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A new competition framework for the digital economy

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Dr. Bernd Langeheine, Falko Mohrs, Martin Schallbruch,
Prof. Dr. Jens-Peter Schneider, Prof. Dr. Monika Schnitzer,
Prof. Dr. Heike Schweitzer, Prof. Dr. Daniela Seeliger,
Prof. Dr. Gerhard Wagner), Laurence Chaperon
(Dr. Matthias Heider), Anna Logue Fotografie
(Prof. Achim Wambach)

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Authors

Commission 'Competition Law 4.0'

Chair



Martin Schallbruch
*European School of
Management and
Technology (ESMT)*



**Professor Dr
Heike Schweitzer**
*Humboldt-Universität
zu Berlin*



**Professor Achim
Wambach, Ph.D.**
*ZEW – Leibniz Centre
for European Economic
Research*

Members



**Professor Dr
Wolfgang Kirchhoff**
*Federal Court of
Justice*



Dr Bernd Langeheine
*Cleary Gottlieb Steen
& Hamilton LLP*



**Professor Dr
Jens-Peter Schneider**
University of Freiburg



**Professor Dr
Monika Schnitzer**
*Ludwig-Maximilians-
University of Munich*



**Professor Dr
Daniela Seeliger**
Linklaters LLP



**Professor Dr
Gerhard Wagner**
*Humboldt-Universität
zu Berlin*

Members without voting rights



**Hansjörg Durz,
MdB**



**Dr Matthias Heider,
MdB**



**Falko Mohrs,
MdB**

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Summary

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

The Commission ‘Competition Law 4.0’ is convinced of the necessity to ensure that positions of power in the digital economy remain contestable, to prevent their being used to impede innovation and competition or their being leveraged to other markets. Protecting innovation and strengthening consumer autonomy in the digital sphere will continue to be key for effective competition. This will require the EU and the Member States to develop an enhanced set of competition rules which take account of the pace of change in the digital economy, an enhanced framework for law enforcement in order to put a halt to potentially highly dangerous anticompetitive conduct more quickly than has been the case and a better dovetailing of competition law and sectoral regulation in certain areas.

The legal framework for European competition law will need some adaptation, without undermining the fundamental principles of competition law. In particular, the Commission ‘Competition Law 4.0’ 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.

Access to 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 protected by strong barriers to entry. To ensure that resulting positions of power remain contestable, it may be necessary in such cases 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. If anti-competitive denials of access to data become a systematic problem, competition law may be unable to ensure an effective enforcement.

The Commission ‘Competition Law 4.0’ 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. For this reason, 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 Payment Services Directive – envisage a right for consumers to grant third-party providers access to their user accounts. Also, the Commission ‘Competition Law 4.0’ proposes encouraging the establishment of data trustees which can grant companies access to data on behalf of and in line with the preferences of the consumers.

Platform regulation: 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 behaviour of their users, the rapid pace of market developments and the significance of first-mover advantages, the costs of non-intervention or of a failure to halt abusive conduct in time tend to be particularly high in such cases.

In order to ensure the contestability of existing positions of power and undistorted competition on platforms and on and for neighbouring markets, the Commission 'Competition Law 4.0' proposes that there should be an EU Platform Regulation establishing clear rules of conduct for dominant online platforms. Such a 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 with an interoperable data format. Platform operators retain the possibility to offer objective justification.

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 antitrust issues which can impede the willingness to engage in cooperation.

The Commission 'Competition Law 4.0' 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 EU competition law. It is proposed that a voluntary notification system be introduced at European level for cooperative 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.

Joined-up digital regulation: Digitisation entails a fundamental restructuring of almost all areas of our economy and society. Protecting functional, open and innovative markets will also require changes 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 institutionalised networking should be introduced. The desired improvement in policy coordination could be attained by the establishment of a new Digital Markets Board located in the General Secretariat of the European Commission. A majority of the members of the Commission 'Competition Law 4.0' 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.

The recommendations

1. The Commission 'Competition Law 4.0' recommends that the Commission Notice on the definition of relevant market be revised.
2. The Commission 'Competition Law 4.0' recommends that a separate **Notice on market definition and the definition of market power with respect to digital platforms** be published.
3. The Commission 'Competition Law 4.0' recommends commissioning a **study on cross-market market foreclosure strategies in the digital economy** and of the potential for countering these via competition law.
4. The Commission 'Competition Law 4.0' recommends the formulation of **cross-market principles guided by competition law** in a framework directive based on Article 114 of the Treaty on the Functioning of the European Union (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 authorised to enact sector-specific regulations to flesh out these rules.
5. The Commission 'Competition Law 4.0' recommends **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.
6. The Commission 'Competition Law 4.0' recommends **developing further open data legislation** stipulating, both at European level and at Member State level, that all **public institutions must provide structured data via standardised 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.
7. The Commission 'Competition Law 4.0' recommends 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**.
8. The Commission 'Competition Law 4.0' recommends 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 licences, 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.
9. A majority of the Commission 'Competition Law 4.0' recommends that a **Platform Regulation be introduced to impose a code of conduct on dominant online platforms** with a minimum level of sales or a minimum number of users.
10. The Commission 'Competition Law 4.0' recommends that dominant online platforms that fall under Platform Regulation be **prohibited from favouring their own services** in relation to third-party providers unless such self-preferencing is objectively justified.
11. The Commission 'Competition Law 4.0' recommends that dominant online platforms that fall under the scope of the Platform Regulation be required to **enable their users to port user and usage data in real time and in an interoperable data format** and to ensure interoperability with complementary services.
12. The Commission 'Competition Law 4.0' recommends that the European legislator examine whether dominant online platforms with a certain minimum level of sales or a minimum number of users should be obliged to introduce an **alternative dispute resolution procedure for violations of rights on platforms**.

13. The Commission 'Competition Law 4.0' 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.
14. The Commission 'Competition Law 4.0' recommends 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.
15. The Commission 'Competition Law 4.0' does not currently believe that it is necessary to reform the 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.
16. The Commission 'Competition Law 4.0' is advising **against the introduction of 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 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 market power.
17. 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 'Competition Law 4.0' 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**.
18. The Commission 'Competition Law 4.0' **does not consider a reform of Article 8 of Regulation 1/2003 ("interim measures") to be necessary**. Nor should judicial review of interim measures be weakened. In view of the rapid developments in digital markets, however, the **European Commission should proactively examine whether it is necessary to order interim measures** to prevent irreparable damage to competition.
19. The Commission 'Competition 4.0' recommends 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.).
20. The Commission 'Competition Law 4.0' 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 harmonisation of the various policy areas in the interest of an overarching and coherent European digital policy.
21. A majority of the members of the Commission 'Competition Law 4.0' 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. The agency should support the competent authorities at EU level and the EU Digital Markets Board.
22. The Commission 'Competition Law 4.0' recommends that the Member States should **consolidate their data protection supervision structures** for the non-public sector.

I. The mandate: Making EU competition law fit for the digital age

The Commission ‘Competition Law 4.0’ was set up by Federal Minister for Economic Affairs and Energy Peter Altmaier in September 2018, and tasked with developing recommendations on how EU competition law could be amended to take account of new developments in the data economy, the increased relevance of platform-driven business models, and the emergence of ‘Industry 4.0’.

In particular, the Commission ‘Competition Law 4.0’ was tasked to examine 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 markets¹. The Commission ‘Competition Law 4.0’ 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 also serve the German government as preparation for its 2020 presidency of the EU Council.

The Commission ‘Competition Law 4.0’, which brought together experts from various disciplines, held six meetings. The meetings were prepared by three working groups that also consulted with experts and stakeholders. Furthermore, the Commission ‘Competition Law 4.0’ conducted a written consultation and received 21 written statements. On the basis of the information gathered, the Commission ‘Competition Law 4.0’ developed a shared understanding of the issues ahead. This has resulted in the following recommendations. A uniform view was reached on the key issues.

Where this was not the case, the following report points out various options for action and the arguments for or against each of these.

The report begins with an outline of the challenges associated with the digital economy and its effects on markets and economic structures. The new data economy, the rise of platform-based business models and the growing importance of digital ecosystems are the game changers leading us towards a digital economy (Chapter II). Following this outline, the report highlights the importance of effective competition for innovation as well as the value of innovation for competition and for consumers. Consumer choice is indispensable for undistorted competition. For this very reason, openness for innovation and the strengthening of consumer autonomy are leitmotifs of this report. Any substantive discussion on the various options for reforms requires an understanding of the trade-offs associated with the relevant regulatory regimes and law enforcement institutions in what is a highly dynamic area of regulation full of uncertainty. This is the basic understanding which underpins the discussion of the possible options for action (Chapter III). The digital economy is characterised by its ability to use digital technologies to supersede established business models, to create new markets, and to eliminate or fundamentally transform previously existing markets. This also comes with new challenges for competition law, particularly with regard to market definition and the methods used to establish market dominance. It is for this reason that we recommend in Chapter IV that the guidelines for market definition be revised and a separate analytical framework be developed for defining platform markets and determining dominance in these markets. The ensuing chapters are dedicated to what has been the focus of the work of the Commission ‘Competition Law 4.0’. In Chapter V, we recommend strengthening consumers’ position with regard to the use of ‘their’ data. In particular, we recommend that the right to data portability be strengthened wherever dominant companies interact with final consumers. In Chapter VI, we set out a proposal for a clear set of rules of conduct for platforms that hold a dominant position in the respective market. Chapter VII proposes a new notification mechanism for new types of cooperation, which would provide greater legal certainty to companies. In Chapter VIII, we put forward guidelines on how to deal

1 The wording of the mandate can be found at <https://www.wettbewerbsrecht-40.de/KW40/Redaktion/DE/Downloads/einsetzung-der-kommission-wettbewerbsrecht-4-0.pdf> (in German)

with early acquisitions of start-ups whose turnovers are low, but which have a potential to stimulate competition. In Chapter IX, the Commission ‘Competition Law 4.0’ recommends a greater use of ‘interim measures’ and the creation of flexible and effective remedies. In the final Chapter X we highlight the importance of taking into account and of bringing together various different areas of law when creating a new competition framework. This is necessary to ensure effective competition to the benefit of consumers and to enable innovative and competitive digital firms to thrive.

In our work on this report, we were able to draw on a number of previous reports on developments in competition law and a potential regulatory framework for the digital economy to facilitate competition and innovation. These reports include the following (by date of publication): the report by Schweitzer/Haucap/Kerber/Welker on modernising the supervisory scheme to prevent abuses of market power by dominant companies, which was commissioned by the Federal Ministry for Economic Affairs and Energy² (hereinafter: ‘Market Power Study’), ‘Unlocking Digital Competition’ on the reform of the UK competition framework³ (hereinafter: ‘Furman Report’), ‘Competition policy

for the digital era’ by the special advisers to Commissioner Vestager⁴ (hereinafter: ‘Special Advisers’ Report’), and the ‘Digital Platforms Inquiry’ by the Australian Competition and Consumer Commission⁵ (hereinafter: ‘ACCC Report’). An analysis of these reports to the extent that they deal with issues that were explored by the Commission ‘Competition Law 4.0’ can be found in the Annex to this report.

In addition to these reports, there are a large number of other reports and publications exploring related and sometimes overlapping issues.⁶ Whilst the recommendations for action differ, all of the reports are based on a shared understanding that the digital economy is resulting in profound economic changes that need to be met by adjustments to the legal framework. Hence this report contains a number of references to the various other reports.

Coinciding with the work of the Commission ‘Competition Law 4.0’, the German Federal Ministry for Economic Affairs and Energy, the French Ministry for the Economy and Finance, and the Polish Ministry of Entrepreneurship and Technology tabled joint proposals for the reform of European competition policy.⁷ We also make references to these proposals in our work.

- 2 Schweitzer/Haucap/Kerber/Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen*, Baden-Baden 2018, hereinafter: ‘Market Power Study’.
- 3 Furman/Coyle/Fletcher/McAuley/Marsden, *Unlocking Competition: Report of the Digital Competition Expert Panel*, 2019, hereinafter: ‘Furman-Report’, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (last accessed on 3 September 2019).
- 4 Crémer/Montjoye/Schweitzer, *Competition policy for the digital era*, 2019, hereinafter: ‘Special Adviser’s Report’, <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (last accessed on 3 September 2019).
- 5 Australian Competition & Consumer Commission (ACCC), *Digital Platforms Inquiry, Final Report*, 2019, hereinafter: ‘ACCC Report’, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> (last accessed on 3 September 2019).
- 6 Cf. for instance Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report*, hereinafter: ‘Lear Report’, 2019, http://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf; Scott Morton/Bouvier/Ezrachi/Jullien/Katz/Kimmelman/Melamed/Morgenstern, *Report of the Committee for the Study of Digital Platforms – Market Structure and Antitrust Subcommittee*, hereinafter: ‘Stigler Report’, 2019, <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C> (last accessed on 3 September 2019); Franck/Peitz, *Market Definition and Market Power in the Platform Economy*, 2019, https://www.cerre.eu/sites/cerre/files/2019_cerre_market_definition_market_power_platform_economy.pdf (last accessed on 3 September 2019).
- 7 Federal Ministry for Economic Affairs and Energy/Ministère de L’Économie et des Finances/Ministerstwo Przedsiębiorczości I Technologii, *Modernising EU Competition Policy*, 2019, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4 (last accessed on 3 September 2019).

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II. Structural challenges of the digital economy

The new data economy, the rise of platform-based business models and the growing importance of digital ecosystems spanning what had previously been several separate markets are the game changers in the digital economy.⁸ One of the characteristics of the digital economy is that it combines these different aspects into a single process which puts certain companies in new positions of great and ever increasing power, allowing them to extend their market power beyond the traditional market boundaries.

The role played by data as an input factor for numerous products, services, and processes along the value chain has considerably increased. The more that access to data translates into a competitive advantage, the greater the likelihood of the emergence of self-reinforcing ‘feedback loops’. In other words, better access to data may result in competitive advantages, which may then give the company even more and better access to data. This type of mechanism is characteristic of platform-based business models which combine a trend towards greater concentration due to positive network effects with ever increasing access to data. The fact that the same set of data may translate into competitive advantages on several markets is in itself an expression of a new type of conglomerate effects which may contribute to the emergence of integrated digital ecosystems which have the ability to tear down and modify existing industry structures. All this presents new challenges to competition law and policy-makers. These developments pose the question of whether new rules and regulations are needed to protect competition and the capacity to innovate and keep positions of dominance contestable. Such rules and regulations might include the introduction of new rights for market players vis-à-vis dominant companies – for instance access rights to data, data portability rights (cf. Chapter V below), but also special conduct rules and regulations for dominant players (Chapter VI). At the same time, companies ought to have a sufficient level of legal certainty when they enter into cooperation with others as they seek to harness the possibilities of the digital economy (Chapter VII).

The following section is a summary of some of the most important features of the digital economy. For a more detailed account, please refer to the Stigler Report and the Special Advisers’ Report.⁹

1. Basic characteristics of the data economy: potential for innovation, asymmetrical information, and the danger of dominance

The new levels of data availability – personal and non personal user and usage data, location data, environmental data etc. – combined with lower data storage and processing costs are defining features of the digital economy. 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. Data as an input for the creation of bespoke services and products and for efficiency gains in manufacturing

Systematic data mining makes it possible for customers to better recognise consumers’ preferences and needs. User profiles first became important in marketing. They make it possible to increasingly target the products, services or information shown to consumers to fit their individual preferences. The same is true of adverts (‘targeted advertising’).

Furthermore, detailed insights into consumers’ behaviour and profiles can also be used to individualise products and services, i.e. for innovation not only in sales, but also in the product portfolio. The continuous analysis of usage data can also be used to consistently improve and adjust products and services so that they meet users’ needs. To the extent that this type of data analysis translates into innovative and better products, this can create positive feedback loops and also lock-in effects for the individual. Products and services that have been improved thanks to the use of collective user data are more attractive and will be more popular, resulting in a larger pool of data that can be used for further improvements and innovation. If it is precisely the individualised nature of a product or service that makes that product or service more useful to the consumer, this very same fact will also make it more costly for that consumer to switch suppliers – unless user profiles are portable. From the point of view of firms competing with the original supplier, these positive feedback loops and lock-in effects can be barriers to their entry into the market. Once a company is in a position of market power, these effects can perpetuate that power.¹⁰

8 For a detailed economic representation of this, cf. Market Power Study (fn. 1), pp. 15 ff.; Furman Report (fn. 3), pp. 32 ff.; Stigler Report (fn. 6), pp. 11 ff.; Special Advisers’ Report (fn. 4), pp. 19 ff.

9 Stigler Report (fn. 6), pp. 11 ff.; Special Advisers’ Report (fn. 4), pp. 19 ff.

10 Furman Report (fn. 3), p. 33.

Besides individualised products and services, the data economy can also deliver other types of innovation, such as efficiency gains throughout the manufacturing and the sales processes. Usage data can be mined to help improve existing products. Classic examples of this are the error logs sent by software applications to their respective creators who use them to eliminate bugs.

b. Versatile use across several markets: new economies of scope

One of the characteristics of user data, which provides insights into individual needs and preferences and makes it possible to predict consumers' behaviour in various different situations, is the ability of these data to be used in manifold ways and across several traditional markets. Data that was generated during the use of a particular service may decrease the marginal cost of innovation in other markets if they are used to spot gaps in the market, to enter new markets, or to develop new products that are exceptionally innovative. Economists refer to this as 'economies of scope'¹¹ and, in this particular case, as 'data-driven indirect network effects'.¹² Data generated in the course of developing or using one product may thus be used to improve a different, seemingly unrelated product. As soon as data of the type that can be used for other products has been collected, it will bring down the level of investment needed to enter a new market. This will make it cheaper to develop and create several different products or services within a single company rather than in separate companies. One example of this is Google, which uses data gathered for its search engine to better position Google Maps in the market for navigation systems.

One of the main reasons for the existence of these economies of scope is the fact that data can usually be used by several parties without rivalry. In other words, data will usually not vanish once it has been 'consumed' and can be used an infinite number of times for the purpose of devel-

oping or improving different products. At the same time, however, those holding the data may decide to use technical means to exclude other market participants from using the very same data. Whenever this happens, the benefits derived from access to these data will be limited to the "possessors" of the data – unless they decide to share them on a voluntary basis or as a result of a legal obligation under access rights.

c. Marginal returns from data usage are increasing

It is argued by some that the marginal returns from the use of data are increasing, i.e. that the value of the data acquired by a company will be higher the more data the company already possesses.¹³ Where this is the case, it will be extremely difficult for companies with access to less data to compete with companies that are in control of large amounts of data. The answer to the question as to whether marginal returns are indeed increasing will differ between markets.¹⁴ Nevertheless, it is safe to assume that wherever data mining becomes a significant factor in the competition on a product or service market, those companies competing with 'data-rich' firms will be on the back foot. This is especially true wherever self-learning algorithms are used, the training and optimisation of which crucially depend on regular access to large amounts of data or at least access to highly diverse data. If algorithms are trained with too little data or with data that is too uniform, this will have a negative impact on the algorithms' abilities to deal with the problems they were supposed to solve.

At what point exactly the marginal returns of data can be expected to significantly fall will depend on the respective application of the data. Training a self-learning algorithm for diagnosing rare diseases, for instance, will require a very large and diverse pool of data, whereas smaller data volumes will suffice for establishing sufficiently reliable correlations between location data and visits to local coffee shops.

11 Cf. Bourreau/de Streeck, Digital Conglomerates and EU Competition Policy, March 2019, p. 11, <http://www.crid.be/pdf/public/8377.pdf> (last accessed on 3 September 2019).

12 Prufer/Schottmüller, Competing with Big Data, TILEC Discussion Paper 2017-006, 2017.

13 Cf. e.g. OECD, Big Data: Bringing Competition Policy to the Digital Era, Background Paper, 2016, p. 11, [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf) (last accessed on 4 September 2019).

14 The marginal returns of, say, image recognition will fall (Varian, Artificial Intelligence, Economics, and Industrial Organization, November 2017).

The notion that data can potentially be relevant for competition is now generally accepted.¹⁵ Particular problems arise in markets in which the possession of data is of great relevance for competition and which are highly concentrated due to network effects: positive interactions between the holding of data and network effects can perpetuate positions of market power (cf. II). There are also new types of competition issues arising from the fact that data can be relevant for competition on several markets at once, allowing companies to extend their dominant position to other markets (cf. III).

d. The data economy as a new source of information asymmetries

Companies' access to user and consumer data is by no means an issue for competition law alone. It also establishes a new level of information asymmetry between companies and consumers. Detailed user profiles and the ability to predict consumers' behaviour in different situations can tempt companies to manipulate and exploit certain groups of consumers. If the interests of data-rich companies diverge from consumers' interests, the exploitation of information asymmetries may result – depending on the company's position on the market – in welfare losses and considerable distortions of competition.

All of this shows that the new data economy presents a challenge to the legislator – a challenge which goes beyond competition law in a narrow sense and which requires legislators to adjust the legal framework to ensure that competition remains a process of invention to the benefit of consumers.

2. Concentration tendencies in platform markets

One of the key characteristics of the digital economy are platform-based business models which are increasingly integrated into the sales chain. The emergence of platform companies is resulting in changes to the structures of

industries and value chains as well as to the global distribution of value creation. Thus, platform companies are causing structural changes in our economic system at large.

a. Platforms come in various different forms

For analytical purposes, it makes sense to distinguish between advertising platforms and intermediation platforms.¹⁶ Advertising platforms are platforms that sell to one user group the attention of other user groups. Intermediation platforms, by contrast, are designed to bring together and connect members of different user groups according to their individual preferences and wishes. Within this group of platforms one can further distinguish between transaction and non-transaction platforms. Transaction platforms are designed to facilitate economic transactions whereas non-transaction platforms mediate other types of interaction, such as 'matches' on dating websites. These latter interactions are often impossible for the platforms to observe. While this classification may be theoretically valid, it may be difficult to distinguish between these different types of platforms in practice. Search engines, for instance, often share characteristics of advertising and intermediation platforms.

Besides two-sided and multi-sided platforms that bring together two or more different groups of users, there are also one-sided networks which facilitate interaction within one single user group. This is typically the starting-point for pure social networks. However, since this type of service is often financed by advertisements, many of these networks do feature a second user group – the advertisers – which means that these networks are two-sided platforms after all. This report uses a broad definition of 'platform', which also includes networks that only cater to one group of users.¹⁷

We can also differentiate between platforms that are aimed at consumers (B2C or business-to-consumer platforms) and platforms that are part of the value chain between businesses (B2B or business-to-business platforms). Retail platforms, hotel booking platforms, travel platforms, payment

15 Cf.: Autorité de la Concurrence/Bundeskartellamt, Competition Law and Data, 2016, <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> (last accessed on 3 September 2019).

16 Cf. also Bundeskartellamt, Arbeitspapier Marktmacht von Plattformen und Netzwerken, 2016, pp. 19 ff., <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.html?nn=3591568> (last accessed on 3 September 2019).

17 Also: Special Advisers' Report, pp. 21 f.

service providers, real estate, vehicle, and job-hunting portals as well as social networks are all examples of B2C platforms. Operating systems such as Android or iOS are also platforms, as they connect users with app providers. B2C platforms tend to strive for high user numbers.

B2B platforms, by contrast, act as intermediaries between companies. They come in the form of purchasing or sales platforms or service or software platforms. All of the users on both sides of the platform are companies, resulting in more individualised contracts between users and between users and the platform. The overall number of users of this type of platform also tends to be smaller than that of B2C platforms.

b. Network effects as a key feature of the platform economy

The network effects manifested on platforms are a defining characteristic of the platform economy. It is important to distinguish between direct and indirect network effects.¹⁸ Positive direct network effects are present when the usefulness of a network increases with the number of participants or, in the case of a platform, with the size of a user group on one side. Positive indirect network effects occur when there is a growing number of users on one side of the platform that makes using that platform more interesting for those on the other side of the platform. Put more simply, this means that users will derive the greatest benefit from using the platform that has the most users already, either on the same side (positive direct network effects) or on the other side of the platform (positive indirect network effects). For example: Those seeking to sell goods or services will usually have a preference for an online market place that brings them into contact with the largest possible number of potential customers; conversely, customers will tend to visit online market places that offer the largest possible range of products or services that are relevant to them.

Negative (direct or indirect) network effects operate the opposite way around: if the number of users on one side of the platform is too big, the platform becomes less attrac-

tive for users on the same or opposite side of the platform. In the case of advertising-financed products or services, for instance, any network effects observed will often be asymmetrical, i.e. they will benefit those placing the advertisement whilst driving other users away.

c. Specific features of platforms and platform-based markets

Platforms are a new element in the value chain and are transforming our economy. The following characteristics of platforms and platform-based markets are important for the purposes of this report:

In an economy that is based on the division of labour, platforms can generate value by bringing together upstream and downstream market participants. The platform can turn into a gatekeeper if it is able to control access to the other side of the market, for instance where customers tend to be active only on that one platform ('single homing').

The (direct and indirect) network effects that are characteristic of platforms enable companies to scale up their digital business models more easily and quickly. This also makes it easier to market innovative products and services. It is therefore common for newly founded platforms to focus on generating network effects by covering as much of the market as possible.

Platforms factor indirect network effects into their pricing, which often results in those on the consumer side paying less than the marginal cost, if anything at all, for a service.

Platforms creating market places or other spaces for online interaction set the rules governing the social interactions taking place in these virtual spaces. This can take the form of explicit rules (e.g. terms and conditions), implicit rules (e.g. those underpinning the ranking algorithms used by a platform) or the market or forum design including all of the institutions belonging to the platform (recommendation schemes, buy boxes etc.).

18 Cf. Monopolies Commission, Sondergutachten 68, Wettbewerbspolitik: Herausforderung digitale Märkte, 2015, paras. 37 f., https://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf (last accessed on 3 September 2019).

In the case of hybrid platforms (vertically integrated platforms) the operator itself also acts as a user of the platform – for instance by selling goods or services there. While this can lead to efficiency gains, e.g. by allowing the platform operator to respond more swiftly to changes on the market, it also creates room for distortion as platform operators may favour their own products and services.

3. Digital ecosystems and conglomerate effects

Due to the rapid increase in the use of data and platforms for the creation and selling of products and services, value chains and economic structures are changing and new types of digital ecosystems emerge.¹⁹ While there is still plenty of uncertainty about the future development of this process in most industries, some patterns have already emerged.

One of these is referred to as ‘Industrie 4.0’ or the ‘Industrial Internet’. In the industrial context, this is understood to mean an increased use of data that is available through the greater use of sensors as well as data processing with the help of software-based solutions, and the inter-connection of products with one another and with users and manufacturers (Internet of Things (IoT)). For instance, the wear and tear on a vehicle’s brake pads is recorded by sensors and transmitted to the manufacturer who can use it to build a database that will allow him to optimise his brake pads; at the same time, the user of the car receives a message to have the defect fixed at a repair shop. This kind of technology can help create new value chains and modify existing ones, e.g. by modifying or replacing previous value creation stages. Companies seeking to create value in this environment may have to generate data themselves, so that it can be pooled with other data and used to build new platforms. This in turn may result in greater cooperation between different companies.

a. Formation of new types of conglomerate structures

Another defining characteristic and pattern observed in digital ecosystems is the fact that data from several different markets are increasingly pooled by a single company. This allows new types of conglomerates to emerge.

Over the last few decades, conglomerates have become less prominent in traditional industries. In fact, many corporate groups that used to be active in different sectors have divested and focused on their core business. By contrast, conglomerate structures are experiencing a revival in the digital economy.²⁰ Prominent examples of the growing importance of conglomerates have been leading US-based digital corporations including Facebook, Apple, Amazon, Netflix and Google. Large Chinese platform operators such as Tencent operate in a similar fashion. What all these companies have in common is that they are expanding into new markets which seem to have little to do with their core business. Amazon, for instance, is not only a retailer and market place provider, but also one of the world’s largest providers of cloud-computing. Google is not only a search engine, but also active in online streaming, online advertising, smart phone operating systems, smart homes, self-driving cars etc. The increasingly conglomerate structures of many digital corporations is fed both by new companies established by these corporations as well as acquisitions of other companies, notably small and innovative start-ups.

The reasons why conglomerate structures are becoming more important in the digital world are manifold. There are supply-side and demand-side factors that sometimes reinforce each other (feedback loops), and which provide incentives for conglomerate activities.

On the supply side, this is particularly true of economies of scope in product development, as many different digital products or services are based on similar input factors. These include cloud services, identification and payment services, coding capacities and most importantly data.²¹

19 For a definition of ecosystems cf. Autorité de la Concurrence/CMA, The economics of open and closed systems, December 2014, pp. 6 ff., http://www.autoritedelaconcurrence.fr/doc/economics_open_closed_systems.pdf (last accessed on 3 September 2019).

20 Lim, Tech Wars: Return of the Conglomerate – Throwback or Dawn of a New Series for Competition in the Digital Era?, 2017, <https://ssrn.com/abstract=3051560> (last accessed on 4 September 2019); cf. also Market Power Study, pp. 56 f.; Bourreau/de Stree, Digital Conglomerates and EU Competition Policy, 2019, <http://www.crid.be/pdf/public/8377.pdf> (last accessed on 3 September 2019).

21 Cf. Bourreau/de Stree, loc. cit., pp. 9 ff.

These economies of scope provide an incentive to digital companies to widen their product range and branch out. The incentive for sharing such input factors only within the corporation is further increased by the absence of a market for unused resources such as personal data. Data, especially user data, is a key factor for economies of scope (cf. Chapter II. 1 above). Pooling user data is a way to create ever more detailed user profiles which can be used for continuous optimisation and personalisation of existing services and for identifying potential new products or services; in the best-case scenario, this will lead to a growing competitive advantage compared to other companies seeking to sell to the very same customers. In addition, access to large amounts of personal data also makes it possible to optimise personal advertising, which is the key source of financing for many digital products and services.

Those able to combine data from different sources are often able to achieve a significantly better position for their own services on the market. They are also better positioned to develop new products and to enter new markets. The use of user data across separate markets is a characteristic feature of the digital economy and can be regarded as a sub-type of economies of scope ('data-driven economies of scope').²² Unlike in the case of traditional conglomerates, the various activities performed by digital conglomerates are closely linked by the user profiles being used. Against this background we need to interpret statements by digital companies saying that rather than competing on distinct product markets they compete for access to users.

Maximising access to data is also of crucial importance in the growing number of market segments in which the use of artificial intelligence, especially machine learning, is turning into a key enabling technology.

In addition to these supply-side factors, there can also be factors on the demand side that lead to conglomerate activities.²³ Of special importance are consumption synergies. These exist where consumers derive a benefit from

buying different products from the same supplier (e.g. through product bundling). Moreover, every additional digital service provided by a supplier also has the effect of strengthening the supplier's digital brand and builds consumer trust. There can also be incentives for companies to link up their various individual products and services to form their own ecosystem designed to inspire customer loyalty.

Companies may also pursue conglomerate activities with a view to retaining their market position by building a strong and strategic presence on emerging markets that could potentially be disruptive to their business models. This can be achieved by way of acquisitions (cf. Chapter VIII) or by developing new products and services or imitating existing ones. Digital companies may find it easier to identify new markets as they tend to have access to large bodies of data that provide them with superior information (especially regarding user preferences).²⁴

b. Conglomerate structures may encourage anti-competitive conduct

Looking at conglomerate activities from a competition angle, it is important to assess whether a digital company is abusing its market power in a given market. For instance, it could leverage its power onto other markets rather than competing on the merits. Furthermore, there are circumstances where conglomerate mergers may result in significant impediments to effective competition.

In general terms – irrespective of the latest developments in the digital economy – the potential for restrictions to competition caused by conglomerates is often seen as a result of their 'deep pockets'.²⁵ Financial strength may allow conglomerates to sell their products or services at a loss for a longer period, thus forcing their competitors out of the market or stopping them from entering it in the first place. Restraints of competition may also be caused by tying or

22 Cf. also Market Power Study (fn. 1), pp. 107 f.

23 Cf. *Bourreau/de Streeck*, Digital Conglomerates and EU Competition Policy, March 2019, p. 11, <http://www.crid.be/pdf/public/8377.pdf> (last accessed on 3 September 2019), pp. 12 f.

24 Monopoly Commission, *Sondergutachten 68*, loc. cit., paras. 478 f.

25 Market Power Study (fn 1), pp. 56, 106.

bundling different products or by portfolio effects.²⁶ At the same time, the resulting economies of scope may also lead to efficiency gains. From an economic point of view this means that any review of conglomerate corporate strategies or of conglomerate mergers must weigh up the potential harm to effective competition against the potential for efficiency gains. Legally, the competition rules do allow for considering efficiency gains, but set out strict criteria for this.

In principle, the general theories of conglomerate harm also apply to conglomerates in the digital economy. For instance, digital corporations with deep pockets are able to do without profits for longer periods of time when they intend to quickly gain a strong foothold in an emerging market. If these new markets are characterised by strong network effects, such a strategy can allow the company to quickly reach a critical mass of users, thus tipping the market in favour of its own interest. Therefore, the ‘deep-pockets’ criterion might even be more important in the digital economy than in traditional sectors.²⁷

In general, the same applies to tying and bundling strategies. It may be the case that the very same supply-side and demand-side factors that have already been described result in strong efficiency gains for digital conglomerates. However, these same factors might also reinforce the negative impact of tying and bundling strategies pursued by dominant companies.²⁸ In particular, they may present obstacles for innovative companies seeking to enter the market. Small and innovative suppliers, in particular, often (need to) focus on a single market niche rather than enter all of the markets catered to by large digital corporations. Hence, the tying and bundling strategies pursued by dominant companies may prevent these small competitors from entering the market successfully. Dominant digital plat-

forms may also be able to transfer positive network effects to new markets, thereby putting actual and potential competitors at a significant competitive disadvantage.²⁹

Problems under competition law may also arise if individual companies have exclusive access to certain resources or technologies that give them a competitive edge on other product markets. Exclusive access to data can be of key importance here. As has been explained above, the ability to collect and pool data from different sources can generate information that is important not only for the improvement of existing products and services, but also for the development of new ones. Access to data from one market and the ability to combine it with data from other markets could be a way of expanding into promising markets or strengthening one’s position on these markets in ways that are similar to the ‘classical’ financial strength.³⁰

We would also like to point out that there is a danger that individual digital corporations that are widening their product and service ranges to create ecosystems of their own may become gatekeepers that control access to their users, where these are reluctant to leave the ecosystem (e.g. because of convenient product bundling). Examples of companies that are acting as gatekeepers are AppStores vis-à-vis web developers³¹ and operating systems vis-à-vis complementary service providers. Where third-party suppliers seeking to market their products are dependent on access to these users, the digital corporations controlling these ecosystems may be able to dictate the terms on which they are willing to grant access to these users.

26 Kerber/Schwalbe, in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht, Volume 1, 2nd ed. 2015, Einleitung B, paras. 524 ff.

27 Stigler Report (fn. 6), p. 54.

28 For the following, cf. especially, *Bourreau/de Streeck* Digital Conglomerates and EU Competition Policy, March 2019, <http://www.crid.be/pdf/public/8377.pdf> (last accessed on 3 September 2019), p. 13 f.

29 Cf. e.g.: *Zhu*, *Journal of Economics & Management Strategy* 28:1 (2019), p. 23.

30 Market Power Study (fn. 1), pp. 107 f.

31 For more detailed information: ACM, Market Study into mobile app stores, 2019 <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf> (last accessed on 3 September 2019).

III. Strengthening innovation and consumer autonomy in a dynamic economy

German and European legislators are currently faced with the task of adapting the existing legal framework to take account of the many changes taking place in the digital economy. The task of the Commission ‘Competition Law 4.0’ was to identify options for action that could help protect competition and the capacity for innovation and competitiveness of German and European companies under the new conditions created by the digital economy. The Commission ‘Competition Law 4.0’ was led in its considerations and the development of its recommendations by three guiding principles: the importance of innovation for competition and competition law (I.); the importance of informed and autonomous demand-side decisions for undistorted competition (II.); and the need for rules and institutions that can respond to the speed of change that is characteristic of the digital economy in a way that is flexible and is based on sufficient information (III.). These guiding principles are outlined below.

1. Objective: protecting competition as a driver of innovation

Innovation is a key driver of competition and economic development. The ability of companies to thrive in the race for innovation is key for their international competitiveness. This is particularly true in the current state of the digital economy: platform-driven business models have proven to be a disruptive innovation in many markets and are challenging the market positions of established companies. Efforts to identify new fields of application for platforms that link up businesses with consumers (B2C) and businesses with businesses (B2B) are continuing. The Internet of Things (IoT) is, in many different ways, designed to enable new types of networking. Using data to make production and sales processes more efficient and to design new products and services carries enormous potential for innovation for the foreseeable future.

The digital economy is, however, characterised by trends towards greater concentration. These tendencies are driven by large economies of scale and vast network and connectivity effects (cf. Chapter II above), and can create significant advantages for first movers. At a theoretical level, the way that innovation and competition affect one another remains a contentious issue.³² The permanent contest between businesses for positions of power on the market is, however, widely recognised to create important incentives for innovation.³³ Companies that make risky investments must – once they manage to develop a successful innovation – be able to make a profit which, multiplied by the probability of success, exceeds the cost of the investment. For companies that are shielded from competition or that are able to shield themselves from competition, the incentive to develop innovations becomes weaker as they do not need to innovate in order to make high profits. If radical innovations emerge on the market, they can therefore expect their own returns to be cannibalised (replacement effect). Dominant companies that are not subject to the pressure of competition therefore have considerable incentives to focus on developing innovations which do not jeopardise their own business model. It is therefore crucial to maintain opportunities for companies to pursue decentralised innovations. Maintaining the contest between businesses to attain a position of power on the market also serves to protect innovation.

In keeping with the Furman Report³⁴ and the Special Advisers’ Report³⁵, the Commission ‘Competition Law 4.0’ attaches great importance to preserving the contestability of dominant positions once these have been attained. Dominant companies have a special responsibility to maintain the competition that still exists: they must not be allowed to take any action that hinders this competition or the development of this competition by acting in a way that is not compatible with the basic principles of competition.³⁶ The stronger the position of dominance, the greater

32 In industrial economics, the question remains as to what kind of market creates the most ideal conditions for innovation – monopolistic markets (position attributed to *Schumpeter*, cf. *Schumpeter*, *Capitalism, Socialism and Democracy*, 1942, p. 106) or competitive markets (position attributed to *Arrow*, cf. *Arrow*, *Economic Welfare and the Allocation of Resources to Invention*, in: NBER, *The Rate and Direction of Inventive Activity, Economic and Social Factors*, 1962, p. 609 (620)). Cf. ‘Arrow-Schumpeter debate’ as analysed by *Shapiro*, *Competition and Innovation*, in: Lerner/Stern (eds.), *The Rate and Direction of Inventive Activity Revisited*, 2012.

33 *Arrow*, *Economic Welfare and the Allocation of Resources to Invention*, in: NBER, *The Rate and Direction of Inventive Activity, Economic and Social Factors*, 1962, p. 609 (619 ff.).

34 Furman Report (fn. 3), pp. 56 ff.

35 Special Advisers’ Report (fn. 4), p. 14.

36 ECJ, Judgment of 13 February 1979, Case 85/76, ECLI:EU:C:1979:36, para. 91 – *Hoffmann-La Roche*.

the probability that actions meant to secure this position will result in anti-competitive foreclosure.³⁷ In an environment that is characterised by highly concentrated, strongly entrenched market power, the risk of permanent damage to competition and innovation is particularly high. The non-intervention of competition authorities against action that could potentially weaken contestability can therefore lead to high-level welfare losses.

The general thrust of innovation policy thus reinforces competition law in its goal to ensure contestability. The rising significance of innovation-based theories of harm in competition law reflects the role of innovation in competition. Recent decisions of the European Commission stress the importance of protecting both competition to innovate and consumers' freedom of choice.³⁸

Developing innovations can require cooperation – a fact that is broadly recognised in EU competition law.³⁹ However, there is currently a high level of uncertainty regarding the (il)legality of new forms of cooperation – such as the exchange and sharing of data. A competition law that seeks to promote innovation needs to be designed in a way that allows companies to gain legal certainty on the lawfulness of new types of innovation projects with high investment potential (cf. Chapter VII below).

2. Objective: ensuring freedom of choice for consumers

In open markets with undistorted competition, the allocation of resources is driven by the choices made on the demand side. Competition as a discovery process draws an

important part of its societal legitimacy from the fact that innovations and efficiency gains generated by competition ultimately benefit the consumer.

The digital economy has led to a massive increase in consumer options and has made it much easier to exercise choice. At the same time, it changes the conditions under which consumers decide. In particular, consumers are increasingly relying on the services provided by intermediaries. The availability of user data and user profiles allows for the personalisation of products and services, frequently to the benefit of consumers.

Under certain conditions, however, data-driven competition in products and sales can jeopardise the ability of consumers to steer competition in their interest. A growing literature points to the fact that digital intermediaries with access to detailed consumer user profiles may have the ability, and the incentive, to systematically exploit information asymmetries and/or bounded rationality.⁴⁰ Furthermore, where certain product and service providers have exclusive access to individual user data, 'lock-in' effects may result and increase switching costs for consumers. This effect may be reinforced where a digital platform bundles a variety of interlocking services, including services that enable consumers to participate in the digital market in the first place, like communication services, digital identities, payment methods, cloud data storage and digital content management.

A legal framework that strives to protect open markets and undistorted competition, it is vital to give special consideration to these new conditions created by the digital economy. Such a legal framework must protect the ability

37 European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C/45/7, hereinafter: "Priorities Communication", para. 20.

38 Cf. e.g. European Commission, Case AT.40220 – *Qualcomm*, press release of. 24 January 2018, available at https://europa.eu/rapid/press-release_IP-18-421_en.htm (last accessed on 4 September 2019); European Commission, Decision of 21 March 2018, Case COMP/M.8084 – *Bayer/Monsanto*; European Commission, Decision of 27 March 2017, Case COMP/M.7932 – *Dow/DuPont*. With regard to the latter, cf. *Wirtz/Schulz*, NZKart 2019, 20.

39 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ 2011/C 11/1, hereinafter: "Horizontal Guidelines", para. 2; Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 2014/C 89/3, hereinafter: "Technology Transfer Guidelines", para. 17; Regulation (EU) No 316/2014 ("Technology Transfer Block Exemption Regulation"), Recital 4; Regulation (EU) No 1217/2010 ("R&D Block Exemption Regulation"), Recital 4.

40 Stigler Report (fn. 6), p. 36.

of consumers to make meaningful choices and to determine how “their” data are processed and used.⁴¹ In this report, particular emphasis is therefore placed on strengthening the position of consumers in a variety of contexts. One measure that can serve this objective is the creation of “data intermediaries” which are committed to upholding the interests of the data subjects whose data are processed. This objective can also justify legislation that strengthens the right to data portability vis-à-vis dominant companies and facilitates switching in typical lock-in situations (cf. Chapter V and Chapter VI for further details on all aspects). Reinforcing the position of consumers vis-à-vis dominant companies also increases contestability and contributes to an environment in which decentralised innovation can thrive. Consumer empowerment thus contributes to the objectives of competition policy.

3. Objective: adapting regulatory structures to the conditions created by the digital transformation

European competition law is characterised by its broadly formulated general clauses. They have allowed competition authorities to analyse the new market conditions created by the digital economy case-by-case and to respond flexibly to the changes in market structures that it has brought about. However, applying competition rules often involves a great deal of time and resources. Based on experience and widely accepted economic insights, certain types of behaviour have been identified which, by their very nature, are considered harmful to the proper functioning of competition and are therefore generally prohibited (subject to an objective justification in an individual case) with no extensive effects analysis being required. This is so in the context of both the ban on cartels and the ban on the abuse of dominant positions.

However, in most cases the likely effects of a given conduct will need to be analysed with a view to the actual economic and legal context. The demands on this effects analysis have increased as the “more economic approach” has gained acceptance over the past 20 years. On the positive side, this leads to a considerable amount of knowledge about the changing market conditions being generated case by case and, ideally, to a high degree of fairness in each individual case. However, the number of cases that the competition authorities are able to process based on such a resource-intensive approach are limited.

In line with the Furman Report⁴² and the Special Advisers’ Report⁴³, the Commission ‘Competition Law 4.0’ works from the assumption that there has been a considerable rise in welfare costs for society due to the non- or late intervention against anti-competitive conduct by powerful digital companies (false negatives). This is especially true with respect to dominant platforms that benefit from strong, positive network effects and, as a result, from high and entrenched barriers to market entry. There is also broad agreement that anticompetitive practices by dominant companies that foreclose competitors and promote concentration can call for particularly rapid intervention: once the market structure has changed, these changes are very difficult to undo. The speed of change in the digital economy needs to be met with a regulatory framework that allows competition authorities to quickly step in against anti-competitive behaviour with a high probability of harm.

Previous reports have, however, drawn different conclusions from these findings. Whilst the Furman Report advocates the development of a binding code of conduct that is designed to promote competition, and for a regulatory regime, the Special Advisers’ Report points out the possibilities of a further evolution and refinement of competition rules.

41 Decisions by the European Commission have also recently focused increasingly on the limiting of freedom of choice on the opposite side of the market, cf. for example European Commission, COMP/AT.40220 – *Qualcomm*, press release of 24 January 2018, available at https://europa.eu/rapid/press-release_IP-18-421_en.htm (last accessed on 3 September 2019); Decision of 6 December 2016, COMP/M.8124 – *Microsoft/LinkedIn*, typical example in para. 348 ff., in addition press release of 6 December 2016, available at https://europa.eu/rapid/press-release_IP-16-4284_en.htm (last accessed on 3 September 2019); Decision of 13 May 2009, COMP/C-3/37.990 – *Intel*, Rn. 1598 ff. For the universal importance of substantial consumer freedom in current regulatory law as an important parallel regime accompanying liberalisation, cf. *Schneider*, in: Holznapel (ed.), *20 Jahre Verantwortung für Netze*, Munich 2018, pp. 51 ff.

42 Furman Report (fn. 3), pp. 91 f.

43 Special Advisers’ Report (fn. 4), pp. 50 ff.

The Commission ‘Competition Law 4.0’ works from the assumption that the following basic principles can be helpful in identifying an optimum structure of rules that foster competition and innovation in the digital economy:

Ideally, rules should be structured such that they minimise the overall costs for society resulting from welfare losses caused by wrong decisions (false positives and false negatives) and of the costs of enforcing the law.

If rules of conduct are simplistically divided into two groups – clear, simple and unambiguous rules of conduct which leave little room for interpretation (rules), and broad general clauses formulated to allow for interpretation (standards), the advantages and disadvantages of each type carry different weight in different contexts. If the factual information relevant to deciding a case is readily available, clear, simple and unambiguous rules of conduct can be implemented comparatively quickly and at low cost. Such rules send out clear signals to all concerned and facilitate planning. The rigidity and “formalism” of such rules can, however, have negative effects: if the particular circumstances of a given case are not taken into account, the number of decisions that are economically wrong may increase. In addition, such rules often leave less room for a rule evolution in reaction to new developments. Consequently, the legislator may be required to intervene more frequently. Developing the right rules at legislative level can be time-consuming and difficult given the variety and complexity of the economic issues involved, and in the face of a quickly changing environment.

The use of standards [as opposed to rules] is therefore particularly suitable if the legislator does not (yet) have sufficient knowledge about the breadth of the issues that are relevant to individual cases and the effects that certain behaviours will have. The relevant information can then be generated case by case. The decisions made can take account of actual differences in a flexible manner. Hence, standards lend themselves more towards an evolutionary development of law. The addressees of standards can feed relevant information into the decision-making process and thus contribute to the development of legal stipulations. However, the use of standards is associated with greater legal uncertainty, and application of the law requires a great deal of time and resources.

In very basic terms, rules and standards represent two opposite styles of legal stipulations. In practice, there is a variety of intermediate stipulations which seek to combine the advantages of both rules and standards depending on the specific contexts in which such stipulations are used. For example, where rules have been designed based on the presumption that a particular behaviour will have undesirable effects, a list of clearly defined exceptions can be issued. These then take account of a defined set of exceptional circumstances that can occur in individual cases. Similarly, rebuttable presumptions are frequently used. These, too, are based on the presumption that a particular behaviour will have undesirable effects, but enable the rule addressees to rebut this presumption by drawing upon information that is primarily available to them.

The Commission ‘Competition Law 4.0’ proposes that in markets that tend towards fast concentrations of power and therefore call for a particularly speedy intervention against anti-competitive practices by dominant companies, the best approach is for relatively simple rules of conduct to be applied. These send clear signals to the market as to what the “rules of the game” are and are easier and quicker to apply. Granting companies the opportunity to justify their conduct ensures that, with each application of the law, important information about new economic interrelationships is generated, which can then feed into the future development of rules of conduct (cf. Chapter VI for more detailed information). In the view of the Commission ‘Competition Law 4.0’, simple, generalised rules of conduct are not currently a suitable approach for other problem areas, such as obligating dominant companies to provide access to data. This is because the circumstances involved are too varied and the effects on competition too complex. The cost of making bad decisions when imposing simple, clear bans and obligations would be too high. Instead, the recommendation is to develop sector-specific rules on access to data, which would enable experience to be gathered and solutions to be tested in more narrow settings (cf. Chapter V).

Reflections on the optimal structure of rules are closely linked to law enforcement structures. The changes in the digital economy raise the question of whether competition authorities alone are capable of providing sufficient protection for the competitive process, or whether new insti-

tutions need to be established. Furthermore, questions as to the relationship between the enforcement of competition law by competition authorities and the enforcement of other areas of digital law, particularly data protection law arise – areas of law which can also impact competition. The Furman Report advocates that a Digital Markets Unit be established which should work together with all the stakeholders of the digital economy to develop rules of conduct for platforms that have a strategic market position. These rules, it suggests, should not only prohibit restraints of competition, but should pro-actively foster and strengthen competition. The Furman report further recommends that such a Digital Markets Unit should also continuously monitor compliance with these rules of conduct and intervene quickly if they are violated.

In the past, the discussion about the advantages and disadvantages of having additional regulation that applies and is enforced alongside general competition rules has focused on the network industries in their transformation from a monopolistic regime to a competitive situation. Far-reaching interventions into the economic freedoms of the addressees of regulation (i.e. permanent supervision and monitoring, special obligations to provide information, codes of conduct and possibly licensing requirements) are justified here partly as transformational regimes and partly due to the economic characteristics of network infrastructures. The question as to which markets should be subject to regulation is examined according to three criteria:⁴⁴ Markets should be regulated only if i) there are significant and permanent barriers to entry, whether structural or legal, and ii) if no trend towards competition can be identified. The third precondition for regulation is that iii) general competition law alone is not enough to counter market failure.

Despite certain parallels to the conventional network industries, the digital economy is different. Among other things, the positions of power have emerged on the basis of competition. In addition to ensuring contestability, a key challenge is to deal with the conglomerate effects outlined above which can facilitate the leveraging of market power to new markets. As a result of the process of digitalisation, nearly all sectors are subject to rapid and complex changes that are often difficult to predict. In an environment in which there is a considerable degree of market dynamism

and a high level of innovative potential, a regulatory regime characterised by heavy-handed intervention can entail high costs. At the same time, it is precisely these disruptive processes of change – compared to a relatively stable market environment characterised by more incremental innovation – which call for a continuous generation of not only case-specific, but cross-sectoral information, and for a close dialogue between competition authorities and other authorities (e.g. consumer protection and data protection authorities) so that a coherent legal framework for the digital economy can be developed that adequately considers the special features of the digital economy and the interaction between different areas of law. Moreover, an evolutionary approach towards rule development may be too slow, such that a more rapid rule-setting is needed.

All of these aspects argue against the idea of establishing a public utilities-style regulation for the digital economy; at the same time, they also indicate that the conventional mechanisms of implementing competition rules are not always sufficient in order to respond to emerging trends towards a concentration of power. This may make it necessary to develop other instruments for systematically generating information, developing rules and implementing the law. Whilst the Commission ‘Competition Law 4.0’ does not arrive at unanimous recommendations on how such a regime should be designed, it does agree on this initial finding. There is also agreement that it can be helpful to develop sectoral rules that can be used to target the particular problems found on specific markets. Sector-specific rules – for example on data access, data portability, or interoperability – can also serve as a regulatory sandbox for rules that could subsequently be generalised.

44 Known as the “Three criteria test”, enshrined in Section 10 subsection 2 Telecommunications Act.

IV. Markets and market power – towards a more differentiated assessment

The aim of competition law is to ensure an open competitive process, thereby to enable innovation, and to protect freedom of choice for consumers. Relevant positions of power and competitive restraints are defined with a reference to relevant product/service and geographical markets that circumscribe the object and area in which competition takes place. The “dominant position” that Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the EU Merger Regulation (EUMR) refer to is to be established with a view to a relevant market.

The objective in determining a relevant market is to identify the particular market actors that impose competitive discipline on a company in a particular field of activity.⁴⁵ The relevant product/service market comprises all products or services that consumers consider substitutable with a view to their characteristics, price, and intended use.⁴⁶ The relevant geographical market is “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”.⁴⁷ The concept of the ‘relevant market’ is thus a legal concept influenced by economic science⁴⁸ the function of which is to identify, within the “whole universe of market-based relations”, those relations which are relevant in a given case.⁴⁹

The digital economy can change the structure of competitive relations. For certain situations – particularly services offered free-of-charge – new methods are being looked for to measure the level of competitive discipline exerted by other market actors. When it comes to defining the relevant market, platform markets raise questions of their own. The Commission ‘Competition Law 4.0’ therefore recommends an update to the Commission Notice on the defini-

tion of relevant market which is now more than 20 years old⁵⁰ (see a.).

Digital platforms can also bring about new forms of control over market access and thus new positions of power which need to be better understood and conceptualised. The Commission ‘Competition Law 4.0’ therefore proposes that a Notice on the application of the concept of market power on digital platforms be published (b.).

The importance of advertising for the business models driving B2C platforms, and the data-driven economies of scope can trigger corporate strategies that are no longer geared towards single product or services markets. This raises the question as to whether new concepts are needed in competition law to determine the ability of companies to foreclose competition through the use of cross-market strategies. The Commission ‘Competition Law 4.0’ recommends that studies be commissioned in order to examine this question in more detail (c.).

1. Specifying the methods to define relevant markets in the digital economy

The Commission Notice on the definition of the relevant market dates back to 1997. When it comes to determining the competitive forces that discipline companies in their corporate planning and activities, the digital economy presents competition authorities and courts with new challenges. This suggests that an update to the Notice based on the experience of the competition authorities would be useful. The challenges are partly conceptual, partly of a practical nature.

New conceptual questions are due to the multi-sidedness of digital platforms. A clarification of when the competi-

45 *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, 3rd edition Munich 2014, Section 26 para. 39.

46 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372/5, para. 7.

47 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372/5, para. 8.

48 *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, 3rd edition Munich 2014, Section 26 para. 36.

49 *Hoppmann*, *Fusionskontrolle*, Tübingen 1972, p. 48.

50 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372/5.

tion law analysis should start from the existence of separate markets on each side of the platform and when we should assume one single market combining the different sides of a platform would be useful.⁵¹ It should also be resolved when and how the interdependency of the different sides of the market can be taken into account when examining separate markets;⁵² and how situations should be analysed in which users of one platform simultaneously use other platforms and non-platform services (i.e. engage in multi-homing).⁵³

Conversely, an updated notice should clarify when the lock-in effects are sufficiently pronounced to define ecosystem-specific secondary markets for certain services or functionalities⁵⁴ – on which the operator of the digital ecosystem will then typically have a dominant position.⁵⁵ The question is gaining increasing practical significance in the context of Industrie 4.0. The more and more frequent practice of combining the sale of a product with a data-driven

service element and the importance of data analytics for customising such services can lead to new areas of application for the ‘aftermarket doctrine’ in the digital economy.⁵⁶ The Notice on the definition of relevant market published in 1997 deals with questions surrounding secondary markets only very briefly.⁵⁷

Practical problems for market definition arise also where services are offered “free-of-charge” (zero-price markets).⁵⁸ Analytical methods like the SSNIP test do not work⁵⁹ as they focus on the willingness of customers to switch providers in the event of a hypothetical price increase. The competition authorities continue to resolve these cases by determining interchangeable products or services from a demand-side perspective.⁶⁰ It is being discussed whether the extent of customers’ willingness to switch providers in reaction to a hypothetical decline in quality can help to measure the degree of substitutability.⁶¹

51 Also cf. Market Power Study (fn. 1), pp. 119 f.; Special Advisers’ Report, p. 46; *Franck/Peitz*, Market Definition and Market Power in the Platform Economy, Report, May 2019, pp. 22 ff. with other references. For relevant information on U.S. antitrust law, cf. *Ohio v. American Express Co.*, 138 p. Ct. 2274 (2018). The ruling by the U.S. Supreme Court continues to be widely criticised in literature – cf. for example *Carlton*, The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex, *COLUM. BUS. L. REV.* (forthcoming 2019)

52 *Franck/Peitz*, Market Definition and Market Power (fn. 5), pp. 39 ff.

53 *Franck/Peitz*, Market Definition and Market Power (fn. 5), pp. 54 ff.

54 See Special Advisers’ Report, pp. 88 ff.

55 For information on aftermarkets, see for example *Bechtold*, Die Kontrolle von Sekundärmärkten: Eine juristische und ökonomische Untersuchung im Kartell- und Immaterialgüterrecht, 2007; *Shapiro*, Aftermarkets and consumer welfare: making sense of Kodak, *Antitrust Bulletin* 1995, Vol. 63, p. 483 ff. – each with other references.

56 Cf. Special Advisers’ Report, p. 88 ff.

57 Cf. Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372/5, para 56.

58 Cf. Special Advisers’ Report, p. 44. For conceptual understandings and definitions of the market for services that are “free-of-charge”, cf. for example: Stigler Report, (fn. 6) p. 33, 45, 66; *Franck/Peitz*, Market Definition and Market Power in the Platform Economy (fn. 6), pp. 46-54. For information on attention markets, cf. Chapter III below.

59 The SSNIP test (small but significant and non-transitory increase in price) or “Hypothetical Monopolist Test” describes the following thought experiment: the concept of a market should (only) be so narrow that a hypothetical monopolist would have sufficient market power on this market to sustainably raise prices by 5–10% above the competitive price and still run a profit – the additional revenue not being outweighed by the decline in sales due to the migration of marginal consumers to substitutes. Cf. *Schwalbe/Zimmer*, Kartellrecht und Ökonomie, 2011, p. 77-81; for the reservation shown in German case law vis-à-vis the SSNIP test, cf. Federal Court of Justice, Decision of 4 March 2008 – KVR 21/07, BGHZ 176, 1, paras. 18 f. – Soda-Club II.

60 The focus in the way in which the market was defined in the Google Shopping case was the *interchangeability* of different internet search products in terms of their *function* and thus ultimately the question as to what services – when seen in terms of function – can cover a specifically defined user need; see European Commission, Decision of 27 June 2017, Case AT.39740, paras. 145 ff., particularly para. 161 ff., and para. 245 on the rejection of the SSNIP test by the Commission. Cf. Special Advisers’ Report (fn. 4), p. 45.

61 *Gebicka/Heinemann*, *World Competition* 37 (2014), 149, 156 ff.; *Filistrucchi/Geradin/van Damme/Affeldt*, *Journal of Competition Law and Economics* 10 (2014), 293; *Capobianco*, Big Data: Bringing Competition Policy to the digital era, OECD, 2016, DAF/COMP(2016)14, p. 15; *Filistrucchi*, Market Definition in Multi-Sided Markets, OECD, 2018, DAF/COMP/WD(2017)27/FINAL, p. 15. For sceptical views, also see Special Advisers’ Report (fn. 4), p. 45; *Franck/Peitz*, Market Definition and Market Power in the Platform Economy (fn. 5), p. 65; Market Power Study (fn. 1), p. 45 f; *Podszun/Schwalbe*, *NZKart* 2017, 98, 102.

The high speed at which digital markets are evolving and the inability to predict the future of digital innovation can lead to particular challenges for market definition – both at a conceptual and a practical level.⁶² This is particularly true for merger control, where the expected influence of a merger on future competition needs to be assessed. Although the economic determinants used are identical, the methods used to define the market for the purposes of merger control may therefore differ from those used in Article 102 TFEU, where past behaviour is to be assessed.⁶³ Particularly (but not solely) in merger control, the question arises as to how competition authorities should deal with genuine and non-resolvable forecast uncertainty and to what forecast periods are to be taken as a basis.⁶⁴

Closely linked to this is the question of when it can be assumed that potential competition will have a disciplinary effect.⁶⁵ However, according to the Notice on the definition of the relevant market, the issue of potential competition is not taken into account for the purposes of defining the market, but is only considered once it has been determined that a dominant position has been obtained.⁶⁶ Nevertheless, it would seem useful to more closely specify the role of the internet and digitalisation for market entry in an updated Notice, given that the internet can simplify access to certain markets and can therefore influence the way in which geographical markets are determined.⁶⁷ The importance of data and the consequences when the availability of this data is limited can, in contrast, lead to the development of new barriers to entry.

The explanations concerning the possibilities and limits of supply-side substitution that are set out in the Notice⁶⁸ should be supplemented to take account of the possibility for traditional products and services to be substituted by new, digital ones (for example, substituting printed books with eBooks; CDs with music streaming, daily newspapers with online news services).

At a general level, it may be asked what function the exercise of defining the market should have for the competitive analysis in a market environment characterised by uncertainty and driven by innovation. If a market environment is relatively stable, defining the market often allows competition authorities and courts to draw presumptions about market power based on the market structure – particularly market shares. However, this is often not the case for markets that are young and strongly driven by innovation. In this kind of environment, merely defining the market and calculating market shares is no longer a sound basis for drawing presumptions about market power. Rather, market definition will then just be a first filter for analysing competition, and will be used to map the different competitive forces in a systematic and differentiated manner. Where markets are defined broadly, the differing proximities of substitution that exist on these markets need to be taken into account when analysing competition. If they are defined narrowly, the analysis of competition needs to take account of the disciplinary effect exerted by companies outside the relevant market.⁶⁹ In merger control in particular, the European Commission is already taking these aspects into account today.

62 See Special Advisers' Report (fn. 4), p. 47.

63 *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, 3rd edition 2014, Section 17 para. 2.

64 An analysis of decisions from 2011 showed that the European Commission sometimes used a longer forecasting period when evaluating developments which the parties to the merger considered *negative* (3–5 years), than that which they used when evaluating those they considered *positive* (2–3 years) – cf. *Schröder*, *Der Prognosezeitraum in der Fusionskontrolle*, in: FS Säcker, 2011, 985 ff., 997 f.

65 Cf. European Commission, *Guidelines on the assessment of horizontal mergers*, OJ 2004 No C 31/5 para. 9; and European Commission, *Guidelines on the assessment of non-horizontal mergers*, OJ 2008 No C 265/6 para. 20: the Commission will take into account changes to the market that can reasonably be predicted. For a discussion of whether possibilities for fast market entry (rapid entry/swing capacity) should be taken into account, cf. *Fletcher/Lyons*, *Geographic Market Definition in European Commission Merger Control*, 2016, pp. 57–58.

66 European Commission, *Notice on the definition of relevant market for the purposes of Community competition law*, OJ 1997 C 372/5 para 24.

67 For example in the area of trade.

68 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372/5, paras 20 ff.

69 *Fletcher/Lyons*, *Geographic Market Definition in European Commission Merger Control*, 2016, pp. 12 f., available at http://ec.europa.eu/competition/publications/reports/study_gmd.pdf (last accessed on 3 September 2019).

Finally, an updated Notice on the definition of the relevant market should take into account recent decisions in which the European Commission has defined ‘innovation spaces’⁷⁰ rather than markets in contexts where there is competition for innovation, but such competition is not yet clearly linked to a specific product, service or technology market. Such innovation spaces include companies that have the necessary resources and skills to be successful in certain areas of research and development.

The Commission ‘Competition Law 4.0’ recommends updating the Notice on the definition of the relevant market to take account of these recent developments and issues. Information on market definition issues that especially occur in the context of digital platforms can be presented in a separate Notice that also deals with the various types of digital platform and the methods used for determining whether a platform has obtained a dominant position (see Recommendation 2 below).

Recommendation 1:

The Commission ‘Competition Law 4.0’ recommends that the **Commission Notice on the definition of relevant market be updated.**

2. Sharpening methods for defining the market and for determining positions of power with respect to digital platforms

The issues raised for the methodology used to define digital platform markets have already been outlined above. However, new problems for competition law also arise when it comes to determining whether such platforms are dominant.⁷¹ The recent reports on the challenges of digitalisation for competition law all recognise these problems, but use different terminology to describe them.

The Market Power Study conducted for the Federal Ministry for Economic Affairs and Energy uses the term

‘*Intermediationsmacht*’ (intermediation power) to describe the position of power that platforms can obtain in controlling a sales channel or access to a particular group of customers⁷² – a position of power that can also exist where different sales channels operate in parallel with one another, but a particular goods or service provider depends on the use of each and every one of them.

The Special Advisers’ Report points out the relationship between this concept and the recognised concept of “unavoidable trading partners”. It highlights that the control platforms may have over data and the potential power they have to steer behaviour need to be taken into account in the determination of market power.⁷³ Principles from behavioural economics might also need to be incorporated into the analysis.

These concerns are also highlighted by the Stigler Report. This report uses the term ‘bottleneck power’⁷⁴ – a position of power which is obtained if consumers primarily use a single provider (single-homing) – meaning that the providers are dependent on having access to the platform in order to gain access to the consumers. According to the report, factors that favour the development of such ‘bottleneck power’ are high costs that may be associated with switching providers – such as loss of data or contractual or technical obstacles to switching/a lack of interoperability; the practice of coupling services, or inertia on the demand-side, favoured by the fact that particular user-settings would be lost. According to the report, digital companies that have the incentive and ability to create and maintain a single-homing environment should be considered as having this ‘bottleneck power’.

Finally, the Furman Report speaks in a similar context of a ‘strategic market status’ which, if attained, should lead a special regulatory regime to take effect. According to this report, a ‘strategic market status’ is reached if one or more digital companies have a high level of control and influence over the relationship between buyers and sellers

70 European Commission, Decision of 11 April 2018, COMP/M.8084 – *Bayer/Monsanto*; European Commission, Decision of 27 March 2017, COMP/M.7932 – *Dow/DuPont*.

71 Cf. Special Advisers’ Report (fn. 4), pp. 48 f.; *Franck/Peitz*, Market Definition and Market Power in the Platform Economy (fn. 5), pp. 69 ff. with other references.

72 Cf. Market Power Study (fn. 1), pp. 85 ff.

73 Cf. Special Advisers’ Report (fn. 4), pp. 49 f.

74 Cf. Stigler Report (fn. 6), pp. 84 ff.

or over the access of advertisers to potential buyers. The opportunity that this creates for platforms to act as ‘gatekeepers’ between companies and potential customers provides them with a special kind of power. Alongside this ability to control access to the market or customers, other facets characterising this particular position of power are the ability to manipulate rankings and to influence companies’ reputations.⁷⁵

In all of these analyses, the ability to control access to the market or to important customer groups is given particular significance with a view to determining whether a platform has obtained a relevant position of power under competition law. The principle that “whoever controls access to the market dominates the market” is not new. It is generally accepted in competition law that a firm that, under these conditions, excludes others from access without objective justification abuses its dominant position.⁷⁶ This general principle was crucial for opening up network industries to competition. It has now taken on a new importance in the era of digitisation and needs to be moulded in a way that takes account of the role that platforms and data play in controlling access to customers. Traditional market share-based presumptions may not be a reliable indicator for the determination of relevant market power in these settings.

The Commission ‘Competition Law 4.0’ considers it necessary that the concept of market power be clarified and more precisely defined for use in the context of digital platforms. This would help competition authorities to respond more quickly to potential abuses in the future. The Commission ‘Competition Law 4.0’ therefore proposes that a special Notice on competition-law issues for digital platforms be drafted which contains information not only on methods for defining platform markets (see a.), but also on the methods and criteria for determining whether a platform has obtained a dominant position.

The Commission ‘Competition Law 4.0’ suggests that this Notice also explain the relationship between the analysis of market power, analysis of the conformity of certain types of behaviour with competition law, and the effects analysis. Similar to the way in which anticompetitive agreements as per Article 101(1) TFEU can provide indications on how the relevant market is defined as certain agreements only make commercial sense if market power has been obtained, certain behaviour – combined with the finding of foreclosure effects – can indicate that the conduct of a given firm is not subject to effective discipline through competition and is therefore to be considered dominant within the meaning of Art. 102 TFEU.⁷⁷

Recommendation 2:

The Commission ‘Competition Law 4.0’ recommends that a separate **Notice on market definition and the definition of market power with respect to digital platforms** be published.

3. Identifying cross-market market foreclosure strategies

Digitalisation raises fundamental questions for competition law in areas where corporate strategies are no longer based on a conventional market context, i.e. are not geared towards clearly defined product and service markets (see Section II.3). Often, companies that operate in a digital context oriented towards consumers are not only in competition with one another on a specific services market, but are also competing to attract customers’ attention and to retain it across markets. Gaining customers’ attention is especially important where services are financed through advertising. Retaining these customers then becomes the primary aim when building up a digital eco-system.

The importance of customers’ attention for obtaining finance from advertising has led economists to develop the concept of ‘attention markets’.⁷⁸ Various competition

75 Cf. Furman Report, para. 1.117. Also cf. paras. 2.116-17: the Furman Report refers here to the concept of ‘substantial market power’ used in telecommunications regulation and the concepts of economic dependency and relative market power.

76 *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, 3rd edition 2014, Section 17 para. 4.

77 For more details, cf. Market Power Study (fn. 1), pp. 47 ff. Also see *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, Section 17 para. 3.

78 For early analyses of the importance of the competition for gaining customers’ attention in radio and television markets, cf. *Anderson/Coate*, *Market Provision of Broadcasting: A Welfare Analysis*, *The Review of Economic Studies* (2005) Vol. 72(4), 947-972. For more recent analyses in the context of the internet, see *Ambrus/Argenziano*, *Asymmetric Networks in Two-Sided Markets*, *American Economic Journal: Microeconomics* (2016), Vol. 1(1), pp. 17-52; *Anderson/Foros/Kind*, *Competition for Advertisers and for Viewers in Media Markets*, *The Economic Journal* 128 (2018), p. 34; *Prat/Valletti*, *Attention Oligopoly* (2018). For an overview, cf. Lear Report, pp. 6, 28 and annex A.2.

authorities have referred to this concept in their effort to define markets vis-à-vis advertising clients.⁷⁹ However, this concept tends to define such markets very broadly, as they will include a very wide variety of different services that are all competing to attract customers' attention.⁸⁰ Overall, the ability of this concept to isolate the factors that discipline corporate behaviour in practice is limited. It does, however, rightly refer to the high level of practical relevance that advertising markets have for the digital economy. The way in which these markets function needs to be further analysed. Various competition authorities have recently launched sector inquiries.⁸¹

The question, therefore, is whether new approaches are needed in order to analyse the impact that cross-market corporate strategies have on competition. The Special Advisers' Report concluded that the use of market definition as an instrument to identify and systematise competitive discipline should not be abandoned, but that special emphasis ought to be placed on identifying potential anti-competitive strategies and theories of harm.⁸² In merger control, the ability and incentives of the merging parties to impede or foreclose access to certain customers and markets are assessed based on the use of the SIEC test (see for example Chapter VIII).

In the context of Art. 102 TFEU, a relevant position of power could be assumed wherever a company is able to control resources and skills that enable it to foreclose certain markets. The starting point here is the same as in the

'essential facilities' doctrine (for more details on this doctrine and importance for access to data, see for example Chapter V). This doctrine is, however, also based on the recognition and experience that in competition law, great caution needs to be exercised when placing obligations on companies to provide access to certain resources as such obligations will often negatively impact innovation and investment incentives. These aspects need to be taken into account when balancing the different interests. Further experience and a theoretical foundations are needed in order to determine how these interests ought to be balanced for new types of cases within the digital economy.

Against this background, the Commission 'Competition Law 4.0' recommends that studies be commissioned which look at the various dimensions of cross-market foreclosure strategies in the digital economy, and ability of competition law to counter these strategies early on.

Recommendation 3:

The Commission 'Competition Law 4.0' recommends commissioning a **study on cross-market market foreclosure strategies in the digital economy** and the potential for countering these via competition law.

79 Cf. European Commission, Decision of 3 October 2014, M.7217, paras. 73 ff. – *Facebook/WhatsApp*; European Commission, Decision of 6 December 2016, M.8124, paras. 153 ff. – *Microsoft/LinkedIn* – neither of these use the term 'attention markets' nor do they arrive at a final view.

80 Also found in the Lear Report, p. 28.

81 Such analysis has already been keenly pursued in the Lear Report, p. 45 (advertising markets as a 'blind spot' in the work of the competition authorities), 117 f. The French Autorité de la Concurrence (CMA) has conducted a sector-based analysis of online marketing – cf. the final report Avis no. 18-A-03 portant sur l'exploitation des données dans le secteur de la publicité sur internet, <http://www.autoritedelaconcurrence.fr/pdf/avis/18a03.pdf> (last accessed on 4 September 2019). The CMA commissioned a market study on 3 July 2019 – see <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>. The Bundeskartellamt has launched a study on market conditions for online advertising – cf. press release of 1 February 2018 – cf. https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html (last accessed on 3 September 2019). The ACCC Report (fn. 2) includes a whole chapter on the competitive conditions on advertising markets (Chapter 3). Also cf. *Adshad/Forsyth/Wood/Wilkinson*, Online advertising in the UK. A Report commissioned by the Department for Digital, Culture, Media & Sport, January 2019.

82 Special Advisers' Report, p. 46. For a critical view, cf. *Franck/Peitz*, Market Definition and Market Power (fn. 5), pp. 10 f.

V. Strengthening access to data and the self-determined handling of data

1. Access to data as a source for innovation and competition

The digital economy entails fundamental structural changes to the information basis for economic and societal organisation and transactions.

In the commercial sector, information – whether about (potential) customers, business partners, or product and market developments – has always been central for competitiveness. In the digital world, however, the data generated in the context of a specific commercial activity can acquire significance and value, and generate commercial opportunities and competitive advantages, far beyond the original market context. Consequently, access to data can determine opportunities to innovate and compete.

This finding has led to debates on who has or should have an exclusive right to data control – a debate which went under the heading of “data property rights”.⁸³ Currently, certain control and access rights to personal data are assigned by data protection legislation⁸⁴, in terms of rights to privacy,⁸⁵ Also, certain information is, under certain conditions, protected by trade secrets.⁸⁶ To an – admittedly narrowly defined – extent, protection is afforded to investments in the collection and processing of data by

rules on database protection.⁸⁷ Whether it would be advisable is necessary to introduce further intellectual property rights to data in order to generate additional incentives for investments in data collection and to facilitate trade in data, or whether the existing technical possibilities to control data suffice to incentivise investments and possibilities to share data, remains a contentious issue.⁸⁸ Views on this differ within the Commission ‘Competition Law 4.0’.

However, the Commission agrees that competitive opportunities can depend on access to data. Property rights – whether for physical objects or intellectual property – usually encompass not only a right to exclude and rights of use and exploitation. Rather, legislation will typically also specify their limits. In the absence of legally specified data property rights, the question arises as to whether – and perhaps how – the *de facto* control of data can and should be restricted by law, and in what circumstances there is a need for specific access rights to data in order to protect competition and opportunities for third parties to innovate.

Obligations for companies to provide information to competitors or the market are primarily set out sector-specific regulations or regulations relating to specific objects. A variety of public registers (e.g. Commercial Register, Real Property Register) make specific types of informa-

83 Cf. e.g.: Zech, Information als Schutzgegenstand; Kerber, GRUR Int. 2016, 989; Wandtke, MMR 2017, 6; Determann, MMR 2018, 177; Denga, NJW 2018, 1371; Hoeren, MMR 2019, 5 et al.

84 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR).

85 Cf. Section 22 Art Copyright Act.

86 Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, implemented by the Act on the Protection of Commercial Secrets of 18 April 2019, Federal Law Gazette I p. 466.

87 Directive 96/9/EC of 11 March 1996 on the legal protection of databases. An evaluation of the directive was recently undertaken by the European Commission along with a public consultation and may result in future reforms; cf. European Commission, Synopsis Report on the Stakeholder Consultation to assess Directive 96/9/EC on the legal protection of databases, 2018, available at: <https://ec.europa.eu/digital-single-market/en/news/synopsis-report-public-consultation-evaluation-directive-969ec-legal-protection-databases>.

88 Cf. e.g. “Fresh Digital Start” working group of the Conference of the Justice Ministers of the Länder, report of 15 May 2017, available at https://www.justiz.nrw.de/JM/schwerpunkte/digitaler_neustart/zt_bericht_arbeitsgruppe/bericht_ag_dig_neustart.pdf, pp. 8 ff.; Kühling/Sackmann, Rechte an Daten: Regulierungsbedarf aus Sicht des Verbraucherschutzes?, legal expertise commissioned by the vzbv of 20 November 2018, available at https://www.vzbv.de/sites/default/files/downloads/2018/11/26/18-11-01_gutachten_kuehling-sackmann-rechte-an-daten.pdf; European Commission, SWD(2017)2 fin.; from academia: Kerber, GRUR Int. 2016, 989; Drexel, Designing Competitive Markets for Industrial Data: Between Propertisation and Access, Max-Planck Institute for Innovation and Competition Research Paper No. 16-13; *ibid.*, NZKart 2017, 339; Drexel/Hilty et al., GRUR Int. 2016, 914 – all opposed to the establishment of new data ownership rights. But cf.: Federal Ministry of Transport and Digital Infrastructure, “Eigentumsordnung” für Mobilitätsdaten?, 2017, p. 90: “Data have also become intellectual property so that it seems logical to recognise their increased significance by recognising a separate exclusive right for the investor.” For an experiment as to whether “absolute” ownership rights are more effective than “relative” rights – albeit not in the context of data – cf. Bar-Gill/Engel, Bargaining in the Absence of Property Rights: An Experiment, Preprints of the Max Planck Institute for Research on Collective Goods, 2015/19.

tion either publicly available or accessible to parties with a legitimate interest. In some respects, companies are obliged to furnish information to state authorities, which then aggregate the information and subsequently provide it to the public or all market players. One example is the Infrastructure Atlas in the field of broadband telecommunication regulation which is provided by the German Federal Network Agency (Bundesnetzagentur). Regulatory law in particular imposes a growing number of obligations on companies to provide information with the goal of enabling (rival) companies to compete. Many such obligations are limited to companies with a special market position, e.g. in the case of transparency obligations for transmission system operators in the energy sector. In accordance with the EU Transparency Regulation, the addressees must provide information about the availability of grids, the capacity of cross-border interconnectors, generation, demand and grid failures, so that market participants can take efficient decisions about generation, consumption and trading of energy. This is of particular importance in the phase of transition to highly intermittent renewable energy sources.⁸⁹ Such obligations to provide information only achieve their purpose if the “data holders” cooperate appropriately, the quality of the data is sufficiently high, and the data are processed properly. To ensure their effectiveness, obligations to provide information must be supplemented by appropriate incentive systems and control structures. For example, the implementation of the afore-mentioned transparency obligation for transmission system operators in Germany is supervised by the Market Transparency Office of the Federal Network Agency (Bundesnetzagentur) and the Federal Cartel Office (Bundeskartellamt). The obligations to provide information are limited by data protection rules and rules governing the protection of trade secrets. It must also be ensured that there is no privileged access to data, e.g. for the data aggregators, which harms competition.⁹⁰ The existing rules governing specific objects and sectors indicate the types of conflict of interest which can be expected when passing legislation on obligations to provide information.

2. Specifying data access obligations under competition law

Across sectors, obligations to grant access to data can follow from competition law. The legal basis for such an obligation may be the prohibition of abuse of dominance (Article 102 TFEU; Section 19 Act against Restraints of Competition) or of relative market power (Section 20 Act against Restraints of Competition). Whether and when these legal rules impose an obligation to provide access to data has been investigated for German law by the Market Power Study⁹¹ and for European law by the Special Advisers’ Report.⁹² We refer to these reports. In Germany, the introduction of a new rule on data access is currently being considered in the context of the 10th amendment of the Act against Restraints of Competition.

When discussing data access obligations of dominant companies, it is necessary to distinguish between different categories of cases. There is a broad public debate about the question as to whether certain companies with “data power” can or should be obliged to grant other companies access to their data in order to open up opportunities in the market search for data-driven innovation. In Germany, this concept is also being discussed under the heading of a “data for all” act. According to a proposal by the Social Democratic Party of Germany (SPD), dominant companies with a quasi-monopolistic position in the field of data-driven business models are to be required to provide non-personal data unchanged and personal data in anonymised form, via application programming interfaces (API) for specific fields of application stipulated by legislation.⁹³ Such proposals extend beyond current competition law. The specific details of such data sharing obligations are still unclear. The Commission ‘Competition Law 4.0’ shares the goal of promoting data access for decentralised data-driven innovation. However, the debate about a “data for all” act has not yet resulted in a concrete proposal. On the basis of the consultations and the hearings of stakeholders, the Commission ‘Competition Law 4.0’ rather finds that firstly, other

89 Commission Regulation (EU) No 543/2013 on submission and publication of data in electricity markets (EU Transparency Regulation), OJ L 163/1.

90 Cf. the discussion of the relationship between transmission system operators and distribution system operators in the field of energy information management, *Säcker*, *EnWZ* 2016, 294; fundamental arguments in *Günnewicht*, *Reguliertes Informationsmanagement in der Elektrizitätswirtschaft*, 2015.

91 Market Power Study (fn. 1), pp. 162-180.

92 Special Advisers’ Report (fn. 4), pp. 98-108. Cf. also *Schweitzer*, *GRUR* 2019, 569 ff.

93 SPD, *Digitaler Fortschritt durch ein Daten-für-alle-Gesetz*, discussion paper of Andrea Nahles, chair of the Social Democratic Party of Germany, available at https://www.spd.de/fileadmin/Dokumente/Sonstiges/Daten_fuer_Alle.pdf, p. 6.

approaches to improve data access should be explored and a better understanding of different interests and circumstances should be gained on the basis of sector-specific regulation before attempts can be made to design a broad horizontal rule.

Therefore, the Commission ‘Competition Law 4.0’ attaches greater practical importance to two other categories of cases in which an obligation to grant access to data might follow from competition law.⁹⁴ In the first scenario (Scenario 1), a company controls access to individual level data – i.e. the non-aggregated user data of a specific person or machine.⁹⁵ This might for example be a car or aircraft manufacturer which constantly receives all sorts of data from sensors built into the machine. Other companies wishing to supply add-on services to the operator of the machine or the user of a service require access to the individual user data in order to be able to adapt their services to the needs of the user. These may be traditional after-sales services like maintenance and repair, but may also be innovative complementary services. It is also possible that a company competing with the “data holder” on the primary market demands access, i.e. would like to offer the operator of a machine or user of a service an alternative product or service, but needs to know the usage patterns of this user in order to offer a competing service. Scenario 1 can cover situations in which there is competition on the primary market for the machine or the service, but likewise, it covers situations in which a company on the primary market has a dominant position.

In the second scenario (Scenario 2), companies desire access not only to the user data of a specific person or machine, but also to the aggregated user data of a large number of users or machines because this enables them e.g. to predict when a certain defect will emerge in a specific machine or what the needs of the users are likely to be. Again, the access to data can enable the provision of complementary services on a downstream market, or can enable entry to the primary market. As in the case of Scenario 1, Scenario 2 can occur both in a competitive and in a monopolistic primary market.

In both scenarios, whether a denial of access to data may represent an abuse of a dominant position will depend crucially on whether it would entirely exclude effective competition on and around the primary market or whether there is a risk of market power being transferred to adjacent markets in a way that is not justified in terms of competition on the merits.

Since a company will usually need to invest in the generation and storage of data, it is necessary to strike a balance between different interests as is done in the essential facilities doctrine which is traditionally used in German and European competition law to scrutinise cases of full denial of access to key input factors: the rights to use one’s facilities and goods only for the benefit of one’s own commercial activities and freely select one’s trading partners, and hence to fully appropriate the profits resulting from one’s own investment decisions, creates incentives for companies to invest, and thus fosters competition in the longer term.⁹⁶ Access obligations tend to create follow-up problems for the solution of which the institutional set-up of competition law enforcement has not been made. In particular, it will frequently be necessary to impose and possibly regularly update detailed rules on access conditions and prices. These need to take account of the costs and riskiness of the investment of the company subjected to the obligation. Consequently, access requirements push competition law to the verge of regulation.⁹⁷ Nevertheless, where the contestability of monopoly positions depends on access obligations being imposed, such obligations may be justified. These general considerations that have informed the “essential facilities” doctrine in its more traditional form also apply to access to data. However, compared with “traditional” input factors, data have some special features which must be taken into account when balancing the concerned interests.⁹⁸

When applying the prohibition of an abuse of dominance to denials of access to data, it is first necessary to establish whether a dominant position actually exists. Such a position can, but does not necessarily, derive from the exclusive control of the data. The control of the data can also be

94 Cf. in this regard also *Schweitzer*, GRUR 2019, 569, 572 f.

95 For a listing of the types of data which may arise in the case of in-car data, cf. e.g. *Metzger*, GRUR 2019, 129, 130.

96 Cf. *GA Jacobs*, Opinions, ECLI:EU:C:1998:264 para. 56 – *Bronner*.

97 Cf. *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, Section 19 para 53.

98 For more details: *Schweitzer*, GRUR 2019, 569, 577 ff.

the consequence of a market position established by other means. However, in the new data economy, more and more cases are emerging in which – irrespective of competition which initially exists on the primary market for a product or a service – the longer-term use of a product or service leads to a situation in which users cannot switch products or services without incurring prohibitive costs. These costs derive from the ongoing, data-driven customisation of the product or service to individual needs. When in such a situation the remaining competition for new customers on the primary market has no disciplining effect on the relationship between the provider and its existing customers, a situation can arise in which effective competition can only be ensured by giving customers the ability to port their data to other providers. If competition is to be facilitated on adjacent markets, real-time access to data can be indispensable.

An obligation to grant data access may also follow from competition law in Scenario 2 if competition on the primary market or on secondary markets is only possible on the basis of an evaluation of data usage profiles of a large number of customers. In such cases, one possibility might be a direct entitlement for third party providers to have access to aggregated and anonymised data stocks held by the dominant company.

The Commission ‘Competition Law 4.0’ takes the view that data access denials can be dealt with under competition law as it stands, although there may be a need for further sector-specific regulation. However, there are three major issues for the application of Article 102 TFEU and Sections 19 and 20 of the Act against Restraints of Competition to cases of data access denial. First, the application of these principles to individual case types necessitates detailed knowledge of the market and competitive landscape in the various sectors and thus takes time and resources. Second, where violations of data access obligations are identified, it will be necessary to develop detailed technical specifications and the stipulation of remuneration that both protects incentives to invest and allows competition to evolve. Moreover, it might be indispensable to introduce an independent monitoring mechanism. Third, a set of rules must be maintained for adapting data access conditions to changing market and competition conditions. These aspects suggest that, in sectors with entrenched market positions in which a widespread denial of access to data results in structural competition problems, a general regulatory regime for data access is called for, e.g. in the form of an EU regulation.

Section V.3 below addresses the establishment of such a regime.

3. Ensuring that consumers can self-determine the handling of their data

The question of when denial of access to data constitutes an abuse of a dominant position raises complex issues which require the examination of individual cases. If access to data becomes a systemic problem in a certain competitive environment, competition law may be unable to address this.

Where access to personal data is involved, attention must be paid to the strong position of the data subjects in terms of data protection rules; in particular, the granting of access will normally require the approval of the data subjects. This raises the question of whether competition-related questions regarding access to data might be avoided by strengthening the control of the data subjects of “their” data when and because rivals to a dominant company thereby obtain an alternative access option. Strengthening the consumers’ control of “their” data can thereby become an important element of competition policy.

The Commission ‘Competition Law 4.0’ recommends to strengthen consumer rights in three ways: (1) strengthening consumer rights to data portability, particularly vis-à-vis dominant companies; (2) establishing data access regimes on a sector-specific and selective basis which enable consumers to give third parties access to their user accounts; (3) examining whether and under what circumstances the establishment of new “data trustees” – i.e. institutions which enforce data usage preferences on behalf of consumers both individually and collectively and also offer pooled access for companies to such data for the purposes to which the consumers have agreed – can enhance both the ability of consumers to determine how “their” data are processed and strengthen competition and the possibilities for data-driven innovation.

The concepts of data portability, data access and interoperability are crucial for effectively protecting the rights of consumers regarding the personal data stored by their service providers. The Commission ‘Competition Law 4.0’ understands these terms as follows: *Data portability* or data transferability means the right of data subjects to obtain their personal data held by a provider in digital form and

in such a way that they can be forwarded to another provider for further processing. Data portability can also be implemented in such a way that the other provider directly obtains the data on behalf of the data subjects. *Access to data* stands for the ability of third parties to access the data held by a provider. Here, access should be understood to mean direct access, i.e. the latest data can be accessed real-time. *Interoperability* means the ability of various IT systems to work together as seamlessly as possible and without losses. An effective strengthening of the consumers' control over their personal data requires interoperable data formats, i.e. syntactic and semantic standards which ensure that data from one system can be further processed by another system without a loss of data and meaning.

a. Boosting data portability

In 2015, the average internet user had 90 user accounts; this figure is set to rise to 200 by 2020.⁹⁹ Each of these user accounts contains information about transactions, as well as searches, browsing of offers, etc. – data which the users themselves are generally no longer aware of. If the user profile created in this way is used to customise services to the user's preferences, this results in an increasing bond between the individual and the respective provider. To the extent that each individual is enabled both in law and in practice to access the data from his or her user account and possibly to provide them to third parties, the costs of a switch or a parallel use of several providers (multi-homing) diminish, as does the lock-in effect, and the freedom of economic choice increases. This also applies to the use of complementary services.

In order to prevent this lock-in effect¹⁰⁰, the EU General Data Protection Regulation (GDPR) grants the data subjects affected by data processing a “right to data portability”:

the data subject can demand from a data processor that it hands over his or her personal data in machine-readable form and, in certain circumstances, that it transfers the data to another data processor. The approach to the right to data portability in the GDPR is primarily oriented to a transmission of personal data in the course of changing providers. In addition to this, it can also facilitate the input of data during the (first) additional use of other data providers whilst the original provider continues to be used (multi-homing). In contrast, the present version of Article 20 GDPR is not designed to cover ongoing real-time transfers of data to providers of complementary services.

Central aspects relating to the design of data portability still remain open. Firstly, it is unclear what data are covered by Article 20 GDPR. According to the wording, the right to data portability only refers to data which the data subject has “provided” to the processor. The meaning of this phrase is controversial. While data protection officers assume that this includes all the data which a processor actively receives on the basis of an agreement by the data subject or a contract with the data subject or records by monitoring the data subject (e.g. user behaviour),¹⁰¹ others believe that it does not cover data about user behaviour.¹⁰² There is however agreement that data which can be assigned to a data subject but which have been collected or generated by the processor without any involvement of the data subject, e.g. via the transfer to third parties or in-house calculations or processing (e.g. scoring), are not covered by the right to data portability.¹⁰³

Also, the scope of the right to data portability is contentious. According to Article 20(4) GDPR, this right must not adversely affect the rights and freedoms of third parties. Questions arise when the personal data of a data subject are linked with others' personal data.¹⁰⁴ Social networks in particular have such strong linkages (“likes”) that a strict inter-

99 Schallbruch, Schwacher Staat im Netz, Wiesbaden 2018, p. 2.

100 Cf. Dix in Simitis/Hornung/Spieker, Datenschutzrecht, para. 1 regarding Art. 20 GDPR; Veil in Gierschmann et al., Kommentar DSGVO, Art. 20, para. 3.

101 Data Protection Working Party, Guidelines on the Right to Data Portability, WP 242rev.01 of 5 April 2017, pp. 9f.

102 E.g. Veil in Gierschmann et al., Kommentar DSGVO, Art. 20, paras. 97 ff. Cf. also Richter, PinG 2017, 231; Piltz in Gola, Art 20 para. 14; Westphal/Wichtermann, ZD 2019, 191, 192: “provided” data within meaning of Article 20 GDPR are only data which have been actively and knowingly transferred by the data subject. Middle position in Strubel, ZD 2017, 355, 358 ff.

103 Loc. cit, paras. 92 f. also e.g. Dix in Simitis/Hornung/Spiecker under the name of Döhmman, Datenschutzrecht, para. 8 regarding Art. 20 GDPR.

104 This means that it is contentious whether data referring to third parties are covered by the right to data portability (in favour e.g. Herbst in Kühling/Buchner, DSGVO Art. 20 para. 3; Schantz, NJW 2016, 1841, 1845; against e.g. Jülich/Röttgen/v. Schönfeld, ZD 2016, 358, 359; Piltz in Gola, Art. 20 GDPR para. 36).

pretation of Article 20(4) GDPR would render data portability impossible, because it is impossible in practice for the processor to separate the data of different people in such cases.¹⁰⁵ The question of how to resolve these conflicting objectives remains open. Whilst the data protection officers advocate a generous transfer of data, including those of third parties, with the new data processor “inheriting” the responsibility for the separate treatment of these third party data, others believe that the data subject is responsible for preventing the data of third parties obtained through the right to data portability from being forwarded to other processors.¹⁰⁶

Article 20 GDPR shapes the right to data portability as a right to transfer data that has been provided or stored up to the time of the application for data transfer. A renewed application is required for each update. The Article does not provide for an ongoing request by the data subject to be informed or for another processor to be informed whenever the data are updated or supplemented. Nor does Article 20 GDPR give providers of competing or complementary products permanent access (possibly in real time).¹⁰⁷

Another practical difficulty is the rudimentary definition of the technical format by the GDPR. The data must be provided in a structured, commonly used and machine-readable format. This includes formats which make further processing much more difficult, even virtually impossible, e.g. the production of database contents in the form of PDFs or other document formats. The development of interoperable formats by the providers is merely mentioned in the recitals of the GDPR as an appeal, not as an obligation.¹⁰⁸ The idea of authorising the European Commission to define technical standards, modalities and procedures, as was considered during the legislative process, was not taken up.¹⁰⁹ Furthermore, Article 20(2) GDPR makes data portability in the form of a direct transfer to another provider subject to the unspecified reservation of “technical feasibility”.¹¹⁰

Basically, whilst the right to data portability in the GDPR is an instrument to strengthen the position of the data subject, it still needs to be further refined and developed. The significance of the right to data portability as an instrument to open up and maintain options for the data subject on complementary product and services markets is restricted by the lack of clarity about the scope and in particular by the lack of a right to real-time access and interoperability. A modification of Article 20 GDPR into a right for data subjects to real-time transfers of their data and the establishment of interoperability with data providers designated by them would however encounter significant competition policy concerns: a general obligation for data processors to provide data in real time and to establish interoperability with rival companies and/or providers of complementary services could significantly increase the market entry costs for smaller providers. Also, an exclusive packaging of different services and a longer-term lock-in of customers can generate investment incentives and opportunities for providers. In the case of a “strong” right to data portability as a right to real-time data transferal and interoperability, dominant companies with an intensive level of customer loyalty which benefit from network effects and economies of scope (e.g. the platform companies) could quickly displace smaller competitors. Customers might find it attractive to transfer their data from rarely used user accounts with small companies to large platform providers in order to manage as much information as possible in one place.

The Commission ‘Competition Law 4.0’ therefore advocates a strengthening of user rights to data portability vis-à-vis dominant companies, e.g. via an obligation to use interoperable data formats and to deliver real-time access to data. Chapter VI proposes a corresponding special rule for dominant platform operators. This proposal is driven by a competition policy goal; yet, this goal is achieved by strengthening the rights of data subjects to access and transfer their data.

105 *Veil* in Gierschmann et al., *Kommentar DSGVO*, Art. 20, paras. 97 ff.

106 Compare the contrast made in *Veil* in Gierschmann et al., *Kommentar DSGVO*, Art. 20, paras. 128 ff.

107 Cf. e.g. *Spiecker gen. Döhmann*, GRUR 2019, 341 (348).

108 *Hennemann*, PinG 2017, 5 (7).

109 *Veil* in Gierschmann et al., *Kommentar DSGVO*, Art. 20, para. 110.

110 Regarding the argument about the requirements to be imposed on the interoperability of the data format, see the summary in *von Lewinski*, BeckOK DatenschutzR, Art. 20 DSGVO paras. 68 ff.; also *Schätzle*, PinG 2016, 71, 74.

Such a reinforced right to data access and portability need not automatically be restricted to dominant companies; it could be extended to other companies via sectoral regulation. Conversely, an enhanced data portability obligation does not have to apply to all dominant companies across the board, irrespective of an impact analysis based on the specific market context. The type of data access needed to protect effective competition on a core market or adjacent markets can vary in different contexts. Also, the justifications for a restriction of data access can vary from one sector to another. Against this background, it would be feasible to have sectoral regulations which, taking into account the respective conditions of the sector, establish broader data access (cf. III.2 below), either for competitors or for providers of complementary products and services.

b. Third party access to data accounts

The European legislature has opened possibilities for a much further-reaching third party access to the data of a data subject in the field of payment services: in the Second Payment Services Directive¹¹¹, novel “third-party payment service providers” are given the possibility to access a consumer’s payment accounts on the basis of a corresponding contract with the consumer. These third-party payment service providers are firstly payment initiation services which a customer can use to make a payment charged against his/her (bank) account. These include fintechs like e.g. *sofortueberweisung.de*, but also large companies like PayPal. Secondly, account information service providers fall under this category; these offer, for example, apps which enable customers to pool and manage the transactions on their various accounts at different banks in one place. Banks have to open up their core banking systems to permit the providers access to the customer’s account. But they can also make use of the new rights themselves and, for example, offer their customers the possibility to include an account run by a rival company in their own app. These data access rules have been an important instrument for opening up a specific market.¹¹²

Access to people’s user accounts raises security and data protection issues. In the field of payment services, these

are addressed in that a company wishing to provide such payment initiation services or account information services must be approved by or registered with the Federal Financial Supervisory Authority pursuant to the Payment Services Supervision Act. A key requirement for permission to be granted for access to customer account data is strong customer authentication. For certain payment procedures and data, but at least every 90 days, the customer must identify him- or herself to the payment service provider using a 2-factor authentication procedure; username and password are insufficient: instead a smart card, token or smartphone is also required.

The opening up of bank accounts to third-party access at the customer’s request exceeds the right to data portability as set out in Article 20 GDPR. It enables competitors or downstream service providers to integrate customer data collected by another company directly and immediately into their own services (as in the case of account information services) or even to broker transactions (as in the case of payment initiation services). The right to access extends to all banks – not just dominant banks. Conceptually, its legal basis cannot be found in the prohibition of the abuse of dominant positions (Article 102 TFEU). However, the cost of switching accounts has traditionally been high for bank customers compared with the costs borne by their banks. The ensuing lock-in effects which may allow an established service provider to leverage his position to a secondary market (aftermarket) are broken up by the Second Payment Services Directive. Furthermore, the establishment of far-reaching rights to data access promotes innovation in the field of financial services and business models. The beneficial effects on competition and innovation are triggered by enhanced customer choices: customers can decide to transfer their data from an existing relationship to a competing service provider or to use existing providers along with new providers (multi-homing).

The approach taken by the Second Payment Services Directive to opening up user accounts can in principle be translated to other markets characterised by long-term contractual relationships where an existing provider’s exclusive control of user accounts results in high costs for switching accounts and, subsequently, in entrenched market struc-

111 Directive (EU) 2015/2366, implemented by the Act Implementing the Second Payment Services Directive of 17 July 2017 and the Payment Services Supervision Act contained in it, Federal Law Gazette I p. 2446.

112 In detail *Elteste*, CR 2018, 98.

tures. In the digital environment, this can particularly be the case when user accounts which have existed for a lengthy period and have been the basis of a high and regular number of transactions permit insights into user behaviour and customer preferences, and only by strengthening the customer's control of this information is it possible to create opportunities for follow-up innovations and competition. Such circumstances with a high lock-in potential might exist in relation to energy, telecoms, mobility or eCommerce providers. In future, they may also become more prevalent in the IoT context. In such circumstances, it is necessary to examine on a sector-specific basis whether the existing provider's control of a user account significantly reduces the degree of contestability and/or allows for a leveraging of a dominant position to adjacent product or services markets. A strengthening of the customers' control over access to their user accounts can offer a means of breaking up entrenched market structures and permitting the evolution of innovative services.

However, if deployed in the wrong place, the instrument of opening up user accounts can also reduce competition. In markets with well-functioning competition – which can include competition between different system providers and between open and closed systems¹¹³ – the opening up of user accounts can result in the disclosure of sensitive commercial information to competitors. Also, it can make it easier for large, possibly dominant companies operating across different markets to extend the customer relationship built up on a core market to other markets. In some circumstances, the exclusive control of a customer account in the context of a longer-term contractual relationship is the factor that enables a non-dominant company to undertake the necessary investment in an attractive service. For this reason, requiring companies to open up user accounts will only be justified in those markets where competition is permanently affected due to exclusive control of user accounts, such that companies can avoid the disciplining effect of competition to a substantial degree or extend dominant positions to secondary markets.

It is feasible that, in certain markets, sectoral regulation may require only dominant companies to open up user accounts for third-party providers.

What is to be understood by a user account and what type and degree of data access is to be required will need to be defined on a sector-specific basis.

Furthermore, the way in which the rights of third parties must be taken into account, e.g. with a view to the GDPR requirements, will need to be specified on a sectoral basis. As in the case of the Second Payment Services Directive, it will also be necessary to stipulate requirements for technical implementation like customer authentication or interoperability. It may be necessary to involve the relevant market participants in the drawing up of standards.

In view of the growing significance that control over customer accounts may have as companies aim to gain market power – particularly in the context of IoT – the Commission 'Competition Law 4.0' believes it is necessary to formulate general principles for the opening up of user accounts in a cross-sectoral regulatory framework. This framework should define the preconditions – generally derived from competition law – for a mandated opening up of user accounts, and should also define key principles and methods for their opening. The European Commission could be authorised to flesh out the principles set out in such a framework directive on a sector-specific basis. This could permit more rapid intervention where market structures are becoming entrenched.

Recommendation 4:

The Commission 'Competition Law 4.0' recommends the **formulation of cross-market competition-based principles in a framework directive** based on Art. 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 authorised to enact sector-specific regulations to flesh out these rules.

113 Cf. in this regard Autorité de la Concurrence/CMA, The economics of open and closed systems, 16 December 2014, pp. 16 ff.

c. Establishing new data trustees

A further option to strengthen competition in a data-driven competitive environment is the strengthening of the possibilities for data subjects to provide their data to chosen data trustees which then organise third party data access on behalf of the data subjects.

According to the GDPR, the data subjects' consent to data processing is a key factor justifying such processing (cf. Article 6(1)(a) GDPR). This does not answer the question of whether and when such consent is sufficiently informed and voluntary¹¹⁴, nor does it solve the well-known problems of the rational apathy of data subjects when consenting to what frequently will be complex data processing policies and the lack of power on the part of the individual to negotiate with companies, the attractiveness of which may derive from strong positive network effects (cf. Chapter II above). The policy call for enhanced data portability and the opening up of user accounts may require an even greater effort from the individual in considering different data protection policies. In view of the high average number of online accounts per user described above, the procedure of individual case-by-case consent by customers as an instrument of digital self-determination faces practical limitations.¹¹⁵

As a consequence, there is often a lack of effective competition between providers of digital services to offer data processing policies which correspond to user preferences. It is true that there are already Personal Information Management Systems (PIMS) with very different functionalities,¹¹⁶ also termed Personal Data Stores (PDS) or Personal Data Banks (PDB); these are intended to enable data subjects to gain an overview of different services and providers showing what data are stored where, and to make it easier for

them to define their data protection preferences across different services. However, these services have yet to become widely used.¹¹⁷

Even if greater use is made of them, these initiatives on their own will not be able to resolve a further problem: from the point of view of companies which are interested in obtaining sizable quantities of data – e.g. in order to develop self-learning algorithms – there is no instrument permitting an offer to be made jointly to a large number of data subjects for the use of their data under certain conditions. Conversely, the data subjects lack an instrument to communicate a decision to simultaneously approve the transfer or processing of data to a multiple number of providers, e.g. the decision to offer their data under certain conditions for the purpose of health research or for product innovation. Even though the GDPR creates in principle an additional data access point by empowering the data subjects to control their own data, the possibilities to use it thus remain limited. This strengthens the competitive advantages enjoyed by digital companies holding large quantities of data in the field of data-driven innovation.

The development of a new form of data trustee could fundamentally change this situation. This new form of data intermediary could act in the interest of and on behalf of the data subjects, with significantly greater negotiating power with digital service providers about data protection policies, and could help the data subjects to assert data protection rights. Also, it could provide pooled access to data of the data subjects in line with the conditions imposed by the data subjects.

Different data trustee concepts are already being discussed.¹¹⁸ However, they require further refinement and debate.¹¹⁹ Existing PIMS and data protection management

114 Cf. Art. 4 no. 11 GDPR regarding these requirements.

115 Cf. Aretz, DuD 2019, 13.

116 A list can be found in Jentzsch, Die persönliche Datenökonomie: Plattformen, Datentresore und persönliche Clouds. Gutachten. Deutsches Institut für Wirtschaftsforschung (DIW), p. 37, Annex 2 of the study Neue Wege bei der Einwilligung im Datenschutz. Study. Leipzig 2017. Available at https://stiftungdatenschutz.org/fileadmin/Redaktion/Bilder/Abschluss_Studie_30032017/stiftungdatenschutz_broschuere_20170611_01.pdf (accessed on 30 July 2019).

117 In the 9/2016 comments, the European Data Protection Supervisor recommended study into how data subjects can be encouraged to make more widespread use of such services. European Data Protection Supervisor, Opinion on Personal Information Management Systems, available at https://edps.europa.eu/sites/edp/files/publication/16-10-20_pims_opinion_en.pdf (accessed on 30 July 2019).

118 Cf. in detail Stiftung Datenschutz, Neue Wege bei der Einwilligung im Datenschutz. Study. Leipzig 2017. Available at https://stiftungdatenschutz.org/fileadmin/Redaktion/Bilder/Abschluss_Studie_30032017/stiftungdatenschutz_broschuere_20170611_01.pdf (accessed on 16 May 2019); cf. also Fezer, Dateneigentum. Study for the Konrad Adenauer Foundation, St. Augustin/Berlin 2018, especially pp. 77 ff.

119 Cf. in this context e.g. the Stigler Report (Fn. 5), pp. 8, 33, 89.

services can develop into some sort of data trustee. In view of their central position in assuming the rights of data subjects under data protection law, data trustees will have to be subject to an appropriate legal framework. In order to avoid the emergence of new dominant positions and to ensure that they remain appropriately committed to the various preferences of the data subjects, it would be necessary to safeguard competition between data trustees.¹²⁰

Recommendation 5:

The Commission ‘Competition Law 4.0’ recommends **studying** the feasibility of **the establishment of data trustees** and examining various possible 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.

4. Improving access to public data

a. Improving the provision of data by the public sector

Public institutions already hold considerable data stocks which are appropriate for purposes of product, service and business model innovation. This is true for example for mobility data, health data, environmental data and official statistics. As digitisation progresses, the stocks of data will grow further.

The G8 states committed themselves in the Open Data Charter of 2013 to provide public-sector data in a standardised form in open data formats.¹²¹ However, there is no uniform legal framework governing access to public data. Germany’s federal-level Open Data Act¹²², which entered into force in 2018, only applies to the federal administration and does not offer any subjective legal claim to data access. The reference to Sections 3 to 6 of the Freedom of Information Act also gives the authorities far-reaching possibilities to refuse disclosure on the basis of public interests like national security, third-party confidentiality, or data protection rights.

The new Directive (EU) 2019/1024 on open data and the re-use of public sector information (PSI Directive - OJ 2019 No L 172/56) extends the existing rules and obligations for data transfer to include public-sector companies. The aim of the PSI Directive is that data held by the public sector which are already publicly accessible under national law can in principle be made available for further use, including commercial use. In addition, there are various sector-specific rules, many of them on the basis of European law like the INSPIRE Directive for geodata.

Many public institutions are currently setting up data infrastructures to provide public data or to permit companies to share data (e.g. mCloud of the Federal Ministry of Transport and Digital Infrastructure).

Irrespective of the new legal provisions and efforts, the Commission ‘Competition Law 4.0’ finds that availability of public sector data remains inadequate. Many of the newly established data infrastructures are only sectoral or standardised only at the level of a public body (e.g. platforms for mobility services). This is due to

- the fragmentation of the data stocks (in the federal system and between different parts of the administration),
- a lack of standardised data formats and interface formats,
- a legally too limited order to provide data (e.g. for data stocks of the statistical offices),
- a lack of resources in the various authorities to tackle the task of providing data,
- a lack of solutions for use and transfer of data in line with data protection law, and
- the authorities’ concern that too much transparency will impede their own work or result in a restructuring of sporadic state supervision into comprehensive control and detailed steering.

¹²⁰ Regarding risks of consolidation of power, cf. Stigler Report (Fn. 5), p. 89.

¹²¹ Available at: <https://www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex> (last accessed on: 4 August 2019).

¹²² Cf. Richter, NVwZ 2017, 1408.

If sensible commercial use is to be made of the data held by the public sector, the data need to be appropriately structured and data formats need to be standardised and interoperable. The development and promotion of interoperability standards can substantially foster the actual use of data. Where public institutions offer data platforms, they should be obliged to structure the data and to use standardised data formats. This would have to be stipulated at European and national level. Furthermore, existing EU law should be screened to ascertain where EU rules stipulate data sharing and data provision, and whether open interoperability standards could be required or made possible in each case. The EU should expand its investment into support for the standardisation of data sharing formats. These include further-reaching technical and organisational models for anonymisation and pseudonymisation of personal data and the use of personal data in line with data protection rules.

Recommendation 6:

The Commission 'Competition Law 4.0' recommends **developing further open data legislation stipulating, both at European level and at Member State level, that all public institutions must provide structured data via standardised 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 Institute¹²³ could serve as a model.

b. Increasing the benefits from public-sector data

The growing volume of data in all areas of economic life also opens up new possibilities for their use for public purposes or purposes related to or fostering the common good. These include, for example, state planning processes: mobility data can be used to improve traffic planning and

the availability of multimodal transport services; consumption and generation data can help to improve planning and distribution in the field of energy supply; health data can improve health planning and the availability of holistic health services.

Fostering the common good also includes the use of data for the purposes of science and research. Data analysis offers considerable potential for beneficial innovation.

Also, public sector data are a significant factor for commercial innovation – which can likewise benefit the public. In fields of application like the smart city, healthcare, energy and mobility, many data are generated under the responsibility of the state or publicly controlled services. If companies had the possibility to make market-based use of these data, this would boost their innovative capacities and competitiveness and could – at least indirectly – also generate significant benefits for consumers and the public (e.g. in the field of environmental protection).

It should be of great interest to the public sector to ensure that the benefit that can be generated from “its” data can actually be realised. Here, the public sector should make use of the possibilities available to it to also open up data for the common good and for market participants which are generated via the use of private companies to fulfil public tasks. Where Member States entrust companies with the provision of public services, grant them privileged access to scarce resources (e.g. in the awarding of a limited number of concessions) or award 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 trade and business secrets for use by the public sector. In the context of open data legislation and the balancing of interests it requires, this may also permit the data to be passed on to third parties.

In order to actually realise the benefits of data collection, storage and forwarding which are directly or indirectly the responsibility of the state, a data strategy should be stipulated both at European and at German level regarding what data are collected and provided under what conditions

123 A description of the fields of activity can be found in the annual reports, e.g. the 6th report for 2018, available at <https://theodi.org/wp-content/uploads/2019/03/ODI-2018-Annual-Report-High-2019-03-07.pdf> (accessed on: 30 July 2019); regarding the tasks of such a service body cf. also *Technologiestiftung Berlin*, Open Data in der Berliner Verwaltung. Report. Berlin 2018, pp. 44 ff., available at https://www.technologiestiftung-berlin.de/fileadmin/user_upload/Open_Data_in-der-Verwaltung_WEB.pdf (most recently accessed on 30 July 2019).

and in what form within the responsibility of the public sector. Here, consideration should also be given to why in some cases data which are generated in a public context are aggregated and provided by private service providers in a better quality than is done by the public sector (e.g. Google Maps or HERE for maps, INRIX for mobility services, Google Books for digitised books, etc.). The guiding principle for the data strategy should be access, also for companies, to data from the public sector and public services which is as comprehensive and high-quality as possible. Restrictions – particularly relating to the protection of personal data, the protection of business secrets and interests of national security – should be kept as small as necessary.

Data generation and use is typically characterised by sectoral features. The commercial, political and regulatory framework for data use varies from sector to sector and is closely related to the market regime in the respective sector. For this reason, the specific strategy for collecting, processing and accessing data should primarily be stipulated on a sectoral basis. This also means that it should be ensured on a sectoral basis that all the data which are generated in connection with the fulfilment of state tasks, public services entrusted to private companies, or in the course of performance of public contracts, are made available to the public sector in such a way that they can be used both for public purposes and by market participants unless this is ruled out by public interests.

In addition to the use of sectoral data, new business models are also increasingly arising from the linking of sectors. This increases the demand for cross-sectoral data access and horizontal rules, e.g. for interoperability standards, standards for the technical interconnection of systems, safety and security requirements, data protection rules, certification procedures, requirements for trusted platforms, etc., which can address a cross-sectoral strategy and serve as a framework.

Recommendation 7:

The Commission ‘Competition Law 4.0’ recommends 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 8:

The Commission ‘Competition Law 4.0’ recommends 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 concessions, 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 trade and business secrets for use by the public sector **in line with uniform criteria for use and – in the context of open data legislation – access by third parties**.

VI. Clear rules of conduct for dominant platforms

1. Entrenched market positions of platforms call for new rules

In addition to the structural changes associated with the new data economy, digital platforms and networks are central components of the digital economy, with platforms increasingly being used as intermediaries for the sale of products and services.

The economic characteristics of the platform economy have already been described in Chapter II. Two aspects pose particular challenges to competition law: the concentration tendencies that result from strong positive network effects, which at the same time make it more difficult to contest a position of power once it has been attained (1.); and the control of competition on the platform (and potentially on neighbouring markets) that a platform gains (so-called ‘gatekeeper’ function, see 2. below). From both points of view, non-intervention by competition authorities or their failure to take timely action against abusive behaviour come at a very high price. More recently, competition authorities have intervened against abuses by dominant platforms in various settings, identifying behaviour with potential foreclosure effects. These procedures can be taken as a basis for developing presumptions that will enable faster intervention in the future (3.).

a. Concentration tendencies on platform markets

Positive network effects lead to concentration tendencies on platform markets (see Chapter II above). They may lead to or strengthen an existing dominant position. Since a large number of users and matching options are often what make platforms attractive, concentrating on one or a few platforms can be efficient.¹²⁴ However, positive network effects can also lead to high barriers to market entry.¹²⁵ Once a dominant position has been attained, it can

quickly become entrenched, making it almost impossible for (potential) competitors to attack. This is referred to as ‘tipping’, i.e. when an initially competitive market tips into a monopolistic or highly concentrated market.¹²⁶

b. Platforms as ‘gatekeepers’ and regulators

Platforms are often referred to as ‘gatekeepers of the internet’.¹²⁷ The stronger the position of the platforms in providing information and in sales, the more suppliers of goods or services depend on the intermediation services of certain platforms for access to the other side of the market. The growing economic importance of platforms as intermediaries may lead to new forms of dependency, and especially the dependency of product and service providers on platforms.

One common strategy of platform providers is to enhance their intermediation services with additional functionalities and to bundle these with the intermediation service – for instance, voice control, SmartHome connectivity, payment services, cloud storage, etc. If the platform operator is dominant in the intermediation market, this can lead to a transfer of market power to neighbouring markets, especially if there are no open interfaces for competing providers.

Irrespective of their position as ‘gatekeepers’, platforms start out as regulators.¹²⁸ Platforms can use general terms and conditions as well as technical arrangements to determine the terms of interaction on the platform. The ranking parameters and the platform design, together with its rating and recommendation systems, influence selection decisions on the demand side and steer competition on the platform. In principle, there is no reason to object to this regulatory role of platforms. It is in fact inherent in a business model that creates new space for interaction. However, as soon as the regulatory function of platforms coincides with a dominant position or a particular dependence

124 Monopolies Commission, Sondergutachten 68, loc.cit., para. 43

125 Monopolies Commission, Biennial Report XXII: Competition 2018, 2018, paras. 730 f. In addition, it is easier for digital companies to transfer their market power from one market to neighbouring markets. This is because an existing user group will often jointly make use of any additional offer from the same company rather than switching to a competitor. However, this is not a platform-specific problem, but a problem of the digital economy as a whole.

126 However, this kind of development is by no means inevitable on platform markets either. Much depends here on how simple and meaningful it is to change to another platform (‘switching’) or to use several platforms parallel (‘multi-homing’) on the same market; cf. Market Power Study (fn. 1), p. 21.

127 Cf. e.g. Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM/2018/238 final – 2018/0112 (COD), 26 April 2018, p. 1; Monopolies Commission, Sondergutachten 68, loc. cit., para. 43; Market Power Study (fn. 1), p. 17.

128 Cf. also the Special Advisers’ Report (fn. 4), pp. 55 ff.

of one or more market sides on the platform, market power brings with it a particular responsibility to ensure undistorted competition both on the platform¹²⁹ and on neighbouring markets.

Wrong incentives for a dominant platform, i.e. incentives for systematic self-preferencing in competition on the platform and/or incentives to transfer existing market power to neighbouring markets based on practices that are not “competition on the merits”, can especially be expected from so-called hybrid platforms whose operators are simultaneously users of the platform.

c. High price of non-intervention or late intervention against abuse of power

Once a platform has attained a dominant position and benefits from large-scale positive network effects, this position of power becomes difficult to contest. The combination of dominance on the platform market with a gatekeeper position and rule-setting power gives rise to the risk of distorted competition on the platform and the expansion of market power from the platform market to neighbouring markets. In view of the strong steering effect that platforms can exert on their users’ behaviour, the often rapid pace of development on digital markets and the importance of first-mover benefits, non-intervention or late intervention against abusive behaviour typically comes at a very high price.

In the recent past, both the European Commission and Germany’s Bundeskartellamt have repeatedly taken action

against abuses of dominant positions of digital platforms. At EU level, the European Commission’s three prohibition decisions against Google deserve special mention.¹³⁰ On 17 July 2019, the European Commission initiated proceedings against Amazon:¹³¹ it is investigating the allegation that Amazon uses competition-sensitive data obtained from marketplace sellers via Amazon Marketplace for its own sales activities on the marketplace.¹³² The European Commission’s decision against Microsoft¹³³ which was confirmed by the European Court of Justice in its judgment of 17 July 2007¹³⁴ is another – early – precedent. The Bundeskartellamt’s abuse proceedings against Facebook¹³⁵ (based on the provisions of the German Act against Restraints on Competition¹³⁶) also triggered discussions at European level. The Bundeskartellamt closed abuse proceedings against Amazon, subject to commitments given by Amazon, at the same time as the European Commission opened proceedings.¹³⁷

The list of proceedings – to which other proceedings by national competition authorities could be added – provides an insight into the types of behaviour that can be expected by dominant digital platforms and of the distortive effects on competition that can be associated with them. In particular, in the case of practices that are normally not accompanied by clear efficiency gains for platform users and where there is a risk of distorted competition, the existing precedents can thus provide a basis for developing general rules of conduct for dominant platforms, which should, however, remain subject to justification. Such prohibitions with exceptions are especially justified if late intervention is likely to lead to the foreclosure of competitors that would be impossible or very difficult to reverse.

129 Cf. the Special Advisers’ Report (fn. 4), pp. 55 ff. Cf. also – tending to go further – Bundeskartellamt, Case Report of 17 July 2019, B2-88/18 – *Amazon commitments*.

130 European Commission, Decision of 20 March 2019, AT.40411 – *Google Search (AdSense)*; Decision of 18 July 2018, AT.40099 – *Google Android*; Decision of 27 June 2017, AT.39740 – *Google Search (Shopping)*. Cf. also the overview – albeit with a focus on market definition and not limited to cases of abuse – of European Commission proceedings concerning platforms at *Franck/Peitz*, *Market Definition and Market Power in the Platform Economy*, May 2019, pp. 19 f. available at <https://www.cerre.eu/publications/market-definition-and-market-power-platform-economy> (last accessed on 3 September 2019).

131 European Commission, case AT.40462 – *Amazon Marketplace*, cf. press release of 17 July 2019, available at https://europa.eu/rapid/press-release_IP-19-4291_en.htm. (last accessed on 3 September 2019).

132 The European Commission is investigating both the standard agreements between Amazon and marketplace retailers with a view to a breach of Art. 101 TFEU and the question as to whether Amazon abuses competition-sensitive data in order to select sellers who are placed on product pages in the Amazon Marketplace in a particularly prominent manner (in the so-called “buy box”).

133 European Commission, Decision of 24 March 2004, Case AT.37792 – *Microsoft Work Group Server*.

134 CFI, judgment of 17 July 2007, Case T-201/04, ECLI:EU:T:2007:289 – *Microsoft Work Group Server*.

135 Bundeskartellamt, Decision of 6 February 2019, B6-22/16, *Facebook, exploitive business terms*.

136 Critical of that: *Wils*, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Anti-trust Law and the Facebook Decision of the Bundeskartellamt*, 2019, available at <https://ssrn.com/abstract=3424592> (last accessed on 3 September 2019).

137 Bundeskartellamt, Case Report of 17 July 2019, B2-88/18 – *Amazon commitments*.

2. Clear rules of conduct for dominant platforms

To ensure that existing positions of market dominance remain contestable and to safeguard undistorted competition on the platform and on neighbouring markets, the Commission ‘Competition Law 4.0’ proposes a set of clear rules of conduct for dominant online platforms, namely a set of clear-cut prohibitions, with a possibility for the online platforms to prove that an exception is justified. An important function of such rules of conduct is to clearly inform market players of the ‘rules of the game’, which shall ensure greater compliance and speed up procedures in case of infringements. The exceptions shall ensure that practices which generate benefits for consumers that outweigh any foreclosure effects in relation to competitors remain possible. The exceptions shall also ensure that, in the course of the enforcement of the law, economically relevant information continues to be generated, which will then help to further specify and improve the rules of conduct (see section III.3 above).

Rules of conduct for dominant online platforms could, in principle, evolve on the basis of the case law as the competition authorities flesh out the prohibition of abuse of dominance. The development of new rules case by case is, however, a slow process which requires a substantial number of relevant decisions by competition authorities that are later upheld by the courts. This process cannot be abbreviated by publishing a Commission Notice on abusive behaviour by dominant platforms. Even though, by publishing such a Notice, the European Commission could self-commit to a specific interpretation of Article 102 TFEU, it would not bind the European courts. If the European Commission were to propose non-effects based rules of conduct for digital platforms, an obvious critique could be that its previous Article 102 TFEU proceedings were based on an impact analysis. The transition to a non-effects based prohibition with exceptions based on Article 102 TFEU alone would have to be based on sufficient experience with the relevant conduct that would justify such an “infringement by object”-rule, or it would have to be backed by strong theoretical arguments. It is unclear whether the reference to high error costs in the case of non-intervention or belated intervention alone could justify a transition

from an “infringement by effect” to an “infringement by object” rule under Article 102 TFEU without further case experience.

In view of these obstacles and uncertainties, the Commission ‘Competition Law 4.0’ proposes accelerating the development of new rules of conduct for dominant digital platforms through an EU Platform Regulation that both fleshes out and supplements competition law.¹³⁸ In as far as such a regulation specifies the prohibition of abuse of dominance (Article 102 TFEU) for digital platforms, it could be based on Article 103 TFEU. Where the rules of conduct move beyond what can be derived from Article 102 TFEU case law, Article 114 TFEU provides a legal basis. When adopting a regulation, care must be taken to make sure that the rules of conduct are sufficiently flexible and open to development. This is ensured by the wording of the rules of conduct as a prohibition with a caveat for justification of the conduct.

The Platform Regulation would complement the recently adopted P2B Regulation (EU) 2019/1150 of 20 June 2019,¹³⁹ which imposes obligations on online intermediation service providers,¹⁴⁰ irrespective of their market power, in relation to business users, namely a duty to make transparent their terms and conditions of service, to state reasons in the event of a restriction, suspension or termination of intermediation services, to disclose ranking criteria, and to reveal any self-preferencing policies or the preferencing of third parties in the intermediation of goods or services and/or in data access. The rules of conduct proposed here would substantially exceed the transparency obligations set out in the P2B Regulation, but their scope of application would be limited to dominant platforms.

The proposed content of a Platform Regulation is outlined below. We start by demarcating its addressees (see a.). The following subsections specify a set of rules of conduct that should be part of a Platform Regulation. These include a ban on self-preferencing (see b.) as well as obligations to ensure data portability and interoperability (see c.). The obligation to provide for a special ADR procedure for rights violations on the platform is a conceptually separate aspect, but could be a useful complement (see d.).

138 The German-French-Polish manifesto ‘Modernising EU Competition Policy’ of 4 July 2019 goes in the same direction.

139 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.

140 For the definition of this term, see Art. 2 No. 2 of the P2B Regulation.

The enforcement of the obligations set out in the Platform Regulation should follow the general rules of competition law enforcement.

a. A Platform Regulation for dominant online platforms

A Platform Regulation that supplements competition law should exclusively target dominant online platforms with certain minimum revenues or user numbers.¹⁴¹ Such a de minimis threshold should exclude minor cases from the scope of the Platform Regulation. Even where platforms with a very small user base and sales possess monopoly power in a niche, they should not be burdened with additional regulatory costs. Rather, it is sufficient to apply the general competition rules in such cases.

In principle, all types of online platforms (see section II.2.a above) should be covered. In this respect, the scope of application of the Regulation would be broader than that of the P2B Regulation, which only covers the intermediation service providers and search engines in relation to business users, and excludes operating systems or payment platforms. However, for the time being, only those platforms that operate in business-to-consumer (B2C) intermediation should be covered by the proposed Platform Regulation. There is as yet not enough case practice and experience with regard to pure B2B constellations to justify extending the scope of application to cover the platforms active in this area.

The Platform Regulation should specify the rules of conduct that follow from the prohibition of the abuse of dominance in typical cases (Art. 102 TFEU). Only dominant companies have a special responsibility to ensure that their behaviour does not adversely affect remaining competition. The criteria and methods to be used to determine the dominance of digital platforms are currently being discussed. In order to increase legal certainty, the state of the art as it follows from recent case law and debate should be summarised in a Commission Notice (see Chapter IV above). More novel concepts like ‘gatekeeper power’ or ‘intermediation power’¹⁴² should be fleshed out. The Furman Report

has proposed that platforms with a ‘strategic market status’ should be subject to a special regulatory code of conduct, thus linking regulation to a special regulatory concept of market power.¹⁴³ The code of conduct would then only apply to platforms that have been identified as addressees in the course of an independent procedure.¹⁴⁴

By contrast, the majority of the Commission ‘Competition Law 4.0’ is of the opinion that the code of conduct specified in the platform regulation should apply to all platforms active in B2C intermediation that are dominant based on the established competition law criteria. Market players – including digital platforms – can generally assess with sufficient certainty whether or not they fall under Article 102 TFEU. However, a minority of the members of our Commission considers a two-stage procedure based on the model of telecommunications regulation or the proposals put forward in the Furman Report to be more appropriate given the current state of knowledge.¹⁴⁵

Recommendation 9:

The majority of the Commission ‘Competition Law 4.0’ recommends that a Platform Regulation be introduced to impose a specific **code of conduct on dominant online platforms** with a minimum level of revenues or a minimum number of users.

b. Prohibition of unjustified self-preferencing

Operators of digital platforms are often vertically integrated, i.e. they operate as providers of products or services on their own platform. One example of such a ‘hybrid’ platform (see section II.2.c above) is the operator of an online marketplace, which also acts as a seller on the marketplace and therefore competes with other third parties operating on the platform. Another example is the provider of a mobile operating system who also offers an app-based payment service on this platform and is therefore in competition with other app-based payment services on the platform; or the provider of an app store who also distributes its own apps via this app store which compete with apps from third parties. Vertical integration can increase effi-

141 In the platform economy, and especially in the B2C sector, a company’s lack of or low sales often fails to reflect the company’s economic potential.

142 Cf. Market Power Study (fn. 1), pp. 85–99.

143 Furman Report (fn. 3), pp. 58 ff.

144 Similar to the manifesto by the German, French and Polish governments on ‘Modernising European Competition Policy’ of 4 July 2019, when it proposes the identification of certain systemic actors, in particular digital platforms, that should be subject to specific scrutiny.

145 Furman Report (fn. 3), Annex D, strategic recommendations A and C.

ciency, for example if the platform provider can use it to gain experience in downstream markets and thus respond faster to changes in the market. At the same time, there is, however, a relevant risk that such a platform operator will exploit its position as rule-makers, be it in the design of the ranking algorithm or in access to data, in order to favour its own products and services over those of other users.¹⁴⁶

In its *Google Search (Shopping)* decision, the European Commission found that Google had abused its dominant position as a search engine operator by privileging its own comparison shopping service in the placement of the search results, thereby diverting traffic from competing offers to their own service and thus leveraging its market power in the market for general internet search to the market for comparison shopping services.¹⁴⁷ The abuse was established on the basis of a detailed examination of the exclusionary effect of the disapproved conduct. The *Google Search (Shopping)* decision is thus a precedent for an effect-based assessment of the abusive nature of self-preferencing by a dominant hybrid platform. An appeal is pending before the European General Court.¹⁴⁸

The Commission ‘Competition Law 4.0’ considers that conduct by which a dominant platform favours itself contrary to the rules applicable to other platform users and thereby *prima facie* gains a competitive advantage should be prohibited subject to objective justification. Such self-preferencing infringes the principles of effective competition on the merits. Its general suitability to distort competition can be presumed. Given the highly dynamic nature of digital markets, it often very quickly becomes impossible to reverse the foreclosure effects that are likely to result.

The proposed prohibition of self-preferencing does not ban dominant online platforms from not listing competitors’ products or services or from listing them only in a subordinate position based on uniformly applied ranking criteria. The same applies, for example, to including (additional) offers that are needed to process transactions inter-

mediated via the platform, such as payment, identification or shipping services: an exclusion of such services as offered by third parties would need to be objectively justified. Third-party providers must be given the opportunity to prevail against the platform operator’s offers in competition for access to the platform or the best ranking on the platform. In this respect, the platform operator is obliged to ensure a fair procedure.

Recommendation 10:

The Commission ‘Competition Law 4.0’ recommends that dominant online platforms that fall under the Platform Regulation be **prohibited from favouring their own services in relation to third-party providers unless** such preferencing is objectively justified.

On the other hand, the Commission ‘Competition Law 4.0’ does not propose any tightening of the general prohibition of discrimination as it follows from Art. 102 TFEU. Similarly, a refusal by a dominant platform to grant access to service providers should only be considered abusive based on the general principles of competition law. The imposition of a general ban on discrimination, irrespective of effect, could easily tip into a heavy-handed regulatory regime for dominant platforms and could significantly restrict their design choices and entrepreneurial freedom. The regulatory costs associated with a specification of any objective justifications are known from the discussion on the US Robinson Patman Act.¹⁴⁹ Given the wide variety of legitimate differentiations in business and trade, there is no justification for a general reversal of the burden of justification with regard to a differentiated treatment of business partners.

c. Improved data portability and interoperable data formats

The continued contestability of the position of a dominant online platform depends on the ability of users to ‘multi-home’ and switch platforms. Given the new conditions

146 For example, cf. ACCC, Digital Platforms Inquiry, Final Report 2019, pp. 135 f.

147 European Commission, Decision of 27 June 2017, AT.39740 – *Google Search (Shopping)*, esp. paras. 341 ff.

148 Action brought on 11 September 2017, T-612/17 – *Google and Alphabet*. Behaviour that favours one’s own products over those of other providers was also the subject of further decisions by the European Commission; cf. e.g. European Commission, Decision of 18 July 2018, AT.40099 – *Google Android*; Decision of 16 December 2009, AT.39530 – *Microsoft (Tying)*. In the *Google Search (Shopping)* case, however, the prohibition of self-preferencing was a particular focus and it was – as far as can be seen – only there that it was expressly designated as such by the European Commission.

149 Cf., for example, *Hovenkamp*, Federal Antitrust Policy: The Law of Competition and its Practice, pp. 774 ff.; *Mestmäcker*, Der verwaltete Wettbewerb, pp. 97 ff., in particular p. 98, and pp. 187 ff.

of the data economy, the ability of users to provide competing platforms with access to their usage data can be decisive in this respect. The same may apply to competition in markets that are complementary to the platform market: if the dominant platform has exclusive access to the user or usage data generated on the platform, this can give the dominant platform a significant competitive advantage in such markets. Undistorted competition in such markets may depend on the ability of users to provide third parties with effective and rapid access to 'their' data.

Pursuant to Art. 20 GDPR, a data subject has the right to receive personal data concerning him or her, which he or she has provided to a controller in a commonly used, machine-readable format. This includes the right to transmit them to another controller without hindrance or to obtain direct transmission to that other controller. The scope of Art. 20 GDPR is partly disputed (see section V.3.a above). The general view is that Art. 20 GDPR does not include a right to have data transferred to third parties in real time, i.e. immediately after request and continuously (see Chapter V above). However, real-time access can be particularly crucial for the competitiveness of competing complementary services, for instance, payment, cloud or identification services.

A right to real-time access to all data necessary for effective competition in neighbouring markets that goes beyond the scope of Art. 20 GDPR may arise in individual cases on the basis of Art. 102 TFEU. In its decision of 24 March 2004 based on Art. 102 TFEU, the European Commission obliged Microsoft to provide interface information to providers of competing work group servers to achieve full interoperability with its PC operating system.¹⁵⁰

The requirements of the so-called 'essential facilities' doctrine, on which the Microsoft decision was based, are nevertheless strict. Proving an infringement requires substantial time and resources. Again, an impact analysis is required in each individual case.

The Commission 'Competition Law 4.0' is of the opinion that, given the strong concentration tendencies on platform markets, the high barriers to attacks on existing positions of market power and the expansion tendencies inherent in a position of power once gained on a platform

market under data economy conditions, it is justified to oblige dominant platforms to enable user data portability in real time and, when requested by a platform user, to ensure interoperability of data formats with complementary services.¹⁵¹ The dominant platform would have to objectively justify restrictions on portability or data interoperability. The obligation to guarantee data portability and interoperability beyond the scope of Art. 20 GDPR must be expressly limited to dominant platforms within the meaning of the new Platform Regulation. A reciprocal obligation for non-dominant complementary service providers would hinder rather than promote competition.

Notwithstanding this extended data portability obligation for dominant platforms, it may make sense to introduce a right for third parties to access a digital user account with the consent of the user by way of sector-specific regulation (Recommendation 4, section V.3.b.). This goes beyond data portability in real time because it has a bidirectional character, since transactions can also be carried out via access to the user account.

Recommendation 11:

The Commission 'Competition Law 4.0' recommends that dominant online platforms that fall under the scope of the Platform Regulation be required to enable for 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**.

d. Alternative dispute resolution procedures for platform violations

Online platforms create new, and frequently cross-border, interaction spaces that can increase the risk of an infringement of third-party rights by platform users or the impact of such an infringement. The spectrum of possible violations ranges from violations of the general right of privacy due to incorrect factual claims or unlawful expressions of opinion, to the uploading of copyright-infringing content, the violation of trademark rights and the distribution of products that do not meet the applicable product safety requirements.

Against this background, discussions have developed in the various contexts on the due diligence obligations of

¹⁵⁰ European Commission, Decision of 24 March 2004, case AT.37792 – *Microsoft Work Group Server*.

¹⁵¹ Also for extended data portability obligations of dominant platforms: Furman Report, p. 5. For a different assessment, see ACCC, Digital Platforms Inquiry, Final Report 2019, pp. 115 ff.

platform operators and the liability of platforms for such infringements. The starting point continues to be Article 14 of Directive 2000/31/EC on electronic commerce that a so-called hosting platform is not responsible for the information and activities stored on behalf of a user as long as it does not adopt them as its own, is not aware of illegal activities or information and, as soon as it becomes aware of them, takes immediate action to remove the information and block access to it (so-called ‘notice and take down’ procedure). Yet, according to Article 17 of the new Directive (EU) 2019/790 on copyright so-called file-sharing platforms shall now qualify as infringers within the meaning of copyright law if they provide the public with access to copyright-protected works or other subject matter that have been uploaded by users. In addition, an EU Regulation to prevent the distribution of online terrorist content is in preparation and will oblige platforms to remove such content immediately.

With the introduction of the Network Enforcement Act, the German legislator has obliged providers of social networks to maintain an effective and transparent procedure for dealing with complaints about illegal content, so that such content is immediately removed and blocked. Obviously illegal content within the meaning of the Act must be removed and blocked within 24 hours of receipt of the complaint. A similar regulation is planned in Germany to implement the European Directive on Audiovisual Media Services (AVMD) and, on the basis of an amendment to the Telemedia Act, for video sharing platforms.

The design of due diligence obligations for platform operators can become relevant to competition: On the one hand, it is important to ensure fair competition between digital platforms and functionally equivalent providers in the analogue world. What is more, in their function as rule-makers, dominant platforms have a special obligation to ensure undistorted competition on the platform (see above). If platforms and/or platform users in effect manage to shake off in the online world the liability that exists in the analogue world for infringements of third-party rights, this will distort competition.

A general liability of platforms for rights violations on the platform cannot be the solution, however. It is not only the Electronic Commerce Directive 2000/31/EC that stands in the way of such a principle. It would also be difficult to reconcile with the importance of freedom of communication on the internet (as far as liability for assertions of fact or expressions of opinion is concerned) and the protection of innovation and the diversity of business models that platforms can pursue as intermediaries and matchmakers. Therefore, platforms should only be liable for rights violations on the platform to the extent that they play an active role by curating, i.e. standardising, preparing and checking the content and offers of users as well as presenting such content and offers to other users in an orderly manner in order to recoup the costs incurred through commission (sales platforms) or advertising income (file-sharing services). The specification of the degree of curating that would trigger a liability of the platform¹⁵² is not the subject of this report, but may be relevant to ensuring undistorted competition between digital platforms and functionally equivalent providers in the analogue world.

Ensuring undistorted competition on the platform requires that disputes regarding the admissibility of a product or service, the use of a trademark, a work protected by other intellectual property rights or an assertion of fact or expression of opinion are taken seriously as conflicts between users or between users and external third parties, i.e. as conflicts located in a tripolar or even multipolar relationship. If, in such disputes, the platform is held responsible for a possible infringement, it must decide on the lawfulness of the activity. If assertions of fact or expressions of opinion are in dispute, the platform assumes the role of a censorship authority. In general, there is a risk of overblocking if and because the platform has an incentive to avoid liability by prodigiously blocking content and activities prone to complaint. This applies particularly to the extent that platforms are not subject to any conflicting obligation to protect certain fundamental rights of the parties involved, such as freedom of expression.¹⁵³

152 Extensive references to this discussion at *Spindler*, in: *Spindler/Schmitz*, TMG, Section 7 paras. 11 ff. and paras. 18 ff.

153 Regarding the binding of social media platforms – specifically: Facebook – to the fundamental right of Art. 5(l) of the Basic Law for the Federal Republic of Germany, there are a number of (still) inconsistent current judgments by the courts of instance: Karlsruhe Higher Regional Court, judgment of 25 June 2018, 15 W 86/18 = NJW 2018, 3110, para. 21; Dresden Higher Regional Court, judgment of 8 August 2018, 4 W 577/18 = NJW 2018, 3111, paras. 18 ff.; Munich Higher Regional Court, judgment of 24 August 2018, 18 W 1294/18 = NJW 2018, 3115, paras. 27 f.; Stuttgart Higher Regional Court, judgment of 6 September 2018, 4 W 63/18 = NJW-RR 2019, 35, para. 29; Oldenburg Higher Regional Court, judgment of 1 July 2019; 13 W 16/19 = BeckRS 2019, 16526; Federal Constitutional Court, judgment of 22 May 2019, 1 BvQ 42/19 = NJW 2019, 1935, paras. 15 ff.

One way out could be to create and design an alternative dispute resolution (ADR) procedure at European level that would provide effective protection against infringements on platforms without evoking the risks of overblocking and censorship by platform operators. In an ADR procedure, third parties are called in to settle disputes. Central elements of such a procedure in the case of infringements on platforms would be:

- Dispute resolution by neutral and competent dispute resolution bodies that are independent of the platforms and would need to be certified by public authorities.
- Dispute resolution within a short period of time to avoid irreversible damage due to the continued availability of illegal content on the internet.
- The decision by the dispute resolution body is provisionally binding between the parties and on the platform. This does not exclude recourse to the courts of law. Interim relief by civil courts would also still be available. However, in the absence of a decision by a court of law, the decision by the ADR body prevails.
- Communication on the internet is still possible anonymously. If, however, a complaint is made, the author of the incriminated content must decide whether to give up anonymity and participate in the ADR procedure or whether to remain anonymous. In the latter case, the incriminated content would be deleted following the complaint by the allegedly injured party.
- The costs of the ADR procedure are in principle to be borne by the dominant platform which made the incriminated content accessible.

In principle, the establishment of such an ADR procedure could also be considered for disputes concerning actions on non-dominant platforms: The practical importance of online platforms in the intermediation of information, products and services, the associated increase in the risk of infringements, the difficulty of prosecution by the injured party, which can result from the geographical scope of a platform's activity and possibly also the anonymity of its users, and finally the fact that platforms derive a profit

from this activity justifies a responsibility to provide an infrastructure for the settlement of disputes between platform users and third parties which arise indirectly from the intermediation activity.

At the same time and not least from the point of view of competition policy, caution must be exercised when entering into new obligations for platforms which could raise barriers to entry for new platforms.

The latter risk does not exist as far as dominant platforms are concerned. In any event and given their special responsibility to ensure undistorted competition on the platform and their relevance to freedom of communication and action in the digital world, dominant platforms should be required to have an independent ADR procedure in place to deal with relevant disputes and, as a general rule¹⁵⁴, to bear the costs of such a procedure. Where disputes relate to a public interest that differs from the interests of the parties (e.g. aspects related to the protection of minors), representation of this public interest would have to be ensured. It is conceivable that where specific public interests consistently play an important role – for example in product safety issues on online marketplaces – an obligation could be introduced to set up interfaces that competent authorities could use in order to quickly access platforms in the event of danger and bring their legal duties to bear in the conflict resolution process. At the same time, this would generate and pool valuable insights into the risks, in a similar way to the regulatory consumer complaint procedures, at the competent authorities.

The detailed design of such an ADR procedure would still have to be examined. However, it could allow for taking into account both the role of platforms as intermediaries and the resulting special responsibilities.

Recommendation 12:

The Commission 'Competition Law 4.0' recommends 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 infringements on platforms.**

154 Exceptions must apply in the case of an abusive or manifestly unfounded appeal.

VII. Enabling innovation through cooperation

1. Cooperation as part of the innovation process

Digitisation is bringing about radical structural changes in many markets (see Chapter II above). In “Industrie 4.0” and through the use of IoT technologies, products and services are being combined in novel ways. The data and platform economy is creating new ways of satisfying user needs. Long-established market players are being challenged by these new phenomena. Value chains are breaking down and need to be restructured. New networks and ‘digital ecosystems’ are being created. In order to survive in this new environment and benefit from the opportunities presented by these technological and market changes, it is vital that companies be able to experiment with the new possibilities engendered by the data and platform economy. Cooperation in many different forms is part of this discovery and innovation process. Many companies have started to collect usage data for their products and services and are using them – sometimes in combination with other data – to continuously improve and customise their products and services. They are adding novel kinds of software components to their products and in some cases are reaching out beyond established market boundaries, as can be seen in the mobility sector, for instance. Other new opportunities are arising through the use of artificial intelligence (AI). However, artificial intelligence requires the training of algorithms based on especially large amounts and various kinds of data stocks, which can therefore necessitate the collating of data from different competitors. All of this means that the importance of cooperation between companies in the field of data sharing is increasing.

The same is true for cooperation involving the development of new platforms and networks – especially in the B2B area. While the powerful positions of the large digital platforms that organise interactions between consumers or between consumers and businesses are virtually unassailable due to their strong positive network effects, the development of digital platform cooperation and networks between businesses is still at a relatively early stage. We should strive for setting a legal framework that ensures that companies are able to take advantage of the competition and innovation opportunities that are opening up here.

2. Legal uncertainty as an obstacle to investment

a. New forms of cooperation in the digital economy and non-legal hurdles

New forms of cooperation which seize the aforementioned innovation and competition opportunities presented by the new digital economy, are currently being explored. However, they seem to be developing rather slowly. This is especially true in the case of cooperative projects between competing firms or potential competitors. If the cooperation involves an exchange of data, companies are often hesitant to allow other undertakings access to their data because they are unsure about the value and the potential use of their own data bases and about the potential economic benefits of cooperation. Concerns about the loss of control of one’s own data and about the innovation-related and competitive advantages associated with the exclusive use of such data often win out when the value of cooperation on data is still difficult to estimate.

b. Legal uncertainty as an impediment for cooperation

New kinds of data cooperation can also raise competition law concerns. This is especially the case when competitively sensitive data are involved. The criteria for determining the legality of such data cooperation are still largely unclear.¹⁵⁵ The legal uncertainty for companies is substantial.¹⁵⁶ Cooperation projects involving networks or platforms face similar difficulties.

With Council Regulation (EC) No 1/2003 (and its counterpart in German law, i.e. the Seventh Amendment of the Act against Restraints of Competition), the former notification system for restrictive agreements was abolished. The prohibition of anti-competitive agreements shifted from an authorisation regime to a prohibition with legal exceptions. Companies must now self-assess the legality of their agreements and bear the risks of legal error. These risks are lessened through the Block Exemption Regulations and through the Commission Guidelines. But many of the new forms of cooperation fall neither within the Block Exemption Regulations nor within the Guidelines.

¹⁵⁵ For an outline of the basic principles of antitrust law with respect to the lawfulness of data pools or of the practices of data sharing, see the Special Advisers’ Report (fn. 4 above), pp. 92 ff. Cf. also Lundqvist, *EuCML* 2018, 146.

¹⁵⁶ Concerns about possible issues of data protection law are not being addressed here.

The existing law provides various instruments at European and at German level to ensure legal certainty even in such cases. At the European level, these instruments include

- “no infringement” decisions pursuant to Article 10 of Council Regulation (EC) No 1/2003 by which the European Commission can decide that Article 101 TFEU and/or Article 102 TFEU does not apply to certain commercial practices if the ‘Community public interest [...] so requires’, and
- informal guidance letters that the European Commission can publish in the case of novel questions in individual cases.¹⁵⁷

There are a number of reasons, however, why these instruments have not yet been able to help satisfy the undertakings’ needs for more legal certainty in relation to the new kinds of cooperation:

- According to Recital 14 of Council Regulation (EC) No 1/2003, “no infringement” decisions pursuant to Article 10 of Council Regulation (EC) No 1/2003 are for ‘exceptional cases’ only, namely cases where a decision is needed to clarify a new or an unresolved legal question, or where the European Commission wants to prevent the competition authorities of different Member States from coming to different conclusions about the lawfulness of a certain practice.¹⁵⁸ However, the European Commission has not yet made use of these Article 10 powers.¹⁵⁹ Furthermore, Article 10 of Council Regulation (EC) No 1/2003 does not grant companies a subjective right to a decision.¹⁶⁰
- Nor has the European Commission made use of the instrument of guidance letters so far. Companies may seek a guidance letter from the European Commission if an agreement or a concerted practice within the meaning of Article 101(1) TFEU raises an unresolved legal question and if the economic importance from

the point of view of the consumer of the goods or services concerned by the agreement and/or the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture makes a clarification of the question appear *prima facie* expedient by way of a guidance letter (paragraph 8 of the Commission Notice on informal guidance). The informal guidance must be compatible with the European Commission’s enforcement priorities (paragraph 7 of the Notice). The actual intention of the guidance letter is to provide undertakings with an informed assessment of their agreement. Informal guidance letters would therefore appear to be *the* instruments with which undertakings can obtain legal certainty when it comes to new questions. And even though guidance letters do not prevent the European Commission from reviewing the disputed practices later in prohibition proceedings, such review must take the earlier guidance letter into account (paragraphs 22 ff. of the Notice). The imposition of an administrative fine in respect of a practice covered by a guidance letter is just as unlikely as a finding of fault with respect to such a practice, which would be a requirement for a civil law claim for damages brought by a wronged party.

Yet, companies are not entitled to be provided with a guidance letter. Whether and if so how many undertakings have tried in vain in the past to obtain such a letter from the European Commission is unknown.

The unsatisfactory state of the instruments available at the European level is not compensated for by the instruments available at national level. “No infringement” decisions can only be adopted by the European Commission.¹⁶¹ The competence of the Bundeskartellamt is limited to stating, in a decision pursuant to Section 32c Act against Restraints of Competition, that it has no reason to take action. In such a case companies no longer have to fear that the Bun-

157 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 [Articles 101 and 102 TFEU] that arise in individual cases, OJ C 101, 27/04/2004, p. 78.

158 Ritter, in: *Immenga/Mestmäcker*, Article 10 of Council Regulation (EC) No 1/2003, para. 4.

159 Wils, *JECLaP*, 4 (2013), 293, 299, fn. 47.

160 Ritter, in: *Immenga/Mestmäcker*, Article 10 of Council regulation (EC) No 1/2003, para. 3.

161 The competition authorities of the Member States are not able to bind the European Commission or the authorities of other Member States with negative decisions. Cf. ECJ, judgment of 3 May 2011, Case C-375/09, paras. 19-30 – *Tele2 Polska*. On this, cf. van de Walle de Ghelcke, *JECLaP* 2 (2011), 477.

deskartellamt will impose an administrative fine. But the decision will not protect them from proceedings being brought at European level or from private damage claims.

The same applies to the informal consultations that the Bundeskartellamt offers to companies and the conclusions reached by them. These are recorded in a guidance document (known as a ‘*Vorsitzendenschreiben*’) and are often published in the form of case summaries.¹⁶² The Bundeskartellamt takes the consultation services very seriously in the case of companies involved with digital cooperation. Frequent use is also being made of these services by the undertakings in cases involving novel and difficult legal questions in conjunction with cooperation projects. And although a guidance document will not protect a company from the future institution of prohibition proceedings, the company itself no longer needs to fear an administrative fine from the Bundeskartellamt once it has received a positive decision in a guidance document. However, a legal safeguard against the imposition of a fine by the European Commission is not provided by such a guidance document.¹⁶³ Currently, this guidance document has no legal foundation in the Act against Restraints of Competition. There are no stipulated time periods within which the Bundeskartellamt must conclude a consultation. In practice, the duration of the informal consultations varies significantly.

c. The cost of legal uncertainty

Even after consultations and meetings with companies and business associations, the Commission ‘Competition Law 4.0’ is unable to make any reliable statements as to the extent to which the current state of legal uncertainty prevents companies from experimenting with novel forms

of cooperation. But companies and lawyers alike maintain that the uncertainty regarding the legality of such novel forms of cooperation under competition law is a relevant obstacle to engaging in and experimenting with them. There is no doubt that new legal questions are being raised in conjunction with data cooperation – i.e. agreements between companies for exchanging, sharing, and collating data – and in conjunction with cooperative projects that jointly develop platforms, digital networks, and ecosystems. Where cooperative projects fall outside the scope of application of the existing Block Exemption Regulations, the Commission Guidelines¹⁶⁴ often contain no instructions on how these new forms of cooperation are to be dealt with. Nor is there any kind of comprehensive case law with regard to these forms of cooperation which could guide companies and lawyers when designing their cooperation.¹⁶⁵

Violations of the ban on cartels result in large fines for the companies involved. Legal uncertainty that cannot be resolved under the current laws and guidelines of the competition authorities contributes to the cost and risks of cooperation and is therefore a relevant factor inhibiting companies from engaging in such cooperation.

The Commission ‘Competition Law 4.0’ is therefore of the opinion that new legal procedural instruments are needed, especially at the European level, for companies to obtain legal certainty regarding the lawfulness of novel forms of cooperation under competition law. The rule of law demands¹⁶⁶ that companies, as the addressees of what is by necessity a broadly worded and widely interpretable prohibition of anti-competitive agreements, be provided – in the case of legal uncertainty that is unresolvable on the basis of the current practice of reported cases and established methods of interpretation (i.e. in cases where the

162 For example in the case of the industrial platform ECEMENT (Bundeskartellamt, press release of 7 December 2017, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2017/07_12_2017_Zementplattform.html (last accessed on 3 September 2019) and *XOM Metals* (Bundeskartellamt, case summary of 27 March 2018, B5-1/18-001).

163 ECJ, judgment of 18 June 2013, Case C-681/11 – *Schenker*.

164 European Commission, Guidelines to horizontal co-operation agreements OJ C 11/1; European Commission, Guidelines on Vertical Restraints, OJ C 130/1.

165 At the European level, there is one case – albeit on merger controls – worth mentioning to date: Commission Decision of 7 November 2018, Case M.8744, *Daimler/BMW/Car Sharing JV*. On the German approach, cf. Bundeskartellamt, press release of 7 December 2017, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2017/07_12_2017_Zementplattform.html – *ECEMENT*; Bundeskartellamt case summary of 27 March 2018, B5-1/18-001 – *XOM Metals*.

166 On the principle of legality in European law, cf. Article 49(1) of the Charter of Fundamental Rights of the European Union. On the requirements that follow, for German antitrust law, from the constitutional imperative of the certainty [of the law] (Article 103(2) of the Basic Law), cf. the recent decision of the Federal Court of Justice of 14 November 2017, KVR 57/16 – *EDEKA/Kaiser's Tengelmann*, paras. 68 f.

legal questions raised are *de facto* novel) – with a procedural instrument for resolving such uncertainty. The use of general clauses and widely interpretable terminology and, in connection with this, the step-by-step clarification of legal norms case by case are necessary in competition law in order to do justice to the complexity of the factual situations involved. However, the encroachments on the entrepreneurial freedom must not go further than what is needed to accomplish the intended function of competition rules, i.e. the safeguarding of undistorted competition. An unresolvable state of legal uncertainty for companies can also generate substantial costs for the economy as a whole, especially in a situation where innovation depends on the ability to experiment with new forms of cooperation.

3. Increasing legal certainty for cooperation: introducing a notification procedure for novel forms of cooperation

There is some indication that the Directorate-General for Competition of the European Commission strives to make use of the instrument of the informal guidance letter in the future. Many other instruments (Block Exemption Regulations, possibly Notices as well) are going to be revised in the coming years. This will give the European Commission the opportunity to create greater legal certainty for novel forms of cooperation between undertakings in the digital area – particularly with respect to the issues of data cooperation and cooperation on the creation of platforms and digital ecosystems. Particularly the upcoming revision of the Horizontal Guidelines would present an ideal opportunity to specify the criteria for determining the lawfulness of new forms of cooperation in the digital economy.

It is, without doubt, highly desirable that novel forms of cooperation will be taken into account in the drafting of a new generation of Block Exemption Regulations and Notices. However, it is unlikely that this alone will suffice to eliminate legal uncertainty. Factors that contribute to the uncertainty include the absence of reported cases, the lack of experience on the part of the European Commission with handling such cooperative projects, and the absence of court rulings. Reliable competition law criteria generally evolve on the basis of a wide variety of reported

cases. Such case practice is at the same time an important instrument for acquiring knowledge about market changes, corporate strategies, and the impact of these on competition. Such information can be obtained in part from the so-called ‘sector inquiries’ pursuant to Article 17 of Council Regulation (EC) No 1/2003.¹⁶⁷ A proactive use of this instrument is desirable. But sector inquiries do not help where new forms of cooperation are being newly developed and certain forms of cooperation are not entered into for reasons of legal uncertainty.

The Commission ‘Competition Law 4.0’ therefore recommends that a voluntary notification procedure be introduced at the European level for cooperative projects that

- (a) raise new legal questions that have not yet been decided on by a court of the European Union or are pending before such a court; and
- (b) are of substantial economic significance from the point of view of consumers of the goods or services involved in the agreement.

If these requirements are satisfied, the procedure would have to be concluded by way of a decision no later than 90 working days from the time of notification, provided that all relevant information has been submitted by the applicants. Similar to the case of commitment decisions under Article 9 of Council Regulation (EC) No 1/2003, the European Commission should be authorised to revoke the decisions in the event of changes to the factual circumstances (cf. Article 9(2) of Council Regulation (EC) No 1/2003). Given the novelty of the legal questions and the uncertainty as to the effects of such cooperation in the face of rapidly changing market conditions, at least some members of the Commission ‘Competition Law 4.0’ find it advisable to review whether the decision could also be set aside with effect for the future in cases where, although the cooperation has been approved, negative effects on competition unexpectedly arise. Such an option could also make it easier for the European Commission to ‘experiment’ with novel forms of cooperation. Companies would benefit from full protection from fines and private damage claims. The flip side would be a reduced degree of legal certainty and the risk of losing parts of the investment in a cooperation.

¹⁶⁷ Article 17 of Council Regulation (EC) No 1/2003 also includes the possibility of subjecting certain kinds of agreements to a cross-sector inquiry. According to Article 17(1), however, such an investigation can only be made if there is a presumption that competition within the internal market is likely being restricted or distorted. Such a presumption would currently seem doubtful in the case of data cooperation.

The suggested system of voluntary notification of certain cooperative projects is not intended to reinstate the old notification system of EEC Council Regulation No 17/62. The pros and cons of such a notification system were discussed at length prior to the enactment of Council Regulation (EC) No 1/2003.¹⁶⁸ A key argument against the notification system was that much of the resources available to the Directorate-General for Competition were thus pre-committed to reviewing mostly unproblematic agreements or marginal transgressions, while leaving little room for pursuing more serious violations. The reinstatement of a general notification regime – including on a voluntary basis – would reinstate the same dilemma.

Therefore, the introduction of a voluntary notification system will only be a viable option if the practical scope of its application can be effectively limited to those cooperative projects that raise truly novel legal questions and legal questions of fundamental significance.¹⁶⁹ Additional criteria could include – as in paragraph 8b of the Notice on informal guidance – the economic significance of the transaction, which would have to be specified in greater detail, and/or the treatment of the investments linked to the transaction in relation to the size of the companies concerned. A decision would be based on the information provided by the companies and would be restricted to the factual situation defined thereby.

The intention of the new notification system is not to adversely affect the pursuit of serious cartel violations and abuses of dominance. The Directorate-General for Competition should hire additional personnel to handle the extra

workload that would be created by the proposed notification procedure. The majority of Commission members recommends a review of whether the costs of the notification system can be financed on the basis of fees to be paid by the applicants – even if this is a novelty in European competition law.

Recommendation 13:

The Commission ‘Competition Law 4.0’ recommends that the clarification of new legal questions concerning the legality 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 14:

The Commission ‘Competition Law 4.0’ recommends the introduction of a **voluntary notification procedure** at the 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.

¹⁶⁸ Summary in *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, Section 14, paras. 9 f.; also *Wils*, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*, 2019, pp. 7 f., available at <https://ssrn.com/abstract=3424592> (last accessed on 3 September 2019). For examples from the literature at that time, see *Mestmäcker*, *EuZW* 1999, 523; *Deringer*, *EuZW* 2000, 5; *Schaub/Dohms*, *WuW* 1999, 1055; *Ehlermann*, *CMLR* 2000, 537 ff.; *Geiger*, *EuZW* 2000, 165 ff.; *Wils*, *European Law Review* 24 (1999), 139; *idem*, *The Reform of Competition Law Enforcement – Will it Work?*, 2004, available at <https://ssrn.com/abstract=1319249> (last accessed on 3 September 2019).

¹⁶⁹ On this, cf. the wording of Point 8a of the Commission Notice on informal guidance, *OJ C* 101, 27/04/2004, p. 78.

VIII. Merger control: Towards a more effective control of the acquisition of start-ups by dominant companies

An intense debate has evolved recently on whether the current regime of merger control effectively protects against the potential harm to competition and innovation that may result from the acquisition by dominant companies of small, young, innovative companies with little turnover at the time of their acquisition, but a high competitive potential.¹⁷⁰ The debate is not limited to the digital context; similar issues arise, *inter alia*, in the pharmaceutical sector.¹⁷¹ However, the large digital groups have developed a comparatively high level of takeover activity.¹⁷² There is concern that some acquisitions are intended to eliminate potential future competitors early on, thereby consolidating the dominant position of digital ecosystems and protecting them from attack, while also deterring efforts to innovate in their area. Much of the debate on the need to reform merger control rules with respect to the takeover of start-ups therefore revolves around the acquisition strategies of dominant digital players.

The Commission ‘Competition Law 4.0’ shares the view that the takeover of start-ups at an early stage of their development by dominant digital companies, particularly by digital platforms, can be detrimental to competition under certain circumstances and can impact on the incentives to innovate in problematic ways. Given the fact that there is already a strong trend towards concentration and that there are major barriers to market entry for platform markets (see Section VI above), a particular concern of competition law must be to keep these positions of dominance contestable (see Section III above). Dominant undertakings have strong incentives to reduce the level of contestability by identifying potential competitors at an early stage – often, attacks will emerge from what are initially niche markets for complementary services – and neutralising them, either by copying their services or by acquiring them. The acquisition of highly innovative start-ups with rapid user growth can then lead to a further consolidation

of existing positions of dominance. Systematic acquisition strategies by entrenched incumbents can also lead to young companies no longer attempting to penetrate their markets or related markets (“kill zones”),¹⁷³ or doing so primarily with the objective of profiting from a possible acquisition by a major digital company. This reduces the incentive to invest in “radical” innovation or in “competing for the market”. Instead, innovative efforts are redirected in ways that are complementary to the approaches taken by major digital companies. At the same time, it is vital to consider the relevance of acquisitions as an important exit strategy for investors in innovative start-ups as part of an attractive regulatory environment for start-ups in Europe.

Furthermore, the acquisition of start-ups by dominant digital companies can also be associated with significant advantages for consumers. Sometimes it is only thanks to the resources of these companies that innovative products or services can be further refined or successfully brought to the market. Also, many company founders and investors are heavily motivated to invest and innovate by the hope of their start-up company being bought up. Therefore, such acquisitions – including acquisitions by dominant digital companies – should not be prohibited in and of themselves. What is needed, instead, is a case-by-case assessment that takes account of the importance of protecting competition for the market and that attaches particular importance to the continued contestability of consolidated positions of dominance.

A first precondition is that any acquisitions with the potential to be anticompetitive is covered by merger control and, should they have a Union dimension, can be examined at the European level. The acquisitions discussed here frequently relate to companies with low turnover such that they do not meet the thresholds under Art. 1(2) of the Merger Control Regulation. Nevertheless, the Commission

170 Market Power Study (fn. 1), pp. 151-157; Furman Report (fn. 3), pp. 91 ff.; Special Advisers’ Report (fn. 4), pp. 110-124; Lear Report (fn. 6); Stigler Report (fn. 5), pp. 89 ff.; *Federico/Scott Morton/Shapiro*, Antitrust and Innovation: Welcoming and Protecting Disruption, 2019, available at <https://ssrn.com/abstract=3393911> (last accessed on 3 September 2019); *Costa-Cabral*, Yearbook of European Law 37 (2018), 305. Cf. also ACCC Report (fn. 2), pp. 74 ff.

171 Cf. here *Cunningham/Ederer/Ma*, Killer Acquisitions, 2019, available at <https://ssrn.com/abstract=3241707> (last accessed on 3 September 2019).

172 Cf. here the Furman Report (fn. 3), para. 3.48; Lear Report (fn. 5), pp. 11 ff.

173 Stigler Report (fn. 5), p. 54; Special Advisers’ Report (fn. 4), p. 117; Market Power Study (fn. 1), p. 152; Economist dated 2 June 2018, Into the danger zone: American tech giants are making life tough for startups, available at <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups> (last accessed on 3 September 2019); The Guardian dated 20 October 2017, As tech companies get richer, is it ‘game over’ for startups?, available at <https://www.theguardian.com/technology/2017/oct/20/tech-startups-facebook-amazon-google-apple> (last accessed on 3 September 2019); Bloomberg, 7 November 2018, Big Tech Sets Up a ‘Kill Zone’ for Industry Upstarts, available at <https://www.bloomberg.com/opinion/articles/2018-11-07/big-tech-sets-up-a-kill-zone-for-industry-upstarts> (last accessed on 3 September 2019).

'Competition Law 4.0' does not currently believe it necessary to introduce new thresholds into the European Merger Control Regulation, if and to the extent that the European referral system effectively ensures that problematic acquisitions can be examined by the European Commission (see 1. below). It is further of the view that the existing system of ex-ante monitoring should not currently be replaced by a system of ex-post monitoring (see 2.). The analysis which takeovers present a significant threat to effective competition is unavoidably complex for very early acquisitions. The Commission 'Competition Law 4.0' nevertheless believes that there is no need for an amendment to the SIEC test.¹⁷⁴ However, its application must pay particular attention to the level of market power of the acquiring company and the characteristics of the relevant market, while also being cognisant of the entrepreneurial strategies. In light of these criteria, we need a fresh review of theories of harm that are suitable for identifying threats to competition at an early stage (see 3.).

1. No introduction of a transaction-value-based threshold at European level

The scope of application of the European Merger Control Regulation¹⁷⁵ is based on turnover thresholds of the companies that are party to the acquisition (see Art. 1(2) of the Merger Control Regulation). In response to some much-discussed cases in which large technology companies have bought up start-ups with significant competitive potential at high purchase prices, but the acquisitions – due to the low turnover of the start-up – were neither caught by the European Merger Control Regulation nor by the

majority of national merger control regimes, Germany¹⁷⁶ and Austria¹⁷⁷ have recently introduced new thresholds that relate to the value of the relevant transaction ('transaction value thresholds').¹⁷⁸ Transaction-value-based thresholds are built on the assumption that a high purchase price combined with low sales indicates a transaction's competitive relevance.¹⁷⁹ Other jurisdictions have applied thresholds that are not (solely) linked to revenues all along.¹⁸⁰

In the digital economy, the absence of sales, or a low level of sales, for a start-up that is still relatively young does not necessarily reflect its competitive potential. This is particularly true if a start-up initially heavily aims for growth in size or user growth and postpones the development of a sustainable business model to a later point in time. An example that is often mentioned is WhatsApp, which was acquired by Facebook in 2014. WhatsApp had scarcely any turnover at that time, but had a large user base of 450 million customers. Notwithstanding WhatsApp's low turnover, Facebook paid a purchase price of around 19 billion US dollars for the acquisition.

For some time now, there has, therefore, been a debate about whether the Merger Control Regulation thresholds need to be reformed.¹⁸¹ The European Commission has included this issue in a consultation on a possible reform of the Merger Control Regulation. The reactions were mostly sceptical, however, and the European Commission has not proposed any changes to thresholds for the time being.¹⁸² If a new transaction-value-based threshold were to be introduced it should be ensured that the additional bureaucratic costs are limited to companies where this is justified by a noticeable improvement in protection of competition. A

174 The term "SIEC test" describes the substantive and procedural standard for the approval or prohibition of mergers in Art. 2(2) and (3) Merger Control Regulation: the key consideration is whether a merger constitutes a "significant impediment to effective competition" = SIEC

175 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 No L 24/1.

176 Section 35 subsection 1a Act against Restraints of Competition, introduced with effect from 9 June 2017 by the Ninth Amendment to the Act (Federal Law Gazette I 2017, 1416).

177 Section 9 subsection 4 Cartel Act, introduced with effect from 1 May 2017 by the Act amending Antitrust and Competition Law, 2017.

178 The introduction of a transaction-value-linked threshold is also being examined in the Netherlands.

179 Explanatory memorandum, government draft, Bundestag printed paper 18/10207, p. 71.

180 For example, the UK merger control also intervenes irrespective of sales if the transaction results in a combined domestic market share of the companies involved of at least 25%, see Furman Report (fn. 3), para. 4.14. Spanish merger control law also uses applicability criteria linked to market share, see *Hahn*, in: MüKo EuWettbR, Merger Control EEA, para. 196. The US notification obligation applies depending on the working capital of the parties involved, see *Sullivan/Grimes/Sagers*, The Law of Antitrust: An Integrated Handbook, Section 8.2, p. 489.

181 Cf. recently also the German/French/Polish manifesto "Modernising EU Competition Policy" of 4 July 2019, which suggests that the European Commission should examine this question once again.

182 Cf. here "Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control" (DG Comp July 2017) which lists, in particular, the calculation of transaction value and the establishment of an EU reference as problematic points.

regime would need to be established that would not force the European Commission to audit a large number of transactions that are entirely unproblematic from a competition law perspective. Furthermore, the regime should continue to ensure a sensible sharing of responsibilities between the European Commission and Member States – as a basic principle, any transaction-value-based thresholds should therefore be well above the applicable thresholds in the Member States. At the same time, however, the thresholds should be capable of catching cases that are potentially problematic. At present, it is not clear how to resolve these conflicting goals appropriately.

Not least in light of these difficulties, it is particularly important that the European Merger Control Regulation already provides for a referral regime that can result in a merger being reviewed by the European Commission even if Member State authorities were primarily responsible. A merger that does not fall under the primary responsibility of the European Commission but that could be reviewed under the merger control regimes of at least three Member States can be referred to the European Commission following a submission by the companies involved in the merger (Art. 4(5) Merger Control Regulation), which can then conduct its inspection for the entire EEA.¹⁸³ Alternatively, Member State authorities can refer a merger that is notifiable under national merger control law to the European Commission if the merger restricts trade between Member States and threatens to significantly restrict competition in the territory of the referring Member State(s) (Art. 22(1) Merger Control Regulation).

This referral regime has already been used on a number of occasions in the digital context. For example, in the case of *Facebook/WhatsApp*,¹⁸⁴ which was notifiable in several Member States, the companies involved in the merger requested a referral under Art. 4(5) Merger Control Regulation which meant that the merger was ultimately examined by the European Commission. The case of *Apple/Shazam*¹⁸⁵ was referred under Art. 22 Merger Control Regulation by

the Austrian competition authority to the European Commission, so that the latter could examine the impact of the merger on the Austrian market and on the markets of the other Member States approving the referral.¹⁸⁶ The Commission's analysis of markets can also relate to the territory of Member States that have not requested a referral where this is necessary to assess the consequences of a merger in the territory of the requesting Member States, particularly because the relevant geographical market extends beyond the territory of the requesting Member States.¹⁸⁷

In the absence of a “primary responsibility” of the European Commission, Art. 4(5) and Art. 22 Merger Control Regulation thus offer the possibility for the European Commission to examine significant acquisitions of innovative, low-sales companies on the basis of a referral, provided that the merger is notified at the national level and provided that national authorities are willing to refer the merger or are prepared not to object to a referral.

To date this system has led to an examination by the European Commission in every case in which the European Commission regarded an examination at EU level as being desirable. In the view of the Commission ‘Competition Law 4.0’, no reform of the Merger Control Regulation thresholds is therefore required at present. Nevertheless, the Commission ‘Competition Law 4.0’ believes that it is advisable to systematically observe the handling of relevant cases at European level.

Recommendation 15:

The Commission ‘Competition Law 4.0’ does not currently find it necessary to revise the 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.

183 Nevertheless, there is a right of objection for Member States that would themselves be responsible for examining the merger in question. If this is exercised, it can impede the overall referral. If no Member State objects, on the other hand, it is assumed that the merger has a Community dimension.

184 European Commission, Decision of 3 October 2014, Case M. 7217.

185 European Commission, Decision of 6 September 2018, Case M. 8788.

186 In particular, FR, IT, ES, SE and NO and IS. Germany had not joined this referral request.

187 European Commission, Notice on Case Referral in respect of concentrations, OJ 2005/C 56/2, fn. 45; *Körber* also agrees in: *Immenga/Mestmäcker*, Art. 22 FKVO para. 55.

2. Do not replace the system of ex-ante controls with ex-post controls

As an alternative to the introduction of new merger control thresholds, the introduction of ex-post control is sometimes considered – in other words, an abstention from an ex-ante review of relevant mergers, but subject to the possibility of a subsequent demerger should serious competitive problems emerge within a certain period of time following a merger. The introduction of ex-post merger control is currently being discussed in France, in particular.¹⁸⁸ An ex-post proceeding would be initiated if severe competition concerns were to show within a reasonable time period following the merger (a period from 6 to 24 months is being considered).¹⁸⁹ The introduction of ex-post merger control at EU level has been put forward in a report for the French Economy and Finance Ministry.¹⁹⁰ The report argued that such a regime would, in effect, treat anti-competitive acquisitions as what they actually are, namely the abuse of a dominant position and that it would allow the competition authorities to concentrate on those transactions that actually caused problems for competition.

However, the report also concedes that the possibility of questioning mergers retrospectively would give rise to significant legal uncertainty.¹⁹¹ The reference to UK and US merger control law, under which a notification is optional but the authorities can step in ex post in the event of non-notification, is misplaced as a reference for ex-post control without a notification option because with an optional notification system, the decision as to whether an official decision is required to provide sufficient legal and investment certainty lies with the companies.

The Commission ‘Competition Law 4.0’ believes that the introduction of a system of ex-post control for the transactions being considered here – the acquisition of innovative start-ups with low turnover for a high purchase price – is not currently to be recommended. The legal uncertainty associated with such a system could prevent the merging parties from exploiting synergies during the “waiting

period” – in which an unwinding of the merger must (still) be anticipated – by taking appropriate measures to integrate the companies. Such measures would then be strategically postponed until an ex-post intervention is no longer possible. From a legal perspective, such a regime would give rise to the difficult question as to which subsequent competitive effects can be attributed to the merger and which can be explained by other factors.

Needless to say, this does not exclude the strict enforcement of the prohibition of an abuse of dominant positions (Art. 102 TFEU) following an acquisition, including the possibility to impose structural remedies.¹⁹² But Article 102-enforcement is, by necessity, linked to specific abusive practices. A demerger can be mandated only if it is necessary to prevent the recurrence of the abuse or to undo its effects.

Nevertheless, the system of ex-ante control for the transactions being considered here faces a particularly high and unavoidable degree of forecast uncertainty (for more on this see III. below). Should it emerge in the future that this regime systematically fails to accomplish its objective of filtering out problematic mergers and preventing them, even following the broadening of theories of harm proposed below, there could be a need to reconsider the introduction of the possibility of an ex-post demerger even if is not linked to specified abusive practices post merger.

Recommendation 16:

The Commission ‘Competition Law 4.0’ is currently **advising against the introduction of a system of ex-post merger control**. However, as part of the proposed monitoring and assessment of cases involving the early acquisition of innovative start-ups by dominant firms 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.

188 For such considerations see Autorité de la Concurrence, Reform of merger law and ex-post control, 2018, available at http://www.autoritedelaconcurrence.fr/doc/note_controle_expost_en_final.pdf (last accessed on 3 September 2019).

189 Cf. also the press release from the French antitrust authorities of 7 June 2018, Modernization and simplification of merger control, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3182&lang=en (last accessed on 3 September 2019).

190 *Blonde/Catoire/Mariton*, La Politique de la Concurrence et les Intérêts Stratégiques de L’UE, April 2019, pp. 22 ff. Cf. also *Jean/Perrot/Philipon*, Competition and Trade: Which Policies for Europe?, Les notes du conseil d’analyse économique, No. 51, May 2019, p. 8.

191 *Jean/Perrot/Philipon*, Competition and Trade: Which Policies for Europe?, Les notes du conseil d’analyse économique, No. 51, May 2019, p. 8.

192 Art. 7 Council Regulation 1/2003.

3. New guidelines for the acquisition of start-ups by dominant digital companies

The question remains as to whether the acquisitions being discussed here require a reform of the substantive merger control standards, or at least additions to the merger control guidelines, in order to better encapsulate the threats to competition that have been outlined above.

This question has been the subject of much debate recently. The suitability of the general merger control standard as set out in Art. 2(2), (3) Merger Control Regulation, under which an assessment must be made as to whether the merger “would not significantly impede effective competition in the common market or in a substantial part of it” (the SIEC test) is not called into question. However, it is debated whether the standard of proof normally applied in merger control proceedings should be lowered. In order for a merger to be prohibited, the Union courts have consistently demanded evidence that it is “more likely than not” to lead to a significant impediment to effective competition.¹⁹³ However, the major challenge in the cases discussed here is that the target companies, at the time of their acquisition, are often not (yet) actual competitors in the market dominated by the acquirer, or that the horizontal overlaps are limited to markets where the acquirer does not possess a strong market position at the relevant time. The question as to whether the target companies would become (potential) competitors in the future but for the merger often involves a high degree of forecast uncertainty.¹⁹⁴ A prohibition would also be considered if the acquisition would foreclose other (potential) competitors or weaken their potential to compete. However, when comparing the merger to a possible “but for” scenario, an alternative acquisition

or cooperation prospect for the target company must be substantiated. The same applies for a theory of harm that would be based on the assumption that the acquisition will raise the barriers to market entry for (potential) competitors: the competition authorities always face the challenge, in an innovation-driven market environment, not only of predicting the development of competition assuming the merger takes place, but also of substantiating a plausible “counterfactual”, that is to say, the competitive situation without the notified merger, taking into consideration the characteristics and dynamics of the market.¹⁹⁵

Given the high degree of forecast uncertainty that is typically associated with the mergers being discussed here, the suitability of the “more likely than not” standard of proof has been called into question. The most far-reaching proposal has been put forward in the report for the French Economy and Finance Ministry: it proposes that the inadmissibility of transactions for which a very high purchase price is paid despite a low level of turnover should initially be presumed, and the burden of proof thus reversed.¹⁹⁶ Most of the other reports, and also the Commission ‘Competition Law 4.0’, find that such a presumption of illegality would overreach.¹⁹⁷

Instead, the Furman Report requires that the “more likely than not” standard of proof be replaced by a so-called “balance of harms” approach:

“A more economic approach to assessing mergers would be to weigh up both the likelihood and the magnitude of the impact of the merger. This would mean mergers being blocked when they are expected to do more harm than good.”¹⁹⁸

193 ECJ, judgment of 15 February 2005, Case C-13/03 P, ECLI:EU:C:2005:87, paras. 42 f. – *Commission/Tetra Laval*; ECJ, judgment of 10 July 2008, Case C-413/06 P, ECLI:EU:C:2008:392, paras. 43, 52 – *Sony und Bertelsmann/Impala*.

194 Cf. also: *Federico/Scott Morton/Shapiro*, Antitrust and Innovation: Welcoming and Protecting Disruption, 2019, pp. 15 ff., available at <https://ssrn.com/abstract=3393911>; *Lear Report* (fn. 6), pp. 44 ff., paras. I.152-I.154.

195 *Lear Report* (fn. 6), pp. 44 f., paras. I.152-I.154, in particular, emphasises the difficulties of developing a per-suasive “counterfactual”.

196 *Blonde/Catoire/Mariton*, La politique de la concurrence et les intérêts stratégiques de l’UE, 2019, pp. 22 ff. Cf. also *Jean/Perrot/Philipon*, Competition and Trade: Which Policies for Europe?, Les notes du conseil d’analyse économique, No. 51, May 2019, p. 8. Nevertheless, the report does not conclude by advocating a reversal of the burden of proof, but rather for ex-post control, see above.

197 Cf. e.g. the *Furman Report* (fn. 3): such a presumption is considered disproportionate – cf. p. 101, para. 3.103; similarly, the *Special Advisers’ Report* (fn. 4), p. 124: “[...] does not create a presumption against the legality of such mergers”. However, the *Stigler Report* takes a different view (fn. 6), pp. 89 ff., proposing the introduction of a sector-specific merger control regime for the digital economy that shifts the burden of proof to the parties participating in a merger. In particular, companies with “bottleneck power” should be subjected to these enhanced obligations. The *ACCC Report* leaves this open (fn. 5), p. 109: “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.”

198 *Furman Report* (fn. 3), p. 99, para. 3.88.

However, the “balance of harms” approach faces practical difficulties: very often, it is not possible to quantify the costs and benefits of the merger for competition and the probabilities of their realisation with the necessary precision. In its practical application, a general cost/benefit standard would therefore provide the European Commission with a margin of discretion that would be very difficult for the Union courts to control.

It is therefore preferable to use an approach that is based on relatively simple and clear, economically-based criteria and principles.¹⁹⁹ Applying error cost considerations,²⁰⁰ *Federico, Scott Morton and Shapiro* propose that particular importance be attached to the level of market power of the acquiring company: they argue that, should a potential competitor be acquired by a company with such a heavily consolidated market position that competition is essentially restricted to competition for the market itself, and should there be no better-placed potential competitor on the market, a prohibition should be justified whenever there is even a low probability of the company acquired developing into a potential competitor.²⁰¹

The Commission ‘Competition Law 4.0’ agrees that the extent of the market power of the acquirer is a key criterion for examining the cases being considered here: where market positions are deeply entrenched, particular weight must be given to keeping the markets contestable (see Chapter III above). In such cases, a significant impediment to effective competition can already be assumed if a merger, compared with a situation without the merger, noticeably reduces the contestability of the dominant acquirer with no evidence being required that a possible future attack by the target on the position of the acquirer would more likely than not be successful. The protection of the competitive and innovative process is key. The requisite degree of likelihood of a

significant impediment of competition can then be proven irrespective of the unavoidable uncertainty in predicting specific market developments.

Given the particular importance, in the digital context, of keeping markets open, developing suitable theories of harm that help identify relevant threats to the competitive process possibly involved in the type of acquisitions discussed here is a central task.²⁰² Aside from the special characteristics of any given market, an understanding of the innovation processes and entrepreneurial strategies that drive digital markets is key.²⁰³ Whenever start-ups are acquired by digital platforms, it is necessary to examine not only the potential harm on the consumer side, but also a possible increase in market power on the other side of the platform, particularly if the business model is based on a monetisation on that side. There is also a need to examine whether the acquisition will lead, directly or indirectly, to a strengthening or expansion of the market position of a digital ecosystem. A noticeable reduction in contestability and therefore a significant impediment to effective competition can also flow from a systematic strategy applied by a digital platform with entrenched market power to identify and acquire young start-ups with fast user growth and a corresponding competitive potential at an early stage, particularly if it can be shown that this has led to a significant increase in the barriers to entering the market.²⁰⁴ Another useful question to ask is what factors explain the high purchase price for the target company.²⁰⁵

While a change to the substantive standard of merger control and to the standard of proof is not required, it does, therefore, seem appear appropriate to develop guidelines for the assessment of the mergers discussed here that take account of their special features and set out the relevant, possibly novel, theories of harm. Particular importance

199 This is also emphasised by *Federico/Scott Morton/Shapiro*, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 2019, p. 12, available at <https://ssrn.com/abstract=3393911>.

200 *Federico/Scott Morton/Shapiro*, loc. cit., p.15.

201 *Federico/Scott Morton/Shapiro*, loc. cit., p. 22.

202 For a detailed examination of the theories of harm applied in practice to date, as well as any further theories of harm, see the Lear Report (fn. 6), pp. 21 ff.

203 Cf. also the Lear Report (fn. 5), p. 46, which notes that “counterfactuals” in an uncertain market environment are necessarily speculative and “somewhat imaginative”.

204 Similarly: *Federico/Scott Morton/Shapiro*, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 2019, p. 22, available at <https://ssrn.com/abstract=3393911> (last accessed on 3 September 2019); Stigler Report (fn. 6), p. 68.

205 *Federico/Scott Morton/Shapiro*, loc. cit., p. 22.

should be attached to data-based, innovation-based and conglomerate theories of harm. Further research is needed to test the economic resilience of new theories of harm and to precisely define their preconditions.

Recommendation 17:

When applying the SIEC test to the acquisition of young, innovative, low-turnover start-ups by dominant digital companies, particular importance must be attached to ensure that entrenched positions of dominance remain contestable. The Commission 'Competition Law 4.0' recommends the development of **guidelines** that specify relevant theories of harm. Particular account must be taken of **data-based, innovation-based and conglomerate theories of harm**.

IX. Improving the enforcement of competition law

One of the special challenges the state is facing in dealing with the digital economy is the speed of the changes in the economy and society brought about by digitalisation and the self-reinforcing tendencies of competitive advantages once gained. An example of this is when economies of scale lead to positive network effects that translate into advantages in data access which continue to be reinforced in a feedback loop.

To effectively protect competition, it is therefore of central importance for competition authorities to be able to intervene quickly and effectively where the market conduct of a dominant company has an exclusionary or predatory effect. Once previously promising competitors have been forced out of the market, it is not only the damage to the competitors concerned that cannot be rectified; frequently, it will also be unlikely that competition will be restored in another way in the foreseeable future.²⁰⁶ This is particularly true in concentration-prone platform markets where the elimination of competitors can be accompanied by an increase in positive network effects, which further raises barriers to market entry.²⁰⁷ The increase of power in the platform market can also have an impact on neighbouring markets in view of data-driven network effects.

Competition law proceedings are often time-consuming and resource-intensive: the market conditions and the impact of certain entrepreneurial strategies in a given market environment must be determined and assessed case by case, and rights of defence must be safeguarded. Abuse proceedings can therefore take several years to be brought to a conclusion. The European Commission's Google Shopping proceedings, which took more than 6 years from initiation to conclusion,²⁰⁸ may be regarded as an outlier. However,

proceedings taking three years or more are not unusual in competition law.²⁰⁹

In the preceding chapters we proposed a shift in certain cases from effects-based prohibitions to general rules of conduct for dominant players (Chapter V – e.g. data portability) or to presumption-based prohibitions (Chapter VI). This is particularly justified where anti-competitive behaviour typically has a foreclosure effect, when the information for possible efficiency justifications lies with the addressees of the prohibitions, when possible efficiencies can typically be realised in other, less restrictive ways, and when the welfare costs of an erroneous non-intervention are particularly high.

In other cases, a careful assessment of the factual basis and, where necessary, of the likely effects of a firm's conduct on competition case by case remains a strength of competition law and may well be a precondition for competition law enforcement to protect competition instead of restricting it.

Even in these cases, however, a situation must be prevented where a prima facie abusive conduct is only prevented once foreclosure has already occurred. Against this background, a debate has begun on whether the instrument of interim measures, which has so far been little used at European level, should be sharpened²¹⁰ (see 1. below). If it is not possible to prevent damage to competition ex ante, the question arises as to which means are available to competition authorities in general, and to the European Commission in particular, to restore competition after an infringement has been found (see 2.).

206 Monopolies Commission, Sondergutachten 68, para. 504. Also Art, Italian Antitrust Review 2:1 (2015), 55, 61.

207 *Lowe/Maier-Rigaud*, Fordham Comp. L. Inst. 2007, 597, 609: the risk of irreversible damage to competition exists in markets with a propensity to tip.

208 European Commission, Case AT.39740 – *Google Shopping*: Abuse proceedings were initiated on 30 November 2010 and concluded on 27 June 2017 by means of an order to bring the infringement to an end. An overview of all steps in the proceedings is available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.

209 Cf., for example, European Commission, Case AT.40099 – *Google Android*: The proceedings were initiated on 15 April 2015 and concluded by decision of 18 July 2018; European Commission, Case AT.37792 – *Microsoft (Working Group Server)*: The proceedings were initiated on 3 August 2000 and completed by way of decision dated 24 March 2004. A proceedings duration of some three years is also not unusual in abuse proceedings before the national authorities – cf. the Facebook proceedings of the Bundeskartellamt, Case B6-22/16 – *Facebook*: The abuse proceedings were initiated on 2 March 2016 (cf. press release dated 2 March 2016, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/02_03_2016_Facebook.html) (last accessed on 3 September 2019) and concluded on 6 February 2019 with a prohibition order.

210 Cf., for example, Monopolies Commission, Wettbewerbspolitik: Herausforderung digitale Märkte, Sondergutachten 68, 2015, available at https://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf (last accessed on 3 September 2019), para. 509: a stronger activation of the instrument of interim measures could be a key to better tackling competition problems in fast moving digital markets.

The Commission ‘Competition Law 4.0’ concludes that there is currently no need for a reform of the relevant provisions. However, the existing instruments and the possibilities they offer should be exploited to a greater extent.

1. Towards a more proactive use of interim measures in digital markets

In “cases of urgency” due to the “risk of serious and irreparable damage to competition”, Art. 8 of Regulation 1/2003 empowers the European Commission, acting on its own initiative, to order interim measures on the basis of a prima facie finding of an infringement of Art. 101 or Art. 102 TFEU.²¹¹

To date, however, the European Commission has made only very cautious use of the power to issue interim measures:²¹² It has only ordered interim measures in ten cases.²¹³ Following the judicial suspension of the execution of an interim measure ordered by the European Commission in the *IMS Health*²¹⁴ abuse proceedings in 2001, the European Commission did not issue any further interim measures until 2019. However, in a decision of 26 June 2019 against Broadcom the European Commission has reactivated the instrument and objected to a number of prima facie anti-competitive practices (exclusive purchasing obligations, anti-competitive rebates conditioned on exclusiv-

ity or minimum purchase requirements, product bundling and a deliberate degradation of interoperability) in the market for TV and modem chip sets.²¹⁵

The reasons given for the restrictive use of interim measures in the past relate in part to the demanding legal preconditions set out in Art. 8 of Regulation 1/2003, but above all the high procedural requirements imposed on the European Commission: before adopting an interim measure, the European Commission must issue a statement of objections, grant access to the files, give the opportunity to comment, hold a hearing and consult the advisory committee.²¹⁶ Procedures under Art. 8 of Regulation 1/2003 can therefore tie up additional resources and delay the decision in the main proceedings.²¹⁷

In addition, whereas the ordering of interim measures is also possible in principle in proceedings which raise new legal questions,²¹⁸ the Court of Justice of the European Union has a wide leeway in deciding whether interim measures²¹⁹ should be suspended for the duration of an action for annulment brought by the company concerned against the interim measure.²²⁰ The suspension of enforcement in the *IMS Health* case is seen as an indication of the high risk of suspension, particularly in novel cases or cases based on a change in the interpretation of the competition rules.²²¹ Due to the long duration of proceedings for annul-

211 The damage must not be limited exclusively to damage to individual market participants or a complainant in the main proceedings, cf. *Ritter*, in: *Immenga/Mestmäcker*, Art. 8 Regulation 1/2003 para. 4; also *Lowe/Maier-Rigaud*, *Fordham Comp. L. Inst.* 2007, 597, 602. Section 32c Act against Restraints of Competition uses the same wording to provide for a power of the Bundeskartellamt to order interim measures. For an overview of the relevant provisions in other Member States, cf. ECN, Recommendation on the power to adopt interim measures.

212 Cf. *Ritter*, in: *Immenga/Mestmäcker*, Art. 8 Regulation 1/2003 para. 2. The same applies to the Bundeskartellamt.

213 *Art*, *Italian Antitrust Review* 2:1 (2015), 55, 60, available at <http://iar.agcm.it/article/view/11379/10557> (last accessed on 3 September 2019). A list of all proceedings can be found in *ibid*, pp. 72 f. Six of these cases concerned abuse of market power proceedings, the remaining three vertical agreements – cf. *Jaspers*, discussion paper of 8 June 2018, cited according to https://www.dechert.com/content/dam/dechert%20files/event-and-webinar/2018/5/Interim_measures_EU_competition_proceedings.pdf, p. 2.

214 CFI, Decision of 10 August 2001, Case T-184/01 R – *IMS Health*. The European Commission then withdrew its decision of 3 July 2001, Case COMP D3/38.044 – *IMS Health: Interim Measures* by Decision of 13 August 2003.

215 Cf. IP/19/3410 of 26 June 2019.

216 *Jaspers*, discussion paper of 8 June 2018, (fn. 210), p. 1.

217 *Lowe/Maier-Rigaud*, *Fordham Comp. L. Inst.* 2007, 597, 609; *Jaspers*, discussion paper of 8 June 2018, (fn. 210), p. 1; *Ritter*, in: *Immenga/Mestmäcker*, Art. 8 Regulation 1/2003, fn. 5.

218 CFI, Decision of 26 October 2001, T-184/01 R – *IMS Health*, para. 93.

219 Proceedings according to Article 278 TFEU.

220 *Art*, *Italian Antitrust Review* 2:1 (2015), 55, 62 ff., in particular 65, with reference to CFI, president’s decision of 10 August 2001, Case T-184/01 R – *IMS Health*.

221 *Art*, *Italian Antitrust Review* 2:1 (2015), 55, 65 and 66; *Jaspers*, discussion paper of 8 June 2018, (fn. 210), p. 3.

ment before the CFI, a suspension of this type can be tantamount to the revocation of the interim measure.²²²

In some jurisdictions, particularly in Belgium and France²²³, the requirements placed on the adoption of interim measures are significantly lower, a broad margin of discretion of the competition authorities in imposing such measures is recognised and short time limits for bringing action and making a decision²²⁴ have been imposed. In these jurisdictions, interim measures have become significantly more important in practice.²²⁵ The Furman Report has called for the adoption of such a model for the United Kingdom.²²⁶ Similar proposals are being discussed with a view to European (and German) law.²²⁷ For example, it has been suggested that the examination of the necessity of an interim measure be based on whether substantial changes in the market (cf. Art. 9(2) lit. a of Regulation 1/2003) are to be expected within a timeframe of two years.²²⁸ The judicial review of interim measures in proceedings under Art. 278 TFEU²²⁹ could be restricted to a plausibility check of the Commission's decision.²³⁰

Among the advantages cited in favour of the Belgian and French model is that the greater ease in adopting interim measures tends to increase the companies' willingness to cooperate and their interest in a consensual settling of the proceedings by way of voluntary commitments.²³¹ It is precisely for these reasons, however, that a facilitation of

interim measures can also raise concerns (see above): obviously, an infringement of competition law has not yet been established when interim measures are imposed. As they significantly encroach on entrepreneurial freedom, full legal protection against provisional measures is called for. The incentives for companies to accept commitment decisions under Art. 9 of Regulation 1/2003 are high anyway – at EU level, commitments account for a high proportion of the competition decisions taken compared to the number of prohibition decisions. The result may be that new legal issues are not decided by the Union courts, legal uncertainty persists and the development of the competition law increasingly shifts from the courts to the executive.²³² For all these reasons, legal protection against provisional measures should not be weakened – but it may be desirable to accelerate the judicial proceedings wherever possible.

The Commission 'Competition Law 4.0' is of the opinion that the text of Art. 8 of Regulation 1/2003 itself does not need to be reformed. Rather, an interpretation and handling of Art. 8 must be ensured that considers the extent of the danger to competition when specifying the European Commission's burden of substantiating a possible infringement and the urgency of interim measures. According to the case law of the European Court of Justice, this is already applicable law: the ordering of an interim measure is based on an overall assessment and weighing up of the interests concerned – the interest in the protection

222 Art, Italian Antitrust Review 2:1 (2015), 55, 67.

223 Jaspers, discussion paper of 8 June 2018, (fn. 210), p. 2. A comprehensive analysis of French practice can be found in *Giraud/Blanc*, Les mesures conservatoires à la française: Un modèle réellement enviable?, Concurrences No. 3-2018, available at <https://fr.lw.com/thoughtLeadership/mesures-contradictaires-une-solution-souhaitable>. All decisions since 2001 are listed in tabular form here. For the situation in Spain, s. Art, Italian Antitrust Review 2:1 (2015), 55, 61.

224 Thill-Tayara, discussion paper of 8 June 2018, cited from https://www.dechert.com/content/dam/dechert%20files/event-and-webinar/2018/5/Interim_measures_EU_competition_proceedings.pdf, p. 4.

225 *Giraud/Blanc*, Les mesures conservatoires à la française: Un modèle réellement enviable?, paras. 3 ff.

226 Furman Report (fn. 3), paras. 3.128 ff.

227 Cf. also *Jean/Perrot/Philippon*, Competition and Trade: Which Policies for Europe?, Les notes du conseil d'analyse économique, no. 51, May 2019; and the Franco-German-Polish manifesto "Modernising EU Competition Policy" of 4 July 2019, which proposes a simplification of interim measures.

228 Monopolies Commission, Sondergutachten 68, para. 510; in agreement *Guérin/Wolf-Posch*, JECLaP 7 (2016), 30, 44.

229 With respect to the standard of judicial review, cf. ECJ, Decision dated 11 April 2002, Case C-481/01 P(R) – *IMS Health*, paras. 57 ff.

230 Art, Italian Antitrust Review 2:1 (2015), 55, 69.

231 *Lowe/Maier-Rigaud*, Fordham Comp. L. Inst. 2007, 597, 610.

232 For critical comments: *von Kalben*, Verpflichtungszusagen im EU-Wettbewerbsrecht, Baden-Baden 2018, in particular pp. 427 ff.; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, Section 21 paras. 60-63; *Schweitzer*, Verpflichtungszusagen im Gemeinschaftsrecht, in: FS Möschel, pp. 637 ff.; *idem*, Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement within a Federal Enforcement Regime, 2012, available at <https://ssPar.com/abstract=2101630>.

of competition and the interest of the companies affected by the interim measure; and the extent of the danger to competition is determinative for the requirements for substantiating the prima facie infringement.²³³ In the case of high risks to competition, serious doubts as to the legality of conduct may suffice to order interim measures, particularly in the earliest stages of examination.²³⁴ With the prerequisite of the “prima facie finding of infringement”, Art. 8 of Regulation 1/2003 sets a minimum threshold for the submission of an infringement of competition. Since interim measures significantly encroach on entrepreneurial freedom, may restrict competition if imposed without sufficient justification, and may lead to a situation where competition authorities, rather than competition, decide on market structures, this minimum threshold is not to be criticised.²³⁵

It is important, however, that interim measures can be ordered even if the doubts as to legality a company’s conduct are based on a novel interpretation of competition rules that has not yet been confirmed by the Court of Justice of the European Union – in particular in cases where such a novel interpretation is based on fundamentally different market circumstances. In such cases, a substantiated and strong proof of the threat to competition and the urgency of the measure as well as a plausibility check of the legal view by the European Commission are required. The task of the Court of Justice of the European Union is to ensure that both are accorded appropriate significance when weighing up interests.

Recommendation 18:

The Commission ‘Competition Law 4.0’ does **not consider a reform of Art. 8 of Regulation 1/2003 (“interim measures”) to be necessary**. Nor should judicial review of interim measures be weakened. In view of the rapid developments in digital markets, however, the **European Commission should proactively examine whether it is necessary to order interim measures** to prevent irreparable damage to competition.

2. More flexible use of remedies

If infringements of competition law have nevertheless led to a sustained deterioration in the competitive situation, the aim should be to order remedies which restore undistorted competition. Pursuant to Art. 7(1) of Regulation 1/2003, the European Commission may combine the finding of an infringement of competition law with all necessary remedies of a behavioural or structural nature which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. The purpose of such remedies is not merely to terminate the infringement in question. Rather, remedies should at the same time prevent a recurrence of the infringement and restore effective competition. In this context, the Court of Justice of the European Union as well as German courts refer to the “restoration of legality”²³⁶ or “restoration of the legal state”²³⁷. If the anti-competitive effects of an abuse persist after its cessation, the European Commission is in

233 ECJ, Decision of 11 April 2002, C-481/01 P (R) – *IMS Health*, para. 63. The decision was issued under application of Regulation 17/62. However, it can be assumed that Art. 8 of Regulation 1/2003 has not changed this legal situation.

234 Cf., for example, CFI, judgement of 12 July 1991, T-23/90 – *Peugeot*, paras. 61 ff.: “It must be pointed out that in proceedings relating to the legality of a Commission decision imposing provisional measures, the requirement of a finding of prima facie infringement cannot be placed on the same footing as the requirement of certainty that a final decisions must satisfy. [...]”. From literature: *Art*, Italian Antitrust Review 2:1 (2015), 55, 70.

235 *Giraud/Blanc*, Les mesures conservatoires à la française: Un modèle réellement enviable?, (fn. 31), para. 10. Cf. also *Jaspers*, discussion paper of 8 June 2018, para. 2.

236 ECJ, Judgment of 6 April 1995, C-241/91 P and C-242/91 P – *RTE and ITP*, para. 93; refers to the granting of compulsory licences. CFI, judgement of 17 September 2007, T-201/04 – *Microsoft*, para. 1276; refers to the use of a supervisory officer with investigation powers at the expense of the company – which was declared null and void by the CFI; furthermore, the European Commission required the company to disclose interface information (see more below).

237 Federal Court of Justice, Decision of 4 March 2008, *KVR 21/07* – *Soda-Club II*, para. 50; refers to the attachment of a legal notice on the product. Higher Regional Court of Düsseldorf, decision of 25 October 2006, *VI-Kart 14/06 (V)*, para. 45; refers to the exclusion of a shareholder – annulled by the Higher Regional Court of Düsseldorf.

principle responsible for taking action to “eliminate or neutralise” these effects.²³⁸

In the case of infringements of competition with a foreclosure effect, special importance is attached to restoring competition. At the same time, however, it poses special challenges to competition authorities: restoring the situation as it would have been without the infringement – a restitution in a strict sense – is *de facto* impossible in a rapidly developing market environment. What may be possible is a restoration of competitive opportunities. Depending on the respective market conditions, however, this can also be very complex and difficult.²³⁹

The Commission ‘Competition 4.0’ does not recommend to change the legal rules on remedial action. However, under the conditions of the digital economy with its pronounced concentration tendencies and in light of the recent abuse proceedings of the European Commission – in particular *Google Search (Shopping)*²⁴⁰ – which have raised questions about an adequate regime for restoring competitive opportunities, the Commission ‘Competition Law 4.0’ deems it necessary to reflect anew on remedies. In particular, it must be asked how competition can be restored after an infringement with foreclosure effect has occurred. Remedies which primarily pursue this purpose are referred to in the following as “restorative remedies” (see a.). Another question to be asked is whether and under which conditions it is possible to experiment with restorative remedies (b.).

a. Imposing “restorative remedies”

In cases where the anti-competitive effects do not end after the infringement of competition has been terminated,

the European Commission faces a dilemma: it is generally required to take action to “eliminate or neutralise” these effects.²⁴¹ If this is not successful, competition law enforcement will not only fail in its function of protecting competition in the given case. Where the restoration of competition fails systematically, incentives to disregard the competition rules will continue to prevail in the future. Only if competition law enforcement succeeds in restoring effective competition will the competition rules deploy the desired deterrence effect. However, on fast moving markets it will usually be impossible to restore competition to its “but for” state. Even the determination of such a “counterfactual” would present the European Commission with considerable difficulties. Where the European Commission examines the effects of conduct on competition in its infringement proceedings, it does so taking into account also the potential anti-competitive effects, and the aim of such a determination is not to order a restoration of the state of competition as it would exist without the infringement.²⁴²

Remedies within the meaning of Art. 7 Regulation 1/2003 are not a functional equivalent to private damage claims. Their function is not compensate disadvantaged competitors for the harm suffered. Nor can they produce a market outcome as it would presumably have existed in the absence of an infringement. Rather, the function of remedies within the meaning of Art. 7 must be to restore competition, i.e. to ensure that existing positions of market power are (again) made contestable and that competitors have real and effective competitive opportunities – functionally comparable to those that existed before the infringement. The aim of remedies must primarily be to keep markets open. This is the benchmark to be used when deciding on the imposition of remedies – not the restoration of the competitive situation as it would exist without

238 ECJ, Decision of 4 March 1999, [C-119/97 P](#) – *Ufex et al.*, para. 94; refers to the complaint against a non-intervention by the European Commission against allegedly persistent anti-competitive effects of cross subsidies which have since ceased. Cf. also CFI, judgement of 27 June 2012, [T-167/08](#) – *Microsoft*, para. 115 (concerning Microsoft’s proposal to subject the negotiation of fee rates with potential licensees to arbitration supervision): “However, the implementation of such a mechanism cannot restore the competitive situation as it would have been if Microsoft had, on its own initiative, offered access to the interoperability information on reasonable terms”. From the literature, cf. Bulst, NZKart 2014, 245 – Authority of the European Commission to eliminate consequences. From German case law, cf. Higher Regional Court of Düsseldorf, Decision of 21 December 2011, [VI-Kart 5/11 \(V\)](#), para. 156 (referring to the order of the retrospective annulment of a discount scale contrary to antitrust law: “Only in this way can the condition be restored which would have existed without the discount being granted contrary to antitrust law.”)

239 For a discussion, cf. also Stigler report, (fn. 6) pp. 10, 79. The Stigler report assumes that sector regulation is necessary for this purpose.

240 European Commission, Decision of 27 June 2017, case AT.39740 – *Google Search (Shopping)*.

241 ECJ, Judgment of 4 March 1999, [C-119/97 P](#) – *Ufex et al.*, para. 94.

242 Cf. ECJ, Judgment of 28 May 1998, [C-7/95 P](#) – *Deere*, paras. 76 f.

the infringement. With this perspective, and depending on the specific context, the obligation of a dominant company to establish technical interoperability by disclosing interface information or to grant data access may be of particular importance in the digital economy – even in cases where the infringement of competition did not consist in an abusive refusal of interoperability or data access. The role of interoperability and data access in opening the market, which the European Commission has already stressed in specific sectoral contexts (Chapter V) and for platform operators (Chapter VI) can thus affect the design of remedies in individual cases of abuse.

Finally, and as a last resort, where it is not possible to restore competition by other means, the ordering of a divestiture may also be envisaged in certain cases.

b. Evaluation and re-adjustment of remedies

When deciding on “restorative remedies”, a significant difficulty for competition authorities may be that they are unable to assess the effect of these remedies *ex ante* in a complex and rapidly changing market environment. In such situations, in order to avoid the imposition of either overly far reaching or ineffective remedies, a mechanism is desirable which allows a competition authority to impose flexible, more targeted obligations. The remedies imposed by the European Commission in the *Google Search (Shopping)* case are aimed in this direction. In cases in which an infringement can be terminated and harm undone by different measures, the choice of means is incumbent on the addressees of the decision. The European Commission has therefore limited itself to specifying certain “cornerstones” which Google must take into account when selecting and structuring these measures. It is not yet possible to assess whether this is sufficient to increase the flexibility and effectiveness of the remedial regime. A legal limit to

a more flexible remedy regime is the requirement of legal certainty. It would be conceivable to further expand flexibility by creating a new procedure in which companies and authorities can cooperate in their mutual interest with a view to restoring competition and experiment with different solutions, combined with deadlines and criteria for the evaluation of effectiveness of a given regime. If companies accept such an experimental remedy regime, they can potentially avoid a more heavy-handed remedial regime.

The Commission ‘Competition 4.0’ does not wish to make any recommendations for a change in the legal framework at this point, but recommends that competition authorities make the remedy regime for restoring competition in digital markets more “agile” in the sense described above. In addition, the effectiveness of the remedy regime on digital markets should be systematically examined in order to better assess the need for further development of the regulatory framework. A study should analyse the efficacy of remedies imposed in the past from the following points of view: (1) Has the imposed remedy led to the restoration of effective competition? (2) What are the pros and cons and what is the track record of behavioural remedies? (3) What experience has been gained with functional and targeted remedies and what are the potential and legal conditions and limitations of such remedies? (4) When are structural remedies proportionate and necessary?

Recommendation 19:

The Commission ‘Competition 4.0’ recommends 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.).

243 Cf. e.g. Higher Regional Court of Düsseldorf, Decision of 20 June 2006, [VI-2 Kart 1/06 \(V\)](#), para. 122: “It is forbidden to specify in concrete terms the actions necessary for the cessation, because the person concerned has various options open to him among which – in the sense of the most effective possible implementation of decision – he is free to choose.”

244 European Commission, Decision of 27 June 2017, [AT.39740](#), paras. 698 ff.: “As there is more than one way in conformity with the Treaty of bringing that infringement effectively to an end, it is for Google and Alphabet to choose between those various ways. Any measure chosen by Google and Alphabet should, however, ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages. [...] In particular, any measure chosen by Google and Alphabet: (a) should apply to all devices, irrespective of the type of device on which the search is performed; (b) should apply to all users of Google situated in the thirteen EEA countries in which the Conduct takes place, irrespective of the Google domain that they use (including Google.com);[...]”

X. Combining competition law with other regulatory areas

The recommendations for action which have so far been presented in this report mainly relate to the further development of the general framework of competition law. But digitisation entails a fundamental restructuring in almost all areas of the economy and society. As has been indicated at several points in this report (Chapter V and Chapter VI), the protection of well-functioning, open and innovative markets may also require changes in regulations outside competition law – for example in contract law, consumer protection law, data protection law, liability law, procedural law or other areas of information law which are relevant to the digital economy. The introduction of new data access rights or new institutions such as data trustees may be necessary or expedient (Chapter V). In turn, changes of this type then have an indirect effect on competition law and regulatory instruments in areas related to competition. When new technical and economic developments require changes in the regulations and institutions in a large number of areas of life, the legislative and executive powers must react with a new, more integrated approach which covers different areas of law and different sectors and combines the relevant administrative and supervisory structures (cf. 1.).

For this purpose, various reports have, furthermore, demanded the establishment of a digital agency.²⁴⁵ For example, the British Furman Report proposes the creation of a Digital Markets Unit (DMU) which should either be integrated into the Competition and Markets Authority (CMA) or the Office of Communications (Ofcom) or be established as an independent national unit and which should be tasked with a systematic market observation, the development of a “code of conduct” for companies with a “strategic market status” and other regulatory tasks.

As has been shown in previous chapters, the Commission ‘Competition Law 4.0’ considers that a transition to regulation may be necessary at some points. However, it does not recommend the creation of a new public authority which transcends sector boundaries and takes responsibility for all market-related questions on digitisation. In the opinion of the Commission ‘Competition Law 4.0’, special responsibilities for specific legal and technical areas and sectors as they are characteristic for the current administrative structure will remain expedient in the future.

However, to enable legislators and administrations to recognise cross-sectoral changes and issues quickly enough, so that they an adequate reaction can be identified quickly and regardless of specialisation, it is necessary for all parties to have access to reliable cross-cutting information in a timely manner. It is true that a great deal of information about digital change is already being generated and collected today on different markets and in different legal contexts. But this is only being carried out within the framework of the specific limited administrative tasks and areas of responsibility of individual public bodies. To obtain wider access to information with a more general relevance, the Commission ‘Competition Law 4.0’ recommends that new instruments should be introduced to promote stronger interdisciplinary information collection and evaluation.

1. A better linkage of administrative and supervisory structures: creating a “Digital Markets Board”

Digitisation is redefining market and sector boundaries. Especially because of the wider market relevance of many data and the development of artificial intelligence as a new cross-cutting technology, this is leading to upheaval across sector boundaries and new interaction between different sectors. The large digital companies start from different “home markets” (search engines, product sale and trading platforms, smartphones and app stores, social networks), but they are constantly expanding into new markets (financial services, smart home applications, autonomous driving, “Industrie 4.0”) and using the advantages from connected operations which are described in Chapter II and which can especially result from an interlinked use of data portfolios and data analysis resources and from “access” to a large customer base.

The resulting market upheaval does not necessarily call into question the existing administrative and supervisory structures which are partly designed to fulfil specific protective goals at the national and European level and are partly characterised²⁴⁶ by sectoral areas of responsibility.²⁴⁷ But the far-reaching and comprehensive structural changes must be met by an innovative coordination and harmoni-

245 Cf. e.g. Furman Report (fn. 3), paras. 2.6 ff.: “Digital markets unit”; Stigler Report (fn. 6), pp. 79 ff.: creation of a regulatory authority (“Digital Authority”); ACCC, Digital Platforms Inquiry, Preliminary report, 2018, pp. 81, 125 f., 163, available at <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry> (last accessed on 3 September 2019): creation of a new regulatory authority; formulated differently in the final report (ACCC Report, fn. 2), cf. e.g. p. 252.

sation system which transcends the boundaries of technical specialisms and individual sectors. There are many areas of overlap between regulatory issues in different sectors, such as antitrust law, data protection law, IT security law or liability law, and they affect various sectoral regulations, for example in areas such as finance, health and the energy supply. In addition, information about certain digital market services and their effects – such as platforms, cloud services or AI systems – is relevant for a number of areas of responsibility in various public authorities. Coherent action throughout the different areas may require a shared understanding of these developments.

There have already been a number of initiatives in this direction. But the Commission ‘Competition Law 4.0’ believes it necessary to anchor the cooperation between the administrative and supervisory structures better than before by means of institutionalised networking, and thus to facilitate political coordination. At the European level, this goal could be achieved by establishing a new “Digital Markets Board” which could be placed with the General Secretariat of the European Commission, which is already responsible for coordination between the Directorates General. This body should not replace the Directorates General which are responsible for the individual areas (especially DG CNCT), rather it should ensure a systematic exchange of information, close cooperation and coherent alignment of policies. To this end, it should also encourage the EU agencies to adopt this approach. Procedural delays resulting from extended coordination requirements should be avoided.

Recommendation 20:

The Commission ‘Competition Law 4.0’ 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 harmonisation of the various policy areas in the interest of an overarching and coherent European digital policy.

2. Creating a new EU agency to support digital policies

In the next few years, the EU and the Member States will be faced with the challenge of developing a regulatory and enforcement framework within sectors and across sector boundaries which favours competition and innovation and reflects the whole breadth of political goals under the new conditions of digitisation. In this respect the legislative bodies – and the administration which needs to enforce the laws and promote the further development of the regulations – are dependent on a general understanding of the digital development, understandable and consistent terminology and a considerable level of technical expertise. This knowledge must keep pace with the high speed of digital change.

To this end, a majority of the Commission ‘Competition Law 4.0’ recommends the establishment of a European digital institution or a European digital agency (“Digital Markets Transformation Agency”) which should collect and collate the relevant information on the digitisation of markets and the role of the state in monitoring and guiding this development and make this information available. This institution should not have the authority to intervene on its own initiative. Instead, its main task should be to gather and professionalise the generated knowledge about the digital economy and to present its information to the responsible specialised authorities (antitrust agencies, data protection authorities, media supervisors, consumer protection bodies, sectoral regulatory authorities) and to the policymakers involved in government and the legislative process. This should create the conditions for better coordinated, faster and more effective action by the various state authorities. The relevant information would include the following:

- Permanent observation of platform business models, services and market development, as a service for each operationally responsible supervisory authority;

246 At the EU level e.g.: DG COMP; DG JUST; EU Agency for Cybersecurity (ENISA) and the European Data Protection Committee. At the national level e.g. the Bundeskartellamt, the Federal Office for IT Security, the public authorities in the *Länder* which are responsible for the private digital economy.

247 At the EU level e.g.: DG for Communications Networks, Content and Technology (CNCT); DG for Mobility and Transport (MOVE), various EU agencies in interaction with the Commission in the area of regulation administration (ACER, BEREC office). At the national level e.g. the Bundesnetzagentur, financial supervisory bodies, the media agencies of the *Länder* with responsibility for information intermediaries.

- Checking interoperability standards in the context of the obligations of cooperation, access, data protection and the obligation to disclose information;
- Providing an overview of the market and/or a documentation of data stocks in order to support the data access regulations (under consumer protection law or data protection law);
- Documentation of the use and effects of artificial intelligence, for example in connection with automated individual decisions, or any manipulation of competition or public opinion.

The creation of a public authority with its main focus on the generation and processing of knowledge is not a new venture. A comparable institutional arrangement, which could serve as a model, already exists between the European Environment Agency (EEA) and the closely related European Environment Information and Observation Network (Eionet)²⁴⁸, for example to provide information support for environment administrations and environmental policy.²⁴⁹ Other examples of EU agencies which mainly carry out observational and analytical tasks to support the cooperation between public authorities and the formation of policies include the European Centre for Disease Prevention and Control, the European Food Safety Authority, the European Foundation for the Improvement of Living and Working Conditions and the EU Agency for Fundamental Rights. At the national level within Germany, there are also various institutions which monitor certain spheres of life or phenomena and then collect and scientifically evaluate data, such as the Federal Institute for Risk Assessment or the Federal Institute for Population Research. A new federal institute for the digitisation of markets could provide sup-

port for a European digital agency and also carry out additional national tasks.²⁵⁰

Such a support agency should initially be created for a limited time so that the experience gained in the fulfilment of its tasks and its cooperation with other European institutions can be observed and evaluated. In addition to the designation of the topics which should be permanently analysed, priorities should also be set in the form of annual programmes.

A minority in the Commission ‘Competition Law 4.0’ argued against the creation of a new agency. The necessity of generating a better systemic understanding of the digital development is undisputed. In addition to the information which is needed for the assessment of individual cases, it is also necessary to generate the broader type of information which is needed to understand and meet the challenges of digitisation outlined in Chapter III: What effect does digitisation have on the selection decisions of consumers? How does digitisation influence innovation processes and competition? What does digitisation mean for regulatory instruments and the structures for their enforcement? In the opinion of a minority of the members of the Commission, however, it is not sensible to delegate this information generation to an independent agency. Firstly, a significant amount of relevant information is already gathered and evaluated in the framework of the digital single market strategy and by the DG CNCT, so that there is a risk of an unclear duplication of responsible bodies. The minority also suggests that the situation is different from the case of the European Environment Agency because the necessary knowledge in the digital area is often intricately linked with the specific legal or legislative policy issues in areas such as competition law, consumer law or data protection

248 Cf. Regulation (EC) No 401/2009.

249 The EEA does not have its own decision-making powers, it is merely an information and coordination agency. Organisationally, the agency consists of a Management Board, a Scientific Advisory Board and the Executive Director. The Management Board is made up of representatives of the 33 participating states, which also include states which are not members of the EU. In the working programme of the EEA, which is decided by the Management Board, several (currently six) particularly relevant topics are periodically designated as subjects for so-called European Topic Centres (ETCs). These topic centres are networks which currently bring together about ninety specialised institutions from the EEA member states (public authorities, scientific institutions etc.). In the framework of Eionet, the EEA and the ETCs then work together with national focus points (NFPs), which are normally environmental authorities or environment ministries (in Germany: the Environmental Protection Agency [UBA]). The NFPs coordinate the work of Eionet at the national level and transmit the bidirectional flow of information from the national public authorities to the EEA and from the EEA to the bodies which are responsible for specific environmental decisions in the member states.

250 Cf. the topics in the Fetzer Report “Bausteine für einen sektorübergreifenden institutionellen Ordnungsrahmen für die digitale Wirtschaft”, in the Studienreihe Fachdialog Ordnungsrahmen für die Digitale Wirtschaft, commissioned by the Federal Ministry for Economic Affairs and Energy (Professor Dr Thomas Fetzer, Professor Dr Heike Schweitzer, Professor Dr Martin Peitz), published as discussion document No. 18-026 of the Centre for European Economic Research (ZEW), pp. 18ff.

law. It suggests that subject-specific knowledge is then necessary in order to ask the right questions and gather the data which can provide sound answers to these questions. In the opinion of the minority, these arguments mean that the task of generating information should be left with the responsible specialised units. It is suggested that the comprehensive and generalised knowledge that can be generated does not justify the creation of a new public authority. But better coordination between the units responsible for the different areas of law is nevertheless considered desirable. One means to achieve this could be the introduction of a new instrument based on the model of the British “market investigation”²⁵¹, which would enable data about specific situations and markets to be gathered systematically over longer periods of time in order to gain insights into the mode of operation and functional deficits of markets and to develop proposals on how the operation of these markets could be improved. In contrast with the instrument of sectoral investigation under Article 17 Regulation 1/2003, it should also be possible to use this instrument in cooperation between different directorates and without its being limited to a narrow competition law perspective: instead it should be able to cover questions relating to consumer protection or data protection law. And it should not only serve as a basis for the initiation of unfair competition proceedings, it should also act as a basis for the development of regulatory proposals to improve the operation of markets and strengthen innovation and competition.

The majority of the Commission on Competition Law 4.0 also believes that strengthening such an instrument, which is primarily designed for competition law, would be beneficial but not sufficient. In particular, the majority suggests that it would not be enough to enable the different regulatory areas to be linked with competition law. Especially because of the different areas of responsibility for supervision in competition law, data protection, consumer protection and IT security and the different procedural regulations in European and national law, it is suggested that it will not be possible to create such a comprehensive instrument. And the majority suggests that any information provided would only reflect the situation of the moment; this

would not be an adequate substitute for a systematic collection and evaluation of the data.

Recommendation 21:

A majority of the members of the Commission ‘Competition Law 4.0’ 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. The agency should support the competent authorities at EU level and the EU Digital Markets Board.

3. Combining data protection supervisory bodies

Organising the portfolios of public authorities responsible for the single European market as effectively as possible would foster rapid legal certainty for business models in the digital economy. The fragmentation of data protection supervision authorities for the private business sector as a result of regionally distributed areas of responsibility, e.g. in Germany with the data protection representatives in the *Länder*²⁵², forms a stark contrast to the market and competitive structures of digital markets – which are invariably national or international – and places an unjustified regulatory burden on companies.

Therefore, it should also be considered whether the present structures of supervisory responsibility under data protection law still meets the requirements of a fundamental transformation towards a ubiquitous data economy. In some Member States, especially Germany, there are multiple regional data protection authorities which are responsible for private data processing companies, and in some cases, such as the German data protection authorities of the German *Länder*, they only coordinate their work in informal committees. The GDPR has already reacted to the new challenges posed by cross-border digital companies by set-

251 Cf. Competition Commission, Guidelines for market investigations: Their role, procedures, assessment and remedies, April 2013 and CMA, Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach, January 2014 (revised July 2017); Coscelli/Horrocks, Making Markets Work Well: The U.K. Market Investigation Regime, CPI Vol. 10/1, Spring 2014, pp. 24 ff.

252 On the other hand, in response to arguments presented by Germany, Article 51 of the GDPR currently and explicitly permits the creation of multiple data protection supervisory authorities – for example at the level of the *Länder*. At present, Germany makes use of this possibility.

ting up the European Data Protection Board. An adjustment to reflect this concern is still outstanding in national data protection structures – especially in Germany – and should at least be seriously considered. One conceivable option in this respect would be to formalise the cooperation structures, which are currently informal.

But by analogy with the provision in antitrust law under Sections 48 subsection 2 and 49 of the German Act against Restraints of Competition, it could be more effective to stipulate a regulatory responsibility of the Federal Data Protection Commissioner for data processing transactions by non-state organisations which transcend the boundaries of the *Länder*, and to refer them to the data protection bodies in the *Länder* if the relevant transactions are then found

to have no national significance. In contrast with the media sector, there are no insurmountable constitutional obstacles to such a partial centralisation of the data protection supervision under Article 86(3) sentence 1 in conjunction with Article 74(1) No. 11 and Article 72(2) of the German Basic Law.

Recommendation 22:

The Commission ‘Competition Law 4.0’ recommends that the Member States should **consolidate their data protection supervision structures** for the non-public sector.

Annex

This report is based on a number of previous reports on the development of competition law and a regulatory framework for the digital economy which would promote competition and innovation.

- *Schweitzer/Haucap/Kerber/Welker*, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen (Modernisation of abuse control for companies with a dominant market position)*, Baden-Baden 2018. (Report for the German Federal Ministry for Economic Affairs and Energy)
- *Furman/Coyle/Fletcher/McAuley/Marsden*, *Unlocking Competition: Report of the Digital Competition Expert*

Panel, 2019, (Report for the British Chancellor of the Exchequer and Secretary of State for Business, Energy and Industrial Strategy)

- *Crémer/Montjoye/Schweitzer*, *Competition policy for the digital era*, 2019, (Report by the special advisers of Commissioner Vestager)
- *Australian Competition & Consumer Commission (ACCC)*, *Digital Platforms Inquiry*, Final Report, 2019

The recommendations in these publications are summarised here insofar as they are relevant to the recommendations of the Commission ‘Competition Law 4.0’.

Report: Competition policy for the digital era (Special Advisers’ Report)²⁵³

Chapter IV

(Establishing methods for defining markets and market power in a more differentiated manner)

- In the review of abusive conduct on digital markets, less attention should be paid to market definitions and more to theories of harm and the identification of anti-competitive strategies. (pp. 45 f.)
- In consumer “lock-in” situations, it may be necessary to differentiate between ecosystem-specific secondary markets. (pp. 47 f.)
- In other respects, market definitions should be undertaken on a case-by-case basis, and special attention should be paid to behavioural-economy insights and the extent to which established companies are protected from competition, or protect themselves from competition. (pp. 48 ff.)

Chapter V

(Strengthening access to data and the self-determined handling of data)

- On the basis of the prohibition of the abuse of dominance, dominant companies may be obliged to grant data access even under the currently applicable law if it is necessary in order to operate in complementary or secondary markets. But the requirements for such access need to be specified in more detail by the competition authorities and courts.
- Where necessary – for example if market entry or effective competition is dependent on continuous access to data of a dominant company – a sector-specific regulatory regime may be an opportune solution.
- A guarantee of data portability and interoperability may promote multi-homing and make competition in complementary markets possible. (pp. 73-91 and especially pp. 98 ff.)

Chapter VI

(Clear rules of conduct for dominant platforms)

- Measures adopted by dominant digital platforms which are designed to reduce the pressure of competition should be prohibited unless they demonstrably lead to major advantages for consumers. (pp. 41 f.)
- In markets with high entry barriers, certain dominant vertically integrated platforms should bear the burden of proof to show that self-preferencing does not have any long-term displacement effects. (pp. 65 ff.)

Chapter VII

(Enabling innovation through cooperation)

- Cooperation projects involving data exchange and data pooling require greater legal certainty. This could initially be achieved by the means that are available to the European Commission (guidance letters, no infringement decisions, revision of the horizontal guidelines) and later by a specific block exemption regulation. (pp. 92 ff.)

Chapter VIII

(Improving controls on the takeover of start-ups by dominant companies)

- An adjustment of the EU merger control thresholds by the supplementary introduction of a transaction-value-based threshold would be premature. But the experience gained with such a threshold in Germany and Austria should be monitored. (pp. 113 ff.)
- The criterion for the substantive assessment in EU merger control law should be adapted so that the acquisition of start-ups by dominant platforms and/or ecosystems can be more strictly controlled. (pp. 116 ff.)

253 *Crémer/de Montjoye/Schweitzer*; *Competition policy for the digital era*, published on 4 April 2019, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> (last accessed on 22 August 2019).

Digital platforms inquiry (ACCC Report)²⁵⁴	
Chapter V (Strengthening access to data and the self-determined handling of data)	<ul style="list-style-type: none"> ● The introduction of data portability rules for digital platforms is rejected at the present time, but explicitly reserved as a future possibility – after further review. (pp. 115 ff.)
Chapter VI (Clear rules of conduct for dominant platforms)	<ul style="list-style-type: none"> ● A number of measures are recommended which relate to the role of digital platforms in the Australian media scene. This involves issues such as the relationship between platforms and media companies, their conduct in relation to copyright violations and the dissemination of false information on platforms. (pp. 205-278, 370 ff.) ● Principles should be developed for the internal settlement of disputes on digital platforms, and an ombudsman system should be established for disputes in which digital platforms are involved. (pp. 507 ff.)
Chapter VIII (Improving controls on the takeover of start-ups by dominant companies)	<ul style="list-style-type: none"> ● In Australia there is no system for mandatory notification of proposed acquisitions, so the Australian Competition and Consumers Commission (ACCC) should be granted the possibility of agreeing with large digital platforms that they must inform the ACCC in advance of certain proposed acquisitions. (pp. 109 ff.) ● As regards the substantive assessment of proposed acquisitions, the following factors should also be taken into account: (i) the likelihood that the acquisition would result in the removal from the market of a potential competitor; and (ii) the nature and significance of assets, including data and technology, to which the acquiring company will receive access as a result of the merger. (pp. 105 ff.)
Chapter X (Combining competition law with other regulatory areas)	<ul style="list-style-type: none"> ● A digital platforms branch should be set up within the ACCC. In particular, this branch should develop special expertise in the area of digital markets, among other things in order to discover and prohibit potentially anti-competitive behaviour by digital platforms. (pp. 140 ff.)

Report Unlocking digital competition (Furman Report)²⁵⁵	
Chapter IV (Establishing methods for defining markets and market power in a more differentiated manner)	<ul style="list-style-type: none"> ● It is recommended that the new dominance category of a “strategic market status” should be introduced. This status describes the possibility for individual digital platforms to control access to markets. The “strategic market status” should also be a condition for a special regulatory regime which remains to be developed. (pp. 41 f., 59)
Chapter V (Strengthening access to data and the self-determined handling of data)	<ul style="list-style-type: none"> ● The mobility of personal data and systems with open standards and the free availability of certain data are regarded as measures which promote competition in the digital sector, and specific rules should be developed to implement them. (pp. 64-76)
Chapter VI (Clear rules of conduct for dominant platforms)	<ul style="list-style-type: none"> ● A regulatory regime should be developed with special conduct obligations for digital platforms which have a “strategic market status” (cf. also the above recommendations in relation to Chapter IV of this report). For this purpose, a “digital platform code of conduct” should be enacted which prohibits or prescribes certain behaviours by such platforms in relation to (potential) users. (pp. 58-64)
Chapter VIII (Improving controls on the takeover of start-ups by dominant companies)	<ul style="list-style-type: none"> ● The Competition and Markets Authority (CMA) should continue to give priority to the evaluation of mergers in digital markets. In the selection and assessment of merger cases, any harm to innovation and impacts on potential competition should be closely considered. (pp. 91-95) ● Digital companies with a “strategic market status” should be required to make the CMA aware of all intended acquisitions. (p. 95) ● The guidelines of the CMA for the assessment of mergers should be updated and adapted to reflect the features and dynamics of digital markets. (pp. 95-97) ● The statutory criteria for the substantive assessment of mergers should be adjusted to allow the CMA to take into account both the scale of any harm and the likelihood of its occurrence (“balance of harms approach”), i.e. including any harm to innovation and the impact on potential competition. (pp. 97-99)

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254 Australian Competition and Consumer Commission (ACCC), Digital Platforms Inquiry, published on 26 July 2019, available at: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report> (last downloaded on 22 August 2019).

255 Furman/Coyle/Fletcher/McAuley/Marsden, Unlocking digital competition; published on 13 March 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (last accessed on 22 August 2019).

Report Unlocking digital competition (Furman Report)²⁵⁵ (continuation)
Chapter IX
 (Improving the enforcement of competition law)

- To facilitate the use of interim measures, the procedures within the CMA should be optimised, for example by a limitation of the access to file for the affected companies. (pp. 103-105)
- For the same reason, the criteria and reasons for the review of interim measures – amongst other measures – taken by the CMA should also be subject to limitations by the court of appeal. In return, the decision-making structures within the CMA should be organised in such a way that greater independence in the decision-making process is guaranteed. (pp. 105-108)

Chapter X
 (Combining competition law with other regulatory areas)

- An institution should be created (“Digital Markets Unit”) which is tasked, among other things, with the continued development of the competition rules for the digital economy (cf. also the recommendations listed above in relation to Chapters IV, V and VI of this report). The institution should also have enforcement powers, especially in relation to companies with a “strategic market status”. (pp. 54-83)
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Study: Modernisation of abuse control for companies with a dominant market position (Market Power Study)²⁵⁶
Chapter IV
 (Establishing methods for defining markets and market power in a more differentiated manner)

- When defining markets, it should be possible to apply the assessment of dominance more flexibly. In certain situations, a detailed market definition should not be necessary. The development of case law in this respect is a matter for the Court of Justice of the European Union. (pp. 30-40)
- A lowering of the intervention threshold for controlling abuse is recommended for specific groups of cases. In markets which tend to “tip”, unilateral conduct which could promote the tipping of the market should be prohibited even below the threshold for dominance. In addition, the “intermediation power” which platforms may have as intermediaries under certain circumstances should be defined in the law as a separate third form of market power, in addition to the conventional categories of supply-side and demand-side power. (pp. 59-78)

Chapter V
 (Strengthening access to data and the self-determined handling of data)

- In the framework of the “essential facilities” doctrine, the conditions defined for deciding on the abusive nature of a denial of access to data should be lower than the requirements that have so far been formulated for a denial of access to infrastructures and to intellectual property rights, insofar as this relates to access to data which have been generated virtually accidentally and without special investment. (pp. 131-139)
- In the context of value creation networks, if access to data which are exclusively controlled by one company is refused to a third party supplier of complementary services, this should be deemed to be an unreasonable exclusionary conduct if the data are required for effective competition or innovative services, even if access to the data does not constitute a “normally accessible” in the course of typical market transactions”. (pp. 144-156)

Chapter VIII
 (Improving controls on the takeover of start-ups by dominant companies)

- The statutory criteria for the substantive assessment of proposed mergers should be supplemented in such a way that a systematic acquisition of fast-growing companies at an early stage of their development by a dominant company can be more easily prohibited. This should be based on the observation that especially those companies are generally acquired which have an identifiable and significant potential in the medium term to develop in such a way that they could become competitors of the company with the dominant market position. (pp. 122-127)
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256 Schweitzer/Haucap/Kerber/Welker; Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 29 August 2018, available at: https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf?__blob=publicationFile&v=15 (last accessed on 22 August 2019).

