ANTITRUST LAW AND DIGITAL MARKETS

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Introduction: antitrust scrutiny of digital markets

Antitrust law is a set of rules that wants to ensure competitive markets that bring about benefits for customers and consumers in terms of choice, innovation, price, and quality. This area of the law is also referred to as competition law. In the European Union (EU), competition law was introduced with the 1957 Treaty of Rome,¹ and the legal provisions on competition law have, in substance, remained unchanged ever since.² In the 21st century, digital markets are transforming the economy, and this upheaval in the markets also has profound repercussions on European competition law as such. Digital markets comprise all those business activities which make use of digital technology, either to support existing business ventures or to grow new ones (Competition and Markets Authority 2019a: 5). This definition applies to an increasing amount of economic activity (Akman 2019: 5).

In digital, data-driven markets, many of the basic assumptions underlying European competition law need to be questioned, including the analytical tools and the substantive theories of harm that competition law is premised upon. Over the past years, a plethora of reports have dealt with the question of whether and how to adapt competition law to new digital market realities. These reports were published by competition authorities, antitrust legislators, and independent experts, allowing for a good mix of opinions and suggestions. Table 21.1, albeit non-exhaustive, lists some of the most prominent reports in the field in chronological order.

The findings from these reports are now slowly being put into action: in December 2019, Margrethe Vestager, Vice-President of the European Commission, announced that the Commission would reassess its market definition guidance in the face of the changes which digital markets have brought about (Vestager 2019). That same month, the Japan Fair Trade Commission published guidelines on the abuse of a superior bargaining position in the digital realm and thereby took an important first step towards implementing the advice on competition law in digital markets.

¹ Treaty establishing the European Economic Community (25 March 1957), art 85 (anti-competitive agreements) and 86 (abuse of a dominant position).
² Compare the provisions from 1957 with the almost identically worded provisions in today’s Articles 101 (anti-competitive agreements) and 102 (abuse of a dominant position) of the Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).
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Table 21.1 Reports on competition law in digital markets (as of 1 January 2021)

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<td>Report of Study Group on Data and Competition Policy</td>
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through soft law (Japan Fair Trade Commission 2019). It also emerged that the United Kingdom (UK) is considering the creation of a technology regulator in early 2021 that should be tasked with watching over big tech companies, based on recommendations in the UK’s Furman
In June 2020, the European Commission went public with its plans to introduce a new competition tool to tackle structural risks for competition that have been observed in digital markets (European Commission 2020b, 2020c). In January 2021, the German legislature adopted an amendment to the German Competition Act, not only in order to implement the ECN+ Directive 1/20193 but also so as to incorporate findings from the German reports in the area of digital markets.4 In the area of digital markets, the new legislation contains several important changes, which are discussed below. Finally, in December 2020, the European Commission published its proposal for a Digital Markets Act containing new do’s and don’ts for digital gatekeepers as well as a scaled down version of a market investigation mechanism for digital markets (European Commission 2020e).

The present chapter focuses on the main implications of the digital economy for five crucial areas of competition law: market definition, market power assessments, anti-competitive agreements, abusive conduct, and merger control. For each of these areas, it will identify the particular issues that competition law needs to address in digital markets, discuss some of the European experience in dealing with those issues and highlight how each particular area of competition law may (need to) evolve in the near future. This includes a discussion of the proposals made in three of the digital competition reports: the Furman Report, the EU Report, and the Competition Law 4.0 Report.

The Furman Report of March 2019 was commissioned by the UK Government and contains recommendations by a digital competition expert panel headed by Jason Furman and composed of experts in economics, law, and computer science.

The EU Report of April 2019 was written by three Special Advisors to Commissioner Vestager, Jacques Crémer, an economist; Heike Schweitzer, a competition law professor; and Yves-Alexandre de Montjoye, a data scientist.

Finally, the Competition Law 4.0 Report of September 2019 was commissioned by the German Federal Ministry for Economic Affairs and Energy in preparation for its Council Presidency in the second half of 2020. The Report was prepared with a view to updating EU competition law and was compiled by a team headed by Martin Schallbruch, a computer scientist; Heike Schweitzer – the same competition law professor that co-authored the EU Report; and Achim Wambach, an economist and then head of the German Monopoly Commission.

**The relevant market in the digital sphere**

In competition law, the delineation of the relevant market represents one of the basic analytical tools which is employed when analysing a case, whether in the area of anti-competitive agreements, abuse of a dominant position, or merger control. While market definition has its roots in economics, once this concept is received into competition law it becomes a distinct legal concept that builds upon the economic one but takes on its own legal conception (Robertson 2019b). Under EU competition law, the relevant market is relied upon to determine market share thresholds and market power, to provide the economic context of a particular case, and to inform the competition theory of harm. The European Commission has laid down its approach to market definition in its Market Definition Notice of 1997 (European Commission 1997), which is based

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4 Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer Bestimmungen (GWB-Digitalisierungsgesetz), Federal Law Gazette I 2021/1, 2.
on the case law of the Court of Justice of the European Union (CJEU) while at the same time being infused with a more economic approach to market definition (see Robertson 2020a: 50–52).

**The issues**

Market definition is based on substitutability tests which help to identify a relevant antitrust product market, and these tests were established against the background of static markets. The dynamic characteristics of digital markets make the delineation of the relevant market particularly demanding (OECD 2014: paras. 141–147). Digital markets bear a number of characteristics that are markedly different from more traditional static markets. These characteristics need to be reflected in the delineation of relevant product markets for competition law purposes. They include the fast-moving nature of digital markets, the existence of zero price markets or market sides, the ‘winner takes all’ nature of some digital markets, the propensity of digital platform markets to tip based on network effects and resulting in user lock-in, and competition for the market as a particular feature of competition in digital markets (Baye 2008: 640; EU Report 2019: 42–47). Big data and big analytics are cornerstones of the data-driven digital market environment, and it is paramount to get a good understanding of them. In addition, platforms (also called multi-sided markets) have become a popular business model that needs to be understood, together with the direct and indirect network effects such a platform relies upon. Closely related to platforms, digital ecosystems are being created that can lead to a lock-in of consumers and a reduction of competition. This goes hand in hand with an increasingly conglomerate company structure (Bourreau and de Streel 2019). Secondary markets that are specific to digital ecosystems may also need to be considered, especially as they relate to data (Competition Law 4.0 Report 2019: 29; EU Report 2019: 88–90). Digital market environments may significantly impact competitive relationships (Ezrachi and Stucke 2016: 149, 157; Competition Law 4.0 Report 2019: 28), something that needs to be reflected in market definition. The digitalisation of the economy has led to markets in which identical or similar offerings can be bought ‘offline’ (e.g., printed books in a book shop) or ‘online’ (e.g., printed books through an online retailer, or e-books). Here, the question arises whether online and offline markets may be converging or whether they constitute separate relevant markets (Robertson 2017: 146–149). Where one market side receives services in exchange for data rather than against payment of a monetary price, the traditional economic tools for market definition cannot apply in a straightforward manner (Vestager 2019; Robertson 2020a: 249 ff).

As set out earlier, digital platforms are frequent in the digital sphere. These are markets in which a platform occupies an intermediary position between several market sides (‘multi-sided markets’). Take for instance Facebook’s social media platform, which is an interface for a number of market sides: users interacting with friends and family, developers wanting to attract custom, content providers showcasing their offerings to an audience, and advertisers showing ads to their target audience. Frequently, one of the market sides (usually: the user side) receives services such as the social media functionality against exchange of their data and attention, leading to the question whether attention markets (Newman 2016, 2020) or data markets (Jones Harbour and Koslov 2010) could be at issue. Another option is to view each market side individually as the relevant antitrust market. Economists, however, have suggested that a platform’s

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5 In multi-sided platforms, both direct and indirect network effects can be observed. On a social media platform, for instance, the platform will become increasingly valuable to users as more and more users (friends, family, colleagues) join the network (direct network effect). On the other hand, an increase in the number of users will attract more advertising customers to the social media platform (indirect network effect).
market sides cannot be properly assessed in isolation (e.g., Caillaud and Jullien 2003; Rochet and Tirole 2003; Armstrong 2006). Such a narrow approach would miss the big picture of how a digital platform works, losing from view important insights that should be harnessed for the antitrust analysis (Thépot 2013). On the other hand, a relevant market that encompasses the entire platform may be too broad for traditional antitrust analysis – and may include relevant markets that are not substitutable with each other. Such an approach would require significant changes in how competition law relies on market definition.

### The EU’s experience

Platform markets are an important feature of digital markets, yet so far neither the European Commission nor the CJEU have properly incorporated multi-sided market theory into their market definition framework. In a number of cases, they alluded to the two-sided nature of a market, for instance in Google/DoubleClick (2008) or in MasterCard (2014). Even in more recent cases such as Google Shopping (2017), however, the Commission merely referred to a market’s multi-sidedness rather than incorporating this knowledge into the market definition. This points to the lack of a coherent market definition framework as far as platforms are concerned.

Zero price markets (or market sides) that form part of a digital platform are now regularly accepted as commercial activities that can and should be scrutinised under competition law. In its Google Shopping decision, the European Commission relied on a zero-price market, namely general online search, as the relevant market. The Commission argued that this was justified because users paid with their data when using Google’s search engine. In addition, the free user side was part and parcel of Google’s platform business model, and price was not the most important competitive parameter in general online search.

Despite the importance of data in digital markets, the European Commission has not yet delineated a data market where companies were not in the business of selling data. In the merger case of Facebook/WhatsApp (2014), for instance, the Commission refrained from delineating a market for data because the two parties only used their data in-house. Nevertheless, it remains an option to delineate potential markets under such circumstances, which would allow for an antitrust approach that takes into account the importance of data in digital markets. In the recent Google/Fitbit merger review, the Commission had announced that it would examine the effects of the combination of Fitbit’s and Google’s ‘databases and capabilities in the digital healthcare sector’ (European Commission 2020d). While this merger was cleared subject to Google’s behavioural commitments, the European Commission would have had the opportunity to not only earnestly look at an actual or potential health data market in its analysis, but also to consider the privacy implications of ever-growing digital conglomerates (Bourreau et al. 2020).

In order to grasp market-related innovation that has not yet reached the stage of a product that could be delineated as a relevant antitrust product market, the European Commission has resorted to the identification of ‘innovation spaces’ in cases such as Dow/DuPont (2017) and

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10 Case C-418/01 IMS Health v NDC EU:C:2004:257, para 44.
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Bayer/Monsanto (2018). It understands innovation spaces as spaces in which innovation competition occurs before a relevant antitrust market emerges. Such an approach may also be feasible where digital innovation is concerned.

How market definition needs to adapt to digital markets

The EU Report notes that digital markets may not allow us to arrive at clear market boundaries under the present market definition framework, concluding that ‘in digital markets, less emphasis should be put on the market definition part of the analysis’ (2019: 45–48, direct quote at 46). It also suggests that in digital markets, market definition may differ significantly depending on whether an ex ante (Article 102 of the Treaty on the Functioning of the European Union or TFEU) or an ex post (merger control) view is taken (p. 47). In view of the digital ecosystems which digital platforms are developing, one may need to delineate secondary markets that are specific to a particular ecosystem in cases where users are locked into such an ecosystem (p 48, Punkt). Under the current EU competition law regime, this would entail very narrowly defined secondary markets and, consequently, strict antitrust standards.

The Furman Report acknowledges the importance of market definition, for instance in order to arrive at concentration levels that competition economics frequently rely upon in merger control. While it highlights that market definition in digital markets is fraught with difficulties (2019: 24, 30, 89), it does not provide a solution to this issue.

The Commission Competition Law 4.0 recommends revising the Commission’s Market Definition Notice of 1997 in order to reflect the intricacies of digital markets (2019: 31). Bearing in mind the characteristics of digital markets, it suggests that the European Commission may want to issue separate guidelines on how to delineate markets in the digital environment. This first recommendation has already borne fruit: on 9 December 2019, Margrethe Vestager, Executive Vice-President of the Commission and Commissioner for Competition, announced that the European Commission was beginning to review its Market Definition Notice against the background of digital markets. She stressed that well-established methods for defining antitrust markets may no longer apply in the digital environment, especially in multi-sided platforms and zero price markets (Vestager 2019). The Commission’s review of its 1997 Notice is now underway, with both an evaluation of the proposed roadmap and a public consultation concluded over the summer of 2020 (European Commission 2020a).

In 2017, the German legislator adopted an amendment to its competition code, which now states that the fact that a product is provided without monetary remuneration does not invalidate the assumption that an antitrust market exists. In EU law, data and attention are also increasingly seen as a consumer’s counter-performance for the receipt of digital services. Together with the Google Shopping decision discussed earlier, these developments show that zero price markets are no longer an obstacle to antitrust enforcement.

The challenges that market definition is faced with in digital environments lead to the question of whether this analytical tool can continue to fulfil its traditionally assigned role of...
assessing market power in these markets from a primarily quantitative point of view (Competition Law 4.0 Report 2019: 30). It is very well possible that market definition will need to focus on its second major role in digital markets: that of characterising the market so as to provide the necessary background to understanding the markets at issue and developing a coherent theory of harm in those markets (Robertson 2020a: 318).

**Market power assessments in digital markets**

The CJEU holds a dominant position to be

a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.15

In terms of market shares, the CJEU presumes a dominant position from market shares of 50%.16 The existence, creation, or strengthening of a company’s dominant position on a relevant market often represents the crux of a competition law case. This is so because Article 102 TFEU17 forbids the abuse of a dominant position, which in turn presupposes the existence of such a dominant position. The EU Merger Regulation (EUMR)18 views the creation or strengthening of a dominant position as one of the main impediments of effective competition that can lead to the prohibition of a merger (Article 2 para 3 EUMR). Market power also plays a major role under Article 101 TFEU, which prohibits anti-competitive agreements: block exemption can be obtained for a range of agreements if certain market share thresholds are not surpassed, as low market shares are considered to point to a lack of market power, alleviating competition concerns.19

**The issues**

In digital markets, market shares as the traditional measure for market power (or for the absence of market power) may no longer apply with full force. Market shares and concentration ratios based on market shares are not meaningful measures in a market environment that is characterised by its dynamic nature and in which the very tool that market share calculation relies upon – market definition – is increasingly complex.

Market power in digital markets shares an intricate relationship with user data, and the importance of big data for digital markets in all its dimensions – volume, variety, velocity, and veracity – cannot be overstated. Where a digital platform has the capability to both harvest up-to-date data on a large scale and analyse it with appropriate tools, it may be found to be

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15 Case 85/76 Hoffmann-La Roche v Commission EU:C:1979:36, para 38.
16 Case C-62/86 AKZO Chemie v Commission EU:C:1991:286, para 60. For legal purposes, ‘market shares for each supplier can be calculated on the basis of their sales of the relevant products in the relevant area’ (European Commission 1997, para 53).
in a dominant position for competition law purposes (European Data Protection Supervisor 2014: para 60). There is also a self-reinforcing data advantage which stems from network effects in digital platforms (Ezrachi and Robertson 2019: 8) as well as from the ‘winner takes all’ type of competition found in digital markets that are prone to tipping (OECD 2013: 5; Bundeskartellamt 2016: 45).

Where digital platforms possess large troves of up-to-date user data and users are locked into a particular platform, ‘we might be witnessing a rise in power over consumers even when, seemingly, market power relating to a specific antitrust market is not there (yet)’ (Ezrachi and Robertson 2019: 17). This power over consumers by a handful of ‘data-opolies’ (Stucke 2018) often stems from the practice of third-party tracking, whereby a tracker scoops up a user’s digital footprint in order to build a comprehensive user profile (Binns et al. 2018). The power of platforms over their market sides also extends to customers that may sometimes also be the platform’s competitor, for instance in the case of online marketplaces on which the platform provider itself simultaneously acts as a retailer and therefore competes with other retailers (its customers) selling through its marketplace.

**The EU’s experience**

The European Commission and the General Court have recognised that market shares may not adequately reflect the existence of market power in the digital market environment. In *Cisco Systems* (2013), the General Court agreed with the Commission that the consumer communications sector at issue was

> a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition which Regulation No 139/2004 [i.e., the EUMR] seeks to prevent.\(^{20}\)

Shortly thereafter, in *Facebook/WhatsApp* (2014), the Commission relied on an almost identical wording, also in the context of consumer communication services.\(^{21}\) In *Apple/Shazam* (2018), the Commission again highlighted that ‘market shares may not be a perfect proxy for measuring market power in recent and fast-growing sectors characterised by frequent market entry and short innovation cycles’.\(^{22}\) However, in the case at hand, it characterised the market as a mature one that was not subject to this logic.

All three of the cases just discussed were merger decisions in the digital environment, in which an ex ante assessment of the proposed merger was carried out. To date, this logic does not seem to have been applied in ex post assessments. In *Google Shopping* (2017), for instance, the Commission emphasised that very large market shares were ‘save in exceptional circumstances, evidence of the existence of a dominant position’.\(^{23}\) With reference to *Cisco Systems*, the Commission held that under Article 102 TFEU, the fact that a market is highly dynamic does not preclude reliance on market shares, particularly where a market has not shown instability during


times of fast economic growth.\textsuperscript{24} Overall, the Commission took the following factors into account when assessing Google’s dominant position on the market for general online search: its market shares, barriers to entry and expansion, the lack of multi-homing users, brand effects, and the lack of countervailing buyer power.\textsuperscript{25}

\textit{Adapting market power assessments to the digital age}

Market power in digital markets is most often seen through the lens of digital platforms. While a first difficulty lies in adequately delineating the relevant market(s) that a digital platform is operating on, the next hurdle consists in assessing the platform's market power on any given market. Frequently, digital platforms do not conform to traditional notions of market power, and the fact that digital platforms can create self-sufficient ecosystems comes into play when trying to evaluate their market power. Where digital platforms act as intermediaries between various market sides, they may enjoy something akin to intermediation power if they can control suppliers’ access to certain distribution channels or to certain customer groups (Schweitzer/Haucap/Kerber/Welker 2018: 66 ff). In a similar vein, other reports have referred to digital platforms as unavoidable trading partners (EU Report 2019: 49) and have problematised the bottleneck power that digital platforms have over single-homing users (Stigler Report 2019: 32, 105). The Furman Report introduces the concept of a strategic market status, which it understands to consist in the ability ‘to exercise market power over a gateway or bottleneck in a digital market, where [those companies] control others’ market access’ (2019: 41, direct quote at 55).

What these analyses have in common is a concern about whether digital platforms and their specific market power may remain below the radar of current methods for assessing market power because the kind of market power they can exert over users, customers, and competitors is different from traditional markets. Therefore, the Competition Law 4.0 Report believes that the concept of market power needs to be further clarified in the digital sphere, also calling for separate Commission guidance on assessing market power in digital platforms and further research into cross-market foreclosure strategies in the digital economy (2019: 32 f).

The German legislature reacted to the difficulties of assessing market power in digital platforms at an early stage: the 2017 amendment to the German Competition Act introduced a provision stating that in the assessment of market power in multi-sided markets and platforms, one needs to take into account (1) direct and indirect network effects, (2) the parallel use of services from different providers and the switching costs for users, (3) the undertaking’s economies of scale arising in connection with network effects, (4) the undertaking’s access to data relevant for competition, and (5) innovation-driven competitive pressure (§ 18 para 3a GWB, i.e., the German Act against Restraints of Competition). When it prohibited Facebook’s data practices in February 2019, the German Bundeskartellamt relied on these new provisions in order to assert the social network’s market power. It found that Facebook had a market share in excess of 95% among daily active users of private social networks and that strong direct network effects were experienced by users, with advertisers being exposed to strong indirect network effects. Based on the exit of competing social networks, the authority assumed that it was witnessing a market in the process of tipping.\textsuperscript{26}

In January 2021, the German legislature adopted its long-awaited amendment to bring Germany’s competition code up to date with the digitalisation of markets. The law now contains

\textsuperscript{26} Bundeskartellamt, Facebook (B6–22/16, 6 February 2019), paras 422–521.
a new § 18 para 3b GWB: when assessing the market position of an undertaking that acts as an intermediary on a multi-sided market, the importance of those intermediary services for access to supply and sales markets needs to be taken into account. In addition, § 18 para 3 nr 3 GWB now refers to a company’s access to data relevant for competition as a factor to consider when assessing market dominance, irrespective of whether or not the undertaking is active on a multi-sided market.27

In addition, the European Commission has proposed new rules for gatekeepers, i.e., providers of certain platform services that are an important gateway for business users to reach end users and that enjoy an entrenched and durable position in their operations (European Commission 2020e: Art 3). With these proposed rules, the Commission strays away from traditional notions of market dominance under the competition laws and instead tries to capture major big tech platforms through alternative criteria.

**Anti-competitive behaviour in digital markets**

Under Article 101 TFEU, companies are not allowed to enter into anti-competitive agreements with each other. In para 1, the provision lists a number of agreements that are considered to be anti-competitive, such as price fixing, limiting or controlling markets or technical development, market sharing, discriminating among trading parties, and tying or bundling. As this list is merely exemplary, it can be adapted to the specificities of digital markets. So far, the application of Article 101 TFEU in digital markets has not required extraordinary efforts, as anti-competitive agreements appear to take similar forms in the online and offline world. It is presumably for this very reason that the reports introduced at the outset of the present chapter almost exclusively focus on abuses of a dominant position or on merger control, rather than on anti-competitive agreements. Therefore, the following sections will equally be very concise.

**The issues**

Algorithms may allow a company to engage in dynamic pricing, adapting prices to the current demand and supply situation or to competitor behaviour (Autorité de la concurrence and Bundeskartellamt 2019). Similarly, pricing algorithms may rely on user data to discriminate among consumers (Ezrachi and Stucke 2016: 89, 107). The antitrust liability for such behaviour very much depends on whether algorithms are relied upon in order to collude with other companies and their algorithms, in which case Article 101 TFEU can come into play. Where algorithms are used in order to apply dissimilar conditions to equivalent transactions with other trading parties, the identically worded Article 101(1)(d) TFEU or Article 102(c) TFEU may apply. In MEO (2018), the CJEU held that discriminatory pricing is only considered abusive where it ‘tends to distort competition’.28 As Article 101(1)(d) TFEU and Article 102(c) TFEU explicitly refer to ‘other trading parties’ (Graef 2018: 558), their applicability to price discrimination involving final consumers needs to be further tested.

Online marketplaces have become important retail outlets in the digital sphere. Both suppliers’ restrictions on selling through such platforms and these marketplaces’ own restrictions on their suppliers have attracted antitrust scrutiny. Some have observed a certain friction between both approaches, criticising that competition authorities were promoting marketplace platforms

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27 For undertakings active on multi-sided markets, this was already required under § 18 para 3a GWB since the 2017 amendment; this provision remains in force.

through the prohibition of platform bans in distribution contracts, while at the same time challenging the way that marketplace platforms conduct their business (Ibáñez Colomo 2018). However, this does not necessarily represent a contradiction. While retailers should remain free to sell through various kinds of sales channels, marketplace platforms must abide by the antitrust rules.

Digital platforms such as hotel booking platforms frequently require their customers, i.e., hotels, to agree to most-favoured-nation or MFN clauses. In these contractual clauses, the hotels promise not to offer their services for a lower price through any other platform, sales channel, or their own website (see Ezrachi 2015; EU Report 2019: 55–57). MFN clauses can be assessed under Article 101 TFEU and under Article 102 TFEU. While they may occur in both digital platforms and offline scenarios, the frequent use of MFNs by digital platforms has brought them under antitrust scrutiny.

The advent of blockchain technology represents another interesting development for competition law. As blockchain technology relies on a decentralisation of databases, which replaces trust among parties with technology and provides transparency in the distribution of information, there is scope for collusion through blockchains, including cartels or information sharing (Ristaniemi and Majcher 2018). This would be caught out under Article 101(1) TFEU like any other cartel. Under Article 102 TFEU, blockchain technology may make it more difficult to determine what constitutes a dominant market position, or to attribute liability for the abuse of such a position to a specific company (Schrepel 2019). Scenarios may be plausible in which access to private blockchains is refused, thus triggering an intervention under Article 102 TFEU akin to refusals to supply in the pre-blockchain world. Blockchains can also implement other forms of anti-competitive behaviour, such as tying or price discrimination (Schrepel 2019). Importantly, anti-competitive practices may be executed through blockchain technology – and can then be caught out by competition law. For antitrust enforcement, a number of positives are associated with blockchain technology (Tulpule 2017): it may create a level playing field in terms of access to information, reduce transaction costs in merger cases, or allow competition authorities to monitor commitments made by parties (Ristaniemi and Majcher 2018).

The EU’s experience

Concerning online marketplaces, the CJEU dealt with the application of competition law to distribution agreements in the online sphere in a series of preliminary rulings. It highlighted that a supplier could not place an absolute ban on online sales on its distributor; this would generally not be acceptable under Article 101(1) TFEU. More recently, however, the Court’s preliminary ruling in Coty v Parfümerie Akzente (2017) found that manufacturers could foresee certain restrictions regarding online sales channels, such as marketplace platforms, if they were dealing with luxury goods, and if the preservation of the luxury character of those goods required such restrictions.

In 2018, the European Commission revealed that it was investigating Amazon’s dual role as the provider of a sales platform for merchants and, in parallel, as these merchants’ direct competitor in a wide array of product markets. In particular, it voiced concerns whether Amazon may be using data on its merchants, to which it has access as the sales platform provider, in order to improve its own position as their competitor (Schechner and Pop 2018). While the

30 Case C-230/16 Coty Germany v Parfümerie Akzente EU:C:2017:941, paras 37–58.
Commission’s press release of November 2020 suggests that it is currently investigating this case under Article 102 TFEU (European Commission 2020f),31 the case could equally shed light on how the dynamics of a digital platform come into play in a case under Article 101 TFEU. The same applies to the Commission’s investigations into Amazon’s activities related to the Buy Box and access to its Amazon Prime customers for retailers, as the restrictions being investigated relate to the contractual terms between Amazon and independent retailers.32

In the summer of 2020, the European Commission opened an investigation into Apple and its alleged refusal to grant third parties access to the tap and go functionality on iPhones, as well as to its refusal to grant access to its mobile payment solution, Apple Pay. This is being investigated as a potential anti-competitive agreement, with an alternative of constituting an abuse of a dominant position.33

The rise of MFN clauses in some digital markets, most notably on hotel booking portals, has led to a number of antitrust investigations in the Booking.com cases (2015)34 and in the German HRS case.35 MFN clauses have also been at issue in relation to e-books: in the Amazon E-books case (2017), Amazon offered commitments in order to counter the European Commission’s concerns as to the anti-competitive nature of its MFN clauses. Amazon had required e-book suppliers ‘(i) to notify Amazon of more favourable or alternative terms and conditions they offer elsewhere, and/or (ii) to make available to Amazon terms and conditions which directly or indirectly depend on the terms and conditions offered to another E-book Retailer’.36 In light of Amazon’s position on the markets for the retail distribution of English and German e-books to consumers, the Commission considered this as constituting an abuse of a dominant position (Article 102 TFEU). However, this case could also have been decided under Article 101 TFEU. In its commitments, Amazon agreed not to enforce any parity clauses already contained in agreements and not to conclude any e-book agreements containing such clauses.

The future of anti-competitive agreements in digital markets

As stated earlier, the application of Article 101 TFEU to cases arising in digital markets has been very much in keeping with well-established case law. Two topics are likely to receive more attention in times to come. The first is the question of how collusion through algorithms may be caught under Article 101 TFEU, given that this provision requires some form of concurrence of wills or concerted practices above the threshold of tacit collusion (see Autorité de la concurrence and Bundeskartellamt 2019). Second, the question of online distribution will certainly play an important role in the ongoing revision of the Vertical Agreements Block Exemption Regulation, a legal instrument adopted by the European Commission which sets out under which conditions distribution agreements are not considered to be anti-competitive.37 When

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31 Amazon Marketplace (Case AT.40462) Commission Decision pending.
32 Amazon Buy Box (Case AT.40703) Commission Decision pending.
33 Apple Pay (Case AT.40452) Commission Decision pending.
34 Konkurrensverket, Case 596/2013 Booking.com (15 April 2015); Autorité de la concurrence, Case 15-D-06 Booking.com (21 April 2015); Autorità Garante della Concorrenza e del Mercato, Case 1779 Booking.com (21 April 2015); Bundeskartellamt, Case B 9–121/13 Booking.com (22 December 2015); Higher Regional Court Düsseldorf, Case VI – Kart 2/16 (V) Booking.com (4 June 2019).
35 Higher Regional Court Düsseldorf, Case VI – Kart 1/14 (V) HRS (9 January 2015).
describing the purpose for the evaluation of the Vertical Agreements Block Exemption Regulation, the European Commission highlighted that it thought a revision might be necessary due to ‘the increased importance of online sales and the emergence of new market players such as online platforms’ (European Commission 2018b: 1).

**Abuse of a dominant position in the digital sphere**

Under Article 102 TFEU, companies with market power (i.e., with a dominant position on the relevant market) may not engage in anti-competitive unilateral behaviour. As instances of such anti-competitive behaviour, the provision lists the imposition of excessive prices and unfair trading conditions, the limiting of markets or technical development, discriminating among trading parties, and tying or bundling. However, the list contained in Article 102 TFEU is not exhaustive. For the application of competition law to digital markets, this means that unilateral anti-competitive conduct that occurs in the digital sphere can either be caught by already established categories of abuse, or new types of abuse can be developed against the specific background of digital markets.

**The issues**

A distinctive feature of big tech companies that operate digital platforms is that they operate in a great number of different markets (Bourreau and de Streel 2019). By creating entire digital ecosystems, they are able to leverage their market power from one market into adjacent or perhaps even rather distant markets (EU Report 2019: 47–48, 65 ff). In addition, the user data that digital platforms accumulate in one relevant market is of a multi-purpose nature and can prove useful in entirely different markets. While Article 102 TFEU also applies where a dominant undertaking leverages its market power in markets in which it is not (yet) dominant, these dynamics of competition raise the question of whether competition law is fit for purpose in the face of digital ecosystems. Similarly, the frequent acquisitions of (potential) competitors by big tech companies also needs to be scrutinised with a view to maintaining competition (see the following section).

Based on the data-centric nature of digital markets, the question arises whether privacy-related abuses are sanctionable under the current competition rules. Privacy-related abuses may, for instance, relate to a reduction of quality of the platform’s services, to the excessive gathering of user data that digital platforms require in return for digital services (Ezrachi and Robertson 2019), or to low data protection standards that user data is awarded. The European Commission considers that privacy-related issues can be of relevance ‘in the competition assessment to the extent that consumers see [privacy] as a significant factor of quality’ (European Commission 2016). In addition, however, the ‘normative backdrop’ (Costa-Cabral and Lynskey 2017: 14) of the competition provisions in the EU is outspokenly privacy-friendly, including the fundamental right to privacy and data protection enshrined in the Fundamental Rights Charter38 and other legislative instruments, such as the General Data Protection Regulation (GDPR)39 and the proposed ePrivacy Regulation.40 This could lead to EU competition law being infused with

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39 Regulation (EU) 2016/679 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 (General Data Protection Regulation, GDPR) [2016] OJ L119/1.
40 European Commission, Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications (ePrivacy Regulation) COM(2017) 10 final.
a more privacy-driven outlook. At the same time, a breach of data protection laws should not automatically be understood as an infringement of the competition rules, as the two sets of rules protect two different legal interests (Robertson 2020b: 188 f).

The EU’s experience

In the past, the European Commission has primarily relied upon already established categories of abuse of dominance in the digital sphere. The Google cases showcase what kind of behaviour the Commission considers to constitute an abuse of a dominant position by a dominant digital platform, both when translating established abuses of dominance into the digital sphere and when establishing new types of abuses. In Google Shopping (2017), the European Commission found that Google was using its market dominance in general online search in order to systematically place its own comparison-shopping service at or near the top of the search results (self-preferencing; leveraging). In addition, Google demoted competing comparison-shopping services in the generic results of its search engine. Together, these two practices stifled competition by giving Google’s own comparison-shopping service an advantage and foreclosing competing shopping comparison sites – which were among the complainants that had brought the case before the Commission – from the market. In the appeal case before the General Court, the Commission’s reliance on self-preferencing as the theory of harm will be tested. Some have argued that by favouring its own business, Google is merely competing on the merits; under that view, self-preferencing as a theory of harm is not compatible with Article 102 TFEU (Vesterdorf 2015: 6–8). Others have criticised that the Commission did not clearly spell out which legal test it applied to Google’s self-preferencing, instead relying on cases that referred to different theories of harm such as refusal to supply, tying, and margin squeeze (Ibáñez Colomo 2019). Yet, others have argued that Google’s leveraging strategy was anti-competitive based on a manipulation of information by the dominant platform (Colangelo and Maggiolino 2019: 12). Now it is for the General Court to weigh in. In the meantime, the proposed Digital Markets Act, if and when adopted, would also prohibit gatekeepers from engaging in self-preferencing, among others (European Commission 2020e: Art 6(1)(d)).

In its biggest fining decision to date, Google Android (2018), the European Commission penalised Google’s anti-competitive behaviour with a €4.34 billion fine. The Commission looked, among others, at the licensing terms of Google’s Android mobile operating system. It found that Google engaged in anti-competitive tying by requiring manufacturers of smartphones to pre-install its search and browser apps if they wanted to license Google’s popular Play Store. In addition, Google made illegal payments to some manufacturers and mobile network operators for exclusively pre-installing its search app. Furthermore, it engaged in another instance of anti-competitive tying by requiring manufacturers to install the Google-approved version of Android if they wanted to pre-install Google apps. Thereby, it also obstructed the development and distribution of competing Android versions, so-called forks (European Commission 2018a). The case is currently on appeal before the General Court. Its theory of harm relies on classic tying and other single branding measures, all of which are well established under EU competition law. The Google Android case simply applies those to digital markets.

42 Case T-612/17 Google and Alphabet v Commission.
44 Case T-604/18 Google and Alphabet v Commission.
In the third Google case, Google AdSense (2019), the European Commission believes that Google’s behaviour as regards display search advertisements falls foul of EU competition law. In agreements with large clients, Google ensured that these clients did not obtain search ads from any of Google’s competitors (exclusivity). It did this by requiring these clients to grant premium placement to a certain number of Google search ads, and by obliging its clients to obtain its approval for changing the display of competing search ads. This effectively foreclosed actual and potential competitors from this lucrative market (European Commission 2019). Again, this case applies well-established theories of harm relating to single branding/exclusivity to a digital market environment. When the General Court rules on Google AdSense, it is therefore not expected that the case will generate novel antitrust theories of harm specific to the digital environment.

As discussed earlier, the Commission is currently also investigating two ongoing Amazon cases under Article 102 TFEU as well as Apple’s behaviour relating to Apple Pay as either an anti-competitive agreement or an abuse of dominance (see the previous section).

A new type of abuse is currently being ‘tested’ in Germany, albeit under national competition law rather than under EU competition law: in February 2019, the Bundeskartellamt issued a prohibition decision against Facebook based on that social media platform’s collection of user data. In the eyes of the German competition watchdog, Facebook’s collection and use of user data from outside the social platform went against the values enshrined in the GDPR. The Bundeskartellamt understood this to also constitute a violation of the German provision against abuse of dominance (Robertson 2019a). It thereby conflated the dimensions of data protection and competition law. Facebook appealed that decision before the Higher Regional Court Düsseldorf and applied for the suspensory effect of its appeal. When deciding on the latter, the Higher Regional Court Düsseldorf voiced strong legal concerns about the Bundeskartellamt’s legal analysis in its Facebook decision, and granted the suspensory effect. The case then came before the German Bundesgerichtshof, as the Bundeskartellamt appealed the granting of suspensory effect. In its much-anticipated ruling of June 2020, the Bundesgerichtshof sided with the Bundeskartellamt and ruled that there were no serious doubts about either Facebook’s dominant position or its abuse of the latter. However, the Bundesgerichtshof based its decision on a somewhat different reasoning. First of all, it stated that contrary to the Bundeskartellamt’s analysis, the question of whether Facebook’s data conditions had breached the privacy rules of the GDPR was irrelevant for the competition law assessment. Instead, the Bundesgerichtshof insisted that another question should be at the centre of attention, namely whether Facebook’s terms of use did not allow private Facebook users a choice on whether they wanted to use a highly personalised version of the social network (covering their online activities off Facebook) or whether they preferred a personalised version that was limited to the data they divulged on Facebook only. This lack of choice, the Bundesgerichtshof argued, represented an exploitative abuse of users as well as an exclusionary abuse vis-à-vis competitors. The cases before the Higher

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46 Case T-334/19 Google and Alphabet v Commission.
47 For a criticism of this fact, see Wils (2019).
48 Bundeskartellamt, Facebook (B6–22/16, 6 February 2019). On this case, see already previously at the previous section.
49 Regulation (EU) 2016/679 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 (General Data Protection Regulation, GDPR) [2016] OJ L119/1.
50 Higher Regional Court Düsseldorf, Case VI – Kart 1/19 (V) Facebook (26 August 2019).
51 Bundesgerichtshof, Case KVR 69/19 Facebook (23 June 2020).
Regional Court Düsseldorf and the Bundesgerichtshof only concerned the suspensory effect of Facebook’s appeal, while the case still needs to be decided in substance. However, it would be surprising if the Higher Regional Court Düsseldorf were to disregard the Bundesgerichtshof’s clearly worded judgement of June 2020 when deciding the case.

How to approach abuses of dominance in the digital sphere

In all reports on competition law in digital markets, the issue of how to deal with abuse of dominance in these markets takes centre stage. While the discussion of the European Union’s experience with abuse of dominance in digital markets has shown that Article 102 TFEU is able to adapt to the digital market environment in many instances, the specificities of platforms and their gatekeeper or intermediary function have not yet been fully captured. The Furman Report therefore suggests introducing a digital markets unit which would develop a code of conduct for companies with a strategic market status (2019: 59). This code of conduct should especially address how companies with a strategic market status ought to deal with smaller companies and consumers and should be directed by principles that have specific theories of harm in mind (p. 60). For instance, smaller companies that depend on the digital platform with a strategic market status should be given non-discriminatory access, their ranking and reviews should be decided on a fair, consistent and transparent basis, and they should not be forced to single-home on a particular platform (p. 61). This approach is reminiscent of the concept of relative market power that exists in several EU Member States’ competition laws, but not at EU level.

The EU Report identifies two abusive practices by digital platforms that require particular attention, namely leveraging and self-preferencing. It stresses that under Article 102 TFEU, self-preferencing is only abusive if it leads to anti-competitive effects (2019: 65–67). It also notes that in digital markets, competitive parameters such as quality and innovation are more important than price-based effects (41). Finally, the EU Report urges that competition law should be applied in digital markets with full force, with a preference for erring on the side of over-enforcement (51).

Similar to the EU Report, the Competition Law 4.0 Report warns that in the light of increasing concentration in digital markets, and due to digital platforms’ gatekeeper function, the cost of false negatives would be particularly high (Competition Law 4.0 Report 2019: 49–51). Therefore, the Report recommends introducing a set of legal rules that contains a code of conduct for digital platforms of a certain size. The code of conduct should adapt the provision of Article 102 TFEU to the digital market environment, including the prohibition of unjustified self-preferencing and rules on data portability (53–55). Beyond these suggestions, the Report also recommends setting up a digital markets board that should be tasked with carrying out a comprehensive European digital policy, not limited to competition law (82). The Stigler Report similarly recommends the setting up of a digital authority with rule-making competence in the areas of consumer protection, privacy policies, transparency, data portability, and data and algorithmic access for external auditing and research (Stigler Report 2019: 273).

From the reports, it can be deduced that due to the competitive structure of digital platform markets, the area of abuse of dominance is of particular importance when attempting to adequately apply competition law to digital markets. At the same time, the many calls to introduce new rules or rule-making bodies suggest that this is an area that needs to be further developed, in both practice and research. The reports also make clear that competition law should not be the sole focus of these rule-making bodies, suggesting that a broader picture would be more beneficial to shaping digital markets in a pro-consumer fashion. Both the EU Report and the Competition Law 4.0 Report underline that antitrust enforcers should prefer false positives.
over false negatives in the digital environment (on error costs, see Easterbrook 1984), as non-intervention or late intervention may not be able to be remedied at a later stage due to the nature of digital platform markets.

As already set out earlier, the European Commission has started its review of the EU competition law framework by tackling digital market definition. It has also become active in the area of unilateral conduct, however: in December 2020, the Commission published a new legislative proposal entitled the Digital Markets Act, which foresees a number of obligations for so-called gatekeepers (Articles 5 and 6 of the Digital Markets Act Proposal). Several of the obligations imposed on gatekeepers seem to have been based on case law that the Commission has gathered experience with in digital markets. The proposal also includes a market investigation mechanism limited to three specific purposes: the designation of what constitutes a gatekeeper from a qualitative rather than a quantitative perspective, the tackling of systemic non-compliance with the Digital Markets Act, and a possible revision of the legal framework in order to address digital markets in which gatekeepers lead to competition issues (on these three purposes, see Articles 15, 16, and 17 of the Digital Markets Act Proposal). In proposing this tool, the Commission is only putting into action a very narrow set of the recommendations found in the EU Report, and is straying quite far from the initial consultation on the new competition tool (European Commission 2020b). It is now for the European Parliament and the Council to take the Digital Markets Act Proposal further in the legislative process.

Germany has also recently changed its competition law provisions. In light of the new issues arising with reference to digital platforms as intermediaries and their role as gatekeepers to entire digital ecosystems, the German legislature adopted an amendment to the German Competition Act in January 2021 that introduces a new § 19a GWB. This provision has already entered into force and prohibits certain anti-competitive conduct by undertakings that have a paramount significance for competition across markets. It gives the German Bundeskartellamt an additional tool in order to rein in digital platforms that are spreading across multiple markets: § 19a GWB does not apply automatically, only if the Bundeskartellamt issues an order to this effect. As a first step, the Bundeskartellamt needs to declare that a company has a paramount significance for competition across markets, based on a number of factors such as its dominant position, its financial strength, its vertical integration, its access to relevant data, and the importance of its activities for third parties (§ 19a para 1 GWB). These criteria show that § 19a GWB intends to catch digital platforms that have a gatekeeper function or that possess intermediation power. Such an order needs to be restricted to five years. Only when a company has been declared to have such a paramount significance for competition across markets can the Bundeskartellamt go a step further and prohibit various kinds of behaviour, including self-preferencing, pre-installation requirements, holding back competitors, use of data in an anti-competitive way, or hindering interoperability of products (§ 19a para 2 GWB). A declaratory order on a company’s paramount significance for competition across markets can be combined with such a prohibition (§ 19a para 2 GWB).

A further novelty in the recent German amendment, which entered into force on 19 January 2021, relates to conduct that is prohibited for companies with relative or superior market power (§ 20 GWB), a provision that has now been extended to benefit all companies (previously, it was restricted to small and medium-sized enterprises). The provision now also explicitly mentions economic dependency on intermediaries in multi-sided markets. According to
§ 20 para 1a GWB, economic dependency may arise from the fact that a company is dependent on access to data controlled by another undertaking for its own activities. Contrary to ‘regular’ market power, which assesses a company’s market position in relation to the market as a whole, relative market power assesses whether a company might have a dominant position vis-à-vis certain customers that depend on the business relationship with the dominant player for their own business. As the EU currently does not contain any provision on relative market power, this proposal is only of interest to jurisdictions that contain such a provision, such as Austria.

This GWB reform hopes to tackle the type of market power that is arising in digital markets and that opens up new possibilities for unilateral anti-competitive behaviour. It also hopes to keep markets competitive and access to essential platforms open (Federal Ministry for Economic Affairs and Energy 2020). Reactions to the new proposal have been mixed, with some scholars praising the new approach (Neuerer 2020; Chazan and Espinoza 2020) and others, most notably the German Monopoly Commission, cautioning that new types of abuse of dominance should not be introduced hastily (Monopoly Commission 2020).

Moving forward, the interplay between the Digital Markets Act – if and when adopted – and national provisions on competition in digital markets will certainly represent an important focal point. In Austria, for instance, the Ministry for Digital and Economic Affairs has started a review of the Austrian competition law framework in order to take digital markets and data into account. When launching this review, the Ministry exchanged views with the German Ministry, the German Monopoly Commission, and the European Commission (Federal Ministry for Digital and Economic Affairs 2020) – a promising start for a pan-European vision of digital competition law.

Digital mergers

The European Union’s Merger Regulation 139/2004 (EUMR) sets out the European merger regime. As highlighted previously, in the eyes of the EUMR the creation or strengthening of a dominant position can require the prohibition of a merger or some significant changes to the transaction before it is cleared (Article 2 para 3 EUMR). In addition, the EUMR’s test of a significant impediment of effective competition also allows for the consideration of other theories of harm that do not need to be solely based on the merging companies’ market power.

The issues

When it comes to mergers in digital markets, two particular issues have come to the forefront of the debate: data concentration and killer acquisitions. Data concentration relates to the combination of data in the hands of a small number of ‘data-opolies’ (Stucke 2018). Based on the importance of data in digital markets, the question needs to be asked as to whether unchallenged data concentration could allow these data-opolies to engage in an array of anti-competitive behaviour, such as exploitative and exclusionary abuses. As a preventative measure, merger control could seek to prevent such data concentration.

Killer acquisitions refer to the practice whereby a company buys up promising start-ups with the intention of ‘killing’, i.e., discontinuing, the start-ups’ product. This type of behaviour is well known from the pharmaceutical sector (e.g., Cunningham et al. 2021). Where the buyer is a digital platform, however, it will frequently not have the intention to discontinue the start-up’s product, but rather to continue its (potential) competitor’s promising product for itself (EU Report 2019: 117). Where digital platforms buy up (potentially) competing start-ups, they may do so with the intention of expanding their ecosystem so as to stay ahead in this competition
The Furman Report notes that the five biggest digital platforms have made more than 400 acquisitions over the last decade (p. 11 f) – none of them having been prohibited by a competition authority, and very few of them scrutinised at all. In terms of competition law, and in light of the issue of digital ecosystems discussed earlier, these acquisitions raise the question of whether they may hinder both competition and innovation in digital markets (EU Report 2019: 118–123; Competition Law 4.0 Report 2019: 65). Based on the low turnover of the targets in these acquisitions, these concentrations are usually not caught by the turnover-based thresholds of the Merger Regulation (Article 1 EUMR), meaning that it is often not possible to scrutinise these transactions from an antitrust perspective at the EU level.

The EU’s experience

In the decisional practice of the European Commission, one finds an increasing number of merger cases in which data played a role. Nevertheless, none of these mergers has so far been prohibited. In Google/DoubleClick (2008), the European Commission was convinced that any negative impact that the merger may have on user privacy would be held at bay by fundamental rights and the EU’s data protection rules. While the Commission acknowledged the data concentration that the merger would lead to, it emphasised that the data Google would have access to was replicable by other online advertising services, thus minimising this concern. The Commission did not consider whether Google’s power over users may be such as to prevent competitors from effectively collecting this data. When the same merger was investigated in the US, the Federal Trade Commission also found that it would not negatively affect consumer privacy. In her dissenting statement, FTC Commissioner Pamela Jones Harbour made clear that in her view, Google would become ‘a “super-intermediator” with access to unparalleled data sources’ after the merger, and questioned whether competitors could harvest data of a comparable scope (Jones Harbour 2007: 8).

The Facebook/WhatsApp merger (2014) also required the European Commission to delve into the data issue. It found that Facebook was only one among a number of competitors collecting user data, so the merger would not necessarily reinforce Facebook’s market power in targeted advertising. Again, the Commission relegated any privacy concerns to the realm of EU data protection law and did not take them into account as a relevant antitrust concern. During the merger investigation, Facebook claimed that it would not be able to automatically and reliably match Facebook and WhatsApp user accounts. Later, however, it became clear that this was a misleading claim, leading to a €110 million fine on Facebook for providing incorrect or misleading information to the Commission during the merger investigation.

In Microsoft/LinkedIn (2016), the Commission held that data concentration could raise competition concerns in two kinds of cases: where market power was derived from data, or where

58 The Commission argued that this misleading information had no impact on the outcome of the merger review, as it had considered this possibility despite Facebook’s assertions that it was not technically possible; Facebook/WhatsApp (Case COMP/M.8228) Commission Decision of 18 May 2017 [2017] OJ C286/6.
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competition to obtain data was eliminated due to the merger. In the case at issue, the Commission was not concerned about the data concentration that would occur through the acquisition. It emphasised that the merging of datasets would be governed by EU data protection law, that ‘the combination of their respective datasets does not appear to result in raising the barriers to entry/expansion for other players in this space’ due to the replicable nature of the data, and that the merging companies were only small players in this regard.59

In 2018, Apple’s acquisition of the music app Shazam gave the European Commission another opportunity to assess the importance of user data in digital mergers. The European Data Protection Board had hoped for a careful review of the data concentration that the merger brought about. It held that Apple and Shazam would together hold ‘significant informational power’ (EDPB 2018) based on the amalgamation of data capabilities through the merger. The Commission acknowledged that user data did indeed play an important role in the business of Apple and Shazam. However, it concluded that Apple’s post-merger data advantage would not have anti-competitive effects in this particular case (Zingales 2018: 4).60

In the recent Google/Fitbit merger, the Commission was presented with yet another opportunity to adapt its decisional practice to the specificities of data concentrations in digital markets. However, it approved that merger, to the discontent of many commentators (Bourreau et al. 2020).61

While data concentration through mergers has been on the European Commission’s radar for a while, it appears that there does not yet exist a convincing theory of harm that would incite the Commission to consider data amalgamation as a significant impediment of effective competition under the Merger Regulation (Article 2 para 2, recitals 25–26 EUMR) (see Robertson 2020c). Similarly, for innovative start-ups with a low turnover threshold, EU competition law does not provide any tools for intervention, apart from the possible referral of cases from national competition authorities to the Commission (Article 22 EUMR).

Data concentration and killer acquisitions: the road ahead

In 2017, two EU Member States – Austria and Germany – for the first time introduced transaction value-based thresholds into their merger regime.62 Where a merger does not meet the general turnover thresholds, for instance because the target does not yet generate any significant turnover, but the value of the transaction reaches certain thresholds (€200m in Austria; €400m in Germany), it needs to notify the national competition authority. Although intended for the case of digital platforms, it appears that many other types of cases have since been notified under those provisions.

A first consultation by the European Commission on the introduction of transaction value-based thresholds for merger control yielded mixed responses, leading it not to press forward on this issue (European Commission 2017: 4–7). In light of this consultation, both the EU Report (2019: 113–116) and the Competition Law 4.0 Report (2019: 66, 68) suggest that the time is not yet ripe to include such a transaction value-based threshold into European merger control.

Instead, both Reports urge the European Commission to review its substantive theories of harm in connection with acquisitions of innovative start-ups by powerful digital platforms, also in light of tipping effects that can be observed in platform markets. In particular, such a review should focus on data, innovation, and conglomerate effects (EU Report 2019: 112, 116 ff; Competition Law 4.0 Report 2019: 71).

The Furman Report suggests setting up a digital markets unit that should be notified of any intended acquisitions by companies with a strategic market status (2019: 95). While the UK merger regime currently relies on voluntary notification, this change would allow this new type of regulator to review any kind of acquisition that important digital platforms envisage, irrespective of the turnover. The Stigler Report suggests the introduction of transaction value-based thresholds for merger review and of a rebuttable presumption that mergers between dominant platforms and important (potential) competitors are unlawful, thereby shifting the burden of proof (2019: 16, 98). The Digital Markets Act, if adopted in its currently proposed form, would impose a notification requirement on gatekeepers, but without any consequences for the transaction (Article 12 of the Digital Markets Act Proposal).

The recent German Competition Act amendment introduced a new provision that allows the Bundeskartellamt to require a specific company to notify the authority of certain acquisitions, provided that the acquiring company’s turnover exceeds €500 million and the target’s turnover exceeds €2 million (§ 39a GWB). While not motivated by digital markets (Podszun 2020), this new provision may well be used to target certain acquisitions by big digital players that could lead to anti-competitive outcomes.

**Outlook**

The specific characteristics of digital markets represent a significant challenge for the delineation of the relevant antitrust product market, the assessment of market power, the understanding of anti-competitive agreements and of abusive practices, and the issue of merger control. As was highlighted throughout this chapter, these are challenges that national competition authorities, the European Commission, national courts, and the CJEU are already facing in their daily work of enforcing EU and national competition law. While there have been voices arguing that EU competition law is already flexible enough to adjust to digital markets without changing the law (Jaeger 2017), this rather pragmatic approach needs to be understood in light of how cumbersome it is to change the EU Treaties. In some aspects, the flexibility of EU competition law may well reach its limits, and alternative ways of fine-tuning competition law to the exigencies of digital markets will have to be found.

In Europe and beyond, a new approach to assessing market power and market behaviour in digital markets is in the process of being carved out. The plethora of reports on making competition law fit for purpose in digital markets, the legislative changes introduced and debated, most notably in Austria and Germany, and the ongoing review of legislative and soft law instruments connected with the digital economy are all important indicators of this developing approach. While the national developments in this respect are encouraging, this does not mean that the EU should let national legislators take the lead on shaping competition law in our digital times. At the level of the European Union, it appears that the European Commission is best placed to introduce necessary adjustments for the antitrust analysis of digital markets through its tried-and-tested soft law approach, as it is currently undertaking in the area of market definition, and through its role of preparing legislative proposals, a path it has taken when proposing the Digital Markets Act.
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