

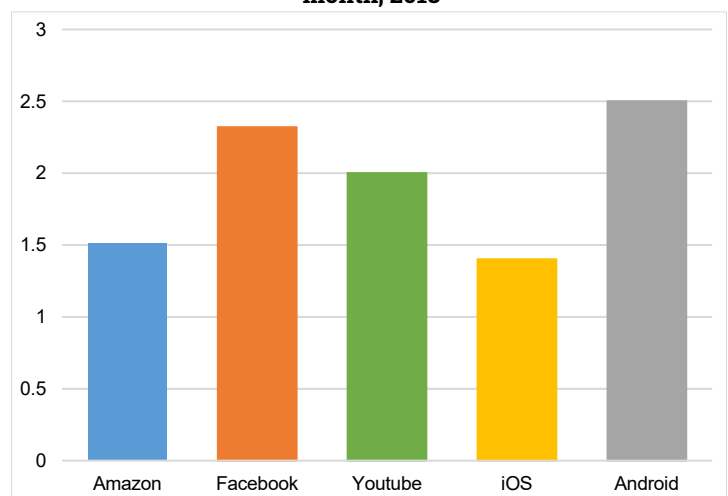
# Trésor-economics

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## Digital platforms and competition

- The digital platforms that make it possible for different users to interact have taken an increasingly important role in many sectors. Indeed, network effects and the possibilities opened up by digital technologies have enabled the most effective platforms to grow rapidly on a large scale, acquire dominant positions, and benefit from comparative advantages to diversify.
- Despite the benefits generated by the digital economy and platform development, the trend towards market concentration and weakening competition raises growing economic concerns. The ability for competition law to fully grasp the digital economy and to effectively combat potential abusive practices undertaken by platforms is an increasingly debated topic around the world.
- Several studies have highlighted the intensifying challenges to competition raised by platform models and to instances of strong positions. By controlling access to the market and through their role in structuring information, platforms can deploy unfair or anti-competitive practices that restrict competition *in* the market. Dominant platforms can also deploy barriers to competition for the market, by blocking the entrance of competitors through "lock-in" strategies or more predatory practices.
- To address these issues, it seems necessary, on the one hand, to revise the competition policy in order to adopt the tools and rules needed to become more responsive and effective when dealing with the specificities of platform models, and, on the other, to enhance the resources available to competition authorities for analysing these markets.
- As a complement, public authorities can protect and encourage competition and innovation on platform markets by using various tools that enhance prevention and *ex-ante* regulation of practices. On the one hand, general ("symmetric") and sectoral rules and obligations can address particularly recurring competition problems, lay out binding principles, and reduce certain barriers to entry. On the other hand, when markets or stakeholders pose competition problems that are structural and persistent, "asymmetric" regulations should allow to establish targeted and proportionate rules and obligations to restore more competitive conditions. Such a framework could be considered at the European Union level.

**Number of users of global platforms  
in billion customer accounts, users, or active terminals per  
month, 2018**



Source: Company financial presentations.

# 1. Digital platforms and their place in the economy

## 1.1 What are digital platforms?

Digital platforms generally designate a wide range of online services and intermediary service providers, such as marketplaces (e.g., Ebay or Amazon, which connect buyers and sellers of goods), community platforms (e.g., BlaBlaCar, which connects drivers and passengers), or app stores (e.g., Google Play, which connects app developers and users of Android operating system-enabled smartphones). These stakeholders have many different characteristics (in terms of size, turnover, etc.) and operate in many business sectors (e.g., transportation, lodging, finance, etc.). With the growth in internet access, platforms have become part of everyday life for consumers and businesses.

In economic terms, platforms relate to the notion of "two-sided markets" (or, more generally, "multisided"), defined by Rochet and Tirole (2003)<sup>1</sup> as markets in which one or several platforms enable interactions between end users and try to recruit the different sides (e.g., sellers and buyers) of the market.

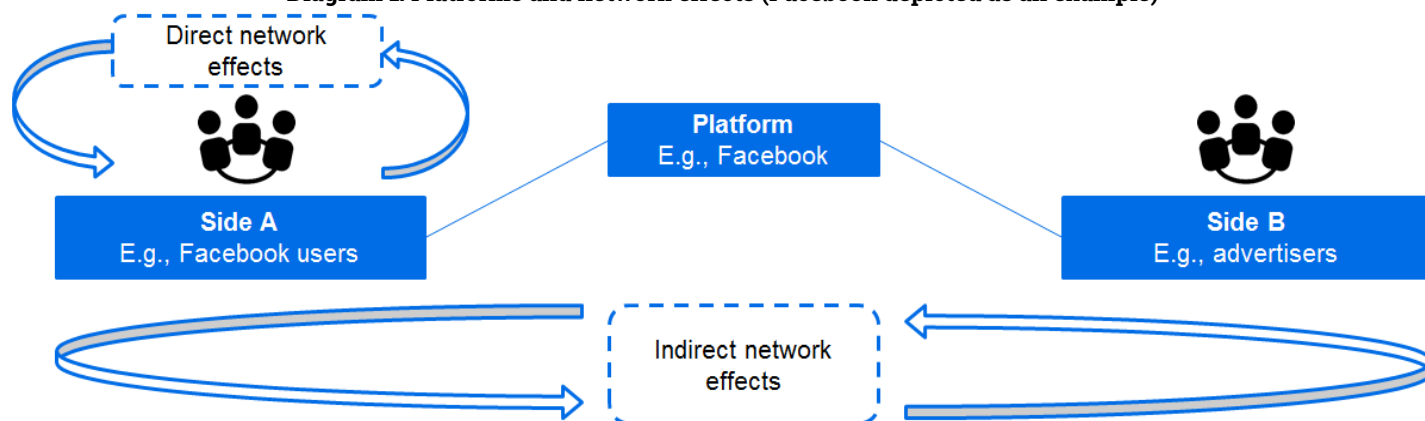
Platforms have experienced significant growth over the past few years, owing in large part to the possibilities opened up by new technologies and online services. Building on these possibilities to gain access to very large potential markets at minimal cost, and to connect users around the world, several platforms have become

significant players through innovative and effective business models. These platforms helped reduce transaction costs and generate considerable efficiency gains across many sectors. As a result, their growth has had positive effects on innovation and productivity.<sup>2</sup>

## 1.2 Characteristics conducive to acquiring dominant positions

Beyond growth and internationalisation opportunities made possible by the expansion of online services, the effectiveness of platform models and the position reached by some platforms in their sector (and more broadly in the economy) are tied to several of their economic characteristics. In particular, platforms have network effects which can be both direct – the more users are present on the platform, the more attractive the platform becomes – and indirect – attractiveness for the user on one side of the platform is a function of users being present on the other side. For example, Facebook users (side A) benefit from the presence of more users which, in turn, also increases Facebook's appeal to advertisers (side B) (see Diagram 1). A platform's success will therefore depend on its ability to attract those users who enable it to best exploit these network effects, and in particular by using a pricing strategy that is consistent with stakeholders' willingness to pay which fluctuates according to which "side" they are on.

**Diagram 1: Platforms and network effects (Facebook depicted as an example)**



In the case of digital platforms, massive data mining tends to strengthen these network effects. Service quality is boosted by the presence of other users, for example by improving algorithms and the relevance of recommendations through mining additional data. In

addition, platforms enjoy increasing advantages in data mining:

- Economies of scale: the costs incurred by platforms to collect, process, store, and transfer data are primarily fixed, and platforms can experience strong growth without needing to make additional large investments.

(1) Rochet J.-C., Tirole J. (2003), "Platform competition in two-sided markets".

(2) In a recent publication, the OECD ("Like it or not? The impact of online platforms on the productivity of service providers", 2019) observes that, in four sectors of the economy (hotels, restaurants, taxis, and retail trade) and ten OECD countries, platform development supports the productivity of the average incumbent service firm and also stimulates labour reallocation towards more productive firms in these sectors.

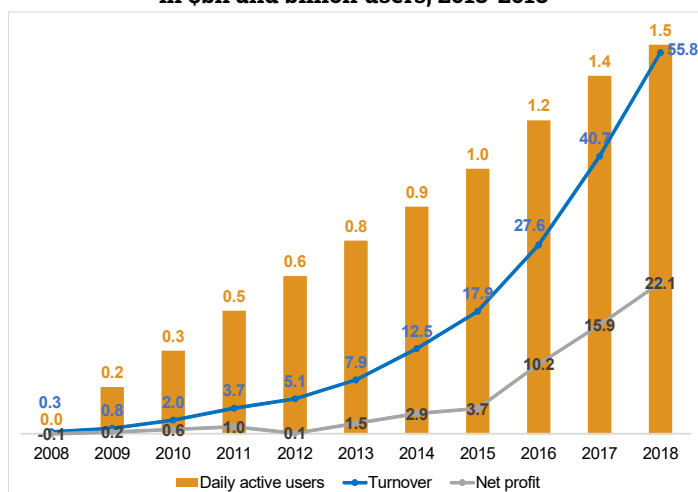
- Economies of scope: investments made in digital infrastructure, data collection and processing, and modular service development yield greater opportunities to offer a broader array of services that leverage the same resources.

Combining network effects with economies of scale leads to winner-takes-all outcomes where platforms acquire a very large share of the market over the long term. As a result, early-stage competition between platforms can be intense for the purpose of securing the market. Later, dominant platforms also have strong incentives to expand into other markets, whether by diversifying internally to dominate new related markets<sup>3</sup> or acquiring further data to increase the potential for economies of scope.

### 1.3 The growing importance of some platforms in the economy

In a few years, several digital platforms have gained considerable scale, in terms of number of users and market share. For example, Facebook, created in 2004 and accessible to the general public since 2006, has reached more than 1.5 billion daily active users worldwide in June 2019. To overcome the strong competition it faced initially (MySpace had about 117.5 million visitors in 2008), users were recruited at the expense of short-term profitability, as Facebook only started turning a profit after reaching a very dominant position (see Chart 1), 5 years after its creation. The platform also significantly diversified its activities and broadened its array of services (acquisition of Instagram in 2012 and WhatsApp in 2014).

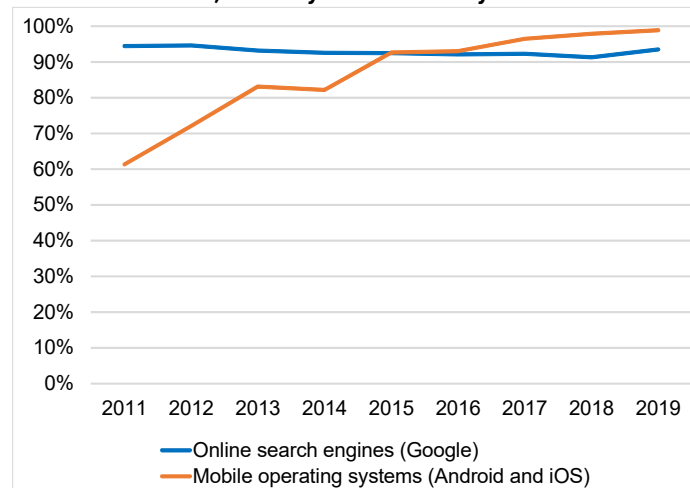
**Chart 1: Turnover, net profit, and users (Facebook) in \$bn and billion users, 2013-2018**



Source: Facebook annual reports.

Accordingly, several markets experienced strong concentration, such as the online search engine market, very largely dominated by one player, or the market for mobile operating systems enabling to access a specific app store, which has been structured around two participants as smartphone usage has expanded (see Chart 2).

**Chart 2: Market share of current major participants in Europe in %, January 2011 - January 2019**



Source: Statcounter.

Such trends, however, are not reflected as conspicuously in all markets where platforms operate. Indeed, the power of network effects, both direct and indirect, varies according to the "sides" that are connected. The presence of local markets (e.g., ride-sharing services) can, for example, produce geographically limited network effects and make it more difficult to reach a dominant position on a large scale. Congestion can also occur when too many users are present which increases search costs and reduces service efficiency. Because multiple preferences exist in certain markets, platforms also have the opportunity to differentiate themselves (service specialisation, restriction to certain targets, etc.).

Although trends vary in intensity, the platforms and surrounding digital conglomerates have become key players in the economy. In the second half of 2019, some of the top 10 global companies based on market capitalisation included Apple Inc., Amazon.com, Alphabet Inc. (Google), Facebook, and Alibaba Group. Today, these firms have a major impact on several parts of the economy and on the activity of many third-party users. In 2017 for example, around 300,000 third-party sellers used the Amazon platform to exports goods from the United States, and iOS app developers made about \$26.5 billion on the App Store.<sup>4</sup> As a result of the central position that these companies have taken, they are at the forefront of many issues,

(3) Prufer J., Schottmüller C. (2017), "Competing with Big Data", TILEC Discussion Paper 2017-006.

(4) OECD (2019), Online platforms: a practical approach to their economic and social impact.

including the protection of personal data, the defence of media pluralism, the spread of illegal online content, consumer protection, sovereignty, and financial market destabilisation. This range of issues and public policy objectives requires deploying an assortment of tools to

regulate the activities of these market players. The following sections focus exclusively on analysing competitive issues (part 2) and the tools devised to address them (part 3).

## 2. New challenges to competition

### 2.1 A growing debate on the international stage

The rise in the digital economy and digital platforms can be viewed as positive given their contributions – both achieved and prospective – in terms of innovation, promotion of new economic models, and even growth. In particular, platforms have been used to eat into the economic rents generated by traditional intermediaries accustomed to reaping the benefits of barriers to entry on their market. Additionally, platforms have opened and deepened markets often to the benefit of consumers (lower search costs, lower prices or improvement in quality owing to a higher level of competition between sellers, access to new products and services, etc.). Furthermore, acquiring dominant positions could seemingly be challenged at any moment by rapidly emerging new market players, as the trends in some markets appeared to show (e.g., Google gained a dominant position at the expense of Yahoo!).

In recent years, however, the persistent domination of some platforms having reached unprecedented sizes and expanded into several markets has led to question whether it is possible to see capable rivals emerge. From a microeconomic standpoint, markets that are weakly contested raise concerns about adverse effects. On the one hand, rents can form, namely the possibility to charge higher prices or offer lower-quality services than under competitive conditions. On the other hand, these situations can stunt innovation since introducing a new good or service could lead the dominant player to replace its own production (substitution effect<sup>5</sup>) and rents could increase the opportunity cost to adopt a new technology.<sup>6</sup> Meanwhile, clear evidence of rising market concentration (see Box 1), particularly in the United States, is increasingly perceived to be a global threat to the economy (impacts on growth, employment, rising inequalities, etc.).

This situation has triggered an international debate on the ability for competition law to address the digital economy

(and platforms in particular) in order to effectively combat abuse of dominance and possible anti-competitive practices undertaken by these firms. When confronted with massive acquisitions or the risk of market foreclosure, antitrust authorities have sometimes come across as slow to react or particularly flexible (e.g., authorisation of the acquisitions of Instagram in 2012 and WhatsApp in 2014 by Facebook).

In the United States, these questions about the strength of antitrust policy have lately become increasingly prevalent in academic and political circles. Among other things, this led to launch a series of hearings in June 2019 on the country's antitrust policy in digital and tech markets by the House Judiciary Committee of the House of Representatives.

Within this context, considerable work has been done on competition in digital markets over the last few months. In Europe, some of the reports include: "*Unlocking digital competition*"<sup>7</sup> and "*Competition policy for the digital era*"<sup>8</sup> commissioned respectively by the HM Treasury and the European Commission; "*Digital Platforms Inquiry*" authored by the Australian Competition & Consumer Commission<sup>9</sup>; and "*A New Competition Framework for the Digital Economy*"<sup>10</sup> by the German Commission on "Competition Law 4.0". These reports highlight different competitive risks related to platforms and to situations of platform dominance, which are important to consider in order to assess the adequacy of public policy tools. These risks can be broadly classified in the following two categories: in cases of strong concentration, platforms can abuse their position by both (i) distorting competition in the market they control in the face of "captive" users (competition in the market, see 2.2) and (ii) restricting the contestability of their market through voluntary, and sometimes predatory, practices (competition for the market, see 2.3).

(5) Arrow K.J. (1962), "Economic welfare and the allocation of resources to invention", *The Rate and Direction of Economic Activity*, Princeton University Press.

(6) Holmes T.J., Levine D.K. and J.A. Schmitz (2008), "Monopoly and the incentive to innovate when adoption involves switchover disruptions", *NBER Working Papers*, n° 13864.

(7) Digital Competition Expert Panel led by Jason Furman (2019), "Unlocking digital competition", Report.

(8) Crémer J., de Montjoye Y.-A. and H. Schweitzer (2019), "Competition policy for the digital era", Report.

(9) Australian Competition & Consumer Commission, *Digital Platforms Inquiry*, final report, 2019.

(10) Kommission Wettbewerbsrecht 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 2019.

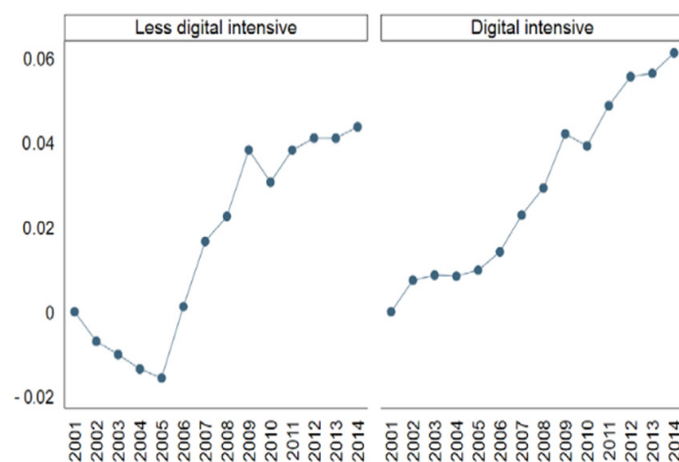
## Box 1: An erosion of competition

Several macroeconomic studies emphasise a trend towards concentration and deteriorating competition in the economy, particularly as a result of the digital economy. This observation is especially pronounced in the United States<sup>a</sup> and Autor *et al.* (2017)<sup>b</sup> have shown rising concentration and mark-ups, which they attribute in part to the adoption of digital technologies and to the reallocation of production towards "superstar firms". Calligaris *et al.* (2018)<sup>c</sup> show an upward movement in average mark-ups between 2001 and 2014 across 26 OECD countries, with particularly high mark-ups (and with widening spreads) in digital-intensive sectors (see Chart 3).

Several studies are also starting to show the economic effects of market concentration and weak market contestability. The IMF (2019)<sup>d</sup> estimates that the increase in concentration and mark-ups, particularly in firms that use digital technologies most intensively, led to lower investments and rising wage inequality between workers in advanced economies. The OECD (2019)<sup>e</sup> specifically shows,

based on a study of some service sectors, that the productivity gains associated to platform development are lower when a platform is persistently dominant on its market.

**Chart 3: Mark-up growth in digital-intensive and less digital-intensive sectors 2001-2014**



Source: Calligaris S., Criscuolo C. and L. Marcolin (2018).

- See Hooper E. and L. Rabier (2018), "Competition and market concentration in the United States", *Trésor-Economics* No. 232.
- Autor D., Dorn D., Katz L. F., Patterson C. and J. Van Reenen (2017), "The Fall of the Labor Share and the Rise of Superstar Firms", *NBER Working Paper* n° 23396.
- Calligaris S., Criscuolo C. and L. Marcolin (2018), "Mark-ups in the digital era", OECD Science, *Technology and Industry Working Papers*, No 2018/10, OECD Publishing.
- International Monetary Fund, *World Economic Outlook*, Analytical Chapter, 2019.
- OECD (2019), "Like it or not? The impact of online platforms on the productivity of service providers".

## 2.2 Higher risks of lower competition in the market

As intermediaries, platforms can control access by a group of users to some goods or another group of users ("gatekeeper" function) as well as shape the information that is transferred to them ("regulator" function) (see Diagram 2). This power can lead to unfair or anti-competitive practices related to the reporting of results or user discrimination. These competitive risks appear particularly high for platforms that have acquired a central and virtually unavoidable position for users:

- Dominant platforms can take advantage of their position as they benefit from: a) almost exclusive access to data on user behaviour, and b) the ability to manipulate how the market functions through its algorithms (e.g., bid ranking on marketplaces). This allows the platform to detect and hold the strongest offers, or to promote its own products and services at the expense of those of its

competitors. In an empirical study, Zhu and Liu (2018)<sup>11</sup> showed, for example, that Amazon is more likely to target products for entry on the most popular categories, practices that are the subject of ongoing in-depth investigation by the European Commission.<sup>12</sup>

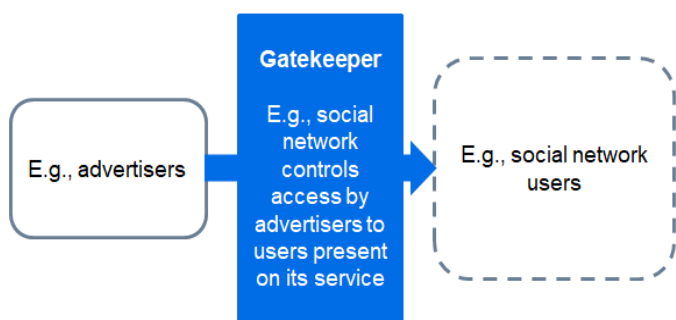
- Platforms can engage in practices that strongly impact reliant ecosystems: since users have no real possibility to bypass the platform, they are directly impacted by its behaviour, which can have immediate and lasting effects on their activity and, ultimately, on competition. During the public consultation launched by the European Commission in May 2017, many firms stressed their inability to negotiate terms and conditions for using platforms, the lack of transparency in ranking and search results, the frequent, unexpected, and unilateral changes to terms and conditions, as well as a general lack of legal remedies within the European Union.

(11) Zhu F. and Q. Liu (2018), "Competing with Complementors: An Empirical Look at Amazon.com", *Strategic Management Journal*, vol. 39.

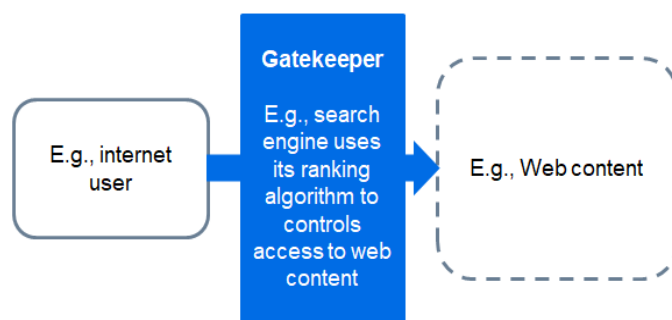
(12) See Press release of the European Commission, 17 July 2019.

**Diagram 2: Gatekeeper examples**

**Case 1: The gatekeeper controls access by third-party firms to its users**



**Case 2: The gatekeeper controls access to content, products and/or services**



### 2.3 Higher risks of lower competition for the market

In theory, the presence of "natural" factors conducive to highly concentrated markets does not necessarily preclude these markets from being contested by an emerging platform that offers an innovative and competitive service and leverages the same advantages as the dominant platform in order to rival with it (relatively low market entry costs, exposure to a vast market, network effects, etc.).

In reality, prohibitive barriers to entry for possible competitors can reduce contestability. In particular, data (whose accumulation, cross-referencing, and weak openness give a considerable advantage to large platforms and conglomerates) constitutes such barriers to entry limiting the emergence of potential competitors.

Furthermore, the voluntary practices of dominant platforms, some of which appear particularly widespread, can strengthen these barriers to entry or create new ones. Two types of common strategies exist:

- "Lock-in" strategies: platforms can restrict users from switching to competing services by, for example, limiting

interoperability of services, multihoming (in particular through exclusivity clauses), or migration to another platform (by limiting access to data and data portability). According to J. Tirole,<sup>13</sup> the possibility for some platforms to develop multiple services and to tie them within a closed ecosystem or a single offer also represents a problematic practice that hinders the emergence of competitors by limiting their growth opportunities when entering niche markets. Best price clauses<sup>14</sup> can also have anti-competitive effects by preventing competitors from charging lower prices to stand out from the crowd.

- Predatory practices and acquisitions: platforms can also adopt predatory behaviours when diversifying or entering a market. By copying an emerging competing service, the dominant platform can stunt its growth by making its offer less attractive. The dominant platform, which usually disposes of significant financial means, can also deploy an offensive acquisition strategy (see Box 2), thereby reducing competition and innovation, or in some cases eliminating a competing product or service ("killer acquisitions").

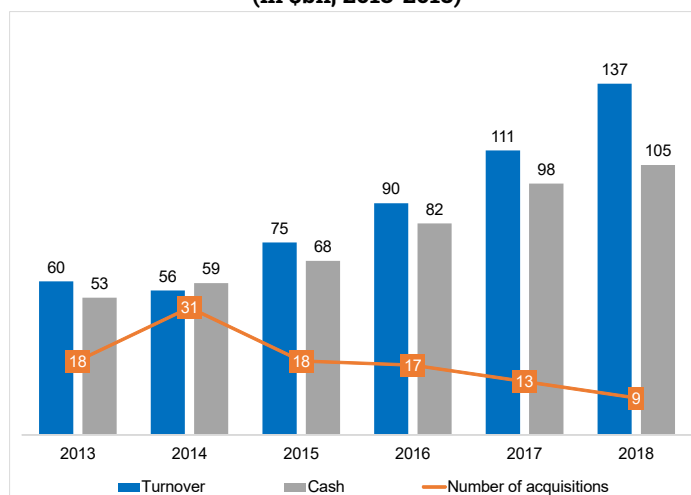
(13) Tirole J. (2018), "Économie du bien commun", PUF.

(14) Contractual clauses requiring that goods or services sold on the platform cannot be sold at lower prices on alternative channels.

## Box 2: Financial and acquisition capacity - Google (Alphabet)

The largest platforms generate substantial and ascending profits, drawn either from their core market or tapping into complementary ones. When these profits endure, this can be an indication that competition is weak and participants are able to extract rents. Google (Alphabet), for example, has massive and growing cash, which reached \$105 billion in 2018. This very strong financial position enabled the company, like other large platforms, to make large acquisitions (e.g., purchase of Youtube and Android) and pursue an offensive strategy of buyout and equity investments in start-ups<sup>a</sup> (e.g., purchase of Waze in 2013, DeepMind in 2014, etc.).

**Chart 4: Turnover and cash - Google (Alphabet)**  
(in \$bn, 2013-2018)



Source: DG Trésor calculations.

- a. The Inspectorate General of Finance (IGF) and General Council for the Economy (CGE) report entitled "La politique de la concurrence et les intérêts stratégiques de l'UE" which became public in April 2019 says that: "Since 2010, according to publicly available information, Google is thought to have taken interests in 111 start-ups."

### 2.4 The limitations of current tools

Competition policy has powerful generic tools at its disposal to address anti-competitive practices, particularly by convicting instances of abuse of dominant position or controlling mergers. These tools can be used in a flexible fashion to apprehend different types of markets and stakeholders, digital platforms in particular. In fact, large

platforms have been investigated and convicted by competition authorities on several occasions, especially at the European level (see Box 3). Furthermore, these authorities have tremendous powers, from imposing financial sanctions, to defining structural remedies, or prohibiting mergers.

## Box 3: Examples of recent convictions by European competition policy

In recent years, the European Commission has convicted large digital firms several times, particularly for abuse of dominant position.

Notably, Google was convicted three times: in 2017 (€2.42 billion for having promoted its comparison shopping service, Google Shopping, in its search engine), 2018 (€4.34 billion for anti-competitive practices related to its Android licenses), and 2019 (€1.49 billion for abuse of dominant position by favouring its own search ad brokering business, AdSense).

Facebook was also fined €110 million in May 2017 for giving misleading statements during the investigation surrounding its acquisition of WhatsApp in 2014<sup>a</sup>. Several investigations are currently under way targeting practices by Amazon (see 2.2) and, following a complaint by Spotify, Apple through its App Store.

- a. During the investigation led by the Commission on the acquisition of WhatsApp, Facebook representatives had indicated that these different services had to remain independent and operate autonomously from one another. It has since become clear that this principle was violated. This sanction did not, however, call into question the merger approval.

However, the effectiveness of competition policy seems to bump up against some limitations when considering the risks ushered by dominant platforms:

- Current tools and regulations are sometimes insufficient: some practices to restrict competition in the market can take new shapes and forms, complex and nearly instantaneous, and elude the control of authorities. In

particular, when it comes to merger controls, the turnover thresholds for notification currently used in Europe make it impossible to control the totality of potentially problematic acquisitions.

- Some types of analysis must still be adjusted: platform characteristics, the complexity of business models and their rapidly changing nature can cause difficulties for

authorities. Issues related to data, for example, raise many questions (on data's competitive role, value, sharing requirements, etc.) that do not have obvious or clear answers. It is therefore important that authorities develop additional analyses. In fact, the changing competitive landscape has led to some decisions being viewed *ex-post* with a critical eye. In the United States, for example, the Federal Trade Commission (FTC) recently opened an investigation on Facebook's acquisitions, expected to conclude by November 2020, to determine if they plotted to stifle competition.

- Decisions take too much time: when confronted with short innovation cycles, robust business activity, and many users' economic reliance on platforms, the length of judicial proceedings (particularly in cases of abuse of dominant position) is inadequate. For example, Google's conviction in the Google Shopping case (see Box 3)

required seven years of investigation by the Commission,<sup>15</sup> a period during which Google took advantage of its position at the expense of different competitors, some of which have ceased operations.

Thought is being given to different levers that would ensure more effective competition and innovation in digital markets. In addition to improving the effectiveness of competition law, additional tools are being considered. If some, like US Senator Elizabeth Warren, are calling to break up the giants of the tech industry, a number of proposals are leaning towards implementing *ex-ante* regulatory measures to better regulate the practices of large platforms. These solutions, whether dismantlement or *ex-ante* regulation, are sometimes also considered as a last resort if other tools, such as fiscal ones, fail to sufficiently influence stakeholders (see Box 4).

#### Box 4: Competition and digital taxation

Large platforms have been able to optimise their regulatory environment by providing remote services and developing avoidance strategies. The subject has been of particular concern when it comes to taxation. Since platforms can provide services without having a permanent establishment in a given country, a significant mismatch can arise between real business activity in the country and profits declared. These findings have prompted several countries, including France, to introduce specific taxes on the digital activities of the largest players. Ongoing discussions, notably at the OECD, must lead to finding more permanent solutions by revising international rules on taxation.

In addition to the issues related to restoring a level playing field between stakeholders, some see taxation as an alternative to regulation to encourage platforms to modify their practices. In a recent article<sup>a</sup>, P. Romer suggested introducing a progressive tax on digital ad revenues, arguing that personal data collection poses a danger to society and democratic values, such as fuelling misinformation and the dissemination of hate speech. The fiscal tool would enable platforms to internalise these negative externalities and encourage them to adopt more principled and traditional models (for example, offering ad-free paid subscriptions that better demonstrate the relation between the value of the service and its cost). The progressive nature of the tax as a function of the size of the firm could also dissuade acquisition strategies and attract new entrants. If these measures aren't enough, P. Romer believes that specific rules could be defined to strengthen the standards of transparency and equity (fairness doctrine).

a. P. Romer (2019), "A Tax That Could Fix Big Tech", *New York Times*.

### 3. Strengthening the tools that encourage competition and innovation

#### 3.1 Competition policy framework and tools

To better regulate platforms, it seems first and foremost necessary to strengthen the technical capabilities of competition authorities as well as build their expertise, particularly for analysing data and algorithms to improve the detection and analysis of practices, and to better monitor commitments. This reinforcement would reduce information asymmetries with large platforms.

Meanwhile, it is important to speed up the process of adapting analyses to platform business models. In this

spirit, the report entitled "Competition policy for the digital era" makes several recommendations at the European level, such as changes in how consumer welfare and market power are measured, or how relevant markets are defined.

Enhanced international cooperation between competition authorities, regulators, and universities would also allow for progress by avoiding risks of disparity and inequality when dealing with stakeholders. This momentum, which began to gather steam during discussions held at international bodies like the OECD, the International Competition

(15) The examination of the appeal that was filed is still ongoing.



Network (ICN), or more recently during the French G7 presidency,<sup>16</sup> must carry on.

Authors of the "Competition policy for the digital era" report also suggest rethinking standards of proof by, for example, declaring that practices employed by dominant platforms aimed at reducing competitive pressure should be forbidden in the absence of clearly documented consumer welfare gains. Specifically, they identify frequent practices that require vigilance, such as best price clauses, restrictions that impede multihoming and migration to another platform, or promoting a platform's own product and service offerings. According to the authors, the error cost analysis should also be revisited so that a decision to intervene by competition authorities does not only depend on the probability of anti-competitive effects but also on their expected magnitude.

Other avenues have been identified to improve the responsiveness of authorities, in particular the use of interim measures that allow a first intervention and protective measures pending a future decision on the merits of the case. According to the Inspectorate General of Finance (IGF) and General Council for the Economy (CGE),<sup>17</sup> this tool, while infrequently used in Europe (nine decisions since 1980), should be made more accessible by relaxing the existing regulatory framework requirements.

To improve merger and acquisition controls, several approaches are being considered. Some countries, like

Germany and Austria, recently chose to introduce alternative thresholds based on transaction value.<sup>18</sup> While this mechanism increases the number of transaction notifications and takes the acquired firm's potential into consideration, it also creates a capacity problem, namely to oversee the universe of problematic cases without significantly increasing the workload for administrative authorities. Another solution, blessed in particular by the IGF-CGE report, is to introduce *ex-post* control powers within a reasonable deadline, which would allow for intervention when acquisitions raise significant competition concerns. Aside from thresholds, one way to better spot problematic cases could be to strengthen controls for acquisitions made by dominant platforms and conglomerates. This could take shape in the form of reversing the burden of proof (proposal recommended by the "Competition policy for the digital era" report, J. Tirole<sup>19</sup> as well as M. Bourreau and A. de Stree<sup>20</sup>) or a notification requirement for any acquisition being contemplated by a set of determined firms (proposal advanced by the "Unlocking digital competition" report).

Finally, it should be noted that several tools can complement the efforts of competition authorities, such as the control of commercial relations and prohibition of unfair trading practices that restrict competition in France (see Box 5). Such rules, virtually unique in Europe, could inspire an evolution of the law in the European Union.

### Box 5: Restrictive competitive practices

Under Title IV of Book IV of the Commercial Code, which relates to the control of commercial relations and prohibition of unfair trading practices, the French competent minister is entitled to initiate a Court action against a firm before the Commercial Court in case of among others significant imbalance in commercial relations, aiming to establish and stop these practices.

The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) has regularly used this legal ground over the last few years to have digital platform practices condemned. For example, in September 2019, Amazon was fined €4 million for the unfair provisions contained in its contracts with companies selling their products on the platform.

### 3.2 A regulatory framework that encourages competition and innovation

As a complement to the competition policy, public authorities can act *ex-ante* to encourage competition and innovation, by imposing obligations on firms before any

infringement is found. This can take shape, for example, in the form of rules that prevent platforms from engaging in specific practices to tackle certain competitive problems. In France, for example, the law on economic growth, activity and equal opportunities<sup>21</sup> prohibits best price clauses between online reservation platforms and hotels. At the

(16) In particular, see the "Common Understanding of G7 Competition Authorities on 'Competition and the Digital Economy'" available online.

(17) IGF, CGE, report entitled "La politique de la concurrence et les intérêts stratégiques de l'UE", April 2019.

(18) Following the reform that went into force in March 2017, and to go along with existing turnover-based notification thresholds, Germany introduced transaction value-based thresholds (greater than €400 million) if the target firm is active in Germany to a significant extent. Austria introduced a similar complementary threshold (transaction value exceeding €200 million).

(19) See recording of the conference entitled "Shaping competition policy in the era of digitization" available online.

(20) Bourreau M. and A. De Stree (2019), "Digital conglomerates and EU Competition policy", report.

(21) Law No. 2015-990 on economic growth, activity and equal opportunities, enacted 6 August 2015.

European level, such measures could be progressively strengthened, for example when the platform-to-business (P2B) regulation is scheduled to be reviewed 18 months after taking effect.

*Ex-ante* regulation of platform practices can be relatively flexible, by establishing general principles that guide

stakeholders and instil more accountability in their role of market "regulator". It is along these lines that the notion of "platform" has already been increasingly used in the normative sphere, primarily to define transparency and fairness obligations with respect to their users (see Box 6).

### Box 6: Establishing regulatory principles for digital platforms

In France, Law No. 2016-1321 of 7 October 2016 for a Digital Republic introduced a definition for "online platform operators" in order to increase transparency in these markets. These operators are required to "provide the consumer with fair, clear and transparent information" on the intermediation service that is being offered and factors that influence classification and indexing (Article L.111-7 of the Consumer Code).

In a similar vein, the European legislator used the notion of platform with the platform-to-business (P2B) regulation published on 12 July 2019, in order to promote transparency for business users of platforms.

The regulation also paves the way to introduce a general framework that encourages competition and innovation by reducing barriers to entry. For example, measures on data mobility and data portability can help to reduce switching costs from one platform to another. Provisions on data portability are already provided for in the General Data Protection Regulation (GDPR) but its application could be strengthened and expanded portability features could be considered, for example for professional and business data. Access to data potentially constituting barriers to entry could also be encouraged by different incentive or binding mechanisms as part of specific industry regulations. For example, France and other European countries have introduced data sharing obligations for firms in the transportation and mobility sectors.

Establishing binding regulations that apply to all stakeholders ("symmetric" approach) should, however, be approached with caution by considering the potential adverse effects on investment and innovation. Some obligations, on data availability for example, could also be more difficult to meet for small firms and emerging

stakeholders and could, indirectly, strengthen already-dominant players. These considerations call to develop, in some cases, a more proportionate approach targeting platforms that raise important issues related to competition and innovation ("asymmetric" approach).

### 3.3 Proactive and proportionate regulation measures that target structuring platforms

"Asymmetric" regulation is intended to be enforced on a case-by-case basis, when competitive problems related to a platform appear to be structural and lasting, and which therefore require continuous intervention to be settled. The *ex-ante* regulation therefore makes it possible to establish targeted and proportionate rules and obligations to restore more competitive conditions. For example, and depending on the situation, this could take shape in the form of obligations to develop technical standards that facilitate interoperability of services and migration options for users, to respect principles of fair treatment and non-discrimination, or to ensure greater openness of certain data.

### Box 7: Examples of asymmetric regulation proposals

The report entitled "Unlocking digital competition" recommends that digital platforms deemed to hold a "strategic market status" be identified by a "digital markets unit"<sup>a</sup> equipped with several functions (to develop a code of conduct, to require data mobility and systems with open standards, to advance data openness).

In the United States, the Stigler Center<sup>b</sup> recommends the creation of a regulator, the "Digital Authority", tasked with enhancing competition by defining symmetric and asymmetric regulations applying to companies with "bottleneck power" (i.e. power to control and block).

In its report<sup>c</sup>, the Australian Competition & Consumer Commission also recommends a more proactive approach to enforce laws in certain markets (heightened investigation and monitoring, ban on certain practices, freedom to choose default search engines and internet browsers, etc.).

a. The recommendation to create a "digital markets unit" was adopted by the British government.

b. See Market Structure and Antitrust Subcommittee report by the Committee for the Study of Digital Platforms, July 2019.

c. Australian Competition & Consumer Commission, *Digital Platforms Inquiry*, final report, 2019.

Such an *ex-ante* "asymmetric" regulation framework, recommended by several recent studies (see Box 7), could be considered at the European level in order to achieve sufficient coverage to curb market distortion. This regulation would focus on the most structuring platforms, based on their sustained domination and the competitive risks that they raise. The designation of relevant platforms should be based on a set of economic characteristics and conditions that justify regulation. In this respect, the different studies and analyses that have recently been performed provide ideas for potential criteria that could be integrated into methodological guidelines such as those

that exist in competition law. The mechanisms that could be considered, whether to identify the relevant stakeholders or to define targeted rules and obligations that they would face, should also be sufficiently agile to react to the rapid development of tech companies and their practices. A dedicated entity at the European level, to be coordinated with the Commission's existing services, could be created to implement this regulatory framework and establish supervision of structuring platforms. Such proposals could be discussed over the next few months as part of the new Commission's agenda.

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