

# COMPETITION POLICY FOR THE DIGITAL ERA



BY HEIKE SCHWEITZER & ROBERT WELKER<sup>1</sup>



<sup>1</sup> Prof. Dr. Heike Schweitzer, LL.M. (Yale) holds a chair for private law and competition law and economics at Humboldt-University, Berlin. She has co-authored the Special Advisors' Report on competition policy for the digital era for Commissioner Vestager, and she has co-chaired the German commission, "Competition 4.0." She has also co-authored the market power study commissioned by the German Federal Ministry for Economic Affairs. Robert Welker is a research fellow at the faculty of law at Humboldt-University Berlin. He co-authored the market power study commissioned by the German Federal Ministry for Economic Affairs and was involved in drafting the final report of the German commission "Competition 4.0."



# CPI ANTITRUST CHRONICLE DECEMBER 2019

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

By Julie Clarke



## Competition Policy for the Digital Era

By Heike Schweitzer & Robert Welker



## Digital Competition Reports and Merger Enforcement

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



## A New Competition Framework for the Digital Economy – Report by the Commission “Competition Law 4.0”

By Martin Schallbruch, Heike Schweitzer  
& Achim Wambach



## 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



## Digital Avant-Garde: Germany's Proposed “Digital Antitrust Law”

By Christian Ritz & Falk Schöning



## Benelux Competition Authorities on Challenges in a Digital World

By Jacques Steenbergen, Martijn Snoep  
& Pierre Barthelmé



## Competition Policy in a Globalized, Digitalized Economy

By Pinar Akman



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

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



Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for  
access to these articles and more!

CPI Antitrust Chronicle December 2019

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)  
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing  
this article is forbidden by anyone other than the publisher or author.

## I. INTRODUCTION

The digital economy poses new conceptual challenges for competition policy. A number of recent reports and studies concur in this finding.<sup>2</sup> 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.<sup>3</sup>

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.

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](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.bmw.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmw.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](https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl_joint_memorandum_191002.pdf).

3 See Special Advisors’ Report, p. 2.

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.<sup>4</sup> 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).

Merger control will not be addressed in this piece.<sup>5</sup> Nor will we address data access more specifically.<sup>6</sup>

## 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*<sup>7</sup> and *Google Android*<sup>8</sup> – have promoted a better understanding of the dynamics of the digital economy. But the attempt to provide quantitative evidence of consumer

---

4 Special Advisors’ Report, p. 5.

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](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*.

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.<sup>9</sup>

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.<sup>10</sup>

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 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,<sup>11</sup> 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.”<sup>12</sup>

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.<sup>13</sup> In U.S. antitrust law, some types of conduct are qualified as “illegal *per se*,” others fall under a “rule of

---

9 Competition 4.0 Report, pp. 74 et seq.; *Vezzaso*, *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>.

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 Ibáñez Colomo, *CMLR* 53 (2016), 709.

reason” and require a more or less full-blown effects analysis.<sup>14</sup> 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.<sup>15</sup>

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 that this efficiency defense applies to Article 102 TFEU as well.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

---

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: “[...] 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 [...]”

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.”



### 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.<sup>19</sup> 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<sup>20</sup> has established transparency rules<sup>21</sup> for online intermediation services and search engines, irrespective of market power.<sup>22</sup> 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,<sup>23</sup> the obstruction or prevention of multi-homing and switching,<sup>24</sup> the use of wide MFN- or best price-clauses,<sup>25</sup> and certain forms of tying and bundling.<sup>26</sup> Conduct that restricts data mobility and/or interoperability may also constitute an abuse of dominance and will be addressed separately below (see IV, below).

---

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

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

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 the Draft Amendment of the German Act against Restraints 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.

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.<sup>27</sup> The *Furman Report* proposes a “code of conduct” for platforms with a “strategic market status,” a form of dominance<sup>28</sup> characterized by the control over “a gateway or bottleneck in a digital market, where they control others’ market access.”<sup>29</sup> Likewise, the *Stigler Report* proposes special conduct requirements for platforms with “bottleneck power.”<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup>

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<sup>33</sup> will predictably be met with the criticism that it is assuming legislative powers.<sup>34</sup> A quick shift in rules may, therefore, require action by the legislator.

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<sup>35</sup> and the German Commission Competition 4.0 Report.<sup>36</sup> 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.

---

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 Restraints 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\\_cdclcl.joint\\_memorandum\\_191002.pdf](https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclcl.joint_memorandum_191002.pdf), p. 4.

34 Cf. Competition 4.0 Report, p. 49.

35 Special Advisors’ Report, p. 70.

36 Competition 4.0 Report, p. 50.

While the reports broadly agree on the need to enact more specific rules of conduct that either specify<sup>37</sup> or expand<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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<sup>41</sup> with “paramount significance for competition across markets”:<sup>42</sup> 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 success 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.

## 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.<sup>43</sup>

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

---

<sup>37</sup> Competition 4.0 Report, p. 49.

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

<sup>39</sup> 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.”

<sup>40</sup> 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\\_cdlci\\_joint\\_memorandum\\_191002.pdf](https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlci_joint_memorandum_191002.pdf), p. 5.

<sup>41</sup> Undertakings which are “active to a significant extent on markets within the meaning of Section 18 (3a),” meaning “multi-sided markets and networks.”

<sup>42</sup> 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>.

<sup>43</sup> 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.



market is competitive, the product supplier may, however, be nonetheless dominant on an aftermarket.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

Frequently, a well-functioning interoperability and data portability regime will, however, depend on sector-specific legislation.<sup>50</sup> 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.

## 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.<sup>51</sup> 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.

---

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/competitionanti-trust-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.

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

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.<sup>52</sup>

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.<sup>53</sup>

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.”<sup>54</sup> He may have meant just this.

---

<sup>52</sup> Competition 4.0 Report, p. 60, Recommendation 14.

<sup>53</sup> 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\\_cdcl.joint\\_memorandum\\_191002.pdf](https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdcl.joint_memorandum_191002.pdf), p. 5.

<sup>54</sup> “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/>.

## 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](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

