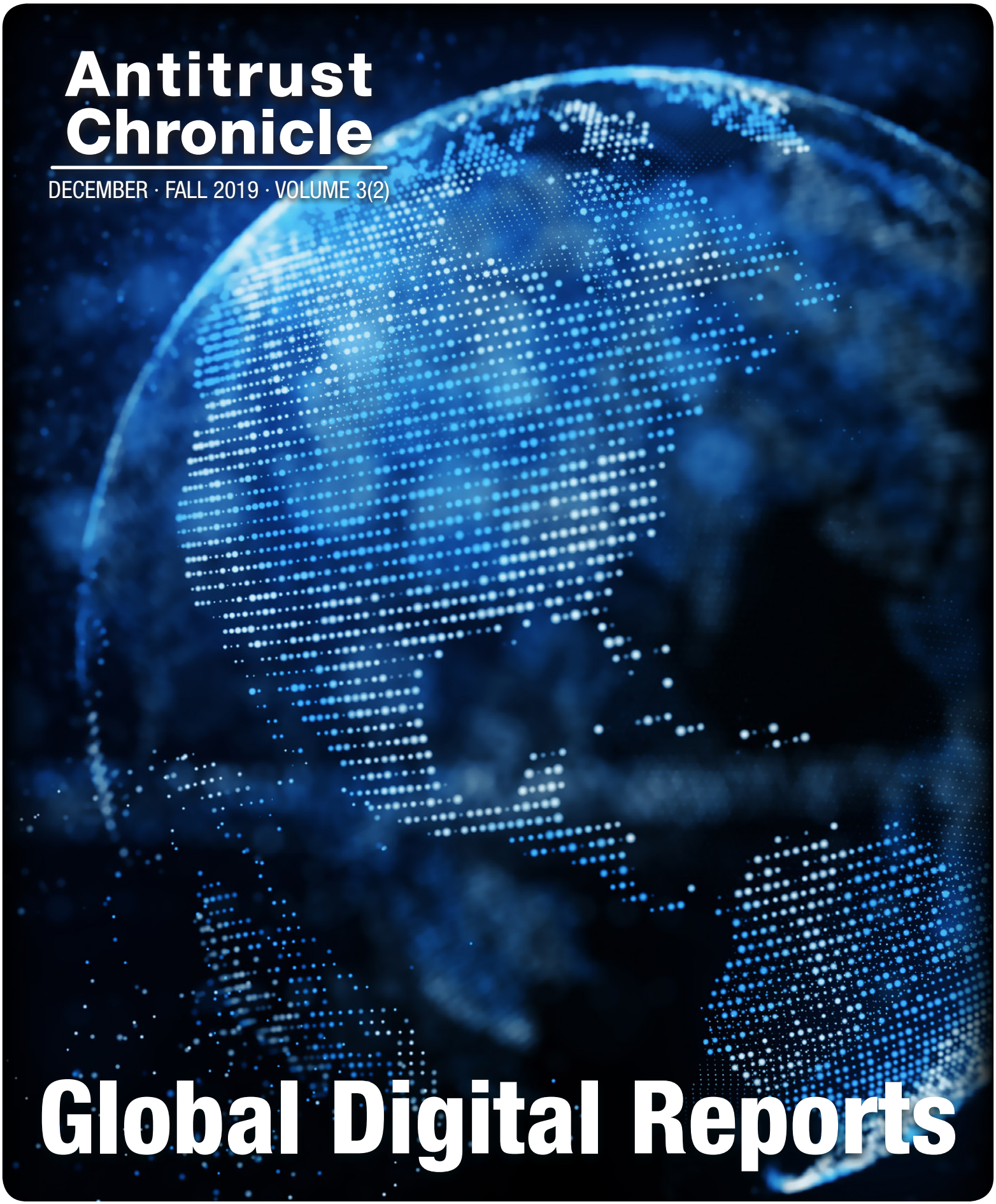

Antitrust Chronicle

DECEMBER · FALL 2019 · VOLUME 3(2)

Global Digital Reports

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

In this edition of the Antitrust Chronicle, we take a satellite view over the approaches that regulators and legal systems worldwide have taken to breakneck developments in the digital economy.

Just like in previous economic revolutions, recent technological developments have upended relationships between consumers, suppliers, and intermediaries across various sectors of the economy. Industries as disparate as content provision (via newspapers, TV, and radio), retail, transport (and countless others) have been disrupted by new players with innovative business models facilitated by the ubiquity of Internet access and the ready availability of technology to consumers.

Antitrust enforcers have met this challenge through various means, including enforcement action, but also through undertaking various investigative measures that aim to evaluate the effects of the digital revolution on existing economic assumptions. The last year has seen the output of these investigative endeavors in the form of reports and studies that analyze the implications of recent technological developments for antitrust enforcement.

While the digital revolution is a global phenomenon, its effects are local, as reflected in the concerns reflected in the multiplicity of reports published by regulators across the world in recent months. But all of the reports seek to answer the same questions, namely: are existing rules sufficient to ensure that the goals of antitrust law are met in this rapidly evolving environment? In other words, is legal reform needed, or can the existing toolkit be redeployed to analyze competitive effects in the current market context?

The diversity of views reflected in the pieces in this edition of the Chronicle will hopefully shed light on this fascinating and evolving debate.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Maureen Ohlhausen, Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Randal Picker, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

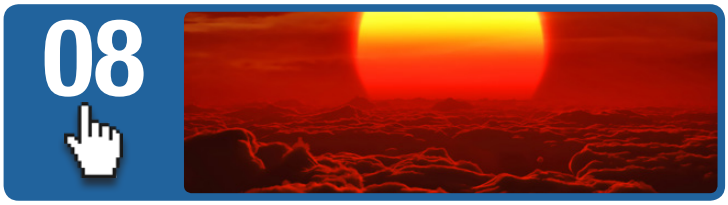
As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks CCIA for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

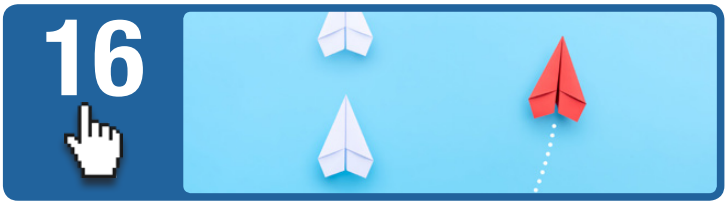
SUMMARIES



Australia's Digital Platform Inquiry: We've Only Just Begun…

By Julie Clarke

Between 2017-2019 the Australian Competition and Consumer Commission conducted a "world first" inquiry into digital platforms and their impact on media and advertising services markets. Its focus was Google and Facebook reflecting, their "influence, size and significance" in Australia. Concluding that these platforms have market power, the *Final Report* makes a raft of recommendations traversing competition, consumer, privacy, media, and broader public interest concerns. In the competition space, minor recommendations were made with respect to Australia's merger laws and processes and a targeted recommendation is made that Google remove default search and browser preferences from Android devices. The Report also calls for the establishment of a specialist ACCC branch tasked with pro-active monitoring and enforcement and armed with compulsory information gathering powers to conduct market inquiries and make recommendations to government. Many of the Report's recommendations call for further consultation, including the development of several "codes of conduct." It is clear that the focus on addressing the rise of the digital platforms in Australia has only just begun.



Competition Policy for the Digital Era

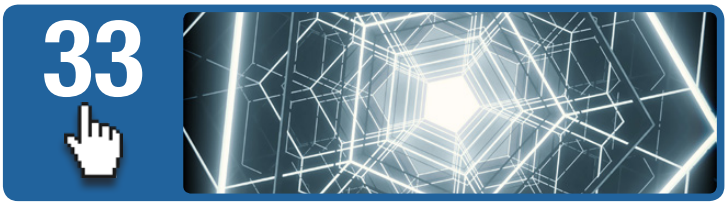
By Heike Schweitzer & Robert Welker

A number of recent reports and studies has discussed the need for competition law reform in the digital era, in particular with a view to exclusionary conduct by digital platforms and with a view to data access. While these reports share a common analysis, they diverge in their recommendations: Can we handle the new challenges on the basis of the existing set of competition rules? Do we need a new set of tests of abuse? Or do we need to shift from *ex post* competition law enforcement to *ex ante* regulation? In this article, we compare the reports. In particular, we discuss the need to shift from an effects-based analysis to "by object" prohibitions for dominant digital platforms, the need to promote data portability and interoperability, and the need for procedural reform, namely for a voluntary notification procedure for novel forms of cooperation. We conclude with some remarks on the need to adjust the enforcement style in light of the uncertainties of the digital era.

Digital Competition Reports and Merger Enforcement

By Alexis J. Gilman, Akhil Sheth, Angel Prado & Eric Fanchiang

Digital-technology companies and online platforms have revolutionized the way people and businesses work, shop, and interact. Today, however, critics are raising questions — and some are ringing alarm bells — about digital platforms and whether antitrust has failed to sufficiently scrutinize their conduct and allowed them grow too large and powerful. In response, various groups have examined digital market competition, past antitrust enforcement in these markets, and formulated recommendations for updated antitrust enforcement and policy. This article examines the merger-enforcement recommendations of three reports and concludes that they are commendable, thought-provoking studies that contain ideas worthy of consideration. But given existing enforcement mechanisms and recently enhanced efforts by U.S. (and foreign) antitrust enforcers to address competition issues in digital markets, some of the Reports' recommendations are unnecessary, inadvisable, and, at best, should be delayed until the results of antitrust enforcers' current efforts to invigorate enforcement can be assessed.



A New Competition Framework for the Digital Economy – Report by the Commission "Competition Law 4.0"

By Martin Schallbruch, Heike Schweitzer & Achim Wambach

The Commission "'Competition Law 4.0'" was set up by the German Federal Minister for Economic Affairs and Energy with the task to draw up recommendations for the further development of EU competition law in the light of the digital economy. The final report with 22 recommendations was handed over in September 2019. The commission finds that the practical and actual power of consumers to dispose of their own data must be improved, clear rules of conduct for dominant platforms must be introduced, legal certainty for cooperation in the digital sector must be enhanced, and the institutional linkage between competition law and other digital regulation must be strengthened.

SUMMARIES

SUMMARIES

The First Report of the BRICS Competition Authorities Working Group on the Digital Economy

By Alexandre Barreto, Patrícia A. Morita Sakowski & Christine Park

The BRICS Competition Authorities Working Group on Digital Economy recently published its first Report under the leadership of Brazil's CADE as Chair and Russian FAS of Russia's as Co-Chair of the Working Group. As a descriptive work, the Report provides an overview of competition policy and enforcement practices involving digital markets in Brazil, Russia, India, and South Africa on selected topics, such as market power assessment, innovation and dynamic competition, acquisition of entrants by incumbents, barriers to entry, algorithmic pricing and big data. The Report also lists some of the main challenges to competition enforcement in the digital era. For CADE, the central question relies on how to intervene in highly dynamic markets. With the release of the Report, CADE hopes to stimulate the debate and is open to discuss the development of competition law and policy in the digital era.

WHAT'S NEXT?

For January 2020, we will feature Chronicles focused on issues related to (1) **Labor Markets**; and (2) **Agriculture**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE FEBRUARY 2020

For February 2020, we will feature Chronicles focused on issues related to (1) **Data**; and (2) **Disruptive Innovation**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

AUSTRALIA'S DIGITAL PLATFORM INQUIRY: WE'VE ONLY JUST BEGUN…

BY JULIE CLARKE[1]

1 Associate Professor in Competition Law, The University of Melbourne.

I. INTRODUCTION

Digital Platforms Inquiries are becoming so ubiquitous as to be almost pedestrian. Nevertheless, when announced in December 2017, the Australian Digital Platforms Inquiry ("DPI") was touted as a "world first" for its focus on the media sector and its breadth of inquiry across competition, privacy, consumer protection, and broader issues of public interest.

The genesis of the DPI was not lobbying from the Australian Competition and Consumer Commission ("ACCC") or broader political concerns about the rise of major platforms. Rather, it lay in a political compromise; the government needed the support of a senator to pass changes to Australian media ownership law and that support hinged (in part) on the government agreeing to investigate the impact of digital platforms on competition in the media and advertising market.[2]

So it came to be that Australia's first significant public inquiry into digital platforms was focused squarely on the impact of platforms on "the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content."[3] As a result, digital platforms, in the context of the DPI, are defined narrowly as "online search engines, social media and digital content aggregators," a distinct contrast to the broad-brush, digital-market-agnostic definitions which typically define digital platforms as digital businesses providing an online meeting place for different groups of users.[4]

II. SCOPE OF INQUIRY

A consequence of the more limited definition of digital platforms adopted by the DPI is that the focus of the inquiry was squarely on the two dominant players in online advertising and media aggregation in Australia: Facebook and Google.[5] Although arguably narrow in this respect, the DPI was also broader than many in that it was not restricted to assessing competition concerns; indeed, while many of the concerns identified in the DPI Report stem from findings of market power, the recommendations directed toward competition law and policy are relatively modest. Part of the explanation for the breadth of focus is that the ACCC is a competition and *consumer* authority, so is accustomed to considering issues from a consumer protection perspective. But the terms of reference went further still, requiring investigation of, among other things, the impact of digital platforms on choice and quality in news and the impact of information asymmetry between platforms and consumers more broadly. Consequently, the ACCC's investigation, analysis and recommendations traverse competition issues, consumer issues, privacy, copyright, and other public interest issues, while recognising that they are all interlinked, at least to some degree.[6] Its breadth in this regard has been described as world first or ground-breaking.[7]

The inquiry itself ran for 18 months, with a Final Report (the "Report," or the "Final Report") delivered in July 2019. Along the journey, the ACCC published an issues paper and a preliminary report, each of which attracted more than 100 submissions, a consumer questionnaire eliciting 260 responses, and it engaged in numerous public and private forums and meetings. It also commissioned independent research and issued 60 statutory notices to compel production of information.[8] Facebook alone claims to have produced over 1608 documents, comprising 14,500 pages, consuming more than 10,000 people-hours.[9] The Report itself runs to 623 pages.

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2 The Hon Josh Frydenberg MP, The Hon Christian Porter MP, Senator The Hon Mitch Fifield, "ACCC Preliminary Report on Digital Platforms," (Media Release, December 10, 2018).

3 The Hon Scott Morrison MP, "Inquiry into digital platforms," (Ministerial direction pursuant to ss 95H(1) of the *Australian Competition and Consumer Act 2010* (Cth), December 4, 2017).

4 The House of Lords' *Online Platforms* report describes digital platforms as a "broad category of digital businesses that provide a meeting place for two or more different groups of users over the Internet": House of Lords, *Online Platforms and the Digital Single Market* (HL Paper 129, April 20, 2016) 7.

5 The closest rival to Facebook (considered together with Instagram) in terms of time spent and unique audience was found to be Snapchat and Twitter, each with a fraction of the "time" share enjoyed by Facebook; ACCC, *Digital Platforms Inquiry: Final Report* (June 2019) 77 ("Final Report"). For Google, its share of search was found to be between 93-95 percent over the last decade, with its closest rival (Bing) enjoying no more than 4 percent during that time: Final Report, 66.

6 Final Report, 5. See also Rod Sims, "Insights and impacts of the ACCC Digital Platforms Inquiry," (IIC Australian Chapter Half Day Seminar, February 11, 2019).

7 See also James Panichi & Marci Eccles, "Australia stakes claim to world's first deep dive into Facebook, Google media impact," (MLex, January 12, 2019, https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/oceania/australia-stakes-claim-to-worlds-first-deep-dive-into-facebook,-google-media-impact).

8 Final Report, 3.

9 Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019) 6 (that excludes voluntary engagement).

The duration of the inquiry meant that between the time it commenced and the Final Report being delivered, a number of other reports were commissioned and reported, including the independent Furman report in the UK[10] and Crémer report in the EU,[11] each of which were referenced by the ACCC in its Report.

III. THE HITS

The Report made 23 recommendations to government and, despite its media focus, many of the findings and recommendations apply to digital platforms generally or otherwise have industry-wide application.

The ACCC's essential conclusions are that Google and Facebook have substantial market power in relevant media and advertising markets and that this means markets are not functioning as well as they should. This is reflected in substantial imbalances in information and bargaining power for consumers, advertising, and media organisations.

In determining how best to address this imbalance the ACCC noted the intersection between competition, consumer protection and data protection, and privacy. It treaded lightly in relation to competition law and policy, but made more substantial recommendations in the areas of consumer protection and data protection and privacy. The Report also includes a significant suite of recommendations directly targeting media and the role of the platforms within the media and media advertising space, including with respect to copyright protection.

This note focuses on those recommendations most relevant to competition law and policy, while also touching on some of the more controversial recommendations around privacy and media.

IV. THE RISE OF THE PLATFORMS: MARKET POWER AND WHAT TO DO ABOUT IT

Chapter 1 of the Report is entitled "Rise of the digital platforms," conjuring up images of a post-apocalyptic *Rise of the Machines*. After acknowledging the value provided by digital platforms, including the lowering of barriers to entry for a wide range of news sources, the Report churns out a plethora of statistics (e.g. "43 per cent of Australians used online sources as their primary news source in 2019;[12] Google and Facebook have collectively captured more than 80 per cent of growth in online advertising in the past three years"[13]) to help support its conclusion that Facebook and Google do indeed have substantial market power in relation to online advertising and in their dealings with news media, and both have substantial bargaining power in dealing with news media.[14] Their ubiquity has made them, in many cases, "critical and unavoidable partners."[15]

Core contributing factors to the ACCC's findings of market power included:[16]

- the breadth and depth of user data collected; and
- the "considerable barriers to entry and expansion for search platforms and social media platforms that entrench and reinforce Google and Facebook's market power," including those arising from "same-side and cross-side network effects, branding, consumer inertia and switching costs, economies of scale and sunk costs."

10 *Unlocking digital competition: Report of the Digital Competition Expert Panel* (UK, March 2019) (Panel comprising Jason Furman (Chair), Diane Coyle, Amelia Fletcher, Philip Marsden & Derek McAuley) (from September 2018-March 2019).

11 Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* ('the Crémer Report') (EU, April 4. 2019) (commencing April 2018).

12 Final Report, 345, citing C Fisher, S Park, JY Lee, G Fuller & Y Sang, *Digital News Report: Australia 2019* (News & Media Research Centre, University of Canberra, June 12, 2019) 13.

13 Final Report, 119.

14 For Google identified markets were "the supply of general search services" and "the supply of search advertising services." Final Report, 8. For Facebook the markets were "the supply of social media services" and "supply of display advertising services": Final Report, 9. The Report did not reach a conclusion about whether there was a market for "news referral services to media business" in which Google and Facebook enjoy market power, but opined that they "probably" did; Final Report, 58.

15 Final Report, 1.

16 Final Report, 58.

The role of data in contributing to and maintaining market power featured prominently in the Report,[17] with the ACCC observing that the collection of data enhances the services of the platforms which in turn attracts more users and advertisers in a "virtuous feedback loop."[18] It rejected the argument that advertising data held by the platforms was "not rare or unique" and that it was "replicable" and "not inherently valuable."[19] The "scale and scope" of data held by Google and Facebook and its "quality and accuracy," make it particularly valuable and give them a "strong competitive advantage" which creates "barriers to rivals" and allows the incumbents to "expand into adjacent markets."[20]

Dynamic competition was also found to be insufficient to curb this market power. Although the ACCC acknowledged that dynamic competition may apply some degree of competitive constraint, Google was "substantially insulated" from dynamic competition and in the case of Facebook, any constraint offered by dynamic competition had been "tempered." In each case, this was largely due to barriers to entry and expansion, advantages of scope, and the "acquisition strategy" of the companies.[21]

A. Merger Reform

Having determined that the digital platforms have market power and that "strategic acquisitions" had contributed to this, the first two recommendations in the Report propose changes relating to how mergers are reviewed.

Australia's merger law prohibits acquisitions that have the effect or likely effect of substantially lessening competition.[22] The ACCC has long been concerned that this standard limits the extent to which they can successfully challenge mergers or acquisitions of small but potentially significant nascent rivals. Despite this, the ACCC stops short of recommending a change to the core test or to the burden of proof for merger assessment (although it does flag that it "may be worthwhile" to consider whether a "rebuttable presumption" should be introduced into Australia's merger laws and is "considering whether it is appropriate to advocate" for such changes outside the inquiry).[23]

Instead, the first recommendation is that additions be made to the list of factors a court *must* consider when determining whether the competition test has been satisfied with respect to a proposed acquisition. This non-exhaustive list currently includes a range of uncontroversial factors, such as the height of barriers to entry, the level of concentration, and the degree of countervailing market power. The ACCC proposes that two factors be added to the list:

- "the likelihood that the acquisition would result in the removal from the market of a potential competitor" and
- "the nature and significance of assets, including data and technology, being acquired directly or through the body corporate."

Although these factors can already be considered, the ACCC regards their inclusion in the mandatory consideration list as offering an important signaling mechanism, highlighting their significance.

In relation to potential competitors, the ACCC states that the recommendation is designed to address concerns about the acquisition of nascent competitors by a dominant platform.[24] Although acknowledging the need to balance this concern against the risk of deterring start-ups who might choose to invest or innovate in the hope of being acquired and preventing anti-competitive acquisitions, the ACCC considered the signaling benefits outweighed this risk.[25] Neither Facebook nor Google have objected to the recommendation, perhaps providing reliable evidence

17 Final Report, 11.

18 Final Report, 11.

19 Final Report, 57.

20 Final Report, 11.

21 Final Report, 58.

22 *Competition and Consumer Act 2010* (Cth) s 50.

23 Final Report, 109.

24 The Report references the Furman and Cremer Reports in relation to these recommendations: Final Report, 106.

25 Final Report, 106.

that it is unlikely to have a substantive impact on their "acquisition strategies,"[26] given the challenges of predicting the competitive impacts of the counterfactual in cases of nascent competition.[27] It would be surprising if the government did not accept this proverbial "low hanging fruit" recommendation.

Unlike the first recommendation, the second is not only industry specific, but directly targets Google and Facebook. It recommends they work with the ACCC to agree on a protocol to notify the ACCC of proposed acquisitions.

There is currently no pre-merger notification requirement in Australia; parties may and frequently do notify the ACCC of proposed mergers that may raise concerns and the ACCC may indicate that they will not be challenged; indeed, many deals are contingent on the ACCC indicating it will not challenge a merger.

Google indicated that it welcomes engagement on this issue, but expressed some caution;[28] Facebook does not support the recommendation,[29] pointing to a lack of evidence of a problem necessitating an industry-specific regulatory response and observing that the ACCC already has considerable powers to review mergers, whether or not notified by the parties.[30]

As with the first recommendation, concern has been expressed about the potential for the recommendation to "chill innovation and entrepreneurship,"[31] and while those concerns may be overblown, industry specific regulations (even informal ones) are fraught, at least where there is a lack of evidence of a problem requiring regulatory redress. It is tough to predict how Australia's conservative government will respond to the call for greater regulation without a solid evidentiary foundation.

B. No New Divestiture Powers

Australia has provision for court-imposed divestiture remedies where merger laws have been contravened; as the ACCC rarely brings merger cases before the courts and even more rarely litigates over concluded mergers, resort to this power has not been made this century. Divestiture is not available for other competition law breaches. Calls by some, including News Corp, that Alphabet divest certain assets were firmly rejected in the Report. Despite "possible benefits" of some divestiture, the ACCC confirmed its view, expressed with some regularity, that, as a general rule, market structure is "best left to competitive forces" and that implementing structural reform "necessarily involves risks in design" and implementation, which is "particularly acute in digital markets." In any event, the ACCC did not consider that the proposed divestitures would address the identified consumer and competition concerns.[32]

C. No Change to Misuse of Market Power Laws

As is the case in most jurisdictions, there is no prohibition in Australia on a company holding market power or in acquiring greater power, provided it is not done through anti-competitive means. Unilateral conduct having the purpose or effect of substantially lessening competition is prohibited.

The Report highlighted concern about the ability and incentives for digital platforms to exploit their market power, but (sensibly) makes no recommendation to change the core misuse of market power law, which was overhauled in November 2017 to reflect a greater focus on competition concerns.

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26 Support is tempered by some caution that the application of the criteria must be supported by evidence: Google Australia Pty Ltd, "Digital Platforms Inquiry: Submission in response to the ACCC's Preliminary Report," (February 18, 2019) 17; Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019) 33.

27 See, for example, John M Yun, "Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms," (Prepared Statement before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Washington DC, September 24, 2019) 4-9.

28 Google Australia Pty Ltd, "Digital Platforms Inquiry: Submission in response to the ACCC's Preliminary Report," (February 18, 2019) 17.

29 Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019) 13.

30 Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019) 38.

31 Final Report, 110.

32 Final Report, 117.

However, the Report does state that dominant firms "of course, have a special responsibility that smaller, less significant businesses do not have."[33] The adoption of this distinctly European terminology is notable, particularly given that it has not been a feature of Australia's misuse of market power law. There is no illumination of what is intended by this reference in the Report, but some guidance can be found in a speech by ACCC Chair Rod Sims, who explained that he simply means that "conduct by a non-dominant firm that is benign, may become problematic when a dominant firm engages in the same behaviour."[34] So much may be accepted, given competitive effects are market and context dependent. But Sims goes on, explaining that the ACCC considers that in the case of Google and Facebook this "special responsibility should go further" and this is reflected in some industry-specific recommendations.[35]

One of those may be the recommendation for a pre-merger notification protocol. Another is reflected in the targeted requirement for Google to remove default preferences.

D. Removal of Default Preferences

The ACCC recommends that Google provide Android device users with the ability to choose default search engines and browsers, arguing it will "improve consumer choice and be pro-competitive" by reducing "customer inertia as a barrier to expansion."[36]

The ACCC's clear concern is default bias. The recommendation itself represents a shift from the preliminary report, which was not company-specific and simply recommended suppliers of operating systems or browsers be required to provide this choice. There are two explanations for this. The first is that the ACCC accepted a number of submissions suggesting an industry-wide requirement might entrench Google's dominance and heighten barriers to entry for small rivals who could no longer benefit from default search or browser installation on some devices.[37] The second is that between the release of the preliminary report and the final report Google announced (in March 2019) that it would make these changes in Europe.[38] The recommendation itself draws on these European commitments, arguing that the ability for Android users to choose default search engines and browsers should also be rolled out in Australia; failure to do so voluntarily is likely to result in the ACCC asking the government to compel them to do so.

In a blog response to the final report, Google identified this recommendation as one of two that raised "particular concerns." It argued that the recommendation does not account for different Australian market conditions and laws, and is not accompanied by a justification for "focusing on Android when Apple's iOS is the most-used mobile operating system in Australia … and Microsoft's Windows remains the most-used PC-based operating system."[39]

E. Proactive Monitoring and Investigation

The final (and arguably most significant) of the competition recommendations is that a specialist digital platforms branch of the ACCC be established to "investigate competition issues relating to digital platforms,"[40] including taking enforcement action, conducting inquiries, and making recommendations to government.

This recommendation was prompted, in part, by the ACCC's conclusion that digital platforms with substantial market power have the ability and incentive to engage in anti-competitive leveraging behavior[41] and that existing laws are insufficient to deal with this, including as a result of lack of transparency and the time taken to accumulate and assess relevant data. In addition, the investigatory and litigation timeframes

33 Final Report, 1.

34 Rod Sims, "Insights and impacts of the ACCC Digital Platforms Inquiry," (IIC Australian Chapter Half Day Seminar, February 11, 2019)

35 Rod Sims, "Insights and impacts of the ACCC Digital Platforms Inquiry," (IIC Australian Chapter Half Day Seminar, February 11, 2019).

36 Final Report, 110.

37 Final Report, 110.

38 Final Report, 111.

39 Melanie Silva, "Google on the ACCC Digital Platforms Inquiry," (Googleblog, September 17, 2019, https://australia.googleblog.com/2019/09/google-on-accc-digital-platforms-inquiry.html).

40 Final report, 140 and recommendation 4.

41 Rod Sims, "Insights and impacts of the ACCC Digital Platforms Inquiry," (IIC Australian Chapter Half Day Seminar, February 11, 2019).

might mean the remedy is too late to address the identified concern.[42]

A specialist branch armed with compulsory information gathering powers would, it is argued, allow for increased visibility of problems and would improve consumer outcomes through greater transparency as well as acting as a catalyst for change by shining a light on bad practices. It would also develop the expertise of the ACCC in relation to digital platform markets and allow evidence to be built up over time and provide the ACCC with the flexibility to respond.

To combat concerns about lack of transparency associated with ad tech, in particular, the ACCC has further recommended a specific ACCC inquiry be conducted by the newly formed digital platforms branch into the supply of ad tech services and online advertising services by advertising and media agencies.[43]

The creation of a specialist branch is not by itself controversial and is not unprecedented, but the ACCC further recommends that the branch be empowered by a ministerial direction to hold inquires over a minimum of five years.[44] Ministerial direction brings with it a raft of compulsory information gathering powers not otherwise available to the ACCC. For this reason, it is perhaps not unsurprising that Facebook has pushed back on this aspect of the recommendation; while providing in principle support for a specialist branch, it has questioned the appropriateness of ongoing compulsory information-gathering powers, concerned about the "largely unconstrained nature of the public inquiry proposed" and noting the "intrusive, burdensome and costly" nature of the "highly coercive governmental power to compel the production of information and documents in circumstances where there is no reason to believe there has been any breach of laws."[45] It is not alone in expressing these concerns.[46]

V. CONSUMER PROTECTION

The Report makes two recommendations specific to consumer protection;

- a recommendation that unfair contract terms be prohibited and subject to pecuniary penalties;
- a recommendation that certain unfair trading practices be prohibited.

Both are industry wide recommendations.

Unfair contract terms in standard form consumer and small business contracts are currently rendered void by the Australian Consumer Law, but the ACCC considers that adding prohibition and the threat of penalties will provide greater incentives for compliance.

In relation to unfair trading practices, the scope of what should be included is left for further consideration, but the Report suggests that it may extend to certain data-use practices.[47] In particular, consumers should be protected from "conduct that deprives them of a real and meaningful choice" including by "imposing extortionate take-it-or-leave-it terms to consumers who are in need of a service,"[48] suggesting a consumer (and perhaps small business) version of an exploitative practices prohibition, *sans* the requirement to demonstrate market power or anti-competitive impact.

42Final Report, 139.

43 Final Report, recommendation 5.

44 Final Report, 140 and recommendation 4.

45 Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019) 6 (that excludes voluntary engagement) 45.

46. Business Council of Australia, *Submission to Treasury on the Digital Platforms Inquiry* (September 2019, p 4). See also John M Yun, Douglas H Ginsburg, Joshua D Wright & Tad Lipsky, "Comment of the Global Antitrust Institute, George Mason University School of Law, on the Australian Competition & Consumer Commission's Digital Platforms Inquiry, Preliminary Report," (George Mason University Law and Economics Research Paper Series, 19-04, January 22, 2019) 1.

47 Final Report, 498.

48 Final Report, 499.

VI. PRIVACY

The Report includes several recommendations relating to data privacy, including by strengthening the Privacy Act, particularly around notification and consent requirements, such as implementing pro-consumer defaults, enabling erasure of personal information, and providing a right of direct action for individuals[49] and the development of a statutory tort for serious invasions of privacy. The Report also calls for broader reform of Australia's privacy law in the form of a further review and development of an enforceable code of practice, developed by the Office of the Australian Information Commissioner ("OAIC"), "to enable proactive and targeted regulation of digital platforms' data practices."[50]

VII. MEDIA-SPECIFIC RECOMMENDATIONS

Most of the remaining recommendations are targeted at media and journalism more specifically. The most notable and most controversial is recommendation 7, that designated digital platforms provide codes of conduct governing relationships between digital platforms and media business to the Australian Communications and Media Authority ("ACMA"). This is the second of the recommendations about which Google raises "particular concerns."[51] Google's concern is unsurprising given the recommendation would require commitments on data sharing with news media business, early notification of changes to ranking or display of news content, and negotiated revenue sharing in some cases designed to address the imbalance of bargaining power.

The privacy and media-specific recommendations, unlike more general consumer and competition recommendations, have been described as "extensive and dramatic" and "far-reaching and bold."[52]

VIII. WHAT NEXT?

In its Report, the ACCC flagged as a "future ACCC work" direction, the issue of data portability. Australia is in the process of implementing a "consumer data right" ("CDR") to give consumers greater control over their data. The CDR will be rolled out sector-by-sector, commencing with banking. The ACCC effectively dodged consideration of data portability as a potential panacea for some of the concerns it identified, although it did observe that it thought it unlikely that in the markets it was considering data portability would "have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term."[53] However, it will consider this further in the context of its work on the CDR.[54]

The ACCC has also pressed ahead with its ongoing investigations involving digital platforms, most notably commencing action against Google in October 2019 alleging that they misled consumers in relation to the personal location data that it collects, keeps and uses.[55] The effectiveness of the Australian Consumer Law in addressing many of the more egregious conduct of the platforms will be watched closely, particularly given the challenges associated with direct action under the competition provisions.

As to the fate of the Report, it is currently being considered by government, which conducted a further review of the Report's recommendations throughout August and September 2019. A formal response is expected by the end of 2019.

Even if all or most are accepted, it is clear that many of the recommendations represent only the start of further program of consultation and inquiry designed to address the market power related concerns identified. The ACCC's work relating to digital platforms *has only just begun*.

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49 Recommendation 16.

50 Recommendation 18.

51 Melanie Silva, "Google on the ACCC Digital Platforms Inquiry," (Googleblog, September 17, 2019, https://australia.googleblog.com/2019/09/google-on-accc-digital-platforms-inquiry.html). Although Facebook supports a code "in principle" it expresses concern about the proposed nature and application of the code: Facebook, "Facebook's response to the Digital Platforms Inquiry," (September 12, 2019), 6 (excluding1 voluntary engagement).

52 Sacha Molitorisz & Derek Wilding, "Digital platforms. Why the ACCC's proposals for Google and Facebook matter big time," (The Conversation, December 11, 2018).

53 Final Report, 116.

54 Final Report, 11 and 115.

55 ACCC, "Google allegedly misled consumers on collection and use of location data," (October 29, 2019).

COMPETITION POLICY FOR THE DIGITAL ERA

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I. INTRODUCTION

The digital economy poses new conceptual challenges for competition policy. A number of recent reports and studies concur in this finding.[2] In a novel way, the digital economy is characterized by extreme returns to scale, positive network externalities that can prevent a superior platform from displacing an established incumbent, and a novel role for data as a crucial input to many online services, production processes, and logistics, as well as a key ingredient for Artificial Intelligence.[3]

Digital platforms have emerged as a new type of information intermediary – indispensable in particular for consumers as they make use of the manifold possibilities of the internet by searching for information, interconnecting with other users or transacting online with businesses. Frequently, these platforms do not charge monetary prices for their consumer-facing intermediation services, but rather monetize the usage and user data collected in the course of the provision of those services by offering targeted advertising to businesses on the other side of the platform. As a consequence, so-called "zero-price markets" have become more common, and have raised questions with regard to the proper methods to delineate and analyze them. Simultaneously, positive network effects that tend to promote concentration on platform markets can translate into concentrated positions with regard to the control over user and usage data – data which can frequently be put to multiple uses across a broad variety of consumer facing markets. Extreme returns to scale, network externalities, and the new role of data can thus result in strong economies of scope as digital platforms expand the range of services they offer to their users and turn into digital ecosystems. Likewise, the Internet of Things ("IoT") is characterized by the interaction between products and complementary services, driven by data. Again, the control over data can lead to the evolution of closed ecosystems where consumer choice is limited to complementary services offered by the product provider upstream.

The market changes we are currently experiencing are far-reaching. What is more: developments take place at high speed.

The various reports and studies largely agree in their diagnostic analysis. Moreover, there is a shared apprehension that, concentration tendencies notwithstanding, in an environment characterized by intense innovation with a view, in particular, to data analytics and data as a product and service component, effective protection of competition is key.

This is true with a view to competition *for* the market: Where extreme returns to scale and positive network effects tend to feed a "winner takes all" dynamic in platform markets, protecting the remaining opportunities for entry and competition becomes more important, not less. Practices by dominant platforms that hinder rivals in their ability to attract users and generate their own positive network effects, e.g. by impeding multi-homing or switching of consumers or by implementing even narrow MFNs, are suspect.[4] It is also true with a view to competition *on* platform markets: Dominant platforms have a special responsibility to ensure free, undistorted, and vigorous competition on their platform. Finally, strong, frequently data-driven economies of scope increasingly draw attention to the need to protect against anti-competitive leveraging of dominance across market boundaries.

The various reports somewhat differ in their more concrete suggestions for change: To what extent can we handle the challenges on the basis of the existing set of competition rules? Do we need a new set of tests of abuse? Or do we need to shift from *ex post* competition law enforcement to *ex ante* regulation?

In this brief article, we propose to focus on this debate. Firstly, we will discuss the need to adjust existing competition rules to effectively protect competition in digital settings (II); secondly, we will inquire into what this means in terms of rules of conduct for dominant platforms (III); and thirdly, we will discuss the need to promote interoperability, including data interoperability, more generally (IV). Some suggestions for procedural reform follow (V). We conclude with some remarks on changing paradigms with regard to enforcement styles (VI).

2 Crémer/de Montjoye/Schweitzer, Competition policy for the digital era. Report for the European Commission, 2019 ("Special Advisors' Report"), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Furman et. al., Unlocking digital competition, Report of the Digital Competition Expert Panel, 2019 ("Furman Report"), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Commission 'Competition Law 4.0', A New Competition Framework for the Digital Economy, Report for the Federal Ministry for Economic Affairs and Energy, 2019 ("Competition 4.0 Report"), available at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3; Schweitzer/Haucap/Kerber/Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 2018 (subsequently: Market Power Study), available at https://ssrn.com/abstract=3262210 including a summary in English; Scott Morton et al., Report of the Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee, 2019 ("Stigler Report"), available at https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf. See also: Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf.

3 See Special Advisors' Report, p. 2.

4 Special Advisors' Report, p. 5.

Merger control will not be addressed in this piece.[5] Nor will we address data access more specifically.[6]

II. "OPTIMAL COMPETITION RULES" IN THE DIGITAL ECONOMY: INSIGHTS OF DECISION THEORY FOR COMPETITION LAW

More than most other areas of law, competition law has been informed by decision theory insights on how to structure rules in light of error costs. In order to apply the broadly framed competition rules to specific cases, competition authorities and courts need to understand and sometimes predict the effects of complex business strategies on the competitive process, and ultimately on consumers. It is well understood that, in doing so, errors will occur: sometimes, conduct, agreements or acquisitions will be prohibited although they are in fact pro-competitive (false positives/Type I-errors). Sometimes, harmful conduct, agreements or acquisitions will be allowed (false negatives/Type II-errors). Both types of errors may dampen competition, thus resulting in welfare loss.

Over the last 30 years, EU competition policy has been guided by two main goals: to reinforce the "fight against cartels"; and to reduce the number of "false positives" in other areas of competition law – i.e. to make sure that the cases pursued by the EU Commission are cases in which consumer harm can be shown. Under this so-called "effects-based approach," the complexity of rules and the amount of case-specific information that competition agencies and courts have to take into consideration has consequently increased in cases of non-hard-core infringements.

The changes brought about by the digital economy have universally brought into view the costs that may accompany a policy that is, to a significant extent, focused on avoiding false positives: The EU Commission's flagship digital cases – *Google Shopping*[7] and *Google Android*[8]– have promoted a better understanding of the dynamics of the digital economy. But the attempt to provide quantitative evidence of consumer harm case by case is time- and resource-intensive. The *Google Shopping* case in particular has been followed by a debate on how to remedy an abuse that has succeeded in driving out competitors.[9]

As important as the debate on improvements of the remedial regime in competition law is: the difficulties encountered in the remedial phase may in part flow from an attempt to reduce error costs in the decision-making phase by establishing more complex, more differentiated rules that require a more in-depth inquiry and more information. Ultimately, this may result in an increase in overall error-costs, in two different ways.

First, competition authorities are budget-constrained, and skilled enforcers are scarce human resources. Given that the enforcement capacities are fixed, any increase in complexity will lead to a decrease in erroneous decisions – but also to a decrease in the absolute number of cases that can be handled. This, in turn, leads to an increase in false negatives, as competition enforcers have to let potentially anticompetitive behavior slip through.[10]

Second, even where competition authorities intervene, more complexity leads to longer procedures. In the absence of interim measures, the anti-competitive conduct will negatively affect the competition for a longer period of time, and in fast-moving, dynamic markets, the harm to competition may be difficult to remedy. "Temporary" false negatives may therefore ultimately turn into permanent error costs, even where competition authorities intervene.

The general notion running through all the recent reports is that the error costs of false negatives in the digital economy, and in particular in digital platform settings, may be particularly high. The typical combination of extreme economies of scale and strong positive network effects

5 On mergers see Special Advisors' Report, pp. 110 et seq.; Competition 4.0 Report, pp. 61 et seq.; UK Competition and Markets Authority, Ex-post Assessment of Merger Control Decisions in Digital Markets: Final report, 2019 ("LEAR Report"), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

6 For that see: Special Advisors' Report, pp. 73 et seq.; Competition 4.0 Report, pp. 33 et seq.; Schweitzer, GRUR 2019, 569.

7 European Commission, Decision of 27.6.2017, Case AT.39740 – *Google Search (Shopping)*.

8 European Commission, Decision of 18.7.2018, Case AT.40099 – *Google Android*.

9 Competition 4.0 Report, pp. 74 et seq.; *Vezzoso,* Android Remedies: Tearing Down the Wall?, CPI online, available at https://www.competitionpolicyinternational.com/android-remedies-tearing-down-the-wall/; Guniganti/Madge-Wyld, Google shopping remedies have had effect, Vestager says, GCR online, https://globalcompetitionreview.com/article/1170666/google-shopping-remedies-have-had-effect-vestager-says; Hoppner, CoRe 2017, 208.

10 Woodcock, The Indispensability of Per Se Rules in Budget-Constrained Antitrust Adjudication, 2017, available at https://ssrn.com/abstract=2896453.

can quickly lead to concentrated markets with very robust and durable market entry barriers, concentrated platform markets tend to translate into concentrated data control and thereby to self-reinforcing positions of dominance as well as to an expansion of market power across market boundaries. The welfare losses from competition law underenforcement may therefore be especially high, and quick, systematic, and forceful intervention against anti-competitive conduct in order to protect the remaining opportunities for decentralized innovation and competition.

Overall, this argues in favor of more simple rules for conduct, and in particular of alleviating the requirement to show consumer harm on a case-by-case basis. This shift can be achieved by qualifying specific types of conduct as infringements "by object" instead of "by effect." Efforts to reduce the "by object" box to types of conduct where pro-competitive explanation are, for all practical cases, almost inconceivable, ignore the error cost calculus. Rather, the "by object" box should include those types of conduct that will harm competition significantly with a significant degree of probability, and where pro-competitive justifications can reasonably be shown by the defendant. The analysis of what may qualify as an infringement "by object" should, furthermore, be guided by a proportionality test: where any pro-competitive rationale that may justify potentially anti-competitive conduct can also be achieved by other, less exclusionary means, the "by object" qualification may be justified.

In the recent reports, this issue is frequently discussed as a matter of introducing presumptions,[11] a shifting of the burden of proof, or a reduction of the standard of proof. These various concepts and terms have caused some confusion. Commentators have warned against reversals of the burden of proof or reductions of the standard of proof, as this would put the investigated firms into a difficult position and break with "core legal principles."[12]

Yet, what is proposed here is not a conceptual novelty in EU competition law. The distinction between infringements "by object" and "by effect" is deeply engrained in the structure of Article 101 TFEU. Likewise, some tests of abuse under Article 102 TFEU have traditionally included an effects analysis, others have not.[13] In U.S. antitrust law, some types of conduct are qualified as "illegal *per se*," others fall under a "rule of reason" and require a more or less full-blown effects analysis.[14] Deciding which type of conduct falls into one or the other box is part of the never-ending process of getting competition rules right in light of the error cost framework – a process in which competition authorities, courts and academics are constantly involved. What should be required – both in the abstract and case by case – is a coherent narrative of how a given type of conduct can lead to harm to the competitive process. What is not generally required under the basic principles of EU competition law is a positive proof of consumer harm, be it quantitative or qualitative.[15]

A turn away from a consumer harm criterion in the application of EU competition rules case by case – quite in line with settled case law – may be further recommended by the fact that innovation-based theories of harm will frequently figure prominently in digital cases. Given the dynamics of digital markets, as well as the fact that on the consumer-facing side of the platform services are frequently provided "for free," protecting competition in innovation will often be a core concern. Translating negative effects on innovation into consumer harm is, however, a methodologically complicated task. A plausible narrative concerning how a given type of conduct will likely harm the competitive process will typically serve as a proxy for consumer harm.

A relaxation, and sometimes abandoning, of the need to show consumer harm will, however, result in a heightened burden for undertakings (and in the case of Article 102 TFEU, dominant undertakings), namely the need to come forward with an "efficiency defense." In order to justify such conduct, they have to show (a) an efficiency rationale, (b) that consumers will benefit to a fair degree, (c) that the exclusionary conduct is indispensable for realizing those efficiencies and (d) that residual competition persists (Article 101 (3) TFEU). The CJEU has found

11 Special Advisors' Report pp. 50 et seq.; Stigler-Report, p. 72; Competition 4.0 Report, pp. 23 et seq.

12 Cf. "Vestager considers shifting burden of proof for big tech," Global Competition Review of 31.10.2019, available at https://www.lexology.com/library/detail.aspx?g=b7159a3d-ae2e-4e87-ba37-e59f9200c2c4.

13 Ibánez Colomo, CMLR 53 (2016), 709.

14 Hovenkamp, Florida Law Review 70 (2018), 81.

15 Cf. CJEU, Decision of 4.6.2009, Case C-8/08, ECLI:EU:C:2009:343 – *T-Mobile Netherlands,* paras 38 et seq.: "Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. Therefore […] in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices"; CJEU, Decision of 6.10.2009, Joined Cases C-501, 513, 515 and 519/06 P, ECLI:EU:C:2009:610 – *GlaxoSmithKline,* para 63: "[…T]here is nothing in [Art. 81(1) EC] to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, […] the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price […]."

that this efficiency defense applies to Article 102 TFEU as well.[16] Where the "bar" for including specific types of conduct in the "by object" box is lowered, competition authorities and courts should seriously consider the merit of a pro-competitive rationale presented to them. The likelihood of succeeding with an efficiency defense would increase. In any case, undertakings must not be required (or allowed) to prove positive welfare effects as such – a form of proof that is outside of their realm of privileged knowledge. What is required is a plausible "narrative" of how the conduct at issue promotes, rather than harms, competition.

The parallel debate as to whether the "*standard of proof*" should be reduced is mainly limited to the realm of merger control. Here, the debate is whether to shift from a "more likely than not" standard for showing a significant impediment to effective competition to a "balance of harms" approach that takes into account not only the likelihood, but also the size of competitive harm.[17] Others have proposed to introduce a presumption of illegality for acquisitions of start-ups by dominant digital platforms with strongly entrenched positions of market power.[18]

III. RULES OF CONDUCT FOR DOMINANT PLATFORMS

The business model of digital platforms is one of the "game changers" in the digital economy. In reaction to the emergence of digital platforms, many producers of consumer goods have reorganized their marketing and distribution channels, often to the benefit of competition and consumers.

At the same time, strong concentration in platform markets, the resulting "bottleneck" or "gatekeeper" positions of digital platforms and the concomitant control over usage and user data with the potential to reinforce dominance drive many of the ongoing debates about competition law reform.

The *Special Advisor's Report* for Commissioner Vestager has highlighted the fact that digital platforms are a special sort of intermediaries in that they set up fora or marketplaces, and thereby the rules and institutions through which their users interact.[19] By designing the platform and framing the interactions, platforms become "regulators." This "regulatory" function is inherent in the platform business model and can be highly beneficial. Platforms can solve a variety of coordination problems that otherwise complicate and sometimes impede interaction or otherwise create inefficiencies: by ranking information and offers according to perceived consumer preferences, they help consumers overcome the information overload of the internet and expand geographical market boundaries. Rating and recommendation systems, standardized contract terms and consumer-friendly dispute resolution regimes allow consumers to significantly reduce the transaction risks associated with information asymmetries and opportunistic behavior. Digital platforms thus address both the problem of adequately comparing and evaluating competing offers and the problem of (a lack of) trust between unfamiliar trading partners. In doing so, platform operators will normally have an incentive to maximize the overall value of transactions effected on their platform.

However, this need not always be true. Where platforms are vertically integrated, incentives may exist to steer customers to services offered by their subsidiaries. In other situations, platforms may steer customers towards the services of those firms who pay the highest commissions. In both cases, firms active on the platform no longer compete "on the merits," but for the patronage of the platform. For users, the fact that the platform no longer ranks the matches according to their own preferences, but according to separate interests of the platform that are not aligned with their own, will typically not be visible. The platform's regulatory choices will frequently be hidden in the algorithms and platform design and difficult to discern. This can be true for dominant as well as non-dominant platforms. It is for this reason that the P2B regulation[20] has

16 CJEU, decision of 15.3.2007, Case C-95/04 P, ECLI:EU:C:2007:166, para 86 – *British Airways*.

17 E.g. Furman Report, paras 3.88 et seq.

18 Stigler-Report, pp. 89 et seq.: "specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition."; Australian Competition & Consumer Commission (ACCC), Digital Platforms Inquiry, Final Report, 2019, available at https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, p. 199: "The ACCC considers it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. […] it signals that, absent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition."

19 Special Advisors' Report, pp. 60 et seq.

20 Regulation (EU) 2019/1150 if 20.6.2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

established transparency rules[21] for online intermediation services and search engines, irrespective of market power.[22] Increased transparency can allow for increased competition between online intermediaries as long as the disciplinary force of competition is still intact. And it can be an important first step to detect anti-competitive conduct where it is not.

All recent reports agree that the ability of dominant platforms to steer competition poses specific threats to the competitive process that can require swift intervention in order to avoid the anti-competitive exclusion of competitors. There is a range of conduct that the reports unanimously view as suspect when adopted by dominant platforms: Self-preferencing by vertically integrated platforms,[23] the obstruction or prevention of multi-homing and switching,[24] the use of wide MFN- or best price-clauses,[25] and certain forms of tying and bundling.[26] Conduct that restricts data mobility and/or interoperability may also constitute an abuse of dominance and will be addressed separately below (see IV, below).

All reports have therefore concluded that stricter conduct rules for dominant digital platforms – or for platforms with some specific sort and degree of market power – are required.[27] The *Furman Report* proposes a "code of conduct" for platforms with a "strategic market status," a form of dominance[28] characterized by the control over "a gateway or bottleneck in a digital market, where they control others' market access."[29] Likewise, the *Stigler Report* proposes special conduct requirements for platforms with "bottleneck power."[30] The German Competition 4.0 Report has proposed to pass a new EU regulation, which specifies a set of conduct rules addressed towards dominant platforms. The recent draft amendment of the German Act Against Restraints of Competition proposes to introduce conduct rules for platforms that have "a paramount significance for competition across markets."[31] A study for the German Federal Ministry for Economic Affairs proposed to extend the prohibition to impede switching and multi-homing to platform businesses with some degree of market power *below* the threshold of market dominance in order to target *tipping-inducing behavior* in *highly dynamic markets* with tipping tendencies already before they tip.[32]

The various reports agree that the need for a speedy intervention and the need for a comprehensive enforcement may require a shift to a set of more clear-cut conduct rules to be specified *ex ante* and swiftly enforced. *De facto*, this includes a move from infringements "by effect" to infringements "by object" (see above). Such a shift is, however, difficult to implement within the institutional set-up of competition law enforcement alone: the proposal that the EU Commission should provide *ex ante* guidance even before a relevant case law has emerged[33] will predictably be met with the criticism that it is assuming legislative powers.[34] A quick shift in rules may, therefore, require action by the legislator.

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21 Material conduct requirements have not been implemented in the P2B regulation. There is a strong consensus that such rules should be limited to dominant platforms, see below.

22 Cf. Special Advisors' Report, p. 69; Competition 4.0 Report, p. 49.

23 Furman Report, para 2.36; Special Advisors' Report, pp. 65 et seq.; Competition 4.0 Report, pp. 50 et seq. See also Section 19a (2) (1) of t he Draft Amendment of the German Act against Restrains of Competition. An unofficial English translation can be found at https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf.

24 Stigler-Report, p. 93; Special Advisors' Report, pp. 57 et seq.; Market Power Study, Executive Summary (English version) p. 3 and recommendation 5.

25 Furman Report, para 2.36; Special Advisors' Report, pp. 55 et seq.

26 Stigler Report, p. 95.

27 For non-dominant platforms, most of the aforementioned business strategies can be manifestations of desirable aggressive competition. The use of narrow MFN clauses or the obstruction of multi-homing, for example, can safeguard investments into the platform. Product bundles, like Amazon Prime, may be attractive for consumers.

28 Cf. Furman Report, paras 2.25 and 2.27: "Platforms that achieve *dominance* can hold a high degree of power over how their users access the market, and each other." […] "Where a platform has this form of control, the Panel considers it *to have achieved strategic market status*, and the proposed code of conduct should apply" (emphasis added).

29 Furman Report, para 2.10.

30 Stigler Report, pp. 84 et seq. and pp. 93–95. However, it is unclear whether this bottleneck power is a special form of dominance or can also be present below the threshold of dominance.

31 Section 19a (1) of the Draft Amendment to the German Act Against Restrains of Competition. An unofficial English translation of the most important parts of the draft amendment is available on the D'Kart blog at https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf.

32 Market Power Study, Executive Summary p. 3 and recommendation 5 (in English), pp. 59-64 (in German).

33 Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf, p. 4.

34 Cf. Competition 4.0 Report, p. 49.

Any attempt to set conduct rules for digital platforms through legislation should, however, be closely aligned with the general competition law rules – as proposed by the Special Advisors' Report[35] and the German Commission Competition 4.0 Report.[36] Wherever we move from an effects-based analysis towards "by object" offenses, we should be particularly careful in framing the rules. Markets and business strategies are evolving quickly. While we may currently live in a state of under-enforcement with powerful digital platforms and ecosystems expanding their regulatory reach, a state of systemic over-enforcement would risk killing beneficial innovation. A shift towards "by object" offenses that is not based on a significant body of case law and experience must, therefore, be supplemented by a meaningful efficiency defense. Dominant firms must be able to set out and explain their business rationale (see above, Section II). This comes with a welcome side-effect, namely an increase of the transparency of business strategies in the digital world, where the lack of transparency is of particular concern: Digital platforms will have to lay open the "regulatory" choices that are implicit in their fora and marketplaces. For competition law enforcers, this provides an opportunity to learn more about the changing business strategies in highly dynamic markets and to adjust the rules of conduct where opportune to protect competition and innovation. Ultimately, such a "structured conversation" between digital platforms and enforcers has the potential to increase both competition on the merits and the public acceptance of the new intermediaries.

While the reports broadly agree on the need to enact more specific rules of conduct that either specify[37] or expand[38] the obligations following from Article 102 TFEU, there is significant divergence regarding the design of the enforcement regime. The Furman Report and the Stigler Report in particular have proposed to introduce a novel regulatory regime for digital platforms which is supposed to exist in parallel with competition law.[39] These regulatory regimes differ from the competition law instruments in several core aspects: they establish *ex ante* rules in the sense that specific conduct requirements can be imposed on undertakings *without* the need to show a *prior* infringement in order to prevent anti-competitive conduct or to promote competition.[40] The discretionary powers of such a regulatory body are significantly broader than those of a competition authority. At the same time, where a regime of specified competition law rules would apply to any dominant digital platform, the addressees of such a regulatory regime would need to be determined or selected *ex ante*. This is true also for the special regime now proposed by the German legislator for platforms[41] with "paramount significance for competition across markets":[42] where the Bundeskartellamt finds that a platform meets the requisite criteria, it may then prohibit conduct that falls under one of five newly formulated conduct rules (self-preferencing; impeding competitors on markets where the platform may expand rapidly without being dominant yet; leveraging data power; impeding interoperability or data mobility; informing other companies insufficiently about the scope, quality or succeed of the own performance).

The regulatory proposals are typically informed by the example of the telecommunications regulatory framework, a cornerstone of which is the determination of markets subject to regulation because "significant market power" is present. Compared to telecommunications markets, digital markets are much more in flux, however. The determination of the addressees of regulation would then be actor-based instead of market-based. A sound theoretical concept for an actor-based regulation different from the concept of "market dominance" has not yet been established. For the time being, conduct rules addressed to dominant platforms therefore seem preferable. Where competition authorities remain competent to enforce these novel codes of conduct, the risk of charging the regulatory regime with additional, non-competition based rationales is kept at bay and an institutional fragmentation of competition-based enforcement powers is avoided.

35 Special Advisors' Report, p. 70.

36 Competition 4.0 Report, p. 50.

37 Competition 4.0 Report, p. 49.

38 Market Power Study, Executive Summary p. 3 and recommendation 5 (in English), pp. 59-64 (in German).

39 Furman-Report, para 2.16: "a pro-competition approach alongside conventional competition policy"; Stigler-Report, pp. 79 et seq.: "a valuable addition to antitrust enforcement."

40 Similarly, the Belgian, Dutch, and Luxembourg Competition Authorities propose, in a joint memorandum, that the EU Commission should offer *ex ante* guidance on specific issues - and as *ex post* enforcement can nonetheless be too slow in fast moving digital markets, they propose the introduction of an *ex ante* intervention mechanism to prevent anti-competitive behaviour by dominant companies that are in a gatekeeper position, i.e. an instrument that allows for the imposition of remedies without a prior establishment of an infringement. See Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf, p. 5.

41 Undertakings which are "active to a significant extent on markets within the meaning of Section 18 (3a)," meaning "multi-sided markets and networks."

42 An unofficial English translation of the most important parts of the draft amendment is available on the D'Kart blog at https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf.

IV. PROMOTING DATA PORTABILITY AND INTEROPERABILITY

An obligation to ensure interoperability and allow for swift and potentially real-time data portability are among the rules of conduct for dominant digital platforms that are most frequently mentioned in the recent reports on competition and digitization.[43]

The importance of technical interoperability and data portability and interoperability extends beyond the platform setting, however: The evolution of the IoT will depend on the design choices made by core actors in the field with regard to technical and data interoperability. Depending on the choices made, we may see more of a competition between (closed) systems, or we may see a complex network evolve with competition between product and service providers across the network.

The IoT architecture will likely evolve around physical products that interact with other products and services, and thereby potentially become platforms themselves. Yet, the firms who provide these products may opt for a "silo" model instead of a platform model. According to general principles of competition law, such a choice would be left to the product supplier as long as it is not dominant. Where the primary product market is competitive, the product supplier may, however, be nonetheless dominant on an aftermarket.[44] So far, the aftermarket doctrine has rightly been used with caution. Only if the conduct of the product supplier on the aftermarket is no longer disciplined by competition on the primary market or by possibilities of product users to switch to other products – i.e. only if the user lock-in is particularly strong and if reputational effects don't act as effective constraints – would the existence of a separate aftermarket be accepted.[45]

The Special Advisors' Report has explained that the aftermarket doctrine may need an update in the data economy. Where digital ecosystems that evolve in the IoT are significantly driven by user data, the lock-in effect for users may be particularly strong, and it may extend to a broad variety of services and hence aftermarkets. Also, user data can provide a competitive advantage not only in markets for secondary goods, but also at the time of the replacement of the primary product.[46]

This may argue for a number of policy choices: To the extent that the IoT is based on – and perceived as – a shared infrastructure, a strong pro-standardization policy is in place. The standards should encompass both technical interoperability standards and standards for data exchange. A number of reports have supported "open standards" policies.[47]

Within the competition law framework, a broader use of the aftermarket doctrine may be in place in the IoT context, in particular when it comes to enabling data portability and data exchange.[48]

The German legislator is about to enact a broad right to data access for undertakings where their ability to offer complementary goods and services depends on such access.[49]

Frequently, a well-functioning interoperability and data portability regime will, however, depend on sector-specific legislation.[50] In the course of the development of these sector-specific regimes, experience will need to be gained with a view to the design and necessary limits of such interoperability and portability rules.

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43 Furman Report, paras 2.48 et seq. and 2.68 et seq.; Stigler-Report, pp. 88 et seq., 92 and 96; Special Advisors' Report, pp. 81 et seq. and 91; Competition 4.0 Report, pp. 38 et seq., pp. 40 et seq. and pp. 51 et seq.

44 For this concept see *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992). Cf. *C. Shapiro*, Antitrust Bull. 63 (1995), 483-511. For a discussion of the consequences of the Kodak case in Europe see Bell/Kramer, Competition/Antitrust Challenges in Technology Aftermarkets, available at http://eu-competitionlaw.com/competitionantitrust-challenges-in-technology-aftermarkets/#.

45 Cf. Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, para. 56.

46 See Special Advisors' Report, p. 90.

47 See in particular: Furman Report, paras 2.68 et seq.; Stigler Report, p.89.

48 See in particular: Special Advisors' Report, p. 102; Competition 4.0 Report, p. 40.

49 The draft amendment of section 20 of the German Act Against Restraints of Competition, a provision that expands the prohibition to abuse dominance on cases of superior bargaining positions ("relative market power"), reads: "Dependency in the meaning of paragraph 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. The refusal of access to such data may constitute an unfair impediment even if there is not yet a commerce opened for such data."

50 See in particular: Special Advisors' Report, p. 74, p. 82; Competition 4.0 Report, p. 41, p. 52.

V. INCREASING LEGAL CERTAINTY

The far-reaching changes in business strategies and markets that are brought about by the "digital revolution" are accompanied by an increase in legal uncertainty. In particular, firms complain about a high degree of uncertainty with regard to the application of Article 101 TFEU to new forms of cooperation in the digital realm, e.g. with a view to data sharing, data pooling or joint platform ventures.[51] Such uncertainty can negatively affect the willingness of firms to invest in innovation.

While the specification of conduct rules as discussed above can significantly promote legal certainty and the level of competition law enforcement and/or compliance within the realm of Article 102 TFEU, a rethinking of the legal instruments available to the EU Commission for providing quick legal guidance – both with a view to Article 101 and Article 102 TFEU – may likewise help.

Some instruments are already in place: Article 10 of Reg. 1/2003 allows for formal decisions declaring the inapplicability of Article 101 and/or Article 102 TFEU to specific conduct if such decision lies in "the community public interest"; in addition, a Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty [Article 101 and Article 102 TFEU] that arise in individual cases allows for the issuing of more informal "guidance letters." Yet, neither of the two has been used in practice so far.

Against this background, the German Competition 4.0 Report has proposed the introduction of a voluntary notification procedure for novel forms of cooperation in the digital economy that provides for a quick decision.[52]

In their joint memorandum, the Belgian, Dutch, and Luxembourg competition authorities propose to develop a "fast track commitment procedure" that could be based on a more pro-active use of Article 10 of Reg. 1/03 and/or the Notice on informal guidance.[53]

Neither of the two proposals argues in favor of a re-introduction of the exception system to Article 101(3) TFEU. The use of the "quick guidance" or decision procedure should be limited to clearly novel and relevant cases. Also, the use of this guidance or decision regime might well be available only for a fee. If well-designed, such a procedure could, however, support a quick and swift adaptation of competition rules to the digital era and become an important element of a good enforcement regime as it would help to bring relevant market information to the EU Commission more quickly.

VI. "PARTICIPATIVE ANTITRUST" – CONCLUDING REMARKS

The increase in legal uncertainty and the growing need for legal guidance may indicate a need for a different type of adjustment of competition law to the digital age: namely a shift in enforcement style. The competition law reform of 2004 has shifted competition law enforcement from a more interactive and co-operative style towards a more confrontational style, as the EU Commission is no longer tasked with the review and approval of agreements under Article 101(3) TFEU, but started to focus on a "fight against cartels" and on major cases of abuse of dominance. In both settings, a more confrontational style continues to be justified.

However, the "digital revolution" comes with a broad variety of novel issues – novel both to the undertakings concerned as for competition authorities. In this context, competition authorities must find new ways to get access to information on market changes and changes in business strategies in a timely manner, and undertakings must be able to obtain legal certainty where their engagement in novel, potentially risky projects with major investments is at stake. In this early phase of the "digital revolution," firms must be able to experiment with novel solutions. Getting competition rules right in such a setting may require a more intense exchange and shared search for solutions than would be required in a more stable and traditional market environment. Jean Tirole has called for a more "participative antitrust."[54] He may have meant just this.

51 Competition 4.0 Report, p. 56, p. 58.

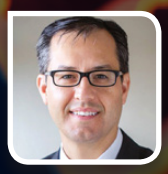
52 Competition 4.0 Report, p. 60, Recommendation 14.

53 Belgian Competition Authority, Authority for Consumers & Markets, Conseil de la Concurrence, Joint memorandum on challenges faced by competition authorities in a digital world, 2019, available at https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf, p. 5.

54 "A Nobel-winning economist's guide to taming tech monopolies," Interview with *Jean Tirole* of. 27.6.2018, available at https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/.

DIGITAL COMPETITION REPORTS AND MERGER ENFORCEMENT

BY ALEXIS J. GILMAN, AKHIL SHETH, ANGEL PRADO & ERIC FANCHIANG[1]

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I. INTRODUCTION

Digital technology companies and online platforms have revolutionized the way people and businesses work, shop, and interact. The benefits are abundant and clear. Today, however, critics are raising questions — and some are ringing alarm bells — about digital platforms and whether antitrust has failed to sufficiently scrutinize their conduct and allowed them grow too large and powerful. Around the globe, many are asking whether antitrust enforcement has the tools, resources, and ability to tackle deficiencies — perceived or actual — in digital competition and enforcement.

In response, various groups have examined the nature of digital markets, analyzed past antitrust enforcement, considered whether updated antitrust laws and standards are needed, and formulated recommendations for updated antitrust enforcement and policy. This article examines the merger-enforcement recommendations of three reports: the University of Chicago Booth School of Business Stigler Center's *Stigler Committee on Digital Platforms Final Report* ("Stigler Report");[2] the Report of the Digital Competition Expert Panel, *Unlocking Digital Competition*, in the United Kingdom ("UK Report"),[3] and the report by Jacques Crémer and others, *Competition Policy for the Digital Era*, to the European Commission ("EC") (the "EC Report").[4]

II. KEY CONCLUSIONS AND RECOMMENDATIONS

A. Stigler Report

The Stigler Report, released in September 2019, expresses concerns regarding digital platforms and recommends changes to address these concerns. The Subcommittee on Market Structure and Antitrust, in particular, recommends changes to merger enforcement. The Report's key conclusions and recommendations follow.

1. Characteristics of and Special Challenges in Digital Markets

According to the Stigler Report, the nature of digital markets presents particular challenges for merger enforcement. Many digital platforms provide services to consumers without monetary charge; instead, consumers barter their attention and data for services. The Report states that antitrust agencies, economists, and courts evaluating digital-platform mergers lack sophisticated tools to analyze non-price dimensions of competition, making it harder to assess likely harm from digital mergers.

The Stigler Report raises particular concern about dominant platforms acquiring small firms and potential competitors, which it says could be especially damaging to competition if, absent the acquisition, the acquired firm would have developed into a major competitive threat. But, the Report acknowledges, it is difficult to predict pre-merger whether the acquired firm is likely to develop into a full-fledged competitor or whether the acquisition will instead propel the commercial development and use of the acquired firm's technology. The Report recommends that antitrust agencies develop a better understanding of when acquisitions of nascent competitors might be anticompetitive.

2. Adequacy of Existing Law and Analytical Tools

The Stigler Report generally finds that existing antitrust law and analytical tools are insufficient to handle merger enforcement in digital markets. The Report contends that traditional antitrust tools are "not applicable in multi-sided markets" where one side pays no monetary price; better analytical tools are needed to account for the impact of potential and nascent competitors; and better tools are needed to analyze non-price effects. The Report concludes that legislation may be required to equip antitrust enforcement for the digital age.

2 Available at https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.

3 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

4 Available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

3. Adequacy of Consumer Welfare Standard

The Stigler Report indicates that consumer welfare is an important objective, but that this standard, as currently applied, may not suffice in digital markets. The Antitrust Subcommittee's section of the Report largely endorses the standard, but other subcommittees are more critical, stating that the standard may not capture important political effects of concentration in social media and suggesting that in studying the impact of digital platforms on the media industry, the consumer welfare standard should be supplanted by a "*citizen* welfare" standard.

4. Burdens of Proof and Legal Standards

Among the Stigler Report's most significant recommendations are to adopt new presumptions and to raise the burden on merging firms in some circumstances. For example, the Report states that, when an acquisition involves a dominant platform, the dominant firm should bear the burden to prove that the acquisition will not harm competition. Further, the Report suggests that "[m]ergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed unlawful, subject to rebuttal by defendants." Additionally, the Report states that courts should be more amenable to plaintiffs proving competitive harm through circumstantial evidence, "especially where the propositions in question are not observable and there thus cannot be direct evidence." The Report also recommends new regulation requiring certain merging firms to show that their transaction will "affirmatively promote competition."

5. Creation of Digital Authority and Specialized Court

The Stigler Report proposes that Congress create a specialized agency to regulate digital platforms. This "Digital Authority" (or "DA") would oversee all aspects of digital platforms and would be tasked with "creating general conditions conducive to competition." It would collect data on digital transactions and interactions, and implement "light touch" behavioral solutions to make markets more competitive. The DA would focus on firms with "bottleneck power" — described as arising when "consumers primarily single-home and rely upon a single service provider," which makes it prohibitively challenging and costly for rivals to compete for those consumers.

The Report envisions that the DA would review mergers, alongside the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"), involving "digital businesses with bottleneck power." The DA, however, would have different standards and tools than the FTC and DOJ. The Report also suggests that businesses with bottleneck power should be required to obtain pre-clearance from the DA for any acquisition. The DA's decisions would be subject to judicial review.

The Report also recommends creating a specialist competition court to hear all antitrust cases. The specialized court would have sole judicial review over DA regulatory actions, and could be created as a trial court, appellate court, or both.

6. Merger Reportability

In addition to requiring that all mergers involving digital firms with bottleneck power be reportable to the DA, the Stigler Report also recommends that the Hart-Scott-Rodino reporting thresholds be changed to account for transaction value, or some other criteria, because "simply focusing on turnover is not enough" since many nascent firms have little revenue as they focus on scaling their user base.

B. UK Report

The UK Report was released in March 2019, with recommended changes to the UK's antitrust enforcement policy.

1. Special Characteristics of Digital Markets

The UK Report identifies certain characteristics of digital marketplaces that informed its recommendations, including the importance of data to digital platforms; the frequent feeless provision of services; markets subject to "tipping" and "winner-take-most" dynamics; and the efficiencies and costs associated with concentrated digital markets. The Report identifies several benefits brought about by digital marketplaces, but nonetheless makes several "pro-competition" recommendations related to digital-market mergers.

2. Adequacy of Current Law, Analytical Tools, and Merger Enforcement

The UK Report calls for a "reset" of merger assessment in digital markets, to be more active, more forward-looking, and more focused on innovation. Some of this reset would require legislation. According to the Report, traditional antitrust tools and policies are "important but there is a limit to how much they can accomplish." Rather than try to strengthen traditional tools, which could have unintended consequences, the Report recommends that the UK build competition into digital markets upfront by creating new frameworks, rules, and standards to ensure "space for new companies to innovate and that ensure fair treatment of competitors."

One of the UK Report's overarching strategic recommendations is for the Competition and Markets Authority ("CMA") to prioritize antitrust enforcement in digital markets by taking "more frequent and firmer action" to challenge mergers. In support of this goal, the Report recommends, among other things, that the CMA update its Merger Assessment Guidelines ("MAG") to account for considerations unique to digital marketplaces. Additionally, the MAG revisions would explicitly reference loss of future innovation as a potential unilateral effect and draw attention to the "evidential relevance" of transaction valuations that appear "exceptionally high."

3. Adequacy of Consumer Welfare Standard

The UK Report affirms the consumer welfare standard as the proper guiding principle for antitrust enforcement in digital markets and says that changing the standard carries risk of "unnecessary uncertainty" and "hindering economic activity." According to the Report, "[i]n principle, all of these questions [about digital acquisitions] can inform merger decisions within the current, mainstream framework for competition, centred on consumer welfare." Indeed, the Report states that the standard can account for non-price factors such as quality and innovation, and privacy, even in zero-price markets.

4. Burden of Proof and Legal Standard

The UK Report recognizes that "the majority of acquisitions by large digital companies are likely to be either benign or beneficial for consumers" and rejects putting the burden of proof on merging parties to show their merger is procompetitive. The Report states that a "presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy."

The Report, however, calls for legislation to allow the CMA to use a "balance of harms" test to evaluate mergers. Under this test, the CMA would not just analyze the likelihood of harm — it would also consider the scale of potential harm. Thus, mergers could be blocked where the *likelihood* of harm is low, but the *magnitude* of possible harm is great. The Report concludes that this test would broaden the scope of mergers that may be found "problematic."

5. Creation of Digital Markets Unit

The Report recommends that the UK create a governmental "digital markets unit" composed of specialists who are tasked with three primary functions: (1) creating and enforcing a code of conduct for digital platforms deemed to have "strategic market status" — essentially large platforms that operate a "key gateway" in one or more digital markets that have many "dependent users" on either side of the platform; (2) enabling greater "personal data mobility" and systems with open standards; and (3) advancing "data openness" to tackle the key barrier to entry, while protecting privacy.

6. Merger Reportability

The UK Report concludes that there is currently no need to change the UK's voluntary reporting system. Moreover, the Report says that the 25 percent share of supply test gives the CMA "flexibility and reach" to address mergers that do not trigger the UK's turnover thresholds but which may have a significant effect on competition and innovation. The Report does propose, however, that companies deemed to have "strategic market status" be required to inform the CMA of all intended acquisitions.

C. EC Report

The EC Report, published in April 2019, also analyzes digital markets and recommends merger-enforcement changes.

1. Key Characteristics of the Digital Economy

The EC Report focuses on three characteristics of the digital economy: "extreme returns to scale," "network externalities," and the role of data as a key input into many online products and services. These characteristics tend to result in strong economies of scope, concentrated markets, and incumbents that are difficult to dislodge. As a result, in terms of merger enforcement, the Report focuses on mergers where dominant platforms acquire small, successful start-ups with quickly-growing user bases and significant competitive potential. The Report recognizes that in many cases such acquisitions will be pro-competitive, but also says that such acquisitions can allow a company to strengthen its hold on a market by eliminating a competitive threat or by raising barriers to entry.

2. Adequacy of Existing Merger Law

The EC Report concludes that the EU Merger Regulation ("EUMR") does not currently need updating, either for jurisdictional or substantive merger-analysis purposes. In general, the Report states that "the basic framework of competition law ... continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era." The Report thus does not advocate a fundamental overhaul of the existing merger control regime, but proposes certain tweaks, particularly in the substantive criteria for analyzing certain digital-market mergers and in the applicable theories of competitive harm.

For example, the EC Report proposes that when a dominant platform or ecosystem that benefits from strong positive network effects and data access acquires a target with currently low revenue but a large or fast-growing user base and high future market potential, the merger should still be analyzed under the "significant impediment of effective competition test," but under revised substantive theories of harm. Specifically, because theories of harm in vertical and conglomerate mergers are often limited to foreclosure effects on actual or potential rivals, or coordinated effects, the Report recommends (1) "inject[ing] some 'horizontal' elements into the 'conglomerate' theories of harm, and (2) assessing whether the acquirer and target operate in the same "*technological space*" or "*users' space*" — i.e. whether "the target is a potential or actual competitive constraint within the technological/users' space or ecosystem." The Report also says that the EC needs to explore innovation-based theories of harm.

3. Adequacy of Consumer Welfare Standard

The EC Report affirms the consumer welfare standard, but calls for reframing its application in digital markets. The Report states that "it has to be implemented differently in a fast-changing world where prices play a very different role compared to traditional industries."

4. Burden of Proof and Legal Standards

The EC Report suggests changes to the burden of proof and legal standards in digital competition cases, but does not recommend a presumption of illegality. It states that:

- "[W]e need to rethink both the timeframe and standard of proof."
- "[S]trategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden in the absence of clearly documented consumer welfare gains."
- "[I]n the context of highly concentrated markets characterised by strong network effects and high barriers to entry … one may want to err on the side of disallowing potentially anti-competitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct."
- Where dominant platforms seek to expand into neighboring markets, there may be "a presumption in favour of a duty to ensure interoperability."

- "[W]here an acquisition is plausibly part of such a strategy [by dominant platforms/ecosystems to acquire small firms and avoid users' defection], the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies. This theory of harm does not create a presumption against the legality of such mergers."

5. Merger Reportability

The EC Report acknowledges that, absent a referral from a Member State, the EUMR's purely turnover-based notification requirements may not catch certain anticompetitive digital acquisitions because start-ups' revenue may not trigger these thresholds. But the Report does not recommend reportability changes yet because (a) the current thresholds do not seem to leave serious gaps in enforcement; (b) certain member states have recently adopted transaction-value-based notification thresholds, which the EC should monitor before making any changes; and (c) there is a need for legal certainty and minimized administrative burdens and transactional costs.

The Report does raise the possibility of a new reporting threshold for transactions with "specific characteristics," such as "acquisitions by dominant firms in markets characterised by strong network effects." But, the Report acknowledges, defining such a jurisdictional threshold that allows for legal certainty is "a challenging task."

III. COMPARING AND CONTRASTING THE REPORTS

All three Reports share several common themes and recommendations. Perhaps foremost is the theme that digital platforms are challenging traditional methods of antitrust analysis and there may be gaps in merger enforcement, particularly regarding acquisitions by large platforms of small start-ups that might grow into competitive threats. The Reports identify certain characteristics of digital markets that increase competition risks and challenge traditional antitrust tools. All three Reports also largely uphold the consumer welfare standard, though they recognize that its implementation in digital markets may require refinement.

But the Reports differ in key respects. In general, the Stigler Report and UK Report propose significant legislative changes, while the EC Report recommends none (only tweaks to the substantive assessment). For example, the Stigler Report and the UK Report both recommend the creation of a new digital regulator focused on transactions involving digital firms with bottleneck power or strategic market status. The EC Report does not. The Stigler Report goes further than the other Reports and proposes that a specialized antitrust court be created. Additionally, both the Stigler Report and the UK Report recommend that firms with bottleneck power or strategic market status report any proposed mergers. The EC Report recommends further study before changing notification thresholds.

The Reports also differ in whether they would change the burden of proof in merger cases. The Stigler Report suggests (1) requiring dominant platforms to prove that acquisitions would not harm competition; (2) treating mergers between dominant firms and "substantial competitors or uniquely likely future competitors" as presumptively unlawful; and (3) enacting regulations requiring merging digital firms to show their transaction "will affirmatively promote competition." The UK Report recommends against presuming that digital mergers are unlawful, instead calling for a new balance of harm standard to evaluate digital mergers. Likewise, the EC Report does not propose a presumption of illegality against digital mergers, but emphasizes that merging parties should bear the burden to show that any harms are offset by merger-specific efficiencies if an acquisition is plausibly part of a defensive strategy against user defection.

These differences may perhaps be explained (at least in part) by several factors. First, U.S. antitrust law and regulations are more limited compared to the EC, which has a more comprehensive and flexible regulatory framework that can be more readily adapted to the new challenges of the digital economy without major legislative changes. Moreover, the EC Report's authors may have seen the EC as being already more active in scrutinizing digital mergers (and conduct), while the authors of the Stigler and UK Reports may have seen their own jurisdictions as having a more modest digital merger enforcement track record. Finally, the EC merger enforcement regime works in parallel with EU Member States' national merger control laws, which supplement or complement the EUMR. By contrast, in the U.S., states often join FTC and DOJ merger enforcement action and bring merger challenges under federal antitrust law (though there are some recent exceptions). In short, the Reports' differences are not particularly surprising in light of these jurisdictions' substantive and institutional differences.

IV. COMMENTARY ON THE REPORTS

The Reports are commendable in their ambition, thoroughness, thoughtfulness, and intent to achieve an appropriate level of merger enforcement. Through the lens of U.S. merger enforcement, however, some of the recommendations are inadvisable or unnecessary. Our comments focus on the Stigler Report's recommendation for U.S. antitrust enforcement.

First, the proposed creation of the DA is unnecessary. The institutional framework for antitrust enforcement in the U.S. is already expansive and diverse. If it's necessary to invigorate U.S. antitrust enforcement, the existing antitrust agencies are capable — and are in the very process — of doing so. In particular, the FTC has conducted extensive competition hearings, with several focused on digital-competition issues; it formed a Technology Task Force, which has now become a full-blown Division; and it is apparently already conducting retrospective and prospective merger reviews. The DOJ also has ramped up its scrutiny of digital mergers, and there are also large multi-state investigations (though these appear to be conduct investigations). Moreover, the FTC plans to issue guidance on platform competition, vertical merger commentary, and an addendum to the 2006 Horizontal Merger Guidelines commentary to deal with nascent competition and how the agency analyzes non-price effects.[5]

As such, if antitrust enforcement in digital markets needs invigoration, doing so from within the existing antitrust agencies is the best, most efficient way to improve merger enforcement — not establishing a new, overlapping agency. Adding a third entity to U.S. merger enforcement may also confuse merger-enforcement standards. At a minimum, introducing a new enforcement entity in the U.S. is premature.

Second, the Stigler Report's recommendations to (a) shift the burden of proof to defendants in mergers involving a "dominant platform" to show a merger will not harm competition, and (b) to presume unlawful any mergers between dominant firms and "substantial competitors or uniquely likely future competitors," are unwarranted and likely to lead to over-deterrence of beneficial or benign mergers.

With respect to the former, shifting the burden to merging parties to prove their transaction's lawfulness overturns over 100 years of antitrust jurisprudence. Any perceived or actual underenforcement against digital mergers does not warrant such a radical shift — particularly when evidence of the extent of any such underenforcement is lacking. Indeed, the key transactions that digital-merger critics point to were reviewed by U.S. (and foreign) antitrust authorities, suggesting that these transactions did not substantially lessen competition or there was insufficient evidence to bring a case. Even if any such agency decisions are questionable in light of post-merger developments, that is an insufficient basis to upend the burden of proof in all future merger cases and hold a *select type of merger in one particular industry* to a different standard than all others. Indeed, we are aware of no comparable area of civil law where defendants to government enforcement actions bear the ultimate burden — and antitrust merger enforcement should not be the pilot project. Moreover, shifting the burden to defendants would be unfair because, unlike the government, merging parties do not have pre-complaint subpoena power to collect evidence from other industry participants to defend their merger.

Likewise, presuming select types of mergers to be unlawful in one industry is inadvisable. Again, such a presumption overturns a century of antitrust law, and begins to approach the *per se* treatment for certain criminal antitrust violations. Mergers should not be presumptively condemned like naked restraints of trade that history and experience teaches have a pernicious effect on competition and lack any redeeming virtue. This is especially true where these very digital competition Reports note the benefits of digital platforms. Indeed, the UK Report notes that the majority of acquisitions by large digital firms are "likely to be either benign or beneficial for consumers," and concludes that a "presumption against all acquisitions by large digital companies is not a proportionate response."

Finally, we question certain other statements in the Stigler Report. For example, the Report says that courts should not presume efficiencies from vertical transactions, citing to *Ohio v. American Express Co*. But *American Express* is not a merger case, and the most recently litigated vertical-merger case did not presume efficiencies.[6] The Report also says that shifting the burden of proof will help the DA by making it the merging parties' job to demonstrate efficiencies. But under the Horizontal Merger Guidelines and existing case law, merging parties already bear that burden.

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5 Julie Masson, U.S. FTC Call for Additional Resources Against Tech Companies, Global Competition Review (Nov. 18, 2019), at https://globalcompetitionreview.com/article/1211013/us-ftc-calls-for-additional-resources-against-tech-companies.

6 See United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), aff'd 916 F.3d 1029 (D.C. Cir. 2019) (recognizing that the elimination of double-marginalization is a "standard benefit" of vertical mergers, but not presuming such efficiencies; rather, the court affirmed *Baker Hughes'* burden-shifting framework and stated that defendants may overcome the government's *prima facie* case by showing that efficiencies will outweigh harm; the court also expressed skepticism of the position, "as a matter of law and logic," that in a vertical-merger case, the government must "account for all of defendants' proffered efficiencies as part of making its prima facie cases.").

The Report also claims, in a section on mergers, that the *Credit Suisse* and *Trinko* decisions have "greatly expanded the industries and conduct that have become ... exempt from antitrust scrutiny." But neither case has precluded any government merger enforcement action, and just recently a private plaintiff succeeding in winning a merger case.[7] Lastly, the Report's statement that a tougher enforcement statute is needed "in light of the difficulty of winning antitrust cases in current U.S. courts" is undermined by the FTC and DOJ's winning record in merger cases over the past decade. The only merger losses over that period were in the *LabCorp/Westcliff*, *Steris/Synergy*, and *AT&T/Time Warner* cases. The agencies' court victories greatly outnumber these losses. While critics would argue that the agencies may have played it safe with the cases they brought, just counting litigated cases fails to account for mergers that were deterred in the face of likely antitrust enforcement and the several consent orders imposed in technology- and data-related mergers.[8]

V. CONCLUSION

The Stigler, UK, and EC Reports are commendable, thought-provoking studies that contain ideas worthy of consideration. In fact, the Reports are already proving influential, having added to the momentum behind calls for more aggressive enforcement. But given existing enforcement mechanisms and recently enhanced efforts by U.S. (and foreign) antitrust enforcers to address competition issues in digital markets, some of the Reports' recommendations are unnecessary, inadvisable, and, at best, should be delayed until the results of antitrust enforcers' current efforts to invigorate enforcement can be assessed.

7 *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545 (E.D. Va. March 13, 2019).

8 See, e.g. Final Decision & Order, *In re Nielsen Holdings N.V.*, Dkt. No. C-4439 (FTC Feb. 28, 2014); Final Judgment, *U.S. v. Google Inc.*, No. 1:11-cv-00688 (D.D.C. 2011).

A NEW COMPETITION FRAMEWORK FOR THE DIGITAL ECONOMY – REPORT BY THE COMMISSION "COMPETITION LAW 4.0"

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I. THE COMMISSION'S MANDATE, ITS FUNCTIONING, AND SCHEDULE

The Commission "Competition Law 4.0"[2] was set up by the German Federal Minister for Economic Affairs and Energy in September 2018, and tasked with drawing up recommendations for action for the further development of EU competition law in the digital economy. The new opportunities of the data economy, the rise of platform-based business models and the growing importance of cross-market digital ecosystems are the game changers in the digital economy. The digital economy is characterized by the interplay of these different aspects within a process which can lead to the emergence of new positions of economic power, their perpetual reinforcement and possible extension to other markets.

In particular, the Commission was tasked with examining whether the overall framework of competition law needs to be revised in order to enable German and European digital companies to successfully compete internationally; what could be done to better respond to the needs of German and European digital companies to engage in cooperation and to scale up; whether there is a need to adapt the provisions governing access to data in a way that is compliant with the rules for data protection; how competition law can contribute to promoting innovation; how to update the competition rules as they apply to platform operators with a high level of market power; and whether procedural rules need to be adjusted to allow competition authorities to respond more swiftly to developments in highly dynamic markets.

The Commission was asked to take into consideration the numerous intersections and overlaps between competition law, unfair commercial practices law, consumer protection law, data protection and liability law, and other fields of law that play a role in the digital economy. The objective was to present proposals for a regulatory framework which enables a positive interplay between these different areas of law while fostering an innovation-friendly environment of vigorous competition. Besides, these proposals are to support the German government in preparing its 2020 presidency of the EU Council.

The Commission, which was chaired by the authors of this article, brought together experts from various disciplines. It held six meetings. The meetings were prepared by three working groups relating to (i) platforms, (ii) data, and (iii) digital ecosystems. Furthermore, the Commission conducted a written consultation. The Commission made use of the working groups and meetings to consult with other experts and stakeholders. The Commission then used all of the information gathered to develop a shared understanding of the issues ahead. This has resulted in 22 recommendations for action, some of which were subject to controversial discussions. However, a shared view was reached on the key issues. Where this was not the case, the report points out various options for action and the arguments for and against each. The Commission completed its work nearly one year after its establishment and handed over the final report to the German Federal Minister for Economic Affairs and Energy on September 9, 2019.[3]

II. THE COMMISSION'S OVERALL ASSESSMENT OF THE DIGITAL ECONOMY'S CHALLENGES AND HOW TO TACKLE THEM

The Commission is convinced that it is necessary to ensure that positions of dominance remain contestable in the digital economy, to prevent their being used to impede innovation and competition, and to prevent their being leveraged to other markets. Protecting innovation and strengthening consumer autonomy in the digital sphere will continue to be key for effective competition. To achieve this, the EU and the Member States are advised to develop an enhanced set of pro-competition rules which take account of the pace of change in the digital economy and reinforce law enforcement in order to put a halt to potentially highly dangerous anticompetitive conduct more quickly than has been the case. This will also require an improved dovetailing of competition law with other areas of the law, like consumer protection, data protection and unfair trading laws, and with sectoral regulation in certain areas.

European competition law is thus in need of some adaptations, without the fundamental principles of competition law being undermined. In particular, the Commission believes that the power of consumers to control their own data must be improved, clear rules of conduct for dominant platforms must be introduced, legal certainty for cooperation in the digital sector must be enhanced, and the institutional linkage between competition law and other digital regulation must be strengthened.

2 Hereinafter referred to as the "Commission."

3 An English version of the report is available for download at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html.

III. SELECTED COMMISSION FINDINGS AND RECOMMENDATIONS

In the following Section, some of the Commission's findings and recommendations for dealing with the digital economy's major challenges are described in more detail.

A. Strengthening Access to Data and the Self-determined Handling of Data

Much of today's digital innovation is linked to the storage, compilation and analysis of data – the stuff of which many business models of the digital age are made. A company's enhanced access to data may result in competitive advantages, which may then give the company even more and better access to data. The fact that the same set of data may generate competitive advantages on several markets is an expression of a new type of conglomerate effects which may contribute to the emergence of integrated digital ecosystems. To ensure that resulting positions of dominance remain contestable, it may be necessary to enable access to data to retain competitive pressure. A denial of access to data can qualify as an abuse of market power under current law, and, in principle, data access can be mandated in such cases.

The Commission takes the view that the strengthening of consumer autonomy can be an important instrument to facilitate access to consumer data and to avoid the emergence of competition problems. The easier it is for consumers to transfer their data from one provider to another or to grant new providers access to their data, the easier it will be for rival companies to attack data-based market power. Consumer-driven access to data also prevents conflict with data protection law. For these reasons, it is proposed that the existing right to data portability in data protection legislation be tightened for dominant platforms. Supplementary sectoral regulation can – following the model provided by the Second Payment Services Directive – envisage a right for consumers to grant third-party providers access to their user accounts. Also, the Commission proposes to encourage the establishment of data trustees which can grant companies access to data on behalf of and in line with the preferences of the consumers.

Correspondingly, the Commission recommends:

- That dominant online platforms that fall under the scope of the Platform Regulation[4] be required to enable on request by their users the portability of user and usage data in real time and in an interoperable data format and to ensure interoperability with complementary services *(Recommendation 11)*.

- The formulation of cross-market principles guided by competition law in a framework directive based on Article 114 TFEU stating when and how users should be granted a right to make a digital user account accessible to third-party providers. The European Commission should be authorized to enact sector-specific regulations to flesh out these rules. The Second Payment Services Directive can serve as an example *(Recommendation 4)*.

- Studying the possibility of establishing data trustees and examining various potential models for this. On the basis of these findings, a decision should be taken regarding the instruments which – if possible at European level – can promote the emergence of such trustees *(Recommendation 5)*.

B. Rules of Conduct for Dominant Platforms

Digital platforms are gatekeepers and rule-makers in the digital economy. Once such a platform has attained a dominant position and benefits from strong positive network effects, market barriers to entry may be particularly high. Given the ability of such platforms to steer the behavior of their users, the rapid pace of market development, and the significance of first-mover advantages, the costs of non-intervention or of a belated intervention against abusive conduct tend to be particularly high in such cases.

In order to ensure the contestability of existing positions of dominance, i.e. competition *for* platform markets, as well as undistorted competition on platform markets and on and for neighboring markets, the Commission proposes that there should be an EU Platform Regulation establishing clear rules of conduct for dominant online platforms. An important function of such rules is to clearly inform market players of the "rules of the game," and to speed up enforcement procedures in case of infringements. Such a Platform Regulation would flesh out and supplement existing competition law.

4 See in more detail *Recommendation 9* below.

The Platform Regulation should in particular include a ban on self-preferential treatment of the platform operator's own services over those of third parties, and an obligation to deliver real-time data portability on the basis of interoperable data formats. Platform operators retain the possibility to offer objective justification. The proposed rules of conduct would substantially exceed the transparency obligations set out in the platform-to-business ("P2B") Regulation,[5] but their scope of application would be limited to dominant platforms with certain minimum revenues or user numbers. Such a *de minimis* threshold should exclude minor cases from the scope of the Platform Regulation. Moreover, for the time being, only those platforms that operate in business-to-consumer ("B2C") intermediation should be covered by the Platform Regulation. There is as yet not enough case practice and experience with regard to pure business-to-business ("B2B") constellations to justify extending the scope of application to cover the platforms active in this area. The enforcement of the obligations set out in the Platform Regulation should follow the general rules of competition law enforcement.

Correspondingly, the Commission recommends:

- That a Platform Regulation be introduced to impose a code of conduct on dominant online platforms with a minimum level of revenue or a minimum number of users *(Recommendation 9)*.[6]

- That dominant online platforms that fall under the Platform Regulation be prohibited from favoring their own services in relation to third-party providers unless such self-preferencing is objectively justified *(Recommendation 10)*.

C. Legal Certainty for Cooperation

To make use of the opportunities offered by changes in technologies and markets, companies must be able to experiment with new possibilities in the data and platform economy. Cooperation in many different forms is part of this trial and innovation process. However, many companies claim that the legal uncertainty about the limits that competition rules pose to novel forms of cooperation is a relevant deterrent to experimenting with such cooperation. Indeed, both data sharing and pooling agreements and cooperative endeavours aiming at the joint establishment of platforms, digital networks and ecosystems can raise difficult competition law issues which can impede the willingness to engage in cooperation.

The Commission therefore finds that there is a need for new procedural instruments to provide companies with the possibility to obtain legal certainty about the lawfulness of novel forms of cooperation under competition law. It is proposed that a voluntary notification system be introduced at European level for cooperation projects which raise unresolved legal questions and which are of substantial economic significance. DG COMP would have 90 working days to decide on the lawfulness of a notified cooperation project.

Correspondingly, the Commission recommends:

- That the clarification of new legal questions raised by novel forms of cooperation between undertakings in the digital area (e.g. data exchanges and data pooling; investments in cooperative projects involving innovation in the area of the Internet of Things ("IoT")) be declared a priority of the European Commission in the coming years *(Recommendation 13)*.

- The introduction of a voluntary notification procedure at European level for novel forms of cooperation in the digital economy with a right to receive a decision within a short period of time. It also recommends that the Directorate-General for Competition hire additional personnel for this purpose *(Recommendation 14)*.

D. Combining Competition Law with Other Regulatory Areas

Digitization entails a fundamental restructuring of almost all areas of our economy and society. Protecting functional, open and innovative markets will require changes also in the rules outside the field of competition law – e.g. in the area of contract law, consumer protection law, data protection law, liability law, and procedural law.

5 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online mediation services, OJ 2019 No L 186/57.

6 *Recommendation 9* was supported by a majority of the Commission's members.

To improve cooperation between the policy steering and administrative and supervisory structures, an institutionalized networking should be introduced. The desired improvement in policy coordination could be attained by establishing a new Digital Markets Board located in the General Secretariat of the European Commission. A majority of the Commission's members also advocates the temporary establishment of a Digital Markets Transformation Agency at EU level in order to improve the networking of the supervisory structures. It should be tasked with collecting and processing information about market developments and technical developments, coordinating with a corresponding network of Member State institutions, and providing comprehensive support to the regulatory and competition authorities as well as the policymaking institutions. A minority in the Commission argued against the creation of a new agency and preferred to install a new instrument based on the British "market investigation," which would enable data about specific situations and markets to be gathered systematically over a long period of time.

Correspondingly, the Commission:

- Recommends that the newly elected European Commission should establish a Digital Markets Board with the General Secretariat which should be responsible for permanent coordination and harmonization of the various policy areas in the interest of an overarching and coherent European digital policy *(Recommendation 20)*.

- Advocates the temporary establishment of a Digital Markets Transformation Agency at EU level in order to improve the networking of the supervisory structures. It should be tasked with collecting and processing information about market developments and technical developments, coordinating with a corresponding network of Member State institutions. The agency should support the competent authorities at EU level and the EU Digital Markets Board *(Recommendation 21)*.[7]

E. List of the Commission's Additional Recommendations

In addition to the recommendations described in more detail above, but in context with the same topics, the Commission also recommends:

- *In Section IV. on "Markets and market power – towards a more differentiated assessment":*
    - That the Commission Notice on the definition of relevant market be revised *(Recommendation 1)*.
    - That a separate Notice on market definition and the definition of market power with respect to digital platforms be published *(Recommendation 2)*.
    - Commissioning a study on cross-market market foreclosure strategies in the digital economy and of the potential for countering these via competition law *(Recommendation 3)*.
- *In Section V. on "Strengthening access to data and the self-determined handling of data":*
    - Developing further open data legislation stipulating, both at European level and at Member State level, that all public institutions must provide structured data via standardized platforms and in open interoperable data formats. The group of data recipients and the sharing of costs should be regulated on a sectoral basis. In order to coordinate this work and to serve as a contact point for interested parties, a central institution of the Federation and the Länder should be set up in Germany with the participation of the business community which also takes on responsibility for the management of registers and the maintenance of standards. A United Kingdom-style Open Data Institute could serve as a model *(Recommendation 6)*.
    - The drawing up of overarching data strategies at European and Member State level which prescribe a cross-sectoral concept and cross-sectoral framework for the collection, use and provision of data of the public sector and from the delivery of public services *(Recommendation 7)*.
    - To the European Commission and the Member States that where companies are entrusted with the delivery of public services, where they are granted privileged access to scarce resources, e.g. in the awarding of a limited number of licenses, and where they are awarded public contracts, these companies should be obliged to provide the data generated in the course of this work in

7 *Recommendation 21* was supported by a majority of the Commission's members.

line with data protection rules and respecting operating and commercial secrets for use by the public sector in line with uniform criteria for use and – in the context of open data legislation – forwarding to third parties *(Recommendation 8)*.

- *In Section VI. on "Clear rules of conduct for dominant platforms":*

    - that the European legislator examine whether dominant online platforms with a certain minimum level of revenues or a minimum number of users should be obliged to introduce an alternative dispute resolution procedure for violations of rights on platforms *(Recommendation 12)*.

- *In Section VIII. on "Merger control: Towards a more effective control of the acquisition of start-ups by dominant companies":*

    - Currently not to reform the EU Merger Control Regulation thresholds, but advocates the systematic monitoring and evaluation of the handling of relevant cases by the European Commission and the submission of a two-yearly report to the Council and Parliament *(Recommendation 15)*.

    - Not to introduce a system of *ex post* merger control at this point in time. However, as part of the proposed monitoring and assessment of cases involving the early acquisition of innovative start-ups by dominant undertakings, the European Commission should also examine and report on whether it is succeeding, with the current system of *ex ante* control, to avert the risk of the systematic consolidation and expansion of positions of dominance *(Recommendation 16)*.

    - That, when applying the SIEC test to capture the threats to competition associated with the takeover of young, innovative start-ups by dominant digital companies, particular importance must be attached to ensuring the contestability of entrenched positions of power. The Commission recommends the development of corresponding guidelines that specify relevant theories of harm. Particular account must be taken of data-based, innovation-based and conglomerate theories of harm *(Recommendation 17)*.

- *In Section IX. on "Improving the enforcement of competition law":*

    - Not to reform Article 8 of Regulation 1/2003 ("interim measures"). Nor should judicial review of interim measures be weakened. In view of the rapid developments in digital markets, the European Commission should, however, proactively examine whether it is necessary to order interim measures to prevent irreparable damage to competition *(Recommendation 18)*.

    - That competition authorities make greater use of flexible, targeted remedies in digital markets. It recommends that the European Commission conduct a study which analyses the previous policy on remedies pursued by the competition authorities in relevant cases (Microsoft, Google Shopping etc.) *(Recommendation 19)*.

- *In Section X. on "Combining competition law with other regulatory areas":*

    - That the Member States should consolidate their data protection supervision structures for the non-public sector *(Recommendation 22)*.

IV. CONCLUSION

With its recommendations, the Commission hopes to have set the basis for a comprehensive advancement of the competition framework at European level in view of the challenges of the digital transition. By implementing the recommendations, Europe can improve the conditions for digital innovation, facilitate vibrant competition, and strengthen the position of consumers.

MODERNIZING THE LAW ON ABUSE OF MARKET POWER IN THE DIGITAL AGE: A SUMMARY OF THE REPORT FOR THE GERMAN MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY

BY JUSTUS HAUCAP, WOLFGANG KERBER, HEIKE SCHWEITZER & ROBERT WELKER[1]




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I. INTRODUCTION

In January 2018, the German Ministry of Economics and Energy commissioned us to prepare a study on options for competition law reforms regarding the abuse of market power in digital markets. While the study has been published in September 2018 in German only,[2] the executive summary has been also published in English.[3] The study's point of departure was the 9th amendment to Germany's competition law. In 2017, the German legislator introduced, among other things, a new set of additional criteria for determining the market power of platforms and networks. Germany's law against restraints of competition ("GWB") now specifies in Section 18 para. 3a that direct and indirect network effects, multi-homing and user switching costs, economies of scale, access to data relevant for competition and innovation-driven competitive pressures need to be considered when determining market power in platform markets. While this set of criteria certainly helps to assess a platform's market power, they do not address the question whether the current state of competition law is sufficiently well equipped to address potentially anticompetitive strategies that lead to market dominance in the first place.

Against this background, we have been asked to analyze the question of whether the intervention threshold is currently too high for competition authorities – either in general or with respect to certain types of firms' practices – so that competition agencies may intervene too late. Put differently, the aim of our study has been to examine whether current competition law provisions to protect against the abuse of market power are sufficiently clear and effective.

Our report is structured as follows: It starts, like many other reports on the topic, with a brief outline of the essential changes in the digital economy, namely the steadily increasing role of data as a critical resource and the emergence of platforms as widespread forms of intermediation. The changes in horizontal and vertical market structures, some of which have become highly concentrated, and in business strategies raise the question whether competition law can appropriately deal with the new challenges arising in the digital economy. As our report examines reform options of the (European and German) rules on the abuse of market power, but not on merger control and cooperation between firms, we have focused on Article 102 TFEU and its (rough) equivalents in German competition law, namely in Sections 18, 19 GWB.

A specificity of German competition law is that its provisions against unilateral conduct are not limited in their scope to firms with market dominance. In Section 20 para. 1 GWB, the abuse of "relative market power," a form of economic dependence or superior bargaining position, is prohibited. Relative market power exists where firms do not have sufficient and reasonable possibilities of switching to other firms ("outside options"). It is assessed by analyzing the imbalance of power between two specific firms and does not require any "market-wide" power. Relative market power has been found in four different constellations:

When retailers need to stock the branded products of a group of manufacturers to be competitive, they may be economically dependent on each of those manufacturers without them being dominant. In the same way, a manufacturer may be economically dependent to have his products stocked by non-dominant buyers. Firms may be dependent of other non-dominant firms insofar as they made transaction specific investments that result in hold-up risks. And, finally, firms may be dependent of other non-dominant firms insofar as they control access over a scarce resource.

Additionally, Section 20 para. 3 GWB prohibits the abuse of superior market power *vis-à-vis* small or medium sized competitors.

In our report, we have paid particular attention to the question of whether Section 20 GWB can become an effective instrument for closing any gaps in controlling the abuse of market power, in particular regarding the special challenges arising in the digital economy.

2 See Schweitzer, H., Haucap, J., Kerber, W. & Welker, R. (2018), *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, Nomos Verlag: Baden-Baden.

3 See Schweitzer, H., Haucap, J., Kerber, W. & Welker, R. (2018) Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany), available at https://ssrn.com/abstract=3250742 or http://dx.doi.org/10.2139/ssrn.3250742.

II. SO, WHAT IS NEW IN THE DITIGAL ECONOMY?

Digitization has transformed – and continues to transform – almost all business sectors and entire economies. Among the characteristic features of digitization are the increasing importance of (a) data as a critical input resource in production and distribution processes; and of (b) digital platforms as new players in the markets. New information intermediaries that collect, organize and rank information and firms' offers play a central role in a growing number of markets. These information intermediaries include search engines, but also trading platforms, price comparison sites, and booking portals. A characteristic feature of the digital economy is that platforms with information and matching functions increasingly obtain a central position in otherwise decentralized markets. These information intermediaries provide information about the quality of offers and the reliability of transaction partners and select and prioritize matching options on the basis of the evaluation of user data. Consumers in many markets use services of such information intermediaries. From an economic point of view, intermediation services can often be characterized as so-called credence goods, where customers can only evaluate the intermediation service's quality *ex post*, if at all.

Information intermediaries may face incentives to systematically bias the display of information in their interest, as consumers may often not recognize whether information (such as an order of search results) is biased or not. Thereby, information intermediaries can induce user decisions and market developments which deviate from those which would be expected under undistorted competition. If the party with the information advantage (here: the information intermediary) systematically exploits this advantage and at the same time has market power, a market failure is likely to result. In addition, such practices can undermine users' confidence in information intermediaries more generally.

Consumers' growing use of information intermediaries has led to product and service providers increasingly becoming dependent on access to and visibility on intermediation platforms. A number of platforms have achieved a "gatekeeper" status in a whole range of contexts. This is accompanied by the power to define the rules of the platform. These rules create separate ecosystems aimed at optimizing the number of users on different market sides. The development of online platforms into central marketplaces and intermediaries on the Internet appears is in many respects efficient, as the platforms add value for all market sides involved. However, their emergence and growth can, at the same time, lead to new positions of power.

In principle, information intermediaries are not an entirely new phenomenon of the digital economy. They have always played a role in some markets, such as insurance brokers, travel agents, or real estate brokers. What is new is the almost universal importance of digital platforms as intermediaries on the Internet. Often these intermediaries are referred to as multi-sided platforms, which are characterized by indirect network effects. Quite generally, the exploitation of positive direct and/or indirect network effects is decisive for the success of multi-sided platforms. If the benefits of a platform result from the network effects across market sides, it is crucial that all relevant market sides participate in sufficient numbers to make the platform attractive for the other market sides. The "chicken and egg" problem, which newly established platforms have to overcome, is often described in this context. As a result, many digital platforms are resorting early to aggressive growth strategies ("scaling").

Markets in which digital platforms have become important players are often characterized by a tendency towards concentration.[4] Strong positive network effects between users or user groups can favor so-called "tipping," i.e. a transformation from a market with several providers to a monopolistic or highly concentrated market.

The concentration tendency associated with positive network effects between user groups can be strengthened by the fact that positive network effects between user groups in the new data economy often result in positive data network effects. High user numbers mean that platforms with a particularly large number of users can also access a particularly large data pool. On the one hand, this can be used to improve the services and/or to tailor them to special user needs (personalization of services). The positive network effects can also be combined with economies of scale: For example, a platform with many users can offer advertisers a much more attractive environment and generate higher advertising revenues. In Google and Facebook in particular, the market strength in user markets seems to have translated into a strong market position in advertising markets. Such profits can in turn be used to optimize services on the user side. Colloquially – and too sweepingly – platform markets are therefore often referred to as "winner takes all" markets.

4 See Haucap, J. & U. Heimeshoff (2014), "Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?," *International Economics and Economic Policy* 11, pp. 49-61.

III. GERMANY'S COMPETITION LAW REFORM OF 2017

Following recommendations by Germany's monopolies commission,[5] several changes have already been adopted for Germany's competition law. Apart from introducing a new merger threshold based on a proposed merger's value, the most notable addition has been Section 18 para. 3a of Germany's law against restraints of competition, which was introduced in 2017 and which provides that: "Especially in multi-sided markets and networks the following criteria have to be considered when evaluating a firm's market position: direct and indirect network effects, the parallel usage of multiple services and consumer switching costs, economies of scale in conjunction with network effects, access to competition-related data, innovation-driven competitive pressure" (author's own translation). This list of criteria reflects the criteria developed in the economic literature.[6]

While the new Section 18 para. 3a may be helpful for the Bundeskartellamt and the courts to assess a platform's *market dominance*, it neither expands the scope of application of the provisions against an abuse of market power, nor does it facilitate a finding of *abuse* or provide any new guidance or legal clarity on this subject. However, incentives to foreclose the market for online platforms are, as a regularity, much stronger than in "traditional" markets, as platforms operate in "tippy markets" or so-called "winner takes all markets." Due to the network effects and the chicken-and-egg problem described above, entry becomes rather difficult once a platform market has been monopolized.

IV. FURTHER CHALLENGES FOR COMPETITION LAW

A. A More Flexible Approach towards Market Dominance

Given the specific and novel economic characteristics of the digital economy described above, our study started out by inquiring whether the existing rules on the abuse of dominance are fit to deal with the new challenges. Among those challenges are the well-known difficulties of delineating platform markets. If these difficulties cannot be solved conceptually, or if they are fraught with uncertainty at least in some cases, a response might be to apply the abuse of dominance rules in a more flexible manner: Instead of first defining the relevant market, competition authorities and courts could be allowed to find relevant market power by implication when anti-competitive behavior is not sufficiently controlled by competition and a subsequent foreclosure or displacement effect can be proven. Although there is no indication in the wording of Article 102 TFEU that prohibits such a flexible approach towards market dominance, the current interpretation and application practice of the European Courts calls for a two-step-analysis consisting of the definition of a market and a subsequent showing of market power on this market. While there are good reasons for adopting a flexible approach to market dominance in a small and distinct set of cases where market definition is especially difficult, such development would therefore be left to the Union Courts.

B. No need to Generally Lower the Intervention Threshold

We next asked whether the threshold for competition law intervention is currently set too high, such as to prevent timely intervention against unilateral conduct with potentially long-term negative effects on the structure of markets.

A general lowering of the intervention threshold could allow competition authorities to deal with threats to competition in the context of digitization at an earlier stage. In our report, four case constellations are considered in which competition law intervention may be warranted below the threshold of market dominance:

a) unilateral behavior by undertakings that are not (yet) dominant and that are active in markets with strong positive network effects, if that behavior is likely to substantially foster the probability of monopolization ("tipping")

b) non-coordinated parallel behavior in a tight oligopoly with market foreclosure effects

c) abuse of "conglomerate market power" as a (possibly) specific form of power which may significantly endanger competition even below the market dominance threshold

d) "Intermediation power" (see below) and information asymmetries

5 Monopolkommission (2015), *Sondergutachten 68: Wettbewerbspolitik: Herausforderung digitale Märkte*, Bonn.

6 See, e.g. Evans, D.S. & R. Schmalensee (2007), The Industrial Organization of Markets with Two-sided Platforms, *Competition Policy International*, 3 (1), pp. 151-179.

Yet, we argue that it is not advisable to address these issues by generally lowering the intervention threshold for controlling abuse of unilateral behavior. German (or European) competition law should not move towards a prohibition of monopolization (following the example of U.S. antitrust, which, however, has not proven to be more effective in addressing the relevant challenges to competition). Nor should it transition to a SIEC test in addressing the abuse of market power. One reason for this is the legal uncertainty that would necessarily accompany such a step. Another reason is that the gaps that we identify in the following are relatively limited and specific – and should therefore be addressed by more specific amendments of the law.

Germany's competition law already provides for a lower intervention threshold for certain cases: Section 20 para. 1 GWB prohibits abuses of relative market power, and Section 20 para. 3 GWB prohibits unfair impediments to small and medium- sized enterprises by firms with superior market power (see above). Hence, the threshold for intervention is already significantly lowered – which may, as we argue, be useful to address some kinds of anti-competitive behavior in the digital economy. Instead we propose to broaden the scope of protection of Section 20 para. 1 GWB: So far, it is limited to the protection of small and medium-sized enterprises against abuses of relative market power. This restriction to SME should be lifted, as relevant dependencies may also arise for large companies.

C. New Provisions to Specifically Address "Tippy" Markets and the Market Power of Intermediation Services

Since we have not recommended a more general lowering of the intervention threshold regarding unilateral conduct, our study also analyzed whether the law should be amended so as to allow for intervention against specific types of unilateral conduct in specific settings that may raise competition concerns – even below the threshold of dominance.

First, markets with strong positive network effects can "tip," i.e. turn into monopoly. However, such "tipping" into monopoly is not necessarily a "natural" market outcome, but can instead be actively promoted or induced by certain practices of relevant actors in the market. These practices include unilateral behavior such as a strategic obstruction of multi-homing or switching. Under existing competition law, such unilateral behavior can be addressed only if the respective undertaking possesses a degree of market power that is relevant under competition law (i.e. a dominant position under Article 102 TFEU/Sections 18, 19 GWB, relative market power under Section 20 para. 1 GWB or superior market power *vis-à-vis* small or medium sized competitors under Section 20 para. 3 GWB). In markets prone to "tipping," an intervention below that threshold may be desirable as a matter of competition policy. The main justification for lowering the intervention threshold would be that "tipping" – once it has occurred – can hardly be reversed. We therefore recommend to insert a new Section 20a or Section 20 para. 6 GWB, which prohibits platform operators in tight oligopolies, or platform operators with superior market power, to obstruct multi-homing or the changing of platforms, insofar as this strategic obstruction is suitable to promote a "tipping" of the market. We propose to frame those conduct rules as a "*per se*"-prohibition open for an objective justification or an "efficiency defense." This amendment to Section 20 GWB may ultimately not prevent tipping altogether – in fact, if firms can demonstrate that multi-homing jeopardizes efficiency, the market will still tip into monopoly. However, such a clause would provide at least some backstop against tipping and help to preserve competition when multi-homing is feasible – while also reducing the risk of over-enforcement imminent with "*per se*" prohibitions that do not allow for an "efficiency defense." It should be noted here that, with multi-homing in place, competition between platforms does not automatically imply a loss of network effects.

Of course, lowering the threshold for intervention may potentially lead to over-enforcement. Even leaving aside that many researchers are currently concerned about past under-enforcement in antitrust and consider this to be one of the reasons for the growing mark-ups and increasing market concentration observed in some countries, erring on the side of over-enforcement rather than under-enforcement appears to be justified in this case, as the welfare losses caused by under-enforcement are difficult to reverse since it is difficult to reinstall competition once a platform market has tipped to monopoly, due to the tippy nature of these markets. In contrast, the welfare costs of over-enforcement appear to be lower, as prohibiting strategies that impede multi-homing may possibly reduce competition between firms, but such a prohibition could easily be reverted.

Second, certain business strategies in markets characterized by tight oligopolies may have a foreclosure effect even if they are not coordinated. Under EU competition law, such unilateral conduct may be difficult to address if no single or collective dominance can be shown. However, we do not find a legal loophole under German competition law: Relevant cases can be addressed either by the prohibition of abuse of market dominance (in particular considering the legal presumption for collective dominance under Section 18 para. 6 GWB) or under Section 20 para. 1 or para. 3 GWB (relative or superior market power). If neither vertical dependency nor horizontal superior market power can be established, the risk is low that an undertaking's non-coordinated parallel behavior could pose a significant threat to competition.

Third, we find that, due to the increased importance of information intermediaries, consideration should be given to the question whether an independent form of "intermediation power" should be recognized as a third and separate form of market power alongside supplier and buyer power. The main service that an intermediary offers – whether by means of resale or brokerage – is access to a specific sales channel or access to a specific customer group. The degree of power that a reseller or an intermediary possesses *vis-à-vis* undertakings that are active on that platform depends on the proportion of demand that the reseller or intermediary bundles and on the presence or absence of viable alternative options for those undertakings in distributing their goods or services. If, for example, the structure of a relevant market is that of a tight oligopoly of platforms that are not collectively dominant, providers of goods and services may depend for their economic survival on being present on each and any of those platforms, or at least on the majority of them if the same customers cannot be served in a similarly effective way otherwise and if it is essential to reach a large proportion of potential customers. A provider of goods or services may therefore be dependent on a digital platform under similar conditions as – conventionally – on a reseller, such as a food retailer.

Given this, a greater degree of legal clarity and predictability can be achieved if the conceptual particularities of the assessment of market power in cases where the activity in question consists in intermediation were fully recognized from the start – by way of recognition of a concept of "intermediation power" (usually P2B). Such legal recognition of the concept could be achieved, under German law, by supplementing Section 18 para. 1 GWB ("A company is dominant if it is a supplier or buyer of a certain type of goods or commercial services *or an intermediary...*"). At the same time, the aspects mentioned in Section 18 para. 3a GWB as being relevant for the assessment of the market position of a platform could be supplemented to clarify the importance of a platform as an intermediary for access to sales and procurement markets. In substance, the recognition of a concept of intermediation power would clarify that in these cases the qualification of a platform's activity as an "offer of brokerage services" or "demand for supply services on the platform" is not decisive for assessing its market position. In contrast to a purely commercial agency activity, the brokerage service of a platform will often have hybrid characteristics. It does not depend on the individual service itself – i.e. the provision of brokerage services – but on an overall view of the circumstances that are decisive for a platform intermediary's position of power, with special consideration of the platform's market position on the various platform sides.

Fourth, particularly the large digital companies are characterized by conglomerate structures. This has triggered a new discussion about the question whether new conglomerate strategies based upon new types of large economies of scope of digital platforms and of advantages from the cross-market collection and use of data (consumer data profiles) can lead to new kinds of market-transcending anticompetitive effects. Particularly in combination with systemic, infrastructure-like services (as cloud services and data analytics software) as well as superior capabilities in data analytics, AI, and algorithms new market-transcending gatekeeper positions might arise that also lead to advantages for disruptive innovation. If these digital companies are dominant in at least one market, then the European and German provisions about abusive behavior can be applied for dealing with strategies of foreclosing competitors or leveraging market power on other markets. However, there can be gaps if the conglomerate power is the result of the aggregation of market power positions below the threshold of dominance on these markets. The provisions about firms with relative market power (Section 20 GWB) might help to close these gaps but still many open questions remain about the economic power of digital conglomerates.

D. Adequate Merger Control for "Killer Acquisitions"

Assessing how the acquisition of relatively small innovative start-ups effects competition in the future poses particular challenges for competition authorities and courts. Many such acquisitions – also by large digital firms – are a legitimate part of the competitive process. At the same time, some of these acquisitions can have anti-competitive effects, in particular if firms that are already dominant succeed to systematically identify and acquire potential future rivals at an early stage. Competition in already heavily concentrated markets can then be dampened for a long time. It is difficult for competition authorities and courts to identify such cases, however – also because potentials for future competition will frequently originate in niche markets. At the time of acquisition, there may not necessarily be a clear horizontal overlap. With the objective to keep markets open and contestable, we suggest that an attempt to strengthen the German competition authority's powers to challenge such acquisitions is worthwhile. Section 36 para. 1 GWB (as the main provision of German merger control) could therefore be supplemented by a sentence which would allow the competition authority to consider, when assessing the existence of a significant impediment to effective competition, the existence of an overall strategy of a dominant company to systematically acquire fast-growing companies with a recognizable and considerable potential to become competitors in the dominated market in the future. It may be an indication for such future competition that the company to be acquired – while only being a niche competitor to the dominant firm – is active in a market that addresses the same basic needs as the acquirer. Instead of looking at relatively narrowly defined markets, the Federal Cartel Office could therefore look at a broader category of competitive relationships which may better capture the reality of fast-changing markets in the presence of potentially disruptive activities.

E. Assessing Data-Related Abusive Strategies and Data Access Claims

Control over data may establish positions of market power. With the newly inserted section 18 para. 3a GWB (in the 9th amendment of the GWB) access to competition-related data can already be taken into account when determining market power in multi-sided markets and networks. In our report we analyzed whether the exclusive control over data can be used for abusive strategies, and whether therefore the refusal to grant access to data can be an abusive behavior of a dominant firm or a firm with relative market power.

Since, from an economic perspective, data is non-rivalrous in its use, access to data for other firms can lead to more innovation, competition, and efficiency. However, the incentives for the production of data also have to be taken into account, which might be very different depending on the size of their costs. Also, compliance with the requirements of the EU data protection law (the "GDPR") is necessary. The report distinguishes different groups of cases with respect to the question whether data access rights should be granted. One important option for dealing with the economically legitimate interest in access to machine-generated usage data, which often arise in vertical relationships in the Internet of Things (or "IoT") context (e.g. when using certain machines and services), is the use of contract law, including the law on unfair contract terms. If however the undertaking in control of the data is, at the same time, dominant or possesses relative market power, there may also be an antitrust basis for data access claims.

Especially in cases of IoT ecosystems (and aftermarket constellations) such as, e.g. smart agriculture, and smart connected cars, the problem might arise that one firm, usually the manufacturer of a smart device (as agricultural machines or connected cars), might use the exclusive control of the data produced with this device for foreclosing independent firms on markets for aftermarket and other complementary services that need access to these data. This would allow the data-controlling firm to leverage its market power to adjacent secondary markets within this ecosystem. This case group is seen as an interesting candidate for applying the competition law provisions about abusive behavior, especially if buyers are locked-in with primary products. With regard to other case groups, as, e.g. access to large data sets for training algorithms in AI contexts, we would recommend solutions outside of general competition law.

A discussion has recently emerged whether – in order to facilitate access to large amounts of data for the purpose of training self-learning algorithms and thus to neutralize competitive advantages of particularly data-rich companies – a market-share-based "data-sharing obligation" should be introduced ("data-for-all" law/"data sharing" obligations as proposed, *inter alia*, by Mayer-Schönberger & Ramge, 2018).[7] We consider this to be an important discussion. Yet, the way in which such a data-sharing-duty could be structured (and limited) is still a completely open issue.

The refusal to grant access to data over which a firm has exclusive control and which is essential for entering into an adjacent market can already be qualified as abusive under German (and European competition) law. In Germany, the legal basis for prohibiting such an abuse is Section 19 para. 1 in adjunction with Section 19 para. 2 No. 1 GWB for dominant firms. The finding of an abuse requires a balancing of legitimate interests. Since the costs of producing data can also be very low, a larger flexibility exists for granting access to exclusive sets of data than in other cases of access to physical infrastructure or intellectual property rights. Therefore, we recommend that the competition authority and courts should use this greater flexibility for data access claims with respect to dominant firms.

Claims about data access can also be based upon the provisions of Section 20 para. 1 GWB (relative market power). If, in the context of value creation networks (as, e.g. in the ecosystem of connected driving), third-party providers require access to data that is exclusively controlled by a participant in this network and that is necessary for substantial value creation in this network, Section 20 para. 1 GWB may already now provide a legal basis for data access claims – in particular if the relevant third party can show to be in a position of "firm-specific dependency." However, in balancing the relevant legitimate interests, the courts have so far required that the resource to which access is to be granted is "normally accessible" in the course of typical market transactions. This requirement is not necessarily met when it comes to data. We therefore recommend to extend Section 20 para. 1 GWB for clarifying that a relevant form of dependency may also result from an undertaking being dependent, in order to achieve a substantial value creation within a value creation network, on access to automatically generated machine or service usage data that is exclusively controlled by another company; and denial of access to data can constitute an unreasonable exclusionary conduct, even if markets for such data do not yet exist.[8]

7 See Mayer-Schönberger, V. & T. Ramge (2018), *Reinventing Capitalism in the Age of Big Data*, 166-171.

8 For an analysis of these data access problems from a competition law perspective, see Kerber, W. (2019), Data Sharing in IoT Ecosystems and Competition Law: The Example of Connected Cars, forthcoming in: *Journal of Competition Law and Economics*.

F. Compatibility of a Stricter National Competition Law with EU Competition Law

The recommendations made in our report consist mostly of a tightening of the German provisions on an abuse of market power. They are in compliance with EU competition law, which allows for national competition rules on unilateral conduct to be stricter than the EU competition rules (Article 3 para. 2 of Reg. 1/2003).

V. GERMANY'S COMPETITION LAW REFORM OF 2020

A number of the suggestions developed in our report have been incorporated into the current draft of Germany's next competition law reform package, which is expected to be enacted in 2020.[9] In particular, among a number of other suggested changes, (a) the threshold for third-party access to data is proposed to be lowered; (b) the anti-competitive impediment of multi-homing is proposed to be prohibited for firms with superior market power (which may not yet be dominant); and (c) a concept of intermediation power is proposed to be introduced in addition to buyer and seller power.

With respect to intermediation power, the current Section 18 which defines market dominance is proposed to be supplemented by a new para. 3b of the following form: "When assessing the market position of an undertaking acting as an intermediary on multi-sided markets, account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets."

Regarding third-party access to data, a change of Section 19 which defines prohibited conduct of dominant undertakings is proposed so that "an abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services (...) (4) refuses to supply another undertaking with this product or commercial service against adequate remuneration, including access to data, networks or other infrastructure, the supply is objectively necessary in order to operate on an upstream or downstream market and the refusal to supply threatens to eliminate effective competition on that market, unless the refusal to supply is objectively justified." In addition, Section 20 which describes prohibited conduct of undertakings with relative or superior market power is proposed to be augmented by the following para 1a: "Dependency in the meaning of para. 1 may also arise from the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities. The refusal of access to such data may constitute an unfair impediment even if there is not yet a commerce opened for such data."

Finally, the impediment of multi-homing is also proposed to be addressed in Section 20 on relative and superior market power, as, according to a newly proposed para. 3a, "it shall also be an unfair impediment within the meaning of para. 3 sentence 1 if an undertaking with superior market power on a market in the sense of section 18 para. 3a impedes the independent attainment of positive network effects by competitors and thereby creates a serious risk that competition on the merits is restricted to a not inconsiderable extent."

9 A non-official English-language summary of the draft reform proposals is available at https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-Übersicht-2019-11-15.pdf.

DIGITAL AVANT-GARDE: GERMANY'S PROPOSED "DIGITAL ANTITRUST LAW"

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I. INTRODUCTION

"Break up," "Investigation," or "Regulation" of tech players. Almost on a daily basis, we hear political statements on how to deal with overly powerful digital giants from Silicon Valley or China. According to a global study by international law firm Hogan Lovells on the regulation of technology markets, there were more than 450 political initiatives in the first half of 2019 alone which supported a tougher regulatory stance on "Big Tech." However, so far, most of these fairly populist proposals have not been implemented.

One reason for that may be that the proper tools in order to cope with digital firms are yet to be found. Be it the French digital tax, which has recently caused frictions between French president Emmanuel Macron and U.S. President Donald Trump, the recently introduced liability for user comments in online portals, or laws dealing with copyright infringements caused by content uploaded on video platforms, one thing is clear: the legal issues in the context of online business models tend to be highly complex and difficult to address with a single toolbox.

This article will provide an overview of recent global developments that have set the scene for the proposed draft German "digital antitrust" bill and which are continuing to drive global regulatory developments in digital markets (see section II.). Building upon this, we will provide an overview and initial analysis of the main proposed changes in relation to digital markets (see section III.). Finally, we conclude by analysing this proposal in the broader global policy context, also touching upon some of the obvious questions relating to potential EU-wide "digital antitrust" rules and possible enforcement activities in the near future (see section IV.).

In particular, the German draft Ministerial bill on the 10th amendment to the German Act Against Restraints of Competition (so-called "GWB-Digitalisierungsgesetz") provides for the following aspects, which we will discuss in more detail in section III:

- Access rights to "data relevant for competition," making such data a factor in determining a dominant market position and refusal of access to such data an abuse of market power;

- Stricter antitrust regulation of digital platforms through a mechanism that enables the German Federal Cartel Office ("*Bundeskartellamt*") to not only declare by order that large digital platforms are of "paramount significance for competition across the markets" but also to impose stricter antitrust rules on them in a second step;

- Specific regulation of so called "intermediaries," whereby multi-sided digital platforms whose business model is to collect, aggregate and evaluate data in order to reconcile supply and demand between user groups will be subject to specific antitrust rules;

- Right of intervention against so-called "tipping" of markets (i.e. the "overturning" of a market with several suppliers into a monopolistic or highly concentrated market) as well as new interim injunction measures that make it easier for the *Bundeskartellamt* to deal with possible violations of antitrust laws in the future;

- Broader protection against so-called relative market power, which– under the new law – will not only protect small and medium-sized enterprises, but also apply to any "B2B" situation where a company is dependent on another market participant. In the future, all market players, even large companies, will be able to rely on this protection mechanism; and

- More legal certainty for horizontal arrangements through new rules entitling companies to a decision by the *Bundeskartellamt* on the legality of a planned cooperation with a competitor (instead of reliance on self-assessment only) if the companies have a substantial legal and economic interest in such a decision.

II. SETTING THE SCENE – THE GERMAN DRAFT IN THE GLOBAL CONTEXT

In a political environment where regulating "Big Tech" has become one of the most prominently discussed topics, the German draft Ministerial bill is capable of creating legislative facts at a European and international level and placing Germany, if not at the forefront of "Big Tech" business in general, at least at the forefront of its regulation.

A. Antitrust Law – A Powerful Regulatory Tool

Over the last few years, antitrust law has transformed into a particularly powerful tool against market power in online markets. EU Competition Commissioner Margrethe Vestager made a name for herself by imposing billions in fines and tax reclaims against companies, especially from Silicon Valley. In her next term under the leadership of the newly elected President of the EU Commission, Ursula von der Leyen, Commissioner Vestager will also be given responsibility for the digital sector as a whole. This dual role will further strengthen the importance of antitrust law. In Germany, the *Bundeskartellamt* under its President, Andreas Mundt has been no less ambitious and has used its competences to deal with online marketplaces and social networks. In light of this, it does not come as a surprise that the global Hogan Lovells study on digital regulation found that around a quarter of the political initiatives opted for stronger regulation of tech companies.

By and large, these proposals have not made it through the discussion stage. However, with the now published draft German "digital antitrust" bill, Germany is focusing on an actual legislative project to endow the *Bundeskartellamt* with more competences and to place it at the forefront of global regulators.

According to the Minister of Economic Affairs and Energy, Peter Altmaier, the new law is going to "set some ground rules for dominant online platforms and [improve] market and data access for their competitors." This announcement only slightly reveals what is about to come; a program that has what it takes to make Germany a pioneer in the antitrust regulation of digital markets. Some parts of the current proposals will certainly attract focused attention in Silicon Valley and China.

B. The Global Context

The planned reform of the German antitrust law can be seen as one of the first regulatory results of a controversial international debate which has been fuelled by antitrust decisions of leading antitrust authorities worldwide as well as by the views of legal scholars.

Just over the last twelve months in particular, the following papers and studies have contributed to the ongoing debate: the Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities (October 2019); the Report by the German "*Kommission Wettbewerbsrecht 4.0*" (September 2019), whose recommendations have partially become part of the new bill; the Report prepared by the BRICS countries entitled "Digital Era Competition: A BRICS View" (September 2019); the "Stigler Report" prepared in the U.S. by the "Stigler Committee on Digital Platforms" (July 2019); the "Digital platforms inquiry" by the Australian Competition Authority (June 2019); the Report of the European Commission on "Competition policy for the digital era" (April 2019); and the "Furman Report" on "Unlocking digital competition" prepared for the British government (March 2019).

III. THE MAIN FEATURES OF THE NEW DIGITAL ANTITRUST LAW

For some years now, both at government level in Berlin and at the level of the *Bundeskartellamt* in Bonn, Germany has seen itself as a pioneer of state-of-the-art antitrust law regulation of digital markets. This understanding already existed when discussions on the last reform of the GWB, which introduced new merger control thresholds in June 2017, took place. Ever since, it has been necessary to take into account the value allocated to a company rather than simply its turnover in order to prevent so-called "killer acquisitions" of innovative start-ups, especially in the tech and pharmaceutical markets. Additionally, the last reform of the GWB shed some light on what amounts to a market within the meaning of German antitrust law and, in particular, clarified that a market can exist not only in respect of paid services, but also where free services are provided (e.g. online searches or social networks).

However, up until this point, none of these changes has been made with the goal in mind of creating some sort of a "digital antitrust law." The official title of the proposed 10th amendment of the GWB, by contrast, shows that the time has now come. The German Government has proposed nothing less than a "Competition Law Digitization Act." The GWB will of course continue to apply to all market sectors and will merely integrate the proposed amendments into the existing framework. In the area of digital markets, however, the *Bundeskartellamt* will be equipped with far more tools than most other competition authorities following the adoption of the proposed amendment.

At the same time, the draft bill will implement to a large extent the ECN+ Directive (i.e. the European Directive "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market"), and increase the second merger control turnover threshold from € 5 to € 10 million. Finally, it intends to make slight adjustments to ministerial approval, cartel proceedings, as well as the private enforcement of antitrust laws, which are not dealt with in this article.

In the following sections we will shed some light on the main features of the proposed draft bill and analyse them in their context.

A. Access to "Data Relevant for Competition" as a Factor in Determining a Dominant Market Position

The new law expressly provides for access to "data relevant for competition" to be a factor in determining whether a company has a dominant market position in relation to its competitors (Section 18(3) no. 2 GWB draft bill).

The legislator's objective is to point out the significance of data not only for digital business models, but also for business models in general. The availability of large amounts of detailed data enables companies to tailor their products to the needs of consumers and to engage in targeted advertising, which is why data has gained increasing popularity among advertising companies.

The ever-growing importance of data for companies in all sectors is the reason why access to data is meant to become easier under the new law. Therefore, it also becomes clear why, for the purposes of German antitrust law, "an abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services refuses to supply another undertaking with this product or commercial service against adequate remuneration, including access to data, networks or other infrastructure, the supply is objectively necessary in order to operate on an upstream or downstream market and the refusal to supply threatens to eliminate effective competition on that market, unless the refusal to supply is objectively justified" (Section 19(2) no. 4 GWB draft bill).

Additionally, the rule that deals with so-called relative market power below the level of dominance has been subject to changes. The new law introduces another possibility for a finding of a "dependent" position within the meaning of Section 20 GWB to arise, i.e. "the fact that an undertaking is dependent on access to data controlled by another undertaking for its own activities" (Section 20(1a) GWB draft bill).

Only time will show how these changes will affect the way companies deal with big data. In practice, it will be particularly important for those demanding access to data to provide substantive evidence of their dependence on getting access to it. As already indicated in the discussions leading to this draft bill, the issue of data access will not be immune from further scrutiny.

B. Stricter Antitrust Regulation of Companies with "Paramount Significance For Competition Across the Markets"

Another important change can be found in Section 19a GWB draft bill, which has been introduced to allow for a better regulation of digital companies with "paramount significance for competition across the markets." It enables the *Bundeskartellamt* to declare by order that a company operates "*to a significant extent*" on multi-sided markets or networks.

In the legislator's view, such companies are at any time capable of expanding their market power to dynamic new markets simply because of their strategic position and their access to superior resources. Ways to do so are, for example, competitive pricing strategies, exclusivity agreements, bundling or the use of data in parallel markets. Moreover, network effects, a typical feature of digital markets, can lead to accelerated market concentration.

The current law, in principle, only allows for sanctioning abusive conduct where a company already had certain market shares in the relevant market. The new rules, by contrast, endow the Bundeskartellamt with the competence to prevent a company with a dominant position in one market from engaging in certain particularly harmful practices in another market, provided that it has previously declared by order that any such dominant market position exists. This new provision appears to be targeted directly at the biggest global tech players concerning their activities in Germany.

C. Special Regime for Digital Platforms

The new law deals specifically with digital platforms. Section 18(3b) GWB draft bill makes it clear that so-called "intermediaries" can also be dominant market players; a view that has already been expressed in the German study on "Modernising the law on abuse of market power" published on August 29, 2019.

The term "intermediary" should be construed as referring to an undertaking which "*acts as an intermediary on multi-sided markets.*" These intermediaries – typically digital platforms – mostly function as "gatekeepers" in that they decide on the market entry of product suppliers who wish to trade their goods on the intermediaries' websites. For these suppliers, how they are listed and ranked on the websites is critical, particularly if there are no real alternative options. Consequently, the new rule emphasizes that, in the assessment of a firm's market position "account should be taken in particular of the importance of the intermediary services it provides for access to supply and sales markets."

D. Relative market power: Now not only in relation to small and medium-sized companies (Section 20 GWB draft bill)

With the proposed changes in Section 20(1) GWB, the draft bill introduces another topic that has already been discussed in the German study on "Modernising the law on abuse of market power." The study concluded that, under certain circumstances, there might be too high a threshold for anti-trust authorities to stop the abuse of market power in digital markets. That being said, the new law wants to make sure that there is a possibility to monitor the conduct of digital companies which are about to obtain a dominant position for potential abuses of market power.

According to the authors of the study, digital markets are prone to being easily "tilted," leading to markets without real competition. Reasons for that might include network effects as well as uncomplicated scalability of services in digital markets. However, once markets are "tilted," there is usually no way back.

Under the old law, the *Bundeskartellamt* acted well within its competences when taking actions against a company that abused its market power insofar as that behaviour was directed against companies dependent on it. However, it was only regarded as an abuse of market power within the meaning of Section 20 GWB, where this behaviour affected small or medium-sized companies. Within the new framework, there is no such requirement, therefore also covering situations where large companies are pressurized by digital companies. However, this new rule should only be applied when "because of a clear asymmetry, the dependence is not offset by corresponding countervailing power of the suppliers or customers of the undertaking with a strong market position" (Section 20(1) GWB draft bill).

E. Lowering the Conditions for Interim Injunctions

Additionally, Section 32a(1) of the GWB draft bill provides for relaxing the conditions for the application of interim injunctions by the Bundeskartellamt. The reason being, that due to complex and lengthy investigations, it sometimes takes the *Bundeskartellamt* months or even years to reach a final decision. However, digital markets in particular are very dynamic and can quickly "tilt" into a market where competition is largely eliminated. In such cases, the *Bundeskartellamt* should be able to react quickly and effectively, so as to minimise the risk of irreversible changes during the course of years of investigations.

F. New Assessment Options for Horizontal Cooperation

Although the planned changes are all about providing the *Bundeskartellamt* with stronger intervention powers against dominant digital companies, they also introduce new possibilities for certain forms of cooperation between horizontally aligned (potential) competitors. The objective behind this change is to create legal certainty in situations where potential competitors of large digital companies try to cooperate in order to compete with the major players on the market.

At the moment, any form of cooperation between (potential) competitors carries the risk of violating antitrust rules, especially where cooperation takes place between (potential) competitors who have already gained a significant market share. For competition agencies any such form of cooperation includes a significant risk of anticompetitive effects, concerted practices and exchange of strategic information.

However, not every sort of cooperation between competitors should raise concerns from an antitrust perspective. This is particularly true for those forms of cooperation that merely allow companies to enter the market. Examples in the relevant field of the digital economy include the joint use of data and the cooperation of (potential) competitors in establishing platforms.

Under the current law, the principle of self-assessment applies. It requires corporations to check and decide all by themselves whether the prospective cooperation complies with rules of antitrust law. In this assessment, companies need to take into account the market shares of the respective participants to the cooperation as well as possible efficiency gains being the result of the planned cooperation. Such an examination is usually complex and there is always a residual risk that companies might make mistakes in their self-assessment.

If later on a competition agency were to come to a different conclusion, there would be a high risk of fines being imposed on the companies involved. It is precisely this risk which leaves companies with no choice but to refrain from cooperating with (potential) competitors in the first place. Although, under the current law, the *Bundeskartellamt* can already informally advise companies on the legality of their planned cooperation, it is not required to do so within a fixed period of time and there is no formal decision. Under the new law, companies are entitled to the *Bundeskartellamt's* rubber-stamping "if they have a substantial legal and economic interest in such a decision" (Sec 32(c) GWB draft bill). According to the draft bill, such an interest may exist, for example, where there are new complex legal issues to be decided or where there is an unusually high investment volume and expenditure.

IV. ANALYSIS AND OUTLOOK – DIGITAL TRENDSETTING OR NATIONAL SOLO?

Germany breaks new ground with the proposed draft bill to regulate digital markets. Irrespective of whether one supports the German government's objective (i.e. more regulation of the online market), it raises plenty of questions that require answers. Unlike many other markets, the online market is truly global. Big players are represented in almost all markets in America, Europe and – with a few exceptions in China, South Korea, and Japan – also in Asia. That being said, what is the reason for a German rather than a European solution? Is the European Commission with its ambitious Competition Commissioner Vestager and her newly expanded digital portfolio not equally or even better equipped to create a Union-wide "level playing field"?

In recent years, the *Bundeskartellamt* in particular has left no doubt that the enforcement of antitrust laws in digital markets needs to be coordinated between the European Commission and the national competition authorities. There is good reason for that, as the effects of digital markets are not restricted to the internet, but are experienced in real life markets. There is a limitation, however, which is the lack of uniform rules across the European Union, especially as the UK, an important and innovative digital market, will likely no longer be part of the internal market in the foreseeable future. This fragmentation would affect not only large online platforms, but also smaller German and European start-ups, whose biggest problem compared to U.S. competitors is the lack of scalability of the markets.

But perhaps things will turn out quite differently and the German draft – if it proves itself in practice – will become a blueprint for regulators in other European and non-European countries. The example of the European General Data Protection Regulation perfectly illustrates that the first legal system to adopt a binding framework for the regulation of conditions in the online market can set standards for similar projects. California, for example, has just recently adopted similar data protection standards.

Although Germany has been making quite some progress with the proposed draft bill in the area of the antitrust regulation of digital markets, there is certainly more regulatory activity to be expected in this field in the foreseeable future. The draft neither fully mirrors the views expressed in the ongoing global debate, nor does it mark its end. In fact, the legislator has also pointed out that further adjustments, especially in the context of access to data, might be necessary in the future.

In any event, the draft bill provides some ideas on what Germany and the world can expect in the context of antitrust enforcement in digital markets. Companies should take this as an opportunity to review not only the impact on their business model, but also their antitrust compliance systems and, if necessary, adjust them accordingly. What becomes clear is that the draft bill aims at creating new ground rules for digital giants. As plenty of industrial companies and service providers have now turned into tech companies in one way or another, in its practical application, the new law might therefore face the challenge of dealing with these digitized industrial companies appropriately.

It will be interesting to see how the German government, during its Council Presidency in the second half of 2020, will pursue this issue at a European level. The reason being that key decisions concerning the enforcement of European and international antitrust laws will require not only domestic but also European solutions. As a basis for that, the German Federal Ministry of Economics asked the "*Kommission Wettbewerbsrecht 4.0*" to provide some recommendations for the future development of European competition law in the context of the digital economy. In their September report, the authors urged regulators, among other things, to further empower consumers to decide about their own data and to be more decisive when it comes to monitoring strong digital platforms.

If Germany, with its ambitious digital antitrust law, succeeds in setting the standards for appropriate competition law tools, and the *Bundeskartellamt* manages to employ them in a reasonable and successful way, Germany may soon belong to the digital avant-garde albeit in regulating "Big Tech" companies rather than attracting them.

BENELUX COMPETITION AUTHORITIES ON CHALLENGES IN A DIGITAL WORLD

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I. INTRODUCTION

In October, the Belgian, Dutch, and Luxembourg competition authorities published a joint memorandum on challenges faced by competition authorities in a digital world. The memorandum is a first joint product of the authorities of the Benelux countries. It refers to a number of recent studies,[2] and suggests some responses. The authors do not claim to address all the challenges faced by competition authorities. The memorandum focusses on issues in merger control, the need for guidance in fast moving digital markets, and the debate on an *ex ante* instrument providing for binding commitments without the establishment of an infringement

II. MERGERS IN A DIGITAL ENVIRONMENT

The questions raised in recent studies focus primarily on the ability to control the growth of platforms in a winner-takes-all environment and the current jurisdictional thresholds and assessment criteria (theories of harm), on the issue of so-called "killer acquisitions,"[3] and on the balance between *ex ante* and *ex post* assessments. The memorandum does not discuss issues related to joint ownership and national champions because they are less specific to the digital economy.

In view of the doubts and issues raised in the available studies,[4] the memorandum considers it most useful for the DG COMP to commission an economic study on merger control in the digital sector.

Building on previous studies, such a study could analyze past acquisitions by the main platforms in the past decade, and review past merger decisions taken by competition authorities.

For the acquisitions that were not subject to review by competition authorities (e.g. because the turnover threshold was not exceeded), the study could examine whether plausible theories of harm, such as the ones proposed by Crémer et al. (2019), or, by contrast, whether efficiencies have developed.

For the acquisitions that were reviewed by competition authorities, the study can seek to find out if competition authorities had access to sufficient information to investigate the relevant theories of harm and efficiencies.

Based on the analysis, the study would need to discuss policy options designed to address any possible under enforcement of competition rules in the digital sector, such as:

- how competition authorities should assess the competitive potential of start-up companies and whether more guidance should be given to allow for self-assessment prior to notification;
- a change in the jurisdictional thresholds, e.g. by introducing an additional threshold based on the market power of the acquirer and/or the value of the transaction;
- whether and how a balance of harms could or already can be implemented, and whether it would improve merger review;
- whether the burden of proof could be reversed, under which circumstances, and whether it would have led to a more competitive outcome;

2 Crémer, J., de Montjoye, Y.-A. & H. Schweitzer (2019), "Competition policy for the digital era," European Commission, Brussels; Furman, J. et al. (2019), "Unlocking digital competition, Report of the Digital Competition Expert Panel: An independent report on the state of competition in digital markets, with proposals to boost competition and innovation for the benefit of consumers and businesses"; Stigler Center (2019), "Digital Platforms, Markets and Democracy: A Path Forward." Stigler Center for the Study of the Economy and the State at the University of Chicago Booth School of Business, Chicago; Lear (2019), "Ex-post Assessment of Merger Control Decisions in Digital Markets," document prepared for the Competition and Markets Authority. See also the recent *Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy"* http://www.autoritedelaconcurrence.fr/doc/g7_common_understanding.pdf.

3 The term killer acquisition is used, because it is often used in policy comments even if, as explained by Crémer et al. (2019) on page 117, there are in their opinion no "killer acquisitions" in the tech sector.

4 See on the introduction of alternative thresholds for merger control Crémer et al. (2019), op. cit, p. 115 advise to wait but see also the letter of the Dutch Secretary of State for Economic Affairs and Climate Policy to Parliament of May 20, 2019 (brief van Staatssecretaris mr. drs. M.C.G. Keijzer to the Voorzitter van de Tweede Kamer, accessible via https://globalcompetitionreview.com/article/1193142/).

- whether there would be options for competition authorities to revise their assessment when young targets have further developed (possibly by requiring that acquirers keep assets and teams separate for a given period of time).

- how the information-gathering power of competition authorities could be broadened for the review of acquisitions of start-ups by digital platforms.

III. *EX ANTE* GUIDANCE FOR DIGITAL AND OTHER FAST-MOVING MARKETS

The digital economy and other fast-moving markets confront us with the challenge of having a real impact on market behavior within a time period that meets the legitimate expectations of stakeholders.

When infringement cases concern novel issues, according to the memorandum we need, e.g.:

- early identification, case allocation, and fast track cooperation mechanisms in related cases as envisaged in the ECN "early warning" procedure;

- complemented by enhanced up-front information exchange within the ECN at the earliest possible stage concerning investigations that may lead to broader media attention;

- further optimization of accelerated procedures such as single or multiple Member State competition authority settlements and commitments;

- optimization of interim measures procedures; and

- more generally the use of any technique(s) that may bring forward the useful effect of such procedures, e.g. by communicating on dawn raids.[5]

But this will not be sufficient.

A. Guidance Papers

Competition authorities must, according to the memorandum, develop the ability and willingness to offer *ex ante* guidance on specific issues,[6] also before they (and the courts) develop the relevant case law. Guidance papers cannot be expected to have an impact on new developments if they come after the market has waited for years for infringement decisions and their confirmation or annulment in court.

Guidance is expected in the first place from the European Commission. But when the European Commission does not think guidance is relevant, or that particular issues are country-specific, Member State competition authorities could and should also take the initiative. In this case, they should, according to the memorandum, exchange drafts and experience *ex post* within the ECN in order to facilitate the development of a coherent policy within the EU.

B. Case-by-case Guidance Letters

The European Commission and Member State competition authorities have, since the entry into force of Regulation 1/2003, been reluctant to give individualized opinions on the compatibility with competition law of envisaged multilateral or unilateral practices as they want to avoid re-introducing individual exemptions "by the back door." This explains also the lack of use of article 10 of Regulation 1/2003 and the limited practice under the *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in indi-*

5 While the BCA considered in the past that it could only communicate by not denying that a dawn raid took place, it changed this policy at the suggestion of the Belgian association of competition lawyers now issues a press release in order to create a level playing field for leniency applicants indicating the sector. See e.g. press release 21/2018.

6 Crémer et al. (2019), op. cit. p. 126. See also the conclusions in the above-mentioned letter of Minister Keijser, pp. 10-11.

vidual cases (guidance letters).[7] The ACM, the BCA, and the Conseil de la concurrence share this concern. They have nevertheless developed a limited practice of "*informele zienswijzen*" if not "*comfort letters.*"[8]

The memorandum proposes to examine, in specific circumstances, the possibility of developing a less formal fast track commitment procedure, e.g. as a development of the practice under article 10 of Regulation 1/2003 or in line with the Notice on informal guidance.

We suggest examining the following issues, for example:

- The scope of application of any such practice: should it be only for specific sectors, specific operators (only in case of dominance on the relevant markets or not), or specific issues?
- Information exchange within the ECN in case of a Commission "case" / opportunity for concertation in case of a "case" before a Member State competition authority.
- The level of transparency and the publication of guidance letters.
- The rights of third parties?
- The possibility of judicial review?[9]

The introduction of such a procedure may not require a legislative change. But it might require a change of culture and the willingness to abandon in some cases the possibility or even probability of establishing an infringement in order to give priority to a faster outcome that will not only provide specific guidance to the parties involved but also to others.

IV. THE INTRODUCTION OF AN *EX ANTE* INSTRUMENT PROVIDING FOR REMEDIES WITHOUT THE ESTABLISHMENT OF AN INFRINGEMENT

One drawback of the current enforcement toolkit is that *ex post* enforcement can be too slow in digital and other fast-moving markets. When such markets are characterized by winner-takes-most dynamics, strong network effects, high barriers to entry due to data collection and consumer lock-in, there is a risk that *ex post* enforcement comes too late to keep markets competitive and contestable. Therefore, the memorandum supports the proposal of the Netherlands' Secretary of State for Economic Affairs and Climate Policy to introduce an *ex ante* intervention mechanism to prevent anti-competitive behavior by dominant companies acting as gatekeeper to the relevant online ecosystem.

A. Ex Ante Tool to Prevent Competition Problems

The proposal envisages a tool that allows the European Commission and Member State competition authorities to impose proportionate remedies on dominant companies in order to prevent competition problems, rather than relying on after-the-fact enforcement. The ability to impose these remedies resembles the powers that the CMA has to impose remedies following market studies and the powers of the Member States' telecom authorities to impose remedies on companies with significant market power. But, unlike the CMA powers, the memorandum only envisages behavioral remedies. Examples are platform access, data portability, data-sharing, and non-discriminatory ranking. Rather than broad-stroke regulation, these remedies should be proportionate and tailored to specific situations.

Strategies and economic dynamics that lead companies to become dominant do according to the memorandum not necessarily create competition problems. Strong growth, innovation, and new services benefit consumers and other companies. The risk, however, is that, once a company becomes dominant, its incentives may shift to protecting its market position by foreclosing actual and potential competitors or deliberately raising switching costs. The *ex ante* tool therefore should be designed to prevent this, closely following the interpretation of dominance

7 *OJ* 2004 C 101/78.

8 See the annual reports of the two authorities.

9 We can indicate that also in formal settlement procedures Belgian competition law excludes judicial review.

and abuse in the context of Article 102 TFEU, and the remedies should seek to prevent a dominant company from abusing that position. Staying close to the well-established terminology and case law of EU competition law reduces the risk of lengthy legal procedures that the introduction of new concepts will involve. Additionally, such an approach would increase legal certainty and predictability. Since market definition in dynamic multisided markets can be complex, updated guidelines clarifying how e.g. the role of data, consumer behavior, and network effects should be taken into account are also considered desirable. This will also enhance uniformity in the approaches adopted by the European Commission and the Member State competition authorities.

B. Non-punitive in Nature

The non-punitive nature of the tool could facilitate a constructive dialogue with the dominant company as it is not accused of any wrongdoing, and will not face fines and damage claims if it accepts the findings of the competition authorities' assessment. For the same reason, it may also lead to agreed commitments at an earlier stage, avoiding long drawn-out legal battles with a strong emphasis on procedural defense that come with punitive sanctions.

C. EU and National Levels

The ACM, BCA, and Conseil de la concurrence are of the opinion that such a tool should ideally be available at both the EU and national levels. The Commission is best placed to impose remedies on EU-wide dominant companies so as not to impair the functioning of the single market. However, given the heterogeneous nature of both platforms and markets, enforcement at the national level may be in line with subsidiarity principles. Some companies might be dominant only in one Member State.

D. Procedural Considerations

The ACM, the BCA, and the Conseil de la concurrence are of the opinion that rebuttable presumptions on the proportionality of certain remedies are appropriate for effective and efficient enforcement, particularly in light of the non-punitive character of the *ex ante* instrument. An effective punitive mechanism should be in place if companies do not abide by the imposed remedies. Also, private enforcement of the remedies should be made possible.

E. Comparison with Existing Tools in EU Competition Law

This new *ex ante* tool will differ from the powers granted to the Commission on the basis of Article 7 of Regulation 1/2003, as it is not required to establish an infringement. Also, for an Article 8, Regulation 1/2003 interim decision a *prima facie* finding of an infringement is required. Even an Article 9, Regulation 1/2003 commitment decision requires an intention by the Commission to adopt a decision requiring an infringement to be brought to an end. The powers to be granted to the Member States' authorities on the basis of Directive 2019/1 require similar findings before remedies can be imposed. Therefore, the proposed *ex ante* tool fills a gap.

F. Examples of Issues and Potential Remedies

Although the *ex ante* tool is envisaged to create tailor made solutions to specific market problems in individual cases, a number of recurring competition concerns can be distilled from reports on the digital economy and online platforms. We think that the *ex ante* add-on to the toolbox could address these concerns.

COMPETITION POLICY IN A GLOBALIZED, DIGITALIZED ECONOMY

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I. BACKGROUND AND CONTEXT

The World Economic Forum is an independent, not-for-profit foundation established in 1971 and headquartered in Geneva.[2] It is "the International Organization for Public-Private Cooperation" which aims to shape global, regional, and industry agendas by engaging the "foremost political, business, cultural and other leaders of society."[3] The Forum's work is organized under "Platforms" one of which is the "Platform for Shaping the Future of Trade and Global Economic Interdependence." This Platform's aim is to strengthen trade and investment flows through modernising "international rules, national policies and behind-the-border trade facilitation strategies."[4] The Platform "works with a range of stakeholders to inform business and policy debate on critical trade and investment issues" in order to drive "practical collaborative steps for growth and development."[5] Current areas of focus for the Platform include "trade tensions, digital trade, investment and trade facilitation, and global tax and competition cooperation."[6] It is in this context and following discussions at the World Economic Forum's Annual Meeting in Davos in 2019 that the Platform commissioned a White Paper on Competition Policy in a Globalized, Digitalized Economy (the "White Paper").

The background to the White Paper involves the recognition that although international trade and commerce, along with globalization and digitalization, have helped to lift hundreds of millions out of poverty, many citizens around the world feel "left behind" and businesses face uncertainty amid growing trade tensions.[7] In particular, for the purposes of the White Paper, there is an acknowledgement of the numerous benefits generated by online platforms and digitalization for firms and consumers while recognizing that these can also raise market concentration and competition concerns.[8]

The preparation of the White Paper was assisted by an initial workshop in Geneva in July 2019, which brought together stakeholders from the technology industry, practice, international organizations, consumer organizations, and academia to discuss the issues that should be covered in the White Paper. This workshop was followed by several rounds of consultations with and feedback from around twenty individuals with diverse backgrounds from different stakeholder groups who agreed to review the White Paper at numerous stages during its preparation. From its inception, the White Paper aimed to be a non-technical piece limited in length to maximize its effectiveness in reaching its audience of high-level representatives from different sectors of government, industry, and society. The Paper was published on December 11, 2019 in time for Davos 2020 taking place in January 2020. Notably, the new "Davos Manifesto" launched by the World Economic Forum to coincide with its 50th anniversary explains that one of the features of a company in the fourth industrial revolution is that it "accepts and supports fair competition and a level playing field" and it "provides a fair chance to new market entrants."[9]

2 See "Our Mission," World Economic Forum, https://www.weforum.org/about/world-economic-forum.

3 *Ibid.*

4 See https://www.weforum.org/platforms/shaping-the-future-of-trade-and-global-economic-interdependence.

5 *Ibid.*

6 *Ibid.*

7 See *ibid.*

8 See World Economic Forum, "Competition Policy in a Globalized, Digitalized Economy," Foreword, https://www.weforum.org/whitepapers/competition-policy-in-a-globalized-digitalized-economy, p. 4.

9 World Economic Forum, "Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution," December 2, 2019, https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/.

II. THE WHITE PAPER

The White Paper comprises a foreword and five substantive sections: introduction; evolution of competition law; globalization, digitalization and competition law; cross-policy implications; and the way forward. After the introduction, the White Paper provides a brief overview of the evolution of competition laws across different jurisdictions and the reignited debate surrounding the objectives of competition policy, and in particular the "consumer welfare" standard.[10] The next section in the White Paper on globalization, digitalization and competition law makes up the bulk of the work and goes through various challenges and issues that arise in the context of applying competition law to practices of digital businesses and in particular multisided platforms.[11] These include issues surrounding the legal nature of multisided platforms; anticompetitive agreements (horizontal, hub-and-spoke, vertical); abuse of dominance (market definition, market power, abuse); and, merger control. The following section elaborates on the cross-policy implications by considering the application of competition law and policy in the digital context where it interacts and intersects with other policies such as data protection/privacy, industrial policy and international trade.[12] This section also touches upon the effects of globalization, "digital globalization" and the need for balancing various concerns bearing in mind that the digitalization of the economy has been mostly led by the developed world.[13] The final section of the White Paper presents the various findings and proposals put forward in different reports and studies, and offers a set of policy recommendations and insights to contribute to the debate on the optimal approach to competition law and policy in the digital economy.[14]

The White Paper proceeds on the basis that it is important to acknowledge the enormous benefits that the digitalization and globalization of the economy continue to generate for populations around the world.[15] Multisided, digital platforms are key players in the digital economy and in the generation of such benefits including lower transaction costs, creation of economic value from dormant resources, new employment opportunities, greater convenience and choice, ease of reaching scale for smaller businesses, etc.[16] It is also noteworthy that because many of the services of digital platforms are offered for "free" (i.e. at zero price), the economic value of such services is difficult to quantify and disregarded by traditional measures of economic activity such as GDP.[17] Against the benefits, concerns are raised regarding rising concentration in some industries, including the technology industry, labor's falling share of income, and increasing income inequalities. Although not all of these concerns are associated with a lack of competition or a failure of competition policy/enforcement, calls have been made to break up the big technology companies or to regulate them like utilities to alleviate some of the concerns.[18]

Features of digital platform businesses such as multi-sidedness, zero-price, network effects, competition for the market, heavy reliance on data, and so on have led competition authorities and policymakers to rethink and question the validity of existing competition rules and tools. International differences have emerged regarding how much different authorities trust market forces and the ability of digital markets to self-correct, leading to divergent approaches to competition policy and adding to trade tensions.[19] Against this background, the aim of the White Paper is to articulate the pertinent questions and considerations that can inform the optimal approach to competition policy in digital markets.[20] In contrast to many of the other reports written on the topic of competition policy in digital markets, most of which were written with a specific jurisdiction or region in mind, the White Paper adopted a more "international" approach due to its lack of focus on any given jurisdiction and its global outlook. From the start, it also had a specific focus on the cross-border implications and cross-policy challenges (e.g. data protection/privacy, international trade, industrial policy) of competition policy in a globalized, digitalized economy.

The rest of this piece presents some of the insights and findings advanced during the preparation of the White Paper and the recommendations of the Paper for the "way forward."

10 White Paper (n. 8) p. 7.

11 White Paper (n. 8) pp. 8-12.

12 White Paper (n. 8) p. 13.

13 White Paper (n. 8) p. 13.

14 White Paper (n. 8) pp. 14-16

15 White Paper (n. 8) p. 5.

16 White Paper (n. 8) p. 5.

17 See White Paper (n. 8) p. 5 and the sources cited therein.

18 See White Paper (n. 8) p. 5 and the sources cited therein.

19 White Paper (n. 8) pp. 4-5.

20 White Paper (n. 8) p. 5.

III. NO SUCH THING AS A "DIGITAL MARKET" OR "DIGITAL ECONOMY"

It becomes quite clear quite quickly when researching technology and digitalization that there is really no such thing as a "digital market" or a "digital economy." Indeed, analysts predict that almost 25 percent of the entire economy could be "digital" by 2025 if governments can rise to the challenge to roll out the benefits of digitalization across all sectors of the economy to enable traditional sectors to benefit from digital productivity.[21] As digitalization transforms all aspects of economic life and permeates the economy, the line between offline and online businesses also increasingly blurs.[22] Consequently, the White Paper argues that for new regulations and policies to remain relevant and effective in the long-run, it is important that legislatures and policymakers do not treat "digital markets" or the "digital economy" as segments or sectors of the economy that can be distinguished from other segments or sectors of the economy. This point is particularly relevant in relation to proposals to create stand-alone "digital authorities" put forward in some jurisdictions to tackle the challenges of the digitalization of the economy.

IV. ONE SIZE DOES NOT FIT ALL

Another feature of technology businesses that becomes clear very quickly in researching the different technology companies is that multisided digital platforms that are often bundled together in policy discourse involve very different business models and one-size policies will *not* fit all. Although platforms have important features in common in that, for example, every platform can be considered a "matchmaker" in essence,[23] the underlying business model and revenue generation model can significantly differ. Such differences in business model and revenue generation (e.g. whether the platform is funded by targeted advertising or transaction-based commission) have important implications for the relevance of data, extent of multi-homing, and the competitive dynamics at stake.[24] Therefore, regulatory and policy responses which are not fine-tuned to the underlying business model which they aim to encompass are unlikely be effective and likely to lead to business and legal uncertainty.

V. THE WAY FORWARD

The White Paper presents an overview of the proposals to change aspects of competition law and policy, and includes a discussion of some of the specific proposals contained in the several in-depth reports prepared over the last year or so concerning competition in digital markets.[25] The general sentiment in most of the reports is identified as that of existing competition rules and frameworks being broadly adequate for application to digital businesses, with there being nonetheless a concern that there has been under-enforcement of the rules and/or that under-enforcement is likely to be more costly than over-enforcement in digital markets.[26] Another common theme across the various reports and studies is that some sectors, such as the digital advertising market which provides the main revenue source for ad-funded "free" platform services, are concernedly complex and opaque.[27] The White Paper identifies other recurring suggestions as those including the creation of separate digital authorities or units; data portability, data interoperability, and data access considerations; closer scrutiny of mergers involving incumbent digital platforms and start-ups; rethinking available tools such as interim measures to speed up enforcement; and specific rules to govern the relationship between platforms and their business users.[28] A caveat is also made in that the expert reports are not based on empirical studies of the relevant markets and do not contain impact assessments of any of the proposed solutions.[29] Consequently, the White Paper cautions against changes to policy or law on the basis of recommendations found in the expert reports without complementing such suggestions with empirical studies of the relevant

21 Huawei and Oxford Economics, Digital Spillover: Measuring the True Impact of the Digital Economy, 2017, pp. 7, 9, https://www.huawei.com/minisite/gci/en/digital-spillover/files/gci_digital_spillover.pdf.

22 White Paper (n. 8) p. 5.

23 See Evans, David S. & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, 2016.

24 White Paper (n. 8) pp. 5-6.

25 These include, but are not limited to, Furman, Jason, et al., Unlocking Digital Competition: Report of the Digital Competition Expert Panel, 2019; Crémer, Jacques, Yves-Alexandre de Montjoye & Heike Schweitzer, Competition Policy for the Digital Era, 2019; Stigler Center for the Study of the Economy and the State, *Report of the Committee for the Study of Digital Platforms: Markets Structure and Antitrust Subcommittee*, 2019; BRICS Competition Authorities, BRICS in the Digital Economy: Competition Policy in Practice, 1st Report by the Competition Authorities Working Group on Digital Economy, 2019; BRICS Competition Law and Policy Centre, Digital Era Competition: A BRICS View, 2019. Of notable importance is also the Final Report presenting the findings of the inquiry conducted by the Australian Competition and Consumer Commission (ACCC); Australian Competition and Consumer Commission (ACCC), Digital Platforms Inquiry – Final Report, 2019.

26 White Paper (n. 8) p. 14.

27 White Paper (n. 8) p. 14.

28 White Paper (n. 8) p. 14.

29 White Paper (n. 8) p. 14. These were not within the remit of the reports.

markets, business models, and impact assessments of the proposals to conduct a cost-benefit analysis.[30]

The White Paper notes that the way forward for competition law and policy will involve "a mix of market-driven solutions and regulatory solutions alongside the use of competition, consumers and data protection enforcement tools."[31] The right approach will have to employ a cost-benefit analysis to establish which solutions can best optimize the benefits of digitalization at the lowest cost.[32] With that in mind, the White Paper offers a set of ten recommendations building on the insights gained during the preparation of the Paper:[33]

1. **When it comes to platforms, one size does not fit all.** Authorities need to understand better different business models with digital operations. Insufficient appreciation of the differences among different platforms and their business models, the implications of the multisided nature of businesses or of different revenue generation models can lead to enforcement errors and suboptimal regulatory solutions.[34] The White Paper recommends the improvement of data analytics expertise and development of data tools at enforcer-level with the caveat that creation of separate "digital authorities" may not be meaningful in the long-run as digitalization permeates the entire economy.[35]

2. **Some competition law tools need rethinking.** Traditional methods used to define the relevant market, measure market power, scrutinize mergers, and weigh procompetitive and anticompetitive effects may be unsuited to features of digital business models and need to be rethought.[36] Similarly, existing economic models used for assessing competition may not capture the procompetitive or anticompetitive effects of certain business practices in the digital context. This results from the fact that the business models of technology companies challenge existing categories of anticompetitive conduct.[37] The White Paper identifies the following aspects of digital competition that require more research and a broadening of the knowledge base: the relevance of data for establishing market power; the role of intermediaries in vertical supply chains; ecosystem- and innovation-driven competition; machine-generated outcomes and collusion; and, theories of leveraging market power.[38]

3. **Upending established competition law frameworks appears unwarranted.** Existing competition rules have been applied in many cases those concerning practices of technology companies and multisided platforms as the rules are broad and flexible. These broad rules are coupled with a very wide range of enforcement powers that competition authorities have which include the power to break up companies, impose substantial fines and behavioral remedies, etc. The White Paper remarks that the question of whether the enforcement of the rules has been at an optimal level is a separate question to that of whether the law should be changed.[39] Upending established legal frameworks should be reserved for cases where there is robust evidence that the existing law *systematically* fails to achieve its aims, which does not appear to be the case with competition law.[40]

   The White Paper raises a concern regarding proposals to change existing legal standards for proving infringements through the adoption of presumptions of unlawfulness for certain unilateral conduct or lowering judicial review standards.[41] Such proposals are perturbing given the fact that competition law sanctions are considered to be (quasi-)criminal in many jurisdictions (including the EU) and lowering thresholds for finding abuse in unilateral conduct cases can raise issues with rule of law requirements, including the presumption of innocence. This is particularly the case with administrative enforcement models where the enforcer is a fact-finder (i.e.

30 White Paper (n. 8) p. 14.

31 White Paper (n. 8) p. 14.

32 White Paper (n. 8) p. 14.

33 See White Paper (n. 8) pp. 14-16 for the list of recommendations.

34 White Paper (n. 8) p. 14.

35 White Paper (n. 8) p. 14.

36 White Paper (n. 8) p. 15.

37 White Paper (n. 8) p. 15.

38 White Paper (n. 8) p. 15.

39 White Paper (n. 8) p. 15.

40 White Paper (n. 8) p. 15

41 White Paper (n. 8) p. 15.

prosecutor) and a decision-maker (i.e. judge) in the same case. Where new rules are to be created, the White Paper advices avoidance of reliance on underdeveloped concepts such as "self-preferencing."[42]

4. **Global businesses in global markets require global responses.** International cooperation both at policy-making and at enforcement level and cross-border coordination are essential when dealing with practices of multinational digital businesses.[43] Capacity constraints are aggravated for developing country authorities when it comes to digital business models because of the data-driven nature of many of these businesses. Cooperation and coordination are necessary not just between competition enforcers, but also between competition and other authorities, most notably authorities entrusted with consumer protection and data protection.

5. **Predictability and convergence of regimes is important for promoting innovation and investment in technology.** Global businesses are currently subject to around 130 different competition regimes. In contrast, the underlying technologies are borderless and the business model is usually broadly the same across the world. Consequently, the White Paper raises the point that it may be time to reconsider an international set of competition rules which could not only reduce compliance costs, level the playing field internationally and inject competition into local markets, but also support international trade. Given the unlikeliness of reaching international consensus on the basis of a new paradigm, the White Paper suggests that – despite all its imperfections – a properly construed consumer welfare standard (which includes all relevant parameters of competition) could provide a common ground for international principles to be built upon.[44]

6. **Digital literacy is essential for both consumers and business users of digital services for effective competition in digital markets.** Empowered users of digital products/services who understand what is actually involved when they choose to use a certain digital product/service will drive companies to compete to offer better products/services to users. Sustaining effective competition in the long-run involves user education and improved digital literacy coupled with competition policy to reduce entry and expansion barriers and to encourage multihoming between users.[45]

7. **Competition enforcement and consumer enforcement tools are effective complements.** In the context of digital businesses and conduct, very often consumer protection and competition concerns are closely related. Thus, it makes sense to consider whether the enforcement powers regarding competition and consumer protection should lie in the hands of the same authority. At the very least, cooperation mechanisms should exist to facilitate the close working of competition and consumer protection powers and authorities.

8. **Compliance by design can alleviate certain concerns before they arise.** Technological capabilities and developments can solve certain problems before they arise through design innovation. Such problems that can be resolved through technological means include those surrounding algorithms, artificial intelligence and algorithmic collusion, as well as privacy choices and compliance with other similar consumer rights.

9. **Effective long-term solutions may require continuous input from stakeholders.** Given the informational disadvantage at which governments find themselves when it comes to the business practices of technology companies and the technologies involved, it may be in the interests of all parties involved that various stakeholders (including the businesses, consumer organizations, regulators, etc.) collaborate in the creation and monitoring of the applicable rules.[46] Such collaboration with stakeholders and their participation in the process of crafting the rules of the game can also ensure that any regulatory solutions or enforcement actions are not rendered irrelevant by the speed of innovation that is around the corner and are, instead, targeted at issues where market-driven solutions are unlikely to arise in the near future.[47]

42 White Paper (n. 8) p. 15.

43 White Paper (n. 8) p. 15.

44 White Paper (n. 8) p. 15.

45 White Paper (n. 8) p. 15.

46 For this concept known as "participative antitrust" attributed to Jean Tirole, see Schrager, Allison, "A Nobel-Winning Economist's Guide to Taming Tech Monopolies," (Interview with Jean Tirole), Quartz, 27 June 2018; Bethell, Oliver J., Gavin N. Baird & Alexander M. Waksman, "Ensuring Innovation through Participative Antitrust," Journal of Antitrust Enforcement, 2019 (forthcoming); Furman et al. (n. 25), pp. 5, 9, 54–55, 58–59, 61.

47 White Paper (n. 8) p. 16.

10. **Competition authorities should become more creative in their approach to enforcement tools and remedies.** Competition authority action takes a relatively long time due to the necessity of observing due process requirements, collecting evidence, developing and testing theories of harm, etc. all of which necessarily require detailed and complex assessments. In comparison, technology moves very fast and technology-driven markets can change very quickly rendering any harm to competition irreparable due to the dynamic nature of competition. To counteract such effects, competition authorities could make more effective use of various tools including, and in particular, those such as "market investigations" which enable them to impose changes to market conditions without having to pursue individual enforcement actions. Similarly, interim measures and use of behavioral insights in designing effective remedies can increase the effectiveness of enforcement.

THE FIRST REPORT OF THE BRICS COMPETITION AUTHORITIES WORKING GROUP ON THE DIGITAL ECONOMY

BY ALEXANDRE BARRETO, PATRÍCIA A. MORITA SAKOWSKI & CHRISTINE PARK[1]



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The enhancement of the Brazilian Competition Authority ("CADE")'s capacities to deal with the challenges arising from the digital era has been on CADE's agenda in the past years. This is reflected in CADE's work both in the national and international domains.

Here, we will focus on the international arena – specifically, on the recent release of the report by the BRICS[2] Competition Authorities' Working Group on Digital Economy ("Working Group"): "*BRICS in the digital economy: competition policy in practice*"[3] (the "Report"), which took place last September during the sixth International Competition Conference of BRICS, in Moscow.

I. BRIEF CONTEXT

The BRICS acronym, initially encompassing Brazil, Russia, India, and China ("BRIC") dates back to the early 2000s, when these countries were referred to by financial markets as promising emerging economies. The first meeting among foreign ministers of these countries took place in 2006 and, as of 2009, the meetings started to happen on an annual basis. The BRIC became a cooperation mechanism in areas with the potential to concretely benefit the countries' people.[4]

Competition policy was identified as one of these areas for cooperation. In 2009, the BRIC countries organized the first international conference on competition. Since then, this meeting has been taking place every two years, with each country alternating the hosting of the event.[5] In 2011, South Africa joined the group, and the BRIC became BRICS.[6]

In November 2017, CADE hosted the fifth BRICS International Competition Conference in Brasília. At the time, the competition authorities of Brazil, Russia, India, China, and South Africa (the "Competition Authorities"), aware of the pressing challenges emerging from digital markets, decided to create a working group to channel joint efforts to share experiences and cooperate for the enhancement of their respective competition policies concerning the digital economy.

This event marked the creation of the BRICS Competition Authorities Working Group on the Digital Economy, having Brazil as its main coordinator and Russia as co-chair since 2018. The main goals of the Working Group consist in: (i) sharing of experiences of the BRICS countries in the fight against anticompetitive practices in the digital economy; (ii) examination and discussion of cases related to the fight against new types of cartels; (iii) consideration of mergers and acquisitions in the digital age; and (iv) the development of new mechanisms to support the enforcement against anticompetitive practices in light of the digital economy.[7]

The first meeting of the Working Group was held in Campos do Jordão, Brazil, in October 2018. This meeting was attended by Brazil, Russia, India, and South Africa. As a starting point for closer cooperation in competition enforcement, the group decided to prepare a questionnaire to share the ongoing practices and challenges faced by the Competition Authorities in the context of the digital economy.

As the authorities shared their replies, the Working Group decided to produce a report based on the answers to the questionnaire, with the aim of consolidating the different practices and views within the BRICS countries on the challenges posed by the digital economy to competition enforcement. This process was led by CADE as main coordinator of the Working Group.

Subsequently, the second meeting of the Working Group took place in July 2019 in Brasilia, with representatives from all BRICS countries. Then, the Working Group had the opportunity to discuss its activities, which included the release of the report in the subsequent BRICS International Competition Conference in Russia.

2 Acronym for the co-operation established between Brazil, Russia, India, China, and South Africa.

3 Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

4 As described at http://www.itamaraty.gov.br/pt-BR/politica-externa/mecanismos-inter-regionais/3672-brics.

5 In 2009, the first International Competition Conference (ICC) took place in Russia; in 2011, China hosted the II ICC; in 2013, it was India's turn. In 2015, South Africa hosted the event and, in 2017, the V ICC took place in Brazil. In 2019, the VI ICC was hosted by Russia. This information is described at https://brics-icc-2019.org/en/.

6 As described at http://www.itamaraty.gov.br/pt-BR/politica-externa/mecanismos-inter-regionais/3672-brics.

7 As described at http://www.bricscompetition.org/upload/iblock/ee2/BRICS%20Working%20Groups.pdf.

Accordingly, in September 2019, the BRICS Competition Authorities Working Group on the Digital Economy launched the first Report of the authorities on digital economy during the sixth BRICS Competition Conference, under the leadership of CADE as Chair, and of the FAS of Russia as Co-Chair of the Working Group.

In short, the Report provides an overview of the state of the art of competition policy and enforcement practices in Brazil, Russia, India, and South Africa *vis-à-vis* digital markets. As described in the Report, China did not participate in this release due to institutional reforms that were concluded in 2018 in the competition field, but plans to contribute to future reports. This publication represented an important moment for the strengthening of the cooperation among the BRICS countries.

As noted in the Report itself, the Report is a descriptive work, and thus does not provide normative conclusions, or have any binding effects for the Competition Authorities. Additionally, the Report does not attempt to propose a homogeneous plan of action in the enforcement of competition policies across the BRICS countries. On the contrary – as explained in the introduction of the Report, it relies on the richness of the different approaches and experiences in the enforcement of competition policy in the digital economy in the BRICS countries to explore common challenges and bring possible insights to each Competition Authority.

II. STRUCTURE OF THE REPORT

The Report provides, firstly, a brief introduction to the background of its release. Subsequently, it presents an overview of the digital landscape in each of the BRICS countries, followed by a description of the institutional and legal framework for competition policy in each BRICS jurisdiction. The document then describes competition enforcement practices involving digital markets in Brazil, Russia, India, and South Africa on selected topics, such as: market power assessment, innovation and dynamic competition, the acquisition of entrants by incumbents, barriers to entry, algorithmic pricing, and big data.

Successively, the publication presents examples of how the Competition Authorities have been making use of technology and data tools to support enforcement activities. The Report also lists some of the main challenges identified in competition enforcement in the digital economy.

In order to give concreteness to the discussions, the publication also presents selected cases that exemplify the Competition Authorities' recent experiences with the digital economy. The Report then concludes with final remarks. The full replies of the Competition Authorities to the questionnaire circulated among the Working Group in 2018 was also made available.

III. MAIN CHALLENGES FOR CADE IN THE DIGITAL ECONOMY

The Report identified some of the main challenges reported by the Competition Authorities in their enforcement of competition policy in digital markets. They include exclusionary practices related to data concentration from incumbents, possible limitations to multi-homing; adoption of MFN clauses or discriminatory treatment based on users' data and profiling technologies; algorithmic collusion and vertical restraints in e-commerce.[8]

For CADE, as stated in the Report, one of the main challenges in competition enforcement in digital markets consists in determining how to intervene in highly dynamic markets. This includes, as CADE stated in the Report, finding a balance between the need to intervene in order to protect competition and consumers on the one hand and the risk of hampering innovation or creating unintended exclusionary effects, on the other.[9]

It also includes, as stated in the Report, an estimation of the long-run effects of competition policy intervention and the design of measures that are fit for the specificities of the digital economy in the context of high-technology markets and innovation.[10]

8 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice. Page 28.* Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

9 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice.* Annex I, Brazil's Replies to the Questionnaire. Page 82. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

10 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice.* Annex I, Brazil's Replies to the Questionnaire. Page 82. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

Other aspects that challenge antitrust enforcement in the digital economy include particular pricing dynamics of digital platforms that often provide services and products to one side of the market at a monetary price of zero. CADE also mentioned that multi-sided markets present challenges for the traditional tools used for the definition of the relevant market and for the assessment of market power, such as market share, marginal costs, or the SSNIP test. CADE also mentioned that the fact that platforms operate simultaneously with different interdependent customer groups make the review more complex.[11]

CADE also points out that with the rise of the digital economy, new ways are emerging through which abuses of dominance might take place. Examples mentioned by CADE relate to concerns about data concentration and its effects on competition and barriers of entry, as well as the adoption of clauses which might unduly restrict competition.[12] In this sense, CADE investigated the adoption of Most-Favored-Nation ("MFN") clauses or parity clauses by online travel agencies ("OTAs") operating in Brazil (Booking.com, Expedia, and Decolar.com). These parity clauses aimed at guaranteeing that the companies offered more advantageous conditions (which included prices, room availability, as well as other services) to customers, in comparison to those offered by hotels in their own sales channels (both online and offline), or in competing companies' platforms. Following its investigation, CADE concluded that these MFN clauses limited competition in the market, homogenizing the final price offered to the customer; and hindered the entrance of new players.[13]

The companies investigated negotiated a Cease and Desist Agreement ("TCC" in its acronym in Portuguese) with CADE, by which they committed to cease using broad parity clauses in their commercial relations with accommodation providers. Therefore, they cannot prevent them from making better offers in their offline sales channels (check-in counters, physical travel agencies, and call-centers). Also, they cannot demand parity in relation to the prices charged by other online travel agencies.

On the other hand, CADE understood that parity clauses in accommodation providers' online sales channels were reasonable, in order to mitigate free-rider effect in online hotel reservations. CADE understood that, in the long term, the possibility for sellers and buyers negotiating independently after connecting through the OTAs could harm the latter and harm consumers even more.

CADE also pointed out in its Report that the dynamics of digital platforms give rise to a close relationship between privacy and competition policy, which brings coordination challenges due to the relationship between competition policy and other regulations, such as data protection legislation, that are each carried out by different authorities in Brazil. As mentioned in the Report, Brazil recently enacted the Brazilian Data Protection Law (Law N. 13.709/2018 – or "LGPD" in its acronym in Portuguese) which regulates the collection and treatment of personal data, defined as information relating to an identified or identifiable person. The LGPD introduces rights for data subjects, including the right to obtain information regarding the processing of data, the right to access, to rectify and delete data, and the right to data portability, which ensures users the right to transfer data across different providers of services and products.[14]

In 2019, the Brazilian Congress approved the law that created the National Data Protection Authority ("ANPD," in its acronym in Portuguese). This newly created authority will be in charge of drafting guidelines for the National Personal Data and Privacy Protection Policy. This Law will come into force in 2020. Similarly, consumer protection laws are enforced by Senacon (the National Secretariat for the Consumer), and regulated by the Consumer Protection Code. Therefore, in the coming years, CADE will, together with the authorities of related policy realms, have the task of promoting the cohesive enforcement of competition law in light of other related policies in cases involving the digital economy.

11 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice.* Annex I, Brazil's Replies to the Questionnaire. Page 82. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

12 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice.* Annex I, Brazil's Replies to the Questionnaire. Page 82. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

13 Available at http://en.cade.gov.br/press-releases/booking-decolar-and-expedia-reach-cease-and-desist-agreement-with-the-brazilian-administrative-council-for-economic-defense.

14 BRICS Competition Authorities' Working Group on Digital Economy. *BRICS in the digital economy: competition policy in practice.* Annex I, Brazil's Replies to the Questionnaire. Page 94. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

IV. MAIN FINDINGS IN COMMON

Firstly, as contained in the Report, the process of drafting the document revealed that the Competition Authorities are committed, within their own agendas, to a constant self-assessment on whether their respective competition laws and policies are continue to be fit for task in a fast-paced digital economy.

Some authorities, such as the Russian FAS, have been keener to bring about changes to the existing framework through amendments to current laws. Others, such as the Indian CCI, are evaluating proposals to change the existing analytical tools. And still others, such as CADE, are further assessing possible adaptions to the existing competition laws and policies for the digital era.

That said, the Competition Authorities converged, in general, on the opinion that, so far, the respective legal framework has been providing enough room for adaptation. In this sense, the Competition Authorities have been able to respond to the challenges posed by digital markets on a case-by-case basis. These include, for example, analysis of multi-sided business models based on zero-price offers. Cases in the digital economy have also been bringing issues such as privacy, consumer choice, and dynamic competition to the attention of Competition Authorities. On the other hand, the Competition Authorities also acknowledge there are challenges that might eventually need to be addressed through changes to the respective existing legal framework, such as the accountability of types of anticompetitive conduct involving pricing algorithms.

The Report also describes another point of convergence – the need for increased cooperation, both in the domestic arena and in international fora, in light of the multifaceted and global nature of the digital economy. On the domestic level, as the digital economy affects different policy dimensions, such as privacy, consumer protection, and competition, the often different authorities responsible for each area need to co-operate in order to build cohesive and effective policies. The borderless nature of digital economy, in turn, calls for increased international co-operation, especially in the design of remedies that will potentially affect various jurisdictions.

The Report also points out that, as a non-exhaustive work, there are important subjects that were not covered in-depth in this publication. These include, for example, intellectual property rights and their interplay with competition policy in the digital economy, insights from behavioral economics, and the effect of conglomerates and potential competition. The design of effective remedies, including the most adequate realms to address concerns arising from the digital economy (regulatory or competition) are also on the agenda for future discussion among the Competition Authorities.

Finally, as described in the Report, another area for possible future joint work within the BRICS Competition Authorities Working Group on the Digital Economy relates to the importance of empirical evidence as the basis for policy and decisions in individual cases. These include *ex post* analysis, market studies, and competition assessment of public policies, which provide empirical evidence to enhance and support decision-making in the competition domain.

With the release of the Report, CADE, as the main coordinator of the Working Group, hopes to stimulate debate on the issues covered in this first publication and remains open to further discuss the development of competition law and policy in the digital era with academics, practitioners, and other competition authorities worldwide.

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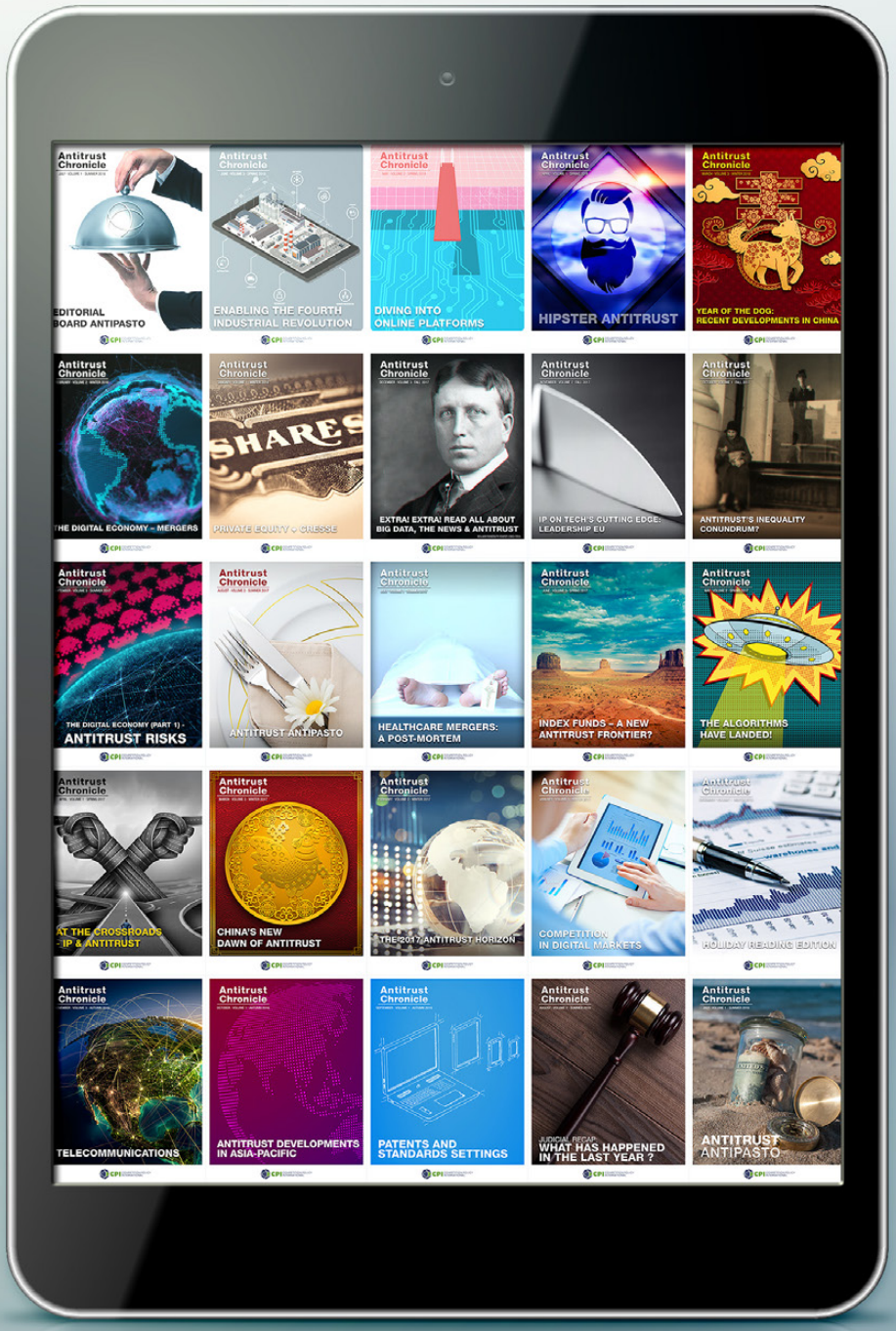


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