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Re Future-proofing of competition policy in regard to online platforms

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Dear Madam Speaker,

With this letter, I inform the House about my policy proposals for ensuring competition policy remains future-proof in light of the role of online platforms. In doing so I am implementing the promise I made in my response to the 2018 annual report and 'Signaal' advisory report published by the Netherlands Authority for Consumers and Markets (ACM)¹ and in the Dutch Digitalisation Strategy.² MP Kees Verhoeven (Democrats '66) also submitted a policy proposal on 5 February 2019 relating to competition in the digital economy.³ I have noted this proposal with interest. The government response to it can be found in a separate letter, which has been sent to the House in parallel to this one.

The government wants businesses and consumers to get the most out of the opportunities offered by the digital economy. To ensure this, markets must be competitive. Competitive markets allow consumers to choose from whom they buy a product or service, challenge businesses to compete and innovate, give them opportunities to enter new markets and make them less dependent on a limited number of large companies.

In order to ensure markets remain competitive, proper competition rules and effective supervision are necessary. To establish whether the existing competition tools are adequate or whether additional measures are required, I have carried out an analysis and spoke with the ACM and the European Commission at the end of 2018. I also presented a discussion paper containing the above-mentioned analysis for consultation from 19 December 2018 to 3 February 2019. In addition I held talks with researchers, competition lawyers, platforms and representatives of businesses using platforms.

It emerged from the consultation and talks that competition policy could be strengthened on a number of points. Therefore, my policy aims are as follows.

¹ Parliamentary Paper 27 879, no. 63.

² <https://www.government.nl/documents/reports/2018/06/01/dutch-digitalisation-strategy>

³ Parliamentary Paper 35 134, no. 2.

Firstly, I believe that in specific situations, at least at European level, it must be possible for the authority to adopt ex ante measures in order to strengthen and safeguard competition. There is a risk in the digital economy that certain large platforms might achieve such a dominant market position that they assume a gatekeeper role, meaning they control a competitive bottleneck leaving consumers and businesses little or no possibility to avoid them, and that new players are all but barred from entering the market. In such situations, ex post supervision alone, as provided for in competition law, is insufficient.⁴ Secondly, the European guidelines that detail the application of competition law need to be amended in order to ensure that the competition rules can be applied effectively to the digital economy. For example, clarification could be given on how the role data plays can be included in the competition analysis. Thirdly, I propose adjusting European merger thresholds so that concentrations in the digital domain are subject to merger control sooner. In the rest of this letter I will discuss these policy aims in more detail.⁵

Below, I will first discuss developments in the digital economy and the issues they may raise. I will then focus on competition policy and discuss the risk of certain platforms acquiring durable dominance in their markets. This calls for additional tools for competition policy. Lastly, I will discuss what needs to be done in order to enforce the existing competition rules in the digital economy.

Developments in the digital economy

In the digital economy various online platforms and services have emerged within a short time. These platforms come in many shapes and sizes. We use them to order food, book a hotel, make an appointment at the hairdresser's, buy books, find a babysitter, interact with friends, and share our holiday photos. The multitude of different purposes these platforms are used for points to the substantial differences between them. What all these platforms have in common is that they bring together various parties, such as consumers and businesses, by using new technologies.

Platforms offer many opportunities for society and the economy. They make markets more transparent, allowing consumers to more easily compare services or products and make decisions. This can lead to a better price-quality ratio and new services. For businesses the market becomes more easily accessible because platforms offer them a larger and more targeted reach. The rise of platforms and their use of smart technology, data and new revenue models have stirred up existing markets and created new ones, boosting innovation and productivity.

At the same time, platforms present various challenges. In this letter I will discuss the competition-related issues resulting from the emergence of large platforms. The issue at hand is whether the tools of competition policy are still fit for purpose

⁴ Apart from merger control, competition law only provides for measures to be taken in response to specific practices.

⁵ These aims are in line with the conclusions of the European Council meeting of 22 March 2019: <https://data.consilium.europa.eu/doc/document/ST-1-2019-INIT/en/pdf>.

in the digital economy. There are other challenges too. For instance, tailoring services to users' personal preferences can give disinformation a greater reach, which raises concerns about democratic interference.⁶ The manner in which data is collected, used and combined is also increasingly leading to concerns about privacy and security, justice, equal treatment, autonomy, and human dignity. It is not always clear how legislation based on the traditional economy applies to online platforms. This causes concerns regarding a level playing field. In addition, activities on platforms can affect third parties in unforeseen ways, e.g. the effects tourism has on the living environment, the difficulty of determining liability for infringement of intellectual property rights, or efforts to combat the distribution of illegal content.

Many of these issues are regulated by separate policies. For example, the New Deal ensures consumers get transparency on how algorithm-based rankings are established and who they are doing business with when they make purchases through platforms, and the General Data Protection Regulation (GDPR) safeguards people's privacy. Due to the key position certain platforms hold, public debate on these challenges sometimes turns to competition policy to provide solutions. However, competition law will generally not be an effective instrument in this regard. Competition law is intended to protect the competitive process by allowing action to be taken against specific anticompetitive practices.⁷ Therefore these issues fall largely outside the scope of this letter. In such situations the more obvious course of action would be to use instruments that tackle the problem directly. Some public interests can be better safeguarded through generic protection. This is the case for privacy, for instance, with the GDPR applying to *all* businesses, not just large or powerful ones.

In the remainder of this letter, I will only discuss competition-related issues resulting from the emergence of large platforms.

Additional rules for open markets

Risk of permanent dominance

The dynamics of the online markets in which platforms operate can lead to a winner-takes-all or winner-takes-most outcome. In this situation all users are served by one or a small number of platforms. This occurs mainly in online platform markets due to the factors that characterise platforms, such as network effects and the smart combination of gathered data. Network effects occur if a product or service becomes more attractive the more users it has. In some cases, having more users of the same type makes a platform more attractive. This applies, for example, to social media platforms, which become more attractive to use as more friends join. Sometimes a platform is made more attractive by having lots of users from another group. For example, consumers will be more interested

⁶ Parliamentary Paper 30 821, no. 51.

⁷ In some cases, the rules can be implemented in combination with other legislation, as in the proceedings brought against Facebook by the German competition authority (Bundeskartellamt), which based the claim of abuse on the GDPR and worked with the privacy regulator.

in an online marketplace with lots of sellers. Conversely, sellers are more likely to join an online marketplace with lots of buyers. In both cases, network effects imply a platform with lots of existing users is more attractive to new users.

Data collection can make this self-reinforcing process even stronger. After all, a platform with more users can collect more data. That data can be used to further improve the platform's quality, thus attracting more users and allowing even more data to be collected. On top of this, the value of data may increase when it is combined with other data since this can lead to new insights. Taken together, these effects can lead certain platforms to achieve relatively strong market positions in a short time.

The risk is that these positions become so strong that challenging them becomes nearly or entirely impossible. If the competitive process functions normally, it is likely that at some point a party will be enticed to enter the market by the high profits being made by the dominant player. The entry of this new party will in time lead to the dominant player losing its position. This may be possible for the largest platforms too, and to some extent the largest platforms also compete with each other. However, it emerged from the responses to the consultation and from the talks that it is not clear to what extent a newcomer offering an innovative service would be able to enter a market dominated by a large platform, given the factors set out above. In the meantime, the absence of a challenger could lead to limited competitive pressure, resulting in less innovation and less choice for consumers. This situation is undesirable.

It is important to note, as I indicated above, that there are substantial differences between platforms, and the risk of permanent dominance therefore varies from one market to another. It is certainly not the case that all online markets are dominated by only one or a small number of platforms. Multiple platforms can operate simultaneously in one market, for example if users have highly divergent preferences or use different platforms side-by-side for the same service ('multi-homing'). Even if only one or a small number of platforms serve the whole market, this does not necessarily mean they have a permanent dominant position, as long as they face a genuine threat of losing their position to a potential competitor who is not yet operating in the market. There are also markets where consumers and businesses conduct a large proportion of their business without using a platform. For example, many people phone their hairdresser to arrange an appointment rather than using a platform.

Although there is uncertainty as to whether market dominance is temporary or permanent, it is clear that some platforms have a gatekeeper role. This refers to a situation in which the use of a specific platform is necessary for businesses to reach their customers or for consumers to find certain products or services or equivalently, that they are in control of a competitive bottleneck. In some cases, access to specific data or to facilities which are necessary to compete is managed by a platform. For example, a business that is developing a product may need a platform to offer this product to consumers. If the platform 'keeps the gate closed'

by imposing unreasonable conditions, it will be difficult or even impossible for the business to sell its product. If a gatekeeper platform provides insufficient access under reasonable conditions to other businesses, the competitive process is more likely to be disrupted. For example if it makes switching between platforms very unappealing, thus making consumers and businesses dependent on its own platform.

Additional tools

At the European level I will be pushing for a new competence in the European competition framework in order to ensure continued access to digital markets. This competence would allow measures to be imposed beforehand to safeguard and strengthen competition where a dominant platform has a gatekeeper role.

Such measures must be considered on a case-by-case basis. Generic rules could seriously disrupt the market and nip innovation in the bud. Moreover, small platforms should not be adversely affected by measures aimed at a small number of large platforms or be discouraged from innovating and investing by far-reaching regulation. Rules must not lead to the many advantages of the platform economy for consumers and businesses being lost.

A European authority such as the European Commission, which already ensures compliance with competition rules, would be best placed to determine on a case-by-case basis whether a platform has a gatekeeper role and whether proportionate action would strengthen competition. The authority would need to perform the following steps. First, the platform must be shown to have a gatekeeper role. The authority must then establish whether the platform is obstructing competition, for example by providing insufficient access under reasonable conditions to essential data or services that are needed in order to compete. If this is the case, measures can be imposed to force the platform to share certain data or ensure consumers are shown products or services in a non-discriminatory order, thus removing the obstacle. It is important that use of this competence is sufficiently clear to give businesses legal certainty.

How and under what conditions the authority can use this competence to promote competition varies from one market or platform to another. It depends mainly on the nature of the obstacle restricting competition. Gatekeeper platforms may for example have access to certain data, such as specific consumer preferences, which other businesses need in order to compete, thereby making use of the platform unavoidable. In such cases the authority could force the platform to share the data in question with the businesses that require it under reasonable conditions. A gatekeeper platform can also obstruct competition by integrating its own services with each other far more closely than with third-party services, thereby leveraging its market dominance and limiting other services' opportunities. If this is the case, sharing data will not solve the problem. Instead, the authority could compel the platform to offers users an active choice between its own services and third-party services. An example of this is the option Google

is going to start actively offering Android users to install browsers or search engines other than its own.

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Furthermore, it is important that a new competence of this kind is introduced at least at the European level in light of the cross-border nature of the internet as a whole and of the services offered by gatekeeper platforms. At the end of this letter I will set out in more detail how I aim to achieve this in the future. If this competence were introduced at national level only, it could negate the advantages of the digital single market and make it impossible to take effective action against the most dominant platforms with a gatekeeper role. In addition to a European competence, implementation at the national level could have added value for dealing with platforms that have a gatekeeper role primarily or exclusively in the Netherlands.

This new competence would allow authorities to regulate dominant platforms *ex ante*, in addition to existing competition law. *Ex post* enforcement is intended to address specific practices by a business that is abusing its dominant position or is involved in a cartel. It is not concerned with combating 'organically achieved' market dominance. However, given that, as mentioned above, it is unclear to what extent market dominance is temporary or permanent, I believe it is necessary to be able to take *ex ante* measures. The rules I propose for platforms with a gatekeeper role would ensure that action can be taken against specific platforms without practices having occurred that constitute an abuse within its strict meaning in competition law. After all, even when no abuse has occurred, a situation can arise in which consumers and businesses are no longer able to avoid certain platforms and competition is restricted. In such situations intervening preventively can strengthen competition.

Future-proofing supervision of compliance with competition law

Even if specific rules for gatekeeper platforms are introduced, *ex post* enforcement will continue to play an important role. That is why it is essential that enforcement is done effectively in the digital economy. At the European level, in order to ensure the proper and consistent application of competition law, I will advocate the amendment of the relevant guidelines. I will also press for changes to the European thresholds for reporting mergers.

Cartel prohibition and prohibition on abuse of a dominant position

The TFEU articles and sections of the Dutch Competition Act that prohibit cartels and abuse of a dominant position are sufficiently flexible to be applied to the reality of digital markets and the technologies used. The application of the existing framework and tools does however need to be geared to digital markets further. For example, the methods traditionally used by competition authorities to define markets or demonstrate abuse tend to be based on the price consumers pay. In the case of platforms, consumers often do not pay a monetary price but 'pay' with their personal details or attention. Data and network effects also play a key role in platform markets, but are not yet taken into account in the traditional competition analysis methods. On top of this, situations that are without precedent occur more

often in the digital domain, which means that competition cases take longer.⁸ At the same time, the fact that the largest platforms are active on many markets, the network effects discussed above and the highly dynamic nature of digital markets mean that restrictions of competition can have major and permanent consequences. That is why fast and effective enforcement is key. For these reasons the manner in which competition law is applied to the digital economy needs to be amended.

Competition law *ex post* consists of the cartel ban and the ban on abuse of a dominant position. The cartel ban in article 6 of the Dutch Competition Act prohibits agreements between companies that would lead to them jointly behaving as a monopolist. The ban on abuse of dominance in article 24 of the Dutch Competition Act stipulates that a company with a dominant market position may not abuse that position by exploiting consumers (e.g. by setting too high a price or other unfair conditions) or by excluding competitors in order to maintain its dominant position.⁹

These provisions of the Dutch Competition Act are based on the corresponding provisions (articles 101 and 102 respectively) of the Treaty on the Functioning of the European Union (TFEU). European and national competition law are closely linked in order to prevent differences in the implementation of competition law between member states. European guidelines set out the application of competition law in more detail. These documents are not legally binding, but in practice often set the standard for enforcement at the European and national level because they provide an explanation of EU primary law. The ACM uses these guidelines in applying the Dutch Competition Act.

The widely held view emerging from the analysis, consultation and talks is that the European and national competition rules banning cartels and the abuse of dominance are sufficiently flexible to allow action to be taken against practices that restrict competition in the digital economy. The rules are functional and therefore defined in a very broad, flexible and technology-neutral manner. The fact that these rules also apply to digital markets is apparent from a number of recent European Commission cases.¹⁰ I therefore see no reason to pursue the amendment of the Treaty articles or sections of the Dutch Competition Act that prohibit cartels and the abuse of dominance.

The main challenge lies in how the rules should be applied. The guidelines on the application of the competition rules play a key part in this, but were drawn up with the traditional economy in mind. This is illustrated by the fact that the competition rules do not preclude taking the role of data into account in competition analyses,

⁸ This is partly because the analysis takes longer, but also because parties are more likely to appeal if a decision cannot be based on precedent.

⁹ This means that the company can to a large extent act independently of other economic operators, for example because there is no other supplier from whom consumers can buy a product if they believe the price is too high or the quality too poor.

¹⁰ E.g. in *Android* (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099). The appeal in this case is still ongoing.

but the guidelines explaining the rules do not currently detail how this can be done.

To ensure fast and effective enforcement, it is important that the European Commission's guidelines apply to the realities of online markets. That is why I believe the guidelines must be amended or guidelines must be issued, geared specifically to the digital economy.¹¹ The new or amended documents could for instance outline methods for defining multi-sided markets or markets in which consumers do not pay a monetary price. They could also suggest a way of taking into account the interconnected nature of services offered by a single platform when determining competitive effects. The Commission could also consider laying down in the guidance documents in what way abuse of market dominance can be determined based on parameters other than price, such as privacy or data. A recent decision by the Bundeskartellamt,¹² which ruled that Facebook was abusing its dominant position on the grounds of the data the company collects, could be included in these considerations. This is what I will be lobbying for within the EU. After the European elections a new European Commission will take office, with which I will discuss this matter.

Because the ACM – like other national competition authorities – bases its decisions on European rules and guidelines,¹³ these changes will also affect supervision in the Netherlands and in other EU member states. Amending the guidelines can prevent fragmentation in the application of the competition rules, thus giving businesses that want to operate in multiple member states sufficient legal certainty and ensuring that consumers throughout the EU are protected to the same extent against exploitation by large platforms. It is also more efficient to invest in developing new methods at the EU level. Lastly, recommendations on how to apply competition law in the digital economy could reduce the duration of competition law cases.

Merger control

The rules on merger control in the EU are set out in the EC Merger Regulation and, at the national level, in articles 26 to 49 of the Dutch Competition Act.¹⁴ Businesses that are planning to merge must report this to the competition authority if they exceed the turnover-based reporting threshold. In traditional markets, if the turnover is low the risk of a concentration having significant competitive effects tends to be limited. However, in the digital economy such turnover-based reporting thresholds are not always suitable. This was also mentioned frequently in the responses to the consultation and the talks with experts. As set out in the discussion paper and the policy brief published by the

¹¹ E.g. the guidance document on the definition of markets (OJ C 372, 9.12.1997) or that on the application of articles 101 (OJ C 101/97, 27.4.2004) and 102 (OJ C45/7, 24.2.2009) of the TFEU, or the various communications in which the implementation of the Merger Regulation is explained (see <http://ec.europa.eu/competition/mergers/legislation/legislation.html>).

¹² See footnote 7.

¹³ Or other communications such as recommendations and regulations that explain how the rules should be applied.

¹⁴ Council Regulation (EC) no. 139/2004.

Netherlands Bureau for Economic Policy Analysis (CPB),¹⁵ platform acquisitions can be intended to gain access to an important data set or to eliminate a potential future competitor. This means takeovers of relatively small, innovative start-ups whose turnover is too low to exceed the reporting threshold can still significantly restrict competition and, by extension, innovation.

We need to avoid a situation where concentrations that may in fact restrict competition do not appear on competition authorities' radar. That is why I advocate adapting the thresholds for merger control in Europe, for example by taking into account the transaction value, so that competition authorities can identify all relevant concentrations. If a platform is willing to pay a large amount of money for a business that generates hardly any turnover, this may be an indication that the business' data is valuable or that it poses a potential future threat to the platform's market dominance.

The competition authority investigates each merger that exceeds the reporting thresholds and may block a merger if it is likely to significantly restrict competition in the market in question. The approval of a merger may also be subject to remedies, such as divesting part of the business if this would remove concerns about reduced competition. It is up to the parties to the merger to propose a remedy.

Guidelines detail what competition authorities should take into account when investigating a merger. The principles tend to be based on the market share and turnover of the parties to the merger. For merger control in the digital economy other factors are relevant too, such as the businesses' data. The competition authorities will also have to assess more often whether a small business being taken over by a large platform could at some later stage achieve a major market position. For example, if a dominant platform is systematically taking over fast-growing start-ups with a lot of potential, this may be an indication that these takeovers are intended to eliminate future rivals. In order to ensure that competition authorities consistently take these factors into account, I will lobby at European level for the guidelines on this issue to be amended by the new European Commission.

Position of competition authorities

It is particularly important for competition authorities to develop sufficient knowledge and expertise about new technologies and business models and their effects on competition analyses in order to continue enforcing the rules in the relevant markets. A lot is already being invested in this. The ACM has for example, as announced in the coalition agreement, set up a special digital competition team. It has already handled investigations, cases and market studies relating to online video streaming platforms, the value of data in the competitive

¹⁵ <https://www.cpb.nl/publicatie/digitalisering-r-en-d>. This policy brief says the following on concentrations in the digital economy: 'In the past there have been cases of large companies taking over competitors who posed a potential threat, e.g. Facebook's takeovers of Instagram and WhatsApp. Cunningham, Ederer and Ma [in their paper *Killer Acquisitions*] show that in particular businesses with a dominant market position have an incentive to take over future competitors and terminate their innovative projects.'

process, new revenue models in the media, platforms for legal services, the use of algorithms, and app stores. In addition to specialised lawyers and economists, data scientists are now also involved in ACM investigations.¹⁶ The European Commission has imposed fines for breaches of competition rules in various cases involving large platforms,¹⁷ set up a monitoring centre for platforms, made up of experts who support the Commission's policymaking on platforms,¹⁸ and held a conference,¹⁹ as well as appointing several competition experts²⁰ to advise on how to continue implementing competition policy in a changing economy.

Next steps

Within the EU I will advocate that in specific situations, at least at European level, it must be possible to lay down proportional rules beforehand for gatekeeper platforms in order to improve competition opportunities. The competence to do so can best be assigned to an independent authority, so that it can be determined on a case-by-case basis whether the platform has a gatekeeper role and whether more openness is required. I will also press for the guidelines to be amended in order to gear the implementation of competition law to the digital economy. Lastly, I want the European thresholds for reporting mergers to be adjusted, so that digital platforms are no longer able to avoid merger control.

The Netherlands cannot achieve these changes on its own. First and foremost, the new European Commission will have to play a key role in realising these ambitions, since it has the ability to ensure that globally operating platforms shoulder their responsibility. The support of other member states is also relevant. I am in talks with various member states about this matter. After all, several member states have similar concerns about the market dominance of the largest platforms. I will therefore continue to actively share my findings with other member states and keep talking to them in order to ensure their support for the changes I have proposed and to explore how they – as well as the European Commission – can be included in developing these proposals further. I see the appointment of the new European Commission as an appropriate time to propose these changes.

The measures set out above are intended to ensure that competition is protected in the digital economy too, so that consumers and businesses maintain their autonomy and freedom of choice and can thereby benefit to the full from the opportunities offered by the platform economy.

¹⁶ <https://www.acm.nl/en/publications/acm-complete-market-study-mobile-app-stores-april>.

¹⁷ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39530;
http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8788.

¹⁸ <https://ec.europa.eu/digital-single-market/en/expert-group-eu-observatory-online-platform-economy>.

¹⁹ <http://ec.europa.eu/competition/scp19/>.

²⁰ https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/commission-appoints-professors-heike-schweitzer-jacques-cramer-and-assistant-professor-yves_en.