CNNum

Conseil National du Numérique

Platform
Neutrality

**Building an open
and sustainable
digital environment**

MAY 2014

Opinion no. 2014-2

of the French Digital Council on platform neutrality

Introduction

In a letter dated 3 July 2013, the Minister for the Economy and Finance, the Minister for Industrial Renewal and the Minister Delegate in charge of Small and Medium-sized Enterprises, Innovation and the Digital Economy asked the French Digital Council (CNNum) to take forward its work on platform neutrality and conduct consultations on the commitments submitted by Google to the European Commission in response to the ongoing antitrust procedure.

A working group of ten CNNum members held four workshops between July and November 2013 to discuss both matters. They were assisted by third parties invited to join the discussion and contribute to the CNNum's work due to their knowledge and their interest in the issues raised. At the same time, a series of meetings was held to garner feedback from economists, legal experts and members of the Internet community. This opinion and supporting documents are the end results of these highly rewarding sessions which drew considerably from the diverse cross-section of over 100 stakeholders who took part, including government officials, representatives of major Internet platforms, claimants involved in the Google antitrust procedure, business federations, entrepreneurs, lawyers, researchers, etc.

Today, the Council issues its opinion on platform neutrality to provide the government with guidance in its decision-making. It is based on the work of the CNNum Working Group on Platform Neutrality headed by Francis Jutand, and assisted by the Chairman Benoît Thieulin and other CNNum members[1].

The CNNum's recommendations propose several courses of action over different timelines. In the short term, it recommends ensuring that the neutrality principle is effectively implemented through the use of the existing legal resources as well as the specific momentum of the digital environment. In the medium term, we should ensure that the data system is properly organised and regulated. And in the long term, we should take steps to safeguard France's competitiveness and sovereignty by equipping ourselves with the necessary skills, knowledge, creative and innovative talent and capacity to test new technologies.

The CNNum 's task is not to make decisions on behalf of the competent authorities or interfere in business matters. Its mission and the purpose of this opinion are to play a full and active role in issuing recommendations on how to maintain equitable conditions for platform ecosystems. Consequently, the CNNum decided to take into account concerns

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[1] Serge Abiteboul, Nathalie Andrieux, Pascal Daloz, Nathalie Pujo, Lara Rouyrès, Nathalie Sonnac, Marc Tessier; Jean-Baptiste Soufron, Secretary General, Yann Bonnet, General Rapporteur, Judith Herzog, Assistant Rapporteur, and Charly Berthet, Assistant Rapporteur assisted by the entire General Secretariat.

about Google into its overall assessment of platform neutrality. Four priority actions have been identified to uphold this principle of neutrality. In the CNNum's opinion, these actions are key to ensuring the sustainability of the digital growth model for both society and the economy.

In addition to these recommendations, the CNNum publishes a series of fact sheets offering a more in-depth analysis of certain suggestions that were made during the meetings and workshops held, both from participants and CNNum's members. A report written by Olivier Le Gall, auditor from the General Inspectorate of Finance, and based on the work carried out by the CNNum as well as on numerous interviews and meetings, is also available along with the minutes of the working group consultations.

Opinion no. 2014-2 of the French Digital Council

Being understood,

In its first opinion (no. 2013-1-), the CNNum affirmed that net neutrality was indispensable for guaranteeing freedom of communication and free enterprise in the 21st century. The communication networks open to the public are infrastructures that play a vital role in ensuring a non-discriminatory approach to the data transferred, enabling every citizen to either contribute or consume on the network as they see fit.

In the same opinion, the CNNum also noted that digital society does not only consist of the actual networks but also of access and communication services in which platforms play a central role.

By pairing supply and demand, platforms help to boost trade and therefore economic activity levels. Most of them base their models on a mass user function, which helps to team product or service offerings with potential buyers. Apple, Amazon, Expedia, Facebook, Google, Microsoft, Netflix, Twitter and Yahoo! all act as online intermediaries and provide valuable tools which can lead to the creation of new business lines and value chains. They promote innovation either directly or indirectly by investing their earnings to fund or buy innovative start-ups.

Platforms are also used by private individuals to interact socially with their peers. Opportunities abound as these social uses grow, become more sophisticated and are sometimes enhanced as the digital society flourishes. These social uses include the exchange of goods and services, information and knowledge sharing, garnering support for a particular project, collaborative work on creative projects, debating with and questioning decision-makers, etc.

Compared to the communication networks, service platforms have followed a different development path, foregoing completely the national monopoly stage: the low level of initial investment required has made it possible to quickly build up dominant platforms on user functions that fully harness the network effect. As long as they continue to go unchallenged by either the political community or by other industry players, their powerful position will be maintained.

Based on the power that they hold, and given they act as catalysts for innovation and drive social interaction in today's digitial society, the CNNum believes that these platforms have a vital role to play in ensuring that the principle of net neutrality is effectively upheld.

By acting as intermediaries, not only do these platforms bring their customers together, but they sometimes come between or compete with them. The position of intermediary offers a significant competitive advantage: it enables them to gather a large amount of data on the relationship between market buyers and sellers and use it to build a detailed picture of consumption and user habits. This can become an issue if, over time, the platforms' business customers become dependent on the platform.

Platforms are now initiating the third phase of their development: after creating value by attracting users with access services (i.e. search engines, offers, emailing or video services, etc.), they monetized their activities with advertisement and paid services giving their clients high visibility (i.e. SEO, media space, etc.), and then started to develop services competing with these clients. This third phase of development is now the source of protests, complaints and other public policy measures as seen recently in the mass retail and telecoms sectors or in the European Commission's recent Google investigation.

These situations ask bigger questions about applying general business principles to the digital economy. The speed at which the digital environment is changing is encouraging the emergence of dominant global players which become pivotal for all consumer-centric sectors of the economy as buyers turn increasingly to the Internet. Consequently, it is very difficult to apply the normal rules of business practices.

Certain platforms have managed to stand out from competitors through sector diversification and by maintaining control over each point in their user access channels, i.e. Internet browsers, logistics, operating systems, terminals and other connected devices, etc. This growth model requires considerable resources, which few platforms can boast. Consequently, the trend has been towards the development of a handful of large platforms operating on separate data silos and aiming for self-sufficiency. For their users and partners, there is a risk of collateral damage as a result of the competition between large platforms, particularly in terms of increased lock-in effects.

Several platforms have adopted a growth model based on placing themselves at the core of genuine ecosystems that they have built themselves. To achieve this goal, they make open tools available for other players to develop their own innovative products or services. These tools include Application Programming Interfaces (APIs), development kits, open source software, etc. However, a platform's business valuation strategy may involve changes to the parameters for accessing its market (e.g. general and technical conditions, algorithms, APIs, etc.) which in some cases are key to the survival of third-party companies in its ecosystem. When these changes are abrupt, discriminatory or opaque, they lead to legitimate concerns about the protection of users' interests and the maintenance of fair and reasonable conditions to encourage innovation.

Given the prescriptive role they play, many of these platforms shape and determine the way we access data. In doing so, they often combine usefulness with opaqueness. For example, they do not always make it easy to determine whether the results are advertising, a generic algorithmic selection, a customisation or a preference for the host platform's offering. It is therefore imperative that their ranking and content management systems are fully transparent and easily understood.

The strength of these platforms lies in their ability to create great value from the data retrieved from users. Any use of this data must be governed by the platform's duty of loyalty towards its customers. This is a requirement to ensure that users' data rights are respected, and that they maintain sole control over the repercussions resulting from the use thereof. It is also a prerequisite to ensure that users themselves benefit from the use of their data. However, recent events have illustrated that current practices do not make it possible to reach these goals.

All of these considerations are key to ensure the sustainability of the digital society and economy. They call for the pursuit of a higher goal other than the straightforward application of the rules of proper market conduct.

The goals behind the neutrality principle should also be factored into the development of digital platforms: while extremely useful and innovative, their growth must not be allowed to hamper the use of Internet as a forum for creation, free expression and the exchange of ideas.

It is equally important to ensure that national and European decision-makers are actively involved in the long term. The transformations that are taking place due to the digital revolution are part of societal change on a global scale: innovation cycles are growing shorter, breakthrough models for creating value are springing up, questions are being raised as to the future form of employment or what the best governance methods are, etc. We will need to constantly adapt to keep pace with a rapidly-changing environment. This need must be an integral part of any digital transition strategies.

To this end, platform neutrality can be viewed from two angles: the traditional defensive angle designed to protect liberties, including freedom of expression, free trade, free access to data and content and free competition; or the offensive angle aimed at developing user power in the long term, promoting economic and social progress, creating the right conditions for a multitude of user types and encouraging innovation. This neutrality approach contributes to sovereignty in the broadest sense, i.e. the ability to act and make decisions. The CNNum recommends that France and the European Union should maintain and bolster their ability in these areas when taking part in international negotiations on neutrality.

Based on these considerations, the CNNum has drawn up four sets of recommendations deemed as priority areas to ensure that the upholding of the principle of neutrality by and within platform ecosystems. These recommendations form an integral part of the position that France should adopt within the European Union to ensure that they are treated as priority areas by the next European Commission team. They target various groups, including lawmakers, public decision-makers, civil society, ecosystems, etc. The CNNum is willing to provide assistance in implementing these recommendations if so required.

Having regard to these considerations, the Council recommends to:

Part I. Bolster the effectiveness of law in relation to digital platforms

Digital platforms are not lawless areas. They have *de facto* power to influence relations between users and providers of goods and services owing to their role as intermediaries and the position they occupy in the digital sector. Many issues raised by this state of affairs can be addressed by making the best use of current law (consumer, business, competition, data, etc.) and by moving case law forward. Specific features mean that law has to be tailored to fit the platforms' own ecosystems. These include economies of scale with global reach, the multimodal complexity of digital channels, platforms' fast and ongoing development, their highly technical nature and new issues regarding ownership of data and digital footprints.

Recommendation 1 **– Make better use of current law provisions whilst curbing legal and economic uncertainty**

- Match interventions and penalties to the speed at which the market is developing and to the extent of the damage/loss. In particular, factor in the consequences of timelines, the complex nature of proceedings and any time-wasting tactics.

- Ensure that regulatory and legal authorities, advisory committees and other support institutions work together to cash in on skills and expertise already in place.

- Provide for comprehensive information on the provisions and rights of action in platform-user or platform-partner relations. Set up a suitable information and advice helpdesk to disseminate this information and promote current tools.

Recommendation 2 **– Use rating agencies to gauge neutrality levels**

- Establish neutrality rating agencies to shed light on how platforms operate and help users and partners with their choices. Give them investigative and monitoring powers so that they can build effective indicators. These agencies could be public, private, non-profit, crowdsourced or based on civil society initiatives.

- To this end, introduce scalable criteria to reflect technological advances, economic shifts and changing uses. Bring stakeholders together to measure API stability, the

understandability of terms of use, interoperability, transferability and appropriate use of data.

- The aim of these agencies will be to redefine the balance between power using crowd momentum and the effects of reputation. They could use digital tool capabilities to marshal stakeholders around this strategy.

- Neutrality agencies should have to capacity to involve platforms and stakeholders in listing best practices and coming up with workable compromises.

- This neutrality rating results could be provided to private and public-sector investors to inform their choices, and to business owners to help with strategic decision-making. They could also be added to public procurement criteria to highlight neutrality in projects backed by France and the EU.

Recommendation 3 **– Get transparency guarantees from platforms and make them vailable to their users and partners**

- Introduce minimum information requirements in terms of prices, terms of use, rights of action and conciliation arrangements.

- To ensure users' rights are better respected, also lay down requirements for clarity, understandability, user-friendliness and access to legal recourse in relations with the platform.

- Establish guidelines on transparency in the way services (in particular algorithms) operate. Users need to be able to make a clear distinction between advertising and information; they also need to know when a platform personalises, promotes or demotes certain results.

Recommendation 4 **– Get guarantees that platforms' models are sustainable**

- Bring in ecosystem stability rules, such as minimum prior notice periods, to avoid overly abrupt changes to, for example, parameters which are decisive for third-party businesses (e.g. sudden change of terms of use or API).

Part II – Ensure data system fairness

Data has many and varied sources. It may originate from individuals, groups or machines in a private or public environment, geared towards market or non-market wealth generation. It is increasingly processed, stored, exchanged and aggregated, and has become a critical input and a key driver for the new economy, enabling new value chains to be established.

Platforms benefit from collecting this readymade and easily-accessible commodity together with an increasing stream of personal data and digital footprints. These represent yield value that grows with user traffic and the widening of the catchment area.

The very nature of data is currently being debated. Is it an unsaleable asset, a common asset, private transferable property, or a right of use or usage? There are also many ethical and economic issues, as well as issues concerning the enforcement of fundamental freedoms. **This new economic and social landscape has to be organised, in compliance with core values to guarantee sustainable development.**

Recommendation 5 **– Introduce a general obligation of fair usage of all data that goes beyond the single notion of final use**

- Require fairness for all data retrieval and processing methods, for ways of obtaining consent and information provided in this respect.

- Provide users and partners with the means of verifying compliance with the commitments made.

Recommendation 6 **– Give users full control over the data concerning their online activities and over the implications of the use of this data**

- Introduce expiry dates for consent given for data retrieval and the use of specific data so that this control can be exercised over time.

- Provide unambiguous and regularly updated information on the secondary use of data, especially for "profiled" information that may have repercussions for users even if it does not directly identify them.

- Pilot oversight and control rights for users as well as the right to use their personal information.

- Heighten transparency on data broker markets by anonymously listing the reselling of data and by making this information available to users.

Recommendation 7 **– Foster data fluidity**

- Introduce data transferability and interoperability to ensure that it can be used freely and for a number of purposes, buttress innovation and safeguard users' freedom of choice.

- Establish categories for data, processing and general or public interest services for which platforms could have particular obligations. These could include greater openness, especially as regards public health, security and digital heritage.

Recommendation 8 **– Going beyond personal data, move discussions on the legal framework for digital footprints and the creation of derived data forward**

- Map out their legal status and how they could be used, in particular the principles governing web traffic data, trend data, etc.

- Examine their effect on value creation, new business models and innovation ecosystems.

The example of Google

Provide a more overall response to concerns about distortion of competition and data system fairness

With its influence and weight, Google is now at the same time an example, a partner and a threat to intermediation chain businesses. The recommendations set out in this Part apply to all digital platforms which use their intermediary status to control relations between both sides of the market.

Google is a thriving business with great capacity for innovation. It has become a global player through the success of its search engine and thanks to its highly effective business model. It is now diversifying into numerous economic sectors: digital technology (content, email, OSs, mobile terminals, communication networks), flow control (advertising, listing), business intermediation (travel, insurance, services), sector-based services (Google maps, urban living, automobile, home automation), etc. Google has a vital role to play in the future developments of the digital society owing to its scientific, technical and industrial reach and its economic and entrepreneurial drive.

The antitrust investigations against Google both in Europe and elsewhere highlight how difficult it is to transpose old legal provisions to the ecosystem features of platforms.

Having been mandated, in part, to examine Google's market practices, the French Digital Council has chosen to include these concerns in its overall assessment of platform neutrality. The Council suggests to clearly identify the economic drivers of Google's success, pinpointing the regulation measures needed to channel its momentum to ensure that it remains committed to innovation and upholding freedoms and, lastly, stepping up detection of its abusive practices.

We have to work with Google to ensure that it complies with the concepts of neutrality and fairness. Its forward-looking strategy should encourage us to have lofty ambitions by moving into sectors such as augmented reality, Internet of Things, autonomous vehicles, information systems, Big Data or artificial intelligence.

All the recommendations are based on these concerns which call for a broader and more long-term strategy than the limited scope of the antitrust investigation conducted by the European Commission.

Recommendation 9 – **Justify the heightened transparency and information requirements by considering that platforms play a prescriptive role**

- Ensure the transparency of the various ranking and content management systems, particularly those that specifically ignore certain content and information and promote others in high-prominence spaces.

- List best practices and lay down guidelines for the main search engines enabling users to easily determine whether the results are advertising, a genetic algorithm selection, customised adaptation or a preference for the host platform's offering.

- Make sure that partners of the main search engines or listing stakeholders are aware of the reasons for a delisting, loss of access or worsening of API access conditions, and are forewarned of new or changing prices.

Recommendation 10 – **Better understand the behaviour of dominant platforms and the power balance that exists between them and their users and partners**

- Maintain fairness in customer relations by ensuring that choices made in the display of search results are backed by legitimate concerns (quality, customisation, etc.) that can be verified by third parties.

- Learn from the relationships between large retailers and producers in order to grasp the "strong to weak" component of intermediation, and to better handle competition scenarios between the platforms and some of their users.

- Proactively adjust the concepts of "dominant position" and "essential facility" to include new forms of dominance with respect to third-party access to their customers, by means of intermediation strategies, the introduction of silos, the creation of a reference ecosystem for partners, and the accumulation of data and unreproducible information about user preferences and the market.

- As commercial links take precedence over search results, ensure that selection mechanisms do not trigger a prohibitive increase in access costs for consumers, reflected in higher prices or, over time, lower quality and less diversity of overall choice and information conditions.

Part III – Invest significantly in skills and knowledge to bolster competitiveness

The digital revolution is deeply changing society, and global platforms are becoming significant sources for the creation of wealth, but also for normative, economic, societal and individual creative efforts. The expression "code is law" rings particularly true given the current situation, in which a handful of competing environments seek long-term dominant positions through self-sufficiency and complete control of their ecosystems.

To fully be a part of the platform economy, it is critical to acquire and develop **skills** and **knowledge** in the areas of forecasting, research, expertise and consulting, and to field multidisciplinary teams (*French Digital Council Opinion no. 2013-3 on Taxation of the Digital Economy*). To allow the wider society to benefit from these efforts, they should be accompanied by an ambitious digital literacy policy aimed at both individuals and organisations.

Recommendation 11 **– Develop our knowledge and understanding of the digital world in support of a strategic approach**

- Set up a long-range, future-oriented research programme to investigate the digital transition and its impact on economic, social and cultural spheres. Specifically, the idea is to better anticipate issues that may arise in sectors making the digital transition.

- Using government or public-private partnership funding, carry out studies, strategic initiatives and consulting efforts on how economic and legal changes and opportunities may benefit the European ecosystem.

- Encourage multidisciplinary research into the cognitive, social and human impacts of the digital revolution, in order to better identify loci of change and means of response.

- Introduce a specific research programme on modelling the legal and economic regulation of the complex and protean chains of digital intermediation, and the forms of creation and redistribution of data-centric value.

Recommendation 12 **– Use this knowledge to develop digital literacy for individuals, businesses and the wider community**

- Help businesses, government departments and other organizations assimilate the digital shift. In particular, encourage and support initiatives that allow users to have greater control over their digital environment and set the conditions of how they access information.

- Inform citizens about how platforms operate by explaining, via various digital literacy resources, the technical principles that govern platforms' basic functions. Provide an array of tools to allow the general public to have hands-on experience.

- In order to encourage take-up by civil society, organise high-quality public discussions on the role of platforms, their technical and economic specificities and their implications.

Part IV - Set the right conditions to allow alternatives to emerge

The European Union counts 500 million inhabitants; it is a powerful region that can call on a wide range of knowledge, cultures and skills. These are powerhouse for the digital future. To avoid being relegated to mere consumption zones of digital solutions and content, both France and the EU must develop a strategy that will protect their social and individual values, and that will act as a springboard for the development of digital economic actors. Sovereignty – understood here as the ability to choose a development model with respect to the digital world – means giving oneself the resources to make such a choice.

A positive and active stance should not be based solely on restricting behaviour with respect to telecoms and platform operators. It should also involve public decision-making, based on a proactive and efficient approach aimed at addressing the platform economy and restoring a balanced relationships between platforms, governments and users.

To this end, the Council believes that maintaining an open digital environment calls for a positive and active approach with respect to neutrality, understood here as an imperative to maintain a propitious environment for both innovation and progress. The goal is to avoid stifling the system under the oligopolisation by multinationals, whose influence equals or surpasses that of a State, but whose interests do not necessarily encompass the general interest. The ecosystem of digital stakeholders and their environment must remain open to debate, innovative, competitive and proactive. This challenge is all the greater given the speed at which the sector is changing, and the fact that new dominant players emerge on a regular basis. This makes regulatory measures difficult in the short term.

Therefore, it is critical that we have the resources to be creative and powerful actors in the platform economy and in digital innovation ecosystems in every sector of activity. Our industrial strategies must complement Internet-based creativity, expression and exchange, and must support the digital transition in all sectors. The global impact of the digital world and dominant platforms will be felt in economic and social life, but also in the cultural and private spheres. We must ensure we have the resources to uphold sovereignty, i.e. the ability to choose and to act to preserve multifaceted points of view at a global level.

*Recommendation 13 – **Promote an open digital development model***

- Ensure the survival of diversity in creation and innovation ecosystems by allowing the development of neutral, open platforms. For these projects, make value creation a prerequisite for financing eligibility (ahead of the monetisation of services).

- Encourage the introduction of new technical solutions and open standards. Use the potential of open data – heightened cooperation, wider audiences and greater ability to build on various contributions – to drive innovation.

- Provide active support for initiatives involving alternative business models. For example, cross-platform solutions that facilitate concurrent use of competing and complementary services, or those that result in diversified value chains between services and users, and the development of new applications in the social economy.

- Actively support stakeholder initiatives upstream of the value chain aimed at restoring direct connections between businesses and their customers, particularly through the introduction of vertical platforms based on sector-specific skills. This is particularly true for stakeholders from fragmented sectors. In addition to sector-specific approaches, support local initiatives that draw on the assets of economic catchment areas.

Recommendation 14 – **Build a sustainable digital society by promoting European values internationally**

- **Provide fair taxation conditions to ensure that everyone contributes to these collective development efforts** (*French Digital Council Opinion no. 2013-3 on Taxation of the Digital Economy*)

- **Uphold European and national values in contractual agreements between platforms and their partners through the principle of using the highest local standard of protection**. This is accomplished, for example, by ensuring that the citizens of a given country are not less well treated on international platforms than on local alternatives.

- **Maintain plurality of opinion and cultural diversity at all levels**

  ○ **Promote the European concept of net neutrality among international governance bodies and play an active role in fora where the standards and protocols of tomorrow are being written** (*French Digital Council Opinion no. 2014-1 on the Digital Chapter of the Transatlantic Trade and Investment Partnership*)

  ○ Define guiding principles for standardisation procedures so that future technological standards, critical to the digital world are consistent with the principle of net neutrality. In particular, anticipate any detrimental pre-emption effects in such areas as mobile applications, the Internet of things, smart cities, education, healthcare, etc.

  ○ Ensure that international discussions of digital governance include issues of data of all types.

  ○ Play an active role in drafting a legal framework that maintains a balance between collective security and the safeguarding of fundamental freedoms. Encourage the adoption of international standards via international bodies.

All of the above recommendations should be taken up by the European Commission when defining future priorities and in upcoming discussions on the reform of global digital governance. It is up to the ecosystem stakeholders to make use of them to structure their response to these challenges. The French Digital Council is prepared to help these stakeholders identify the competent bodies, roll out their recommendations and implement these courses of action.

Fact sheets

The French Digital Council has supplemented its opinion with several suggestions for further consideration based on its recommendations on net neutrality. These have been incorporated into 3 fact sheets designed to clarify its opinion, but without taking its place. These fact sheets cover the main conceptual topics that emerged from the group's work and the consultations.

The fact sheets are part of the French Digital Council's working methodology based on an open and educational approach.

Contents:

Introduction

In July 2013, **the French Digital Council** was asked by the Minister for the Economy and Finance, the Minister for Industrial Renewal and the Minister Delegate for Innovation, Small and Medium-sized Enterprises and the Digital Economy to hold consultations about the commitments that Google made to the European Commission and to further its ongoing investigation into the application of the principle of net neutrality.

The context for this consultation was the initiation of antitrust proceedings against Google around the world, and, more particularly, in the United States and Europe, as well as growing concerns about global intermediation platforms' compliance with the principles of privacy, taxation and competition.

The issues for governments: enforce net neutrality on such platforms by building a consistent legal framework, in view of the transversal nature of digital technology; acquire the conceptual and economic resources to deal with the dynamics in play.

Proposed definition of neutrality

Net neutrality is based on the principle of non-discriminatory handling of information flowing through infrastructures. It aims to protect innovation, freedom of speech and equal access to all of the information and services available.

Net neutrality enforcement for platforms must do more than just protect consumers' well-being. It must also protect the well-being of citizens by ensuring that the Internet's role as a catalyst for innovation, creation, expression and exchange is not undermined by development strategies that close it off.

It takes the form of:

- **Transparency and equity in collecting, processing and retrieving information**
- **Non-discrimination between forms of expression and shared content**
- **Non monopolisation of Information production means**
- **Non-discrimination in the economic terms for access to platforms**
- **Non-discrimination in the technical compatibility or interoperability requirements with platforms**

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Legal resources for neutrality

Free competition has given rise to many historic standards. As the digital economy develops, these standards are mainly expressed in competition law, business law, consumer law and data law. After consulting with the stakeholders, the Council recommends **using these resources** and the existing regulatory tools. But it also recommends **adapting the framework and the procedures** to the specific dynamics of digital technology and to the new legal area of Internet platforms.

a) Distinguish between economic rents from innovation and those that are unmerited

The major platforms raise the usual concerns in competition economics: abuse of a dominant market position, predatory behaviour, vertical restraint of trade, etc.

These concerns are more acute in the ecosystem of such platforms, where they are exacerbated by a swift and tendency toward the formation of oligopolies, in view of the network effects that are inherent in a social phenomenon.

This contrasts with the slower pace of existing supervisory tools, particularly in the case of after-the-fact supervision. The Internet's constant and rapid changes compound this slow pace with the structural difficulty of anticipating the formation of dominant market positions and the future trends in ecosystems. Before a player reaches critical mass, there is not much to monitor, but once a player does, it is often too late. It is very hard to analyse market dominance, since, in principle, the competition is "just a click away"[2].

By crowdsourcing their value creation, the platforms base the strength of their business model on the *crowd*. Even though users do not pay to use the platform services directly, they make a direct contribution to the platforms' value through their attention, their contributions of various content and the information they provide about themselves.

Regulators must not overlook the impact of these new value creation models. The doctrine used to manage market dominance will have to change to cope with these specific developments and to be able to distinguish economic rents that reward innovation from those that are unmerited.

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[2] This refers to the absence of insurmountable obstacles to prevent users from switching providers, or "churn".

Suggestions for further consideration

- **Adapting the notion of dominant market position** to use more than just the market share criterion in order to consider more generally the power to squeeze other players out of a market or to undermine innovation through control of key resources, critical access points, visibility, information, etc. The conceptual tools underpinning regulation will also need to consider the fact that, nowadays, a platform sometimes constitutes a market in itself. Some OECD experts recommend deeming that a digital economy company is dominant if no competitor has challenged its leadership in five years and it is profitable[3].

- **Adapting the concept of "essential facility" [4] to the age of digital technology and network effects**. An economic rent is legitimate if a dominant market position is won by merit. This is why innovative efforts should be encouraged. This is the argument for protecting such rents with intellectual property law, but it is also the argument for competition policies that involve restrictions on such protection at times. For this purpose, the theory of essential facilities is a good tool since it ensures equitable access to the resources owned by a player, if these resources are essential for entry to a market. But this concept has always been difficult to apply to resources that are not actual "*infrastructures*".

- **Clarifying compliance requirements for indirect payment models** with regard to competition rules: by considering subsidised free services and how platforms' business models based on two-sided markets work. The Council's consultations have shown that the main issue is not the opposition between models with free services and those with paid services. The real problem is to be able to detect harmful pricing practices, when there are no price signals to analyse, and to be able to present the economic terms of the relationship between platforms and their users with more transparency (*see Fact sheet 2 – Fairness and sustainability of the data system*).

- Acquiring measurement, testing and analysis skills to **facilitate the definition, detection and substantiation of abuses**, as well as the relevant investigation and handling of cases (commitments, rights of action, etc.)

- **Making all forms of discrimination against partners and users unlawful**, if it is not justified by the need to protect rights, ensure service quality or for other legitimate business reasons. Some of those consulted noted that it seems hard to ensure that a platform will not favour its own content[5], unless **hosting and publishing functions are segregated**. These observers feel that this is the only way to ensure users' freedom of choice and orderly competition in the long term.

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[3] OECD Report, "*The Digital Economy*", 2012.
[4] The notion of essential facility encompasses all hardware and software owned by a dominant company that cannot be easily reproduced and where access is essential for third parties to conduct their business on the market.
[5] For example, a general-purpose search engine or an app store that favours its own services or content.

- **Upholding the principle of equal access for partners that have become competitors** of essential platforms. This principle could be applied specifically to the availability of space and preferential listing services, as well as the economic terms for access.

b) Using trade law to overcome the limitations of competition rules

Unlike competition rules, commercial law is used to settle disputes between businesses and cases are heard in courts. With regard to platforms, trade rules do not rely on restrictive definitions of markets, proof of a dominant market position and the effect of anti-competitive behaviour on the market. Instead, they focus on the nature of the relationships between companies.

Lawmakers could consider relying on trade law and the body of rules dealing with "*restrictive trade practices*" [6], which are more elastic and could be adapted to the dynamics of platforms.

Suggestions for further consideration

- **Clarifying minimum *business ethics* rules for dealings between platforms and their partners**. The rules for exchanging information and data, listings, access to APIs and pricing should be specified. The participants in the French Digital Council's consultation expressed the need to make lists of lawful and unlawful clauses available to stakeholders.

- **Identifying, promoting and disseminating *best practices* with the help of stakeholders, by making the practices binding where appropriate**. Best practices could be updated periodically to incorporate significant changes. To regulate the use of exclusive contracts, the European Commission has provided guidelines that illustrate how the principles apply to individual cases[7].

- **Creating a European network of entities responsible for investigating trade practices** (like the French *Commission d'examen des pratiques commerciales*) with powers to subpoena market information equivalent to the powers of electronic communications and postal regulatory authorities.

c) Optimising use of consumer protection tools

Consumer law includes a wide range of tools designed to protect consumers against abuses arising from a lopsided balance of power *vis-à-vis* businesses in terms of information and economic resources. This law should be adapted to the specific workings of digital environments.

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[6] French law includes a set of rules on "restrictive trade practices", in Part IV of Book IV of the Commercial Code, as well as laws on unfair competition, based primarily on ordinary civil liability law. These two sets of laws are sometimes called "minor competition law," as opposed to "major competition law," which focuses on the effects of practices on the market. See the description on Wikipedia: http://fr.wikipedia.org/wiki/Droit_de_la_concurrence
[7] See Regulation 330/2010 of the European Commission and the related guidelines on requirements for vertical agreements to qualify for the block exemption.

Suggestions for further consideration

- **Drafting terms of use that are understandable and visible**: for example, with an effort to standardise the terms that are common to most services. At the very least, it would be helpful to work with industry professionals to draft best practices on information design and access to rights in dealings between users and platforms with the aim of improving user friendliness.

- **Improving the class action system to make it more effective in the digital environment**: the "*Hamon*" consumer act, which was adopted on 13 February 2014, gives France a new class action procedure. By uniting scattered interests, it aims to improve the balance of power in favour of consumers' exercise of their rights. But the Act is solely intended to provide monetary compensation for damages and only approved national consumer associations can bring suits before the courts. In this, it falls short of the European objective, which called for a scope of application that goes beyond competition and consumption to deal with personal data protection.

- **Clarifying the principles on governing law clauses that assign jurisdiction to foreign courts for disputes between platforms and users**, whether or not the users are deemed to be consumers. More generally, the consultation has shown that there is an urgent need for clarification of how international private law applies to the business of digital platforms.

d) Observing and highlighting best practices

The speed and unpredictability of changes in platforms' ecosystems make it difficult to apply normative rules and regulatory instruments. The drafting of best practices is an effective vector for a flexible legal framework that involves the players governed by it.

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Suggestions for further consideration

- **Establishing best practice and platform neutrality observation and rating networks**, that could focus on the sustainability of platforms' practices with regard to partners (developers, publishers, customers, users, etc.) and their fairness to web users. For example, these networks could rate:
  - constancy of API access conditions;
  - constancy, clarity and fairness of terms of service, particularly with regard to personal data;
  - portability and interoperability of the users' digital goods on a platform, or barriers erected to its removal;
  - disclosure of bias in ranking mechanisms;
  - compliance of the platform's own services to its relevance criteria for ranking results.

- **The observation networks could also be made responsible for analysing specific intermediation risks for different sectors, with due consideration of overall digital**

trends, such as the move toward connected objects in the future. In the longer term, we need to determine whether business dealings between platforms and users are a zero-sum game or, if they are not, who stands to gain.

- **These tasks could be "crowdsourced"**, relying on contributions from wide networks of observers to identify the best rating criteria and to highlight best practices. Many such initiatives are emerging. They should be highlighted and united.

In the United States, the FTC dropped its "silo" approach
in the exercise of its supervision of mergers and business concentrations
by reminding Facebook of its privacy obligations

When Facebook acquired Whatsapp, the Federal Trade Commission took the opportunity to remind Facebook of its commitments regarding personal data management. This was an important step in view of the possibilities opened up by combining the data from both networks (Whatsapp recently announced that it had more than 500 million users). As part of its action, the FTC sent a letter[8] to both companies pointing out that any violation of the user consent rules would be severely punished. The FTC restated the requirements imposed on Facebook since 2012, including the obligation to conduct audits for 20 years[9].

>> The FTC, which is the American trade watchdog, had no compunction about taking a position on the measures regulating exchanges of personal data between Whatsapp and Facebook. This stems from a holistic approach to the issues involved and seems to be particularly suitable in a context where the dividing line between personal and commercial data is porous.

The FTC sets specific disclosure requirements for search engines

In June 2013, the FTC published an update of its 2002 Search Engine Ad Disclosure Guidelines after observing a decline in compliance over time with regard to provisions that enable users to distinguish clearly between search results and commercial links. It cites a survey showing that nearly half of American users did not notice commercial links presented in the search results.

>> The FTC guidelines set out detailed requirements regarding visual signs, labels or other techniques to prevent users from confusing commercial links with search results.

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[8] See: http://www.ftc.gov/public-statements/2014/04/letter-jessica-l-rich-director-federal-trade-commission-bureau-consumer
[9] Following privacy complaints, the FCC started an investigation at the end of 2009. It reached an agreement with the social network, under which Facebook will be subject to independent audits for a period of 20 years to ensure that it complies with the terms of the agreement. Facebook is liable to a fine of 16,000 dollars for each infraction found.

"Terms of Service: Didn't Read" (ToS:DR) raises user awareness of terms of service

ToS:DR is one of many initiatives intended to overcome the excessive length and dense legalese of most web services' ToS agreements.
>> It provides summaries of the agreements and assigns grades from A to E for their respect for individual rights. It is available as a plug-in for web browsers.

See: www.tosdr.org

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Fairness and sustainability of the data system

A new data system – Data volumes are increasing. They are digitised, processed, stored, exchanged, aggregated and transformed. They are commercial and non-commercial assets that give rise to new value chains. The mass of data is aggregated in a global system that encompasses a large number of players and techniques for collecting, enhancing and distributing information. The extent of the "big data" phenomenon is still unknown, but we need to **establish the principles for regulating this new economic and social continent of wealth and value creation.**

a) The engineering of consent must lie at the heart of regulation

Information retrieval procedures must be fair. This approach[11] considers platforms in their capacity as **advisers**[12]: a platform is unfair when its own interest is not aligned with that of its users[13].

Fairness validates the user's consent by ensuring informed consent. Consequently, disclosure to users about how their data is used should be drafted so that it is readily understandable by any reasonably informed person. Fairness also requires that the relevance criteria and governing principles of algorithms be explained to users as part of a digital literacy effort.

The way algorithms, APIs and data systems work should be explained in user-friendly terms of service and fact sheets. But informed user consent will require more operational means of ensuring the users' freedom of choice in all of their dealings with platforms.

> **"Utilities" or "Publishers": two approaches to avoid**
>
> Recent net neutrality debate tends to be polarised around two incomplete approaches. The first approaches platforms as essential "*utilities*" that need to be regulated to prevent *bias* in their listings. The second approaches platforms as *publishers*. The first option is hard to apply in algorithmic listing systems, which are biased by nature, since it is hard to conceive of a "neutral"[10] information product. The other option runs into the problem of infringing the publisher's freedom to make editorial choices. Therefore, the host-publisher distinction may seem obsolete in the case of major platforms, which often combine both notions.

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[10] A listing of search results with no ranking would be of little value.

[11] This interpretation is based on the work of theorists, such a James Grimmelmann ("*Speech Engines*"), University of Maryland, 7 April 2013.

[12] This approach is distinct from a critique of the different forms of customising search results or suggesting content and offers. When done in the user's interest, they are one of the main sources of value added on the web.

[13] This is the case when the algorithm does not live up to its promise. For example, if a search engine deliberately alters its algorithm to the detriment of a player, as in the case of suggestions presented as suited to the user's inferred preferences, when the platform is actually promoting stock that needs to be cleared out rather than goods that are most suited to the user's affinities.

Suggestions for further consideration

- **Building privacy protection by design throughout data systems**: "*the fairness principle must be apparent in the lines of code*". This commitment must be visible. For example, the concept of **privacy by design**[14] is a requirement for the implementation of certain privacy rules, as in the case of the "*right to be forgotten*", which must be planned for before a service is designed in order to be effective.

- **Giving users the possibility to express and renew their consent periodically**. Certain players are required to retain data for specified periods, but it is difficult to conceive that users give their consent once and for all for every service. This recommendation could be implemented as a right to have all data held by the platform deleted periodically, based on the average useful life of data. The user could also have a say about who receives the data and how it is used.

- **Banning practices that make the use of a service subject to any form of data collection when it is not necessary for the proper operation of the service**. This ban could be backed up by highlighting the procedures that web users can use to give their consent for different services, purposes and recipients of the data collected.

Google, https and opportunism in respect for privacy

When a web user clicks on a link in a web browser to go from a page on site A to site B, site B receives the URL of the page on site A. When the referrer is a search engine, traffic analysis tools (such as Google Analytics) collect the search terms entered by the web user.

This referrer information is very useful for the webmaster of site B, who can identify the exact pages that visitors come from and the key words that generate traffic. For some time now, however, Google has started to require all of its users to use its secure search (https). The result is that webmasters are prevented from receiving referrer information. Google's main argument is that disclosing the search terms could infringe privacy since they could contain personal data.

Given that it protects privacy, Google's position is hard to challenge. And yet, Google does disclose this information, if webmasters buy advertising through Google AdWords campaigns. Some contributors slammed this newfound concern for protecting privacy as opportunistic, claiming that the protection takes second place to business interests.

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b) The digital literacy of citizens, private-sector and public-sector players is a pre-requisite for a balance of power.

A digital literacy effort is required to enable individuals and civil society to participate in debates and decision-making concerning the information society. This effort will establish a balance of power

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[14] Considering and complying with privacy principles starting in the product and service design stage and up until the end of the life cycle of the technology concerned.

between citizens, public-sector players and private-sector players. The relevant debates must be accessible if digital citizenship is to emerge.

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Suggestions for further consideration

- **Raising the awareness of consumers, users and citizens** with regard to the platforms' different operating principles and their business, legal and technical policies, along with the implications and opportunities for the public. Much of the awareness-raising could be accomplished by relying on NGOs and helping them observe the platforms' behaviour.

- **Enhancing digital literacy in business**: pointing out to players relying on intermediaries the importance of regaining control of their access to end users and their supply of market information. Greater overall awareness of the importance of maintaining their digital independence is necessary to avoid outsourcing all of the digital skills that have become critical for the survival of their business (SEO, e-crm, etc.). When possible, business should have partnerships with several intermediaries, instead of just one major one, to reach their digital markets.

c) Laying foundations for equitable sharing of the value of data

The role of data as input in the platform business needs to be discussed further.

- **Because data shapes the intermediation markets of today and it will fuel the rest of the economy tomorrow**. We now know that data represents a major economic stake[15], since the use of data underpins the business models of the different platforms. Many observers think that data holds considerable potential to improve how society observes itself and how public policy is made.

- **But also because information is power**. This fact was proven long before digital technology came along, but the massive increase in collection, processing and storage capacities has exacerbated worries about the concentration of information and the related means of production.

These are major issues surrounded by great uncertainty: are "economic" data rules possible and compatible with the protection of fundamental freedoms? Is the economic classification of data a political matter? Can any criteria be applied now and which process could be consistent with the democratic imperatives ? These questions are inextricably linked to the broader issue of adapting governance and regulation to the speed of digital technology change and its transversal scope. There are currently two concerns:

- **Asymmetric power relationships between platforms and users**. Today, the problems lie not only in abusive data collection, storage and use, particularly when data moves across borders,

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[15] The total value of European consumers personal data in 2011 was estimated at EUR 315 billion. In 2020, Big Data in the European Union should become a market worth 1,000 billion dollars (Source: Report by Boston Consulting Group: http://www.libertyglobal.com/PDF/public-policy/The-Value-of-Our-Digital-Identity.pdf).

but also in cases where a platform has much more information about its users than the users have themselves.

● **Asymmetric power relationships between platforms and their partners**. Some partners have trouble securing their business models when they are required to hand over collection of the information that they produce to the host in order to gain access to a platform. There are many data sharing initiatives, but a platform host can cut off access to the most valuable data at any time, if it wishes to develop and provide services that are similar to its partners' services, for example. In this case, the platform can also use the information that its partners produce to identify the best innovations, giving it a major competitive advantage. When a platform is an intermediary between an application publisher and a web user, it could, for example, compile a database of potentially interested customers, their profiles and feedback on their preferences (dropped services, uninstalled apps, use times, key words, etc.).

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Suggestions for further consideration

● **Ruling out the option for data ownership** – in principle, information cannot be owned, in contrast to the means of producing it or enhancing it may be. Recognising individuals' ownership of their personal data is often put forward as a means of striking a balance of power between individuals and the data-collecting entities. The Council urges rejection of this option:

   ○ Because it makes it the responsibility of the individual to manage and protect their data, reinforces individualism and ignores the power relationship between consumers and businesses.
   ○ It would generate only minor income for users and would create a market for digital data protection management, hence rising up the cost of it.
   ○ It would lead to greater inequality between citizens with the capacity to manage, protect and profit from their data and those who do not have the literacy, time, money or resources to do so and leave these functions to the market.

● **Instead, users' rights should be guaranteed by default to reduce the asymmetry of the power relationship between users and platforms** – including a right to understand the legal and economic terms of transactions with the platform: knowing what data is being collected, the right to correct information and to benefit from it as well. On the other hand, certain data uses could be secured for platforms, such as management of data needed to improve customer relationships and sharing data with third parties for the sole purpose of improving efficiency, provided the data is depersonalised and is not sold or rented.

   ■ **Data transferability**, with full restitution of data to users in open and machine-readable formats, without requiring payment for "premium" options. Ideally, a "delta" function could offer retrieval of only the data added or changed over a specified period. This approach could be expanded to more than just personal data to prevent lock-in effects. It could encompass items (co)created by the user through a substantial investment of time and money, such as playlists, favourites, search history, e-mails and contacts.

- **Development of a critical mass of suitable tools for appropriating, monitoring, supervising and managing data**. Several initiatives aim to provide users with a dashboard showing the services using their data. These initiatives should be highlighted and efforts should be made to support their dissemination and their improvement. Such initiatives include:

  - Tools enabling users to manage their own service space, with the option of choosing its location.
  - Systems enabling users to manage their information and applications from a personal environment[16].

- **Clarifying the principles governing techniques for mass data extraction** from third parties by platforms[17]. The stakeholders consulted evoked drafting requirements for minimum reciprocity between players. These requirements should incorporate such practices into the competition rules concerning monopolies over information required for entering or doing business on a market.

- **Anticipating systemic risks stemming from information monopolies**, particularly in healthcare, security and education.

d)   Defining information commons in the digital era

The sustainability of the data system requires tools to ensure that power and the value created are shared equitably. This also means maintaining balanced flows between the spheres of free resources distributed over the Internet and exclusive resources. The success of non-commercial sites is important for citizens' access to knowledge, but it is also important for commercial operators, since the resources of these sites can be tapped by anyone.

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[16] See, for example: Cozy cloud, a tool that enables users to take back control of their data - https://www.cozycloud.cc/
[17] Web crawling and web scraping are automated techniques for exploring and indexing the web. They extract content from sites using scripts or programs in order to transform this content for reuse in different contexts, such as rankings. For a description see: http://fr.wikipedia.org/wiki/Web_scraping and http://fr.wikipedia.org/wiki/Robot_d%27indexation.

Suggestions for further consideration

- **Transposing the European Directive on reuse of public sector information**, especially the ban on certain exclusive arrangements for the reuse of public sector information:

  - Restricting areas where open data is the exception;
  - An effort for comprehensive pooling of resources and funds, particularly for digitising and depersonalising data;
  - Encouraging the use of open licenses[18] and compiling a clear-cut list of the types of data covered by more restrictive licenses;
  - Introducing price supervision.

- **Defining categories of data that cannot become exclusive:**

  - Public sector data;
  - Data that persons have voluntarily made public or covered by open licenses;
  - Data provided by businesses to promote ecosystems;
  - All of the information that constitutes a basis for individuals' participation in society.

- **Addressing the development of management procedures for information resources that are jointly owned by the public sector, the private sector and the public at large.**

- **Promoting partnerships between platforms, universities, communities, etc.** to share information that may affect the general interest: improving life in our communities, public policies, public service quality, etc. in healthcare, education, security, energy, culture, etc.

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[18] Like the Creative Commons license, the Open Database licence (ODbL) is used for open data. It enables anyone to make public, commercial or non-commercial use of databases as long as they hold a licence for the database and, possibly, for changes to the database, and they mention the licence explicitly if such changes lead to creations. The ODbL is a free licence as defined by the Free Software Foundation.

Google tools
for an equitable data system

In some ways, Google is an example, providing users with easily understandable tools for using its services:

- **TakeOut**[19] is a platform created by the Google Data Liberation Front that enables users to download their data in open formats from certain Google services (Google+, Google Drive, Google Reader, YouTube, etc.)
   >> This initiative facilitates the movement of users' data inside and outside Google's services.

   Page Rank: Google launched a site[20] in 2013 that uses animated graphics to explain how its algorithm works
   .
   >> Without denying the stakeholders' criticism of the opaque ranking criteria, this initiative helps demystify the algorithm for users making searches.

- **Targeted advertising:** Google lets its users deactivate the display of advertisements based on their social and demographic categories and their centres of interest (for example, "car enthusiast" or "inferred age: 18-34").

   >> Google maintains that it does not use data about visits in this case to facilitate the creation of social and demographic categories or centres of interest. On the other hand, users cannot deactivate the display of advertisements on the basis of their previous dealings with advertisers, meaning visits to their websites.

Privacy Icons
Clarifying the terms of transactions with the platform

The Privacy Icons initiative emerged from a Mozilla workshop that brought together many on-line privacy experts. Privacy Icons use the same visual model as Creative Commons, suggesting that publishers add small icons to their websites to make it easier to understand their privacy charter. The initiative proposes several icons with the aim of giving users an immediate understanding of how the site uses personal data.

>> The aim of such initiatives is greater digital literacy. They clarify the terms of the transaction with the platform and are simple to use.

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[19] https://www.google.com/settings/takeout
[20] *https://www.google.com/insidesearch/howsearchworks/thestory/*

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Personal Information Management System (PIMS) initiatives

Enhancing users' control of their data

As the number of services and applications increases, users are providing their data to a large number of commercial systems based on a "silo" approach.

Users and partners of major platforms are sometimes held hostage by conflicts between APIs from competing environments: Android-Chrome-Google-Gmail-etc. vs. IOS-Safari-Itunes, etc. vs. Office-skydrive-etc.

Users do not have complete control over the use made of their data, nor do they benefit from this use in their dealings with businesses. Web users cannot carry out a search to find all of the information about them in the different systems and they cannot create a list of websites holding sensitive data about them, such as their banking information. Nor can users synchronise their information across the different "silos". The situation worsens as the number of information sources increases and personal data is scattered across the Internet.

Delegating management of all of this information to a single company, such as Apple or Google, would greatly simplify the users' lives, but it would carry a heavy toll in terms of freedom. To remedy this problem, PIMS initiatives let users take back control of their data. They use services hosted on servers that are managed on behalf of users, rather than services hosted on the major platforms' servers. A basic PIMS monitors the data used on a platform and how they are managed.

>> Since the platform no longer has a say in who has access to the users' data, users know which service has access to which data and they can choose to move their data from one service to another, or to stop certain applications from gaining access to their data. This type of service does not promise to provide a vault to protect data, but to help give users control over their information and let them make appropriate use of it.

Making search logs common property

To make dominant positions in the online search market open to challenges

In a paper for Tilburg University, Cédric Argenton and Jens Prüfer[21] propose a new form of regulation: making search logs (data on previous searches) common property. In view of the general features of the search market, especially the low switching cost for users[22], it is by no means clear that business concentration undermines innovation. And yet, the authors point out that the perceived quality of a search engine depends greatly on the data from its search logs. This is proprietary data that the search engine uses to refine its search results (sites visited, etc.), which enhances the users' perception of the quality and relevance of these results. In turn, greater search quality gives rise to an increase in the number of searches, enabling the company to accumulate even more search logs. This causal link underpins a natural trend towards monopolisation of the online search market and increases the market's economic and social importance. Since Google is the search engine that managed from the outset to capitalise on these externalities, it is not surprising that it now holds a dominant market position, with market tipping accounting for much of this success.

>> Making search logs common property implies establishing an information system for exchanging the data directly between search engines or through a hub, for free or for a price. For the purposes of sustainability, making search logs common property could also open dominant market positions up to challenges, by letting competitors catch up to the leaders and by stimulating innovation.

However, there are criticisms and questions regarding this position:

- Search logs are business assets and constitute a major advantage for the company that owns them, which means that making them common property is contrary to freedom of enterprise.
- Since these assets are crowdsourced, their value must be shared with the crowd and action is needed to cope with the heightened risk of collusion between players.
- Such an arrangement could be made by means of interoperability requirements to ensure that the network effect works to the benefit of other platforms and that the users' switching cost is not prohibitive, especially in the case of platforms with APIs.
- Further discussion of content status is needed: should information producers be paid? Is there a need to ensure that they are properly compensated, especially in the case of non-professionals?

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[21] See the paper by Cédric Argenton and Jens Prüfer, "Search Engine Competition With Network Externalities," available from: http://ideas.repec.org/p/dgr/kubtil/2011024.html

[22] The ease of switching from Google to Bing, for example.

3

Positive neutrality – achieving an open Internet

The growing success of platforms has contributed to the development of the digital economy and, through it, the general economy, services, innovation and trade. The growth of new services with great social value optimises dealings between customers and vendors and gives rise to new value chains and businesses. Platforms promote innovation directly or by using their economic rents to finance or acquire innovative companies.

Is competition really just a click away?

Conventional wisdom states that the competition is "just a click away" on the Web. Users' switching costs in terms of time, money and effort are supposed to be low, which makes it easy for users to switch to an alternative supplier if they are dissatisfied with a service. But the specific growth dynamics of platforms mean that this conventional wisdom needs to be reconsidered: up to a certain market penetration rate or "tipping point", a service is fragile and vulnerable to opposing forces, such as a lack of interest in the service or exorbitant market entry costs. Once a platform reaches the market tipping point, the dynamics make its success overwhelming, creating barriers to entry for competitors through a critical mass of data, learning algorithms, attraction for advertisers and contributors, etc. The barriers to the emergence of alternatives are even higher if the service benefits from network effects and reaches critical mass[23].

Some observers hypothesise that there is a "*natural*" tendency for monopolies to emerge that may or may not be irreversible. Others predict a lasting oligopoly will be established since only a handful of players are capable of deploying the resources required to control their entire value chain and all of the channels of access to their users, ranging from services and content to devices and connected objects, and including operating systems, browsers and search result rankings.

>> Either way, there is the risk of being held hostage by a single solution or the battle between competing platforms. Ultimately, the concern is that quality and diversity will suffer, innovation will be hindered and fewer channels for expression will be available.

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[23] For example, the cost users incur for switching from Facebook to Google+ depends on how difficult it is to convince their contacts to switch too. In a similar vein, users are less likely to switch from iTunes to Google Play if they have already invested time and money in compiling their playlists.

a) Special responsibilities for players that have become indispensable for their ecosystem

When a major platform succeeds in becoming the centre of an ecosystem by making itself indispensable, it may control the access parameters that decide the survival of other players. In this case, the need to create value may predominate and the platform may be tempted to use its power to obtain a larger share of the value chain.

For the players concerned, such as publishers, advertisers or developers, this may mean harsher terms for access to the environment created by the platform. This environment provides the prominence, information and technical resources that enable them to do business. Harsher access terms may mean more restrictive contracts, larger shares of profits for the platforms and, ultimately, a reduction of the players' capacity to grow and innovate. Their dependence on the major platforms is accentuated when the latter have aggressive acquisition policies to aggregate innovative services, maintain their lead and increase their market shares, which sometimes has the effect (or the aim) of nipping disruption in the bud.

Under these circumstances, it is only fair that platforms should bear extra responsibilities when they become indispensable.

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Suggestions for further consideration

Technical compatibility and interoperability are another way of addressing neutrality: the Web works and prospers because of the interoperability[24] of its transport protocols and communication languages, syntax, coding, etc. For services, interoperability based on open formats gives users more freedom of choice. There is a tendency to believe that the less interoperable the formats are, the more likely the platform is to generate income. However, compatibility increases network effects, benefiting both consumers and companies, which acquire broader markets through greater interoperability. This is why some platforms have made open systems a pillar of their business models, publishing some of their technical specifications as open source and allowing third parties to publish, sell and innovate in their ecosystems.

On the other hand, once a platform has a dominant market position, it may be in its interest to restrict its interoperability to secure the market shares it has won. One of the arguments put forward is that compatibility with other services could hinder the platform's own innovation. In such cases, the dominant platform may decide to restrict the types of content it will accept, tighten up its standards or increase its prices.

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[24] Interoperability is the capacity of a product or a system, which has fully known interfaces, to operate with other existing or future products and systems, without access or implementation restrictions. Standardisation is often an aspect of interoperability.

In the digital economy, as elsewhere, such developments are business as usual under freedom of enterprise. The problem when dealing with platforms lies more in the inadequacy of conventional safeguards for protecting users and innovation when a switch from an open format to a closed format occurs. More specifically:

- **Establishing guidelines for equitable use of open source** – A platform's power lies in its capacity to unite an ecosystem of users, developers, etc. to provide information, content and innovation for the platform. When Apple opens some of its APIs to third-party developers or when Google makes its map collection available free of charge to businesses, they are counting on benefiting from positive externalities, by building ecosystems that many players rely on. In such cases, it is important that these externalities are not turned against the contributors to lock them in. The creative and expansive power of open business approaches must not become instruments for players whose strategy is to close off their platforms once they have become indispensable. Ways of preventing this to be considered include:

  - **Disclosing compatibility and interoperability requirements in the terms of service using easily understood and clear labelling:** which other services and environments are the platform's services compatible or not compatible with? Under what conditions? Why are they not compatible (security, quality, cost, corporate strategy, etc.)? The objective is to ensure that platforms do not use their power to impose technical specifications and standards[25] on third parties (application developers and device manufacturers) with the aim of heading off future innovations.

  - **Removing barriers to cross-platform solutions** for mass-market services, if such solutions do not entail extra costs for the dominant platform.

  - **Incorporating these criteria into the assessment of a platform's neutrality** (*see Fact sheet 1 on establishing best practice and platform neutrality observation and rating networks)*.

> ### *Twitter locks out developers*
> ### *after relying on them for its business growth*
>
> By opening up its API, Twitter, like many other players, enabled many services and applications to emerge. Since Twitter could not ensure its presence on all platforms (especially mobile platforms) on its own, crowdsourcing innovation was a simple way of boosting its growth.
>
> But, like many services before[26], Twitter has imposed more and more restrictive rules on developers in its ecosystem, such as requiring compliance with strict message display rules, imposing a cap of 100,000 users and requiring the most popular applications to consult with Twitter before making any changes. This closed strategy increases the developers' dependence on Twitter and makes it harder for them to foresee the future of their business.

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[25] Specifications, best practice guides, updates, compliance requirements, etc.
[26] Twitter is not the first company to impose its requirements on developers using its API. Facebook regularly imposes rules that are sometimes detrimental for third-party developers.

- **Advocating European and international open standards policies to support major standardisation projects, especially for the Internet of Things**, to make possible horizontal surveillance of practices by communities of observers.

- **Dissociating operating systems from devices:** when users buy a computer, they can choose the operating system, the browser and the other services they want to use. This makes it hard to argue that they should not have the same freedom for mobile devices. The objective is not to require manufacturers to produce devices with each type of OS, but to allow users to remove the OS and its native applications from a device without the threat of retaliation.

- **The transferability of mobile applications**: if a user owns a large number of applications, the fact that they cannot be used in a new environment may be a deterrent to switching.

- **Ensuring greater disclosure regarding platforms' treatment of other stakeholders** – The Council's work has shown the need to introduce minimum notice periods, or even mediation arrangements, for the removal of applications and services or major changes in access to APIs that are not responses to detrimental behaviour.

  The major platforms' businesses overlap as a result of vertical integration and diversification. Users become a rare and hotly disputed resource for ensuring the equilibrium of their business. When a handful of competitors share a market, there is a risk that they will collude on key standards to control the market. Under these circumstances, the issue for lawmakers is not so much to protect competitors, but to focus on how the platform deals with advertisers, web users, developers, etc. so as to prevent hegemonic practices with regard to pricing, access, availability of tools, etc., especially when they contribute to the creation of the platform's value and/or bear some of the participation costs.

- **Ensuring greater disclosure of major platforms' acquisitions to prevent the harmful effects of pre-emption of market resources.** Enhanced disclosure requirements for major

players could be considered to foresee not only the market share that they are about to acquire, but also the consequences with regard to personal data (and the possibilities for aggregating data), or the acquisition of patents to pre-empt the market. Special attention could be paid to transfers of exclusive rights that lead to lock on markets, control of bottlenecks, acquisition of cross-platform solutions or entry into markets in competition with the platform's customers.

- **Ensuring closer collaboration between competition authorities, patent offices and standardisation organisations to head off and fight patent trolls**[27]**.** Competition authorities rarely reject mergers and acquisitions leading to business concentration, but they do have the power to extract commitments called "preventive remedies" regarding companies' behaviour or structure. Closer cooperation between these different entities could help identify appropriate remedies for the digital economy and improve supervision of acquisitions by dominant platforms.

b) Active policies to support choice and alternatives

The Internet's primary value lies in its role as a vector for choice and creativity, its capacity to overcome the barriers between producers and consumers, and between professionals and non-professionals. It is in everybody's interest that the Internet remains a writable and modifiable medium for contributions. To achieve this, France and Europe will have to implement an active open Internet policy, ensuring not only that the law upholds net neutrality, that the dominant players do not smother innovation and that the data system is deployed fairly (Factsheets 1 and 2), but also that the law promotes the creation of a dynamic digital ecosystem.

Conventional regulation is still needed, particularly to ensure that dominant players' positions remain open to challenges, which is the only way to prevent abuse. However, neutrality must not be defined in solely negative terms, nor must it be specified in legal terms only, especially since the effectiveness of rules will always be a problem on digital markets.

The Council's consultations made one thing clear: it is not governments' job to decree the birth of Europe's next digital champion and it will not succeed in doing so by trying to duplicate existing platforms. Its job is to **create an environment that favours alternatives.**

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[27] A patent troll is usually a company or individual in the business of using licensing and patent disputes for profit. The main feature of patent trolls is that they do not produce any goods or services. Their business model is akin to blackmail. Patent trolls acquire one or more patents, but not for their own use. They then seek to sell operating licenses to companies producing goods and services under threat of lawsuits for infringement of their patents.

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Suggestions for further consideration

- **Supporting initiatives for business models that are alternatives to the "audience-advertising-data" triptych** – the collaborative economy, or "*peer-to-peer economy*", holds out considerable potential to be explored, especially since it often gives rise to successful hybridisation when it is combined with more conventional business practices[28]. The horizontal nature of the collaborative economy encourages fair dealing. It is important for governments to unleash the potential of these new models and support this dynamic.

  For this purpose, it is also important to discuss the compromises to be made with regard to players in the "*conventional*" economy so as to avoid a repeat of the confrontations seen with hotelkeepers and taxis each time digital technology disrupts a new sector.

Opening up global geolocation data from vehicles-for-hire applications
to ensure fair competition

The controversy about vehicles-for-hire applications[29] epitomises how companies can offer better services at a lower cost than the conventional models by using information technology, but, in doing so, jeopardise the existing business models.

The proposal[30] to ban vehicles-for-hire applications from using global geolocation data rejects innovation in order to protect the business model of taxis, in this case. A back-up solution could improve competition in the sector by **opening up the global geolocation data from vehicles-for-hire applications** instead, so that they benefit the entire sector, including taxis. Backed up by an open data policy aimed at supporting the use of such data, and subject to stringent privacy safeguards, opening up this data would contribute to progress for all and be more in line with an approach that is fair for all players through the emergence of a reputation economy between taxis and vehicles-for-hire applications.

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[28] For example, Wal-Mart encourages its customers to deliver their neighbours' purchases in exchange for a discount on their own bill. See also the November 2013 report by the French Emerging Consumption Models Observatory (ObSoCo), directed by Philippe Moati available at:

[28] http://www.lobsoco.com/images/pdf/4%20pages_conso_emergentes.pdf

[29] Applications for hiring a car and driver.

[30] The report by Thomas Thévenoud (Member of the French National Assembly for Saône-et-Loire) on consultations held on taxis and vehicles-for-hire services suggests that only taxis should be allowed to provide the location of available cars on a map in real time to facilitate contacts with passengers. Mr Thévenoud calls this "electronic prowling". http://www.thomasthevenoud.fr/wp-content/uploads/2014/04/Rapport-Thomas-Th%C3%A9venoud-24-04-20142.pdf

- **Supporting cross-platform solutions that enable services to operate in competing environments** (see boxes).

- **Supporting solutions and initiatives to diversify digital value chain paths between services and users, outside of the device/browser/search engine/app-store access tunnel.**

- **Supporting sector initiatives to rebuild links between businesses and customers, by setting up vertical platforms based on skills specific to a given business.**

Where should we look for inspiration?

VideoLAN project
Greater freedom for playing video and audio content

VLC media player (VLC) is a free multimedia player produced by the VideoLAN project, which was originally a student project at the École Centrale Paris. VLC is free open source software that operates with Windows, all forms of GNU/Linux, BSD, Mac OS, Android, BeOS, Solaris, QNX, Pocket PC, etc., for a total of some twenty environments. It is distributed under a GNU/GPL license.

The advantage of the software is that it integrates the codecs needed to play most audio and video formats. VLC can also play a large number of streaming media. It is now one of the top multimedia players with between 100 million and 150 million users.

>> VLC now seems to be one of the most flexible, or even the most flexible, multimedia player(s) because it rejects the "silo" approach entirely. Unlike other proprietary media players, VLC can play nearly all videos and is very tolerant of slightly damaged data flows. In fact, it even does its best to repair damaged flows.

For more information, go to: www.videolan.org

EPUB

EPUB is a file format designed by the International Digital Publishing Forum (IDPF) for digital documents. It is primarily used for reading text documents on reading devices. Texts are usually stored in files with additional information that determines the layout, adds images, inserts hypertext links, etc. EPUB is an open format, which means that users can edit, write or convert text in this format. It also means that device manufacturers can use it.

>> This initiative has helped reduce lock-in because it enables users to leave a given software and hardware environment and take their digital text assets with them.

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www.cnnumerique.fr/en/plateformes

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