



# A New Competition Framework for the Digital Economy

## Report by the Commission ‘Competition Law 4.0’

### Summary

The Commission ‘Competition Law 4.0’ was set up by the Federal Minister for Economic Affairs and Energy in September 2018, and tasked with drawing up recommendations for action for the further development of EU competition law in the light of the digital economy. The new data economy, the rise of platform-based business models and the growing importance of cross-market digital ecosystems are the game changers in the digital economy. One of the characteristics of the digital economy is the interplay of these different aspects within a process which can lead to the emergence of new positions of power, their perpetual reinforcement and the ability to leverage them to other markets.

The Commission ‘Competition Law 4.0’ is convinced that it is necessary to ensure the contestability of positions of power in the digital economy, to prevent their being exploited to impede innovation and competition, and to stop the leveraging of these positions of power across to other markets. Protecting the development and marketing of innovations and strengthening consumer autonomy in the digital sphere will continue to be the key to effective competition. To achieve this, the EU and the Member States must develop an enhanced set of competition rules which take account of the pace of change in the digital economy and an enhanced framework for enforcing the law in order to put a halt to potentially highly dangerous anticompetitive conduct more quickly than has been the case. This will require further development and better dovetailing of competition law, and of sectoral regulation in certain areas.

There is a need to adapt the legal framework for European competition law without undermining the principles of competition law. In particular, however, the Commission ‘Competition Law 4.0’ believes that the practical and actual power of consumers to dispose of their own data must be improved, clear rules of conduct for dominant platforms must be introduced, legal certainty for cooperation in the digital sector must be enhanced, and the institutional linkage between competition law and other digital regulation must be strengthened.

**Data access:** Much of today’s digital innovation is linked to the storage, compilation and analysis of data. – the stuff of which many business models of the digital age are made. Better access to data may result in competitive advantages, which may then give the company even more and better access to data. The fact that the same set of data may generate competitive advantages on several markets is in itself an expression of a new type of conglomerate effect which may contribute to the emergence of integrated digital ecosystems. To ensure that power positions resulting from this remain contestable, it is necessary in these cases to safeguard access to data which will (re)create the pressure of competition. Abusive denial of access to data can and should be identified under current law as anticompetitive conduct, and instructions to grant data access can be issued. If the denial of data access becomes a systematic problem, however, it may be the case that antitrust law and its enforcement regimes are unable to cope.

The Commission ‘Competition Law 4.0’ takes the view that the strengthening of consumer autonomy can be an important instrument to facilitate access to consumer data and to avoid the emergence of competition problems. The easier it is for consumers to transfer their data from one provider to another or to grant new providers access to data, the easier it will be for rival companies to attack data-based market power. For this reason, it is proposed that the existing right to data portability in data protection legislation be tightened for dominant platforms. Supplementary sectoral regulation can – following the model provided by the Payment Services Directive – envisage a right for consumers to

grant third-party providers access to their user accounts. Also the Commission 'Competition Law 4.0' proposes encouraging the establishment of data trustees which can grant data access to companies on behalf of and in line with the preferences of the consumers.

**Platform regulation:** Digital platforms are gatekeepers and rule-makers in the digital economy. Once such a platform has attained a dominant position and benefits greatly from positive network effects, the contestability of this power position is substantially reduced. In view of the strong controlling and steering effects that platforms can have on the behaviour of their users, the rapid pace of many digital market developments, and the significance of first-mover advantages, the costs of non-intervention or a failure to halt abusive conduct in time tend to be particularly high in such cases.

In order to ensure contestability of existing positions of power and undistorted competition on platforms and on and around neighbouring markets, the Commission 'Competition Law 4.0' proposes that there should be an EU Platform Regulation establishing clear rules of conduct for dominant online platforms. Such a Platform Regulation should in particular include a ban on giving preferential treatment to the platform operator's own services over those of third parties, and an obligation to deliver enhanced real-time data portability and interoperable data formats. At the same time, the Regulation would permit dominant platform operators to offer objective justifications for their conduct.

**Legal certainty for cooperation:** If they are to survive in the digital economy and to utilise the opportunities offered by changes in technologies and markets, companies must be able to experiment with new possibilities in the data and platform economy. Cooperation in many different forms is a part of this search and innovation process. However, many companies regard the uncertainty about the restrictions imposed by antitrust law on novel forms of cooperation as a relevant impediment to entry into and experimentation with such cooperation. It is indeed the case that both cooperation on data – i.e. agreements between companies to exchange, share and collate data – and cooperation on the joint establishment of platforms, digital networks and ecosystems can raise difficult antitrust issues which can impede the willingness to engage in cooperation.

The Commission 'Competition Law 4.0' therefore takes the view that there is a need for new procedural instruments to give companies the possibility to obtain legal certainty about the admissibility of novel forms of cooperation under antitrust law. It is proposed that a voluntary notification system be introduced at European level for cooperative projects which raise unresolved legal questions and are of substantial economic significance. DG COMP would have 90 working days to decide on the admissibility of a registered cooperative project.

**Joined-up digital regulation:** Digitisation is entailing a fundamental restructuring of almost all areas of our economy and society. The protection of functional, open and innovative markets is also entailing changes in the rules outside the field of competition law – e.g. in the field of contract law, consumer protection law, data protection law, liability law and procedural law.

The Commission 'Competition Law 4.0' is convinced that it is appropriate to introduce institutionalised networking in order to improve cooperation between the policy steering and administrative and supervisory structures. The desired improvement in policy coordination could be attained by the establishment of a new Digital Markets Board located in the General Secretariat of the European Commission. A majority of the member of the Commission 'Competition Law 4.0' also advocates the temporary establishment of a Digital Markets Transformation Agency at EU level in order to improve the networking of the supervisory structures. It should be tasked with collecting and processing information about market developments and technical developments, coordinating with a corresponding network of Member State institutions, and lending comprehensive support to the regulatory and competition authorities as well as the policymaking institutions.

## The recommendations

1. The Commission 'Competition Law 4.0' recommends that the **Commission Notice on the definition of relevant market be revised**.
2. The Commission 'Competition Law 4.0' recommends that a separate **Notice on market definition and the definition of market power with respect to digital platforms** be published.
3. The Commission 'Competition Law 4.0' recommends commissioning a **study on cross-market market foreclosure strategies in the digital economy** and of the potential for countering these via competition law.
4. The Commission 'Competition Law 4.0' recommends the **formulation of cross-market principles guided by competition law in a framework directive** based on Art. 114 of the Treaty on the Functioning of the European Union (TFEU) stating when and how users should be granted a **right to make a digital user account accessible to third-party providers**. The European Commission should be authorised to enact sector-specific regulations to flesh out these rules.
5. The Commission 'Competition Law 4.0' recommends **studying the possibility of the establishment of data trustees** and examining various potential models for this. On the basis of these findings, a decision should be taken regarding the instruments which – if possible at European level – can promote the emergence of such trustees.
6. The Commission 'Competition Law 4.0' recommends **developing further open data legislation stipulating, both at European level and at Member State level**, that all public institutions must provide structured data via standardised platforms and in open interoperable data formats. The group of data recipients and the sharing of costs should be regulated on a sectoral basis. In order to coordinate this work and to serve as a contact point for interested parties, a central institution of the Federation and the Länder should be set up in Germany with the participation of the business community which also takes on responsibility for the management of registers and the maintenance of standards. A United Kingdom-style Open Data Institute could serve as a model.
7. The Commission 'Competition Law 4.0' recommends the drawing up of overarching **data strategies** at European and Member State level which prescribe a cross-sectoral concept and cross-sectoral framework for the collection, use and provision of **data of the public sector and from the delivery of public services**.
8. The Commission 'Competition Law 4.0' recommends to the European Commission and the Member States that where companies are entrusted with the delivery of public services, where they are granted privileged access to scarce resources, e.g. in the awarding of a limited number of licences, and where they are awarded public contracts, these companies should be **obliged to provide the data generated in the course of this work** in line with data protection rules and respecting operating and commercial secrets for use by the public sector **in line with uniform criteria for use and – in the context of open data legislation – forwarding to third parties**.
9. The majority of the Commission 'Competition Law 4.0' recommends that a Platform Regulation be introduced to impose a specific **code of conduct on dominant online platforms** with a minimum level of sales or a minimum number of users.
10. The Commission 'Competition Law 4.0' recommends that dominant online platforms that fall under the Platform Regulation be **prohibited from favouring their own services in relation to third-party providers** unless such preferencing is objectively justified.
11. The Commission 'Competition Law 4.0' recommends that dominant online platforms that fall under the scope of the Platform Regulation be required to enable for their users the **portability of user and usage data in real time and in an interoperable data format** and to ensure **interoperability with complementary services**.
12. The Commission 'Competition Law 4.0' recommends that the European legislator examine whether dominant online platforms with a certain minimum level of sales or a minimum number of users should be obliged to introduce an **alternative dispute resolution procedure for infringements on platforms**.

13. The Commission 'Competition Law 4.0' recommends that the clarification of new legal questions raised in conjunction with **cooperation of business undertakings in the digital area** (e.g. data exchanges and data pooling; investments in cooperative projects involving innovation in the area of the Internet of Things – IoT) be declared a **priority of the European Commission** in the coming years.
14. The Commission 'Competition Law 4.0' recommends the introduction of a **voluntary notification procedure** at European level for novel forms of cooperation in the digital economy with a right to receive a decision in a short period of time. It also recommends that the Directorate-General for Competition hire additional personnel for this purpose.
15. The Commission 'Competition Law 4.0' does not currently believe that it is necessary to reform the Merger Control Regulation thresholds, but advocates the **systematic monitoring and evaluation** of the handling of relevant cases by the European Commission and the submission of a two-yearly report to the Council and Parliament.
16. The Commission 'Competition Law 4.0' is currently **advising against the introduction of a system of ex-post merger control**. However, as part of the proposed monitoring and assessment of cases involving the early acquisition of innovative start-ups the European Commission should also examine and report on whether it is succeeding, with the current system of ex-ante control, to avert the risk of the systematic consolidation and expansion of positions of market power.
17. When applying the SIEC test to capture the threats to competition associated with the takeover of young, innovative start-ups by dominant digital companies, particular importance must be attached to ensuring the contestability of entrenched positions of power. The Commission 'Competition Law 4.0' recommends the development of corresponding **guidelines** that specify relevant theories of harm. Particular account must be taken of **data-based, innovation-based and conglomerate theories of harm**.
18. The Commission 'Competition Law 4.0' does **not** consider a **reform of Art. 8 of Regulation 1/2003** ("interim measures") to be necessary. Nor should judicial review of interim measures be weakened. In view of the rapid developments in digital markets, however, the **European Commission should proactively examine whether it is necessary to order interim measures** to prevent irreparable damage to competition.
19. The Commission 'Competition 4.0' recommends that competition authorities make **greater use of flexible, targeted remedies in digital markets**. It recommends that the European Commission conduct a study which **analyses the previous policy on remedies pursued by the competition authorities in relevant cases** (Microsoft, Google Shopping etc.).
20. The Commission 'Competition Law 4.0' recommends that the newly elected European Commission should **establish a Digital Markets Board** with the General Secretariat which should be responsible for permanent coordination and harmonisation of the various policy areas in the interest of an overarching and coherent European digital policy.
21. A majority of the members of the Commission 'Competition Law 4.0' also advocates the temporary establishment of a **Digital Markets Transformation Agency** at EU level in order to improve the networking of the supervisory structures. It should be tasked with collecting and processing information about market developments and technical developments, coordinating with a corresponding network of Member State institutions. The agency should support the competent authorities at EU level and the EU Digital Markets Board.
22. The Commission 'Competition Law 4.0' recommends that the Member States should more strongly **consolidate their data protection supervision structures** for the non-public sector.