

ICLE response to the European commission's public consultation on "shaping competition policy in the era of digitisation"

October 1, 2018

[Dirk Auer](#), [Geoffrey A. Manne](#), [Aurelien Portuese](#) and [Thibault Schrepel](#)

ICLE and a number of its European affiliates have recently responded to the European commission's public consultation on "shaping competition policy in the era of digitisation." In our submission, we argue that competition policy in the digital economy should be based on sound, theoretical underpinnings and rigorous, evidence-based analysis, best encapsulated in the "law and economics" approach. Despite many expressed fears to the contrary, digital markets are not inherently prone to anticompetitive behavior, and the weight of economic theory and evidence offer little support for the asserted risk of harm. We thus argue that competition intervention should take into account the uncertainty of harm, the presence of countervailing benefits and the problems of devising an effective remedy.

Our submission notably challenges the idea that leveraging, consumer lock-in, network effects, and data collection necessarily lead to winner-take all situations where digital platforms exclude their rivals and exploit their users. Instead, we show that these phenomena are just as likely (if not more likely) to benefit consumers as they are to be anticompetitive. Leveraging may, for instance, increase market output by enabling firms to offer superior products. Far from monopoly being the constant problem plaguing markets characterized by network effects, fragmentation is often more of an issue, and mandating smaller networks can limit users' ability to coordinate on a preferred platform.

Of crucial importance in evaluating the conduct of online platforms is the awareness that in such two-sided markets one side of the market may subsidize another or operate under contractual restraints aimed at improving the platform for other participants. These characteristics frequently enable the platform to function effectively—even though, viewed in isolation, they might appear to amount to supracompetitive pricing or anticompetitive restrictions. The interdependent nature of online platforms thus makes it difficult to assert that a price increase or other action that allegedly harms users on only one side of the market represents a harmful course of conduct overall. The only way to assess the propriety of such conduct is to look at its effect on *output* across the entire market, taking account of the full range of costs and benefits.

Our submission also demonstrates that the advent of the "data economy" does not presumptively alter the balance of competition enforcement. Indeed, the mere fact that an incumbent owns large amounts of data may be an indication of successful competition of precisely the sort competition laws are designed to encourage. It *certainly* does not

inherently constitute a barrier to entry, much less an essential facility, that could trigger antitrust enforcement.

Because the digital economy is built upon tremendous investments in innovation, we also argue that competition enforcement should pay particularly close attention to firms' incentives to innovate. It is well-established that expected profits are generally a precondition for innovation. Accordingly, competition enforcers must walk a very fine line between punishing anticompetitive conduct that might deter innovation by new entrants, and protecting incumbent innovators' incentives by avoiding enforcement activity that punishes firms experimenting on the frontiers of their industries.

In the final analysis, we argue that European competition authorities should consider carefully how little certainty we have about digital markets and the effects of challenged conduct within them, and operate with the restraint and regulatory humility appropriate to our ignorance.

[View Article](#)