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Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital

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ABSTRACT

The purpose of this article is to share the lessons learned by the French Competition Authority ("FCA") following its first in-depth investigation of a merger case involving two major online platforms. The FCA believes that anti-competitive risks arising out of Internet platform mergers must be carefully assessed through a case-by-case analysis accompanied by a large body of evidence, in order to conduct a proper investigation. Examples of evidence used in this case include a focus on the typology of platforms, the type of services they provide, their sources of revenue, and the behavior of their users on each side of the market. Questions concerning potential competitive pressure, especially from super-platforms, in addition to potential barriers to expansion, were also at the core of the analysis. The competitive assessment focused on specific risks posed by this kind of merger, such as the impact of a change of scale and of data collection on the remaining effective competition in the market. The FCA has laid the first stone in developing an innovative approach that can be used in the future to assess mergers in the digital economy.

L'objet du présent article est de présenter les principaux enseignements tirés par l'Autorité de la concurrence de son premier examen approfondi d'une opération de concentration impliquant deux plateformes numériques. L'Autorité considère que ce type d'opérations soulève des problématiques spécifiques qui doivent être analysées au cas par cas. À l'occasion de cette opération, elle s'est ainsi intéressée aux caractéristiques des portails de petites annonces immobilières en ligne, le type de services fournis, leurs sources de revenus et le comportement de leurs utilisateurs. L'analyse a par ailleurs porté sur le contre-pouvoir exercé sur la nouvelle entité par la concurrence actuelle, ses utilisateurs, et la concurrence potentielle exercée en particulier par les grands acteurs mondiaux de l'économie numérique. Des risques propres à ce marché biface en ligne, tels que le basculement du marché par un effet de spirale négatif ou la captation exclusive de données personnelles, ont également été étudiés. L'Autorité a ainsi développé une approche innovante qui pourrait être réutilisée dans l'examen de prochaines opérations de concentration dans le secteur de l'économie numérique.

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Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital economy

"Create an account. It's free and always will be."
Facebook homepage

"Things which cost nothing are those which cost the most. (…) [T]hey cost us the effort of understanding that they are free."
Cesare Pavese, *Il mestiere di vivere*

I. Introduction

1. On February 1, 2018, following an in-depth investigation, the French Competition Authority ("FCA") gave unconditional clearance to the acquisition of the French company Logic-Immo by the German group Axel Springer.[1] Axel Springer group (via its French subsidiary SeLoger) and Logic-Immo both manage online real estate ad portals that allow real estate agencies to display their ads to potential buyers and renters in France.

2. For the first time ever, the FCA thoroughly assessed the functioning of online platforms with regard to the risk of a lessening of competition arising out of a horizontal merger between two major French companies. Considering the current thresholds for notification, such an opportunity rarely occurs at the national level. This type of merger is either of European dimension[2] or below the current

1 http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3118&lang=en.

2 Cases COMP/M.5529 *Oracle/Sun* of January 21, 2010; COMP/M.5727 *Microsoft/Yahoo! Search Business* of February 18, 2010; or COMP/M.6281 *Microsoft/Skype* of October 7, 2011.

French turnover threshold.[3] In this regard, such a decision is a useful precedent; however, other national competition agencies have had the opportunity to assess online platform mergers, in particular in Germany (Bundeskartellamt) and in the UK (OFT, CMA).

3. In order to define the relevant markets, the FCA took into account the existing practice of competition agencies and looked at the recent decisions of the European Commission. Digital platforms are often two-sided markets, characterized by their dynamics based on the attractiveness of the users' side, which makes it possible to monetize the suppliers' side. A critical question in the case of online real estate ad platforms was how to define such markets and whether the assessment should consist in a comprehensive approach, rather than two independent assessments on each side of the market. The 2014 Nobel Memorial Prize in Economic Sciences laureate Jean Tirole considered that "*the formulation of new competition law guidelines adapted to the specific characteristic of two-sided markets requires to assess both sides of the market together, rather than each side independently from the other, as competition agencies sometimes still do*."[4] The FCA found that the assessment of competition in the online real estate ad market should be conducted using a comprehensive approach that addresses the close interactions between the two sides of the market. However, the FCA focused its analysis on the market side where the competition risks were higher in terms of price increases, i.e., the upstream side where monetization occurs. Indeed, most online real estate ad platforms generate revenues mainly from real estate agencies that subscribe to services displaying their ads on their portals[5] whereas the services to Internet users remain free of charge. In this case, the FCA defined a market including only platforms that displayed ads from real estate agencies and not from individuals because it found that, from the upstream demand side (i.e., ads providers) these two categories of portals are not substitutable. It found, however, that the real estate ads are a relevant product market that does not call for further segmentation according to the type of property (luxury, for rent or for sale). Indeed, all portals display these different types of property.

4. A wide-ranging investigation was conducted to identify the main characteristics of the online real estate ad market in France. The FCA identified the services and the added value provided by the platforms, as well as the sources of their revenue. As part of the investigation, a massive market test was conducted via an online questionnaire sent out to over 30,000 real estate agencies.[6] The FCA also assessed the potential competition argument put forward by the parties, in particular the threat that super-platforms,[7] such as Google and Facebook, could enter the market. Although this argument was supported by the fact that these super-platforms have strong financial and technical capabilities, the FCA took a cautious position based on the existing evidence at its disposal. It found that, at the time of its investigation, this threat did not exercise any constraint on competition in the online real estate ad market in France. Lastly, the FCA was able to estimate the effects of bundling strategies on competitors' turnovers and concluded that despite a possible loss of revenue for competing platforms, many would remain in the market and continue to exercise competitive pressure on the merged entity.

5. Upon a nine-month-long investigation, the FCA cleared the merger without having to ask for any remedies, despite the important market shares of the merged entity and the opinion of the vast majority of users who considered SeLoger as already essential.

6. This paper explains the reasons that led the FCA to reach this decision. It will serve as a useful framework for future merger assessments in France when two digital platforms are concerned.

II. How does the digital economy make platforms great (again)?

1. What are online platforms?

7. According to the definition provided by the French National Digital Council, "[a] *platform is a service acting as an intermediary in the access to information, content, services or goods published or provided by third parties. Beyond its technical interface, it organizes and prioritizes content for presentation and linking to end-users*."[8]

8. Today, the functions of online platforms go further than mere linking. They used to simply be facilitators of transactions in traditional markets, but have now created new markets, where one needs or wants to be. A new form of intermediation of a very wide scale arose from the Internet, producing its own value. As the president

3 In Europe, Germany and Austria recently introduced complementary thresholds to catch transactions of low-turnover companies that have significant impact in their domestic markets. In France, a public consultation has been launched to consider possible changes to national merger control rules, including the introduction of specific thresholds in the digital sector where companies have high value but low turnover. For instance, in 2015, the only French unicorn company BlaBlaCar, leader in online carpooling markets, generated 80 million euros of turnover, but was valued 1.6 billion euros.

4 *Économie du bien commun*, Presses universitaires de France, 2016, p. 527.

5 In France, a few completely free platforms are financed by display advertising.

6 More than 2,000 agencies replied to this questionnaire, which constitutes the most important basis for a market test by the FCA in a merger investigation.

7 In France, the acronym "GAFA" (Google, Amazon, Facebook, Apple) is frequently used in reference to leading digital platforms. Uber, Tesla, Baidu, Twitter, Alibaba, Samsung, among others, have joined these "Famous Four," which makes it preferable to use the term "super-platform."

8 Digital Ambition Report, 2015, French National Digital Council.

of the French Supreme Administrative Court ("Conseil d'État") Jean-Marc Sauvé pointed out, "*platforms are not, by themselves, a technological innovation, since they rely on existing technology. Nevertheless, by the multitude of people that they can simultaneously put in relation, the platforms operate a change of scale*."[9]

9. Therefore, online platforms are not an extension of platforms that existed before the advent of the Internet. Prior to the rise of the digital economy in the 1990s, real estate agencies used various offline methods to attract potential clients (buyers, sellers, renters or owners), including direct mail, outdoor advertising, and printed newspapers and magazines. The latter functioned as physical platforms between real estate agencies and their clients via the distribution of offline classified ads.[10]

10. The Internet has not only considerably broadened the base of potential customers by way of data collection and analysis tools developed by online platforms, it has also increased the quality of connections.

11. First, the Internet has allowed real estate agencies to reach an incomparably wider audience.[11] In France, nearly three quarters of real estate agencies are small independent companies. It is therefore difficult for them to gain notoriety through their own website and thus generate sufficient traffic, unlike online real estate ad portals. Even large real estate agency networks do not have websites with traffic comparable to that of online real estate ad portals. In this respect, online real estate ad platforms have a non-replicable advantage, insofar as they have the ability to publish a large number of ads, coming from multiple agencies or individuals, whereas the real estate agencies can only advertise the properties for which they are mandated.

12. More importantly, the Internet has allowed real estate agencies to reach a higher quality audience known as "qualified leads." This term refers not only to potential clients, but also to interested clients with whom a transaction is more likely to be realized. Furthermore, the FCA considered that the capacity of the real estate ad platforms to provide real estate agencies with qualified leads reveals their real market power, compared with alternative criteria that were considered, such as the traffic of the website or the volume of ads displayed on the platform (see below, III.1).

13. Considering the above, the FCA decided that physical platforms and online platforms belong to distinct markets with their own characteristics. This approach is in line with its previous cases[12] as well as with recent decisions by German and British competition agencies concerning mergers between online platforms.[13]

2. An attempt at online platforms typology

14. Online platforms have their own characteristics that competition agencies must take into account since they have an impact on the nature of their market competition.

15. In its above-mentioned study,[14] the Conseil d'État distinguishes five types of digital platforms based on their business models: (i) platforms that create common goods, (ii) cost-sharing platforms, (iii) sharing economy platforms, (iv) brokerage platforms, and (v) activity platforms, as briefly described in the table hereafter. As can be seen, the basic operating model of a platform relies on intermediation[15]; however, the modalities differ depending on the business model studied.

	Type of platform	Main characteristics	Examples
1.	Platforms that create common goods	Their objective is not economic. They aim at collaborative content creation or provision of a shared good. Their revenues come from donations made freely by users.	Wikipedia
2	Cost-sharing platforms	Their purpose is to create value by pooling users and allowing economic exchanges. This criterion distinguishes "fee-sharing platforms" from platforms that create common goods.	BlaBlaCar
3.	Sharing economy platforms	They provide users with a service based on information sourced from other users (themselves).	Waze Coyote
4.	Brokerage platforms	They connect users who are suppliers or consumers of goods or services.	eBay Amazon Le Bon Coin
5.	Activity platforms	They connect consumers and suppliers by defining a substantial part of the characteristics of the service.	Uber Deliveroo Se Loger

9 2017 Annual study of the French Supreme Administrative Court, Public Authority and Digital Platforms: Supporting "Uberisation," Foreword. The term "uberisation," derived from the name of the "Uber" company, was popularized by the former president of the French company Publicis, Maurice Lévy, in an interview given to the *Financial Times* on 14 December 2014. It refers to a transition to an economic system where agents exchange underutilized capacity of existing assets or human resources (typically through a website or a software platform), while incurring only low transaction costs.

10 Classified ads are so-called because of their classification by heading: automobile, employment, household appliances, or, in the case at hand, real estate. Offline classified ads are usually grouped into a separate section of the newspapers and magazines and usually linked to their geographical distribution area, which is limited.

11 As a matter of comparison, the audience reached by the top three digital platforms in France (Google, Facebook, YouTube) is ten to twenty times larger than the combined audience of the top three daily general newspapers in France (*Le Monde*, *Le Parisien*, *Le Figaro*). Their own websites generate around five times their offline readership.

12 Decision of the FCA 10-DCC-152 of November 3, 2010, on the acquisition by Axel Springer AG of the exclusive control of SeLoger.com, through a takeover bid.

13 Decision of the OFT of April 26, 2012, Anticipated merger between the Digital Property Group Limited and Zoopla Limited and decision of the Bundeskartellamt of April 20, 2015, on the acquisition by Axel Springer AG of the exclusive control of Immowelt AG.

14 2017 Annual study of the French Supreme Administrative Court, Public Authority and Digital Platforms: Supporting "Uberisation."

15 However, acting as an intermediary does not mean neutrality and passivity on the part of platforms that can set prices, coordinate or prioritize content, or exclude users. The use of algorithms or artificial intelligence cannot exonerate the platforms of their liability, especially with regard to competition law.

16. Interestingly, online real estate ad platforms belong to the fourth and the fifth categories considering the range of services they provide.

17. While their main aim is to connect consumers and real estate agencies, online real estate ad platforms can provide services that generate added value on both sides. On the user side, they aggregate ads from a large number of real estate agencies, which allow users to save time in their search of a property to buy or to rent. On the provider side, they display ads to potential clients, contribute to the reputation of the agencies and, for some, provide targeted data to identify qualified leads.

18. At the time of the investigation, the parties could be considered as activity platforms, whereas their main competitor, Le Bon Coin, could be considered as a brokerage platform since the services it provided were still quite limited.

19. In order to apply this typology to a competition assessment, the FCA has assessed two more characteristics of the platforms: their sources of revenue and their users' behavior, through single- or multi-homing.

3. Sources of revenue, a key issue

20. Super-platforms' revenues in the sector of online search and social networks come almost exclusively from advertising, with advertisers constituting demand on the upstream side of these markets. In this regard, on March 6, 2018, the FCA published the results of a vast sector-specific investigation into online advertising.[16] It shows that Facebook and Google are the two leaders of the online advertising sector and that they generate most of their revenue from the sale of advertising services to publishers and advertisers.

21. In the case of online real estate ad platforms, their revenue similarly comes almost exclusively from services provided to real estate agencies.[17] Real estate agencies principally look for qualified leads. In this regard, an additional distinction can be made between "active contacts," who are willing to buy, and "passive contacts," who consult the ads out of curiosity but with no actual project to buy or to rent. Real estate ad agencies also buy visibility since their ads are a way to put forward their brand and to gain exposure. For them, this is a matter of credibility, and since these agencies are themselves platforms used by real estate owners, they are sometimes constrained by the preferences of these owners. As with most online platforms, monetization occurs on the upstream side of the market, which is constituted by professionals (advertisers, real estate agencies, restaurants, hotels…), whereas the downstream side of the market is constituted mainly by individuals. The growth of online platforms is therefore predicated on their ability to attract and retain users on both sides: the upstream side, of course, since it is on this side that the monetization takes place, but also the downstream side. It is precisely because traffic is the fuel of online platforms that they do their utmost to preserve and develop it.[18]

22. Moreover, the fact that a product or service is provided free of charge is not sufficient to remove any competition concerns. First, what is free today could have a price tomorrow, especially if a platform becomes "a must-have." Furthermore, price effects are not the only dimension examined by competition agencies: quality and innovation play a critical role in competition and, just as with prices, they are important to preserve following a merger, especially in the digital economy. As underlined by the US FTC Commissioner Terrell McSweeny and her attorney advisor, Brian O'Dea, "*if evidence in a future case suggests that a merger is likely to result in negative quality or innovation effects, the mere fact that those effects occur on the 'free' side of the market should matter little to an antitrust enforcer*."[19]

4. Users' behavior is key to estimating platforms' market power

23. Even if platforms belong to the same category and rely on the same monetization system, they do not necessarily deal with the same users' behavior. Defining precisely the way users behave in relation to the platform is key to understanding the market competitive dynamic. Indeed, users can single- or multi-home. Single-homing means the user is using one single platform. For instance, in Internet search and search advertising services, a single-homer can be defined as a user who performs more than 90% of queries on a single platform within a month.[20] In contrast, multi-homing is defined by the use of more than two platforms.

24. Thus, at first glance, online real estate ad platforms seem to have the same business model as Internet search engines. They both attract Internet users by offering a free service and charge advertisers. However, there are important differences regarding their users' behavior.

25. Users of Internet search tend to single-home, whereas advertisers tend to use more than one search advertising services platform. The European Commission found that single-homing tends to increase barriers to entry and

16 http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf. English translated Press release and summary of the opinion are available here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3133&lang=en.

17 There are however free platforms funded by advertising, and others are financed by real estate agencies and advertisers.

18 This dual-market operating mode is not unique to digital platforms: for instance, free television and free press, financed by advertisers, base their growth on the number of their viewers/subscribers.

19 Data, Innovation, and Potential Competition in Digital Markets – Looking beyond short-term price effects in merger analysis: https://www.ftc.gov/system/files/documents/public_statements/1321373/cpi-mcsweeny-odea.pdf.

20 Case COMP/M.5727 – *Microsoft/Yahoo! Search Business* of February 18, 2010.

makes platforms essential on both their sides. It therefore took into account the leading position of Google in this market to unconditionally clear a 3-to-2-player merger case involving online search engines.[21] The European Commission also noted in this case that a clear majority of respondents to its market investigation had stated that the transaction would be pro-competitive, allowing the parties to compete more effectively with Google.

26. The market features are different in the online real estate ad market in France given the fact that the platforms' users multi-home on both sides.

27. On the downstream side, the search for a property typically requires a significant investment, especially in time. Given the value of real estate, consumers attach particular importance to the comprehensiveness of the results relating to the various offers available on the market. This pursuit of comprehensiveness means that they cannot limit themselves to a single portal even if it is the most important. In addition, the consultation of online ads is free and immediate, especially since online real estate ad portals have set up alert systems that allow consumers to be informed in real time of new ads corresponding to their specifications without having to visit the portal. This explains why consumers regularly consult several portals.[22] As the FCA pointed out in its decision, "*the low cost of research facilitates the multi-homing of Internet users, most of them setting up alerts allowing them to directly receive free ads of sought-after properties. The time spent doing research is thus reduced.*"

28. On the upstream side, real estate agencies use several portals to display their ads to as many potential customers as possible. As visibility is key, and despite multi-homing on the downstream side that could spur the agencies to use only one portal, a clear majority often use more than three portals. As for real estate agencies, multi-homing presents two different facets: an agency can publish the same advertisement on several portals or publish separate ads on different portals. This multi-homing by real estate agencies is facilitated by software offering specific services that allow advertisers to upload their ads once and broadcast them automatically on multiple portals.

29. Therefore, in the case at hand, multi-homing on both sides of the market makes it more likely that no platform is a must-have. This analysis was key in the competitive assessment since numerous real estate agencies found that prior to the merger, SeLoger was already essential. However, they also considered that the parties' main competitor, Le Bon Coin, was essential as well. The risk of a change in the behavior of users of online real estate ad platforms, who would stop multi-homing in preference for single-homing, was therefore ruled out.

30. However, the multi-homing characteristics of the market were obviously not sufficient to conclude there were no anticompetitive risks. To assess platforms' market power, one needs to evaluate the risks of market tipping through an analysis of network effects, and the risks of seeing the competitive constraints diminish.

III. Don't make mergers the tipping point!

31. One anticompetitive risk in platform mergers is related to a "winner-take-all" situation in which one platform reaches a monopoly position in the market. Indeed, the acquisition of a competing platform has a double effect on the market: it brings more users to both sides of the platform, which can trigger or reinforce specific network effects. This risk is assessed by evaluating the platforms' market shares. Moreover, competition agencies must remain cognizant of the other competitive assets of the acquired platform, such as brand, specific services or products provided, or data and innovation, independently of their turnover or traffic.

1. Estimation of platforms' market shares

32. Competition agencies usually consider that market power is determined by market share. In traditional sectors, market shares are estimated pre-merger in volume (i.e., number of products sold or square footage for retail) or in value (i.e., turnover). Nevertheless, in some cases, it is not possible or not relevant for the analysis to consider only the part of market value calculated from turnover. Data regarding volume or capacity can sometimes offer an alternative measure of the companies' positions. As is evident from the debate on the controllability of mergers in the digital economy, companies' turnover may not always reflect the intrinsic value of a platform. The highly dynamic nature of these markets also makes it difficult to conduct an assessment based solely on a snapshot taken just before the notification of a merger, particularly if the investigation must be carried out over several months. As acknowledged by competition agencies, past market shares do not necessarily reflect the actual market power of companies at the time of a merger assessment, especially in digital markets.[23] Moreover, current turnovers do not necessarily reflect network effects in the mid- and long-term following a merger, especially if the merged entity has a chance to reach a market's tipping point (see below, III.3).

21 *Ibid.*

22 For example, according to the data provided by the parties, 50% of visitors of Logic-Immo consult 4 other portals (3 concerning visitors of Se Loger).

23 See, e.g., papers from the Organization for Economic Co-operation and Development (OECD), The Digital Economy (http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf) and Merger Review in Emerging High Innovation Markets (http://www.oecd.org/daf/competition/mergers/2492253.pdf).

33. In the digital economy, platform's market shares are also difficult to estimate as several alternative criteria can be used. Regarding network effects, traffic can seem at first glance to be the main criterion to estimate a platform's market power. Reality is, however, much more complex and only a case-by-case analysis that takes into account the platforms' characteristics is able to reveal the most appropriate criteria.[24] In the case at hand, the FCA found that depending on the criterion chosen, the conclusion of the market power assessment could be different. Thus, all criteria were discussed in order to select the best proxy for estimating market shares.

1.1 Volume-based metrics: Traffic/ads volume

34. The parties' point of view was to consider volume-based metrics (i.e., number of ads and Internet users' traffic) as the main indicator of market power on the online real restate ad market. This analysis was in line with the aforementioned argument that platforms' growth relies on the largest base of users, on both sides of the market.

35. According to the parties, on the Internet users' side, the attractiveness of a portal depends mainly on the volume of ads published, while, for advertisers, the attractiveness of a portal depends mainly on the audience it can reach.

36. Because of the interdependence between the volumes of Internet users and advertisers, a competitive analysis based on the number of ads would make it possible to appreciate the cross-network effects. Indeed, the utility gained from the use of a platform would depend on the volume of users on the other side of the market.

37. Similarly, a competitive analysis based on the audience of a portal would effectively capture all the different determinants of its success: the number of ads, its reputation, its ergonomics and services offered. The importance of a portal audience for real estate agencies has been highlighted by respondents to the FCA market test.

38. The FCA has, however, pointed out the limits of these two criteria, which imperfectly reflect the market power of online real estate ad platforms.

39. On the one hand, a competitive assessment that relies only on the volume of ads could be misleading. Indeed, the market is characterized by several business models and some platforms allow real estate agencies to display their ads for free (their revenues come from display advertising), which boosts the volume of ads without necessarily reflecting a corresponding market share for this portal. However, the audience of a portal does not depend only on the volume of ads it offers (and that Internet users are not necessarily aware of), but also on other criteria such as reputation, ergonomics or services, which could be caught by the traffic criterion.

40. On the other hand, the FCA noted that high traffic does not necessarily reflect a platform's market power.

41. First, the FCA found no direct causal link between the volume of ads published and the traffic of an online real estate ad portal. For example, the freemium portal Superimmo's market share calculated in terms of traffic was estimated at 3%, while in terms of ads its market share would have been 15%.

42. Second, in this market, the quality of traffic matters more than its quantity. One of the parties' competitors explained that despite its high traffic, it generated fewer qualified leads than the parties even though they had less traffic. Many of the Internet users are described as "passive," meaning that they visit the portals randomly or out of curiosity. For instance, visitors of a portal could look for another good or service provided by a generalist platform and randomly consult the pages dedicated to real estate ads. This was typically the case of the parties' main competitor, Le Bon Coin, which originally specializes in diversified goods (furniture, pets…) sold directly by owners.

43. The FCA also found counter-examples of platforms that generate high traffic but have a very low turnover: this is the case of freemium platforms that do not charge real estate agencies, for example the Superimmo portal. The FCA's market test showed that these platforms do not exercise any competitive constraints on the parties.

44. Consequently, the FCA found that traffic or volume of ads do not necessarily reflect market power.

1.2 Value-based metric: Platform turnover

45. The FCA considered that turnover remains the best proxy to estimate the platforms' market power in the real estate ad market. Indeed, the turnover was the only value able to combine all the above criteria, since it is the result of the performance of a platform which charges for its services, taking into account the willingness of a real estate agency to pay for using a portal, which itself depends on the extent and quality of the platform's traffic. The turnover also depends on the volume of ads published on the portal.

46. Furthermore, the FCA considered that market share calculations should also reflect the potential growth of the platforms, which is based on their current traffic. Indeed, the FCA considered that market shares based on turnover overestimated the parties' market shares vis-à-vis their main competitor, Le Bon Coin, which did not provide as many services as the parties at the time of the investigation. As platforms' turnovers came from

24 For example, in the *Facebook/WhatsApp* merger case, the European Commission found high market share fluctuations and considered that criteria such as the number of messages sent/received or the time spent using the app were not sufficiently relevant. It preferred a criterion based on "reach" data, which measures the penetration rate of an app among users.

the volume and quality of the services they provided at the time of the merger assessment, the FCA adopted a conservative position. In the course of its investigation, Le Bon Coin, however, acquired a competing platform that provided services to real estate agencies, which would increase its market share.

47. An interesting debate took place regarding the portion of the platforms' turnover to take into account, given the fact that their revenue came both from services provided to real estate agencies and from display advertising. The parties considered that the relevant turnover should include these two sources of revenue in order to capture the competition from freemium portals which, by nature, do not offer paid services to real estate agencies. However, for the purpose of the competitive assessment of the case, advertising revenues were excluded from the calculation of market shares by value. The revenue from advertising reflects the audience of a portal and its quality for an advertiser, but it does not reflect the quality of this audience for real estate agencies looking at the overall performance of a portal. This approach was confirmed by the market test conducted by the FCA. Moreover it was consistent with the Bundeskartellamt's assessment in the *Axel Springer group/Immowelt* merger case. Indeed, freemium sites generated few quality leads for real estate agencies and were not considered as real alternatives to paid portals. However, to the extent that those portals were free, agencies used them all the same at no extra cost, in order to achieve the widest possible dissemination of their ads.

48. Considering the above, the FCA found that the merged entity would reach a significant market share calculated in value (50–55%) while it would have a significant position in terms of the volume of ads. Its main competitor would have similar positions in volume but not in terms of turnover, for the reason explained above. The remaining competition was composed of numerous portals whose market shares did not exceed 10% whatever the criterion considered.

2. The data issue or how to preserve "the goose that lays the golden eggs"

49. Competition agencies increasingly focus on issues related to the collection and use of personal data in the digital economy. Data constitutes indeed a key competitive asset in these markets.

50. In the online real estate ad market, a wide range of data is collected from both sides. The FCA notes that data collection and exploitation, both from Internet users and real estate agencies, is essential for the development of the platforms' new services. For real estate agencies, personal data collection services allow them to obtain contact information for Internet users looking for specific types of properties and willing to connect with a real estate professional. For Internet users, their own data can be used to provide accurate mapping and geolocation services for real estate property. For many market players, collecting data is a strategic priority, in order to capture more users on each side of the market.

51. In the case at hand, the anticompetitive risk could consist in data being captured from real estate agencies and Internet users for the sole benefit of the merged entity. However, the FCA found that competing portals would still retain the ability to access the same amount of data as the merged entity. The fact, as shown above, that users on each side of the market multi-home allows and facilitates the acquisition of data by competing online platforms.

52. Among these competitors, a portal created at the initiative of many real estate professionals, Bien'ici, had an advantage in this respect insofar as it was guaranteed to have access to these data from the real estate agency members of its parent companies. As for Le Bon Coin, which was the leading portal in terms of traffic in France, it could easily obtain data on the Internet users' side: many users consulted its other pages not dedicated to real estate ads, which boosted the user base from which it could collect data.

3. A dynamic assessment to capture the risk of tipping

53. The online real estate ad market is characterized by cross-network effects that the FCA analyzed by estimating their current magnitude. It also conducted a dynamic analysis to assess the risk of foreclosure of the parties' competitors.

54. As a first step, the FCA ensured that the combined entity did not have a post-merger position in terms of ads or users that would place it in a situation where it would reach a tipping point.

55. As explained above, the combined entity would have as many ads and users as its main competitor. But the tipping point could also be reached by a strategy of bundling, which was explicitly envisioned by the parties post-merger. In the present case, the combined entity's commercial offer would be a "mixed bundling," i.e., the simultaneous publication of the ads on the parties' portals would be offered at a lower price than the sum of the prices currently charged by each of the parties.

56. The FCA evaluated the impact of such a strategy on the volume of ads and on the turnover of competitors in the market.

57. First, the loss of competitors' turnover in case such a strategy was implemented was estimated at around 300 million euros, i.e., less than 10% of the total turnover of competitors in the French market. However, each competitor would not be impacted in the same way. In particular, the main competitor of the parties would be little affected by this strategy. The impact on other competitors would be stronger, but would remain below 20%.

58. In any event, the FCA took into account the specificities of several competitors in order to conclude that they would remain in the market despite the bundling strategy of the merged entity. Indeed, besides Le Bon Coin, several portals had a business range broader than only real estate ads: they were in particular generalist portals that derived a portion of their income from the sale of services to other advertisers than real estate agencies.

59. The impact of the ad bundling strategy devised by the merged entity was also estimated through a dynamic analysis, to take into account the network effects.

60. It was indeed necessary to study to what extent a decrease in the volume of competitors' ads, regardless of the impact of bundling on their turnover, would likely lead to a decrease in their audience, in turn aggravating the decline in volume of ads. This cycle, which could ultimately lead to the exit of the competing platforms, could be described as a "negative spiral."

61. However, the FCA took into account the online real estate ad market's characteristics and its recent evolution to rule out this risk. It found that the negative spiral effect was limited by the weakness of cross-network effects on the Internet users' side and by the differentiation between portals. Based on precedents, the FCA observed that a drop in the number of real estate ads did not generally lead to a decrease in traffic, mainly because of the Internet users' multi-homing. In addition, since the portals had a significant degree of differentiation, Internet users could continue to visit a portal even if its volume of ads was lower than that of its competitors. Moreover, the observation of market players' positions confirmed that no negative spiral effect had been observed in France before.

62. As a result, the effects of a bundling strategy leading to a reduction in the volume of the competitors' ads would have a limited impact on their audience, their turnover and their ability to compete with the merged entity.

IV. Ensure that digital platforms will not walk alone!

63. In the presence of high market shares, competition agencies usually consider sources of countervailing power. They assess both current and potential competition as well as demand power. In the case at hand, the FCA assessed the barriers to expansion and to entrance for the online real estate ad market in France. It found that this market is characterized by low barriers to entry but high barriers to expansion, which strengthen the position of existing players. Moreover, the alleged threat from the super-platforms acting as potential competitors was not confirmed by the FCA's investigation despite their undeniable competitive advantages in the digital economy.

1. Current competition between platforms

64. The French online real estate ad market is characterized by relatively low barriers to entry, considering the number of new entrants in recent years.[25] However, the FCA found it necessary to distinguish the mere presence on a market from the actual competitive pressure exerted by a market player. Indeed, it is not sufficient to enter a market to exercise a competitive pressure: such entry must have an impact on competition. It also noted that so far these entrants have not been successful from a commercial point of view, in terms of reputation, traffic or turnover. Reaching a sufficient traffic level and being able to compete with existing platforms is more complicated than merely entering the market. The FCA also noted that the oldest entrants into the market (i.e., more than three years old) still had limited traffic and a limited volume of ads.

65. As a matter of fact, only one recent entry into the market: Bien'ici, had been able to exert a competitive pressure. This market player quickly acquired a large volume of ads, a stable and growing traffic volume and above all developed innovative services. However, this example was isolated and was explained by its peculiar characteristics, since it had been created by some of the biggest real estate agency networks in France. Thus, it had been able to benefit from a large volume of ads from the start, which launched a virtuous circle. The FCA nevertheless considered that this market player was not a maverick, i.e., a company that quickly and massively entered in a market, because of its low market share compared to the three main actors (i.e., the parties plus their main competitor, Le Bon Coin).[26] Based on internal document review, the FCA confirmed that Bien'ici's entry into the market only had a limited impact on the parties.

66. In the end, the competitive pressure on the merged entity came mainly from a single market player, Le Bon Coin, which had equivalent positions to the merged entity, in terms of traffic and volume of ads. Le Bon Coin's competitive pressure on SeLoger and Logic-Immo was also verified by means of the estimation of diversion ratios[27].

67. As a result, particular importance was attached to the risks of coordinated effects between the two leading market platforms following the merger. Coordination between competing firms can occur in markets where it is relatively simple to achieve mutual understanding of how each one operates. Three cumulative conditions must be met to characterize the existence of a collective dominant position in a market: (i) a sufficient degree of market transparency allowing each oligopolist to know the behavior of each of the other members, in order

25 Bien'ici, Monbien.fr, Imoxo, Flatlooker, Morning Croissant, Somhome…

26 The gap between its market shares and the three main platforms was also persistent.

27 As the diversion ratios between the parties were low, the merger was not likely to lead to a profitable price increase for the combined entity.

to ensure that none deviates from it (known as "detection condition"); (ii) a permanent coordination due to a threat of retaliation, encouraging each oligopolist not to deviate from the common line of conduct ("deterrent condition"); and (iii) a lack of effective challenge to coordination by current or potential competitors and by clients ("non-contestation requirement").

68. In the case at hand, the FCA noted the existence of significant differences in the business strategies of the two leading portals. First, the merged entity addressed almost exclusively professional advertisers, while its main competitor addressed in addition non-professional advertisers. Furthermore, the portals had different commercial offers, especially in terms of products and services whose evolution was difficult to predict. The differentiation of the portals was also visible in the profiles and motivations of Internet users which were reflected by important variations of the platforms' market shares at the local level.

69. In addition, prices on the upstream side of the market were not known and could not be compared as real estate agencies negotiated non-public rebates. Moreover, it remained very difficult to accurately estimate the number of qualified leads generated by the portals. The OFT adopted a similar position when it cleared the *Digital/Zoopla* case in the online real estate ad market in the UK.

70. As a result, the FCA had good reasons to believe that the two market-leading online real estate ad platforms in France, which were different and offered differentiated services, would continue to compete with each other.

2. Potential competition from super-platforms

71. The 2013 FCA merger guidelines underline the fact that, even though a company may have high market shares, its market power can be limited if the market is contestable, meaning that it is relatively easy for new players to enter it.[28] When this is the case, any deterioration of the initial market conditions related to the merger will be regarded as an opportunity for new entrants and these new entries can reestablish the initial conditions of competition. The competition, even potential, puts pressure on the behavior of the parties.

72. In the case at hand, the parties highlighted the potential competition exerted by super-platforms, especially Facebook, Google and Amazon on the French online real estate ad market. They underlined the development of innovative Facebook tools that could allow real estate market players to connect directly through its recently launched platform called "Marketplace." The parties added that there had already been several recent market entries that were successful, particularly Le Bon Coin and Bien'ici.

28 http://www.autoritedelaconcurrence.fr/doc/ld_concentrations_juill13.pdf, para. 432.

73. In the digital economy, super-platforms do have a particular status in the sense that they have constituted a massive user base that they can use to enter numerous online markets. However, competition agencies need to assess the credibility of such entries in accordance with high and consistent legal standards. Indeed, it is important to ensure these entries are possible in the short term and on a sufficient scale to exercise real constraint on the parties. Such analysis mainly involves examining the barriers to entry and expansion.

74. The FCA admitted that "*the major global groups, first and foremost Facebook, Amazon or Google, could more easily overcome barriers to entry than other companies and develop in the online real estate ad market because of their notoriety and their audience*."[29] However, the FCA carried out a careful examination of the characteristics of the French market, as barriers to enter the French online real estate ad market were low, an entry of super-platforms was theoretically possible. However, the investigation did not confirm the imminence of this entry.

75. First, the FCA found, at the time of its investigation, that no element was communicated indicating a certain and near-term entry by Amazon or Google into the French online real estate ad market. However, as indicated in the European Commission's guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, "[t]*he Commission examines whether entry would be sufficiently swift and sustained to deter or defeat the exercise of market power. What constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. However, entry is normally only considered timely if it occurs within two years*."[30]

76. The situation of Facebook was slightly different due to it being the only super-platform that already displayed online real estate ads in France. This entry was assessed with regard to the characteristics of the market. Indeed, "Marketplace" was designed as a sales intermediary between individuals. However, the market concerned by the transaction was that of real estate ads provided only by real estate agencies. The latter did not consider Facebook as a serious competitor of the current portals. The analysis of numerous parties' internal documents showed that in the French market, the entry of Facebook had not prompted the parties to commission studies on the effects on competition (in terms of reduced market shares, loss of users...).

77. Second, the FCA noted that the French online real estate ad market was difficult to penetrate for players with a global strategy given its specific legislation and market organization methods. In order to develop such a

29 Decision 18-DCC-18 of February 1, 2018, para. 186.

30 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0205(02)&from=EN, para. 74.

business in France, extensive local adaptations would be required, with the knowledge of real estate professionals that would require regular contact.

3. Do platforms' users have a countervailing market power?

78. Online platforms often claim that any massive switch of their users, especially on the downstream side, could compromise their business model. While it is true that, in theory, a large switch of a platform's users would likely compromise its growth and could turn a virtuous circle into a vicious circle, one must look at whether this risk is credible in practice. So far, no one has witnessed the decline of a super-platform as a result of a sudden and massive departure of its users. Thus, the analysis of the demand countervailing power in the digital economy does not differ from what the FCA already had the opportunity, on many occasions, to conduct with regard to large distributors in the retail sector, where the demand side is constituted of individuals.

79. In the present case, the parties also considered that, on the upstream side, large real estate networks, which included many real estate agencies, could end their contract and thus trigger a vicious circle. The exercise of such a countervailing power would be made more plausible by the fact that real estate agencies multi-homed. Thus, in case of a price increase, advertisers could reallocate their investments to competing portals that they often used.

80. However, for online platforms, demand was constituted by numerous individuals or companies that clearly did not individually exercise any competitive constraint.

81. Regardless of the market side, no user had bargaining power. This is obvious on the Internet users' side. On the upstream side, the FCA contacted more than 30,000 real estate agencies, customers of the parties, through an online questionnaire. In the event of a price increase by SeLoger, 92% of respondents would continue to use this portal, even though about 30% would reduce the number of published ads. Therefore, multi-homing was not enough, in itself, to characterize a countervailing market power vis-à-vis online platforms. From this point of view, the FCA's analysis did not differ from the analyses carried out in the retail sector where end consumers, although able to patronize several stores, were considered unable of disciplining any price increase in a retail store. In addition, the countervailing power was assessed by considering existing alternatives in the market. A competing platform would only be considered as able to discipline a platform that increases its prices if it was comparable in terms of services. Otherwise, real estate agencies would not have a real option to transfer their expenses.

V. Conclusion

82. As long as the growth of online platforms solely arises from competition based on the merits, competition agencies do not need to intervene. However, when the development of such platforms is the consequence of a merger, competition agencies should ensure that the proposed merger would not lead to a lessening of competition in the concerned markets. By preserving the fuel of the digital economy based on competition on the merits, competition agencies play a central role.

83. Jean Tirole wrote that the challenges of two-sided markets must urge the authorities to "*review the competition law software*."[31] To extend the metaphor, the software is already being updated. Competition agencies quickly realized that their traditional analytical tools needed to be adapted to the digital economy. These adaptations may involve a change in the merger regulatory framework, as in Germany or Austria, but also a renewed approach that takes into account the specificities of online platforms. Speaking of regulating online platforms, my predecessor, Bruno Lasserre, used the expression "new players, old tricks" to show that competition issues and their mechanisms were already known.[32] In the USA, where most of today's super-platforms were born, the regulatory framework has not fundamentally changed since the Sherman Act (1890) and Clayton Act (1914). In France, many companies are, however, calling for a change in competition law to deal with the new threats that super-platforms pose to the actors of the traditional economy, but also to French start-ups. However, most competition agencies, particularly in Europe, already have the means to understand the specificities of the digital economy. The European Commission recently displayed this by imposing a fine of more than 2.42 billion euros on Google for abusing its dominance as a search engine by giving illegal advantage to its own comparison shopping service.[33] The FCA has recently opened preliminary investigations in the digital economy sector following its opinion on the online advertising sector.

84. The FCA is also in the process of reviewing its traditional investigative methods in order to make them more attuned to the specificities of the digital economy. It already adapted its "competitive software" for retail assessment considering that it was necessary to integrate online sales in certain retail markets to have a fairer view of the competitive landscape. In the 2016 *Fnac/Darty* merger case,[34] the FCA found that the evolution of the sale of electronic products was such that one

31 *Économie du bien commun*, Presses universitaires de France, 2016, p. 526.

32 Regulating Internet platforms: new players, old tricks? Idate DigiWorld Summit, November 19, 2015. His speech is available online: http://www.digiworldsummit.com/video/dws15-bruno-lasserre-autorite-de-la-concurrence-digital-regulation.

33 http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

34 http://www.autoritedelaconcurrence.fr/pdf/avis/16DCC111VNC.pdf. Please see English translation of the press release here: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2823

could no longer separate physical store sales from online sales. The FCA therefore decided that the evaluation of competition could no longer be limited to physical stores, but must also take into account online sales in the concerned markets.

85. Considering the strong sensitivity to regulatory or public intervention in digital markets, it is crucial to understand the market *modus operandi* before taking any decision. One needs to assess the new schemes of these markets, which can quickly and drastically devolve into a monopoly. The FCA did so in its opinion on the online advertising sector and the *SeLoger/Logic-Immo* merger case, in considering the characteristics of the online platforms and their role in current and foreseeable competition. The FCA took an informed decision, based on convergent evidence collected from most of the market players in France. It came to the conclusion that super-platforms such as Facebook and Google did not—and would not in the short-term—exercise any competitive constraint on the parties. The decision made by the FCA is not optimistic or pessimistic. It is not a bet on the future either; it is based on an in-depth assessment of all the relevant information that the market players have communicated in the course of its investigation.

86. Lastly, who could have predicted the birth and success of the super-platforms? Each entry into the digital economy often raises enthusiastic comments, describing such new entrant as a "new Facebook" and yet, only few of the recent entries have succeeded in destabilizing a whole market. Thus, the FCA will closely follow the evolution of the positions of online real estate ad platforms in France, as well as any change in market conditions. This will lead to the first *ex post* analysis carried out by the FCA following a merger control decision. Reassessment of the conditions of competition in a market, following a merger decision, is usually made by the FCA as part of the revision of decisions with remedies or injunctions.[35] This exercise may also be applicable to important unconditional clearance decisions, or even prohibition decisions. In this respect, the digital economy offers a relevant field of scrutiny, given the fast pace of changes that may occur. ■

35 *See*, for example, the three recent decisions revising commitments and injunctions in the television sector in France: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=663&id_article=3091&lang=en; http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=663&id_article=2995&lang=en; http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=662&id_article=2994.

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