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Discussion Paper 2

DEVELOPING INTERNATIONAL PERSPECTIVES ON DIGITAL COMPETITION POLICY

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EXECUTIVE SUMMARY

This paper outlines key elements of three recent major expert reports on digital competition policy, comparing and contrasting them with each other. These reports – from the EC, UK and US – have been prepared in response to a growing sense that competition in this arena has features that have not been well addressed by traditional structures for competition policy. All highlight that digital platforms have become increasingly important and have delivered huge benefits for consumers, but they also raise significant competition concerns and consider there to have been insufficient intervention by competition authorities to date.

However, the reports also exhibit notable differences in respect to their specific recommendations. For example, the UK and US experts both recommend the introduction of ex ante regulation, albeit taking on somewhat different functions. The EC experts focus more on setting out recommendations for antitrust, albeit recognising that a regulatory regime may be needed in the longer run. Meanwhile, the US and EC experts are inclined to reverse burdens of proof for both mergers and abuse of dominance, albeit in specified circumstances only, whereas the UK experts do not recommend this. This paper focuses on such similarities and differences of view across the three reports under the categories of mergers, dominance, data, regulation, and international.

1 Introduction

Competition policy in the digital arena has attracted increasing attention by policymakers.[1] To some extent, this is a natural consequence of the increasing economic, political and social importance of this sphere, as well as its disruptive effects on existing modes of activity. Disruption is arguably a natural consequence of the increasing digitalisation of society, arising from lower cost digital services, new digital services and business forms and the ease with which customers can adopt these services.

However, digital markets also exhibit economic features that have implications for competition, and in particular the tendency of markets to tip towards concentration, or for market power in one market to be extended into related markets. These include strong transglobal economies of scale and scope, substantial network effects, a key role for data as a key output and key input, and important consumer behavioural biases. While none of these economic features is novel, their joint presence in digital platform markets raises significant challenges for competition policy.

This paper outlines and compares key elements of three major expert reports on digital competition policy, all published in 2019. Two are government-commissioned reports: *Unlocking digital competition* (Digital Competition Expert Panel ("DCEP") Report) (UK) (13 March, 2019)2 and *Competition policy for the digital era* "CMS Report" (DG Competition) (4 April, 2019).3 The contents of these reports do not necessarily represent government policy but might be expected to feed into government thinking. The third is the Stigler Center *Report* by the Market Structure and Antitrust Subcommittee of the Committee for the Study of Digital Platforms (1 July, 2019). While this is a non-governmental report, it involved many former U.S. government officials.

The purpose is not to critique the reports, but rather present their key recommendations in a summarized form and compare these in a balanced way.[4]

It should be noted that a number of other government reports have recently been prepared and are also illustrative of important tendencies and contain related considerations. One that is equally broad in focus is *A new Competition Framework for the Digital Economy: Report by the Commission 'Competition Law 4.0'* (released by German Ministry of Economy, 9 September 2019)[5]. Others that are slightly narrower in focus include *Digital Platforms Inquiry, Final Report* (ACCC, June, 2019), *Algorithms and Competition* (French Autorité de la Concurrence and German Bundeskartellamt, November 2019) and *Online platforms and digital advertising* (UK Competition and Market Authority, December 2019). There is no comparable government report from the United States for the moment, although the FTC has held hearings on many of the related competition topics.

2 Comparison

This paper reviews – in broad outline – the three major reports and highlights the key ways in which they compare and contrast with each other, under five categories:

[1] For example, in July 2019, a G7 meeting brought together competition authorities at the OECD and focused on digital competition policy.
[2] The expert panel consisted of Jason Furman, Diane Coyle, Amelia Fletcher, Philip Marsden and Derek McAuley.
[3] A report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer.
[4] Note that one of the authors of this note (Amelia Fletcher) was also a member of the DCEP.
[5] The expert panel that authored this report included one of the members of the CMS panel, Heike Schweitzer.

- Mergers;
- Dominance;
- Data;
- Regulation; and
- International.

These findings are summarized in Table 1.

The purpose of this exercise is help policymakers and businesses, particularly from other countries, to understand developing thinking in this area and also the diversity of views on possible policy options. The reports themselves are much more detailed than the material here and should serve as the reference for understanding the comments made here. Precise references are provided where possible, in order to ensure the accuracy and verifiability of the points made here.

Table 1: Summary findings			
	DCEP (Expert report for UK)	**CMS (Expert report for European Commission)**	**Stigler Center Report**
Mergers	-Change to "balance of harms" test to allow better consideration of lower probability risk of harm. -Rewrite merger assessment guidelines, including toning down presumption that non-horizontal mergers tend to be benign. -CMA to prioritise review of digital mergers and give greater weight to potential competition issues. -"Strategic market status" firms to make CMA aware of all mergers, but no need for pre-clearance. -No change needed to UK jurisdictional rules, but keep under review. Also encouragement to others to ensure their rules capture relevant mergers, to aid international cooperation	-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. -No increase in focus on potential competition, with preference for reviewing through "moat" lens. -No change to EU jurisdictional thresholds for now, but keep under review.	-Reversed burden of proof for dominant digital platforms with bottleneck power. -Mergers involving a digital business with bottleneck power would be reviewed by digital authority. -Important to consider impact of merger on potential competition and to be more sceptical about non-horizontal mergers. -Platform businesses with bottleneck power to notify every acquisition and receive pre-clearance, no matter the size of the acquisition -The digital authority could review consummated mergers and unwind those that created market power or higher prices.
Dominance	-More proactive intervention through ex ante regulation for firms with	-Focus is on what can be done under existing legal powers, albeit	-More pro-active intervention through ex ante regulation for firms with

	"Strategic Market Status" (to take the form of a Digital Markets Unit (DMU)). -No proposal for a reversed presumption. Focus is on DMU. -Use *ex ante* regulation to address level playing-field issues arising from "platform as regulator" issues - Open standards to be addressed under *ex ante* 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.	recognising that regulation may be needed over the longer run. -Reverse burden of proof for anti-competitive conduct by dominant platforms, such that platforms have responsibility to demonstrate compensating efficiencies. -Duty on dominant platforms to ensure their rules do not impede free, undistorted, and vigorous competition, without objective justification -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.	"bottleneck power" (to take the form of a "Digital Authority" (DA)) -Reverse or relax burden of proof for anti-competitive conduct by bottleneck platforms. -Several other conduct-specific proposals for changing antitrust doctrine, to make intervention easier. -Open standards and interoperability to be address under *ex ante* regulation by DA.
Data	-Digital Markets Unit to have objectives around (i) data mobility and (ii) data openness.	-Access to indispensable data via Article 102, under revised approach to essential facilities.	-Digital Authority to oversee data mobility, open standards and data sharing. -Data mobility and open standards powers to apply across digital firms,

	-These to apply across digital sector (i.e., not just on SMS firms)	-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.	but data sharing only to be mandated for firms with bottleneck power.
Regulation	-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. -No proposed remit for regulator in mergers.	-No explicit recommendation for *ex ante* regulation. -But recognition that it may be needed in the longer run.	-Create Digital Authority, with "clear and broad authority". -Regulations for firms with bottleneck power specifically, including in respect of data sharing. -Regulations for sector more widely, including on data mobility, open standards, 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.		

2.1 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.[6] This raises an important question for these reports; 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 this sector?

All three reports emphasise the need for greater focus on, and intervention in, acquisitions by large digital platforms, and the DCEP specifically recommends that "The CMA should further prioritise scrutiny of mergers in digital markets." (DCEP p.12).

The reports are also consistent in emphasising the need for greater scepticism around non-horizontal mergers, which have traditionally been seen as benign, where they involve major digital platforms. For example, the Stigler report highlights 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" (SR p.112) and recommends that "courts should not presume efficiencies from vertical transactions. Crediting of efficiencies should require strong supporting evidence showing merger-specificity and verifiability." (SR, p.98). 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)

However, in terms of the **substantive merger assessment test**, the proposed solutions vary significantly across the three reports.

- 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 huge. 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. 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". (CMA, p. 101)
- 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

[6] DCEP, p. 12. 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, p49).

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 "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 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." (SR, p. 98). The Stigler report further suggests that such mergers might sensibly be reviewed by its proposed "Digital Authority". (SR, p. 111).

The reports also differ somewhat in their views on how best to address **potential competition** issues.

- The DCEP report suggests that impacts on potential competition should be considered in mergers (DCEP p. 12, Recommended Action 7). In particular, it suggests considering long-term possibilities of whether a "company being bought could become a competitor to the platform. Is the source of its 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?". The Stigler 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…" (SR, 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.

The reports also discuss **jurisdictional thresholds and notification requirements** for mergers.

- The Stigler 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 (SR, p. 104).

- 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 current turnover-based jurisdictional thresholds. The DCEP takes the view that the UK jurisdictional test is sufficiently flexible to capture most relevant mergers, while the CMA 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 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 CMA 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)

Finally, the Stigler 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 lesson competition, as is possible under existing U.S. competition law and practice. (SR, p. 114) The other two reports do not propose any such retrospective unwinding, although this is in principle possible in the UK under the UK's market investigation regime.

2.2 Dominance

There is substantial 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.

In particular, 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 "bargaining power imbalances" between digital platforms and their users" (DCEP, p.59). The Stigler 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 (SR pp. 41-43) or by the strategic use of contracts and technologies (SR, p. 119). It finds that bottleneck power is a particular risk because of "uncertainties in technology and demand, the speed of tipping, the irreversibility of tipping". (SR, p. 114)

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

A first key difference relates to the need for **ex ante regulation** as a complement to ex post antitrust enforcement.

- The DCEP and Stigler 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 DCEP 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 report makes very similar arguments, and recommends the creation of a new Digital Authority ("DA") (SR, pp. 99-100).[7] One role of the DA would be to develop, monitor and enforce regulations in relation to platforms with "bottleneck power". (SR, pp.105-6). Section 2.4 below highlights some similarities and differences between the UK and US digital regulator proposals.

- By contrast, the CMS report does not propose the creation of a separate regulatory function, albeit it supports the general proposition that regulation can be a useful complement to antitrust law "in particular where similar issues arise continuously and intervention may be needed on an ongoing basis" (CMS p.70). On this basis, it recognises that a regulatory regime may be needed in the longer run. However, it 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)

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.

[7] An additional argument made by the Stigler 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 authorities are not well-positioned to do." (SR, p. 80)

- By contrast, both the CMS and Stigler reports make rather more significant recommendations in this area. A key similarity between these two reports is that they both propose a **reversed (or relaxed) burden of proof** in relevant antitrust cases.

    1) 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 "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)

    2) The Stigler report also proposes a reversal in the burden of proof or relaxation of proof requirements, suggesting that plaintiffs should not be required to prove matters "over which defendants have greater knowledge and better access to information." (SR, p. 98) The Stigler report also highlights the need for reform to 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.[8]

An interesting point of comparison relates to the expectations of platforms with bottleneck power in respect of their 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 addressing this, with the CMS report proposing that this be addressed under antitrust law, 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 a specific duty to be imposed on dominant platform 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-setting power to determine the outcome of the competition." (CMS p. 7) 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;

[8] The Stigler report 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.

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 report as potential regulations to be imposed by the DA for platforms with bottleneck power. (SR, pp.114-116)

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; SR, pp.110-1 and 113)

In terms of **remedies**, the CMS report notes that behavioural remedies for addressing self-preferencing may be "difficult for a competition authority to handle". (CMS p. 67) They suggest though that in the alternative of structural remedies that has been considered for infrastructure sectors, "it is less clear that the balance of costs and benefits argues for some version of unbundling of vertically integrated platforms." They do suggest, however, remedies may include a "restitutive" (or restorative) element that would "enable formerly disadvantaged competitors to regain strength." (CMS p. 68)

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 DCEP propose that such power would form part of the assessment of SMS (DCEP, p.10), the Stigler report places this concept at the heart of determining which platforms require additional *ex ante* regulation. 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 power, even if it has less than 40% market share in a wider platform market. (CMS p. 70)

2.3 Data

There are 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 their impact on the competitive environment.[9]

As the DCEP report states, "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. Moreover, the centrality of this data to their business models is unique". (DCEP, p.23) Data can in turn 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)

This means, of course, that if competition is to be promoted, it may be necessary to mandate access to relevant data. The three reports focus on two key ways in which this might be achieved:

[9] See CMS, p. 73, for example.

1. **Data mobility/portability:** These are requirements to give consumers control over their own data. The DCEP report prefers the term “data mobility”, which encompasses the importance of giving consumers the right to request that data be moved or shared directly between a business and a third party, on an ongoing basis, at the click of a button. It is important for enabling effective multi-homing, which in turn is important for overcoming network effects. By contrast, “data portability” typically just refers to consumers being able to themselves request access to and move data from one business to another. This can still facilitate switching but risks being complex and time-consuming and therefore little used by consumers. (DCEP, p.65; SR, pp.109-110). The DCEP and Stigler 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.

- **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 don’t wish to switch to new services if they are poor quality, but they 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 reports use the term “data sharing” (CMS, p.9; SR, p.117). In terms of privacy, while provide 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)

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

- The DCEP and Stigler reports explicitly propose that both objectives will require a combination of **government legislation and proactive regulation** by the 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 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, and that "data is different in several important ways". They therefore propose returning to the balancing of interests criterion that underlay the essential facility concept's development. They note that any balancing must include the need to protect the dominant firm's investment incentives, including in valuable data collection. (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)

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)

Finally, the Stigler 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. (SR, pp. 88-89) Such interventions, which go beyond simple data access, have the potential to revolutionise online markets.

2.4 Regulation

As discussed above, both the DCEP and Stigler 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. In neither case is any thought given to where this regulatory function might sit.[10]

There are a several **similarities** between the two proposals too.

[10] 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 Information Commissioner's Office or the competition authority (CMA). (DCEP, p.55).

- Both emphasise the need for the regulator to be effective. The Stigler report emphasises 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." (SR, p.105) 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)

- Both would involve certain functions applying only to a specific set of major digital platforms.[11] As discussed above, in the case of DCEP these would be SMS firms, whereas in the case of Stigler 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)

- Both would then place a number of requirements on firms with SMS/bottleneck power. The Stigler 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).

- Both are also proposed to have certain regulatory functions which would apply more widely to the digital sector, and not just to SMS/bottleneck power firms.

    - 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.[12] Although, in some contrast with the DCEP report, the Stigler report only proposes data sharing (aka data openness) in respect of bottleneck firms. (SR, pp. 109-113)

However, there are also a number of **differences** between the proposals.

- 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 report.

- The Stigler report proposes that the DA would also have responsibilities in respect of data collection and merger review. While neither is considered in the DCEP report, it is fairly

[11] The Stigler report in fact frames its specific recommendations for regulation as a "menu […] that could be used to solve the problems identified". (SR, p.107)

[12] 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. (SR, p. 109).

standard in UK regulation that firms have reporting obligations to provide the regulator with relevant data.

- 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 report proposes that the DA should have sole authority to define bottleneck power" (SR, p.106), it does not mention anything about pre-designation.
- Both reports emphasise the importance of efficient and speedy regulatory action. As the Stigler 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". (SR, p.119) However, only the Stigler 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.

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 such, the reports are perhaps more aligned on this topic than they might at first appear.

2.5 International

The DCEP report devotes an entire chapter to the international dimension of concerns. Notably, it suggests the the need for increased co-operation (it specifies between competition authorities[13] and in international fora[14]) for example in developing shared tools for assessing dynamic competition. It also recommends that other countries consider adopting some of the proposals in the report, such as the balance of harms approach. They recommend the UK Government to promote its market studies and investigations powers to other countries. They also recommend that governments "work with industry to explore options for setting and managing common data standards." (DCEP, p.126)

In contrast, the CMS report makes a more focused contribution on EU legislation and does not mention international co-operation. The Stigler report extensively mentions EU legal practice and leadership in competition law, considering that it is on the frontier of antitrust compared to U.S. courts. The report emphasises the global nature of the concerns, (SR, p. 5) while not mentioning international co-operation or co-ordination.

[13] DCEP, p.118, 4.1 and p. 119, 4.13.

[14] International Competition Network, OECD, G7 and G20. (DCEP, p. 126, 4.53)

3 Conclusion

This note provides a “state of play” comparison between three major expert reports on digital competition policy. Understanding the reasoning in these reports, whether one agrees with the expert analysis or not, is important for comprehending possible future directions of policy and legislation. This note has compared the reports and highlighted both commonalities and differences between them.

While it is normal that experts will differ, there is in fact notable congruence of views across these three reports. What is less obvious is the extent to which policymakers will ultimately coordinate their actions around these topics. This would be particularly valuable in this sphere, given global nature of the digital sector, and there is a clear risk of diverging regulatory and enforcement practices in addressing these challenges. The DCEP report suggests that importance of cooperation among competition authorities, as did the G7 statement from July 2019.

We hope this note will contribute towards fostering further understanding of potential common views that could underlie elements of such cooperation.