

19 February 2020

The *Autorité de la concurrence*'s contribution to the debate on competition policy and digital challenges

The expansion of global digital platforms, the development of new services based on digital technology (algorithms, cloud, artificial intelligence and blockchain) and the disruption of certain sectors of the traditional economy by new types of operators (online sales for brick and mortar retail, online reservation or sharing platforms for the hotel industry, etc.) are confronting competition authorities with new challenges in the implementation of competition law. The considerable market power acquired by certain players, based, depending on the case, on their technological expertise, the scale of network effects, mass data collection or the economies of scale from which they benefit, as well as the sometimes destructive consequences of the anticompetitive practices implemented, have led competition authorities to conduct in-depth discussions with a view to updating their analysis framework, their methods and the tools at their disposal.

Through this contribution, the *Autorité de la concurrence* (hereafter the *Autorité*) wishes to participate in this collective discussion process and share its latest analyses and proposals. The beginning of 2020 is an important moment, a time when the new European Commission, at the start of its mandate, is to present new initiatives in this area, and when several legislative proposals regarding competition regulation are to be discussed before the French Parliament in the coming months. The *Autorité* will make every effort to update this document in light of the proposals made over the next few months and of any reactions that it causes.

With the development of online services came the emergence of new operators offering intermediation services between their users. These companies have become so large that they may pose a threat not only to the proper competitive functioning of the markets in which they are dominant but also beyond those markets, because of their capacity for development and projection due, *inter alia*, to their financial capacity, the benefit of significant network effects related to their extensive user communities or the data that they are able to access.

To tackle the practices of these players, competition authorities have relied on an evolving decision-making practice and on tools that have proven to be both effective and flexible. In doing this, competition authorities have demonstrated their ability to take on the behaviour of digital players, including by using innovative reasoning or by applying well-established solutions to 'new objects': this was the case for an operating system (European Commission Google Android decision of 2018¹), online advertising services (European Commission Google AdSense decision of 2019²; *Autorité de la concurrence* Google Gibmedia decision of 2019³), a

¹ [Case AT.40099, 18 July 2018, Google Android.](#)

² [Case AT.40411, 20 March 2019, Google Search \(AdSense\)](#)

³ [Decision No. 19-D-26 of 19 December 2019 on practices implemented in the online search advertising sector.](#)

‘vertical’ search engine (Google Shopping decision of 2017⁴) and social networks and data collection (Facebook decision by the Bundeskartellamt in Germany, 2019⁵). Many other cases are currently being examined in France and Europe as well as in other economic areas.

However, the technical complexity of the sector, the powerful impact of network effects and the seemingly immovable nature of certain dominant positions have led the authorities to question the best way to develop their analysis and tools to tackle the challenges brought about by digital platforms.

Among the main findings, the ability to intervene quickly is recognised as an absolute necessity. For most competition authorities, one key objective is being able to carry out their investigations within a timeframe that responds to the rapid changes in the market, and making wider use of interim measures.

Moreover, the discussions taking place to update competition law – whether in relation to how competition law concepts are applied concretely or to legislative changes – are comprehensive and part of constructive international debate: the European Commission has made digital technology a fundamental point of its strategy, under both the previous mandate and the new one. Plans to overhaul the legislative framework in which the authorities can intervene or discussions to this end are under way in Germany, the United Kingdom, the Benelux Union, Austria and Australia. Meanwhile, the practices of major players such as Google, Facebook, Amazon and Apple are the subject of various investigations at international level, particularly in the United States and Europe, before the Commission and national competition authorities.

The *Autorité* considers that the established concepts of competition law continue to provide a relevant approach to digital challenges, but that developments may nonetheless be considered, firstly, in order to prevent and, where necessary, sanction anticompetitive practices by these players more effectively and, secondly, to ensure effective competition in markets such that alternative players are able to emerge and develop, and consumers can benefit from the advantages of innovation. At the same time, the *Autorité* is reflecting on the changes to the legislative framework that may be required to make its function more effective with regard to these players, especially structuring digital platforms. In this regard, it proposes a definition below for implementing a prevention and sanction system specifically for these players.

Firstly, the *Autorité* will set out its thoughts on how the concepts of anticompetitive practices can be applied to the digital economy (I.) and, secondly, on how merger control can be applied to the digital economy (II.).

I. ANTICOMPETITIVE PRACTICES APPLIED TO THE DIGITAL ECONOMY

1. Competition law is a particularly effective tool for addressing the problems of an economy very strongly marked by innovation

Competition law is a particularly effective means of maintaining the competitive dynamics of the digital economy. This is because competition law is malleable and its concepts can be adapted to new practices without the need for legislative action. The fact that it can be applied across disciplines, without sectoral or technical limits, makes it

⁴ [Case AT.39740, 27 June 2017, Google Search \(Shopping\).](#)

⁵ [Bundeskartellamt, 6 February 2019, Facebook.](#)

particularly suitable for addressing technological shifts or disruptions that challenge the boundaries between different sectors of the economy.

The notion of abuse of a dominant position has thus proved to be particularly well suited to apprehending the conduct of major platforms. This concept makes it possible to tackle a wide range of behaviours, whether exploitative abuse or exclusionary abuse, which has been implemented repeatedly in recent years.

In the past, competition authorities have been able to address interoperability issues. In the Microsoft case (2004), on the basis of abuse of a dominant position, the Commission required Microsoft to open up its operating system to enable third-party software publishers to offer Windows-compatible software programmes (in this case, work group server operating systems)⁶.

In France, when the market was faced with the innovation of Nespresso coffee capsules and competitors wanted to offer capsules that were compatible with the brand's coffee machines, in its Nespresso decision of 2014, the *Autorité* made compatibility possible between Nespresso coffee machines and capsules manufactured by its competitors. In particular, it required information to be communicated on any technical modifications, prototype machines to be made available and a trusted third party to be designated⁷. This case is an example of how principles and concrete solutions could be applied tomorrow in the digital economy to respond to abusive practices by a dominant player trying to limit interoperability and the development of competing offers.

More recently, the European Commission announced that it will investigate Apple's practices with regard to access to certain iPhone features (e.g. blocking NFC antennas, which make it possible to exchange data within a short range and are necessary for contactless payment solutions that are competitors of Apple Pay).

The *Autorité's* practice also includes solutions that have solved the problem of access to customer data held by a dominant player that could not be replicated by competing operators, thereby hampering their ability to expand in the market. In its Direct Energie/GDF Suez (ENGIE) Decision of 2014, the *Autorité* thus ordered ENGIE, through interim measures, to grant its competitors access to the customer database that it held in its capacity as the incumbent operator in the gas market⁸. This decision to adopt interim measures quickly enabled ENGIE's competitors to access the database, an essential tool for soliciting ENGIE's customers. The decision was based in particular on the fact that the database could not be reproduced or replicated by competitors, and that the gas supply market was in the process of being opened up to competition. It can be noted that, in order to take into account the necessary privacy protection associated with the transfer of personal data to third parties, the conditions for access to this data have been surrounded with safeguards, defined according to the opinion issued by the French data protection authority (CNIL).

With regard to exclusionary abuse, the European Commission recently fined Google for promoting its own online sales website Google Shopping (2017)⁹. In its Google Android decision, the Commission also sanctioned Google for abusing its dominant position in mobile operating systems to give an advantage to its search application Google Search

⁶ [Case COMP/C-3/37.792, 24 March 2004, Microsoft.](#)

⁷ [Decision No. 14-D-09 of 4 September 2014 on the practices implemented by the companies Nestlé, Nestec, Nestlé Nespresso, Nespresso France and Nestlé Entreprises in the espresso coffee machine sector.](#)

⁸ [Decision No. 14-MC-02 of 9 September 2014 relating to a request for interim measures submitted by Direct Energie in the gas and electricity sectors.](#)

⁹ [Case AT.39740, 27 June 2017, Google Search \(Shopping\).](#)

and its browser Google Chrome (2018)¹⁰. More recently, the Commission received a complaint from the music streaming site Spotify, accusing Apple of discriminating against its application on the App Store in favour of its own music streaming service, Apple Music (2019).

In the 2004 Decision referred to above, the Commission also fined Microsoft for tying the sale of its Windows Media Player (WMP) to Windows, its operating system installed on almost all PCs worldwide.

These examples show that, wherever possible through innovative practice, competition authorities are endeavouring to effectively address the issues raised by the digital economy and develop their analysis without affecting current legislation. Nevertheless, additional ways of adapting the competition analysis framework at national or European level may also be considered.

2. Discussion of possible adaptations without affecting current legislation

2.1 Discussion of the concept of abuse of a dominant position

In addition to the changes already being initiated by competition authorities, other avenues for improvement may be considered, without affecting current legislation, in order to gain a better understanding of the specificities of the conduct of digital platforms and their consequences. In this respect, the rapidity of market developments and the phenomena of ‘tipping’ and ‘winner takes all’ – which reflect a shift towards monopolies or ‘gatekeeper’ situations, in which certain players control market access for multiple users – particularly raise concern.

Additional discussions on how competition authorities should take into account the problems caused by the digital economy have been fuelled in recent months by the debates organised by the French government as part of the French Digital Conference (*Etats généraux du numérique*, held in the first half of 2019), and by the extensive discussions on the subject within the framework of the ECN, the OECD, the ICN and as part of the discussions between G7 competition authorities that led to the adoption of the “Common Understanding on Competition and the Digital Economy”, presented on 18 July 2019 at the meeting of G7 Finance ministers in Chantilly¹¹. The *Autorité* has also deepened its discussions, benefiting from the contributions of several very instructive reports on these issues in 2019¹².

One first approach could be to extend the notion of dominant position to include certain players who are in a position of near-dominance or on the verge of tipping the market. This is the case for ‘structuring’ platforms, which have considerable market power in the market in which they are primarily active, but also in neighbouring markets because of their status as ‘gatekeeper’ (see point 3 below).

¹⁰ [Case AT.40099, 18 July 2018, Google Android.](#)

¹¹ [G7 competition authorities’ Common Understanding on “Competition and the Digital Economy”, Paris, 5 June 2019.](#)

¹² [Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019; Competition Policy for the Digital Era, Final Report, J. Crémer, Y.-A. de Montjoye, H. Schweitzer, May 2019; Stigler Committee on Digital Platforms, Final Report, July 2019; Digital Platforms Inquiry, Final Report, 26 July 2019; Autoridade de concorrência, Digital Ecosystems, Big Data and Algorithms, July 2019; Competition & Markets Authority, Online Platforms And Digital Advertising, Market Study Interim Report, December 2019.](#)

This could be considered to be a new form of dominant position, without current legislation being affected. The traditional concepts of competition law may seem ill-suited to deal with players operating in multifaceted markets, since they are new in nature and may comprise several platforms that are more or less equivalent in size.

In this respect, the *Autorité* welcomes the review of the criteria for defining relevant markets initiated by the European Commission. In particular, these discussions will serve to ensure that the analysis framework used makes it possible to fully apprehend the functioning of the digital economy.

The *Autorité* also wishes to continue its analytical work on the role of data and user communities in the digital economy¹³. Understanding the value and importance of data and user communities is fundamental for competition authorities, making it possible to appreciate both the competitive advantage that access to data and the creation of user communities can represent for the platforms and the extent to which these two factors may constitute a barrier to entry or an advantage that newcomers cannot reproduce.

A second avenue for discussion involves redefining the notion of essential infrastructure or how it may be adapted to the digital economy. This notion has in fact been a point of renewed interest in the digital economy, due to the indispensable nature of certain databases, user communities or ecosystems. Further discussions would be useful to determine whether the standard applied to the notion of essential infrastructure should be relaxed or whether a new standard should be developed to qualify these ‘indispensable’ assets. One of the points to be taken into account in these discussions is the potential access problems highlighted by third parties (customers, users of these platforms or databases). Another side to the problem could be the need to ensure interoperability in the methods of accessing these platforms or databases. Finally, these discussions must take care to uphold a framework that is conducive to innovation.

2.2 Discussion of the procedural tools used by competition authorities

Alongside the update to its analysis framework, some improvements to procedural tools could also be envisaged in order to further accelerate the implementation of competition law and the intervention of competition authorities. The *Autorité* already has the tools available to intervene within a very short timeframe. First of all, the *Autorité* can use interim measures to prevent imminent damage in the event of serious and immediate harm to the interests of an economic sector, a company or consumers or to the functioning of competition in the market¹⁴. Secondly, during a referral, the *Autorité* can identify competition concerns and make it compulsory for the company in question to fulfil the commitments proposed to address those concerns¹⁵.

In certain circumstances, the commitment procedure may resolve difficulties quickly where the companies in question are prepared to change their conduct and alter, for

¹³ The *Autorité* has carried out several studies to develop its analysis, in particular on the role of data in considering the position of actors and any abuses (see the [joint paper published with the Bundeskartellamt \(BKA\) on big data](#) in May 2016, [Opinion No. 18-A-03 on online advertising of 6 March 2018](#) and the [joint study with the BKA on algorithms of November 2019](#)).

¹⁴ [Decision No. 14-MC-02 cited above](#): Decision by which the *Autorité* ordered that competitors be granted access to data held by the dominant incumbent operator in the gas market. See also [Amadeus/Google Decision No. 19-MC-01 of 31 January 2019](#) in which the *Autorité* required Google to clarify the rules applicable to paid electronic enquiry services.

¹⁵ The Nespresso commitments mentioned above (2014) include the communication of information relating to any technical modifications, provision of prototype machines, and appointment of a trusted third party.

example, internal practices¹⁶, contractual provisions¹⁷, their pricing policy¹⁸ or internal organisation¹⁹. The interim measure and commitment procedures may be combined to rapidly and durably remove competition concerns caused by serious and immediate harm to the competitive functioning of a market.

The adoption of the ECN+ Directive also represents a major step forward by generalising the use of interim measures by the European competition authorities and by enabling them to start proceedings *ex officio* with a view to implementing such measures²⁰. Thanks to this new provision, the *Autorité* will be able to act very quickly as soon as abuse is detected, without having to wait for complaints from operators, who are often reluctant to refer practices implemented by dominant players to the *Autorité* for fear of reprisals or because they lack the means to initiate complex procedures.

In addition to these advances, consideration could be given to ways to further promote the use of this tool at European level. One option that has been considered is modifying the standard that applies to the ordering of urgent interim measures by the European Commission, by retaining, for example, the applicable criterion under French law. A second option could be to authorise the parties to submit a request for interim measures to the *Autorité* prior to the complaint on the merits of the case, which would be regularised subsequently.

3. Discussion of the implementation of provisions specifically concerning ‘structuring’ operators

Consideration could also be given to supplementing competition law at national or European level with a mechanism for intervening in the event of conduct harmful to competition by ‘structuring’ operators.

Within the current debate, there is a general need for clarification in order to choose between the different concepts proposed in various reports and by participants in the general debate on the platforms.

The *Autorité* has drawn on the work and initiatives undertaken on the subject in recent months to propose a legal definition of these players, which can be grouped under the term ‘structuring digital platforms’. The following developments are based more specifically on the points raised in the European Commission experts’ report²¹, Her

¹⁶ See, for example, [Decision No. 10-D-30 of 28 October 2010 on practices implemented in the online advertising market](#) in which Google committed to making the operation of its AdWords service more transparent and easier for advertisers to understand as regards devices for bypassing speed cameras in France; see also [Decision No. 18-D-14 on practices implemented in the marketing of satellite television signal decoders](#).

¹⁷ See, for example, [Decision No. 17-D-16 of 7 September 2017 regarding practices implemented by Engie](#) in the energy sector, in which Engie committed to amending its contracts with co-owner associations.

¹⁸ See, for example, [Decision No. 13-D-17 of 20 September 2013 on practices by MasterCard in the payment card sector](#), in which MasterCard and Visa proposed commitments resulting in lower interbank fees; see also [Decision No. 17-D-16 of 7 September 2017 regarding practices implemented by Engie in the energy sector](#), cited above.

¹⁹ See, for example, [Decision No. 17-D-09 regarding practices implemented by the French National Institute for Preventive Archaeological Research \(Inrap\) in the preventive archaeology sector](#), in which the *Autorité* accepted the commitments proposed by Inrap aimed at separating, from an accounting perspective, the Institute’s public service missions from its activities in the competitive sector.

²⁰ [Directive \(EU\) 2019/1 of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market](#).

²¹ Competition Policy for the Digital Era, Final Report, May 2019, cited above.

Majesty's Treasury report²² and the Stigler²³ report, as well as on the initiatives of the Benelux authorities²⁴ and the government bill currently being discussed in Germany²⁵.

Of the many proposals put forward, the suggestion to enable competition authorities to intervene quickly and beforehand as regards the risks of distortion of competition by these 'structuring' players could be a useful addition to regulations and deserves to be examined. Such a mechanism could provide appropriate responses to each situation, taking into account the specificities of each structuring platform and their business model.

To implement this mechanism, the players with a 'structuring' position on the market first need to be identified using criteria defined beforehand.

The *Autorité* proposes defining 'structuring' platforms in three stages. The first part of the definition aims to recognise the companies providing online intermediation services. The second part defines the strategic nature of their conduct in the market that they dominate as well as in other markets. This section refers to the factors that characterise their market power and that enable them to play a role in access to certain markets ('gatekeeper' role) and in the functioning of certain markets ('regulator' role). The third part refers to the importance of these platforms for market players (in particular the indispensable nature of these players for access to certain markets), whether they are competitors, users of their services, or third parties who need access to the services offered by these structuring platforms in order to develop their own activities.

This general definition may be supplemented by guidelines specifying each of the three parts of the definition and, in particular, the way in which the importance of the operator is assessed with regard to its size, financial capacity, user community and/or the data it holds.

A structuring digital platform could thus be defined as:

- 1) A company that provides online intermediation services for exchanging, buying or selling goods, content or services, and
- 2) Who holds structuring market power
 - a) Because of its size, financial capacity, user community and/or the data that it holds,
 - b) Enabling it to control access to or significantly affect the functioning of the market(s) in which it operates,
- 3) With regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity.

The *Autorité* considers that it may be useful to draw up a list of practices that raise competition concerns specific to these players. The justification for such a list lies in the fact that, in this context, certain practices have a heightened anticompetitive effect because of the significant market power held by the perpetrators.

This non-exhaustive list could cover practices that for these platforms consist in:

²² Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019, cited above.

²³ Stigler Committee on Digital Platforms, Final Report, July 2019, cited above.

²⁴ [Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world, 2 October 2019.](#)

²⁵ Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), 24 January 2020.

- disfavouring competing products or services using their services;
- hindering access to markets in which they are not dominant or structuring;
- using data in a dominated market to make access to that market more difficult;
- making interoperability of products or services more difficult;
- making data portability more difficult;
- hindering the use of multihoming.

In the event that one of these practices is implemented by a structuring player, the competition authority could, on a case-by-case basis, either accept commitments and make them binding or require the company in question to change its conduct in order to resolve the competition concern identified and face periodic penalty payments, where necessary. The competition authority could also prohibit this practice in the future.

In the event that the operator in question does not comply with the commitments made or the injunction issued, initiating a procedure against it could be envisaged, in accordance, for example, with the procedure provided for in French law by Article L. 464-3 of the French Commercial Code (*Code de commerce*).

In the event that one of these practices is implemented by a structuring player and likely to raise competition concerns, it would be up to the companies in question to demonstrate, if they do not wish to comply with the measure proposed, that their practices can be justified objectively by efficiency gains. Reversing the burden of proof in this way would save time so that any distortion of competition could be resolved as quickly as possible after it occurred.

This could have the advantage of being proportionate and adaptable, based on a ‘case-by-case’ analysis, thereby avoiding some of the pitfalls that may result from general, permanent regulations being defined *ex ante*. In some cases, this approach may risk being rigid or not very adaptable, or subjecting small players to significant or even disproportionate obligations.

Priority should be given to considering the implementation of such a tool at the European Commission level, which is in the best position to apprehend practices on a European scale. Alternatively, the tool could be considered at national level.

II. MERGER CONTROL IN THE DIGITAL ECONOMY

1. Current difficulties with regard to merger notification and competitive analysis

1.1 Lack of control over transactions below the thresholds raises competition concerns

The numerous transactions carried out by the digital giants have revealed the existence of a legal vacuum that has enabled several mergers and acquisitions to escape the control of competition authorities in cases involving emerging innovators or players that have not yet monetised their innovation. In such cases, the value of the target company is not reflected in its turnover and the notification thresholds are not usually exceeded.

Since 2008, Google has acquired 168 companies, many of which were potential competitors (Waze for navigation services, YouTube for videos, DoubleClick and AdMob

for online advertising)²⁶. As for Facebook, it has taken over 71 companies (some of the largest include Instagram in 2012 and WhatsApp in 2014)²⁷. Despite WhatsApp only generating low revenues at the time, it was bought by Facebook for \$19 billion.

Through such acquisitions, the activity of the young start-ups, in most cases, becomes integrated into the buyer's ecosystem. The aim of the takeover may also be to acquire a community of potential users (Facebook/WhatsApp) or technical or human skills that are rare in the market. As such, the consequence of these acquisitions can be to dry up the labour market when the expert human resources available are often rare and invaluable, either because they have such objective from the start or, at least, because they have such effect.

Through this very intensive acquisition policy, some players could effectively hinder the emergence of potential competitors who could have offered consumers an alternative. These 'below-threshold' acquisitions may raise concerns about certain dominant players appropriating innovation, which could be damaging to the economy in the absence of effective control by competition authorities.

It should be made clear that the issue identified here is not limited to 'predatory acquisitions' in the strict sense of the term. The notion of predatory acquisition refers to cases in which a dominant or structuring player in the digital sector acquires an innovative player in order to achieve external growth, where the consequence or objective is to prevent the emergence of a potential competitor and 'eliminate' it or the products or services that it was developing. The cases identified through academic research, particularly in the pharmaceutical industry, resulted in the competitor disappearing or being shelved, thereby plugging a source of innovation that could have benefited both competition and consumers.

However, the term predatory acquisition only partially describes the problem identified by the *Autorité*. In many cases, the buyer does not in fact 'kill' the target, as in 'killer acquisitions', but on the contrary retains it and strongly develops its activity: the examples of WhatsApp and Instagram acquired by Facebook, or DoubleClick and YouTube acquired by Google, are particularly indicative in this respect, since these entities grew significantly after their takeover and contribute greatly to the success of their buyers.

Several different configurations may therefore be at play: the acquisition of a competitor in order to eliminate or shelve it, or the acquisition of a company that strengthens the position of the buyer in the same market or in neighbouring markets. Today, these acquisition policies, subject to virtually no control, enable certain players to bolster their position in the market: here, we can speak of 'consolidating' or 'encompassing' acquisitions. Through such acquisitions, these players' already dominant position may be strengthened in their core market and/or in a neighbouring market.

1.2 Competitive analysis faced with the characteristics of the digital economy

Beyond the question of how competition authorities can be notified of these transactions, the *Autorité* also considers it pertinent to reflect on how competitive analysis is applied to them. Competition authorities are faced with several challenges in analysing transactions in the digital economy.

²⁶ [Lear Lab, Ex-post Assessment of Merger Control Decisions in Digital Market, Final Report, 9 May 2019.](#)

²⁷ *Ibid.*

First of all, issues rarely involve business activities that overlap horizontally between the target and the buyer. In most cases, the target company is not active in the same market as the buyer or the buyer only has a limited market share in the target company's market.

As discussed in relation to dominant positions, adapting competitive analysis requires an analysis of potential conglomerate effects, which can be complex, especially in emerging and rapidly changing markets.

Moreover, merger control is an *ex ante* analytical exercise that requires competition authorities to carry out a prospective analysis. Anticipating changes in the market(s) concerned can prove difficult and it is possible to question the relevance of the time horizon of the analysis used previously (typically three to five years).

2. Discussion of possible adaptations without affecting current legislation

2.1 Updating competitive analysis criteria

The *Autorité* has already taken into account certain specificities of the digital economy in merger control.

For example, the *Autorité* took into account the potential competition from digital platforms such as Google, Amazon and Facebook in the online property-advertising market by examining their ability to penetrate the market by leveraging their reputation and audience in their main market²⁸.

The *Autorité*, like most competition authorities faced with mergers in the digital economy, is also already considering the impact of the transaction on the various relevant parameters for consumers, not just the effect on prices. In previous decisions, the *Autorité* has thus identified impacts on pluralism and diversity as non-price effects to be taken into account when reviewing proposed mergers in the culture and media sector²⁹. Likewise, in the retail sector, the *Autorité* had the opportunity to focus the competitive analysis on consumer interests by examining the impact of the proposed transaction on the quality of service as regards non-price effects³⁰.

The *Autorité* also questions how relevant the temporal scope of the current analysis is, which could be extended.

Finally, in-depth discussions are underway on the role of data and user communities. The collection, storing and processing of vast amounts of data and the creation of very large user communities give digital giants unprecedented market power. Holding certain data may make it possible to extend this market power to neighbouring markets, where it confers a competitive advantage in the provision of complementary services and/or products.

When it comes to merger control, competition authorities should therefore be particularly vigilant in this area and improve their tools for analysing the market power that results from holding data or having large user communities. Vigilance is all the more essential where these two characteristics are at the centre of the buyer's business model.

²⁸ [Decision No. 18-DCC-18 of 1 February 2018 relating to the acquisition of sole control of the company Concept Multimédia by the group Axel Springer.](#)

²⁹ [Decision No. 12-DCC-100 of 23 July 2012 on the acquisition of sole control of TPS and CanalSatellite by Vivendi and Groupe Canal Plus.](#)

³⁰ [Decision No. 16-DCC-111 of 27 July 2016 on the acquisition of sole control of Darty by Fnac.](#)

2.2 Making better use of existing tools

a) *Recourse to behavioural commitments*

Behavioural remedies can be very useful tools, without affecting current legislation, for restoring effective competition conditions, provided that they are proportionate and implemented over a sufficiently long period.

Discussions could take place on a wider use of such tools in the digital economy, as a complement to the use of structural remedies where these are more suitable.

In order to inform collective discussion of the subject, the *Autorité*'s recent study on behavioural commitments presents a retrospective analysis of French decision-making practice and case law in this area, which presents the diversity of behavioural remedies that can be considered, along with their advantages and disadvantages in comparison to structural remedies³¹.

b) *Application of Article 22 of Regulation 139/2004*

Another avenue for improvement could be to make more frequent use of the mechanism provided for in Article 22 of Regulation No. 139/2004 on the control of concentrations. This article enables national competition authorities to refer a merger to the Commission that does not have a European dimension but that affects trade between Member States and threatens to significantly affect competition within the Member State(s) that submit the request³².

This mechanism is currently not used or seldom used. The *Autorité* considers that the use of referral by virtue of these provisions would allow national authorities to request that the European Commission review a limited number of mergers that are below the thresholds but raise important competition issues. This option presents the advantage of being able to be implemented without affecting current legislation and forming part of the ongoing dialogue between national competition authorities and the European Commission for the review of notifiable mergers.

3. Introduction of merger control mechanisms specific to the digital economy

Under current legislation, neither the European Commission nor the *Autorité* has specific thresholds for predatory or 'consolidating' acquisitions in the digital economy.

This meant that the Facebook/WhatsApp transaction was only notified to the European Commission because of existing market-share thresholds in various European countries (Spain, Cyprus and the United Kingdom) in which the transaction was notifiable and whose competition authorities accepted to refer the case to the European Commission.

There is therefore a legal vacuum that must be closed in order to ensure that, as a minimum, these transactions can be examined by the European Commission and/or the national competition authorities whose markets would be affected.

³¹ [Behavioural Remedies, Collection *Les Essentiels*, La Documentation française, January 2020.](#)

³² Article 22 of Regulation 139/2004: "One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request."

In order to provide a consistent response and avoid distortions within the internal market, it seems preferable for this debate to take place at European level. This does not, however, prevent the issue from being discussed at national level as well, as has been the case in Germany, Austria and in France, where the *Autorité* has already carried out two public consultations on the subject³³.

In order to resolve this issue, the *Autorité* proposes a twofold mechanism.

Firstly, the *Autorité* proposes introducing an obligation to inform the Commission and/or the competition authorities concerned of all mergers within the meaning of Article 3 of Regulation 139/2004 implemented in the European Union by ‘structuring’ companies.

This would be a relatively light requirement that would avoid placing a disproportionate burden on companies and would only concern a list of players defined clearly according to objective criteria. In cases where a merger implemented by one of these previously identified players could bring about competition risks, the European Commission or the relevant national competition authorities could then request that it be notified to them for review in the framework of merger control.

Secondly, the *Autorité* proposes adding a notification mechanism to the current mandatory notification thresholds that can be implemented at the initiative of a competition authority on the basis of competition monitoring. This system exists in several European countries (Estonia, Hungary, Ireland, Lithuania, Norway and Sweden) as well as in the United States and Japan.

Under this mechanism, competition authorities could require the parties to notify a merger, either *ex ante* or *ex post*, where the three following conditions are met:

- All the companies or groups of legal persons or individuals who are parties to the merger have a total worldwide turnover greater than €150 million;
- The transaction raises substantial competition concerns identified in the area concerned and; where applicable,
- The transaction does not fall within the jurisdiction of the European Commission.

In order to ensure legal certainty for companies, the *Autorité* suggests clarifying the concept of ‘substantial competition concerns’ as well as the applicable procedure in guidelines.

In this respect, the question of timeframes requires particular attention. A period of 12 months could be considered, after which *ex-post* control would no longer be possible. The competition authority would review the notification within a set timeframe, which would be the same as in the standard notification procedure defined in Regulation 139/2004 or in national provisions, where applicable.

Another point requiring attention is the possibility for the companies concerned to voluntarily notify such mergers to the relevant competition authorities, in order to remove any doubt about the *Autorité* potentially intervening.

³³ [Public consultations of 20 October 2017 on the modernisation and simplification of merger control and of 7 June 2018 on the proposed introduction of an *ex-post* merger control mechanism.](#)