

Updating Competition Policy for the Digital Economy? An Analysis of Recent Reports in Germany, UK, EU, and Australia

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1. Introduction

- New discussion about concentration / market power in digital economy:
 - + digital platforms / large digital firms, e.g. Google, Facebook, Amazon
- **Question:** Are competition policies still capable of dealing with the new challenges of the digital economy or is it necessary to amend competition laws or complement them with other policies, e.g. regulatory solutions?
- Here: analysis of four recent reports (Germany, EU, UK, Australia)

Germany: Schweitzer/Haucap/Kerber/Welker: Modernising the law on abuse of market power (September 4, 2018)

UK: Furman et al: Unlocking digital competition (March 13, 2019)

EU: Crémer/de Montjoye/Schweitzer: Competition policy for the digital era (April 4, 2019)

Australia: ACCC: Digital Platforms Inquiry. Final Report (July 26, 2019)

- (other reports, e.g., Lear report 2019, Scott-Morton et al 2019 ("Stigler report"), Kommission Wettbewerbsrecht 4.0 2019)

2. The reports: Brief overviews

2.1 Common features and results

- all reports are broad, comprehensive reports commissioned by policy-makers for providing policy advice
- all reports see key role of platforms and data (innovation/AI)
- all reports see significant and so far unsolved market power problems of digital platforms / large digital firms that threaten competition / innovation
- all reports think that we have an underenforcement problem (danger of high costs of "false negatives") and that competition policy / competition authorities should do more
- no report recommends breaking up large digital firms or applying a utility-like regulation
- all reports defend consumer welfare as objective of competition law
- all reports emphasize interplay of competition policy with other policies

2.2 The German report: Modernising the law on abuse of market power

- Lowering the general threshold for intervention below market dominance?
=> No, but "activating" (and amending!) § 20 (1) GWB ("relative market power") for solving platform and data access problems
- proposal for helping to prevent "tipping" of platforms
- broad analysis of market power of digital platforms:
 - + proposal of "intermediation power" (information intermediaries)
 - + P2B-problems like leveraging market power of vertically integrated platforms (self-preferencing etc.)
- conglomerate power of large digital firms, e.g. by cross-market collection/ use of data, and proposal for amending merger control regarding their acquisitions of digital start-ups that might threaten them
- deep analysis of problems of data access for competition / innovation
 - + distinguishing different types: for general market entry, in IoT / aftermarket contexts with lock-in problems (connected cars), for AI / training algorithms
 - + more flexibility for "essential facility doctrine" with data (Art. 102 TFEU)
 - + proposal for facilitating use of § 20 (1) GWB for data access

2.3 The EU report: Competition policy for the digital era

- EU report convinced that EU competition law is flexible enough for dealing with the challenges (sometimes regulatory solutions better)
 - + but necessary are new theories of harm
 - + facilitating enforcement (to err more on the side of disallowing potentially anticompetitive behavior; shifting burden of proof to dominant platforms)
- digital platform problems:
 - + difficulty of market definition and assessing dominance (case-by-case)
 - + platform as regulators (esp. on marketplaces): obligation that this rule-setting does not distort competition on the platform w/o objective justification
 - + case-by-case analysis of self-preferencing behavior of dominant platforms
- data access problems:
 - + heterogeneity of data / data access problems (data portability/ interoperability)
 - + data access with Art. 102 esp. possible for IoT/aftermarket problems, but if more complex => (sector-specific) regulatory solutions
 - + new topic: how to deal with data-sharing/-pooling agreements? (Art. 101)
- problem of acquisition of start-ups: better theories of harm for merger control

2.4 The UK report: Unlocking digital competition

- UK report: traditional competition law solutions are not sufficient, because too slow (due to case-by-case decisions) for establishing clear rules
- proposal of a new "digital market unit" with far-reaching regulatory powers as additional pro-competitive policy (beyond competition law)
- "digital market unit" should collaborate with stakeholders but has also the power to establish mandatory ex-ante rules that should help to promote competition and innovation, esp. for firms with "strategic market status" ("market power with control over bottlenecks in digital markets ... ")
- powers for establishing ex-ante rules for
 - + "code of conduct" for platforms (abusive/unfair/unreasonable conduct)
 - + personal data mobility and systems with open standards
 - + data openness (opening up data for competition/innovation)
- (traditional) UK competition law: several proposals for "optimising" it
 - + merger policy, esp. notification, acquisitions of start ups, merger guidelines
 - + facilitating enforcement: standard of proof and judicial review etc.

2.5 The Australian ACCC report: Digital platforms inquiry

- impact of digital platforms (Google, Facebook) from perspectives of
 - + competition policy, consumer policy, and data protection/privacy policy,
 - + with specific focus on advertising sector / news media businesses
- Google (Facebook) has substantial market power on markets for general search services (social media services), search advertising (display advertising); both have substantial bargaining power to media businesses
 - + deep analysis of competitive advantages through collection of data on their own platforms and by other sources (esp. other websites, online trackers)
- deep analysis of advertising sector with claims that Google and Facebook leverage market power / force out competitors within adtech value chain (which is also very opaque / intransparent; information asymmetry problems)
- deep analysis of relations to news media businesses
 - + with proposal to give additional regulatory powers to Australian media regulator (ACMA) for establishing code of conduct for digital platforms
- deep analysis of impact on consumers with the problems of intransparency and lacking control of consumers over their data (updating privacy law)

3. Digital platforms, market power, and abusive behavior (1)

Market power of digital platforms and its persistence: broad consensus

- broad consensus about economic explanations of benefits and market power problems in digital economy
 - + platform econ., economies of scale/scope, network effects, tipping
 - + more recent: role of data (collection of data, economies of scope, ...)
- broad consensus that this leads to "entrenched" / "persistent" positions of market power for digital incumbents
 - + esp. through accumulated data / control of data as entry barrier, but also superior capabilities for data analytics, AI, algorithms (innovation)
 - + but also through "strategic acquisitions" of new digital firms that might threaten their position
- => all reports agree that the persistent market power of the large digital firms is a huge problem that threatens competition and innovation
- but none of the reports recommends radical solutions (breaking up ...)

3. Digital platforms, market power, and abusive behavior (2)

Abusive behavior of platforms: different approaches

- EU report: Art. 102 TFEU (market dominance) is sufficient but discussion of a number of abusive behaviors; e.g., obligations for dominant firms to offer platform rules that do not distort competition
- German report: Art. 102 / § 19 GWB (market dominance) can deal with many abusive behaviors but also application of § 20 GWB (relative market power/dependency) necessary for solving the problems:
=> amending GWB by abolishing limitation of § 20 (1) to SMEs
- UK report: "digital market unit" as additional regulatory authority, because traditional control of abusive behavior not sufficient
 - + code of conducts for platforms/firms with "strategic market status"
 - + rules for platform conduct broader than "abusive behavior"
- ACCC report: only discusses this for advertising and news media sector (here tendency to sector-specific regulatory solutions)

4. Data access problems for competition and innovation (1)

Problems for competition and innovation through lack of access to data

- new topic that is also directly linked to the so far unsolved question of governance / law of data in a data economy (personal/non-personal data)
- Different types of cases how lack of data access impedes competit./innov.
 - + general market entry problem through lack of data access (essential facility problem?) [German/EU report] but also general opening up of privately held data if positive for competition / innovation (data openness) [UK report]
 - + new case group of IoT/aftermarket situations, in which manufacturer of a connected device (primary product) obtains exclusive control of data and can therefore foreclose other firms from the markets for aftermarket and complementary services (leveraging of market power to secondary products)
 - > "connected car" (EU: "extended vehicle" concept with exclusive control of OEMs over in-vehicle data and technical access to car; Kerber 2018, 2019)
 - + anonymised sets of data for AI and training algorithms
- additionally: interoperability problems, closed vs. open systems, also linked to data portability and standardisation/standard-setting issues

4. Data access problems for competition and innovation (2)

How to solve competition problems through lack of data access:

- law and economics of data, esp. data protection law (personal data)
 - => balancing of benefits and costs of data access is necessary (incentives for data production can be high or very low)
- German report: refusal to grant access to data as abusive behavior
 - + esp. IoT/aftermarket situations can be solved by Art. 102 / § 19 GWB (more flexible appl. of EFD to data) or with § 20 (1) GWB (with amendment of law)
 - + more difficult for general market entry / data access for AI
- EU report: deep analysis; similar conclusion for IoT/aftermarket situations (but only Art. 102 TFEU), sceptical for entry in unrelated markets
- UK report: regulatory solution by digital market unit instead of comp. law
 - + personal data mobility and systems with open standards / interoperability
 - + data openness (based upon UK Open Banking initiative / PSD2)
 - => however: danger of a regulatory "super-authority"!

(ACCC report: views these questions as future tasks)

5. Policy recommendations: Main strategies (1)

- different answers to the question whether current competition law is capable of dealing with the new challenges
 - + EU report: current competition law is sufficient but need for new theories of harm (and sometimes regulatory solutions)
 - + German report: competition law is sufficient but we need legislative amendments and also control of abusive behavior of firms with "relative market power" (and sometimes regulatory solutions)
 - + UK report: competition law not sufficient (even with amendments); therefore an additional regulatory authority is necessary for promoting competition and innovation (platform conduct / data / interoperability)
 - + ACCC report: competition law sufficient (with small amendments) but sometimes sector-specific regulatory solutions (and better privacy law)
- but consensus about the important role of competition law, the need for additional regulatory solutions, and also other policies
 - => it is always a mixture of all three kinds of solutions!

5. Policy recommendations: Main strategies (2)

- solutions within traditional competition law:
 - + EU report: no amendments recommended (except guidelines and perhaps new block exemption regulation)
 - + German report: number of proposals, esp. about strengthening § 20 (1) GWB (relative market power, e.g., with regard to data access), intermediation power, facilitating merger control with regard to acquisition strategies of large digital firms, preventing tipping of platforms (=> some of them are expected in the upcoming 10th amendment proposal)
 - + UK report: number of proposals for UK competition law, esp. merger (notification for acquisitions of digital start-ups, merger guidelines) and facilitating enforcement (standard of proof / judicial review)
 - + ACCC report: only minor proposals with regard to merger policy notification (acquisition of digital start-ups), specific criteria for digital markets), more investigative powers

5. Policy recommendations: Main strategies (3)

- competition policy solutions outside competition law: regulatory options
 - + all reports claim that such solutions might be sometimes more suitable for solving specific problems (e.g., access to anonymised data sets for AI; interoperability problems, data access problems / connected cars)
 - + only the UK report makes a proposal for establishing a new separate regulatory authority for solving these kinds of problems
 - => raises the important institutional (!) question how to adapt rules!
- solutions outside of competition policy
 - + all reports claim the importance of the interplay with other policies, as, esp., consumer law, civil law, data protection law, and others
 - + other policies can help to solve problems for competition/innovation, as data protection law (data portability right, better control of consumers over their data), standardisation policy, unfair trade law, law of data / data rights
 - + but competition policy can also help other policies
(see Facebook case of Bundeskartellamt with regard to privacy protection)

6. Conclusions and perspectives

- all four reports contribute much to the discussion (in different ways)
 - + with much consensus about the problems
 - + and different views in which directions solutions should be sought
 - + in any case: mixture of traditional competition law, regulatory solutions, and an integrated approach with other policies
- all four reports would also accept that legal / regulatory experimentation is necessary (with learning from mistakes)
- current policy recommendations have not been discussed in detail, but many of them might help to some extent
- much more research in law, economics, and data science is needed; in many fields as, e.g., governance of data, we are still at the beginning
- this process of adapting the legal rules and regulatory regimes to the new digital economy is a long-term step-by-step process

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