

EFR POSITION PAPER ON LEVEL PLAYING FIELD (LPF) & FUTURE OF COMPETITION IN A PLATFORM ECONOMY

Executive summary

Digital platforms have helped to unleash enormous benefits for consumers, creating new opportunities and financial, productivity and transparency gains and made a positive contribution to employment, innovation and knowledge sharing. However, certain features in the way very big platforms operate and are incentivised could lead to negative consequences for consumers, producers, manufacturers and ultimately for the overall economy.

EFR considers that there is a need of a balanced, fair and trusted regulatory environment for digital platforms. The EFR recommends focusing on a road-map to define a new regulatory framework for the Platform Economy in which some key points urgently need to be addressed:

- Platforms base their business model on gathering vast amounts of data which requires the overarching need to adhere to strict data protection and privacy standards. It is crucial for regulators to deeply understand the functioning of digital markets and emerging digital business models.
- There is a need for a regulatory framework that provides for the governance of platforms specific rules for neutrality, transparency, data accessibility, interoperability and liability, to ensure fair choice both for customers and service providers. It should also help to prevent unfair terms and conditions and limit the risk of any harmful trading practices. Moreover, there is a need to evenly and fairly apply regulations and other responsibilities (consumer protection, tax, labour law, etc.) across an industry, including for both platforms and platform-participants.
- Consumer awareness towards the fact that search engines, social networks, comparison sites on the internet or digital assistants do not always produce objective or neutral results should be raised.
- Competition law enforcement should be focusing on innovation barriers, technological lock-in effects and considering the implications of multi-sided markets. Attention areas could be potentially anti-competitive practices resulting from strong network effects and data-based economies of scale or vertically integrated platforms, which offer both the platform, upstream functionalities (e.g. the NFC device of mobile phones) and downstream goods and services (eg. apps).

1. Impact of the platform economy on innovation, variety, choice & fair competition

Digitalisation has unleashed enormous potential. It has reduced transaction costs, enhanced consumer welfare and inspired a new entrepreneurial culture which could fundamentally transform existing business models, as well as see the creation of new ones – thereby bringing further benefits for consumers and businesses alike.

Digital platforms (online intermediaries that facilitate the interaction between different types of users) have significantly contributed to this trend, providing financial benefits, productivity and transparency gains and leading to business growth through transaction cost reduction and new promotion opportunities, and a positive contribution to employment, innovation and knowledge

sharing¹. However, certain features in the way platforms operate, are supervised, and incentivised could lead to negative consequences for consumers, producers / manufacturers and ultimately for the overall economy.

Due to network effects and data-based economies of scale, the most successful digital platforms can rapidly dominate a market. At a certain point these platforms can become self-reinforcing and only one or two dominant platform players might be left on the respective markets (e.g. search engine, social networks, e-commerce, app stores or ecosystem players). This leads to an increasingly asymmetric market power between platforms and their business and consumer users, which poses competitive and level playing field concerns across the EU. As the EC points out in the Communication on a Digital Single Market Strategy for Europe², “the market power of some online platforms potentially raises concerns, particularly in relation to the most powerful platforms whose importance for other market participants is becoming increasingly critical”.

Moreover, digital platforms usually act as access facilities for other products or services, becoming “gatekeepers” to other markets over which they can exert different degrees of control e.g. mobile operating systems and app stores with respect to mobile payment services).

The accumulation of market power, across sectors, in a few firms may hamper innovation, diversity of the market place and customer choice, as certain digital platforms which effectively act as gatekeepers could in some cases restrict competition not only for direct competitors but also in related markets and ancillary services (e.g. an insurer who wants to offer insurance to an Airbnb customer, a bank who would like to offer an innovative financing model or any other kind of business, beyond the financial sector). This can be particularly the case when vertically integrated digital players compete at the same time as platforms and providers of goods and services. Competition becomes competition for, not on the market with the winner taking all or a highly substantial part of the (new) market. If established companies no longer battle primarily for the customer, but for the intermediary (i.e. the platform), and winners and losers are designated according to their value for the platform operator, competition is pushed to the periphery with potentially far reaching consequences for general economic welfare and even geostrategic considerations.

Furthermore, it is important to ensure that consumers can see a full range of choices as the search engine, the online shop, the smartphone or the digital assistant may well favour certain providers due to remuneration incentives or vertical integration. From a macro-economic perspective, the prerequisites of innovation - different paths, diversity and capacities for openness - may no longer be given.

It is particularly important for the banking sector in a context in which the new Payment Services Directive (PSD2) will grant third-parties standardised access to bank accounts to aggregate information or initiate payments on behalf of the clients. This opening-up of the banks' payments data and functionalities will trigger the development of financial services platforms, or the entrance of existing platform players into the financial services space. This will be amplified as there is no obligation for platforms or BigTech companies to also share customer data with banks in a similar fashion. If this is not properly dealt with, we run the risk that the PSD2 regulation adds to the already existing asymmetry and increases the unlevel playing field instead of fostering true competition. Reciprocity with respect to access to data would be expedient to safeguard the level playing field with other digital platforms. This gap in the current framework thus needs addressing under the projected regulatory framework for the platform economy.

We believe platforms can and should follow principles of responsible business. This means being responsible with users, producers, stakeholders, society and, of course, with regulators and supervisors. Being transparent and fair, and avoiding or managing conflicts of interests. There are examples where platforms have not followed responsible practices, for example a European Commission's decision that a big platform's practices with respect to shopping comparison services were illegal and that the company is now a dominant player subject to specific obligations³.

¹ Commission staff working document on Online Platforms. May 2016

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>

³ Press release from the European Commission dated 27 June 2017: http://europa.eu/rapid/press-release_IP-17-1784_en.htm

A European Digital Single Market can only succeed if all market participants are able to set up their stand in the marketplaces of the future and markets remain able to perform their function to select winners and losers in a competitive race. For that to be the case, we need a balanced, fair and trusted regulatory environment for digital platforms.

2. Suggestions for a road-map to define a new regulatory framework for the Platform Economy

- a. Platforms base their business model on gathering vast amounts of data. This requires the overarching need to adhere to **strict data protection and privacy standards**.
- b. Whilst regulation and enforcement of fundamental economic rules requires caution to avoid potential chilling effects, it is also necessary to act faster, more hands-on and with more technological sensitivity, given the scope of potential change. It is thus vital **for regulators to deeply understand the functioning of digital markets and emerging digital business models**.
- c. As particularly platforms of big technological players are becoming Gatekeepers of the Digital Economy, the **governance of platforms** should be monitored and controlled by specifying the rights and obligations of platform operators with respect to providers (who offer products or services on the platform) and end-customers in a **regulatory framework**, especially for those platforms with a bigger volume of interactions. This framework should allow authorities to monitor and distinguish between different practices on platforms on a case by case basis, supervise their practices and provide for specific **rules of neutrality, transparency, data accessibility, interoperability and liability** to ensure **fair** choice both for customers and service providers.
- d. Since digital platforms reconfigure how markets are orchestrated, and consumers interact with both the platform itself and the providers of goods and services, the distribution of risks changes. Therefore, there is a need to **evenly and fairly apply regulations and other responsibilities** (consumer protection, tax, labour law, etc.) **across an industry, including for both platforms and platform-participants**. So far regulators and legislators have mainly assessed the impact of digital transformations from the end of the regulated industries. We believe that much more research needs to be conducted to understand the **orchestration** of the digital transformation by gatekeeping platform providers which would also help regulators to better understand the functioning of digital markets (e.g. it makes limited sense to think about additional risk management and outsourcing requirements for insurers or banks, while systemic risks of the digital economy which emerge when an unregulated platform provider acts at the same time as orchestrator and infrastructure-/data analytics provider are not addressed at all). This includes analysis on, for example, consumer protection, data privacy, cybersecurity, competitive imbalances, anti-money laundering and counter-terrorist financing.
- e. Providers of goods and services generally have asymmetric market power with respect to digital platforms to negotiate the terms and conditions of their commercial relations. Therefore, platforms should be subject not only to certain requirements in terms of transparency but should also **prevent unfair terms and conditions**, particularly on listing and ranking parameters, suspension and termination, access to data, differentiated treatment of own products and services, etc.
- f. Some platforms are not only vertically integrated with goods or services provided on the platform (e.g. an app store with particular applications) but also with upstream markets (e.g. mobile hardware and operating system) that are necessary to provide the downstream goods or services. These vertically integrated firms can provide a **differentiated treatment in the access to, or conditions for use of, some functionalities of the upstream market** (e.g. the NFC device of mobile phones). We advocate for the introduction **of neutrality by design requirements** to limit the risk of any harmful trading practices. Otherwise, technological platforms might benefit from the network effects of apparently open environments, while in practice restricting fair competition in some services.

- g. Consumer awareness** towards the fact that search engines, social networks, comparison sites on the internet or digital assistants do not always produce objective or neutral results should be raised. This may be due to a certain weighting applied by algorithms and/or remuneration received by the platform provider from the manufacturer for being placed on the platform (e.g. pay for listing, pay for ranking, pay per click) and has a major potential to steer economic behaviour. This fact should be disclosed in order for consumers to know that any specific decision they make based on the guidance by digital means has a very specific information basis and conflict of interest should be properly managed. However, transparency requirements on the parameters determining ranking should be implemented in such a way that it preserves the intellectual property of algorithms.
- h.** Given the relevance of data in the economics of platforms, the new “right to data portability” — introduced by the General Data Protection Regulation (GDPR) — may contribute to the promotion of fair competition, if appropriately implemented. Otherwise, sectoral regulations on data sharing, such as the access to bank accounts under PSD2, may introduce asymmetries between players in a digital context in which the boundaries between markets are becoming more blurred. It is crucial to safeguard competition and to restore **the level playing field** by addressing the asymmetry in **data exchange** between dominant platforms, and financial services providers.
- i.** Competition law rules which have been written to avoid monopolies of steel barons may be ill-suited to address potentially anti-competitive practices resulting from strong **network effects and data-based economies of scale**, and that might abuse of their existing market power to restrict competition in related markets. The harm to the consumer is difficult to assess when services are deemed to be free, if the value of data given up by consumers is not entered in the equation. Companies of the new economy like Spotify or Deezer have been the first to identify this problem. **Competition law enforcement** should therefore be ideally based on a **more dynamic approach, focusing on innovation barriers and technological lock-in effects**, and considering the implications of multi-sided markets and the links between apparently unrelated markets. The recent amendments to the German Act against Restraints of Competition (market activities encompass non-monetary transactions; merger control threshold captures high-value transactions in which the parties do not yet generate significant turnover (Facebook/Whatsapp merger); reassessment of how market power is characterised e.g. by taking into account network effects) are a step in the right direction and should serve as a role model for European Competition law.

Depending on their individual business strategy and business models, financial services companies can decide to participate in the platform economy as either providers of goods and services, as digital platforms or as a combination of both. In any case, the regulatory and supervisory framework shall follow the principle of level playing field, so that digital platforms run by financial services companies are subject to the same rules as other platforms performing similar activities; hence financial services provided by all kind of platforms would be equally sound for the customers and market integrity.

The European Financial Services Round Table (EFR) was formed in 2001. The Members of EFR are Chairmen and Chief Executive Officers of international banks or insurers with headquarters in Europe. EFR Members believe that a fully integrated EU financial market, a Single Market with consistent rules and requirements, combined with a strong, stable and competitive European financial services industry will lead to increased choice and better value for all users of financial services across the Member States of the European Union. An open and integrated market reflecting the diversity of banking and insurance business models will support investment and growth, expanding the overall soundness and competitiveness of the European economy.

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