

Digital platform regulation: What are the proposals across Europe?





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Calls to ‘do something’ about tech giants are getting louder. Some suggest that breaking them up is the best way to go, but such far-reaching interventions are absent from the most developed regulatory proposals seen so far. Looking at recent prominent reports from (or for) the European Commission and several national competition authorities, what are the main proposals on the table?

This article is based on an Oxera Economics Council meeting in November 2019, with its academic members and guests from the European Commission and the German and French competition authorities. This article is written by Oxera and does not reflect the views of the Council members or its guests.

The hours and pages that regulators and politicians are dedicating to digital platforms suggest that the turn of the decade could bring material changes to the rules of the game. Reports from (or for) the European Commission and several national competition authorities are making the case for more proactive measures to increase competition in (and for) the market. While these reports generally acknowledge the substantial benefits created by digital platforms, they also identify various concerns.

One such concern is that the characteristics of digital markets mean that the major players enjoy enduring market power. For instance, online platforms (a subset of the firms operating in digital markets) may exhibit strong network effects (either direct or indirect), provide free intermediation (matching) services to consumers, and rely on big data as a key input of production to power their algorithms.

Oxera is closely involved with the developments in digital platform regulation. In September 2019, our roundtable event in London served as a forum for prominent stakeholders to discuss the future of digital regulation.¹ The Oxera Economics Council met in November to consider similar issues through an academic lens. By drawing

insight from academia, regulators, and digital platforms themselves, we hope to help shape the future regulatory framework for digital platforms.

In the article, we focus on five prominent reports:²

- ‘Competition policy for the digital era’, or ‘the Vestager Report’;³
- ‘Unlocking Digital Competition’, or ‘the Furman Review’;⁴
- ‘Competition Policy and the EU’s strategic interests’, or ‘the French Report’;⁵
- ‘A new competition framework for the digital economy’, or ‘the German Report’;⁶
- ‘Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee’ or ‘the Stigler Report’.⁷

First, we discuss what the reports say about when to intervene. We then summarise the remedies proposed, focusing on interoperability and data-sharing, codes of conduct, modifications to ex post competition rules, and merger control.

Threshold for intervention

Before looking at the types of intervention in the digital platform market, it makes sense to ask when such interventions should take place, and which companies should be encompassed within their scope. Drawing that line is a complex exercise. It is key to ensure that, regardless of where the line is ultimately drawn, all firms have a reasonable degree of certainty about which side of the line they are on. This requires a clear, well-defined legal test that provides a ‘threshold’ for the point at which an operator in the market may be susceptible to ex ante regulatory obligations.

Legal and regulatory findings of **dominance and significant market power (SMP)** have traditionally served as thresholds for intervention (through ex post competition rules or ex ante regulation, respectively). Both concepts require a relevant market to be well defined.

Some national competition authorities already have additional standards for intervention, such as that of **economic dependency**. In Germany, for example, section 20 of the Act against Restraints of Competition (ARC) creates a lower intervention threshold than the corresponding European rules on abuse of dominance.⁸ The German standard acknowledges that for a distortion of competition to take place, absolute market power may not be a necessary condition

if there is a material difference in relative market power. For economic dependency to be established, the smaller firm—which may be a victim of an alleged abuse—must not have a reasonable alternative trading partner. Other countries that penalise the abuse of economic dependency in a similar way are Austria, Belgium, Cyprus, France, Hungary, Italy and Portugal.⁹

In the UK, the Furman Review proposes that its remedy recommendations be applied to firms with ‘strategic market status’ (SMS).¹⁰ This threshold is not defined in detail in the Furman Review’s report itself. However, the report describes some characteristics that would be expected in a firm with strategic market status, including:

- enduring market power over a strategic bottleneck;
- the ability to control others’ market access;
- the ability to charge higher fees;
- the ability to manipulate rankings or prominence;
- the ability to influence the reputation of others.

Other reports also discuss the standard that must be met before applying new regulation. The German Report adheres to the concept of dominance to determine which online platforms should comply with a new code of conduct. The Stigler Report discusses mainly the balance between false negatives and false positives when it comes to judging conduct. It also differentiates ‘bottleneck’ firms when it comes to certain types of regulation by a yet-to-be-created ‘Digital Authority’.¹¹

The Vestager Report ventures yet another change to the general framework of competition analysis. It suggests that in light of the difficulty of measuring consumer harm, strategies aimed at reducing competitive pressure should be forbidden even where consumer harm cannot be precisely measured, as long as there are no clearly documented consumer welfare gains. This would entail sanctioning dominant platforms when their practices have the ‘potential to exclude competitors’ or the ‘tendency to restrict competition’.¹²

Interoperability and data-sharing

Data mobility or portability are often mentioned as a tool for countering the dominance of digital platforms.¹³ Data mobility or portability can in theory

contribute to lowering switching costs, facilitating entry, and easing lock-in effects. This would increase the contestability of the market. Several reports (including the Vestager Report, the Furman Report, and the Stigler Report) push for interoperability of systems and greater personal data mobility to increase competition and consumer choice, for example by a common application programming interface (API).¹⁴

The Vestager Report suggests stringent data portability rules for dominant platforms to facilitate consumer switching. GDPR¹⁵ has already taken a step in that direction, giving consumers greater control over their personal data. The Vestager Report states that complementing this control with sector-specific regulation or the application of Article 102 TFEU could have a positive effect.¹⁶ Under Article 102, competition courts or authorities would need to specify the cases in which firms can access dominant firms' data (and specify the data they can access).

The German Report proposes that dominant platforms should be obliged to allow users to port their user and usage data in real time and in an interoperable data format, and to ensure interoperability with complementary services.¹⁷

In terms of competition enforcement, the Stigler Report goes even further. It suggests allowing the US Federal Trade Commission to access dominant platforms' internal databases and studies; perform its own research on the impact of platforms using this data; and moderate independent researchers' access to the data.¹⁸

A code of conduct for (dominant) platforms

The Furman Review suggests the development of a code of competitive conduct, to be applied to companies with strategic market status and to be developed with their cooperation. This would lead to the agreement of ex ante rules of behaviour towards smaller companies, aimed at avoiding lengthy and uncertain antitrust procedures.

Similarly, the Vestager Report and the German Report express the view that dominant platforms are responsible for setting their rules such that they do not impede competition without objective justification.¹⁹ The rules suggested by the Vestager Report and the German Report include prohibitions on self-preferencing, the application of mechanisms to port data and the promotion of interoperability. No new rules are deemed necessary for non-dominant platforms.

There are calls for the creation of codes of conduct that follow the concept of 'participative antitrust'. The term, attributed to Professor Jean Tirole, refers to the active engagement of firms in the design of their own regulation.²⁰ In digital markets, such a code of conduct would incentivise firms to participate, as they would benefit from clear rules that allowed them to innovate without the uncertainty that broader antitrust prohibitions might entail.

Exactly what participative antitrust could look like in practice has yet to be specified. The Furman Review considers that industry parties, consumer bodies and other affected stakeholders should take part in devising the proposed participative regulatory model.²¹

Critics of participative antitrust have suggested that participants could use this process to serve their own interests. The Furman Review recognises that restricting one's own behaviour might not be in line with firms' natural incentives; therefore, there also needs to be scope for regulatory enforcement when 'a participative approach is not effective'.²²

Modifying ex post competition rules

Various reports and commentators have suggested a number of modifications to competition rules dealing with anticompetitive agreements or abuse of dominance to tackle digital platforms specifically. The Furman Review suggests stronger use of interim measures to prevent damage to competition while a case is being investigated. In general, the aim should also be to speed up procedures and focus on remedies to anticompetitive behaviour, rather than relying on fines and 'cease and desist' decisions.²³

In the case of self-preferencing by a dominant vertically integrated platform, or other conducts in markets characterised by strong network effects and high barriers to entry, the Vestager Report suggests that the incumbent should bear the burden of proof to demonstrate that its actions are procompetitive.²⁴ This is similar to the suggestion in the German Report, as discussed above.

Regarding predatory pricing—which is difficult to assess in the case of multi-sided platforms owing to skewed pricing between the different sides—the Stigler Report suggests adapting the law to allow for meaningful assessment in the case of digital platforms.²⁵

Changes to merger regulation and guidelines

In addition to the considerations set out above, authorities are pointing to mergers as a source of concern. One of the questions they are asking is whether the current framework to assess mergers is appropriate.

The French Report suggests that specific guidelines be developed, and that a second-opinion procedure be introduced to assess efficiencies.²⁶ The German Report proposes the introduction of a voluntary notification procedure at the EU level for new forms of business cooperation in the digital age. This would give firms the right to receive a decision in a shorter period of time than is currently the case.²⁷ It also recommends developing specific guidelines for data-based, innovation-based and conglomerate theories of harm.²⁸

The Furman Review proposes a review of the UK Competition and Markets Authority's (CMA) merger guidelines. In particular, it questions the fact that, under the current framework, the CMA can block a merger only if it considers that the smaller firm 'was more likely than not' to be able to succeed as a competitor. In the authors' view, this is 'unduly cautious', in that some mergers are being cleared that should be blocked. Instead, the report calls for the CMA to assess whether, on balance, a merger is expected to be beneficial or harmful, accounting for the scale of the impacts and their likelihood.²⁹

The Vestager Report proposes a new set of questions to assess acquisitions that involve a dominant platform or ecosystem.³⁰

- Does the acquirer benefit from barriers to entry linked to network effects or use of data?
- Is the target a potential or actual competitive constraint within the technological/user's space or ecosystem?
- Does its elimination increase market power within this space, notably through increased barriers to entry?
- If so, is the merger justified by efficiencies?

In line with its suggestions regarding abuse of dominance, the Stigler Report proposes shifting the burden of proof or relaxing the proof requirement when a dominant platform is involved in the acquisition.³¹

Conclusions

It is difficult to say how the recommendations in the reports discussed above will make their way into the future European regulatory frameworks. The reports pay special attention to data sharing and interoperability as remedies that could increase contestability. Similarly, discussion of the application of new sets of rules and thresholds for intervention is prominent.

Other areas for reform, such as changing the rules that guide merger control, or shifting the burden of proof to the platforms to show that their actions are procompetitive, are less developed, and feature in only some of the reports.

Given that digital platforms transcend borders, regulatory consistency is a crucial part of avoiding distortions in the competitive landscape across Europe.

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¹ Oxera (2019), 'The future of digital regulation', Briefing paper and questions for discussion, Oxera roundtable event, September, <https://bit.ly/2tCzvJy>.

² Other reports on similar questions include Australian Competition and Consumer Commission (2018), 'Digital Platforms Inquiry: Preliminary report', December; and one for Which?: Oxera (2018), 'Which? report—consumer data in online markets', June, <https://bit.ly/390dNiC>.

³ European Commission (2019), 'Competition policy for the digital era', May. Written by three leading academics at the request of European Commissioner for Competition, Margrethe Vestager. Oxera notes that the views set out in the report do not necessarily reflect the official opinion of the Commission.

⁴ Digital Competition Expert Panel (2019), 'Unlocking digital competition', March.

⁵ Perrot, A. and Blonde, V. (2019), 'Competition Policy and the EU's strategic interests', April.

⁶ Commission Competition Law 4.0 (2019), 'A New Competition Framework for the Digital Economy', September.

⁷ Stigler Center for the Study of the Economy and the State (2019), 'Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee', July, <https://bit.ly/35H67QD>. The Stigler Center published four reports, one of which focused on competition. The chair was Fiona Scott Morton, Theodore Nierenberg Professor of Economics at Yale School of Management.

⁸ Norton Rose Fulbright (2017), 'German competition law update: New revised act against restraints of competition entered into force', <https://bit.ly/2Sb403x>.

⁹ Garzaniti, L., Janssens, T. and Oeyen, T. (2019), 'Abuse of economic dependence: Belgian Competition Authority adds another tool to its enforcement toolkit', *Freshfields Bruckhaus Deringer*, <https://bit.ly/2Sac2cU>.

¹⁰ Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, pp. 59–61.

¹¹ Stigler Center for the Study of the Economy and the State (2019), 'Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee', July, p. 32.

¹² European Commission (2019), 'Competition policy for the digital era', May, p. 42.

¹³ A distinction between mobility and portability is warranted. Data mobility refers to the ability to move data freely and easily across platforms. Data portability refers to the ability to jump from one platform to another. Hence, while portability may encourage one-off switching, it would not be as helpful as mobility when it comes to promoting multi-homing.

¹⁴ The French Report mentions interoperability of data as a potential solution to limit market concentration of digital markets, but it discusses this possibility much less than some of the other reports.

¹⁵ The General Data Protection Regulation is the EU's regulation on dataprotection and privacy for citizens.

¹⁶ European Commission (2019), 'Competition policy for the digital era', May, pp. 8–10.

¹⁷ Commission Competition Law 4.0 (2019), 'A New Competition Framework for the Digital Economy', September, p. 55.

¹⁸ Stigler Center for the Study of the Economy and the State (2019), 'Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee', July, p. 17.

¹⁹ European Commission (2019), 'Competition policy for the digital era', May, p. 61.

²⁰ Meagher, M. (2019), 'Who gets to Participate in "Participative Antitrust"?', Medium, <https://bit.ly/2EBQTR1>.

²¹ Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, p. 61.

²² Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, p. 39 and p. 63.

²³ In a recent paper from the Centre on Regulation in Europe (CERRE), Feasey and Kramer (2019) suggest taking more proactive measures in implementing remedies after cases of intermediation bias by vertically integrated platforms. They highlight the value of experimentation when devising remedies. See CERRE (2019), 'Report: Implementing Effective Remedies for Anti-competitive Intermediation Bias on Vertically Integrated Platforms', October.

²⁴ European Commission (2019), 'Competition policy for the digital era', p. 51.

²⁵ Stigler Center for the Study of the Economy and the State (2019), 'Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee', July, p. 97.

²⁶ Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, p. 30.

²⁷ Commission Competition Law 4.0 (2019), 'A New Competition Framework for the Digital Economy', September, pp. 62–63.

²⁸ Commission Competition Law 4.0 (2019), 'A New Competition Framework for the Digital Economy', September, p. 71.

²⁹ Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, p. 13.

³⁰ European Commission (2019), 'Competition policy for the digital era', p. 11.

³¹ Stigler Center for the Study of the Economy and the State (2019), 'Stigler Committee on Digital Platforms: Market Structure and Antitrust Subcommittee', July, pp. 16–17.