

A NEW FRAMEWORK FOR A COMPETITIVE DIGITAL ECONOMY

REPORT BY THE
COMMISSION „COMPETITION LAW 4.0“

Achim Wambach, ZEW Mannheim

*Global Competition Law Center
Brussels, 10. September 2019*



ZEW

MANDATE OF THE COMMISSION

Set up by Federal Minister for Economic Affairs and Energy in September 2018.

Briefed with: developing recommendations on how **EU competition law can be amended** to take account of the new developments in the data economy, the growing relevance of platform-driven business models, and of “Industrie 4.0”, in order

- to make it possible for **Europe to have internationally competitive digital** companies;
- to better respond to the needs of European digital **companies to engage in cooperation** and scaling-up;
- to better **control platform operators** with a high degree of market power;
- to **improve data access**;
- To enable competition **authorities’ ability to react** .

MEMBERS OF THE COMMISSION

Chair

Martin Schallbruch, Information sciences

Prof. Dr. Heike Schweitzer, Law

Prof. Achim Wambach, Ph. D., Economics

Members

Prof. Dr. Wolfgang Kirchhoff, Judge at the Federal Court of Justice

Dr. Bernd Langeheine, Attorney-at-Law

Prof. Dr. Jens-Peter Schneider, Law

Prof. Dr. Monika Schnitzer, Economics

Prof. Dr. Daniela Seeliger, Attorney-at-Law

Prof. Dr. Gerhard Wagner, Law

Members without voting rights

Hansjörg Durz, Member of the German Bundestag

Dr. Matthias Heider, Member of the German Bundestag

Falko Mohrs, Member of the German Bundestag

APPROACH TAKEN

Period: 09.2018-09.2019

3 working groups

- data
- platforms
- digital ecosystems

6 plenary sessions, with hearings from experts from

- competition authorities and the Federal Statistical Office
- business and other associations
- Industrial and digital companies
- academia

One written consultation procedure with 21 submissions received.

II. LOOKING AT THE CHALLENGES THE DIGITAL ECONOMY PRESENTS TO OUR ECONOMIC STRUCTURES

1. Basic characteristics of the data economy: potential for innovation, asymmetric information, and the danger of dominance
2. Platforms – trend towards greater concentration
3. Digital ecosystems and conglomerate effects

III. STRENGTHENING INNOVATION AND CONSUMER AUTONOMY IN A DYNAMIC ECONOMY

1. Objective: to protect competition as a driver of innovation
2. Objective: to ensure freedom of choice for the consumer
3. Objective: to adapt regulatory structures to the conditions created by the digital transformation

IV. MORE DIFFERENTIATED UNDERSTANDING OF MARKET BOUNDARIES AND MARKET POWER

The new conditions of the digital economy lead to structural changes in the competitive relationships, in particular with regard to

- forms of competitive discipline (what is the relevant market?); and
- access to the market (how does market power manifest itself?).

Recommendations (1-3)

- **Revision of the European Notice** on the **definition of the relevant market**.
- Publication of a separate **Notice** on market definition and **assessment of market power** with respect to digital platforms.
- A **study on cross-market foreclosure strategies** in the digital economy and the potential for countering these via competition law.

V: STRENGTHENING ACCESS TO DATA AND THE SELF-DETERMINED HANDLING OF DATA

Information – whether about (potential) customers, business partners, or product and market developments – is a key parameter determining competitiveness in the digital economy and can gain a significance and value which extends far beyond the original market context. Thus access to data becomes essential.

Recommendations (4-8):

- Formulation of principles stating when and how users should be granted a right to make a **digital user account accessible to third-party providers**.
- **Study** of the the feasibility of the **establishment of data trustees**.
- **Extendend provision of structured data by public bodies** on standardised platforms and in open interoperable data format
- Drawing up of **data strategies** for the collection, use and provision of **data of the public sector and from the delivery of public sectors**.
- Obligation of companies that are entrusted with the delivery of public services, to **provide the data generated in the course of this work**.

VI: CLEAR RULES OF CONDUCT FOR DOMINANT PLATFORMS

In the platform economy, which is characterised by dynamism and network effects, non-intervention and failure to take timely action against abusive behaviour come at a particularly high price.

Recommendations (9-12)

- ***Platform Regulation** with a **code of conduct** for **dominant online platforms** with certain minimum level of sales or user numbers.
- **Ban of preferential treatment** for platform operator's own services in relation to third-party providers.
- Obligation to be able to provide **portability of user and usage data in real time** and in an interoperable data format.
- Examination of compulsory introduction of an **alternative dispute resolution** procedure **for breaches of law on platforms**.

** Recommendations marked with an asterisk were adopted by a majority vote.*

VII. ENABLING INNOVATION THROUGH COOPERATION

In order to survive and benefit from the opportunities presented by these technological and market changes, it is vital that businesses be able to experiment with the new possibilities engendered by the data and platform economies. Cooperation in many different forms is a part of this process of discovery and innovation. However, new kinds of data cooperation could attract concerns by competition authorities.

Recommendations (13-14)

- **Clarification of new legal questions** raised in conjunction with cooperation of business undertakings in the digital area should be declared a priority of the European Commission
- Introduction of a **voluntary notification procedure** for novel forms of cooperation in the digital economy with a right to receive a decision in a short period of time.

VIII. MERGER CONTROL: IMPROVING CONTROLS ON THE TAKEOVER OF START-UPS BY DOMINANT COMPANIES

There is the concern that some acquisitions of start-ups by large digital companies are intended to quickly take over potential future competitors, thereby consolidating the predominance of digital ecosystems and protecting them from attack, while also deterring efforts to innovate in their area.

Recommendations (15-17)

- **No current need to reform the thresholds of Merger Control Regulation**, but systematic monitoring and evaluation of the handling of relevant cases.
- **No current need to introduce** of a system of **ex-post merger control**, but review of suitability of current system of ex-ante control.
- Development of **guidelines** to deal with the **acquisition of start-ups** that take account of data-based, innovation-based and conglomerate theories of harm.

IX: IMPROVING THE ENFORCEMENT OF COMPETITION LAW

If competition is to be protected effectively, it is of central importance for competition authorities to be able to intervene quickly and effectively where the market conduct of a powerful enterprise has an anti-competitive restraining or crowding-out effect.

Recommendations (18-19)

- No reform of Art. 8 of Regulation 1/2003, but the European Commission should **proactively examine whether is it necessary to impose interim measures** to prevent irreparable harm to competition.
- Greater **use of flexible, targeted remedies** by competition authorities; conducting of a study which analyses the previous policy on remedies by the competition authorities in relevant cases (Microsoft, Google Shopping etc.).

X: COMBINING COMPETITION LAW WITH OTHER REGULATORY AREAS

Digitisation is entailing a fundamental restructuring of almost all areas of our economy and society. Where this requires changes in the regulations and institutions in a large number of areas of life, the legislative and executive powers must react with a new approach which covers different areas of law and different sectors.

Recommendations (20-22)

- Establishment of a **Digital Markets Board** with the General Secretariat responsible for coordination of the various policy areas in the interest of comprehensive and coherent digital policies.
- *Establishment of a **Digital Markets Transformation Agency** at EU level in order to collect and process information about market and technical developments.
- Stronger **consolidation of data protection supervision structures** for the non-public sector.

** Recommendations marked with an asterisk were adopted by a majority vote.*

Thank you for your attention!