



HOUSE OF LORDS

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Internal Market Sub-Committee

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ONLINE PLATFORMS AND THE EU DIGITAL SINGLE MARKET

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Witnesses: Charly Berthet and David Viros

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Members present

Lord Whitty (Chairman)
 Lord Aberdare
 Baroness Donaghy
 Lord Freeman
 Lord Green of Hurstpierpoint
 Lord Mawson

Examination of Witness

Charly Berthet, Rapporteur at Conseil National du Numérique (French Digital Council), and **David Viros**, Chief of Staff, Head of International and European affairs at Autorité de la concurrence (French Competition Authority)

Q61 The Chairman: We had hoped to have the French Competition Authority and yourselves together, but your Conseil National has produced a number of reports, some of which we have seen, which have been instrumental in persuading the French Government, among others, to make the platforms a priority within the digital single market. Perhaps you could describe how your council is established and why that priority was given. Then we will have a question from Lord Green.¹

Charly Berthet: Thank you, Lord Chairman. My name is Charly Berthet and I work as a rapporteur at the Conseil National du Numérique, the French Digital Council. I am in charge of issues related to online platforms. I shall give you a very brief presentation about the Council. We are an independent advisory commission. Our mission is to advise the French Government on any topic related to the impact of digital technologies on the economy and society. The board is composed of 30 members, all appointed for three years by the French President, and they all represent the digital ecosystem at large. It gathers researchers, entrepreneurs, activists and representatives of civil society. In July 2013, the French Government asked the Council to issue an opinion on online platforms. The report was published a year later, in May 2014. It was the end result of a large consultation that gathered over 100 stakeholders and included government officials, representatives of major internet platforms—Google, Facebook and Twitter—claimants that were involved in the Google antitrust proceedings, business federations, lawyers, researchers and so on. Last year the French Prime Minister entrusted the council with the mission of leading national consultation on digital issues, and we received 17,000 contributions from the public. This five-month debate was a way to take forward our work on online platforms, which led to the report *Ambition Numérique*—literally, “Digital Ambition”—and most of the recommendations are now being implemented in French law.

The Chairman: Thank you very much. Welcome, Mr Viros. Lord Green will come in with a question specifically to Mr Berthet, but I just wanted to ask: on what basis did your organisation, as part of the French decision-making process, find that attention to platforms was an important issue within the digital single market? Was it because there were

¹ Mr Viros arrived a few minutes late to the meeting.

competition issues and problems with consumer detriment from various platforms or issues of privacy and data, or was it primarily because in some of these areas there was no significant European competitor? In other words, was it more an issue of European industrial policy? Could you perhaps set the scene for that?

Charly Berthet: Yes, we identified two kinds of concern regarding B2B and B2C relationships—business-to-business and business-to-consumer. Those are two different kinds of issues, which I will detail. For business-to-business relationships, most of the concerns might be addressed by using ordinary law, especially competition law. The main concerns over business-to-consumer issues relate to the right to privacy, which is one of the most common problems caused by the platforms' development. There is also a threat to pluralism. Those are the main issues raised by the platforms.

David Viros: I will answer in my capacity as a representative of a competition authority. By the way, we are concerned only with competition issues. In that respect, our position has never been to say that that platforms constitute a unique subject for study or investigation; rather, our position is that platforms today are such an important aspect of the overall economic landscape that we will necessarily have more cases coming our way that involve them. There was the Booking.com case, for example, and cases involving Google, but that is just a matter of our case portfolio evolving with the evolution witnessed in the wider economy. That does not mean that there are not issues requiring further expertise or attention on our part. We address these issues by building, with fellow competition authorities in Europe, a body of doctrine, in the context of higher-level studies, on what the competition issues are in respect of certain aspects of the platforms. To be more concrete, we conducted a joint study with the Competition and Markets Authority on open versus closed systems. That is relevant in the context of platforms and it informed our position on the issue of how to look at the level of openness or closedness of platforms, and what conclusions to draw regarding competition law and the functioning of markets.

We are also doing that today with our counterparts in Germany, the Bundeskartellamt, regarding data and competition. There again, data are collected and used by market players beyond digital platforms, but of course it is of particular relevance with regard to platforms because they are instrumental in the development of Big Data and the use of data on a much greater scale. That would be our approach: nothing entirely new, but the need to gain expertise in relatively new or novel dimensions.

Q62 Lord Green of Hurstpierpoint: I will kick off with a brief supplementary to what you have both just said. Neither of you mentioned industrial strategy in your responses. Is that because it really is not the case that the thought that Europe has not produced a major platform is not driving the thinking or is it because some other part of the French Government are more concerned about that aspect?

Charly Berthet: With respect to the development of a Europe-based strategy—do you mean that although the Parliament does not have the capacity to—

Lord Green of Hurstpierpoint: What I meant was whether you could envisage it being part of the thinking in the e-commerce world, or in the French Government in particular, or that we ought to worry about the fact that all the major platforms that we will talk about—in particular the famous four—are American. Do you think that that is an issue in the minds of the French community that worries about digital strategy?

Charly Berthet: It raises the question of European sovereignty. The fact that the major platforms are indeed American is not a problem in itself, but it can become an issue when there is no alternative and no competition between certain platforms such as social networks and search engines. One of the main parts of our work is to provide a regulatory environment that could lead to the emergence of European digital champions.

Lord Mawson: Why do you think that regulation is the way into that? Is not creating a more entrepreneurial space the way to do it?

Charly Berthet: We do not believe in strict and prescriptive regulation which would become obsolete in a few years. We think that we can adapt the current legal system, such as our competition law, consumer protection law and commercial law, but we still think that we need to put in place adequate regulation in order to fill in the blind spots of the current law. For example, that is why we proposed the idea of platforms loyalty², which is basically a principle that is being implemented into French law. It means that a platform should do what it says and say what it does. There are two parts to that. The “do what it says” part concerns transparency and providing sufficient information for customers and businesses. For example, it means that the terms of service should be written in a comprehensible way. For businesses, this transparency should mean that prior notice is given when there is an overly abrupt change made to, for example, a search engine algorithm. It is not strong, prescriptive regulation, rather we believe that it is just something that could help both customers and businesses with the problems they face.

David Viros: I concur with this. One of the objectives being pursued is the need to increase the level of transparency in the information being provided to consumers as regards how platforms rank and list the content they provide. If consumers are made aware of how the process is being conducted, they can make informed choices. That in turn can support quality-based competition, which is something we would favour. In the B2B context, we addressed Google’s concerns with regard to the functioning of its AdWords³ services back in 2010. What we did was design a system whereby Google had to make clearer and more transparent Adwords’ content policy and give sufficient notice to firms publishing advertisements, in case of suspected infringement to the content policy, prior to excluding them from those services. It also had to give firms prior notice with regard to any change in the content policy. Competition law provides us with the tools to intervene, but of course our intervention is conditioned on the need to first assess the impact on competition. In that particular instance, we investigated Google’s behaviour with regard to certain firms which had been placing advertisements and we noticed that the content policy was not transparent and clear enough. That led to some discriminatory practices, and in this way we were able to impose transparency measures. We would concur perfectly with the position whereby increased transparency is very important.

Q63 Lord Green of Hurstpierpoint: I have two questions, one for each of you. First, Mr Berthet, can you tell us a bit about the proposal that the digital authority came up with for a platform agency? What would that amount to and how would it work? Does this proposal

² Later on, Mr Berthet clarifies the meaning of this word to be “fairness”

³ This a service from Google whereby a business can create an advertisement and select the search terms which will make the advertisement show on the Search Engine. A business sets a daily budget of “pay per click” and a payment is then made to Google.

have traction with the French Government as a proposal? Perhaps I may come back to you with a question about Google afterwards.

Charly Berthet: To enforce the principle of loyalty on platforms, we strongly believe in a new form of regulation. In this innovative world, it is crucial that we adopt a disruptive approach. We have been advocating in our latest work to open up the monopoly on regulation in order to adopt more flexible and crowd-based regulation in order to complement and sometimes overcome some of the weaknesses in the traditional tools. As the information society grows, trust and reputation become a bigger part of the equation. When competition is supposedly just a click away, reputation is very important for online platforms. That is why we proposed the creation of the European platform rating agency to evaluate the behaviour of digital services. It came from a simple observation. During the consultation period, many small businesses came to us complaining about Google's predatory practices, but none of them could provide any objective proof. That is to be expected because they do not have the time or the money to investigate such practices themselves. That is why we proposed a kind of platform rating agency—it would offer a channel for information feedback and provide a way of rating a wide variety of potential expertise from developers, designers, lawyers and consumer associations, and thus exploit an expertise that already exists on the web. Those agencies would examine and raise specific aspects of the platforms at both the C2C and B2C levels, such as, for example, the comprehensiveness of the terms of service. It could detect some user interface that was crafted to trick people into doing things, such as signing up for a recurring bill, disguised ads or false disclosures. It could also rate the stability of the APIs for developers, the commercial behaviour and—why not?—harmful tax practices.

Just like the current credit rating agencies, this agency's role would be to clarify the choice for consumers, for businesses which want to develop an app within a platform, for investors who want to invest in an app that is developed within a platform, for shareholders and public authorities. This idea is getting more and more support. Last year the Germans launched an agency that is quite similar, der Marktwächter Digitale Welt—forgive my German—which means literally the guardians of the market in the digital environment. This agency already relies on a collaborative approach and provides a channel for information feedback and empirical observations from the consumer associations. Plus, this agency works with competition authorities to share information. We have been discussing this proposal with the EU Commission for quite a while now.

Lord Green of Hurstpierpoint: Would you like to see this become a European-level initiative?

Charly Berthet: Yes. In most of the works the relevant level is often the European level in the global legal environment.

Lord Aberdare: You mentioned a couple of times the principle of loyalty to a platform. I am not sure that I understand what that means.

Charly Berthet: This is what we call a flexible tool for regulation. In short, the platform should say what it does and does what it says. For example, it would be a general principle applied to the platform, which could apply both in the B to C and B to B. I have explained the “say what you do” part in terms of transparency and information and the comprehensiveness of the terms of service, for example. The other part is the “do what you say”. It means that loyalty should apply to the behaviour of the platform in relation with its promises. There is a great information asymmetry between the platform and businesses and consumers. This is precisely because the platform knows a lot more information than I do. It

can hide what it knows from me, deceive and manipulate. We have seen Facebook manipulations and other things. The platform should act as an advisor. A good search engine advises its users on where to find the relevant information. However, this relationship is incredibly opaque in a way and yet based on truth. Loyalty means that it should do what it is supposed to do.

Lord Aberdare: That is very helpful. I am not convinced that “loyalty” is the ideal English word. I think I was a little misled by that word. However, the explanation is very clear.

Charly Berthet: It should be understood as fairness, mostly, and accountability. I am sorry I used the word “loyalty” but this is the word in French.

Lord Aberdare: “Fairness” might be the right word. We could argue for a long time what the best word might be. Thank you for that.

Charly Berthet: “Fairness” is the word. I am sorry.

Q64 Lord Green of Hurstpierpoint: My other question is to Mr Viros. You mentioned Google and we are aware that the European Parliament recently called for Google to be unbundled. I am not sure exactly what that means but I would be interested in your views on that instinct to say that Google has just become too big and too comprehensive and we should find a way of unbundling in it. What might it mean? How would that benefit, first, consumers and, secondly, small businesses?

David Viros: To date, unbundling has been used with regard to infrastructure and technical networks, at a regulatory level, with the aim of ensuring fair, non-discriminatory treatment, whether it is transport providers or telecom operators.

Lord Green of Hurstpierpoint: I understand the general proposition; it is just how you apply that to this world of fast-changing digital platforms with dominant market positions.

David Viros: Unbundling is not something we do every day as a competition authority. It is a novel concept and used sparingly in standard anti-trust enforcement.

Lord Green of Hurstpierpoint: I do not think that is so. It has been done in telecoms; it was done with Microsoft; it has been thought about in transport, as you have mentioned. So the concept is not novel. Applying it to digital platforms is something different.

David Viros: Even in Microsoft, with regard to Windows Media Player and Internet Explorer, the idea was for Microsoft to offer alternatives from the start when you switch on its operating system.

It is not per se unbundling. That is why I referred to regulatory frameworks, which are different from anti-trust enforcement. Unbundling in the sense of separating two activities, whether selling off assets or a functional separation, goes quite far. It has been experienced in the context of former state monopolies. In a digital world you would first have to consider that the Google search engine is an unavoidable service, to some extent created not on a merit-based competition but through inherited advantages. There are a set of circumstances that would lead to unbundling. Otherwise, if you were to unbundle Google, it would beg the question of how you maintain the incentive to innovate and achieve a more innovative product and offering in a context where competition can be within a market or for the market. To that extent, this would have consequences for the incentives for firms to innovate. That does not mean that we cannot intervene. The Commission proceeding is

pending and several different remedies are being considered, and may be applied, which do not involve unbundling but which would ensure that competing vertical search offers are awarded an equivalent treatment if Google were also to have its own price comparison service. Again, that is not strictly speaking unbundling.

Lord Green of Hurstpierpoint: I think you are taking a very strict view on what unbundling means. Unbundling can mean a requirement to price different services and that requirement being transparent to the user of the services, neither of which pertains at the moment to the digital platform world. Your opening remarks majored on transparency rather than on that sort of directive approach to ensuring that the value of the consumer's data is properly compensated to the consumer.

David Viros: The sort of transparency measures that are foreseen—probably even more so for those foreseen in the context of the data protection regulation with regard to data collection and use, and a right to portability—should together allow the consumer to have a better view of what is being done with its data, which is not currently the case, as I think we can all agree. It provides some leverage to the consumer and will reduce its switching costs tomorrow, by saying, “I am not satisfied with the service being offered and the way my data is being treated. Therefore, I will switch to another service”.

Lord Green of Hurstpierpoint: Or get paid for my data.

David Viros: Or I can be paid, but in a sense you have a free service that is a quid pro quo for the data being provided. Maybe it is not enough. Maybe the consumer is overpaying, but the free services are consideration for the data thus provided.

Lord Green of Hurstpierpoint: That is one of the points, is it not? At the moment, a lot of value is being created, almost none of which goes to the consumer, other than through free access to the platform.

David Viros: Then it is a matter of how valuable the service is.

The Chairman: Do you have any more thoughts on Google Search: whether there are benefits to the consumer, or whether it is so dominant that there is consumer detriment? More generally, are there barriers to competitive entry into platforms such as search engines?

Charly Berthet: Especially on Google Search, or in general?

The Chairman: We have started on Google Search. Things are moving on Google Search. In most definitions, it is a dominant platform. Do you think not just that it is a dominant platform, but, as a result of its structure, that it excludes new competition? If so, does that outweigh the benefit to the consumer?

Charly Berthet: I will not be able to comment specifically on Google Search because we have chosen to include it in our overall assessment of platforms, but I would be happy to answer on switching costs.

David Viros: To answer on Google Search, the dominant position is established. That has been a given since we issued an opinion and interim measures in 2010, which were based on the assessment that Google held the dominant position with regard to online search advertisement. With regard to natural search, there are interesting questions as to whether this is indeed a relevant market. That would suppose that natural search services are being

paid for by the data provided. Whether you accept that or not, you can hold that there is a relevant market for natural search.

I am getting into the details. On a more general level, whether that position is disputable or can be contested is something that I cannot say today. The level of market strength that Google has achieved already has a bearing on the different proceedings being conducted. That is probably why the Commission is considering a new theory of harm in the context of the Google proceedings: discrimination between its own services and third-party services. Google, in the light of its super-dominance, probably has extra responsibilities, consistent with established case law, for instance with regard to actors such as Tetra Pak, vis-à-vis which competition law applies with extra strength as they hold a position of “super-dominance”.

Q65 Lord Freeman: To follow on from dominance concentration, could you indicate what difficulties there are for those, whether customers or suppliers, seeking to switch from one online platform to another? Is this creating a real problem for the wider community—those who are not directly win the business of being an online platform? I am concerned about the switching costs.

David Viros: For instance, when upholding a finding that Google is dominant, this first means that we look at the market, either for online search advertising or other markets. The finding of dominance is also linked to the existence of significant barriers for entry, which themselves are linked to the perceived switching costs. To mention a market we did look at—the market for online search advertising—we noticed that there was evidence of a sort of monopoly rent extraction on that market. Google was able to apply a fee that was, for certain keywords, four times that applied by Yahoo! in relation to its online search advertising. That is evidence of market power and, to some extent, a by-product of the fact that most market players are unable to switch to an alternative online search advertising provider.

Lord Freeman: In your experience and inquiries, and because of the problems you have described, to what degree is there switching?

David Viros: To what degree is there an obstacle to switching?

Lord Freeman: No. From the experience that you have had as those investigating the industry, because of the difficulties, cost and inconvenience of switching, I assume from your response that there has not been a significant amount of switching. Once you are plugged into a dominant supply you tend to stay with that platform.

David Viros: Yes, for that service. We look market by market. We occasionally take part in hearings or make speeches, but we have a case-by-case approach. I can only mention the markets that we looked at. For that market, this was indeed the case. What I said about the difference in pricing testifies to that. This was compounded by the fact that, as made evident by the Commission’s proceedings, Google appears to add to the barriers by preventing its clients from exporting their advertising campaign and all the ancillary data to a competitor of Google’s AdWords services. There is a combination of structural factors linked to the fact that Google, in a winner-takes-all logic, has managed to achieve a critical mass of data, users and clients, which means that it is difficult to replicate Google’s service. At the same time, Google adds to that by imposing certain contractual restrictions that further increase barriers to switching. All this has been looked at and is being addressed.

Lord Mawson: This all sounds fine, but in practice how will you be able to do anything about that?

David Viros: What I referred to is covered by the Commission's proceedings. Granted, the proceedings were opened in 2010, so that begs another question. As an authority we have many powers to intervene. We might come to this, but the French Competition Authority has been using interim measures. We have adopted 30 interim measures decisions since 2000. That allows us to intervene swiftly to prevent a market pre-emption by actors such as Google or other platforms resorting to—

Lord Mawson: So you intervene technologically into the system?

David Viros: We issue orders. For Google AdWords, for instance, we issued an order before our proceedings came to a close. Within three months of the complaint being lodged we issued an order whereby Google had to revamp its whole content policy. That might have a bearing on the technical workings of its system, but that is not something that is our concern.

The Chairman: It might be useful if you could send us some details on that.

Lord Green of Hurstpierpoint: I have two brief follow-up questions. First, have you faced any legal challenge by the likes of Google on the basis of these interim awards before it has been proven to be a competitive issue? Secondly, do you think it would be good if the Commission had powers at the European level to intervene on an interim basis?

David Viros: On your first question, the interim measures were not contested and Google ended up submitting commitments which mirrored the interim measures we had adopted. In that respect it illustrates the leverage that the use of this tool gives you. You impose a solution, so to speak, and the firm has to work around the solution to provide you with convincing commitments. We have used this combination in a number of other instances, such as the distribution of the first iPhones. We issued an interim order whereby Orange and Apple had to rescind their exclusivity agreements which were for five years. They then adopted commitments which replicated the interim measures. We have done that a couple of times and it has worked well. The Commission has this power, but almost as a policy choice it has decided since 2001 not to use interim measures. I believe it deems that it is either best left to us or to judges. It is a civil matter.

Lord Green of Hurstpierpoint: At the national level?

David Viros: At the national level or even at the judicial level in that it is a dispute between two private parties.

Lord Green of Hurstpierpoint: That is interesting. I did not know that.

David Viros: That has been the case. The Commission has the power but it has not used it.

The Chairman: Let us move away from Google and look at another case where you have intervened.

Q66 Lord Aberdare: We are interested in the Booking.com case and the issue of price parity agreements. I understand that the French Government have banned price parity agreements. Can you tell us a bit about the case, your view on price parity clauses, and what impact the action taken by the French Government has had so far?

David Viros: I will to the extent that I am at liberty to comment. Three different hotel associations complained to us in 2013. Similar complaints were lodged before a number of other national authorities, and in 2014 we decided, together with our Swedish and Italian colleagues, to take action. It was a rather new reinforced co-operation mechanism whereby we co-investigated the case in close co-operation with the European Commission. We looked at bookings and the application of price parity agreements, also known as across-platform parity agreements or retail-MFNs⁴. There were three sorts: one that dealt specifically with prices, which forbade a hotel from applying lower prices on a competing platform or on its own website. There was a parity clause that concerned conditions: basically whether breakfast was provided and the level of the rooms being provided. Then there was an availability clause which concerned room availability. The hotel had to provide the platform which sought to impose that clause at least an equivalent number of rooms per night as the number provided to competing platforms. The restrictive effects were at least twofold. First, the application of this clause led to reduced competition between online travel agencies to the extent that an online travel agency which sought to apply lower fees could not take advantage of this price advantage because the hotel would in any event be forced to apply the same price on its platform as on the platform imposing the price parity clause. That meant that it dampened or stifled price competition between platforms. It had the same effect vis-à-vis new entrants because for successful market entry they might seek to rely on lower fees and thus attract a lot of hotels and consumers with the lower prices made possible by those lower fees, but again that was not possible due to the parity agreement. It also had the effect of obliging all platforms to align themselves with the worst platform; that is, the costliest one. If a platform decided to apply a 30% commission, the effect of that increase in its commission would be diluted throughout the market because the hotel that was forced to pay the 30% commission would have to adjust its prices accordingly on that platform, thereby leading to price adjustments on all the other platforms. The negative effects of price increases would be diluted throughout the market, again limiting competition between platforms. So those were the restrictive effects.

However, we did not want to prohibit all these clauses because there was a valid argument on the part of the online travel agencies to the effect that there would be a risk of free-riding on the part of hotels in the sense that all of the investment made by the platform is made before the sale. The platform buys advertising on AdWords, it works on the quality of its website et cetera, and all of these investments are made prior to being paid for that service. The online travel agency is paid on a per-transaction basis once the hotel room has been booked. For an online travel agency, just as for a real estate agent, you are forced to show the name of the hotel you are providing the offers for. It is very simple for the consumer to see the name of the hotel and then to check the hotel's website to see whether the prices being offered are lower, so the risk of free-riding was clear. The investment of the OTA was being made prior to the sale and there was no viable alternative in the sense that it would probably not suffice for the OTA to keep the consumer by, for instance, increasing the quality of its services. Perhaps the alternative was to switch business models and move from cost per transaction to cost per click, but that would shift the burden and the risk on to the hotel, which would have to pay for every click on its website, not just for every transaction. It would have to pay before a booking, and that is something that hotels were on the whole not willing to accept. There were some virtues in that model that we did not want to cast

⁴ Most Favoured Nation

away or demolish, and that is why we ended up advocating, together with our Italian and Swedish colleagues, and in agreement with the Commission, and now in agreement with the CMA, our Danish, Greek, Austrian, Swiss and a number of other colleagues, a solution whereby a narrow clause would be kept and the hotel would be allowed to apply lower prices on competing platforms, lower prices in all its offline environments, lower prices in all bilateral dealings with consumers—through emails and text messages, on the phone and so on—as well as loyalty groups. The only single restriction was that it was not allowed to apply low prices on its publicly accessible website. That is the solution we are running with.

The Chairman: That is very fair?

David Viros: At the end of the day, lawmakers were in favour of a maybe more radical move that I will not comment on. We are waiting to see how the market unfolds and how to deal with it.

Lord Aberdare: So the law, the loi Macron, goes beyond what you were proposing?

David Viros: Yes.

Q67 Baroness Donaghy: My question is a bit of an echo. Is competition law sufficient to address potential abuse by large online platforms on a day-to-day basis? The German Monopolkommission recommended more rapid enforcement and increased use of interim measures. You have just said that your organisation was not going down that road so much.

David Viros: We would favour the use of interim measures, yes. Very much so. On the other hand, we probably would not advocate any adjustment to the substantive law, if only because any difficulties experienced are not related. Even in the Google case, it is not a matter of finding Google's dominant position or even trying to find an infringement. It is a matter, first, of the timeline within which proceedings are being conducted. So it is a procedural matter. Then it is a matter of finding the right remedies because, once you decide that Google has committed an infringement, which remedy will you find? That is the crux of the issue. Whether there should be equivalent access by its competitors, whether this access should be monetised and to what extent, all these questions were left unresolved in the commitment proceedings. So trying to tweak the notions of dominance or of abuse is, to me, beside the point. We have the tools: the question is what do we want to do with them. That is probably not a clear answer.

Lord Mawson: One of the key strands of the Commission's consultation concerns business to business relations, particularly the relationships between platforms and their smaller suppliers. Are there aspects of platforms' relationships with other businesses that particularly concern you and what solution do you propose? As a supplementary, to what extent are some of these concerns about asymmetries of scale and bargaining power specific to online platforms and do they not affect other industries, too?

Charly Berthet: Online platforms have become busy innovative intermediaries for businesses and suppliers as well as for consumers. While they offer quality services to professional users, letting suppliers benefit from great networks' effects, some online platforms might abuse this economic power to impose significantly unbalanced commercial conditions on them. When an online platform is vertically integrated, it might restrain competition by decreasing the feasibility of the offers of its competitors to the benefit of its own offers. This phase of development can be the source of protest. We have talked about that already. Complaints are something we must consider in the telecom sector or in the European

Commission's Google investigation. This position allows the platform to capture a large part of the value created by third parties, increasing their economic dependency.

I would like to come back to the previous question on competition law because we issued some recommendations, even though it is not in our area expertise. We have an understanding of those topics from the public consultation we conducted. We propose in the platform's neutrality report, four possible adaptations to competition law. Not the substantive aspects of competition law but, as you said, procedural aspects. We think that competition law remains a relevant approach to address those issues. It is true that competition law is global by nature, just like the online platforms. We recommended four adaptations to the interim measures, which I wish to mention at this point. We advocated adapting the criteria for reviewing the mergers and the business concentrations because the internet's constant and rapid changes can lead to structural difficulties when it comes to anticipating the formation of dominant market positions and the future trends in the systems. Before a player reaches critical mass there is not much to monitor, but when it does it is sometimes too late. We believe this calls for adapting the criteria for reviewing mergers which are today merely based on the company's turnover. We need to take into account the companies that have an important yet not monetised growth potential because of those networks' effects and the critical mass of data.

The second recommendation we issued was about interregulation. We believe this is key.

Regulation has to take into account the complexity of multisided markets. For example, in the United States, the FTC, the American trade watchdog, took the opportunity to remind Facebook of its commitments regarding privacy while it was exercising its supervision of mergers and business concentration. That was when Facebook acquired WhatsApp. In doing so, the FTC adopted an interesting approach because it dropped the silo approach. This kind of interregulation, mixing competition data with other sectoral regulations, is very interesting.

We think that the competition authorities could rely more on the sectoral authorities, for example, data protection authorities. The last recommendations we made, regarding regulation in general was to increase the coercive power of regulation authorities in order to make penalties more dissuasive. For example, the French data protection authorities can only impose ridiculous penalties. It is roughly €150,000, which is basically two minutes of Google's turnover. So this is the kind of recommendation I am sure will be issued.

Q68 Lord Mawson: Can you tell me what Google might say are the unintended consequences for the customer of these kinds of intervention? Does it increase the cost to the customer or is it neutral?

Charly Berthet: We do not have any official position on this.

Lord Mawson: You are an independent body so you do not have an opinion?

Charly Berthet: Yes.

Lord Mawson: That is the other thing I was wondering about. How independent are you? Who pays your fees?

Charly Berthet: We are paid by the state.

Lord Mawson: So you are not independent. You are paid by the state. How can you be independent if you are paid by the state?

Charly Berthet: We are. This is a tricky question.

Lord Mawson: The President appoints everyone. So how is that independent?

Charly Berthet: I think we have shown our independence multiple times in past years. For example, on surveillance law we have been in confrontation with the Government a number of times. The members of the French Digital Council are not paid—they work for free. Yes, they are appointed by the French President, but the members of the council get no money from that. We have shown our independence.

Q69 Lord Green of Hurstpierpoint: I want to come back to the question of interim measures, which are intriguing, given the fast-moving nature of the industry. There are interesting thoughts on taking a wider perspective of what constitutes monopoly power, rather than just looking at turnover as a percentage of total market turnover. There are two parts to the question. On interim measures, we had a conversation about the Commission and its decision since 2002 not to use those powers. Would it not be a good idea if it did start using those powers? Secondly—this is a cheeky question and you might say that we should know the answer—do you get the sense that the CMA would be predisposed to use interim powers in the way that you do and the German Monopolies Commission has said it is interested in?

David Viros: Going back to the question of turnover, to make it clear, when we conduct an assessment in the context of merger control we do not look at turnover, per se. We look at market share, barriers to entry, price—

Lord Green of Hurstpierpoint: I was picking up on the phrase you used, which I think was “not yet monetised growth potential”. I thought that was very interesting.

David Viros: That is interesting in the context not so much of the assessment but of the thresholds. In France and most European countries we have turnover thresholds. That is not the case in the UK, where you also have market share thresholds. Indeed, that was the case for Facebook/WhatsApp, which was reviewable under the UK’s merger control regime. That is what allowed the European Commission to look at this particular merger. It is true that with turnover thresholds these transactions, which involve an actor whose potential has yet to be monetised, go under the radar. It is a matter not of assessment, but of jurisdictional thresholds. It is something different, but it could be an issue.

Lord Green of Hurstpierpoint: What about the CMA and the use of interim measures?

David Viros: We were very happy to see the amendment brought to the Enterprise Act, which changed the standard from “serious and irreparable damage” to “significant damage”. The standard was reviewed in 2013 or 2014, I believe. That is a very good thing and is closer to the standard we apply. The CMA will probably, based on this new standard, be keener to use interim measures. It had a difficult time using interim measures under the prior regime as its only decision was annulled by the Competition Appeal Tribunal. Because of that new standard, there is probably room for a more proactive approach.

Lord Green of Hurstpierpoint: That is something we should explore.

Q70 Baroness Donaghy: What are the main problems you hear from consumers? Is there a difference in the age profile of the consumer? Do you think competition law is sufficient to address consumer problems?

Charly Berthet: Regarding business-to-consumer relationships, I started to detail the three main concerns we have been hearing. In our opinion, the relationship between the platforms and their consumers can raise three main concerns: threats to pluralism, to freedom of expression, and of course to privacy. On pluralism, we are witnessing the emergence of information on filter bubbles and intellectual isolation that can occur when a website makes use of an algorithm to personalise and selectively make assumptions about the information that a user will want to see, then gives that information to the user according to that assumption. Platforms such as Google are more likely to provide information that only abides by the user's past activity. This can cause users to get significantly less contact with contradicting viewpoints. We see this as an enormous threat to pluralism.

Our second concern refers to a sort of privatisation of the control of freedom of expression. Some witnesses have already expressed this concern to your committee, so I will not detail it too much. Online platforms define their own sets of rules regarding what content is authorised and what content can be withdrawn, sometimes without notice. There is the famous Facebook example: it attempted to ban the posting of Gustave Courbet's "The Origin of the World" because of its policy on naked pictures.

The third concern might be the most prominent. It relates to the right of privacy, but again, many of your witnesses have expressed their views on this topic. A fourth concern might be the opacity of algorithms, but I have already explained that concept.

Q71 Lord Aberdare: One of the things that Monsieur Berthet said at the beginning was that one of the aims is to promote innovation and investment in Europe, particularly to encourage the growth of EU-based platforms. We have heard quite a lot of concerns about what I believe is termed *ex ante* regulation and the danger that that could have the opposite effect of stifling the market. What is your view on how to get the right balance so that we achieve the aim of stimulating the growth of the EU-based market, without closing it down through regulation or whatever?

Charly Berthet: The main goal of regulation should be to maintain an open environment and to adopt a positive and active approach. Regulation should not be seen only in its negative aspect. The goal is precisely to maintain a propitious environment for both innovation and progress, maximising the growth potential of the digital economy and avoiding stifling the system with the dominance of a handful of actors, to prevent Europe becoming a digital colony. That is a French way of seeing this, a French expression—a digital colony of the global internet giants. Still, we do not believe in strong, prescriptive regulation that would get obsolete in the coming years. This kind of regulation would force us constantly to adapt to keep pace with this rapidly changing environment. We believe that many issues raised by this state of affairs can be addressed by making the best use of current law: competition law, of course, but also business law, data protection and policies. Yet, the platforms raise new kinds of issues. We face digital giants that combine strong characteristics that give them market power without equal. That is why we proposed those three sets of recommendations, adapting competition law and competition law procedures, and other regulation. We need to show some legal creativity. That is why we are proposing the fairness principles and rating agencies.

Last but not least, it relates to the question of the industrial strategy. We need to foster data fluidity. In this respect, we strongly believe in a right to data portability, because it is a way to liberate the consumers from the data traps that they can sometimes be in.

The Chairman: On industrial strategy and, I think you said, digital colonialism, we heard about something earlier today. I had nearly forgotten that some 15 years ago President Chirac announced that there was going to be a French version of Google called Quaero. Why did that happen?

Baroness Donaghy: This is where you look at the man in the middle.

The Chairman: Perhaps the question is better addressed to the French Government, but obviously it did not happen. Is there anything else you think we should know about on this. It has been an interesting session and you have been very forthcoming with the detail you have given us of the French approach and some of the cases that you have taken on the competition side, and on the strategic report.

Baroness Donaghy: I asked about the age profile of consumers and whether you wanted to comment on whether young people in France are basically making their own rules and demands about what they expect from digital platforms. Are they creating any political pressures that might make the authorities change their views on the digital economy?

Charly Berthet: Do you mean pressure coming up from young people?

Baroness Donaghy: Yes. I am talking about younger people as opposed to, if you like, established institutions and organisations.

Charly Berthet: I am not sure that there is any pressure coming from young people. In the public consultations we have been leading we have had many contributions from, for example, minors who have asked for the right to be forgotten and a chance to remove their personal information from platforms. Apart from that, I do not feel that there is any pressure.

David Viros: I do not know whether this is directly related to your question, but we have met a number of young entrepreneurs whose position is interestingly more one of seeking to create their own platforms and provide services that way. For instance, a number of reforms are currently being implemented in the field of driving lessons. There is a rigid regulatory framework in France and we have met with actors who are seeking to develop a domestic platform which puts together driving instructors and pupils and bypasses the driving school as we know it today, thereby considerably reducing costs and perhaps allowing more flexibility. My personal experience is that this is just one example amongst many of young individuals who are keen on building the platforms of tomorrow. I find that very interesting.

You may also have heard of the car sharing platform BlaBlaCar, which now has a global imprint. It started in France. Perhaps that is one of the answers to the challenges we face.

Q72 Lord Mawson: Is not the alternative to ever more regulation of these things for the EU to stimulate these kinds of entrepreneurial, innovative cultures, which in my experience is a generational thing? If we are to have a real platform, because we are going to be challenged by India, China and some other big players, that is what we need to be stimulating. But it sounds like they are already there in France anyway.

David Viros: All these objectives can be pursued in parallel, but in my opinion there are a few things that still need to be done at the regulatory level as well, especially in terms of resolving asymmetry of information between platform users and platforms—what kind of service is being provided, how is your data being treated et cetera. When it touches more on economic regulation, as a competition authority we are probably more cautious, although that is open to debate. I think that these two objectives can be pursued at the same time.

Lord Aberdare: Is BlaBlaCar similar to Uber? Is it a French version of Uber?

David Viros: No, it is a car sharing service. For example, you say that you are travelling from Paris to Bordeaux and then you ask if anyone wants to join you and shoulder part of the costs.

Lord Mawson: Given the size of family cars, that might have implications for a little island such as the UK. Given the distances being travelled in France, it may have massive implications.

David Viros: It is now seen by SNCF as its main competitor.

Lord Mawson: Is it really? That is interesting.

The Chairman: I wonder if you have anything to add on the issue of information and data asymmetry. Do you have any proposals on that front that we ought to take on board?

Charly Berthet: We do not have any specific proposals, but it is an issue.

The Chairman: You have covered the ground pretty thoroughly, but is there anything else you want to tell us? Thank you very much for your time and patience. We have been given some useful insights into the way you are approaching these things.