

Developing international perspectives on digital competition policy

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There are other differences too. While the US and EC experts were inclined to relax or reverse burdens of proof for both mergers and abuse of dominance, albeit in specified circumstances only, the UK experts did not recommend this. This paper compares these reports under the categories of mergers, dominance, data, regulation, and international.

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DEVELOPING INTERNATIONAL PERSPECTIVES ON DIGITAL COMPETITION POLICY

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ABSTRACT

The year 2019 was a turning point in the debate around how to address competition issues in digital platform markets. At the start of the year, the focus was on reform of competition law. By July, there had been calls – on both sides of the Atlantic – for pro-competitive *ex ante* regulation.

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Keywords: Antitrust, Competition Policy, Digital Markets, Platforms, Merger Policy, Regulation, Big Data

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INTRODUCTION

Over recent years, there has been a notable increase in focus internationally on competition issues in digital platform markets, and how best to address them. In 2019 alone, a panoply of expert and governmental policy reports were published across several jurisdictions.¹ In broad terms, these all recognised that digital platforms have become increasingly important and that they have delivered enormous benefits for consumers, but also that they raise significant competition concerns and challenges for competition policy.

The year 2019 was, though, a turning point in this debate. At the start of the year, the focus of the policy discussion was on reform of competition law. By July, there had been calls – on both sides of the Atlantic – for pro-competitive ex ante regulation. This paper considers these developments through the lens of three influential expert reports from 2019, from the UK (the Digital Competition Expert Panel or “DCEP” report), EC (the “CMS” report) and US (the “Stigler Center” report).²

The three reports offer similar diagnoses of the underlying economic drivers of competition concerns in digital platform markets. These include strong transglobal economies of scale and scope, substantial network effects, the crucial importance of data as a key output and key input, and the influence of consumer behavioural biases. While none of these economic features is novel, their joint presence in digital platform markets creates a tendency towards concentration and towards the creation of ecosystems within which market power may be extended across markets. This may also be exacerbated by strategic behaviour by digital platforms, which is intended to cement and extend their position within and across markets.

¹ The three reports we focus on in this paper are those from the EC (J. Crémer, Y-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era, Report to the European Commission*, 2019); UK (J. Furman, D. Coyle, A. Fletcher, D. McAuley and P. Marsden, *Unlocking Digital Competition*, 2019); US (F. Scott Morton, Bouvier, P., Ezechia, A., Jullien, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, *Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, Stigler Center for the Study of the Economy and the State*, 2019). There have also been reports from Australia (ACCC, *Digital Platforms Enquiry: Final Report*, 2019); Benelux (*Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world*, 2019); BRICS (*BRICS in the digital economy: Competition policy in practice*, 2019); France (G. Longuet et al., *Report at the French Senate on digital sovereignty*, 2019); Germany (M. Schallbruch, H. Schweitzer and A. Wambach, *A new competition framework for the digital economy: Report by the Commission ‘Competition Law 4.0’*, 2019); Italy (AGCM, AGCOM, AGPDP, *Big Data Joint Survey*, 2019); Japan (FTC, *Report regarding trade practices on digital platforms*, 2019); Netherlands (Ministry of Economic Affairs and Climate Policy, *Future-proofing of competition policy in regard to online platforms*, 2019); Portugal (Autoridade da Concorrência, *Digital Ecosystems, Big Data and Algorithms*, 2019); UNCTAD (Competition issues in the digital economy, 2019).

² The first two of these were government-commissioned, and while the contents of these reports do not necessarily represent government policy, they might be expected to feed into government thinking. Indeed, in the UK, the March 2020 Budget announced that “The government will accept all six of the Furman Review’s strategic recommendations for unlocking competition in digital markets.” (NB The DCEP report was led by Jason Furman and is often referred to as the Furman Review). The US report is a non-governmental report, but it did involve some former US government officials.

These factors raise significant challenges for competition policy, and all three reports consider there to have been insufficient intervention in this area to date. There is also much congruence of views about how policy should evolve to address these concerns. However, there are also some important differences.

For example, the EC CMS report highlights recommendations for competition law, but makes no proposals for *ex ante* regulation. While it recognises that a regulatory regime may be needed in the longer run, this option is not considered in any detail. This is perhaps not surprising, given that the EC report was commissioned by a competition authority (DG Competition) and the Expert Advisors were asked to explore only how competition policy should evolve. However, it may also reflect the fact that this report was commissioned earlier than the other two reports, in March 2018. At this stage, there had been little mention in the global debate of *ex ante* regulation as an option.

By contrast, the UK DCEP and US Stigler Center experts both commenced their work later (in September 2018) and had a less constrained remit. Their final reports changed the nature of the debate, by arguing strongly for *ex ante* regulation and even discussing the potential scope and remit of such regulation. These ideas are now contributing to policy debates across a number of jurisdictions, including the UK, Germany and the EC.

There are also differences between the three reports in the core area of competition law. While the US Stigler Center and EC CMS experts are inclined to relax or reverse burdens of proof for both mergers and abuse of dominance, albeit in specified circumstances only, the UK DCEP experts do not recommend this, but do propose an alternative revision to the substantive merger test to better enable it to address digital mergers.

This paper compares these reports under the categories of mergers, dominance, data, regulation, and international. The purpose of this exercise is to underpin policy debates, examining the extent of both similarity and diversity of views across these reports on possible policy options. To maximise accessibility, our key findings are outlined in Table 1 at the end of the paper. Precise references are provided where possible, in order to ensure the accuracy and verifiability of the points made here.

I. MERGERS

In relation to mergers, the DCEP report states that five major digital companies have made more than 400 acquisitions globally over the last 10 years, with very few being substantially investigated or challenged.

(DCEP, p. 12)³ This raises an important question: to the extent that market power has arisen from acquisitions, how might this have occurred and how could a merger regime more effectively address merger deals in the relevant sectors?

All three reports conclude that there is a general need for greater scrutiny of, and intervention in, acquisitions by large digital platforms. Indeed, the DCEP specifically recommends that “The CMA⁴ should further prioritise scrutiny of mergers in digital markets...” (DCEP p.12). However, the reports also make a number of more specific points.

A. Non-horizontal mergers

All three reports also highlight the need for greater scepticism in relation to non-horizontal mergers – which have traditionally been seen as benign – where they involve major digital platforms.

The DCEP report recommends that the UK Merger Assessment Guidelines be rewritten, with one of the proposed changes being “Toning down the existing text that suggests non-horizontal mergers will typically be benign...” (DCEP p. 96). The Stigler Center report highlights more specifically that “entry from elsewhere in the vertical (or conglomerate) chain may be the most effective and promising entry point to challenge an established bottleneck business” (SC p.90) and recommends that “courts should not presume efficiencies from vertical transactions. Crediting of efficiencies should require strong supporting evidence showing merger-specificity and verifiability.” (SC p.78). The CMS report identifies this potential competition argument too, but also highlights the importance of considering non-horizontal mergers within the context of conglomerate ecosystems which address a broad variety of user needs. A non-horizontal merger may raise “barriers to entry by combining the acquirer’s and the target’s positive network effects” (CMS p.122)

B. Potential competition

The reports differ somewhat, however, in their views on how best to address potential competition issues. The DCEP report suggests that closer consideration should be given to impacts on potential competition in mergers (DCEP, Recommended Action 7, p. 12). In particular, it highlights that long-term run effects are key. “Could the company that is being bought grow into a competitor to the platform? Is the source of its

³ The report does not suggest that most, or even many, of these deals should have been prevented. However, given that the percentage of merger deals challenged among core digital players has so far been lower than across the full set of industries, and given that we now understand more about developments in digital markets, the panel considers that “...at least some of the acquisitions that have been made by large digital companies will have been problematic.” (DCEP p. 49).

⁴ The CMA is the UK Competition and Markets Authority.

value an innovation that, under alternative ownership, could make the market less concentrated? Is it being bought for access to consumer data that will make the platform harder to challenge?” (DCEP p. 12). The Stigler Center report notes the challenge, at the time of an acquisition, in identifying “...whether the acquired firm is likely to develop into a competitor...”, suggesting that antitrust enforcers may need to think “more as venture capitalists do...” (SC p. 67).

By contrast, the CMS report considers there to be a risk that a greater focus on potential competition could lead authorities to overstate the competitive constraints on the major digital platforms, and thus “the result of a broadened concept of potential competition could be more “false negatives” instead of fewer.” (CMS p. 119). This is a key factor in the CMS report focusing instead on the “moat” theory of harm (see above).

C. Substantive merger test

On the substantive merger assessment test, however, the recommendations vary significantly across the three reports.

The CMS report does not propose any formal change to the merger assessment test, nor does it seek to create any general reversal of legal presumption. However, it does come very close to this in respect of one specific circumstance. It introduces a new theory of harm that effectively involves major digital platforms buying up small digital start-ups as a defensive strategy to create and protect “moats” around their ecosystems. It then proposes “a heightened degree of control” in such circumstances whereby “Where an acquisition plausibly is part of such a strategy, the burden of proof is on the notifying parties to show that the adverse effects on competition are offset by merger-specific efficiencies.” (CMS p. 124).

The Stigler Center report goes further still along this road and suggests that for digital platforms: “Mergers between dominant firms and substantial competitors or uniquely likely future competitors should be presumed to be unlawful, subject to rebuttal by defendants. This presumption would be valuable, not because it would identify anticompetitive mergers with precision, but because it would shift the burden to the party with the best access to relevant information on issues of competitive effects and efficiencies from the merger.” (SC p. 78). The Stigler Center report further suggests that such mergers might sensibly be reviewed by its proposed “Digital Authority” (SC p. 90).

The DCEP report highlights the inherently uncertain nature of theories of harm in these complex and dynamic markets, but also the very substantial harm that can arise from allowing anticompetitive mergers. The Panel is concerned that the existing “balance of probabilities” threshold may limit the potential for intervention where the likelihood of harm is below 50% but the quantum of any such harm would be very large. To address this, and so enable intervention against such mergers, the DCEP suggests the introduction

of a new ‘balance of harms’ test, which would enable the authority to weigh up – in broad terms – both the probabilities and magnitudes of potential outcomes (DCEP p. 100). The DCEP specifically rejects an alternative option of reversing the burden of proof in such mergers, concluding that “a presumption against all acquisitions by large digital companies is not a proportionate response to the challenges posed by the digital economy, and has therefore been ruled out in favour of the balance of harms approach” (DCEP p. 101).

D. Jurisdiction and notification

The reports also discuss jurisdictional thresholds and notification requirements for mergers. The Stigler Center report makes the strongest recommendation here: that digital platforms with bottleneck power would need to notify every acquisition and receive pre-clearance, no matter the size of the acquisition. (SC p. 92)

By contrast, in terms of jurisdiction, neither the DCEP nor CMS reports recommend change at this time, despite recognising that some potentially problematic digital mergers may fall below existing turnover-based jurisdictional thresholds. The DCEP takes the view that the UK’s ‘share of supply’-based jurisdictional test is sufficiently flexible to capture most relevant mergers. The CMS report considers that the combination of EU-wide and domestic jurisdictions are likely to capture most relevant mergers, especially given the recent introduction of new lower transaction value thresholds in Austria and Germany, and the potential for cases to be referred up to the European Commission from Member States. However, both reports highlight the need to keep this issue under review and to revisit it if existing thresholds turn out to be insufficient to capture potentially problematic digital mergers. (DCEP pp. 94-95; CMS pp. 113-116)

The DCEP does, however, identify a potential risk – within its voluntary notification regime – that it may not be aware of some relevant mergers. It therefore recommends firms which are designated as having ‘Strategic Market Status’ be required to make the UK Competition and Markets Authority aware of all mergers, albeit that would not constitute formal merger notification and therefore would not necessarily trigger a case opening. Pre-clearance of mergers would not be required. The DCEP report also notes the benefits of coordinated global merger review of mergers involving major digital platforms, and thus the importance of ensuring that other jurisdictions can review such mergers. (DCEP p. 120)

E. Remedial powers

Finally, the Stigler Center report suggests that one role of the digital authority could be to review and potentially unwind past mergers, if they have been found to substantially lessen competition, as is possible under existing U.S. competition law and practice (SC pp. 92-93). The other two reports do not propose any

such retrospective unwinding, although this is in principle possible as a remedy under the UK's market investigation regime.

II. DOMINANCE

As discussed in the introduction, there is general agreement between the three reports on the economics of digital platform markets, in terms of the characteristics which drive a tendency towards market concentration and also towards market power being extended from one market to another.

More specifically, the reports all give weight to the important 'gatekeeper' or 'bottleneck' role that can be held by digital platforms. As the DCEP report puts it: "As these markets are frequently important routes to market, or gateways for other firms, such platforms are then able to act as a gatekeeper between businesses and their prospective customers. This gives the platforms three distinct forms of power: the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations." (DCEP p. 41). It notes the existence of "'bargaining power imbalances' that exist between digital platforms and their users" (ACCC Digital platforms inquiry – preliminary report, p. 13, as quoted in DCEP p. 59).

The Stigler Center report notes that this bottleneck market power is strongest where one of the markets is 'single-homing', and that it can be exacerbated by consumer behavioural biases (SC pp. 41-43) or by the strategic use of contracts and technologies (SC p. 98). It finds that bottleneck power is a particular risk because of "...uncertainties in technology and demand, the speed of tipping, the irreversibility of tipping..." (SC p. 92).

The three reports nevertheless have rather different policy responses to such dominance concerns.

A. A role for *ex ante* regulation?

A first key difference relates to the need for *ex ante* regulation as a complement to *ex post* antitrust enforcement. The DCEP and Stigler Center reports both conclude that, given the fast-moving nature and complexity of digital platform markets, standard *ex post* antitrust enforcement will not, in itself, be sufficient to address the substantial dominance-related issues arising, and that supplementary *ex ante* regulation is required. As the DCEP report puts it "...antitrust enforcement, although having an important role, moves too slowly and, intentionally, resolves only issues narrowly focused on a specific case. In digital markets this has not established clear and generalisable rules and principles to give businesses certainty about the boundaries of acceptable competitive conduct." (DCEP p. 55).

On this basis, the DCEP recommends the establishment of ex ante regulation in the form of a Digital Markets Unit (“DMU”). One role of the DMU would be to monitor and enforce an agreed code of conduct, based on high-level principles, in respect of digital platforms that have been designated as having Strategic Market Status (“SMS”) (DCEP p. 5). The Stigler Center report makes very similar arguments, and recommends that serious consideration be given to creating a new Digital Authority (“DA”) (SC pp. 78-79).¹ One role of the DA could be to develop, monitor and enforce regulations in relation to platforms with “bottleneck power”. (SC pp. 84-85). Section IV below highlights some similarities and differences between the UK and US digital regulator proposals.

By contrast, the CMS report does “not envision a new type of ‘public utility regulation’ to emerge for the digital economy. The risks associated with such a regime – rigidity, lack of flexibility, and risk of capture – are too high.” (CMS p. 126).

However, it would be wrong to overstate the differences between the CMS report and the UK and US reports on the need for regulation. As discussed in the introduction, the CMS panel was not asked to explore this issue, but only the narrower question of how competition policy should evolve. Moreover, the CMS report accepts the general proposition that regulation can be a useful complement to competition law and that there may be “areas where regulation might be appropriate, in particular where similar issues arise continuously and intervention may be needed on an ongoing basis” (CMS p. 70), and proposes that a “regulatory regime may be needed in the longer run. In particular, competition law enforcement may be overburdened to deal with the implementation and oversight of interoperability mandates imposed on dominant players” (CMS p. 126).

B. Enhancing antitrust enforcement

A second key difference relates to the recommendations made in respect of enhancing antitrust enforcement itself. The DCEP does make some recommendations that are designed to speed up antitrust enforcement, such as to amend interim measures processes and UK appeal standards, but its focus is on the creation of the DMU. By contrast, both the CMS and Stigler Center reports make rather more significant recommendations in this area.

¹ An additional argument made by the Stigler Center report is that the only structural solution to some of the problems in these markets would be breakup of a platform, but that this may be very disruptive. As such, less disruptive remedies could be put in place, but these would include ongoing monitoring. This in turn is a role that it asserts “antitrust enforcers are not well-positioned to do.” (SC p. 80).

1. *Burden of proof*

A key similarity between these latter two reports is that they both propose a relaxed or reversed burden of proof in relevant antitrust cases. The CMS report bases this on a review of the error cost framework around intervention against anti-competitive conduct by dominant platforms and concludes that “a finding that [specific practices] restrict the ability of other firms to compete either on the platform or for the market in a way which is not clearly competition on the merits should trigger a rebuttable presumption of anti-competitiveness. It should be the dominant platform’s responsibility to show that the practice at stake brings sufficient compensatory efficiency gains.” (CMS p. 71). “Self-preferencing” is discussed as a form of conduct where such a reversed presumption might apply. (CMS pp. 66-7)

The Stigler Center report also proposes a relaxation of proof requirements or reversal in the burden of proof in appropriate cases. Specifically, this would involve “adopting rules that will presume anticompetitive harm on the basis of preliminary showings by antitrust plaintiffs and shift a burden of exculpation to the defendant or by ensuring that plaintiffs are not required to prove matters to which the defendants have greater knowledge and better access to relevant information.” (SC p. 77)²

2. *Platforms as rule-setters or regulators*

An interesting point of comparison relates to the expectations of platforms with bottleneck power in respect of their own conduct as rule-setters or regulators for businesses using their platform. All of the reports identify that bottleneck platforms have a key role to play in establishing a level playing field between platform users, but they take different approaches to achieving this, with the CMS report proposing that antitrust law is a suitable vehicle, whereas the UK and US reports view this as an issue to be addressed by the proposed *ex ante* regulator.

Specifically, the CMS report proposes that a duty be imposed on dominant platforms under antitrust law. It notes that many platforms, in particular marketplaces, act as regulators, setting up the rules and institutions through which their users interact. They do not consider this a problem *per se* but, consider that: “because of their function as regulators – dominant platforms have a responsibility to ensure that their rules do not impede free, undistorted, and vigorous competition without objective justification. A dominant platform that sets up a marketplace must ensure a level playing field on this marketplace and must not use its rule-

² The Stigler Center report also makes some arguably more US-specific recommendations. It argues for reform to US legal doctrine across a variety of forms of anticompetitive conduct. These include unilateral refusal to deal doctrine; predatory pricing; loyalty payments; vertical restraints and exclusive dealing. The reforms would be designed to make intervention easier. It also recommends the creation of a specialised Competition Court, to enable better development of legal doctrine in this area. This is based on the fact that general US courts see antitrust matters only rarely.

setting power to determine the outcome of the competition.” (CMS p. 6) The report suggests that this concept is not novel, highlighting that “...sport associations and sporting leagues have been subject to the same type of requirements.” (CMS p. 61).

However, this proposed duty has strong similarities to part of what DCEP proposes to include within its *ex ante* regulation regime. Specifically, the DCEP report proposes as draft overarching principles that users should be (i) provided with access to designated platforms on a fair, consistent and transparent basis; (ii) provided with prominence, rankings and reviews on designated platforms on a fair, consistent, and transparent basis; and (iii) not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market.

This proposed duty is also very similar to options discussed by the Stigler Center report as potential regulations to be imposed by the DA for platforms with bottleneck power, which include rules around non-discrimination and rent expropriation. (SC pp.93-94)

3. *Interoperability and open standards*

The situation is similar with respect to interoperability and open standards. The CMS report proposes that dominant digital platforms be placed under “a duty to ensure interoperability with suppliers of complementary services” (CMS p. 71), but this proposal is intended to be required under antitrust. Similar recommendations are made by both DCEP and Stigler, in relation to interoperability and open standards, but are proposed as objectives for *ex ante* regulation. (DCEP pp. 71-74; SC pp. 110-1 and 113)

4. *Remedies*

In terms of remedies, the CMS report notes that: “Behavioural remedies – for example remedies relating to changes to the design of a ranking algorithm – might be difficult for a competition authority to handle” (CMS p. 67). On the other hand, they accept that the alternative of structural remedies, as have been considered in some infrastructure sectors, is unlikely to be a suitable general solution: “When it comes to digital platforms, it is less clear that the balance of costs and benefits argues for some version of unbundling of vertically integrated platforms.” (CMS p. 67). They do suggest, however, that remedies could include a restitutive (or restorative) element that would “enable formerly disadvantaged competitors to regain strength.” (CMS p. 68).

5. *“Bottleneck” or “intermediation” market power*

Finally, all three reports discuss the implications of “bottleneck” or “intermediation” market power for assessing market power, but their focus is somewhat different. While the Stigler Center report places this

concept at the heart of determining which platforms require additional *ex ante* regulation, the DCEP report proposes only that such power would form part of the assessment of SMS (DCEP p. 10). The CMS report, meanwhile, focuses on implications for assessing dominance under antitrust law. It concludes that a platform may be found dominant, on the basis of such intermediation power, even if it has less than 40% market share in a wider platform market. (CMS p. 70)

III. DATA

There is substantial congruence between the three reports in respect of data. They all acknowledge the centrality of concerns around the use of and control of data, and the impact of data on the competitive environment.³ As the CMS report states, “Data is a core input factor for production processes, logistics, targeted marketing, smart products and services, as well as Artificial Intelligence.” (CMS p. 73). At the same time, as the DCEP report emphasises, “the scale and breadth of data that large digital companies have been able to amass, usually generated as a by-product of an activity, is unprecedented.” (DCEP p. 23).

Thus, data can create a strong barrier to entry and incumbency advantage, helping to confer and maintain market power. “The extent to which data are of central importance to the offer but inaccessible to competitors, in terms of volume, velocity or variety, may confer a form of unmatchable advantage on the incumbent business, making successful rivalry less likely.” (DCEP p. 34). The CMS report highlights that *timely* access to relevant data is also important. (CMS p. 73)

If competition is to be promoted, therefore, it may be necessary to mandate access to relevant data. The three reports focus on two key ways in which this might be achieved.

A. Data mobility/portability

Data portability provisions require firms to give consumers control over their own data, enabling them to download it and transfer it to third parties. The DCEP report prefers the term “data mobility”, which it defines as giving consumers the more extensive right to request that their data be moved or shared directly between a business and a third party, on an ongoing basis, at the click of a button. This latter functionality is important for enabling effective multi-homing, whereby consumers utilise two competing services, and this in turn is important for overcoming network effects. Simple ‘data portability’ can potentially facilitate switching, which is itself beneficial for competition, but risks being complex and time-consuming and therefore little used by consumers (DCEP p. 65; SC pp. 88-89).

³ See CMS p. 73, for example.

The DCEP and Stigler Center reports also emphasise the importance of introducing open API standards in order to make data mobility work effectively. The CMS report makes the same points but uses the term ‘data interoperability’ in place of data mobility.

B. Data openness/sharing

While data mobility is likely to have many positive benefits, it is unlikely to be sufficient to address all competition concerns. It will only work to create the sorts of big datasets needed to train algorithms if consumers take it up in large numbers. In reality, take up may be too slow and partial to provide smaller rivals of dominant firms with the data they require to develop new service offerings. Moreover, there may be a ‘chicken and egg’ problem in that consumers do not wish to switch to new services until they reach a certain quality level, but services may struggle to improve their quality until they have sufficient data. In addition, data mobility only helps in providing access to consumer data, whereas non-personal data may also be important. For these reasons, there may be a need to mandate direct data access.

The DCEP report refers to this as “data openness” (DCEP p. 74). The CMS and Stigler Center reports use the term “data sharing” (CMS p. 9; SC p. 96). In terms of privacy, while providing such access will typically be easier for non-personal data, the CMS report notes that increasingly datasets can be interrogated anonymously, with users not receiving access to the underlying dataset itself, but running procedures or asking questions by distance in a way that does not allow access to individual information (CMS p. 86).

C. Implementation

With these objectives agreed across the reports, there are some differences between them in terms of how to achieve the objectives. However, the differences should not be overstated.

The DCEP and Stigler Center reports argue that both objectives will require a combination of government legislation and proactive regulation by the proposed DMU/DA. They propose that the regulator should have powers to review particular markets and ‘use cases’ and mandate data mobility or data sharing where this is considered important to promote competition. For the most part, they propose that such interventions need not be limited to digital platforms with existing market power, although the Stigler Center report does suggest that data sharing would only be mandated for firms with bottleneck power. The rationale for mandating data access (and especially data mobility) beyond currently monopolised markets is to help prevent digital markets from tipping in the first place, by promoting multi-homing and thereby limiting the impact of network effects. This is preferable to having to address dominance once it has emerged. The development of “Open Banking” in the UK financial sector is cited as a good, novel example of data mobility being imposed to promote competition and innovation in a market not characterised by dominance.

By contrast, the CMS report gives greater weight to achieving these objectives through existing antitrust law (Article 102). Mandated data access can be a remedy where data is found to be an essential facility for a rival. The report argues that the current ‘essential facilities doctrine’ may be overly restrictive, having been first for classical infrastructure industries, since “data is different in several important ways”. They propose returning to the balancing of interests criterion underlying the essential facilities doctrine, noting both the need to protect the dominant firm’s investment incentives (including in data collection) and the need to ensure that markets remain contestable (CMS p. 98). At the same time, alongside this antitrust focus, the CMS report recognises the complexities involved in designing data-sharing protocols and in setting FRAND terms for access, and concludes that “very likely, mandated data access will therefore, in the end, be a sector-specific regime, subject to some sort of regulation and regulatory oversight.” (CMS p. 109).

D. Voluntary data-pooling

The CMS report also discusses the benefits of voluntary data-sharing or **data-pooling** agreements, and the conditions under which such arrangements should be exempt from competition review. They note that data-related exemptions have been granted in the past for the insurance industry in relation to joint data compilations on the average costs of risks and frequency of certain types of accidents (CMS p. 95). They suggest that block exemptions may be worthwhile when a data pooling is open to all, data is licensed non-exclusively into the pool and then licensed out to any potential licensee on ‘FRAND’ terms (CMS p. 95). In the first instance, they propose “a scoping exercise of the different types of data pooling and subsequent analysis of their pro- and anti-competitive aspects”, with a view to issuing guidance and potentially a block exemption (CMS p. 9).

E. Digital identity

Finally, the Stigler Center report further suggests that the DA could help to create an open standard for digital identities, enhancing users’ ability to access goods online, as well as seeking to facilitate an open standard for micro-payments (SC pp. 88-89). Such interventions, which go beyond simple data access, have the potential to revolutionise online markets.

IV. REGULATION

As discussed above, both the DCEP and Stigler Center reports propose the creation of a specialised regulatory function to develop, monitor and enforce regulation in the digital sector, to work alongside

traditional *ex post* antitrust enforcement. Both leave open the question of where this regulatory function might sit.⁴

There are several similarities between the two proposals, but also a number of differences.

A. Similarities

In terms of similarities, first, both the DCEP and Stigler Center proposals would involve certain functions applying only to a specific set of major digital platforms.⁵ As discussed above, in the case of the DCEP report these would be SMS firms, whereas in the case of the Stigler report they would be firms with “bottleneck power”. In practice, though, this distinction may not be major, given that the DCEP report describes SMS as applying to “those in a position to exercise market power over a gateway or bottleneck in a digital market, where they control others’ market access.” (DCEP p. 55).

Second, both proposals would place a number of requirements on firms with SMS/bottleneck power. The Stigler Center report frames these simply as regulations, whereas the DCEP report is more granular, setting out that they would take the form of a ‘code of conduct’, based on a set of core principles. However, both are expected to address similar issues. For example, these firms would be required to ensure that their activity as a rule-setter for platform users was non-discriminatory and did not unfairly restrict or penalize users for using other platforms or routes to market. (See discussion above).

Third, both also propose that there would be certain regulatory functions which would apply more widely to the digital sector, and not just to SMS/bottleneck power firms, albeit the details are somewhat different. In the case of the DCEP proposal, the DMU would have wider functions relating to data mobility and open standards and to data openness (DCEP p. 11). In the case of the Stigler proposal, the DA would develop, monitor and enforce a set of broadly applicable regulations for all digital companies, including around data mobility, open standards, interoperability.⁶ Although, in some contrast with the DCEP report, the Stigler Center report only proposes data sharing (aka data openness) in respect of bottleneck firms (SC pp. 109-113).

⁴ The panel explicitly leaves open the question of whether the unit should be an independent body, or in a pre-existing institution, such as the communications regulator (Ofcom), the data protection regulator (the Information Commissioner’s Office) or the competition authority (CMA). (DCEP p. 55).

⁵ The Stigler Center report in fact frames its specific recommendations for regulation as a “menu [...] that could be used to solve the problems identified”. (SC p. 85)

⁶ It also proposes that the DA would regulate practices that are designed to “enhance behavioural mistakes”, something that is effectively done by the CMA in the UK under EU consumer law. (SC p. 87)

Fourth, both reports emphasise the need for the regulator to be effective. The Stigler Center report proposes that the DA “should have clear and broad authority over digital business models in order to prevent firms subject to regulation from evading its oversight.” (SC p. 84). The DCEP report is more granular, stating that the DMU would have “to impose solutions and to monitor, investigate and penalise non-compliance” (DCEP p. 10).

B. Differences

The differences between the proposals are outweighed by the similarities, but are nevertheless noteworthy. First, a key DCEP recommendation is that the Digital Markets Unit “will take a co-operative approach, working with platforms, other businesses and other stakeholders to agree rules, standards and solutions.” Albeit “it also needs to be backed with new regulatory powers, so it can impose and enforce these solutions if necessary.” (DCEP pp. 54-55). There is no such recommendation in the Stigler Center report.

Second, the Stigler Center report proposes that the DA would also have responsibilities in respect of data collection (SC p. 86) and merger review (SC pp. 89-93). While neither is considered in the DCEP report, it is fairly standard in UK regulation that firms have reporting obligations to provide the regulator with relevant data.

Third, the DCEP report proposes a designation process, whereby the DMU would apply criteria to pre-designate specific firms as having SMS. Only designated firms would be covered by the code of conduct (DCEP p. 12). By contrast, while the Stigler Center report proposes that the DA should have “sole authority to define bottleneck power” (SC p. 85), it does not mention anything about pre-designation.

Fourth, both reports emphasise the importance of efficient and speedy regulatory action. As the Stigler Center report puts it, because of “the fast pace of change in these industries, the short amount of time it takes to destabilize or eliminate an entrant, the substantial discrepancy in bargaining power between digital bottlenecks and their business customers, and the necessity to use government resources efficiently, a speedy process is crucial.” (SC pp. 97-98). However, only the Stigler Center report discusses the implications of this for the adjudication process in case of regulatory dispute, considering options such as mandatory deadlines and other procedural rules.

C. Regulation and the CMS Report

Finally, it should be reiterated that, although the primary focus of the CMS report is on antitrust law, it also highlights the potential need for regulation in this sector, at least over the longer term, as discussed in Section II above. As such, the reports are perhaps more aligned on this topic than they might at first appear.

V. INTERNATIONAL

The DCEP report devotes an entire chapter to the international dimension of competition policy in digital markets. Notably, it suggests the need for increased co-operation between competition authorities and in international fora, for example in developing shared tools for assessing dynamic competition (DCEP, pp. 118-19). It also recommends that other countries consider adopting some of the proposals in the report and that the UK “Government should engage internationally on the recommendations it chooses to adopt from this review” and also promote its market studies and investigations powers to other countries. It also recommends that governments “work with industry to explore options for setting and managing common data standards.” (DCEP p. 126). It suggests that “Avoiding a fragmented regulatory landscape, with the risk that digital companies face a proliferation of different rules across jurisdictions, will be central to allowing innovation to flow freely to consumers at a global level” (DCEP p. 119).

In contrast, neither of the other reports focuses on the need for international co-operation, although the Stigler Center report does highlight the global nature of the concerns (SC p. 5) and also mentions EU legal practice and leadership in competition law extensively and positively.

CONCLUSION

This paper compares the recommendations from three major expert reports published in 2019, which between them substantially influence the debate around competition policy in digital platform markets. Understanding the reasoning in these reports, whether one agrees with the reports’ analysis or not, is important for comprehending discussions around policy and legislation in this arena. The key findings in this paper are summarized, for easy accessibility, in Table 1.

While it is normal that experts will differ, there is in fact notable congruence of views across these three reports. Moreover, where there are differences – such as around the need for *ex ante* regulation – this may be driven as much by the remit given to the experts, and the timing of their work, as by any major difference of view.

A number of jurisdictions are progressing these ideas, including in the EC through its Inception Impact Assessment for an *ex ante* regulatory instrument⁷ and in the UK through the CMA’s final market study report on *Online Platforms and Digital Advertising* and the UK Digital Markets Taskforce⁸.

Perhaps the fastest moving jurisdiction for implementing new policies is Germany, where the proposed 10th Amendment to the competition law⁹ would allow the Bundeskartellamt to designate a firm as being an “undertaking of paramount significance for competition across markets” on the basis of five specified criteria. This has clear similarities to the SMS concept in the DCEP report. Having done so, the Bundeskartellamt could prohibit such an undertaking from engaging in a variety of specified activities, unless they can be objectively justified, with the burden of proof lying with the undertaking in question. Such specified activities include self-preferencing; raising barriers to entry through the use of data; and hindering interoperability or data portability. Here, there are clear similarities to recommendations in the CMS and Stigler Center reports.

While the German policy developments are interesting, we hope that this paper contributes towards a common understanding of potential policy responses, and thereby help to drive further international cooperation. There is a clear risk of diverging regulatory and enforcement practices in addressing these challenges, which may not be in the best interest of either consumers or businesses. Given the global nature of many digital platform markets, the benefits of a cohesive international approach are clear, albeit there may also be some benefits from observing the impacts of different policies across jurisdictions.

⁷ European Commission, *Impact Assessment: Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market*, 2020.

⁸ CMA, *Online Platforms and Digital Advertising: Final Report*, 2020. The Terms of Reference for the Digital Markets Taskforce are available at: <https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference>.

⁹ For an unofficial English translation, see: <https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf>.

Table 1: Summary findings

	DCEP report (for UK Government)	CMS report (for European Commission)	Stigler Center report (US)
Mergers	<p>-Change to “balance of harms” test to allow better consideration of lower probability risk of harm.</p> <p>-Rewrite merger assessment guidelines, including toning down presumption that non-horizontal mergers tend to be benign.</p> <p>-CMA to prioritise review of digital mergers and give greater weight to potential competition issues.</p> <p>-“Strategic Market Status” firms to make CMA aware of all mergers, but no need for pre-clearance.</p> <p>-No change needed to UK jurisdictional rules, but keep under review. Also encouragement to other jurisdictions to ensure their rules capture relevant mergers, to aid international cooperation.</p>	<p>-No need for change in substantive SIEC merger test, but “heightened degree of control” where acquisition is plausibly part of a “moat” strategy. Burden would then shift to merging parties.</p> <p>-No increase in focus on potential competition, with preference for reviewing through “moat” lens.</p> <p>-No change to EU jurisdictional thresholds for now but keep under review.</p>	<p>-Reversed burden of proof for dominant digital platforms with bottleneck power.</p> <p>-Mergers involving a digital business with bottleneck power would be reviewed by digital authority.</p> <p>-Important to consider impact of merger on potential competition and to be more sceptical about non-horizontal mergers.</p> <p>-Platform businesses with bottleneck power to notify every acquisition and receive pre-clearance, no matter the size of the acquisition</p> <p>-The digital authority could review consummated mergers and unwind those that created market power or higher prices.</p>
Dominance	<p>-More proactive intervention through <i>ex ante</i> regulation for firms with “Strategic Market Status” (to take the form of a Digital Markets Unit (DMU)).</p> <p>-No proposal for a reversed presumption. Focus is on DMU.</p>	<p>-Focus is on what can be done under existing legal powers, albeit recognising that regulation may be needed over the longer run.</p> <p>-Relaxed burden of proof for anti-competitive conduct by dominant platforms, in appropriate cases, such that platforms have responsibility to demonstrate compensating efficiencies.</p>	<p>-Serious consideration of <i>ex ante</i> regulation for firms with “bottleneck power” (to take the form of a “Digital Authority” (DA))</p> <p>-Reverse or relax burden of proof for anti-competitive conduct by bottleneck platforms.</p> <p>-Open standards and interoperability to be address under <i>ex ante</i> regulation by DA.</p>

	<ul style="list-style-type: none"> -Use <i>ex ante</i> regulation to address level playing-field issues arising from “platform as regulator” issues - Open standards to be addressed under <i>ex ante</i> regulation, as an objective of DMU. -Within antitrust, amend procedures to facilitate quicker use of interim measures in dominance cases. -Change antitrust appeal standard to facilitate speedier enforcement action. 	<ul style="list-style-type: none"> -Responsibility of dominant platforms to ensure their rules do not impede free, undistorted, and vigorous competition, without objective justification, for marketplaces they create -Duty on dominant platforms to ensure interoperability -Possible dominance below 40% market share on basis of intermediation power -Potential for remedies to include a restorative element. 	<ul style="list-style-type: none"> -Several other conduct-specific proposals for changing antitrust doctrine, to make intervention easier.
Data	<ul style="list-style-type: none"> -Digital Markets Unit to have objectives around (i) data mobility and (ii) data openness. -These to apply across digital sector (i.e., not just on SMS firms). 	<ul style="list-style-type: none"> -Access to indispensable data via Article 102, under revised approach to essential facilities. -Recognition that for ongoing data access needs, sector-specific regulation likely to be needed. -Need for guidance, and potentially block exemption, around voluntary data-sharing/pooling. 	<ul style="list-style-type: none"> -Digital Authority to oversee data mobility, open standards and data sharing. -Data mobility and open standards powers to apply across digital firms, but data sharing only to be mandated for firms with bottleneck power.
Regulation	<ul style="list-style-type: none"> -Create Digital Markets Unit, with appropriate powers to impose solutions and to monitor, investigate and penalise non-compliance. -Code of conduct for firms designated as having Strategic Market Status. -Regulations for sector more widely on data mobility and open standards, and data openness. 	<ul style="list-style-type: none"> -No explicit recommendation for <i>ex ante</i> regulation. -But recognition that it may be needed in the longer run. 	<ul style="list-style-type: none"> -Serious consideration to be given to creating a Digital Authority, with “clear and broad authority”. -Menu of regulations for firms with bottleneck power specifically, including in respect of data sharing. -Menu of regulations for sector more widely, including on data mobility, open standards,

-No proposed remit for regulator in mergers.

interoperability and also data collection (the latter not explicitly mentioned in DCEP).

-DA to have a role in mergers.

-Need for speedy and efficient adjudication process.

International

-Competition authority leads sharing of best practice, develop global approach.
