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

BY MARTIN SCHALLBRUCH, HEIKE SCHWEITZER & ACHIM WAMBACH[1]

1 Digital Society Institute, ESMT Berlin, Humboldt University of Berlin, and ZEW-Leibniz Centre for European Economic Research Mannheim, respectively.

CPI Antitrust Chronicle December 2019

www.competitionpolicyinternational.com

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

2 Hereinafter referred to as the "Commission."

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.

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)*.

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.

4 See in more detail *Recommendation 9* below.

- 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.

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.

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.

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.

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)*.

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

- 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 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.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.