available in the area to satisfy an apparent desire.

1. Data analytics enable platforms and other businesses to infer both consumer demand and even how much a particular consumer is willing to pay for a product or service (the "reserve" price).
2. "The inferences drawn from the analysis of mass surveillance can be stunningly effective. These inferences can even be used to inform individualized pricing . . . . Whether selling a basket of bread or a basket of bonds, a buyer now needs to think if they are being charged a higher price compared to someone else browsing for that same product. . . ." Chopra Remarks 3.

B. Economists tend to consider price discrimination pro-competitive because it enables price calibration based on demand. Firms can compete for all customers, not just those at the

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margin. But, depending on the circumstances, it also can be harmful to consumers, suppliers and competitions.

C. U.S.: Section 2(a) of the Robinson-Patman Act makes it unlawful for a seller "to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 13(a). However, the FTC, the Act's primary enforcer, tends not to bring such cases, although private parties do from time to time.

D. Europe: Article 102(c) TFEU prohibits firms from applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

1. The Court of Justice of the European Union has interpreted subpart (c) to reach dominant firm conduct only where the price discrimination "tends to distort competition . . . . "

a. C-525/16, *MEO v. Autoridade da Concorrencia* ¶ 26 (19 Apr. 2018). Mere price difference is not enough. Instead competitive effects must be analyzed to determine whether there is an abuse of dominance. *Id*. ¶ 28.

b. Evidence that the discrimination could distort competition is sufficient. *Id.* ¶¶ 27, 28, 31.

E. Are harmful effects more likely in ecommerce?

1. "The scope for price discrimination in the digital economy is expanding as firms increase the accuracy with which they can predict an individual's willingness to pay. This raises

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the stakes on exploitative price discrimination, and there are particular reasons to worry that price discrimination in digital markets will be harmful." OECD Directorate for Financial and Enterprise Affairs Competition Committee, Executive Summary of the Roundtable on Price Discrimination 5 (8 Mar. 2018), https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN5/FINAL/en/pdf.

2. This sort of price discrimination raises significant social policy concerns. Can we rely on "the market" to eliminate harmful effects?

VIII. Open v. Closed Ecosystems

A. Data security and privacy are central to online commerce. A "closed" ecosystem, such as that used by Apple, maximizes the platform provider's ability to firewall and lockdown the data collected from platform users. But the closed system also can have implications for online competition.

1. For example, Apple offers apps for iPhone and iPad, most of which are created by developers (and the rest by Apple itself) through its App Store. By license:
    a. Apple approves developer-created apps before they may be offered in the App Store.
    b. Moreover, developers must price their apps within Apple's prescribed structure—which permits only $.99 amounts ($.99, $1.99, $2.99, etc.).
    c. They also are prohibited from offering Apple-compatible apps on their own website or through other online retailer sites, although they may offer an Android-compatible version of the same app on sites of their choosing.

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2. This "closed" system can promote security and app integrity. However, it also effectively limits price competition by app developers who otherwise could select other price points, or could find other ways to reach consumers.

B. Apps available for Android phones illustrate an "open" system. Google allows developers of android apps to distribute to phone users outside the Play Store.

C. Apple's closed system is the subject of a pending lawsuit by iPhone users who allege that Apple has unlawfully monopolized the sale of apps through the App Store. The case is now before the U.S. Supreme Court, which must decide the preliminary question whether purchasers from the App Store have standing to sue. *Apple, Inc. v. Pepper*, No. 17-204 (U.S. Sup.), *reviewing*, 846 F.3d 313 (9th Cir. 2017).