

IN DEFENCE OF COMPETITION LAW:
ADDRESSING THE EUROPEAN COMMISSION'S PROPOSALS
FOR EX ANTE REGULATION OF ONLINE PLATFORMS,
INCLUDING IN PARTICULAR PROHIBITING SELF-PREFERENCING
BY SEARCH PLATFORMS

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A. Introduction

1. The European Commission is keenly exploring new rules, including *ex ante* regulation, to govern the activities of what have been referred to as "*on-line [or] digital platforms*". Various definitions of what constitute digital platforms have been proffered. Crémer, de Montjoye and Schweitzer, in a report for Commissioner Vestager, define platforms as "*firms that derive their market power from connecting entities together*".² In the digital arena, oft-cited examples include search engines, social media, app stores, online market places, and price comparison websites that link sellers with customers.
2. These moves in the European Union reflect a worldwide trend towards greater regulatory and antitrust scrutiny of major technology companies, and in particular,

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² Crémer, Jacques; de Montjoye, Yves-Alexandre; Schweitzer, Heike: [Competition policy for the digital era](#), A report for Commissioner Vestager, European Commissioner for Competition (2019), page 13.

Google³, Apple, Facebook and Amazon (“**GAF**A”), with a significant expansion of regulation of digital platforms being proposed in (amongst other places) the United States⁴ and the United Kingdom⁵.

3. For its part, the European Commission’s thinking is most recently embodied in an informal working document (“**Commission Working Document**”) produced by the Directorate General for Communications Networks, Content and Technology and the Directorate General for the Internal Market, Industry, Entrepreneurship and SMEs.
4. The Commission Working Document can be seen as building on some of the papers that have been written in the last year or so considering whether and how existing laws dealing with competition should be developed to meet the challenges posed by digital platforms. The papers universally recognise the immense benefits that digital platforms have brought to users. Many also tend to suggest that there is a consensus on the need for regulatory change. This paper aims to examine the foundations for that so-called consensus by reference to specific examples such as ‘self-preferencing’; and to assess the need for, and appropriate content of, new regulation by reference to established jurisprudence and competition policy. In an effort to make the analysis more concrete, it considers search platforms in particular, albeit not exclusively.
5. The focus of the paper is on the *rules* that should govern *competition*-based interventions. A number of commentators, including Furman et al. in the context of the UK,⁶ have also proposed new *institutions* to scrutinise the competition implications of digital platforms. So too are there developments and proposals for new rules to address issues of privacy, harmful content, consumer and business protection, and other issues such as taxation. All these other topics are manifestly important, but outside the scope of this paper.
6. This paper is structured as follows:
 - 6.1. Section B summarises my conclusions.

³ By which I refer both to the search company and (where appropriate) its parent company, Alphabet.

⁴ See, for example, the US House of Representatives’ Report, [Investigation of Competition in Digital Markets](#), Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020.

⁵ See, for example, the report by the UK Competition and Markets Authority, [Online platforms and digital advertising](#), Market study final report, 1 July 2020.

⁶ Furman, Jason; Coyle, Diane; Fletcher, Amelia; McAuley, Derek; and Marsden, Philip: [Unlocking Digital Competition](#), Report of the Digital Competition Expert Panel, appointed by the UK Government (March 2019).

- 6.2. Section C provides a brief overview of the existing legal framework.
- 6.3. Section D analyses some of the core themes underlying calls for new regulation.
- 6.4. Section E discusses a framework for assessing new rules.
- 6.5. Section F considers whether the common regulatory framework for regulation of electronic communications in the EU provides a good template for regulation of digital platforms.
- 6.6. Section G considers the need for new rules concerning self-preferencing.
- 6.7. Section H considers some other potential new rules for regulating competition in digital platforms.

B. Conclusions

7. Three core justifications advanced for new *ex ante* regulation are: (i) the speed of intervention; (ii) the degree of market power held by digital platform owners; and (iii) filling lacunae in substantive *ex post* competition law.
8. I conclude (section D) that these points do not justify a radical departure from established principles enshrined in orthodox *ex post* competition law in the context of digital platforms. Suggestions that “technology is different” are overstated. There is no evidence that innovation is suffering in the technology sector – far from it.
9. That said, there are measures that can be considered to help make competition in digital platforms, and competition-based interventions intended to protect such competition, more effective.
10. As a broad framework for analysis, I propose (Section E) as follows:
 - 10.1. First, rule-changes can more readily be contemplated where the expected costs of a mistake (taking account, where possible, of both its probability and its severity) are low. Where the costs could be significant, then strong evidence will be required to show convincingly that the expected costs of not altering the rules is likely to outweigh those costs.
 - 10.2. Second, within the overall framework proposed above, any conduct to which new rules may be applied must be capable of being tolerably clearly identified and defined. New rules which add to the existing canvas of competition law are unlikely to be helpful where they are susceptible to argument about what is or is not in principle within the rule, undermining certainty for all market participants, and increasing the costs associated with having the rule.

11. Judged by these criteria, I conclude:

11.1. (Section F) The regulation of electronic communications provides a possible model for implementing a regime of market reviews and regularly reviewable market power designations. This could then be used to create a hybrid *ex ante / ex post* regime which allows for more rapid enforcement of competition law according to existing, orthodox principles. Otherwise, the regulation of electronic communications is not a good fit for digital platforms.

11.2. (Section G) No new rules are required to tackle self-preferencing, whether in the form of outright prohibition, reversal of the burden of proof, or a code of conduct. Existing *ex post* competition law in the form of the duty to supply, together with development of the law on the prohibition on product degradation, provide a sufficient basis for intervention in the interests of consumers.

11.3. (Section H) In consideration of other possible rule changes:

- a) As to substantive rules concerning conduct already covered by *ex post* competition law: no new rules are required to address the relevance or plurality of results, these being already captured and addressable, for competition purposes, in the rule against product degradation.
- b) As to (broadly) "procedural" rules concerning conduct already covered by *ex post* competition law:
 - i) As noted above, there may be a role for regular market reviews and market power designations.
 - ii) Codification of existing law is unlikely to be desirable. Where necessary, guidance is likely to be more flexible and preferable.
 - iii) The law already allows for prospective analyses, interim remedies and commitments decisions.
 - iv) The standard of proof in competition cases should not be changed.
 - v) Nor should the standard of review of the decisions of competition authorities be changed.
- c) As to other changes beyond those considered above:
 - i) Strengthening personal data ownership and portability is likely to be beneficial.
 - ii) A "New Competition Tool" that allows for sector wide investigations and remedies could be further explored. If not suitably constrained,

however, it risks allowing free-roaming intervention without the discipline of clear guiding principles for its application.

iii) Reform of merger control is another legitimate area for consideration, but outside the scope of this paper.

C. Legal Framework

Competition Laws

12. European rules governing the way in which companies compete may be broadly divided into the following:
 - 12.1. so called 'ex post' competition law, principally Articles 101 and 102 TFEU;
 - 12.2. bespoke 'ex ante' regimes such as exist for electronic communication providers, and in particular those with significant market power ("**SMP**");
 - 12.3. merger regulation; and
 - 12.4. other regimes of less relevance to this paper, such as rules on state aid.
13. Additionally, for its part, the UK also has a 'market investigation' procedure (conducted by the Competition and Markets Authority or "**CMA**") which allows for broad-ranging investigations and recommendations to address an absence of effective competition. By comparison, the European Commission has powers under Article 17 of Regulation 1/2003 to conduct sectoral inquiries into distortions of competition within a particular sector. Unlike the CMA, however, it currently has no powers to impose substantive remedies under Article 17.
14. One of the new areas being considered by the European Commission as part of its current review of digital platforms (and potentially across the economy more widely) is a New Competition Tool ("**NCT**") which would enhance the Commission's broader investigatory powers in way which would make them more akin to those of the CMA.

General Legal Principles

15. Other important principles which underpin EU law, and which are relevant to the development of *ex ante* regulation, are the requirements of (i) proportionality and (ii) certainty / foreseeability.
16. As well as being a fundamental principle within EU law, proportionality also underpins the law on state interference with property rights under Article 1 of Protocol 1 of the European Convention on Human Rights, and under Article 16 of the Charter of Fundamental Rights of the European Union. In EU law, it may be considered to

require satisfaction of a three-limb test: (i) suitability of the measure for its purpose; (ii) necessity (that is, no less intrusive an interference would suffice); and (iii) absence of an excess burden on the persons adversely affected by the measure.⁷

17. Certainty and foreseeability are also general principles that underpin the legality of regulation. Businesses must be able to understand, at least to a reasonable degree, what the law requires of them, so that they can attempt to comply with it.⁸
18. These general principles, whilst important, only go so far in helping answer the question of what new types of rules, if any, are required and what form they should take. For that, it is necessary to turn to potential justifications for new rules and underlying competition policy.

D. Justifications for *ex ante* regulation

19. A wide variety of new forms of regulation have been proposed. A number of these are addressed in more detail in Sections G and H below. For present purposes, it is sufficient to note that some of the proposed rules, such as a prohibition on “self-preferencing”, are potentially far-reaching and go substantially beyond the scope of obligations that exist under competition law.
20. A number of different justifications for *ex ante* regulation have been advanced. These include:
 - 20.1. the speed of intervention;
 - 20.2. the degree of market power held by digital platform owners; and
 - 20.3. overcoming constraints on the ability of competition law to address particular competition problems effectively.
21. These justifications are assessed in turn.

(i) Speed of intervention

22. Taken literally, a core difference between *ex ante* regulation and *ex post* regulation is in the *timing* and *perspective* of the intervention – before or after the event. In very broad terms:

⁷ See e.g. Opinion of Mischo AG in Case C-331/88 *Fedesa & others* [1990] ECR I-4023 at 4051. In practice, the third element does not necessarily receive separate consideration from the second.

⁸ A point emphasised, for example, by the [Danish Government Response](#) to the European Commission’s Inception Impact Assessment for Digital Services Act package: *Ex ante* regulatory instrument for large online platforms with significant network effects acting as gate-keepers (29 June 2020).

- 22.1. *ex post* competition law sets out a broad prohibition on conduct which can be enforced if transgressed; whilst
- 22.2. *ex ante* regulation establishes more detailed sets of rules to constrain behaviour and prevent competition problems from occurring in the first place.
23. Seen in this light, a key justification for the use of *ex ante* rules is that the process for enforcement of *ex post* competition law can be too slow, such that effective control requires *ex ante* regulation. It is often argued that this is particularly the case in dynamic markets characterised by rapid innovation and change, and where market dynamics lead to 'tipping' – that is, the establishment of 'winners' who are able to take very large shares of a given market.
24. The complaint that enforcement of *ex post* competition law can be slow is not without force. But it is a significant leap from this to the conclusion that the answer necessarily lies in the development of a prescriptive new *ex ante* regulatory regime.
25. First, it is far from obvious that the issue of the timing of intervention should justify a departure from the substantive content of established jurisprudence accreted over 60 years of competition law enforcement in the EU across a host of different sectors. This very significant body of law should, in principle, be capable of differentiating between anti-competitive and benign or pro-competitive conduct. The time taken to carry out a full competition assessment under (for example) Article 102 TFEU is at least in part a reflection of the necessarily fact-specific nature of determining whether particular conduct is pro- or anti-competitive. There may well be some ways of streamlining parts of this process (discussed in section H below). But there are in general unlikely to be easy short-cuts to be adopted in *ex ante* regulation which would circumvent a rigorous economics-based analysis of the facts of particular cases. Certainly, crude substantive rules that prioritise speed and ease of enforcement seem unlikely to be effective in promoting the underlying goals of more effective competition, more innovation and better outcomes for consumers. This point is developed further in sections E (framework for assessing new regulation) and G (self-preferencing) below.⁹
26. Second, and relatedly, a core advantage of competition law, which is based on high-level prohibitions and the development of doctrinal advances through case-law, is in its flexibility and adaptability, albeit within the constraints of a framework based substantially on precedent. It can adapt to changes in factual circumstances and

⁹ Merger analysis requires rigorous assessment of potential restrictive effects – see, for example, Case T-399/16 *CK Telecoms UK v Commission (concerning the Three/O2 attempted merger)* at [279]; but this is still capable of being carried out within the tight administrative timetable of such investigations.

moreover to changes in economic thinking. A notable trend in the last few decades has been a greater role for economic underpinning to enforcement, even if there is still room for improvement.¹⁰ Although Crémer et al. make proposals for the adaption and refinement of competition law, they observe:¹¹

“Competition law doctrine has evolved and reacted to the varying challenges on a case by case basis. This evolutionary method has allowed competition law enforcers to react to changing circumstances based on the solid empirical evidence of real-life cases. At the same time, the stable core of EU competition rules has prevented EU competition policy from following fashions. We are convinced that the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era”.

27. Similarly, Sir Peter Roth, the President of the UK’s specialist competition court – the Competition Appeal Tribunal, has observed that the strength of EU competition law lies in its adaptable approach, akin to the English common law:

“In steering the evolution of that [antitrust] law, the courts have been doing what common law courts always do: moving it forward incrementally, and sometimes developing new principles. Even for the pure common law, free from any statutory underpinning, the courts act in this way.”¹²

28. And as regards the suitability of the EU’s existing antitrust rules for the task of addressing the challenges of dealing with the competition law issues raised by digital platforms, the Judge further observed:

“As for the antitrust rules, they are of course applicable to digital products and markets and I believe the courts will continue to evolve them to meet these new challenges. [...] The concept of abuse of dominance is also adaptable to these developments.”¹³

29. By contrast, much *ex ante* regulation appears ill-suited to such a dynamic industry as technology. A highly prescriptive regime risks codifying a set of specific economic concerns about a particular moment in the evolution of an industry in a way which

¹⁰ See e.g. Padilla, Jorge, [The Role of Economics in EU Competition Law: From Monti's Reform to the State Aid Modernization Package](#) (28 September 2015).

For an earlier account see Neven, Damien J., [Competition Economics and Antitrust in Europe](#), *Economic Policy*, Vol. 21, No. 48, pp. 741-791 (October 2006).

¹¹ Page 39.

¹² See Roth, [The Continual Evolution of Competition Law](#), An edited version of the Blackstone Lecture delivered at Pembroke College, Oxford, on 9 November 2018, p18.

¹³ *Ibid*, p23.

prevents the law from evolving to reflect both developments in technology and in economic thinking.¹⁴

30. It is notable that, the main companies subject to *ex ante* economic regulation typically originate from state-owned monopolies. Regulated industries include electronic communications, post, energy, water, rail and airports. Whilst they have their own complexities, these industries are very different from the technology industry; and generally the pace of innovation and change is much slower. (Electronic communications, which is arguably the closest sector to digital platforms and has the fastest pace of change, is considered further below in Section F.)
31. Third, it is important to have regard to the fact that the difference in timing between *ex ante* regulation and *ex post* competition law is not as clear-cut as the stylised description in paragraph 22 above.
 - 31.1. In reality, *ex post* competition law is itself intended to, and does, deter anti-competitive conduct from taking place in the first place. The following all provide strong incentives to avoid infringing competition law:
 - a) the reputational damage of a finding of infringement – a particularly acute factor for companies for whom consumer trust is an important part of their brand;
 - b) the financial and high-level management resource implications of dealing with infringement proceedings, and their consequences, including fines and damages actions; and
 - c) the threat of being subject to remedies which limit commercial freedom and product quality.
 - 31.2. If intervention is urgent, *ex post* competition rules can in an appropriate case be relied upon to obtain interim relief, potentially to stop a present or future competition problem from occurring. They do not necessarily require concrete evidence of harm having occurred to apply.
 - 31.3. Conversely, *ex ante* rules can themselves be violated, requiring after-the-event enforcement action, which may be neither straightforward nor quick.
32. Accordingly, whilst improving the speed of competition law interventions is a justifiable aim, speed alone is not an adequate basis for adopting a prescriptive new regime of *ex ante* regulation which departs from existing competition law principles.

¹⁴ See Scott Morton, Fiona et al.: [Report of the Committee for the Study of Digital Platforms](#), Market Structure and Antitrust Subcommittee, Stigler Center of the Study of the Economy and the State (1 July 2019), at p73.

(ii) Market Power

33. A second factor advanced to justify *ex ante* intervention is the exceptional degree of market power held by digital platforms, in particular derived from economies of scale and scope and network effects. Digital Platforms are often referred to as “gatekeepers” and there are repeated suggestions that this justifies a departure from dominance-based rules. Crémer et al. argue that economies of scope themselves arise because of:¹⁵
- 33.1. extreme returns to scale;
 - 33.2. network externalities which arise because of the difficulties that consumers face in coordinating migration to a new service; and
 - 33.3. the role of data.
34. It is argued that these features often lead to ‘tipping’ where the vast majority of the market is won by a single competitor.
35. A number of observations may be made in response.
36. First, an allegation of market power should not itself be a rebuke. As made clear by the Court of Justice of the European Union (CJEU) in the seminal case of *Michelin I*:
- “A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the Common Market.”¹⁶
37. This point is made equally forcefully in the context of US antitrust law:
- “The successful competitor, having been urged to compete, must not be turned upon when he wins.”¹⁷
38. There must be at the very least a serious threat of the misuse of that market power to justify intervention. This is developed further in Sections E and G below.
39. In this regard, although *ex post* EU competition law imposes obligations on undertakings which hold a dominant position, regardless of the source of that dominance, there is nonetheless an important difference between the electronic communications sphere and digital platforms in the context of *ex ante* regulation. None of Google, Apple, Facebook or Amazon started out as the biggest players in

¹⁵ See Crémer et al., page 2.

¹⁶ Cases C-322/81, *Michelin v. Commission* EU:C:1983:313, at paragraph 57. See also C-413/14 P, *Intel v Commission* EU:C:2017:632, paragraphs 135-136.

¹⁷ *United States v Alcoa*, §148 F.2d 416, 430 (2d Cir. 1945) (Hand J).

their fields, handed the incumbency advantage of a state monopoly. They entered markets facing fierce competition from more established rivals and attained current market leading positions by providing a better, more desirable products or services than those rivals. This is precisely the process that competition law should seek to *protect* and *foster*, rather than disallow its rewards. By contrast, the *ex ante* regime adopted in, for example, electronic communications reflects a policy decision to open up a sector originally dominated by state-owned incumbents which had never experienced competition of the type seen in search, consumer electronics, social media or online shopping at any point. This point is developed further below in Section F.

40. Second, as the CJEU has pointed out in *Teliasonera*, "*the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.*"¹⁸ There is no clear reason, therefore, why the *degree* of dominance should justify a different set of substantive rules governing what constitutes pro- or anti-competitive conduct.
41. Third, not all of the features asserted to be associated with platforms are applicable across all industry participants.
 - 41.1. For example, whilst there are certainly scale effects in search, they are not characterised by obvious coordination difficulties for users wishing to migrate to a different service, in the way that social media platforms are. A new entrant competitor for search would need sufficient scale to obtain the data necessary to provide high quality results; but if it offers a high-quality innovative product, a user does not have to persuade others to follow in order to take advantage of it.
 - 41.2. Equally, on the side of businesses seeking attention, a pay-per-click model allows advertisers to try alternative channels for reaching users at low incremental cost. They do not need to persuade other businesses to use the same channel.
 - 41.3. It follows that interventions to address coordination difficulties are not obviously appropriate in the case of all digital platforms. Switching, and similarly multi-homing¹⁹, are already inherently feasible for search services, albeit they may be facilitated with improved data portability to the extent that

¹⁸ Case C-52/09 *Konkurrensverket Teliasonera Sverige AB* EU:C:2011:83; [2011] 4 CMLR 18 at [81].

¹⁹ Using more than one platform for a given service.

users' search history can better help predict their current searches (as to which see section H below).

42. Fourth, the features associated with digital platforms used to support special regulation such as scale, network effects and the use of data are not unique to digital platforms. Walmart could be said to exhibit similar features to Google, in particular in terms of the relevance of scale and use of data, but is not a candidate for specialised regulation because of it.
43. Fifth, as to the argument that *ex ante* regulation is justified because of tipping effects, a number of points can be made in response:
 - 43.1. First, to the extent that these effects arise, it likely to be because of features that are of direct benefit to consumers: for example, significant returns to scale allow services to be delivered at low (or zero) cost; and network effects arise precisely because a service is more valuable to users the more other people there are who use the same service. It is not clear, therefore, that taking measures designed to reduce tipping effects is necessarily in consumers' interests if it undermines features of digital platforms from which they benefit. Sponsoring less efficient entry for entry's sake is fraught with difficulties including its incentive effects on innovation by existing platforms, increasing average costs (to the extent that there are pervasive economies of scale) and the risk that it is regulators who choose how winners and losers are determined rather than the market.
 - 43.2. Second, the argument that we have now reached a unique moment in the development of the technology industry where markets have now "tipped" such that market leaders have become unassailable should be approached with scepticism:
 - a) References to returns to scale that are so "extreme" that they dictate that there is necessarily only room for one (and thus an inherently dominant) player in a given sector are based more on assertion than empirical data. There are, in fact, competitors in all of the areas listed in paragraph 1 as examples of digital platforms - search engines, social media, app stores, online market places, and price comparison websites that link sellers with customers. It is not evident that there are insurmountable bars to success for any competitor with a sufficiently attractive product.

- b) But even to the extent that markets can have tipping tendencies, they are not static. Yahoo! was once declared to have "*won the search wars*".²⁰ Google overtook, not just Yahoo!, but other more established rivals such as Altavista and Lycos because it offered faster and more relevant search results, not because it was sponsored by a pro-entry industrial policy. Apple struggled in the 1990s, losing out in the personal computer market to PCs based on the Windows operating system of the world's then leading technology company, Microsoft; but Apple ultimately became what is currently the world's largest company, by offering highly desirable products and diversifying from computers to consumer electronics.
- c) There are, moreover, many examples of other once powerful technology companies who failed to maintain their seemingly inviolable positions of strength beyond those mentioned above in search. These include Nokia, Blackberry, Xerox, Kodak, Polaroid, Atari, MySpace, Nortel, Silicon Graphics, Sun and Apollo.

43.3. Third, the imperative for intervention because innovation is allegedly being undermined by the strength of leading technology companies is highly suspect. For example:

- a) Amazon and Alphabet, Google's parent, are the world's two leading companies for research and development, spending respectively \$22.6 billion and \$16.2 billion in 2018 according to the PwC Global Innovation 1000 Study.
- b) Alphabet, Apple, Amazon and Microsoft occupy the four top places for the world's most innovative companies in several surveys of innovation.²¹
- c) Google's success has not decreased incentives to invest in innovation: in 2002, Google spent 7.2% (\$0.4 billion) of its revenues on R&D; by 2009, that had increased to 12.0% (\$2.8 billion) of its revenues; and by 2019 the figure had increased again to 16.1% (\$26.0 billion).²²

²⁰ See, for example, Stross, Randall, [How Yahoo! Won the Search Wars](#), Fortune Magazine (2 March 1998).

²¹ Boston Consulting Group, [The Most Innovative Companies 2019](#) (21 March 2019).

Visual Capitalist, [Ranked: The 50 Most Innovative Companies](#) (17 July 2020).

²² See Google Inc. 10-Ks for years ending 31 December 2002 and 2009, and Alphabet Inc. Form 10-K for year ending 31 December 2019.

(iii) Addressing competition law's potential lacunae

44. A further justification advanced for *ex ante* regulation is that it helps address anti-competitive conduct that competition law rules may not clearly prohibit and/or which it finds difficult to remedy.
45. Prominent amongst the examples of conduct that is said by proponents of new regulation to require clear prohibitory rules is 'self-preferencing'.
46. There would be some difficulty for the Commission itself in explicitly endorsing this justification for *ex ante* regulation. Whilst the Commission argues that its decision in *Google Shopping*²³ relies on case-specific analysis, in its decision it also claims that 'self-preferencing' and 'leveraging' are already recognised, generally applicable heads of abuse in *ex post* competition law. If the Commission is right, the corollary of this is that there is no lacuna for *ex ante* regulation to fill.
47. Nonetheless, it is certainly the case that some self-preferencing is capable of distorting competition: for example, for an undertaking to reserve to itself an essential facility which is indispensable for competition and is liable to eliminate the possibility of competition. Where it is not objectively justified, such conduct is already proscribed by orthodox competition law. Similarly, for an undertaking to set an inadequate margin between its upstream and downstream prices so as to prevent equally efficient rivals from competing, thereby 'preferencing' its own downstream business, is a recognised abuse. The question is whether the law should go further.
48. Whether a new rule is justified depends on how the rule is framed, what it aims to catch, and to what extent existing rules already do the job. This is most easily addressed in section G, which deals in more detail with alternative forms of rules designed to address self-preferencing.

E. A framework for determining whether change is needed

49. Crémer et al. seek to justify their proposals for regulatory changes by reference to the "error cost framework". This is intended to provide a framework for choosing one policy alternative over another by reference to the expected cost of competing policies. The expected cost takes account not merely of the *probability* that conduct is pro- or anti-competitive but also the *costs* of errors if certain conduct is wrongly prohibited (or deterred) or allowed. It also takes account of the implementation

²³ Commission decision of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the Agreement on the EEA (AT.39741 — *Google Search (Shopping)*)

costs of a regulatory solution. Furman et al. propose a similar framework for the assessment of mergers in the UK.

50. Such a framework is unobjectionable in theory and as a starting point. Indeed, I would endorse it in broad terms as the right approach for guiding decision-making in this area, so long as it is applied with sufficient rigour. I would propose the following approach:

50.1. First, rule-changes can more readily be contemplated where the expected costs of a mistake (taking account, where possible, of both its probability and its severity) are low. Where the costs could be significant, then strong evidence will be required to show convincingly that the expected costs of not altering the rules is likely to outweigh those costs.

50.2. Second, within the overall framework proposed above, any conduct to which new rules may be applied must be capable of being tolerably clearly identified and defined. New rules which add to the existing canvas of competition law are unlikely to be helpful where they are susceptible to argument about what is or is not in principle within the rule, undermining certainty for all market participants, and increasing the costs associated with having the rule.

51. A number of observations may be made in the light of these principles:

51.1. First, there may often be a tension between, on the one hand, legal certainty and, on the other, having a nuanced prohibition which reduces the likelihood of it misfiring (whether by prohibiting or deterring beneficial conduct or allowing harmful conduct). However, when there is already both legislation and a well-developed body of jurisprudence in place which has sought to negotiate this tension in the form of existing *ex post* competition law, any new rule which is not to risk serious adverse consequences must strive to give effect to both principles if it is to make a helpful contribution to the law.

51.2. Second, it follows from the above that calls to fill substantive lacunae in competition law should be treated with considerable caution. Since the evolution of existing competition law already reflects the balancing exercise called for by the first principle above, altering that careful balance requires highly compelling justification.

51.3. Third, existing competition law contains obvious examples of rules that are intended to give effect to the principle underlying the first point above. "Efficiency" or "objective" justifications for otherwise infringing conduct exist not merely in Articles 101 and 102 TFEU themselves, but also in the more prescriptive context of, for example, the Vertical Agreement Block Exemption

Regulation (“**VABER**”),²⁴ which provides a safe harbour for conduct fulfilling its criteria, but still does not rule out an efficiency justification under Article 101(3) TFEU for conduct which does not.²⁵ Such a rule will generally have low costs in terms of permitting harmful conduct; whereas not having it will lead to potentially significant costs from intervention.

51.4. Fourth, the highly structured efficiency derogation in Article 101(3)²⁶ can be seen as an attempt to satisfy the second principle. The derogation in Article 102 of objective justification, since it is judge-made, is broader. Each has some merits and demerits, albeit in two-sided markets, the operation of the former has, at least until recently,²⁷ been contentious.

52. In my view, the conclusions drawn by the Crémer et al. in reliance on the error cost framework go further than currently justified. They write:

“The error cost framework. We propose that competition law should not try to work with the error cost framework on a case by case basis. Rather, competition law should try to translate general insights about error costs into legal tests. The specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such that some modifications of the established tests, including allocation of the burden of proof and definition of the standard of proof, may be called for. In particular, in the context of highly concentrated markets characterised by strong network effects and high barriers to entry (i.e. not easily corrected by markets themselves), one may want to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct. This may be true especially where dominant platforms try to expand into neighbouring markets, thereby growing into digital ecosystems, which become ever more difficult for users to leave. In such cases, there may be, for example, a presumption in favour of a duty to ensure interoperability. Such a presumption may also be justified where dominant platforms control

²⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

²⁵ Directive 2019/633 does not itself have such an escape valve; but arguably the relatively micro-level of control which it embodies has less potential for far-reaching economic inefficiency than banning all self-preferencing by digital platforms.

²⁶ An efficiency exemption under Article 101(3) requires that an agreement: (i) “contributes to improving the production or distribution of goods or to promoting technical or economic progress” (ii) “while allowing consumers a fair share of the benefit; but does not (iii) “impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives”; or (iv) “afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question”.

²⁷ See judgment of the UK supreme Court in *Visa and Mastercard v Sainsburys, Asda and others* [2020] UKSC 24 at [139] to [174].

specific competitively relevant sets of user or aggregated data that competitors cannot reproduce.”²⁸

53. The language generally used (“*competition law should try ...*”, “*one may want to err on the side of ...*”) is fairly tentative, appropriately so given the lack of empirical evidence being brought to bear. Nonetheless, the overall thrust appears to be in favour of introducing new restrictions into competition law. Moreover, seemingly in reliance on the error-cost framework, elsewhere the authors propose in clear terms a new presumption against self-favouring.²⁹
54. In this regard, it is certainly true that one might “*want to err on the side of disallowing potentially anti-competitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct*”. But equally one might not. To determine which is more appropriate necessarily demands an empirical analysis. Crémer et al. reject undertaking this on a case-by-case basis. But if it really cannot be performed case-by-case, the feasibility of drawing generally applicable conclusions to guide the imposition of new rules is open to question, at least without strong evidence. On its face, this would appear to be more ambitious, not less, than a case-by-case approach. And there is no strong evidence advanced to show that the balance of risks has changed so as to justify changes in competition law.
55. Taking search markets as an example, a potential benefit from a rule against self-preferencing designed to foster more undertakings providing services in and around those provided by Google (that is, the potential cost of not intervening) could arise if there was evidence of dissatisfaction with Google’s services. But users *already* appear to indicate high levels of satisfaction with services that are provided free of charge.³⁰ Indeed, that satisfaction appears to compare favourably with areas where there are both a number of competing firms and a regime of significant economic regulation, such as in energy markets.³¹
56. It can also hardly be said that there is not already substantial innovation driving advances in digital platforms: see paragraph 43.3 above. The innovation and

²⁸ Page 4.

²⁹ Page 66-67.

³⁰ For example, *Furman et al.* report evidence at §1.13 that “*In the UK, 76% of internet users report using a search engine every day or almost every day, and 95% of users report usually finding what they are looking for*”.

³¹ Ofgem reports [Customer Satisfaction: Six large electricity suppliers](#) typically around the 70% level (2018).

improvements that come therefrom cannot be taken for granted if the regulatory or competition law framework is significantly altered.

57. Further, a core justification the authors give for arguing that the balance may have tipped in favour of changes to competition law is that of coordination problems which prevent users from leaving a particular platform. But, as noted above at paragraph 41, search engines do not exhibit such significant coordination problems in the way that social media platforms might.
58. On the side of the costs of imposing new obligations on digital platforms, many commentators have referred to information asymmetries between digital platforms and competition authorities. *Furman* et al. do so in the context of an argument justifying the strengthening of information gathering powers, which may well have force.³² However, this asymmetry also points to the care required before assuming that new interventions have low costs. This point is developed in the context of a rule against self-preferencing, addressed in section G below. Whilst such a rule might sound superficially attractive, in reality, its consequences are likely to be far from those expected by its proponents, once its implications are properly understood.
59. Finally, to the extent that new regulation is adopted, there may be means of reducing its potential costs by, for example, limiting the timeframe for its application. As the UK's CMA has observed in its review of how regulation affects competition in the UK business environment:

“[...] in dynamic markets more flexible forms of regulation can reduce the risk of deterring innovation, and therefore harming competition. Such approaches can include the use of sunset clauses for new regulation which are triggered after a fixed period of time or once certain criteria have been met.”³³

F. Does EU electronic communications regulation provide a good model?

60. The EU common regulatory framework which has been adopted for electronic communications is focussed (albeit not exclusively) on undertakings with significant market power (“**SMP**”). SMP designations come out of a market review process that occurs at regular intervals. As addressed in Section H below, this aspect of the regime for electronic communications may have value as a potential precedent in

³² §§3.146 to 3.150.

³³ [Regulation and Competition, A Review of the Evidence](#), January 2020, CMA 111, §1.16.

the context of digital platforms. There are, however, a number of reasons why the *ex ante* regulatory regime adopted for telecommunications is not, in general, a good fit for digital platforms.

61. First, as outlined above, the regulated companies in the electronic communications sector were generally formed from ex-state monopolies that, in contradistinction to the digital platforms that are the present concern of regulators, had not obtained their leading positions by competing on the merits and offering a higher quality product, but simply by dint of their historic advantages conferred by state ownership and/or statutory monopoly. At the time of the introduction of EU-wide regulation, beginning in 1998, telecommunications was not a sector which had seen the degree of innovation and success through improved quality that is a current characteristic of digital platforms.

62. As *Cave, Genakos and Valletti* observe:³⁴

“By the second half of the twentieth century, in most of the world including Europe, telecommunications were characterized by both monopoly and public ownership: two characteristics that are often associated with certain benefits but also with a substantial dose of inertia and inefficiency. Thus, unlike information technology, telecommunications had to liberate itself from these latter tendencies through re-invention while remaining under a form of indirect public control via regulation.”³⁵

63. Second, most regulated products have very different qualities to digital platforms. One of the most regulated areas in the electronic communications sphere has historically been access to the local loop – that part of the network nearest consumers that has historically been considered harder fully to replicate than other parts ‘higher up’ in a network where there are greater economies of scale. Whilst there have been technological developments in the relevant products, they are nonetheless tolerably stable; upstream and downstream products are distinguishable; and the regulated products are amenable to regulation based on expected long-run incremental costs of delivering those upstream products. Regulation has most often been imposed when the facility has been *essential* for competition – with little prospect of any competition at that level without such access (albeit see below, as regards potential unintended effects of regulation).

³⁴ Cave, Genakos and Valletti, [European Framework for Regulating Telecommunications: s 25-year appraisal](#), Review of Industrial Organisation (2019) 55:47-62, p48.

³⁵ Jean Tirole similarly observes in his paper [Competition and the Industrial Challenge for the Digital Age](#), 3 April 2020, (p4) that “*In the late 20th century emerged a growing discontent about the poor quality and high cost of public services run by (public or private) incumbent monopolies regulated by the government*”.

64. It is far from clear how the approach adopted in the electronic communications sector could sensibly or fairly be applied to digital platforms. As exemplified by the data on innovation and investment in research and development highlighted in paragraph 43.3 above, the markets in which the likes of Google, Apple and Amazon operate are fast-developing and very significant investment is continually required to make the products more attractive and useful to consumers. The precise nature of the products that those companies produce is also in a state of near-constant evolution. And taking search as an example, equally fluid are the boundaries of what is 'upstream' or 'downstream'. Integration of mapping technologies, improvements in algorithms to determine the likely purpose of a search, and the provision of specialised boxes to help direct consumers to more useful results more quickly are all innovations which pose particular challenges for telecoms-style regulation.
65. Third, the assets that are typically regulated under the EU electronic communications regulatory scheme are located nationally and therefore more amenable to regulation which is carried out nationally, albeit according to a common framework. By contrast, the infrastructure needed to provide search, social media, app stores or online retail stores need not be located in the country to which the services are supplied and the same infrastructure can be used to make supplies into multiple countries. This makes any form of asset-based regulation per the electronic communications regime very difficult. Further, even where national regulation is feasible, subjecting the same infrastructure to multiple different national regulatory regimes can be expected very significantly to increase compliance costs and cause inefficiencies.³⁶
66. Fourth, some regulation in the electronic communications sector provides a salient lesson in unintended consequences. For example, in the UK, TalkTalk – an entrant into the supply of broadband services – brought proceedings to challenge the imposition of price controls on BT, the incumbent telecommunications provider and its rival. This is because the extent of such price controls undermined the competitive advantage it could obtain from rolling out its own competing infrastructure; the regulation allowed rivals (such as Sky) the cheaper option of simply using BT's infrastructure instead: see *TalkTalk v Ofcom & Sky* [2013] EWCA Civ 1318 at [30] per Rix LJ. This highlights the real problem that regulation can stymie investment that would have occurred, but for the regulation.

³⁶ See also Jean Tirole's comments on the problems of inconsistent regulation of multinational companies in the paper cited at footnote 35 above, p25.

67. Fifth, it is to be observed that, even in the electronic communications sphere, the 'primacy' of competition law is still arguably recognised in Recital 29 of the European Electronic Communications Code³⁷ (the "EECC"), which provides as follows:

"This Directive aims to progressively reduce *ex ante* sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that *ex ante* regulatory obligations are imposed only where there is no effective and sustainable competition on the markets concerned." (emphasis added)

68. It is accepted that the EECC contemplates, as did the common regulatory framework before it,³⁸ that where there is a lack of effective and sustainable competition, something other than competition law may be required. But it also indicates the long-term undesirability of rules governing competition that depart from *ex post* competition law, reinforcing both the need to keep divergences to a minimum, and the long-run objective of avoiding rules going beyond competition law.

69. Finally, the conclusion that the electronic communications regulatory framework, or indeed utility regulation more generally, does not provide a good model for digital platforms seems to be widely shared.

70. For example, Crémer et al. write:

"... in this very fast moving and diversified market, we believe that regulation organising the whole sector – akin to the type of regulation used for traditional utilities – is inappropriate. Rather, we must adapt the tools of competition policy to this new environment."³⁹

71. Similarly, Furman et al. suggest:

"... utilities regulation typically allows a regulated rate of return for the monopoly operator, and seeks to ensure open and fair access that allows competition in markets that rely upon the network.

But utilities regulation of this kind involves trade-offs: it accepts the monopoly position of the utility operator while looking to minimise the resulting consequences for competition and consumers. The approach this review recommends is instead to use pro-competition policy tools to provide every chance for competition to succeed in digital markets, tackling the factors that lead to winner-takes-most outcomes and to that position becoming entrenched. By using pro-competition rules and frameworks that

³⁷ Directive (EU) 2018/1972

³⁸ Directive (EU) 2018/1972, recital 29; Framework Directive 2002/21/EC, recital 21.

³⁹ Page 15

open up opportunities for competition, it can deliver a market-led approach.”⁴⁰

72. That all said, the common regulatory framework in electronic communications may have some elements which are worth considering as precedents for regulation of digital platforms. One of those is the designation of certain undertakings – following a regular market review – as having (in the case of electronic communications) “significant market power” in certain core markets. This is discussed further below I Section H.

G. Self-preferencing

73. Arguably one of the most prominent rules proposed for new *ex ante* regulation is one against so-called “self-preferencing” – a term which is not always precisely defined by the proponents of new rules.⁴¹ This section considers a number of ways that have been proposed of addressing the issue of self-preferencing, namely:

73.1. an outright ban on certain activities;

73.2. a reversal of the burden of proof; and

73.3. a code of conduct based on fair, consistent and transparent access.

74. I then address an alternative proposal focussed on competition law, which extends beyond the doctrine of refusal to supply.

(i) Outright prohibition

75. The Commission Working Document⁴² proposes a “*self-executing*” “*blacklist*” of prohibited self-preferencing practices. This “*self-executing*” “*blacklist*” is to be contrasted from a “*greylist*” of “*unfair practices where intervention by the competent regulator is required*”. Included on the “*blacklist*” is that “*Gatekeepers shall not provide preferential display/ranking in online search engines or online intermediation services for their own downstream services and offers*”.

76. In this section I consider (i) whether self-preferencing can be regarded as generally harmful and whether there is an obvious lacuna in competition law in this regard; (ii) arguments about the leveraging of market power; (iii) the implications of a rule

⁴⁰ §§2.14 to 2.15.

⁴¹ As noted at paragraph 47 above, both refusal to supply and margin squeeze can be seen as forms of “self-preferencing”

⁴² See paragraph 2 above.

against self-preferencing on vertical integration of product development; and (iv) the evolution of competition law in this area and what it teaches us.

A lacuna in competition law: is self-preferencing generally harmful?

77. European law contains some examples of conduct which is automatically prohibited because of its perceived harmful economic effects. One such example is the Directive 2019/633 on Unfair Trading Practices in business-to-business relationships in the agricultural and food supply chain. This prohibits certain types of practices where the turnover thresholds for buyer and supplier imply an imbalance of power. Prohibited conduct includes payment days beyond 30 days after delivery for perishable products, or unilateral changes in supply terms by the buyer.
78. Directive 2019/633 has been proposed by Alexandre de Streel as a possible precedent for the imposition of a rule such as a general prohibition on self-preferencing.⁴³
79. However, Professor Tommaso Valletti, then Chief Economist DG Competition, explained,⁴⁴ in the Impact Assessment accompanying Directive 2019/633⁴⁵ that the Directive sought to address conduct which was "*generally harmful*" where "*there is only a very limited risk that such regulation would eliminate potential efficiencies*"⁴⁶.
80. Consistent with the framework discussed above in section E, this appears to be a broadly reasonable basis for the imposition of rules prohibiting certain types of conduct, so long as the conduct can be clearly identified and defined, and so long as the prohibitions based on what is "generally" the case are also subject to potential justification on efficiency grounds⁴⁷: see the discussion at paragraphs 50 and 51 above.
81. The problem with relying on Directive 2019/633 as a precedent for a rule against self-preferencing, is that self-preferencing is not "*generally harmful*" and is not a well-defined means of delineating anti-competitive conduct. On the contrary, as

⁴³ See Presentation by Alexandre de Streel for the conference *Designing an EU Intervention Standard for Digital Gatekeepers*.

⁴⁴ T. Valletti, [Economic impact of unfair trading practices regulation in the food supply chain](#), Annex H, 22 January 2018, in Commission Staff Working Assessment of 12 April 2018 on the Initiative to improve the food supply chain (unfair trading practices), SWD (2018) 92.

⁴⁵ T. Valletti, *Annex H: Economic impact of unfair trading practices regulation in the food supply chain*, 22 January 2018, in Commission Staff Working Assessment of 12 April 2018 on the Initiative to improve the food supply chain (unfair trading practices), SWD (2018) 92.

⁴⁶ *Ibid*, Page 267.

⁴⁷ Directive 2019/633 does not itself have such an escape valve; but arguably the relatively micro-level of control which it embodies has less potential for far-reaching economic inefficiency than banning all self-preferencing by dominant online platforms.

discussed below, self-preferencing in the form of developing assets and retaining the use of them for oneself has long been regarded in competition law as generally pro-competitive.

82. I would suggest that the proposal in the Commission Working Document noted in paragraph 75 above combines two very different concerns. On the one hand, it requires that "*Gatekeepers shall not provide preferential [...] ranking in online search engines*" (emphasis added). To the extent that this implicitly means "*where such ranking is not based on merit*", this appears on its face to be unobjectionable. There is an obvious transparency justification for requiring that results that explicitly or implicitly purport to be based on a consistent, merits-based approach are indeed so based. Otherwise, users are liable to be misled. An example might be Google giving a better ranking within its generic search results to its own YouTube links than to other results its algorithms indicate to be more likely to be helpful to the user. As discussed at paragraph 129 and following below, prohibiting consumers from being misled in this way does not require any new law.
83. A search engine results page ("**SERP**") may, however, often contain more than merely generic rankings. For a start, it may contain forms of advertising. Indeed, advertising is the means by which a search engine will monetise its services and enable users to search for free. Necessarily, advertising will tend to have a form of "*preferential display*" in the sense that its appearance is in part a function of the advertiser having paid for it to be there. So long as paid links are transparent that they are not part of the same merits-based ranking, it is submitted that search engines must be allowed to provide such "*preferential display*" of them. This includes adverts by the dominant undertaking itself. In this context, if Google were to use the same space on its SERP for advertising its own products and/or those of others, it would likely be appropriate to ensure that equally efficient advertisers could compete to win that space. However, competition law already has the doctrine of margin squeeze in its armoury to address this possible concern.
84. A further feature of an innovative SERP is that the form in which results are most usefully displayed from users' perspective depends on the nature of the search and what can be inferred about its purpose. For example, the words entered into Google's general search page may indicate that the user is interested in flights. It is likely to be helpful to the user to provide them with up-to-date and accurate information that satisfies their search demands, and to do so in a tailored manner, different from the mere provision of generic links to ranked sites. The display of this information might be argued by some to be "preferential"; but it may also be a highly

helpful product improvement, enabling consumers to satisfy their demand to find answers quickly and efficiently.

85. It follows from the points made above that a requirement that "*Gatekeepers shall not provide preferential display in online search engines [...] for their own downstream services and offers*" is potentially problematic, depending on what is said to constitute a "*downstream service or offer*", and what is said to be "*preferential*". These points are considered further below at paragraphs 93 and following in the context of a discussion of leveraging, vertical integration and product development.
86. Some proponents of introducing a special regime to address self-preferencing may argue that it is precisely the difficulty with addressing such conduct in competition law that justifies specific ex ante regulation of platforms.⁴⁸ But, as with the proposal to use Directive 2019/633 as a precedent, that would be to overlook why competition law does not impose a blanket prohibition on self-preferencing. There is no obvious lacuna in competition law in this respect. Rather, the preservation of contractual autonomy except in special cases recognises the underlying economic justification for allowing companies, including dominant ones, to choose whether and to whom they supply the fruits of their innovation – because that is the very spur to innovation in the first place.
87. As Advocate General Jacobs explained in *Bronner*:⁴⁹
- "In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business [...] Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it".
88. Far from being inherently *antithetical* to competition, permitting such commercial freedom underlies the very basis of dynamic competition - an undertaking developing distinct products, or features for a product, which are not automatically shared with rivals, but used by it as competitive tools to differentiate its offering, thereby improving consumer choice. Such a form of "self-favouring" only becomes abusive under competition law when the asset is indispensable, so that a refusal to supply access would eliminate all competition.

⁴⁸ Scott Morton et al., pp. 69-70 argue more generally that "[b]ecause large technology platforms have huge scale and benefit from network effects, they are often able to engage in aggressive conduct targeted at rivals without violating existing antitrust standards". The need for rules that are better targeted at self-preferencing is implicit in the proposals in the Furman et al. at Box 2.A (page 61) and following.

⁴⁹ Opinion of Advocate General Jacobs of 28 May 1998, *Bronner*, C-7/97, EU:C:1998:264 at [57].

89. And as Crémer et al. observe:⁵⁰

“The core goal of competition law should remain that consumers benefit from the digital era and from innovation. And, as Commissioner Vestager has laid out: ‘The real guarantee of an innovative future comes from keeping markets open so that anyone, big or small, can compete to produce the best ideas’.”

90. No clear and cogent basis for disturbing the orthodox competition law approach to when to require innovations to be shared has thus far been articulated in the proposals for new regulation. Where a competitor has other means of attracting customers than access to the innovations of a dominant undertaking, it is not evident why there should be mandated access to those innovations, even if (as is claimed) the dominant undertaking wields very substantial market power.

91. Take comparison shopping as an example. If the objective is simply to stimulate many companies to offer comparison shopping, no doubt it would be advantageous to compel Google to supply rivals with its inventories and/or promote them on the scarce real-estate that is Google’s search results page. But why, unless access to these facilities are essential to compete, should Google do so? It is Google that innovated and invested in developing these technologies. There is no good reason why others should be permitted to free-ride off that investment simply because it would be advantageous and profitable for them to do so. The ‘competition’ thereby created is likely to have little in the way of true benefits to users if the underlying product is little different to that already provided by Google. And in many cases it may well be inferior, because rather than make large investments in developing an innovative product, companies may be keen to maximise short-run returns by exploiting the opportunity of a regulated regime for intermediating searches and earning revenue on clicks with as little investment as possible.

92. Moreover, unrestricted access to Google’s innovations has the obvious problem that Google’s future incentive to innovate will be substantially undermined if it has to share the technological fruits of that investment with all comers. That is not only because it reduces the returns to investment, but also critically including because developing ‘sharable’ versions of its products is likely to inhibit the development of more sophisticated products which integrate a variety of technologies and are more difficult to offer on a technologically neutral ‘wholesale’ basis to rivals.

⁵⁰ Page 14.

Leveraging of market power

93. It might be argued that the points made above overlook that a prohibition on self-preferencing should focus (as it did in *Google Shopping*) on situations where there is a concern of *leveraging* market power from one market to another; in particular, where competitors in a downstream market are disadvantaged if they do not have access to the same upstream advantages as Google. However, this argument is also problematic:

93.1. First, the distinction between different markets in the context of digital platforms may be far from clear.

a) As noted by Scott Morton et al:⁵¹

“Pinpointing the locus of competition and therefore the relevant market in which technology platforms compete can also be challenging because the markets are multisided and are often ones with which economists and lawyers have little experience. This complexity can make market definition another hurdle to effective enforcement.”

b) For example, mapping is not necessarily a distinct market from general search. Rather mapping is one feature of general search that may be offered where a user’s search appears to have a geographical or local element to it.

c) Similarly, product results as presented in a Shopping Unit (where a user can click through to buy a product) are just one form of result that, from the perspective of consumers, may be generated as part of a general search offering, when Google detects that a user’s query indicates a possible interest in purchasing a product.

93.2. Second, it is typically possible to deconstruct any consumer-facing product into hypothetical upstream and downstream components.

a) For example, general search could be said to involve:

- i) The (downstream) presentation of search results to users; and
- ii) The (upstream) provision of the underlying search technology.

b) Thus, a no-leveraging rule seems capable of opening up existing services to simple free-riding.

93.3. Third, whether or not a new service constitutes a separate market, it may be highly efficient and beneficial for an existing digital platform to compete in a

⁵¹ Page 70.

related market, such that any rule which has the object or effect or deterring entry into new markets by digital platforms may compartmentalise markets, stifle competition and harm consumers. Discouraging new entry is not ordinarily considered to be pro-competitive.

94. Ultimately, 'leveraging' is a simply generic expression that covers a range of different practices, and is no more suitable for defining the line between legitimate and illegitimate conduct than 'self-preferencing'. The General Court in *Tetra Laval* made clear that 'leveraging' can occur through a variety of mechanisms which may or may not be abusive.⁵² Examples of unlawful leveraging include margin squeezing, tying and refusal to supply. But a proper analysis must consider the mechanism through which that leveraging takes place. Having done so, the tests for determining whether such conduct has a deleterious impact on competition such that it should be prohibited are already well developed in existing competition law.

Vertical Integration and Product Development

95. A further important point to note in this context is that a rule against self-preferencing presents formidable difficulties both for vertical integration, which is generally recognised as being efficient, including for product development.⁵³ For a search engine, it would seem to represent a bar on being able to provide a comprehensive search tool unless the provider can develop a means of ensuring shareable versions of any aspect of it that might conceivably be identified as constituting a separate potential market. For example, as noted above, where Google detects that a search may have a local or geographic element to it, it may prominently provide a map as part of its search results.

- 95.1. Does this mean that a separate mapping market is now engaged? Why would this not be just feature of the presentation of a search result, like a picture? Maps *per se* may not have been core to the nature of the search (which might have been focussed on finding out information about a local restaurant,

⁵² See General Court in Case T-5/02, *Tetra Laval BV v. Commission*, EU:T:2002:264, [218-219]. The Court of Justice likewise found that, when examining examples of leveraging, there is only the "possibility" that the "conduct is unlawful", see Judgment of 15 February 2005, *Tetra Laval*, C-12/03, EU:C:2005:87 at [74].

⁵³ Luis Cabral, in [Merger Policy in Digital Industries](#), May 2020, makes the point that intellectual property is less well defined in the technology industry than in (say) pharmaceuticals, and that vertical integration in the technology industry can be seen as an efficient solution to the problematic contractual issues that would arise were two firms to attempt to collaborate. I would suggest that there may also be formidable practical problems to such cooperation – and in particular seeking to integrate different technological solutions to a given problem, as illustrated by the *Streetmap* case (see paragraph 96.2 below); and as Google explained in connection with its deployment of Product Universals in *Google Shopping* (see paragraph 116.1 below).

including opening times and location). As noted above, the locus of competition can be hard to identify.

- 95.2. If a separate mapping market has been engaged, does Google now have to ensure that it provides the results of any competing provider of mapping services, and equally prominently? Surely not, since there is only a limited amount of 'real estate' on the search results page and there is an obvious opportunity cost to whatever is displayed.
- 95.3. And if it does have to provide competing maps to its own, how are they to be chosen?
- 95.4. How is all of this to be achieved without degrading quality?
96. The case of *Streetmap v Google* [2016] EWHC 253 (Ch) illustrates just some of these problems. In that case, Streetmap wanted equal prominence to Google for its mapping results on Google's search results page. The English High Court found, however, that:
- 96.1. there was no appreciable actual or potential effect on competition from the conduct.⁵⁴ (This undermines blanket statements that digital platforms inherently require non-discriminatory access to Google's search pages, since that is inconsistent with the careful and detailed findings of the High Court in this regard in the context of digital mapping); and
- 96.2. even if there had been such an effect, requiring Google to show Streetmap's mapping results would have degraded the quality of Google's own search results, so its refusal to do so was objectively justified.⁵⁵

The role of ex post competition law

97. In my view, no convincing explanation has been offered as to why the economic principles underpinning decades of established competition law jurisprudence are inadequate or inapplicable in the context of digital platforms. To assess this properly requires a reasonably detailed analysis of that existing case-law. Accordingly, I conclude this section by revisiting five key cases on refusal to supply. These cases show, in particular, that there are no cogent distinguishing factors associated with the technology industry which justify abandonment of the principles which underpin existing, orthodox competition law of general application. (The reader who does not

⁵⁴ See [84, 88-90, 96-97, 104, 106-107, 139-140].

⁵⁵ See [142, 145, 147, 150, 155, 158-159, 170-171, 175, 177].

require the level of detail inherent in this legal study may wish to skip to the conclusions at paragraph 103 below).

98. Case C-331/84 *CBEM v CLT and IPB (Telemarketing)* EU:C:1985:394 [1986] 2 CMLR 558:

98.1. This case considered the actions of the Luxembourg monopolist TV station RTL. Centre Belge (the Claimant) had previously held an exclusive contract to carry out telemarketing on the RTL station. However, on the lapse of that contract, the station's advertising agent announced that the only telephone numbers which could be shown in ads were its own. This prevented Centre Belge from carrying out any telemarketing operations on the RTL.

98.2. The Court was asked to address the legality of RTL's conduct on the basis that "*by reason of provisions laid down by law there can be no competition or only very limited competition on the market*" [11]. In other words, the factual premise for the Court's assessment was on the basis that the dominant undertaking had a stronger grip on the market - because of legal protection of its monopoly - than has been suggested in relation to any digital platform.

98.3. The Court found at [26] that is an abuse for an undertaking with a dominant position on the market in a service which is indispensable for activities on another market to refuse to supply that service, if the refusal is not justified by technical or commercial requirements but is intended to reserve the downstream market to itself, with the possibility of eliminating all competition from the competing undertaking.

99. C-241/91 P and C-242/91 P *RTE and ITP v Commission ("Magill")*:

99.1. This case concerned an attempt by Magill publish a magazine containing TV listings in Ireland for channels owned by RTE, ITV and the BBC. RTE and ITP (an agent of ITV) appealed against a Commission Decision upheld by the Court of First instance, finding an abuse of dominance. The Court of Justice noted that RTE, ITP and the BBC "*enjoy ... a de facto monopoly over the information used to compile listing for televisions programmes in most households in Ireland. [...] The appellants are thus in a position to prevent effective competition on the market in weekly television magazines*" [47]. This was due to their ownership of copyright in the information [48]. They thus held a position of extreme market power, backed by legally enforceable property rights.

99.2. The Court stated that "*the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct*". The appellants'

conduct was found to constitute an abuse because they were reserving the secondary market (weekly TV guides) to themselves, 'excluding all competition' by denying access to the 'raw material indispensable for the compilation of such a guide' [56].

100. Case C-7/97 *Oscar Bronner v Mediaprint* [1999] 4 CMLR 112:

100.1. Oscar Bronner published daily newspaper *Der Standard* which accounted for less than 4% of circulation. Mediaprint's newspapers accounted for 47% of the market. Mediaprint's subsidiary operated a nationwide home-delivery scheme: [7]. Bronner sought an order for *Der Standard* to be included in Mediaprint's home delivery system for 'reasonable remuneration' [8].

100.2. The Court of Justice began its ruling by stating that it was not clear if home delivery was a separate market from delivering in kiosks or by post. Mediaprint was dominant only if home delivery turned out to be a separate market: [34]-[35]. The court referred, inter alia, to *Telemarketing* to affirm that an obligation to supply could occur where the product was 'indispensable' and the conduct was likely to 'eliminate all competition on the part of that undertaking' [38]. The court recalled that a refusal to license intellectual property is an abuse only in "exceptional circumstances": [26] and [39].

100.3. The Court extracted from *Magill* four factors establishing exceptional circumstances in that case [40]:

- a) it was impossible to publish a weekly guide without the licence;
- b) the refusal prevented a new product with potential customer demand;
- c) there was no objective justification; and
- d) the refusal was likely to exclude all competition in television guides.

100.4. The Court applied this to the case before it, saying "even if" the case law on licensing intellectual property applies to any property right whatever, it is necessary to show the refusal [41]:

- a) is likely to eliminate all competition;
- b) must be incapable of objective justification; and
- c) the input must be indispensable to carrying on the business in that there were no actual or potential substitutes.

101. Case C-418/01 *IMS Health v NCD Health* [2004] 4 CMLR 28:

101.1. In this case, IMS held a dominant position on the market for German regional pharmaceutical sales data services to pharmaceutical laboratories. It provided

data studies structured around a database which divided Germany into 1860 bricks (the 1860 brick structure). That database was developed with a high level of input from the laboratories: [29].

101.2. NCD Health sought to compete with IMS. It discovered that the laboratories required data to be provided using the same brick structure. But it was enjoined from doing so on basis of a breach of copyright.

101.3. The Court referred back to *Bronner* and explained that the conduct would be abusive if three cumulative criteria are satisfied [38]:

- a) the refusal is preventing the emergence of a new product for which there is a potential consumers demand;
- b) the refusal is unjustified; and
- c) it is such as to exclude any competition on a secondary market.

101.4. The Court went on to clarify that the 'secondary market' need not be an existing market (that is, it can be a potential or hypothetical market). It is sufficient to identify two different interconnected stages of production and that the upstream product is indispensable for the downstream product.

102. Case T-201/04 *Microsoft v Commission*:

102.1. This case concerned (inter alia) the refusal by Microsoft to supply interoperability information to enable non-Microsoft servers to interoperate with Windows PCs.

102.2. Microsoft provide some interoperability information (which enabled e.g. Windows-compatible software to be produced) but the Commission found that '*the degree of interoperability that can be achieved using the available methods is too low to enable Microsoft's competitors to remain viably in the market*' [219].

102.3. The General Court reviewed the case-law on refusal to supply and noted the 'cumulative' test in *Magill*, for when there are 'exceptional circumstances' justifying a requirement to supply, noting the requirement at [332] that:

- a) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
- b) the refusal is of such a kind as to exclude any effective competition on that neighbouring market; and

- c) the refusal prevents the appearance of a new product for which there is potential consumer demand.⁵⁶

103. What may be deduced from these cases is the following:

103.1. The dominant positions held were in a number of cases those of an unassailable monopoly, since their dominance was protected by law – for example, the right to broadcast a television channel, or the right to provide listings of television broadcasts.

103.2. There is, therefore, no clear justification for a general departure from this case law simply because of an allegation that digital platforms have particular market strength: no digital platform has market power that is stronger than that derived from a legally protected monopoly.

103.3. Nor do leveraging arguments supply a justification for abandoning this case law. For example, in Case T-201/04 *Microsoft v Commission*, the Court noted at [1344] that:

“the two abuses at issue form part of a leveraging infringement, consisting in Microsoft's use of its dominant position on the client PC operating systems market to extend that dominant position to two adjacent markets, namely the market for work group server operating systems and the market for streaming media players”.

That did not cause the Court to depart from the orthodox approach to assessing whether Microsoft had abused a dominant position by refusing to supply sufficient interoperability information.

103.4. The requirement to supply intellectual property could only arise in “*exceptional circumstances*” where, in particular:

- a) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;

⁵⁶ The refusal to supply case-law, and *Bronner* in particular, has recently been considered by AG Saugmandsgaard ØE in Cases C-152/19 P and C-1655/19 P *Deutsche Telekom and Slovak Telekom v Commission* (Opinion delivered on 9 September 2020). Consistently with the analysis above, the Advocate General reaffirms that the strict test in *Bronner*, which is not found in other aspects of Article 102 TFEU, is justified in cases concerning refusal to supply by reason of the fundamental interference with freedom to contract that imposing an obligation to supply implies – see [68]:

“In essence, there is a fundamental difference between, on the one hand, penalising the *terms* of an agreement, such as the price agreed, on the ground that they favour an undertaking which, because of its dominant position, is not subject to market discipline, and, on the other hand, penalising a *refusal to make available*. Penalising a refusal to make available, which amounts to requiring an undertaking to conclude an agreement, is significantly more detrimental to the freedom to conduct business.” (Emphasis in original).

- b) the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
- c) the refusal prevents the appearance of a new product for which there is potential consumer demand.

103.5. There is no good reason for relaxing these conditions for mandating supply developed in the case law in the context of digital platforms:

- a) If the platform in question really does have the degree of strength that is suggested of it, then it may be that its services are indeed indispensable to effective competition. If they are not, then providing rivals with a legally guaranteed route to market by piggy-backing off an existing platform is on its face unlikely to foster dynamic competition and innovation so as to benefit consumers. Rather, it would tend to lead to a convergence of offerings and a reduction in innovation.
- b) If there is no new product that is being held back from the market, the negative repercussions of not mandating supply do not appear likely to be substantial.

103.6. Finally, any rule that does not sufficiently acknowledge the potential objective justifications for conduct is likely to be problematic, as discussed below.

104. The substitution of careful, economics-based, case-by-case determination of conduct by reference to the existing body of jurisprudence on Article 102 by rigid *per se* rules is a backwards step. It is at odds with the Commission's generally well received attempt in its 2009 Communication, *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) ("**Article 102 Guidance**") to drive Article 102 in the direction of economics-based case-by-case assessments, and away from *per se* rules. The abandonment of that approach for a particular sector of the economy should be treated with considerable caution.

(ii) Reversal of burden of proof

105. An alternative approach to a complete prohibition, as suggested by Crémer et al. (see paragraph 51 above) is that it may be appropriate to have rules that:

"err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct. This may be true especially where dominant platforms try to expand into neighbouring markets, thereby growing into digital ecosystems, which become ever more difficult for users to leave. In such cases, there may be, for example, a presumption in favour of a duty to ensure interoperability. Such a presumption may also be justified where

dominant platforms control specific competitively relevant sets of user or aggregated data that competitors cannot reproduce”.

106. Whilst seemingly preferable to an outright ban, this proposal remains problematic.
107. First and foremost, this modified approach does not meet the fundamental objections to abandoning established law discussed above. That law is based on the recognised principle that competition that benefits users arises through product differentiation and improvement, not enforced sharing of innovation. There are very strong reasons for allowing all undertakings, even dominant ones, to innovate and to use those innovations as drivers of competition.
108. Second, the ‘escape-clause’ of being permitted to demonstrate the pro-competitiveness of conduct is liable to be an ineffective chimera, unless the *prima facie* presumption against such conduct itself has sound foundations. Obvious arguments to be made by dominant undertakings include that: (i) innovation and product differentiation are positive for consumers in circumstances where the facility to which access is sought is not essential for competition and alternative routes for competition by rivals exist; and (ii) it is liable to blunt innovation and quality to impose a requirement to commoditise the ‘upstream’ product to ensure it is available to (actual or potential) ‘downstream rivals’ on equal terms. But these points would seem already to have been discounted and made subordinate to the interests of rivals having access to the dominant undertaking’s innovations in the establishment of the presumption in the first place. It is far from obvious how, in practice, an undertaking would be able to go about displacing the rule.
109. Third, shifting the burden of proof onto ‘the accused’ to demonstrate their innocence in the quasi-criminal context of competition law, raises – at the very least – potential concerns about the protection of fundamental rights (see also paragraphs 150 to 156 below).

(iii) “Fair, consistent and transparent access” under a code of conduct?

110. Furman et al. propose a Code of Conduct for Digital Platforms. This has been endorsed in the CMA’s Final Report on online platforms and digital advertising.⁵⁷ Furman et al state at Box 2.A:

“Based on its own assessment of the issues and the evidence available, the Panel intends for the digital platform code of conduct to be formed around a set of core principles that would be required of digital platform businesses deemed to have a strategic market status.

⁵⁷ See footnote 5 above.

For the business side of platforms with a strategic market status, the principles should ensure that business users are:

- provided with access to designated platforms on a fair, consistent and transparent basis
- provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis
- not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market”

111. The authors explain at §§2.46 to 2.47 that:

“An ongoing monitoring function [...] should be set up to achieve fast resolutions [of complaints], in multiples of weeks or months, but not years [...] The benefits of a clearer set of rules with ongoing monitoring and a fast-moving enforcement function are illustrated by the case study in Box 2.B, analogous to the Google Shopping case taken by the European Commission, currently under appeal, and outlined in Chapter 1 of this report.”

112. Box 2.B sets out as follows:

“Box 2.B: Code of conduct case study

Case study: A general internet search platform gives premium positioning on its webpages to its own comparison shopping service and demotes rival comparison shopping services in its search results.

Scenario

A general internet search platform is designated by the digital markets unit to have a strategic market status in the online search market.

This platform also provides a comparison shopping service, in competition with existing rival offerings. Comparison shopping services allow consumers to compare products and prices of a variety of online retailers. They are typically funded by the participating retailers on a ‘price-per-click’ basis, and as such their success depends heavily on the extent to which consumers utilise their services. They also exhibit indirect network effects, in that retailers are more likely to use comparison shopping services that provide access to more consumers, and consumers are more likely to use services that give them more choice of retailers.^[58]

The designated search platform is a frequent first point of call for consumers seeking to make a purchase. This platform capitalises on this by designing its webpages and algorithms such that its own comparison shopping service

⁵⁸ Whilst these observations are true, it is unclear why the authors consider that indirect network effects are a *particular* problem in this context given that they note immediately prior that comparison shopping is typically funded on a price per click model. The costs to retailers of using a spread of both more and less popular comparison shopping services is thus small, thereby undermining any ‘chicken and egg’ cycle in terms of developing scale.

is given prominent placement on its pages, while rival services are demoted in the search results it displays.

The effect of this behaviour is that rival comparison shopping services are less visible to consumers, and thus gain fewer clicks, threatening their viability. The behaviour also limits the competitive constraint facing the designated platform's own comparison shopping service, and allows it to leverage its market position in search into this related market.

Application of the code of conduct

The code of conduct includes a core principle that business users of platforms should be provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis.

The code of conduct then sets out in more detail a range of behaviours that are inconsistent with this principle. These include a platform with strategic market status giving undue preferential prominence on its webpages to its own integrated services.

These details in the code of conduct were agreed through a participative approach with the industry, and are well understood by affected parties as a result.

Impact

The code provides clarity to the platform about the boundaries of acceptable competitive conduct. It may well comply and operate in line with these, so that competition between these services will occur on the basis of their attractiveness to consumers and the prices they charge retailers, without distortions from the restrictions previously in place. Over time, such competition will drive up the quality of comparison shopping services and may even stimulate the development of new ways to help consumers with their decision-making. Such competition will also drive down charges to retailers.

Should the designated platform choose to contravene the code, the digital markets unit would go on to achieve a speedy and decisive resolution, doing so far more quickly than would result from a prolonged investigation and remedies under competition law. Faster action creates competitive market conditions at a time when rivals are still active in the market and before any market tipping has occurred. The designated platform gains from the increased legal certainty as to what behaviour is considered acceptable."

113. Thus explained, the proposal sounds beguilingly simple and desirable. However, it is respectfully suggested that that is because the proposals abstract away from core factual issues in the case.

114. In *Google Shopping*, the Google algorithms in issue were not aimed at demoting rival comparison shopping sites at all. They were intended to, and did, improve the relevance of Google's search results. The Commission recognised this.⁵⁹
115. Nor did the Commission object to the prominent display of two types of boxes which in the Furman report quoted above are described as providing "*premium positioning on [Google's] webpages to its own comparison shopping service*".⁶⁰ These boxes were shown in certain cases where Google's algorithms detected that a user's search appeared to be for a product. "Product Universals" were a specialised grouping of free-results. "Shopping Units" were, and remain, a specialised grouping of ads.
116. In essence, what the Commission wanted was the inclusion of rival comparison shopping services within those boxes, to the extent that they were shown at all. However:
- 116.1. In the case of "Product Universals", that was not technically feasible without lowering quality. That is principally because the results of rival comparison shopping services are necessarily a function of their own algorithms as applied to their own product inventories, whilst Google's results are a product of Google's algorithms as applied to Google's product inventories. The two do not naturally mix.
- 116.2. As regards Shopping units, the links in issue did not go to Google's comparison shopping site at all. Rather, they went directly to webpages where the product in question could be bought.⁶¹ The Commission did not object to this;⁶² and it is where the links still go today.
117. Given the actual facts of the Google Shopping case, it is exceptionally hard to see what simple rule embodied in a Code of Conduct could cut through the complexities of the case and yield net benefits for consumers. Given the points made above:
- 117.1. a rule prohibiting relevance improving algorithms would not work;
- 117.2. a rule requiring changes to Google's search pages which reduced the quality of specialised results in "Product Universals" would not work; and
- 117.3. a rule prohibiting Google from directing users to sites where the products in question could be bought would not work either.

⁵⁹ *Google Shopping*, §§16 and 345.

⁶⁰ Decision §§537-538 and 662.

⁶¹ Decision §32.

⁶² Decision §699.

118. The case of *Streetmap* (addressed at paragraph 95.4 above) illustrates a similar point.

(iv) A competition law-based approach, including a rule against product degradation

119. In the analysis above I have sought to explain that the reason why *ex post* competition law is broadly framed, and part of the reason why competition cases can often be lengthy, is that the devil, like God, is in the detail. Bold statements about new rules that seek to sweep away complexity may be superficially attractive. But if the rules are to benefit, not harm, consumers, they need to be thoroughly thought through. In particular, if - in respect of one important segment of the economy - sixty years of carefully and incrementally developed jurisprudence, with increasingly robust economic underpinnings, are to be replaced by *per se* rules, there needs to be an extremely compelling and cogent case for doing so. That case has not been made out.

120. Competition law is better equipped than many commentators suggest in being able to prevent dominant undertakings from limiting the legitimate competitive opportunities available to rivals when choosing whether and how to deal with them. It is not limited to intervening in decisions about whether and what products to supply when the requirements discussed in paragraphs 97 to 103 above are met. In particular, there is an alternative rule which already has a natural home in the competition law jurisprudence and that is capable of assisting in this context. That is a rule against deliberate or negligent product degradation.

121. The European Commission has on a number of occasions indicated that it can be abusive for an undertaking deliberately or negligently to degrade its products or services.

122. In Commission Decision IV/30.979 *Decca Navigator*, the Commission found that Decca - a dominant producer of navigation systems for vessels - implemented an aggressive anti-competitive strategy to frustrate rivals. This included, *inter alia*, deliberately altering transmission frequencies used by the Decca Navigation System ("**DNS**") in a way which both impaired the use of DNS by rivals and resulted in malfunctions, endangering navigators at sea.

123. In Commission Decision, Case AT.39713 *Baltic Rail*, the Commission found that the Lithuanian railway and infrastructure manager had abused a dominant position when removing and failing to replace a crucial 18km segment of track necessary to link an oil refinery in Lithuania, close to the border with Latvia, with the Latvian rail system. This in turn had the effect of preventing a Latvian rail company from making a

competitive offer to the oil refinery to transport its oil for export via Latvian sea ports.

124. This line of case-law has some similarities with that on predatory pricing, but deals with product quality instead of price. The essential principle underpinning it is that actions which on their face do not appear in the legitimate commercial interests of the dominant undertaking may be presumed to have an anti-competitive intent, unless the contrary is proven.

125. In my view, together with the established jurisprudence on refusal to supply, margin squeeze and tying, this rule provides a more proportionate means of tackling concerns about self-preferencing by digital platforms. For example, a number of complainants in the *Google Shopping* case maintained that Google's failure to give them equal prominence on Google's search page constituted a reduction in the quality of Google's search results relative to them having such prominence. If such an allegation were properly made out, and it could be shown that rivals were adversely affected by such quality-reducing conduct, it could be inferred that Google had acted anti-competitively, either deliberately or negligently (unless Google could show that its conduct was inadvertent and non-negligent, or was objectively justified; that could be challenging if Google had in fact introduced a quality-reducing change to its products).

126. This approach:

126.1. places primacy on consumer welfare, focussing directly on quality of the product they are receiving;

126.2. is apt for markets, such as digital platforms, where goods are often provided at zero or negative prices, and so changes in quality, rather than changes in price, are often core to assessing consumer impacts; and

126.3. avoids making bold and difficult general assumptions about whether sharing innovations is positive or negative. That endeavour is liable to be overly ambitious and prone to failure. Instead, it allows for more nuanced and fact-specific assessments – which are hallmarks of successful intervention.

127. In my view, this approach also has the considerable benefit of being grounded in existing competition law, albeit a seam that has been relatively little explored by the Courts.⁶³ To provide clarity for market participants, this rule (along with others – see below) could perhaps be codified in new legislation. However, the updating of

⁶³ *Baltic Rail* is on appeal in Case T-814/17.

the Commission's 2009 Enforcement Priorities Guidance, or the provision of new Guidance may be more flexible, and preferable.

H. Other Rules

128. This final part of the paper briefly considers some other rules which have been suggested for new *ex ante* regulation. I have categorised them into three types:

128.1. substantive rules on conduct which traverse the ground currently covered by *ex post* competition law;

128.2. what may be described in broad terms as "procedural" rules concerned with the ground currently covered by *ex post* competition law; and

128.3. changes outside the realm of *ex post* competition law.

(i) Substantive Competition Law Rules

Relevance of results

129. Some commentators have suggested a new rule to require search engines to provide the most relevant results. I would suggest that this rule is already sufficiently encompassed in the rule against product degradation suggested above. It will in general not be for competition authorities to second-guess the algorithmic decisions of search engines. As *Crémer et al.* note at p30:

"... search engines provide freely accessible lists of websites; [...] Their market positions stem from the quality of the content as perceived by their users and the presence of these users in turn attracts advertisers. These platforms thus have incentives to keep their users satisfied, which is not to say that the quality is optimal or that they would have chosen them if there was more competition"

130. However, where a search engine is engaging in conduct that is demonstrably quality-reducing, for example by showing generic results that are not chosen on a merits-based approach but to advantage the search engine, then this would *prima facie* constitute anti-competitive conduct if it had an exclusionary effect on rivals.

131. Plainly, however, search engines should be allowed to pursue making profit. This means they must be entitled to sell advertising space on their search results page to those that bid for it, as well as providing free search results. So long as adverts are identifiable as such, they cannot be subject to precisely the same form of relevance ranking as free results, since the amount that is bid for an advertising spot is a legitimate factor to take into account in deciding whether to show a particular advert.

Indeed, competitive auctions are likely to be one of the fairest and most transparent means available of allocating space.

Plurality of results

132. Crémer et al. suggest a different potential problem requiring to be addressed, that of selling monopoly power:

“Consider the hypothetical case of a platform that, faced with requests by users whose preferences it knows imperfectly, would present, among many irrelevant ones, only one choice that is acceptable to the consumer, even when it had several in its portfolio. Even if the choice corresponded in some ways to what it knows about the preferences of the users, the platform could be restricting consumer choice and making the marketplace less competitive. It would be selling monopoly power, and in the absence of a valid efficiency rationale, this would violate the obligations which we have described above.”⁶⁴

133. This would, however, again be covered by the rule against product degradation suggested above, and does not require separate treatment.

(ii) ‘Procedural’ Competition Law Rules

Market Power Designations

134. One complaint made of Article 102 TFEU is that the stage of defining markets and finding dominance can be long-winded. Further, it has been argued that the ordinary tools which have been developed for this exercise in simpler markets (such as the SSNIP test) do not work well for two-sided markets or ones where prices are zero or negative.

135. Furman et al. propose that there should be designations of suppliers with “strategic market status”, which designations can be reviewed every 3 to 5 years.⁶⁵

136. In my view, this proposal, or a version of it, should be carefully considered. It has at least three important points in its favour:

136.1. First, it could go some significant way to helping address complaints about the length of *ex post* competition law proceedings by removing the stage of defining markets and making findings of dominance, whenever a question of conduct arises for consideration.

⁶⁴ Page 64.

⁶⁵ §2.115.

136.2. Second, it could allow a toolkit of techniques for the assessment of market power in digital platforms to be developed, taking account of the particular nature of the markets in which they operate and the features of those markets which require special consideration.

136.3. Third, it would require the competition authority enforcing the regime to engage with and investigate digital markets on a continuing basis, encouraging specialist knowledge and understanding to be built up, thereby allowing for more effective and timely interventions.

137. However, any such development would need to be approached with caution. In particular, it is generally accepted that analyses of market definition need to reflect the conduct in issue.⁶⁶ And, as noted at paragraph 93.1 above, the locus of competition is not always clear. Moreover, a finding of strategic market status would need to be confined to the market or markets in which it was justified, rather than applying more generally. It may be that softer law, in the shape of guidance, is ultimately a more flexible and appropriate tool.

Codification or Guidance

138. In 2009, the Commission produced its Article 102 Guidance. This sought to straddle the difficult line between summarising case-law as it then stood and seeking to shape its future direction according to an economics-based approach, in place of *per se* rules.

139. The Commission was necessarily limited in what it could achieve in the Guidance, since it was not a legislative act *per se*. The European Union now has the opportunity to go further and introduce new law. For the reasons already explained, I would suggest that, when it comes to introducing a new body of law which potentially conflicts with existing jurisprudence on Article 102, restraint should be exercised.

140. As explained above at paragraph 26, codification of the law, particularly by way of detailed and prescriptive rules, risks its ossification. More broadly formulated rules may be less susceptible to this, but their value over the existing body of jurisprudence is unclear. Moreover, as Scott-Morton et al. point out⁶⁷:

“In our view it is very important that antitrust law not have different rules aimed at different sectors—such as technology or agriculture—that would

⁶⁶ See Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) at §12.

⁶⁷ Page 73.

differentiate industries and undermine political support for antitrust law in general.”

141. This is right as regards substantive law. There may be lower costs, however, associated with what are effectively more “procedural” differences being applied in certain circumstances, along the lines discussed above at paragraph 134 and following.

142. Notwithstanding their comments quoted above, Scott Morton et al. go on to state:

“For this reason, the report outlines a number of useful digital platform interventions that can be undertaken by a sectoral regulator rather than falling to the task of antitrust enforcement.”

143. When one examines what those interventions are, however, including non-discrimination rules going beyond the realms of antitrust law, this approach becomes questionable. It may arguably be considered to be sleight of hand to ostensibly have the same antitrust laws for all sectors, and then to introduce new rules for the technology sector which are – in all but name – different antitrust rules, simply ones which have been given the moniker “sectoral regulation”. Sectoral regulation should not be used as a guise for the effective application of a differentiated system of competition law enforcement.

144. As I have sought to explain above, existing competition law jurisprudence already has the fundamental building blocks for assessing conduct such as “self-preferencing” without the need for new substantive rules, even if there is scope for streamlined enforcement. Where necessary, new or amended guidance is likely to be a more flexible and proportionate means of providing clarity than attempts at formal codification. It should not, however, be used as a backdoor means of introducing what are – in reality – changes to the law, since – at the very least – that will cause confusion that the Courts will ultimately have to put right. It is for the legislature to write the law and the Courts alone to declare its meaning.

Timeframe and standard of proof

145. Crémer et al. argue (p42) in favour of re-thinking the “relevant timeframe” and standard of proof for competition law enforcement:

“Simultaneously, both the relevant timeframe and the standard of proof need to be rethought. In a digital world, where the future is more uncertain and less understood, there will be underenforcement if we insist that the harm be identified with a high degree of probability. In some cases, one may be able to use the error-cost framework that we discuss below to compute what economists would call the “expected” consumer welfare, but in many cases this will be too complicated. Nonetheless, under-enforcement

in the digital era will be of particular concern, all the more as the harm will presumably be longer term than in traditional markets because of the stickiness of market power caused by the factors discussed in Chapter 2. Therefore, even if the consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains.”

146. This discussion proceeds from the premise that under-enforcement is necessarily more problematic than over-enforcement. But as discussed above, that premise has not been established, even as a general matter. Moreover, to determine its validity, the nature of the “enforcement” needs to be specified with some precision. Without that, any cost benefit analysis of over - or under- enforcement is highly vague and of limited value.

147. Further, it is not evident that existing competition law lacks the tools to deal with prospective analyses. The authors go directly on to explain that:

“... according to the ECJ’s case law, the anti-competitive effect of a relevant practice must not be purely hypothetical. [Case C-23/14, Post Danmark II, EU:C:2015:651, at para. 65.] Yet, it is sufficient to show that such practice “potentially” excludes competitors [Case C-23/14, Post Danmark II, EU:C:2015:651, at para. 66.] or “tends to restrict competition”. [Case C-549/10 P, Tomra and Others v Commission, EU:C:2012:221, at para. 68.]”

148. Moreover, prospective analyses are necessarily difficult, but they cannot be an excuse for relying on low quality evidence. As the General Court recently pointed out in Case T-399/16 *CK Telecoms UK v Commission (concerning the Three/O2 attempted merger)* at [111]:

“However, the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the internal market is important (see, to that effect, judgment of 15 February 2005, *Commission v Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 44). In other words, the more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission in this respect.”

149. None of that is to say that greater use could not potentially be made of prospective analysis and interim remedies, and commitments decisions. But the essential tools,

including for the Commission to impose interim measures under Article 8 of Regulation 1/2003, already exist.

150. Finally, it is respectfully submitted that calls to change the standard of proof appear to conflate questions of the standard of proof with the type of evidence that may be appropriate in a given case to satisfy the standard. As the UK's Supreme Court has recently pointed out in *Visa and Mastercard v Sainsburys, Asda and others* [2020] UKSC 24, European competition law distinguishes between the standard of proof (which, when it comes to the devolved enforcement of competition law by national courts, is a matter for those national systems of law) and the type of evidence which may be brought to bear, which is a question of European law. This often misunderstood distinction was explained by the Supreme Court, in particular by reference to the decision of the Court of Justice in *Eturas UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) [2016] 4 CMLR 19, paras 30-32. It said this at [113] to [115]:

"The passage in the judgment of the Court of Justice at paras 30-32, cited above, was concerned with the specific question whether the dispatch of a message through an electronic system may constitute sufficient evidence to establish that the operators which used the system were aware, or ought to have been aware, of the content of that message. Unsurprisingly, the Court of Justice held that, in accordance with the principle of procedural autonomy, the standard of proof in relation to establishing that fact was a matter for the national legal order of the member state concerned. The Court of Justice went on, however, (at para 33) to distinguish the presumption arising under article 101(1) of a causal connection between a concertation and the market conduct of the undertakings participating in the practice. That presumption, it emphasised, followed from article 101(1) and consequently formed an integral part of the EU law which the national court was required to apply. The Court of Justice then went on (at paras 46-49) to address in detail the nature of the evidence that would be sufficient to rebut the presumption.

[...]

Eturas illustrates how the nature of the evidence by which a finding of infringement can be secured or rebutted may be a question of EU law. In the same way, the nature of the evidence by which an undertaking may establish that a restriction on competition is exempted by virtue of article 101(3) may also be a question of EU law.

[...]

While the Modernisation Regulation recognises the autonomy of member states in determining the legal test for the standard of proof under article 101(3), it does not recognise any autonomy in the member states to determine the nature of the evidence required to satisfy that standard."

151. In conclusion, there is no need to re-think the standard of proof in the context of digital markets. Indeed, doing so is highly dangerous, not least given the presumption of innocence to which undertakings are entitled.⁶⁸ Competition law already contains sufficient flexibility, including in relation to prospective analyses, in that the evidence that may be appropriate to satisfy the standard of proof is context dependent. That said, prospective analyses are not an excuse for mere theorising. The party enforcing competition law must ensure that the evidence relied upon is of high quality, even if there are constraints on the type of evidence that can be brought to bear.

Standard of review

152. In a UK context, Furman et al.⁶⁹ call for more limited standards and grounds to be permissible in judicial scrutiny of antitrust cases. This echoes a familiar call from the CMA to reduce the extent to which its decisions are capable of being scrutinised by the Courts. The call was, for example, embodied in a consultation document in 2013,⁷⁰ but (rightly)⁷¹ not pursued by Government. It is misguided.

153. First, the authors suggest, without identifying any differences between them, that "A standard comparable with that applied by the General Court of the European Union may be a suitable candidate, or a judicial review standard."⁷²

154. These standards differ, however. Judicial review before the General Court involves an intensive assessment of the factual and legal basis for a decision.⁷³ It is effectively equivalent to the merits-based review conducted by the UK's Competition Appeal Tribunal. The focus of English judicial review, whilst flexible, is on procedure, and it does not grapple with the merits of a decision save in limited circumstances (such as to assess its rationality in a highly limited manner).

⁶⁸ See Article 48 of the Charter of Fundamental Rights of the European Union and, for example, Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commission* EU:T:2007:306.

⁶⁹ §§3.128 to 3.141.

⁷⁰ [Streamlining Regulatory and Competition Appeals](#), Consultation on Options for Reform (19 June 2013).

⁷¹ See Pickford, Meredith and Turner, Jon, *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, [Consultation Response](#), (11 September 2013) at pdf page 36 et seq.

⁷² §3.138.

⁷³ Case C 12/03 P, *Commission v. Tetra Laval*, EU:C:2005:87 at [39]: "Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

155. It is unclear what the authors consider would be achieved by an explicit adoption of the approach of the General Court.
156. As to English judicial review, this is plainly not appropriate in the context of EU decision-making (nor, obviously, is it suggested as such). It is also far from clear that it is adequate in the context of breach of competition law which results in fines, and the required standard of judicial protection under Article 6 of the European Convention on Human Rights: see paragraphs 58-59 of the judgment of the European Court of Human Rights of 27 September 2001, *A. Menarini Diagnostics S.r.l. v. Italy*; and paragraphs 298-299 of Case T-393/10 *Westfälische Drahtindustrie GmbH and Others v European Commission* EU:T:2015:515.
157. More generally, reducing the degree to which a competition authority's decisions can be scrutinised by a specialist court is liable to lead to less robust decision-making, since decision-makers can afford to be less concerned with providing robust and convincing evidence to support their decisions, leaning instead on large margins of discretion. It will also inevitably mean decisions with flawed economic analysis going unchecked. This in turn is liable to lead to poorer outcomes for consumers and ultimately reduced economic growth.

(iii) Other rules

158. In this final section, I consider some other changes which have been proposed which lie outside the context of *ex post* competition law and its *ex ante* regulation analogue.

Data Portability

159. A strong and consistent theme in analysis of digital markets is the highly important role played by data. There is a generally held consensus that, whilst the European Union has led the way internationally in protecting individual's rights in respect of their data via the General Data Protection Regulations (2016/679), more can still be done to strengthen users' rights over their data in the context of facilitating effective competition in digital platforms.
160. Most observers propose Application Programming Interfaces or similar to promote the portability of data and user control over their own digital identity. These are in essence standards to enable data to be transferred easily from one provider of services to another provider of similar services.
161. Such moves are consistent with the fact that it is a user's personal data that is effectively bartered for the 'free' services which they receive from a platform such as free search and that they should have rights in relation to that data. Further, data portability is liable to reduce the extent to which a user is tied to a particular

service provider who has their data, and thereby promote competition, to ensure that there are effective means of transferring data.⁷⁴

162. Moreover, the costs of such moves appear limited. Whilst open standards require some degree of cooperation, investment, and in some cases compromise, this seems unlikely significantly to inhibit innovation; on the contrary, overall, it seems more likely to promote innovation. The standardisation of mobile telecommunications in the European Union and beyond pursuant to the work of the European Telecommunications Standards Institute is an example of the success that standards-setting can bring in terms of promoting competition and innovation.
163. A more controversial issue is the provision of access by one undertaking to large data sets gathered by another, as proposed by some, including in the Commission Working Document. Such aggregated data is a valuable asset, obtained through the investment of the undertaking compiling it. There is no reason *a priori* reason why the law should require it to be capable of appropriation by those who have not contributed to its collation. To impose such a requirement is strongly liable to promote free-riding and blunt incentives to invest and innovate. In my view, this issue can appropriately be addressed under the law concerning the obligation to deal, as considered in section G above.

New Competition Tool

164. As noted above, the European Commission is actively considering introducing an NCT (New Competition Tool), seemingly with some parallels with the market investigation regime in the UK. This could potentially enable sector-wide competition issues which have no other natural home in existing law (such as oligopolistic activity) to be scrutinised and, where appropriate, remedied. Until its contours are made more concrete, it is difficult, however, to take an assessment of it much further forward. To make a positive contribution the panoply of legal tools at the European Commission's disposal, at a minimum there would need to be clear parameters as to when the NCT could be deployed, the procedures adopted around it would need to be fair, and any remedies that resulted from it would need to be proportionate. If not suitably constrained, it risks allowing free-roaming intervention without the discipline of clear guiding principles for its application.

⁷⁴ A common example is that ensuring data portability in connection with the tracks played and saved by someone using a music streaming services promotes competition in streaming services.

Merger Control

165. A number of proposals have been made as regards reform of merger control including pre-notification of mergers (in jurisdictions where this is not already the case), changing thresholds for scrutiny of mergers, examining the price paid for an acquired entity as evidence of a possible anti-competitive strategy, and preventing certain types of mergers outright.
166. A more restrictive regime for mergers may perhaps be justified in certain respects in the context of digital platforms, given the important role played by innovative companies in shaping online markets.⁷⁵ However, these proposals justify more detailed scrutiny than I am able to provide in relation to them within the limits of this paper.

⁷⁵ Cabral sounds a cautionary note on such changes in the paper cited in footnote 53 above.