UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Global Competition Law and Policy Approaches to Digital Markets

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CONTENTS

1. INTRODUCTION

In the 21st century, the world has witnessed an unprecedented transformation driven by the rapid development of the digital economy. Digital platforms have contributed to technological developments and given rise to a number of new business models and novel products and services. These innovations in digital markets have been a significant driver of economic growth since the late 20th century. This evolution has not only revolutionized the way businesses operate but has also significantly impacted consumers. The digital economy has produced numerous benefits for consumers, ranging from convenience and accessibility to a vast number of novel products and services.

However, this remarkable progress has not been without its challenges. One prominent challenge is the risk of high levels of concentration in digital markets, embodied by global big tech companies. There were no digital tech companies among the global top five companies by market capitalization in 2009;[1] however, in 2023, digital tech companies Apple, Microsoft, Alphabet and Amazon constituted four of the top five.[2]

The COVID-19 pandemic accelerated the growth of big tech companies by promoting a shift to transactions and other activities through digital platforms. It has been estimated that 80% of all internet traffic relates to videos, social networking and gaming. In several developed countries, up to 8 in 10 internet users shop online. While the New York Stock Exchange Composite Index increased by 17% between October 2019 and January 2021, the stock prices of the top digital platforms rose by between 55% (Facebook) and 144% (Apple).[3] Big tech companies have extremely high market shares and high levels of market concentration have been observed in the digital sectors around the world, reflecting the cross-border nature of their services.

UNCTAD has been following the issue of competition and digital markets for several years. UNCTAD has organised discussions between member States in annual meeting of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy[4] since 2019 and in the 8th United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (2020),[5] and conducted extensive research in collaboration with academia.[6]

Competition authorities around the world have recognized the risks posed to competition by the emerging digital platforms and have been making efforts to address them. They have grappled with the challenge of striking a balance between mitigating the detrimental effects of conduct which limits competition in the digital sector and fostering innovation by digital platforms.

It is often observed that governments and competition authorities around the world have struggled to use traditional competition regimes and enforcement tools to address the competition concerns in the digital markets and anticompetitive practices with digital features. Developing countries that may not have sufficient resources and experience to enforce competition law and policy also face additional challenges.

The recent passage of the Digital Market Act in the European Union[7] represents a huge change in the governance of digital markets, but it is far from the only possible approach. Other jurisdictions have introduced or are reviewing various options that suit their legal system, culture, stage of economic development and other contextual factors, as it will be illustrated in this report.

1 TD/B/C.I/CLP/54.

2 https://www.pwc.com/gx/en/audit-services/publications/top100/pwc-global-top-100-companies-2023.pdf.

3 UNCTAD, Digital Economy Report 2021, available at: https://unctad.org/system/files/official-document/der2021_en.pdf.

4 UNCTAD secretariat background note on "Competition issues in the digital economy" in 2019 and "Competition law, policy and regulation in the digital era" in 2021.

5 UNCTAD secretariat background note on "Strengthening consumer protection and competition in the digital economy" in 2020.

6 "Competition and Consumer Protection Policies for Inclusive Development in the Digital Era".

7 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), published in the Official Journal of the European Union, series L 265, 12.10.2022, p. 1-66.

This report examines enforcement cases, emerging legislation, soft law approaches including guidelines and market studies cases targeted at digital platforms from around the world for the benefit of policy-makers and competition authorities responsible for monitoring and, where necessary, addressing the changes the digital economy is bringing to the competitive landscape. It is intended to inform them of the policy options being implemented and considered, and the existing tools being leveraged, by their counterparts around the world. This includes understanding the different policy drivers that could explain any differences in approach.

This paper is based on desktop research by the UNCTAD secretariat to identify different enforcement, legislative and soft law initiatives that have been taken in UNCTAD member States around the world in order to respond to competition issues associated with digital platforms. The aim was to examine measures taken by member States at varying levels of economic development (including from the global south) and different geographic regions. However, it does not purport to be a complete account of all initiatives that member States have taken in this area. This paper also focuses on measures that are explicitly targeted at competition issues associated with digital platforms. UNCTAD recognizes that several other measures not discussed in this paper may also affect the impact that digital platforms have on competition, such as general law reform associated with merger control and the control and misuse of market power.

This paper aims to identify some of the different approaches being taken by competition authorities and policymakers globally for the benefit of those who are still considering their options on how to proceed.

It begins by discussing the general policy considerations that appear to drive policy-makers and competition authorities when assessing the impact of digital platforms on competition and considering how to respond to those impacts. That discussion introduces some of the measures that have commonly been used to introduce those concerns, observing that there does not to be a clear consensus on the extent to which action should be taken to manage the competitive impacts of digital platforms, or what any action of this type should look like.

The paper then goes on to provide a more detailed account of specific measures and initiatives that member States have taken, beginning with enforcement actions and the use of merger control regimes under existing competition law frameworks.

The final section of the paper explores how international cooperation can improve and advance responses to those concerns and the potential role of UNCTAD in facilitating that cooperation. As legislative and soft law initiatives discussed have only recently been implemented or are still works in progress, it is still too early to assess their effectiveness in responding to dynamic and rapidly changing digital markets. Even so, understanding the different approaches being taken in a range of jurisdictions can serve as a basis for building an international consensus on how to best respond to competition concerns in digital markets in the future.

2. ANALYSIS OF COMPETITION RESPONSES TO THE IMPACT OF DIGITAL PLATFORMS ON MARKETS: POLICY CONSIDERATIONS AND THE DIFFERENT APPROACHES AVAILABLE

Competition authorities around the world have been increasing their efforts to understand, monitor, and act against anti-competitive behaviour in digital markets. In doing so, they have sought to strike a balance between policy objectives that, depending on the circumstances, can either complement or conflict with one another. The most prominent policy objectives are:

(a) promoting dynamic efficiency and the associated benefits in digital markets themselves by facilitating innovation. In practice, this means ensuring there are sufficient incentives for digital platforms to invest in their offerings and have the flexibility to change and improve their business models as they develop new technologies;

(b) promoting competition in other markets and economic development more generally through the use of digital platforms. For example, the presence of digital platforms can facilitate new, lower cost ways for micro, small and medium sized enterprises to reach consumers by removing the need for them to establish their own distribution channels, and increase their geographical reach by removing the need to establish physical stores in different areas. Ultimately, this helps those businesses and economies grow; and

(c) protecting users of digital platforms and other potential providers of digital services from the adverse impacts of network effects[8] where the more users there are of a product or service, the more valuable it becomes to existing and potential users, and "winner takes all" outcomes. Examples of the types of impacts of concern include the ability of players with significant levels of market power to leverage that power in ways that preserve their market position by making it more difficult for other digital services that pose a competitive threat to emerge (such as through the use of "most favoured nation" or "price parity" clauses that prevent businesses who list on the platform from offering cheaper prices elsewhere), and to leverage that power into other markets, especially when they are "vertically integrated" (that is, operating and competing at different levels of the supply chain). For example, when digital platforms start to sell non-digital goods and services of the same type that are hosted on their platforms, they may be able to provide their own offerings with competitive advantages over other options through methods such as self-preferencing (giving their own services more prominent positions in search and display results) and how they access and use data they gather from vendors and end-customers using their platforms.

There does not appear to be a clear consensus on the appropriate balance to be struck between these three policy objectives. For example, based on UNCTAD'S review of the outcomes of enforcement and merger control cases (section 3), the factors that policy-makers have explicitly identified as informing their approach to new legislative measures targeted at the digital sector (section 4) and statements of enforcement priorities in the digital sector (section 5) it appears that developing nations are more wary of intervening in digital platforms' efforts to innovate and develop new offerings that could produce benefits for the wider economy. This can be characterized as a

[8] Network effects can either be "direct", where an increase in the number of users increases the value of the good or service to other users of the same type; or "indirect", where there are two or more types of users of the good or service and an increase in the number of users of one type increases the value of the good or service to users of another type. "Two-sided" or "multi-sided" platforms are platforms with two or more user groups, and can display both direct and indirect network effects.

wariness of “type 1 errors” that may harm economic development; that is, a wariness of over-regulation or over-enforcement targeting conduct that is not in reality anti-competitive. Type 1 errors are a particular risk in the context of digital platforms and markets, which move and develop quickly in ways that are difficult to predict and understand. Competition authorities and policy-makers in more developed nations, on the other hand, appear to place greater weight on the risk of “type 2 errors” than their developing nation counterparts, being failures to identify, enforce against or prohibit conduct that is anti-competitive. This may represent attempts to “correct” for perceived type 1 errors in the past.

It is important to acknowledge that those high-level, general observations are not universally applicable. There is no single view or approach taken by all developing economies or by all developed economies, with examples available of developing nations proactively taking action to place limits on the operation of digital platforms and developed nations too expressing wariness of over-regulation.

Similarly, all jurisdictions that have enacted or are contemplating more proactive regulation of digital platforms have considered the regulatory burden that any proposed regime might have on digital platforms and whether that burden can be justified. These concerns are evident across the board. For example, developed and developing nations alike appear to consider consistency with regimes in other jurisdictions when developing their own legislative proposals for regulating with digital platforms. However, developing nations frequently identify a concern that veering too far from the regimes present elsewhere may disincentivize digital platforms from investing and operating in their jurisdictions, and consequently deprive their economies of the development opportunities that digital platforms offer. Less developed nations may also have less capacity to design and implement standalone measures that differ from those already in place elsewhere, with both competition and technical digital expertise required.

Other policy considerations are often also at play. For example, concerns about how digital platforms access and use data they collect from users give rise to privacy concerns, and the cross-border nature of digital platforms can make it difficult to effectively enforce consumer protection regimes. Local political and ideological considerations also factor into the approach taken by individual member States. For example, South Africa’s competition regime includes a social objective of promoting small businesses owned by historically disadvantaged persons to counteract past systemic injustices. Principles relating to fairness and inclusive economic growth may also carry different weight in different jurisdictions.

Just as the weighting of different policy concerns varies, the individual approaches being used by competition authorities and policy makers across the globe to deal with the challenges posed by digital platforms take different forms. An increasing number of jurisdictions have either built on their existing competition law frameworks so that they are better adapted to the challenges of the digital era, or turned to new forms of regulation specifically targeted at conduct engaged in by digital platforms that are perceived as harmful to competition.

There does not appear to be a clear consensus on the most effective tools or framework to manage the challenges posed by the market power of digital platforms. The main categories of approach, ranging from those that require the least to the most change, are:

(a) seeking to enforce traditional competition frameworks against digital platforms where this appears to a competition authority to be justified;

(b) leveraging other regimes to target the competition concerns associated with digital platforms;

(c) using soft law approaches to update traditional competition frameworks and promote competitive behaviour;

(d) updating competition frameworks using legislation; and

(e) introducing entirely new legislative and regulatory frameworks specifically targeted at digital platforms and the risks and opportunities they present for competition.

The trend of introducing new forms of regulation for digital platforms reflects concerns among competition authorities and policy makers that traditional competition frameworks are ill-equipped to deal with the challenges posed by digital platforms. The tendency for digital platforms to offer their services for "free" or in exchange for users' data rather than in exchange for a price (in so-called "zero-price markets") poses significant challenges for the usual approach to defining antitrust markets, where changes in price are a key factor.[9] The fast-moving and unpredictable nature of digital markets also presents significant challenges for traditional competition law enforcement in both an analytical and a practical sense. Under traditional competition law enforcement frameworks, competition authorities are often required to predict with a requisite degree of certainty how markets are likely to develop in future. Policy-makers and competition authorities are often also concerned about a potential mismatch between the time needed for competition investigations and legal processes compared and the fast-moving nature of digital markets, with enforcement not being able to keep pace with conduct of concern.

However, as discussed further below, introducing new forms of regulation poses its own challenges. Developing new legislation and regulations is itself a time-consuming, expensive and resource-intensive process. Developing nations in particular may not always have the resources to develop or enforce a regime of this type, or may have other development priorities. Adapting regimes introduced elsewhere for an individual country's local circumstances and policy priorities may help overcome some of these difficulties. However, before doing so, it is important for member States to be aware of the different approaches that could be used as "templates" for their own jurisdictions and of their non-legislative options as either interim or permanent measures.

An overview of each of the five possible approaches based on the further information contained in sections 3 to 6 of this paper, including the rationales for using them and their potential pitfalls, is set out below. It begins by first explaining the ends of the spectrum of options that involve the least and the most amount of change, being the enforcement of traditional competition frameworks and the introduction of new legislative regimes specifically targeted at competition and digital platforms. It then goes on to consider the other options in between.

a. Enforcing traditional competition law frameworks: challenges and successes

UNCTAD's review of competition enforcement cases and merger approvals reveals that the competition issues raised by digital platforms have primarily been considered by most competition authorities through the lens of abuse of dominance. There is also a trend towards an increased emphasis on merger control involving digital platforms.

There does not appear to be a single preferred approach for how proactive or aggressive competition authorities should be in their interventions. In developing countries in particular, there is a concern that type 1 errors by competition authorities may harm economic development.

However, as previously indicated, it is possible to identify some common challenges that competition authorities and judicial bodies encounter when applying traditional competition law frameworks to digital platforms:

(a) Future developments in the digital economy are difficult to predict. The focus of digital platforms on competing "for the market" through innovation and the prevalence of network effects mean that digital markets are prone to tipping and winner-take all scenarios. However, it is also possible for a new winner to emerge with time. This creates challenges for competition analysis, which is forward-looking in nature, and these challenges are exacerbated by the evidential thresholds that apply in legal proceedings.

(b) Market definition, a key element for most competition analysis (in particular, abuse of dominance cases), has been made a more difficult exercise as a result of the increasing prevalence of zero-price markets and the expansion of digital platforms into lines of business that are ancillary to their main operations, where they become competitors to their business users. Vertical integration and expansion of this type is often accompanied by the introduction of self-preferencing practices. The emphasis of traditional tools used to define markets on how consumer respond to changes in price means those tools may not be well-suited to these changes. But investments

[9] The "SSNIP" test is a commonly used tool to identify the boundaries of a market. It considers how consumers would respond to a "small but significant non-transitory increase in price" by a hypothetical monopolist.

in data analysis and in developing digital tools show that competition authorities do appear to be well-equipped to understand changes in consumers' purchasing habits.

(c) In the case of cartel enforcement, market definition is generally seen as less important. However, other difficulties arise. In the digital economy, human actors may not determine price or output. I It can be difficult to detect and target potential "algorithmic collusion", when pricing algorithms that take into account competitors' current or future pricing are used in ways that ultimately raise prices above competitive levels and resemble tacit collusion or cartel conduct.

(d) Many competition concerns relating to digital platforms are vertical or conglomerate in nature. This, along with difficulties in assessing how markets may develop, is increasing the complexity of merger control in particular.

(e) In general, litigation against digital platforms has a reputation for being lengthy, difficult and expensive. Competition authorities are forced to choose whether they are willing to divert attention and limited resources away from other potential priority areas for enforcement.

b. Options to leverage other existing frameworks to target competition concerns

Some competition authorities (such as the Australian Competition and Consumer Commission (ACCC) and Common Market for Eastern and Southern Africa (COMESA)) have experimented with using other legislative frameworks, such as privacy laws, consumer protection laws, and unfair contract term regimes to address what are effectively competition law issues. This has not always been successful. However, competition authorities with dual or multiple mandates may wish to consider whether some of the other tools at their disposal could be used to advance competition objectives. This may or may not be appropriate based on the particular facts of a case and local legal frameworks.

Alternatively, competition authorities could explore mechanisms to cooperate with other domestic regulators, as is occurring in Canada and the United Kingdom, to ensure that relevant regulators can work together to better understand and target practices of shared concern.

c. Moves to new legislative frameworks: trends and potential challenges

As explained further in section 4, some jurisdictions have introduced specific new legislative regimes and regulations for digital platforms. These regulations often require close collaboration between competition authorities and other regulatory bodies, and sometimes involve interactions with other policy considerations which go beyond the traditional competence of competition authorities. The new laws include *ex-ante* regulations which try to capture practices that either do not clearly fall within the scope of existing competition legislation but have harmful effects on competition or are difficult to establish as infringements of competition law under existing analytical and evidential frameworks.

The most common model for these *ex-ante* regimes is the model reflected in the European Union's Digital Markets Act. Under this model, legislation sets out criteria for identifying a digital platform that plays a significant role in controlling access to goods or services, akin to a "gatekeeper" role. A regulator of competent authority is responsible for applying these criteria and assessing individual digital platforms against them. Next, the legislation or regulations prohibit those "gatekeepers" from engaging in certain types of conduct of concern or impose additional obligations on them, directed at ensuring that digital markets themselves and ancillary markets (being the markets for goods or services sold through digital platforms) remain competitive. For example, the gatekeepers could be prohibited from using price parity clauses, have restrictions imposed on how they can use data they collect from business customers and end user customers, and be made subject to interoperability requirements which make it easier for customers to switch over their data to a competing platform or use multiple platforms.

In introducing *ex-ante* legislative regimes, policy makers and governments around the world have grappled with how to best regulate businesses of a global nature while also taking into account local conditions. For example, depending on a country's own economic conditions and priorities, they may be reluctant to impose requirements that increase the regulatory obligations on digital platforms to a point that may make that country a less attractive environment in which a digital platform could invest.

This has led some countries, such as Australia, Brazil, India and the United Kingdom, to deliberately design regulatory frameworks that are based on or informed by the European Union's Digital Markets Act. The factors that have led them to do this include a desire to ensure that any benefits that are produced from the Digital Markets Act are replicated in their own jurisdictions, and avoid introducing new regulatory regimes that may disincentivise digital platforms from operating in their jurisdiction due to the cost of regulatory compliance.

Despite adopting the same high-level approach, these jurisdictions have taken different approaches to whether the additional prohibitions and obligations are set out in legislation in advance (as is the case with the DMA), delegated to a regulator to develop for general application, or delegated to a regulator to develop and tailor for each regulated platform on an individualized basis.

Although this appears to be the most common model for regulating digital markets, it is not the only option available nor is it the only model that has been adopted. For example, Japan's Act on Improving Transparency and Fairness of Digital Platforms imposes high level obligations on digital platforms to disclose their terms and conditions, develop fair practices, develop complaint processes for consumers and ensure a means of communicating with the government of Japan, with additional obligations to report on the effectiveness of the measures adopted. This model likely imposes a lesser burden on regulators and digital platforms alike. However, it also has a less direct impact on competitive outcomes. As both models are relatively new, it is too soon to evaluate the relative effectiveness of each model in achieving the desired outcomes.

Developing new regulatory frameworks for digital platforms presents its own challenges and may not be a realistic option for every jurisdiction, especially when the examples of those frameworks are still new and unproven. This course of action requires a country to make ongoing commitments of finances, expertise and other resources that may not always be available. Other preconditions include a means of enforcing the regulatory framework, which can be particularly challenging when dealing with global companies based elsewhere in the world. In addition, each new set of regulatory obligations introduced may risk digital platforms re-examining the relative costs and benefits of having a presence in any given country.

As a result, not all competition authorities and governments consider it appropriate to introduce entirely new regulatory frameworks at this time. For example, in its recently completed Online Intermediation Platforms Market Inquiry, South Africa's Competition Commission decided not to proceed with a potential recommendation to develop such a framework. It prefers instead to further consider the issues it has identified and has used some existing tools within the competition framework already in place to deal with the competitive concerns it has identified. It is therefore useful to consider other options that do not go so far as introducing entirely new regulatory frameworks, but can still help overcome some of the potential shortcomings of relying on enforcement of traditional competition law frameworks alone.

d. Using soft law approaches to update existing competition frameworks and promote competitive behaviour

Commonly used tools within existing competition frameworks for jurisdictions that prefer not to make any legislative changes at the current time or would like to sharpen their toolkit more quickly than a legislative process may allow include issuing or updating guidance to ensure that their competition frameworks are better adapted to the competitive dynamics of digital markets. This could include the following:

(a) Issuing and updating guidelines on market definition and theories of harm (being the "story" that explains how particular conduct could lead to competitive harm) to reflect the increasing prevalence of zero-price markets, for example, by ensuring that non-price dimensions of competition are given appropriate weight.[10]

[10] For example, Japan's Digital Platform Guidelines, Nigeria's Notice on Market Definition and the United States of America's draft updated Merger Guidelines.

(b) Issuing and updating merger notification thresholds[11] and merger assessment guidelines to better capture potential “killer” acquisitions.[12,13] Depending on the particular jurisdiction, adjusting merger notification thresholds may be something that a competition authority can do itself. However, in other jurisdictions, this may require legislative change.

(c) Issuing guidance on how traditional competition law frameworks apply to digital platforms and common practices they engage in, or updating existing guidance on different aspects of competition law to include illustrative examples of how those laws may apply to digital platforms.[14]

(d) Making public statements about enforcement priorities in the digital sector, in an effort to dissuade particular types of conduct.[15]

Market studies are another tool that competition authorities have been using to better understand and identify the effects digital platforms are having on competition and any potentially anti-competitive practices, including those that are individually or collectively harmful but do not necessarily reach legal thresholds for being unlawful.[16] They often result in recommendations for changes in behaviour or in other regulatory settings to improve competition, and can also help identify areas for further investigation and enforcement by the competition authority itself.

[11] The criteria that, if meant, mean merging parties must first inform a competition authority before completing a transaction. This gives the competition authority an opportunity to review and, if necessary, block a proposed merger before it can lead to competitive harm.

[12] This term refers to an acquisition which involves an established company acquiring another company which has the potential to become a strong or disruptive competitor in future. The acquisition, in effect, prevents that competition from emerging.

[13] For example, the United States of America’s draft updated Merger Guidelines.

[14] For example, Brazil’s Mercados de Plataformas Digitais of August 2021, Japan’s Distribution Guidelines, the Republic of Korea’s Guidelines for Review of Abuse of Market Dominance by Online Platform Operators, Singapore’s guidance on abuse of dominance in digital markets, and the United States of America’s draft updated Merger Guidelines.

[15] For example, Brazil’s various reports and speeches on digital markets and Mexico’s Digital Strategy (2020).

[16] For example, Mexico’s market study on retail e-commerce, South Africa’s Online Intermediation Platforms Market Inquiry and the United Kingdom’s Mobile Ecosystems Market Study.

Soft law initiatives have the benefit of being processes that a competition authority can control itself, in terms of the substance of the initiative, how quickly it can be progressed, and the actual decision of whether or not to implement the initiative. However, by definition, they do not carry as much legal force as full legislative initiatives and are therefore more vulnerable to challenge or non-compliance.

Finally, although not strictly a “soft law” approach, some competition authorities have recently entered into cooperation initiatives with other domestic regulators[17] and their counterparts in other member States from their region.[18] This can help promote understanding of how well competition frameworks are working in the digital economy, what can be done to improve them, areas to target for enforcement, and the range of tools available to regulators with different responsibilities which could be used to target conduct of common concern.

e. Updating existing competition frameworks through legislation approach

A further option available to member States is to update existing competition laws so that they are better adapted to the digital economy and less vulnerable to the challenges of enforcement. Updating existing laws using legislation carries more force than soft law initiatives, but is less radical and onerous for policymakers and regulators alike than introducing an entirely new legislative framework targeted at digital platforms.

Observed examples of this approach include:

(a) Updating the factors listed in legislation as relevant to market definition, the analysis of “dominance” in the markets (for example, by establishing criteria to help assess when a platform is “dominant”) or the analysis of other key concepts;[19]

(b) Reconsidering the requirements to establish abusive conduct and other types of anticompetitive conduct, for example, by

[17] For example, the Canadian Digital Regulators Forum.

[18] For example, the Africa Heads of Competition Authorities Dialogue.

[19] For example, Germany’s Tenth Amendment to the German Competition Act and Russia’s Fifth Antimonopoly Package, and Canada’s 2022 amendments to its Competition Act.

prohibiting certain types of conduct with narrower and more specific definitions;[20]

(c) Reconsidering the legal tests and burdens of proof for efficiency exceptions and defences (where conduct or a merger that would otherwise be considered anti-competitive in violation of the law is allowed on the basis of cost savings or efficiencies associated with it);[21]

(d) Reconsidering merger notification thresholds to better capture potential "killer" acquisitions;[22]

(e) Reconsidering the remedies available in cases relating to anti-competitive conduct, including the introduction of structural remedies in appropriate cases (for example, requiring divestments or operational separation of businesses) in addition to more traditional monetary penalties and behavioural remedies.[23]

It is also worth noting that the South Africa Competition Commission's rejection of a new regulatory regime (for the time being) was likely influenced by its ability to make legally binding and enforceable orders as an outcome of a market study to address the immediate competition concerns it had identified. Germany and the United Kingdom have similarly granted to their Competition Authorities powers to order a wide range of remedies to resolve any competition concerns identified in sectoral inquiries, even if no breach of the law has been found.

Powers to make such orders following a market study or inquiry may not be available to competition authorities in all jurisdictions. However, the introduction and use of such powers could be considered as an alternative to developing an entirely new *ex-ante* regulatory framework.

[20] For example, China's amended Anti-Monopoly Law, Germany's Tenth Amendment to the German Competition Act, Germany's Eleventh Amendment to the German Competition Act, Canada's 2022 amendments to its Competition Act, and the United States of America's proposed Competition and Antitrust Law Enforcement Act and proposed Trust-Busting for the Twenty-First Century Act.

[21] For example, Canada's proposed removal of its efficiencies defence for mergers.

[22] For example, Germany's Tenth Amendment to the German Competition Act, Russia's Fifth Antimonopoly Package, early proposals in Canada's ongoing review of its Competition Act, and the United States of America's proposed Trust-Busting for the Twenty-First Century Act and proposed Platform Competition and Opportunity Act.

[23] For example, Germany's Eleventh Amendment to the German Competition Act.

3. ENFORCEMENT ACTION AND MERGER CONTROL USING EXISTING FRAMEWORKS

Before considering whether significant reforms are required to address the competition concerns in digital markets, it is important to first understand how traditional competition laws have dealt with those challenges. This can help identify (a) if there are any shortcomings in existing competition law frameworks; and (b) where and how significant they may be.

This section provides an overview of how different jurisdictions have applied traditional competition law frameworks in the context of the common categories of competition cases of abuse of dominance, merger control, and other potentially anti-competitive conduct. It also provides an overview of examples where other legal frameworks have been used to target what are in substance concerns about anti-competitive or abusive conduct. Cases are listed in alphabetical order by jurisdiction beginning with individual member States.

A common theme in cases where no violation has been found or an action to prevent a merger has been unsuccessful has been uncertainty about how a relevant market will develop in the future.[24] It can also be seen that there is no common approach to market definition. For example, platforms offering similar services have been found to operate in different markets by different authorities,[25] and individual authorities themselves have sometimes taken different approaches or placed varying levels of importance on market definition depending on the circumstances of a particular case.[26]

a. Abusive conduct

Abuse found or resolution agreed

China: Alibaba

On 10 April 2021, China's competition enforcement agency, the State Administration for Market Regulation (SAMR), fined the tech giant Alibaba RMB 18.228 billion (EUR 2.4 billion, USD 2.8 billion).[27] Alibaba is an e-commerce, online retail and technology company. SAMR imposed the fine based on findings that Alibaba had coerced traders to sell their products exclusively on Alibaba's platform. It found that these activities had harmed, or potentially harmed, competitors, sellers, consumers and the economy as a whole.

SAMR enforcers found that Alibaba held a dominant market position as an online retail platform.[28] SAMR did not consider offline retailers to be close substitutes, and they therefore were not treated as part of the defined market.[29] SAMR distinguished between the two markets by pointing to some of distinct characteristics of the online retailer on the demand side and the supply side, and found that brick and mortar stores are not likely to transition into digital markets.

SAMR also considered further potential divisions of the market based on business model and sales method. It found that business-to-consumer and consumer-to-consumer services formed part of the same market, and that it was immaterial whether consumers or suppliers instigated the sale and the products sold. The agency found that these options did not raise extra costs for the online retailers on

24 For example, Brazil's 2019 Google Shopping case, Chile's Mercado Libre case (where the dynamic nature of the market made it difficult to reach the view that Mercado Libre had market power), Chile's Uber/Cornershop case and the United States of America's Meta Platforms/Within Unlimited case.

25 See, for example, the discussion in the Brazil Google Shopping case on the importance of market definition to the differing outcomes investigations of the Federal Trade Commission, the European Commission and CADE itself into similar conduct.

26 Compare, for example, CADE's approach to market definition in the 2018 Uber case and the 2019 Google Shopping case in Brazil.

27 https://www.nytimes.com/2021/04/09/technology/china-alibaba-monopoly-fine.html?searchResultPosition=16; https://academic.oup.com/antitrust/article/10/1/217/6530164; https://www.samr.gov.cn/.

28 SAMR Administrative Penalty Decision (2021) No. 28 (*Alibaba* decision).

29 Ibid.

the supply side. In fact, most of them offered these services already.

China was considered the relevant geographic market. International markets were not relevant because of language, tariff and other barriers.

This analysis is in line with a variety of developments in China's antitrust space, including the Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy,[30] Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of the Relevant Market[31] and the decision of the Supreme People's Court in *Qihoo 360 v Tencent*.[32]

Within these parameters, SAMR was able to establish Alibaba's dominance using traditional market shares based on sales value and total revenue, the Herfindahl-Hirschman Index (HHI) and the four-firm concentration ratio (CR4) to establish a deeply concentrated market.

Finally, SAMR observed Alibaba's control over price, its powerful bargaining position against independent buyers and sellers on the platform, its financial and technical superiority and high switching costs which raised barriers to entry. Moreover, network effects made it difficult for other platforms to compete.

SAMR found that Alibaba was abusing its dominant position by forcing sellers to exclusively use Alibaba's platform.[33] Alibaba used both written and verbal exclusivity agreements with sellers to keep them on the platform. Sellers who refused to conform to these agreements and chose to continue selling elsewhere would be excluded from promotions, get demoted in searches and lose other rights on the platform. SAMR found that this behavior was in violation of Article 17(4) of China's Anti-Monopoly Law, which bars dominant firms from allowing firms to exclusively deal with them or firms designated by them without proper justification.

The decision states that these agreements hurt actual and potential competition in the relevant markets. The agreements hurt sellers by restricting their ability to compete on Alibaba and on other online platforms. They also hurt consumers by affording them less choice. Considered together, Alibaba's activities hindered resource allocation, innovation and the economy as a whole.

In light of the above findings, Alibaba was fined and required to partake in a number of behavioral remedies. These include a "rectification plan." Among other things, this means the firm must provide self-assessments for the next three years and will continue to be closely monitored during that period.

Egypt: Food and grocery delivery services

In May 2022, the Egyptian Competition Authority announced it was taking administrative measures against an unnamed food ordering and delivery platform after finding it had abused its dominant position in the market.[34] The delivery platform offered a request for reconciliation.

The abuse related to three practices. First, the platform engaged in exclusive dealing. This created barriers to entry and expansion for competitors and potential competitors, enhanced the platform's market power, and threatened the viability of competitors. Consumers were harmed by this practice as they could not benefit from better offers and prices that would have been available under more competitive conditions.

Second, the platform engaged in tying practices which forced restaurants to accept delivery services to the final consumer in order to use the platform.

30 Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy, adopted on 7 February 2021 (Platform Economy Guidelines), available at: http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html.

31 Guidelines of the Anti-Monopoly Commission of the State Council on the Definition of the Relevant Market, adopted on 7 July 2009, available at: http://www.gov.cn/zwhd/2009-07/07/content_1355288.html.

32 *Qihoo Technology Company Ltd v Tencent Technology (Shenzhen) Company Limited and Shenzhen Tencent Computer Systems Company Limited* (2013) No. 4, announced 17 October 2014 (*Qihoo 360 v Tencent*) http://www.court.gov.cn/wenshu/xiangqing-7973.html.

33 This was referred to as an "either-or" strategy.

34 https://www.bremerlf.com/resources/overview-of-egyptian-competition-authoritys-decision; and https://www.globalcompliancenews.com/2022/09/27/https-insightplus-bakermckenzie-com-bm-antitrust-competition_1-egypt-the-competition-authority-issues-its-first-retail-price-maintenance-and-most-favoured-nation-clauses-infringement-decisions-under/; https://amereller.com/publication/the-egyptian-competition-authority-on-the-abuse-of-a-market-dominant-position-in-the-online-food-delivery-business/?utm_source=mondaq&utm_medium=syndication&utm_term=Anti-trustCompetition-Law&utm_content=articleoriginal&utm_campaign=article; https://www.mondaq.com/antitrust-eu-competition-/1229268/the-egyptian-competition-authority-on-the-abuse-of-a-market-dominant-position-in-the-online-food-delivery-business.

As well as harming competition in the online food delivery market, this restricted competition in a separate market for delivery riders.

Third, the platform's use of price maintenance or most favoured nation clauses in its terms and conditions with businesses using its platform was an abuse of the platform's market power. Those businesses were required to offer a consistent price across all of their sales channels. This curtailment of those businesses' freedom to set different prices with the platform's competitors safeguarded the platform's dominant position in the market.

India: Alphabet

In October 2022, the Competition Commission of India issued orders against Alphabet under section 27 of India's Competition Act 2022, for contraventions of section 4 of the Act.[35] The orders addressed claims made by three separate groups of complainants and related to the market for app stores for the Android operating system in India (the Indian Android app store market), and the market for apps facilitating payment through India's Unified Payments Interface (the Indian payments apps market).

The Commission found that Google had a dominant position in the market for licensable operating systems for smart mobile devices in India (the Indian mobile OS market) and the Indian Android app store market, and found six abuses of those dominant positions.

The finding of dominance in the Indian mobile OS market was based on a series of factors. First, Android had a dominant, persistent and increasing share of the market (noting that the most popular alternatives to Android are not licensable). Second, Google controlled the ongoing development of Android and Android device manufacturers had a high level of dependence on Google to ensure that their devices are compatible with the latest version of Android, despite the availability of open-source licenses for the Android OS source code.[36] Third, the absence of countervailing buyer power among device manufacturers. Fourth, barriers to entry and expansion for a new OS, some of which were created by Alphabet itself. For example, Google imposed anti-fragmentation restrictions in its agreements with handset manufacturers for the use of Android which restricted the viability of alternative "Android fork" operating systems.

The finding of dominance in the Indian Android app store market was based on the fact that the Google Play Store is pre-installed on all Android OS devices,[37] the Play Store having more apps listed than any other Android OS app stores, and barriers to entry. Again, these included some barriers created by Google itself, such as measures to make it more difficult to find and install alternative app stores, a practice which also required users to accept heightened security risks. Finally, Apples App store was not a substitute from an end user's perspective.[38]

The first form of abuse was Alphabet's imposition of unfair or discriminatory conditions. App developers and owners were required to exclusively use Google Play's billing system (GPBS) for the processing of payments for apps and in-app purchases. Google imposed anti-steering provisions that restricted app developers' ability to inform consumers of the ability to purchase in-app content elsewhere. These requirements and restrictions constituted abuse of dominance under section 4 of the Act. Failure to exclusively use the GPBS would mean an app could not be listed on the Google Play store. The Commission observed that app developers have "no choice but to agree to the terms and conditions unilaterally decided by Google" or they would not be able to access a vast pool of potential Android users in India, and this situation was exacerbated by the anti-steering positions.

The second form of abuse also related to the imposition of unfair discriminatory conditions and prices. Despite requiring other app developers to exclusively use the GPBS in Android apps, Google did not require the same of its own apps such as YouTube. The Commission found that this discriminatory practice harms app

35 https://www.cci.gov.in/antitrust/orders/details/1072/0.

36 This dependence is derived from manufacturers' need for a certificate from an authorized testing facility confirming compliance with the specifications and contract terms of the Android Compatibility Program to freely use the source code and use the Android trademark on hardware, packaging and marketing materials, and Google's written approval to use the suite of Google proprietary apps.

37 With the implication that developers can reach the entire market by listing on the Play Store, as against the more limited reach of other app stores which have failed to offer any significant context to the monopoly position of the Play Store.

38 While it is possible for app developers to "multi-home" their apps, an end user on an Android device cannot use the Apple App store (and vice versa), with competition between the Android and Apple ecosystems (as opposed to app stores) largely limited to the time a consumer is deciding which device to buy.

developers and consumers as it increases app developers' costs, which they will either need to pass on to consumers (increasing the prices consumers pay) or absorb themselves (leaving less money available for research and development, reducing the quality of the apps available to consumers).

The third potential form of abuse related to Google's collection of data regarding app users through the mandatory requirement for app developers to use GPBS and Google's use of that data, which it did not share with developers in full. The Commission found that this impacted developers' ability to improve their services, provide targeted offers and promotions, and compete effectively in their respective domain. Meanwhile, Google's access to that data as well as other data put it in a position to distort competition in downstream markets. These included app markets through its ability to set rules for and control the process to develop and distribute apps and target users specifically for its own 'paid' apps, and advertising markets where Google could sell the data back to the developers.

The fourth form of abuse related to the imposition of unfair payment terms. Google's agreements with payment aggregators for the processing of payments on Google Pay imposed short and strict deadlines for payment aggregators to transfer payments for app and in-app purchases from the end-user to Google, but Google would only release those payments to app developers after a gap of 15 to 46 days from the date of the transaction. The Commission considered this to be unjust enrichment on the part of Google that could be especially harmful for small developers, "for whom regular and prompt cash flows from their users is critical."

The fifth form of abuse related to denial of market access to Android users for other payment processers operating in the Indian app payments market, flowing from Google's requirement that app developers use GPBS for app and in-app purchases combined with its anti-steering provisions.

The sixth form of abuse related to Google's self-preferencing and discriminatory practices in the Indian payments apps market. Apps for India's Unified Payments Interface could be integrated into a payment platform using two different methodologies. Google enabled the more efficient methodology for the Google Pay UPI app, but used the other, less efficient methodology to integrate other UPI apps with Google Play. The Commission found that, as the dominant player in the Indian Android app store market, Google had a responsibility to provide a level playing field to all trading partners, and not to promote its own apps at the expense of others.

The Commission directed Google under Section 27 of the Act to "cease and desist from indulging in anti-competitive practices that have been found to be in contravention of the provisions of Section 4 of the Act". It outlined specific requirements to cease some of the conduct of concern and to improve transparency on how it collects, uses and shares data and in its communications with app developers on services provided and fees charged. Google was also prohibited from enforcing the clauses of its agreements identified as in breach of the Act and required to pay a financial penalty.

European Union: Amazon Marketplace Data/ Amazon Buy Box

Amazon has two roles on its platform. It runs a marketplace where sellers can list and sell their products directly to consumers, and it sells products on the platform itself, directly competing against these other sellers. As a marketplace provider, Amazon has access to lots of public and non-public information from these seller-competitors.

Amazon's Buy Box is a function on the platform that displays an offer from a single seller and expedites the purchasing process by allowing users to simply click the buy button. Amazon also has a Prime program. This allows a variety of premium customer services for a membership fee. In addition, independent sellers may sell to Prime customers under certain conditions.

In July 2019, the European Commission opened an investigation into Amazon's use of non-public information provided by its marketplace sellers. In November 2020, the Commission preliminarily found that Amazon held a dominant position in French and German markets for online marketplace services for third party sellers. It also found that Amazon's use of non-public information to make decisions for its own retail business distorted competition on the platform.

Also in November 2020, the Commission opened an investigation into how Amazon selects sellers to feature in the Buy Box and offer products under Prime. The investigation sought to determine whether these systems favored Amazon's own retail service or the sellers that use Amazon's other services, namely, logistics and delivery services. The Commission preliminarily found that Amazon held a dominant market position in French, German and Spanish markets for online marketplace services for third party sellers, and that it had unduly favored its own business and sellers that used Amazon's other services.

However, Amazon offered a series of commitments which the Commission accepted after concluding that they remedy the practices under investigation. The commitments cover all of Amazon's current and future marketplaces in the European Economic Area (except Italy with respect to the commitments relating to BuyBox and Prime, in view of the decision of the Italian competition authority regarding its separate investigation into those concerns in Italy). If Amazon breaches the commitments, the Commission can place a fine of up to 10% of Amazon's total turnover. Alternatively, Amazon could be fined a periodic payment of 5% per day of Amazon's daily turnover for every day of non-compliance.

To address the data use concern, Amazon committed to:

(a) not to use non-public data relating to, or derived from, the independent sellers' activities on its marketplace, for its retail business. This applies to both Amazon's automated tools and employees that could cross-use the data from Amazon Marketplace, for retail decisions;

(b) not to use such data for the purposes of selling branded goods as well as its private label products.

To address the Buy Box concern, Amazon committed to:

(a) treat all sellers equally when ranking the offers for the purposes of the selection of the Buy Box winner;

(b) display a second competing offer to the Buy Box winner if there is a second offer from a different seller that is sufficiently differentiated from the first offer on price and/or delivery. Both offers will display the same descriptive information and provide the same purchasing experience.

To address the Prime concerns Amazon committed to:

(a) set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime;

(b) allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice;

(c) not use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services;

(d) increase the transparency and early information flows to sellers and carriers about the commitments and their newly acquired rights, enabling, amongst others, early switching of sellers to independent carriers;

(e) Lay out the means for independent carriers to directly contact their Amazon customers, in line with data-protection rules, enabling them to provide equivalent delivery services to those offered by Amazon.

The commitments relating to Prime and to the display of the second Buy Box will have a duration of 7 years, whereas the data-silo commitment and the commitments relating to the non-discriminatory access to the Buy Box will have a duration of 5 years.

European Union: Google-Android

On September 14, 2022, the General Court of Court of Justice of the European Union issued its final decision regarding Google's dominance in interconnected digital and technological market. Google was fined EUR 4.125 billion for its illegal activities.[39]

The case involved Google's conduct in four different markets: (i) the market for licensing mobile device operating systems (Android OS); (ii) the Android app store market (Play Store); (iii) the market for general search services (Google, etc.) and the non-operating

[39] Case T-604/18, https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=4625651.

system specific mobile web browser market (Chrome, etc.).

Google argued that its products in these various markets should not be considered individually, but rather as part of a broader "ecosystem." They claimed that instead of considering the position of each of these products, the Court should consider the ecosystem, and how the Google ecosystem competes with similar technological ecosystems, e.g., Apple. However, the Court rejected this ecosystem argument, and instead examined Google's position in each of the relevant markets listed above. However, since these markets are related, the Commission also determined whether Apple's ecosystem was sufficiently competing with Google in its various markets.

Since many of the markets at issue in this case are zero price markets, the Commission introduced new methods of assessing market dominance. For example, to determine Google's market position for licensing mobile device operating systems, the Commission conducted a small but significant and non-transitory degradation in quality (SSNDQ) test in place of the standard small but significant and non-transitory increase in price (SSNIP) test. The Court found that the Commission did not need to define a precise standard of degradation, all that matters is that the degradation is small, significant and non-transitory. The Court also rejected Google's arguments that Android's open-source nature and Anti Fragmentation Agreements (AFAs) would exert competitive pressure on the operating system market.

Next, the Court addressed whether Google had dominant position in the Android app store market through the Play Store. The Court upheld the Commission's assertion that Google held a dominant position in this market citing "market shares; the quantity and popularity of downloadable apps and update functionalities; the obligation to use the Play Store in order to obtain Google Play Services; the existence of barriers to entry; the lack of countervailing buyer power of original equipment manufacturers (OEMs); and the insufficient competitive constraint from app stores for non-licensable mobile OS."[40] The Court also considered competitive pressure from the Apple App store ("app stores for non-licensable mobile OS"), however, it found that these app stores could only compete indirectly through the operating systems discussed above.

The Court also found that Google was dominant in the general search market. However, Google did not hold a dominant position in the browser market.

The Court found that Google had abused its dominance in three ways: (i) requiring pre-installation agreements for OEMs constituted a tying arrangement;[41] (ii) revenue sharing agreements with OEMs and (iii) AFAs.

First, the Court found that Google's requirement that OEMs use install Chrome and search was a tying arrangement. While some Google apps, including Android, are free and open source, others are not, including the Play Store. In order to use the Play Store on their devices, OEMs must enter into a Mobile Application Distribution Agreement (MADA) with Google. The MADAs required OEMs to pre-install Google search and the Chrome browser onto their devices. This allowed Google to use its dominance in the Android app store market to leverage power in the markets for browsers and search. Since search and Chrome came pre-installed, they were given a subsequent advantage over other search engines or browsers because of a "status quo" or "default setting" bias.[42]

Second, the Court assessed Google's agreements with OEMs to share advertising revenue if they exclusively pre-installed Google Search on their devices. If they did not do so, they would forego any of the advertising revenue. The Commission considered whether these agreements restricted competition by disincentivizing OEMs to install other search engines. To do so, the Court determined that the Commission should have determined whether competition was actually restricted by these agreements and whether competitors as efficient as the dominant undertaking were excluded.[43]

40 Id. at paragraph 236.

41 The Commission relied on the factors *Microsoft* v *Commission*, T201/04, EU:T:2007:289, paragraph 869 to establish that tying had occurred: first, the tying and tied products are two separate products; second, the undertaking concerned is dominant in the market for the tying product; third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; fourth, the practice in question 'forecloses competition'; fifth, that practice is not objectively justified.

42 Id. at paragraph 331.

43 Id. at paragraphs 639-641. *See also, Intel* v *Commission* (C413/14 P, EU:C:2017:632).

Finally, the Court examined Google's potential bundling arrangement. Google made licenses for the Play Store and Google Search conditional on the signing of AFAs. As discussed above, Android is an open-source system and can be modified by anyone to create a mobile operating system, these are sometimes referred to as Android Forks. However, the AFAs would bar sellers from selling devices using Android Forks unless they met certain minimum requirements. In addition, OEMs would sometimes have to ensure that all their devices met these minimum requirements even those they were not seeking a license for. The Commission argued that Google leveraged its dominant position in the Android app store to bolster their market position in general search. The Court agreed with the Commission's assessment.

European Union: Google Search

On 27 June 2017, the European Commission fined Google EUR 2.42 billion for breaching the European Union's antitrust rules. The Commission found that Google had abused its dominant position as a search engine, giving priority to its own comparison-shopping service.[44] The General Court of Justice of the European Union largely upheld the Commission's decision on 10 November 2021.[45]

The Commission determined that Google had a dominant position in each of the national markets of the European Economic Area (EEA) for specialised product search services,[46] comprised of 31 EEA countries in the search sector. Google was found to have held a dominant position in all but one market since 2008, and the remaining market from 2011 until the time of the decision. To determine this, the Commission found that Google held a market share of more than 90% of searches in most of the nations it investigated from 2008 until 2017.

Additionally, the Commission found that there were powerful network effects in play. More users on the platform produced several benefits. First, it made the platform far more appealing to advertisers. Profits from these ad-sales and other ventures allowed the business to attract more users. Next, the data the platform would gather about each user would be used to further refine results. These in turn raised the barrier to entry for competitors.

The decision also makes a distinction between comparison shopping platforms and merchant platforms. Merchant platforms are businesses, such as Amazon and eBay, which offer consumers the ability to buy goods on their site. Comparison shopping platforms do not offer such a service. Instead, they allow consumers to compare prices and products and to find deals from different kinds of online retailers. Google's shopping services would list merchant sites as possible sources for the displayed goods; however, it would not link other comparison-shopping services.

While this sufficiently established that Google held a dominant position in the search market, that alone is not sufficient to establish an antitrust violation. Under EU law, dominant companies have a special responsibility not to abuse their position by restricting competition. This responsibility extends beyond the markets in which they are dominant into separate markets.

The Commission found that Google abused its market dominance in search by giving a product they owned (called Froogle, Google Product Search, or Google Shopping) an illegal advantage in the shopping market. It did so by giving prominent placement to its own shopping results, placing them at the top of search results and above non-Google results that the algorithm had sorted as relevant. In addition, Google would demote rival shopping services using at least two other algorithms starting in 2004 and 2011, respectively. Even the highest ranked Google EEA competitor would only appear on the fourth page of search results.

The Commission did not object to the sorting or use of the algorithm generally. The problem was Google leveraging its dominant search position to promote its own services and demote rival services. The Commission, therefore, found that violations had occurred when Google began to favourably place its shopping service and unfavourably place its rivals'. It found this had occurred in thirteen EEA nations from 2008 through 2013.

[44] Case AT.39740, https://competition-cases.ec.europa.eu/cases/AT.39740.

[45] Case T-612/17, https://curia.europa.eu/juris/document/document.jsf?text=&docid=250881&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2438966#.

[46] The General Court of Justice of the European Union upheld the Commission's findings regarding national markets for specialised product search services, but not the Commission's findings regarding abuse of dominance in national markets for general search services.

Finally, the Commission demonstrated that the favourable placement of the Google shopping services had a significant effect on actual competition. The prominent display increased the number of clicks and traffic to Google shopping platforms. Studies demonstrate that consumers are far more likely to click on search results that are at or near the top of the first page of results. In fact, on desktops the first ten results on the first page of a search are likely to receive 95% of the clicks. In comparison the first result on the second page receives only about 1%. Moreover, moving the first result to the third position reduces the number of clicks by 50%.

These studies are consistent with Google's experience displaying its shopping services prominently. For example, Google's shopping service engagement increased significantly in the United Kingdom (45-fold), Germany (35-fold), the Netherlands (29-fold), Spain (17-fold) and Italy (14-fold). In comparison, rival firms faced a significant decrease in engagement when their results were demoted. Drops in engagement amounted to as much as 85% in the United Kingdom, 92% in Germany and 80% in France. Other factors cannot explain the drop in engagement. The disparity between these figures demonstrates the impact that search has had in this related sector. The Commission found that they represent a distortion to competition and Google's practices deprived consumers of competitive benefits, including genuine choice and innovation.

The fine levied against Google was calculated using the Commission's 2006 Guidelines on fines based on Google's revenue from its comparison shopping services in the thirteen countries identified.[47]

No abuse found

Brazil: Google Shopping

In a split 3-3 decision decided by the former President–Alexandre Barreto's casting vote, CADE dismissed allegations against Google in 2019 for anti-competitive conduct. The complaints alleged that Google leveraged its dominant position in the market for general search engines to provide an advantage to Google's own price comparison services at the expense of competing third party services, engaged in anti-competitive tying by requiring users purchasing ads with images and links to also list their products on Google Shopping, and engaged in misleading advertising by confusing users about the distinction between sponsored and organic search results.[48] The analysis below is taken from the President's decision.

Unlike in its 2018 decision regarding Uber (discussed later in this paper), CADE considered market definition to be a key issue in this case. CADE's investigation was related to investigations into similar conduct with differing outcomes by the Federal Trade Commission (FTC) of the United States of America (ended in 2013 with no further action) and by the European Commission (ended in 2017 with the imposition of penalties and behavioural remedies on Google). CADE suggested that the investigations had different outcomes because of differing approaches to market definition The FTC defined a single market where Google Shopping was innovation in a broad search engine market for which Google was entitled to recoup its investment. By contrast, the European Commission viewed Google Shopping as falling within a separate product market for price comparison services (distinct from an online sales market), with Google's conduct in the search engine market creating barriers to entry and harming competition in the price comparison services market.

CADE considered there to be some key differences between Brazil's local context and that of the EU, which resulted in it adopting a broader market definition which included search engines, price comparison services and market places. There was also no evidence of any reduction in traffic for competing price comparison sites or that they had suffered from a drop in "visibility," or that Google's algorithm had any effect on Brazilian price comparison websites. Finally, under Brazilian law, product design changes that benefit consumers are generally treated as pro-competitive unless the changes are introduced solely to harm competitors, prevent access to an essential facility, or produce actual harm for consumers. CADE found no evidence of such effects, and considered that the relevant conduct may have benefited consumers.

A key point of disagreement between the Commissioners, and essential to the finding of no

[47] https://competition-policy.ec.europa.eu/antitrust_en.

[48] Administrative Proceeding No. 08012.010483/2011-94, available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yOb0rdAAnkZ36Rru6H33qbFO51_fjuVWb1uid6m5S5BxJ8gFyW8xprjnuylPdYbaX3VDhhG3SAtGWLJPlqjsEDX.

anti-competitive effects, was the ability of CADE to consider any potential anti-competitive effects that were not already evident after six years of market developments. The President (who cast the deciding vote) declined to consider any such effects, as doing so would eliminate any limits on an authority's performance and make it impossible for companies operating in the highly dynamic and innovative digital economy to assess the compliance of their actions with competition law.

Finally, CADE did not consider there to be appropriate remedies available, even if the conduct did violate Brazilian competition law. CADE was particularly reluctant to intervene in Google's algorithm and the design and functioning of its search engine, and did not consider it appropriate to require Google to cease any conduct without presenting viable and effective alternatives.

The President expressed the view that traditional antitrust networks needed to be discussed and revisited to arrive at a policy position that promotes technological innovation and avoids overuse of competition law, with type one (false positive) errors in competition enforcement being more costly than type two (false negative) errors. This, too, was a point of disagreement among the Commissioners.[49]

Chile: Mercado Libre[50]

In September 2020, Chile's Fiscalia Nacional Economica (FNE) rejected a complaint regarding online e-commerce platform Mercado Libre Chile Limitada's (Mercado Libre) arrangements for transport and logistics services.[51]

Mercado Libre was the second-largest e-commerce platform in Chile, at a time when Chile had experienced rapid increases in internet penetration and e-commerce transactions. (behind AliExpress), with its sales accounting for 25-35% of sales on e-commerce platforms.

The complaint alleged that Mercado Libre's practice of offering lower product prices to customers who elected to have their products delivered to them using Mercado's complementary delivery service, Mercado Envíos, would prevent retailers on the Mercado Libre shopping platform from being able to compete against Mercado Libre using direct sales through their own websites. It also raised concerns about potentially abusive or unfair terms and conditions in Mercado Libre's arrangements with end-customers and retailers using its platform.

The FNE considered that, for Mercado Libre's terms relating to Mercado Envíos to have a distortionary effect, Mercado Libre would need to have market power. It concluded that Mercado Libre did not have such market power given the dynamic nature of the market. This was based on evidence that both incumbents and potential entrants had the opportunity to innovate and grow rapidly over time, and the availability of alternatives for both retailers and end customers. The FNE also noted that there was no requirement for retailers to exclusively use Mercado Libre's platform to list their products. Therefore, even if Mercado Libre had the largest market share, it would not hold a dominant position that it could sustain over time, or that it could consequently abuse.

The FNE also noted that there were potential efficiency rationales to justify offering discounts to end-customers whose shipments could be consolidated among Mercado Libre's business partners (such as economies of scale). In addition, the FNE did not identify any potential abuses or unfair terms in Mercado Libre's arrangements with its delivery partners, which were non-exclusive and had similar terms to those available with other e-commerce platforms.

b. Merger control[52]

Merger not allowed

Mexico: Walmart/Cornershop[53]

In 2019, Mexico's Comisión Federal de Competencia Económica (COFECE) blocked Walmart's acquisition

49 Da Silveira, Paulo Burnier and Fernandes, Victor, Google Shopping in Brazil: Highlights of CADE's Decision and Takeaways for Digital Economy Issues (August 9, 2019). Concurrences e-Bulletin, 2019, available at: https://ssrn.com/abstract=3435159 or http://dx.doi.org/10.2139/ssrn.3435159.

50 https://competitionlawblog.kluwercompetitionlaw.com/2023/03/17/mind-the-gap-assessing-ride-hailing-apps-in-latin-america-and-the-caribbean/.

51 https://www.fne.gob.cl/wp-content/uploads/2020/09/inpu_2624_2020.pdf.

52 https://www.maastrichtuniversity.nl/blog/2022/05/enforcement-competition-laws-latin-american-digital-markets.

53 https://www.galicia.com.mx/archivos/brochure/2023%20Competition%20in%20Digital%20Markets%20-%20Mexico.pdf.

of Cornershop, a platform for online grocery shopping and deliveries.[54] Walmart operated self-service stores, membership price clubs, pharmacies, and online stores.

COFECE blocked the merger because of vertical competition concerns that the merged entity could engage in anticompetitive conduct by refusing to provide services to Walmart's competitors, concerns that Walmart may refuse to make its products available through platforms operated by Cornershop's competitors, and the potential for the merged entity to induce Walmart's competitors to leave the Cornershop platform through strategic use of data associated with the retail of their products.

COFECE defined the relevant market as the market for logistical services for the exhibition, purchase and immediate delivery of products offered by supermarkets and membership price clubs through websites and mobile apps to final consumers. This represented a single market definition for both sides of the platform. Before arriving at this market definition, COFECE considered the substitutes available for users on both sides of the Cornershop platform. The online stores of Walmart's competitors were excluded from the market on the basis that, on the supply side, they do not display or sell products offered by supermarkets and membership price clubs competitors, and, on the demand side, they offer significantly longer delivery times and do not offer the same personalized service. Similarly, their physical stores were excluded on the basis that, on the supply side, they do not offer any services to competing supermarkets and membership price clubs and, on the demand side, they require end consumers to incur additional time and travel costs to physically visit a store and purchase products.

COFECE's analysis of the geographic dimension of the market was complicated by the fact that, for any given consumer, Cornershop and competing platforms would use an algorithm to ascertain which stores' products to display to a consumer based on their location. Ultimately, COFECE settled on a geographic dimension of city, based on the areas that Cornershop served at the time.

In COFECE's view, platforms like Cornershop would be costly and take time to replicate. It identified three conditions for a multi-sided platform to operate successfully: (i) the coexistence of the different user groups, requiring the use of mechanisms that guarantee the exchange of goods and services and thereby attracting the largest number of members; (ii) ensuring a sufficient quantity of members on both sides of the platform which allow the platform to earn enough to cover its costs; and (ii) ensuring that there is enough value, trust between participants of each other and of the platform, and willingness to participate on both sides of the platform to generate indirect network effects. Significant capital outlays would be required to subsidise a platform's operation until these conditions could be met. Platforms also often had exclusivity arrangements with self-service stores and price membership price clubs. All of this would make new entries difficult. No potential entrants were identified.

Based on an analysis of market shares, Cornershop was identified as the leading platform in eight centers. It was also the only platform that operated in all the locations in which self-service stores had a presence. In addition, Walmart was the best positioned self-service store on the platforms available, and its sales accounted for a significant portion of the platforms' revenues.

Cornershop had detailed information about its users, including their locations and purchasing habits, which Walmart would have the ability and incentive to use to its benefit in multiple ways, such as making personalized offers to customers who would commonly buy from Walmart's competitors. There were also concerns that the merged entity could position Walmart's products more favourably on the Cornershop platform than its competitors' products, influencing customers' purchasing decisions. Fears about this kind of conduct could cause those competitors to leave the Cornershop platform. Similarly, Cornershop would be able to prevent Walmart's competitors from accessing its platforms. The reduced choice available through Cornershop would in turn harm consumers.

Walmart and Cornershop did not offer any arguments that the proposed transaction would lead to efficiencies and be pro-competitive but did offer commitments to address the competition concerns in this case. These included high level and general commitments to grant Walmart's competitors free access on non-discriminatory terms to the Cornershop platform and not to use their information in promotions, and commitments to maintain separate boards for Walmart

[54] https://www.cofece.mx/cofece-resolvio-no-autorizar-la-concentracion-entre-walmart-y-cornershop/, https://www.cofece.mx/wp-content/uploads/2019/06/COFECE-032-2019-English.pdf, and https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6008/9/4845885.pdf.

and Cornershop with different directors.[55] However, they were rejected by COFECE as insufficient and too vague and imprecise to avoid the potential anticompetitive effects of the proposed transaction.

United Kingdom: Meta Platform-Giphy[56]

In 2021, the Competition and Markets Authority (CMA) found that the merger between Meta Platforms (owner of Facebook), the largest provider of social media and messaging services in the UK, and GIPHY, the world's leading provider of GIFs and GIF stickers, has resulted or may be expected to result in substantial lessening of competition. The CMA ordered Meta to sell GIPHY in its entirety.

The CMA found that the merger gave rise to horizontal unilateral effects in the market for display advertising in the form of a of a loss of dynamic competition. GIPHY had been offering a GIF-based, 'paid alignment' advertising service in the United States of America and had hoped to expand this service internationally, including into the United Kingdom. The CMA considered that GIPHY had been driving dynamic competition in the display advertising market through this service. The CMA considered this loss of competition to be substantial for reasons that included Meta's significant market power in display advertising, GIPHY's strong position as a leading provider of an important social media engagement tool, and potential for network effects in two-sided social media platforms to magnify any successful expansion by GIPHY into display advertising in a market where barriers to entry and expansion are high.

The CMA also considered that the merger may have vertical anti-competitive effects in social media markets. It found that GIPHY has several distinctive features that may make it particularly attractive to social media platforms, and Meta would have the ability and incentive to foreclose the social media market by limiting its rivals' access to GIPHY.

As a result of the CMA's order requiring Meta to divest GIPHY, Meta sold GIPHY to Shutterstock in 2023.[57]

55 https://www.reuters.com/article/us-walmart-mexico-exclusive-idUSKCN1TF2IF.

56 https://assets.publishing.service.gov.uk/media/635017428fa8f53463dcb9f2/Final_Report_Meta.GIPHY.pdf.

57 https://assets.publishing.service.gov.uk/media/649d86f245b6a2000c3d458e/Meta-GIPHY_case_closure_summary.pdf.

United States of America: FTC v. Meta Platforms/ Within Unlimited[58]

In August 2022, the FTC challenged Meta Platforms' proposed acquisition of Within Unlimited, a virtual reality development studio, in federal court. The FTC alleged that Meta, by virtue of being a key player at each level of the VR sector, was a potential entrant in the VR dedicated fitness app market in which Within's Supernatural product was the top seller.

The U.S. Federal Court declined to grant a preliminary injunction to stop the acquisition, and the FTC decided not to pursue an appeal or further litigation. While the judge ruled that the FTC had met its burden in showing that the virtual reality fitness app market is highly concentrated, he found that the FTC did not prove there was a reasonable probability that Meta would enter the market independently.

Despite the loss, the case advances the law in the United States of America for future cases involving emerging digital markets, specifically surrounding the standards required to succeed in a potential competition case. Importantly, the court rejected Meta's argument that there could be no competition concern in new, fast-growing markets, finding that competition law has an important role to play in new markets with recent entry. Moreover, the FTC's market definition was validated in ways that can be helpful in future digital merger cases, with the court relying on traditional qualitative factors to find a relevant market for VR dedicated fitness apps.

Merger allowed

Chile: Uber/Cornershop

In May 2020, Chile's FNE approved Uber Technologies Inc's acquisition of Cornershop Technologies LLC (CornerShop).[59] CornerShop was a leading player in the online groceries market.

Uber offered online intermediation platforms for transport (Uber Rides) and for the purchase and delivery of prepared food (Uber Eats). CornerShop

58 https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter.

59 https://www.fne.gob.cl/wp-content/uploads/2020/06/inap2_F217_2020.pdf and https://one.oecd.org/document/DAF/COMP/WD(2020)60/en/pdf.

offered a digital platform for the online purchase and home delivery of groceries, mostly from supermarkets. The main digital platforms considered in this decision were online intermediation platforms for groceries, ridesharing and food delivery. It also briefly considered online intermediation platforms for the purchase of other goods.

The FNE carried out extensive market definition exercises for each type of intermediation platform, identifying the different user groups or "sides" for each platform. It observed that, when dealing with multi-sided segments or platforms, different approaches are available. A single market definition for all sides of a segment or type of platform (the "focus of a market" approach) may be more appropriate in cases where the purpose of a platform is to facilitate transactions between different groups of services. Alternatively, a different market definition for each side of the segment or platform (the "multi-market approach") may be appropriate where the different sides of the platform do not transact with each other (such as radio, television and newspapers).

The FNE reached the view that the most appropriate approach in this case was a focus of a market approach where each market included all sides of users of the relevant platform type. It defined separate markets for digital intermediation platforms for the delivery of groceries, the delivery of prepared food, passenger transport or ride sharing, and the delivery of other types of goods. This was on the basis that the services provided by the different platforms were not substitutable on both the demand and supply side.

It consistently found that sales external to the digital intermediation platform (such as face-to-face sales) were not in the same market as sales through the digital intermediation platforms. This was based on evidence of business users' practices, end consumers' preferences and behaviours, and parameters of competition that were unique to online sales. Even so, there were differences in the closeness of competition between the different digital intermediation platforms and their more traditional alternatives. The FNE singled out digital intermediation platforms for ride sharing as potentially prone to competitive pressure from traditional taxis, depending on the density of taxis in the particular location of the end-consumer at the time transport services are required.

The FNE identified the main source of potential harm as the loss of a potential competitor in the market for intermediation platforms for the delivery of groceries. The FNE considered the test for assessing whether the elimination of a potential competitor (Uber) in a digital intermediation market would substantially lessen competition to be whether it would leave the market prone to a tipping scenario. Despite the availability of evidence that Uber would likely enter the market without the merger, the FNE did not consider that eliminating Uber would leave the market prone to tipping. The market was dynamic and highly competitive (as demonstrated by the adaptability of platforms during the COVID-19 pandemic). It was characterized by innovation, market participants with the ability to enter and expand (including the supermarkets' own direct sales channels), and the countervailing power of supermarkets.

The FNE also considered the potential reduction of incentives of the merging parties to innovate in related or adjacent markets that could result from the merger if they were no longer driven by competition from each other to develop new functions or services. Similarly, the FNE found that digital intermediation markets and e-commerce platforms were in the early stages of development and sufficiently dynamic for the merging parties to continue to have incentives to innovate.

The FNE observed that network effects and economies of scale and scope present in digital markets heightens the risk of conglomerate effects. Even so, the FNE ultimately dismissed the risk of conglomerate effects in this case.

The FNE considered four potential conglomerate effects theories of harm. These related to anti-competitive bundling, the collection and use of user data to foreclose the market, worsened privacy policies for end-consumers, and potential effects for shoppers, delivery persons and drivers resulting from the merged entity's increased bargaining power.

To assess anti-competitive bundling theories of harm, the FNE adopted the European Commission's conceptual framework for anti-competitive bundling strategies. This required consideration of the ability of the merged entity to exclude rivals, its incentives to exclude rivals, and if doing so would have a significant detrimental effect on competition to the detriment of consumers. The FNE ultimately dismissed all possible permutations of an anti-competitive bundling theory of harm, for reasons that included the early stage of the online grocery market's development and the potential for a range of competitors to enter or expand (in particular supermarkets, either on their own or in partnership with firms already in the ride-sharing market or other industries). Before doing so, the FNE considered and rejected the possibility that indirect network effects could exacerbate any potential conglomerate effects.

Second, the FNE recognized that user data can be a relevant input for the development of a digital platform's services and constitute a source of market power. However, in this case the additional data the merged entity could collect would be used to improve services but was not a key input with both sides of the platforms in this case being monetised. There were therefore no concerns about market foreclosure. In addition, competitors such as supermarkets could also obtain access to data and could give other platforms access to that data as part of their own overall arrangements.

Finally, the FNE dismissed the third and fourth conglomerate theories of harm relating to worsened privacy policies and worsened conditions for shoppers, delivery persons and drivers on the basis that all these groups could switch to other providers if the merged entity's terms and conditions became too unfavourable.

United Kingdom: Microsoft-Activision[60]

The CMA confirmed its decision to block the merger of Microsoft and Activision, in accordance with section 36 of the Enterprise Act in August 2023.[61] The CMA decided that the merger is anticipated to result in a substantial lessening of competition in the supply of cloud gaming services in the UK, due to vertical effects from input foreclosure, and prohibited the merger because that would be the only effective and proportionate remedy to the substantial lessening of competition.

However, Microsoft restructured the merger following the CMA's initial investigation. Under the new structure, Microsoft did not acquire Activision's cloud streaming rights outside the EEA for all current and future Activision PC and console games released over the next 15 years.[62] Instead, Ubisoft acquired these cloud streaming rights. The CMA accepted undertakings and provided clearance for this restructured transaction in October 2023.[63]

c. Other anti-competitive business practices (using competition laws)

Brazil: Uber

In 2018, Brazil's Administrative Council for Economic Defense (CADE) released Nota Técnica Nº 26/2018/CGAA4/SGA1/SG/CADE,[64] outlining its decision on an investigation of Uber[65] for predatory pricing practices (where prices would be set at a level that was lower than drivers' costs) and practices that formed a cartel and of influencing the adoption of uniform commercial practices among drivers. Ultimately, CADE did not find any violation of competition law, but did suggest changes Uber could make to its business model to better promote competition.

The complaints that triggered the investigation alleged that Uber's partner drivers would be competitors in a market for private individual paid passenger transport services and focused on Uber's practices of setting uniform prices for those partner drivers' services through its use of a pricing algorithm, including its use of dynamic pricing to increase prices when demand for services was high.

Before considering the complaints in detail, CADE expressed some observations about the ability of competition law and enforcement to deal with challenges posed by digital platforms and innovative, multi-sided markets. The particular challenges it discussed included competition being focused on innovation rather than price, defining markets (particularly for multi-sided platforms), and competition

60 https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming; and https://www.gov.uk/government/news/microsoft-concession-a-gamechanger-that-will-promote-competition.

61 https://assets.publishing.service.gov.uk/media/64e3735b4002ee0014560ca5/Final_order_explanatory_note.pdf.

62 https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-ex-cloud-streaming-rights-merger-inquiry.

63 https://www.gov.uk/government/news/microsoft-concession-a-gamechanger-that-will-promote-competition.

64 https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yMoApKcz8ELnAZd2EyCRH9tTRIPRGsoybrVkHgIlb0X4CgW9nU9w7Ns7Q8pdf4XhtWpQGuc_PBO56paZt_TrAmX.

65 Preparatory Procedure No. 08700.008318/2016-29.

often occurring through the relevant markets rather than in the relevant markets. On the other hand, CADE also expressed optimism that competition law could be capable of dealing with anti-competition practices in innovative markets, given its adaptability, fluidity and constant evolution. Transport network companies remained market agents operating in a competitive environment, meaning that their business models and practices could be analysed against the relevant law.

CADE easily rejected the allegations of predatory pricing, accepting Uber's argument that if partner drivers were consistently making losses they would not use Uber's platform. CADE considered the other allegations within the frameworks of: (i) horizontal cartel conduct; (ii) hub and spoke cartel conduct; and (iii) influencing the adoption of uniform business practices. CADE considered the following questions: (i) whether Uber's practices promoted a cartel of 'partner drivers' (even if unintentional); (ii) whether there was evidence of damage to free competition; (iii) whether Uber managed pricing between competitors; and (iv) whether Uber promoted or influenced uniform businesses practices between competitors.

CADE initially considered the way the three types of conduct are analysed in the context of traditional markets, where there are direct relationships between suppliers and consumers. It then overlaid that analysis with possible peculiarities that might arise in two-sided markets.

Unlike in its later decision in 2019 regarding Google Shopping, CADE did not consider it necessary to adopt precise market definitions for its competition analysis, with no need to estimate the market shares of the relevant economic agents.

Uber and its partner drivers were not seen as direct competitors, so Uber itself could not be in a horizontal cartel with its partner drivers. However, CADE did consider situations in which partner drivers seemed to attempt to manipulate Uber's app and algorithm to increase prices and whether these could be seen as horizontal cartel conduct. Specifically, partner drivers would plan to "turn off" the Uber application to create an imbalance between supply and demand, triggering the application of the price multiplier. These allegations were dismissed evidential concerns, and in any case the evidence available did not show that Uber was itself a participant in the conduct.

A key principle in CADE's consideration of the question of hub and spoke cartel conduct was that mere communication between competitors intermediated by a hub does not constitute a hub and spoke cartel in and of itself. CADE considered it necessary to prove the following factors to establish the existence of a hub and spoke cartel; (i) interaction between all economic agents, i.e. the hub and the competitors, aimed at the coordinated action of direct competitors; (ii) the competitors actively demonstrate interest in a coordinated action (with these factors together constituting a tacit agreement); and (iii) the exchange of commercially sensitive information between direct competitors through the hub. CADE had typically analysed cartels, including hub and spoke cartels, as per se violations.

CADE rejected the existence of a hub and spoke cartel based on a lack of any exchange of commercially sensitive information between direct competitors through the hub. CADE considered that influencing the adoption of uniform commercial practices was a more appropriate lens through which to examine Uber's role in producing uniform pricing.

CADE expressed caution against intervening with a finding that Uber's business model influenced adoption of uniform business practices, given its (then) innovative and novel nature. CADE's concerns included that excessive and reckless action could create excessive barriers to entry that discourage the emergence of innovative businesses and the need to weigh competition concerns against possible benefits generated for consumers.

The pricing control exercised by Uber caused Uber's partner drivers to stop competing with one another on price. However, because it was based on the estimated time and distance of each trip, CADE accepted that the pricing model was intrinsically objective, reasonable and rational. CADE also referenced a study that confirmed that Uber's entry in Brazil had generated benefits for consumers. Finally, CADE accepted Uber's argument that its pricing algorithm respected market principles and that consumers had choices other than Uber (including not accepting a ride through Uber and using other transport network companies).

Despite finding no violation, CADE did suggest some changes Uber could make to better protect competition. CADE acknowledged that the pricing algorithm could be manipulated through coordination by partner drivers to increase prices for end passengers, even if only momentarily. It therefore highlighted the importance of Uber's role in protecting its own driver partners and discouraging coordination among them, for example, by promoting a competition compliance program. It also suggested that Uber and other transport network companies consider whether more competitive business models that allowed for competition between partner drivers as well as transport network companies might be available; for example, allowing partner drivers to set their own prices and allowing drivers to offer discounts or participate in an auction to compete to provide a requested ride.

d. Other anti-competitive business practices (using other laws)

Australia: Google

In July 2020, the ACCC unsuccessfully brought proceedings against Google under its consumer protection legislation for misleading or deceptive conduct and making false or misleading representations regarding its use and collection of data about consumers' internet activity for advertising purposes.[66]

Before 2016, Google's collection and use of user information for advertising purposes was limited to information about Google users' activities while they were using a Google-owned site, service or app. However, in 2016, Google made changes to "start combining personal information in consumers' Google accounts with information about those individuals' activities on non-Google sites that used Google technology, former DoubleClick technology, to display ads".[67] Google sent a pop-up notification to Google Account holders describing optional features that would give consumers "more control" over Google's use and collection of data while also allowing Google to more closely target advertising, seeking their consent for those changes. Consumers were required to either scroll or click through (depending on the device and service being used at a time) some more detailed information and were then invited to select a box which stated, "I agree".

The ACCC alleged the notification did not properly Inform consumers about the change, and Google misled Australian consumers about its use of their information (including information derived from consumers' use of websites not associated with Google). It also alleged that Google had misled consumers through its privacy policy, which stated that it would not reduce consumers' rights under the privacy policy without their explicit consent. According to the ACCC, the change did reduce consumers' rights under the policy, and Google had not in fact obtained consumers' consent to the change as promised.

The Federal Court of Australia rejected the ACCC's case in its decision of December 2022.[68] This was based on a number of reasons, including that the expert evidence presented by the ACCC (which explored behavioural economics and argued that Google had designed the notification in a way that would maximise the number of consumers who consented to the change) was of limited assistance , and that Google had given consumers sufficient information to make an informed decision. The Court did not consider it relevant that Google did not disclose the benefits of the changes for Google to consumers, as long as consumers could understand and assess the benefits for themselves.

COMESA: Jumia Group[69]

In February 2023, the COMESA Competition Commission found that Jumia Group, one of Africa's leading online e-commerce platforms, was engaged in false and misleading representations, and in unconscionable conduct, in breach of the COMESA Competition Regulations. The relevant conduct included failures to disclose the legal names of the platform operators in COMESA's member States, disclaimers of liability on the quality and standards of the products sold on the platform, disclaimers on the validity of information provided on the platform, the lack of an online dispute resolution mechanism, and a return policy for defective products that was particularly unfavourable to consumers. COMESA required Jumia to make amendments to its terms and conditions so that they complied with the COMESA Competition Regulations.

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66 https://www.accc.gov.au/media-release/court-dismisses-accc-case-against-google.

67 https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data.

68 https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca1476.

69 https://www.comesacompetition.org/wp-content/uploads/2023/02/DETERMINATION-ON-JUMIA-INVESTIGATION.pdf.

4. NEW LEGISLATION AND REGULATION DIRECTLY TARGETED AT DIGITAL PLATFORMS AND COMPETITION

In response to the emerging competition concerns brought about by digitalization and the challenges competition authorities have faced in their attempts to enforce competition law against digital platforms, competition authorities and law makers around the world have been considering the need to introduce new legislative and regulatory frameworks to ensure markets remain competitive, open and accessible in the digital era.

The European Union's Digital Markets Act is the most cited example of legislation of this type. It has been used to inform a number of proposals still under consideration in other jurisdictions, including in Australia, Brazil, India and the United Kingdom. The relevant bodies responsible for the proposals in each of those jurisdictions has cited various benefits of ensuring that their regime is aligned with the Digital Markets Act, although each has opted to make some changes to both the reach and practical operation of the regime to account for their own policy priorities and local contexts. As will be demonstrated later in this paper, the Digital Markets Act has also been taken into account in the context of soft law initiatives, such as in South African's Online Intermediation Platforms Market Inquiry.

However, the Digital Markets Act is not the only framework that has been introduced to directly address the relationship between digital platforms and competition.

This section provides an overview of new legislative and regulatory framework that have been introduced to target digital platforms and competition. It begins with those that are already being implemented in Japan and the European Union, followed by proposals that are under consideration (and potentially subject to change) in Australia, Brazil, India, the United Kingdom and the United States of America.

Laws already passed

Japan: Act on Improving Transparency and Fairness of Digital Platforms (TFDPA)

On May 27, 2020, the Japanese government established the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA). The law was promulgated on June 3, 2020, and took effect February 1, 2021.[70] As the name suggests, the law promotes transparency and fair dealings of digital platforms, particularly regarding their transactions, data usage and their impact on fair competition. The law was based on discussions held at the Headquarters for Digital Market Competition, set up within the Cabinet, involving the Japan Fair Trade Commission (JFTC), the Ministry of Economy, Trade, and Industry (METI) and the Ministry of Internal Affairs and Communications.

The law aims to address problems of a lack of transparency and "extremely low predictability" in assessing transactions in digital markets.[71] It also aims to deal with inadequacies in existing procedures and systems for dealing with such transactions. Since these problems can impede the growth of healthy competition, the law aims to improve the transaction environment to ensure the benefits of free and fair competition.

The law explicitly acknowledges the important role that digital markets play in the economy and beyond and aims to facilitate their contributions to the sustainable development of the Japanese economy and society. To this end, the regulation is primarily based on voluntary and proactive initiatives to be implemented by digital platforms themselves with limited government intervention. The rationale for this approach is to allow digital platforms to continue to be as innovative as possible.

70 https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.

71 https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/sum_tfdpa.pdf.

The regulation works as follows. First, the Ministry of Economy, Trade and Industry (METI) may identify a digital platform as a "Specified Digital Platform Provider" (SDPF). The first step in this designation process is to identify a digital platform. A digital platform is a firm that: (i) provides multi-sided markets to connect product providers with consumers using digital technology, (ii) provides these services via the internet, (iii) provides services in a manner that involves network effects (meaning, relationships where mutual benefits exist for both the provider and the consumer, increasing the number of both). In addition, METI can designate a firm as falling under a specific business category.[72]

Once a digital platform is identified, it can be further designated as a SDPF if it is particularly required to improve transparency and fairness. To determine if that is the case, METI will consider: (i) the degree of the firm's impact on the lives of the people and the national economy; (ii) the degree of concentration of the digital platform; (iii) the need to protect product providers based on the specific circumstances at issue; (iv) other relevant regulations and policies; and (v) the scale of the business at issue. Surveys will be conducted to determine the scale necessary for a special designation.

SDPFs face certain self-guided obligations under the new law. They must disclose terms and conditions and other relevant information to users. Additionally, they must develop procedures and systems to ensure their fairness voluntarily.[73] They must submit a report on the measures they have implemented, along with a self-assessment of their efficacy, each fiscal year. The points this report should contain include: (i) a business outline; (ii) status of information sharing; (iii) establishment of operational procedures and systems; and (iv) status of settlements of disputes.

In addition to these obligations, SDPFs owe special duties to users that sell goods on their platforms (providers).[74] The guidelines provide an overview of the objectives of the special duties and specific examples of measures SDPFs should take to encourage a mutual understanding with the providers on the platform. They include the platforms developing systems and procedures that ensure fairness and to resolve complaints, appointing administrators to manage communications with stakeholders in Japan, and other necessary steps to protect customers. The government will review the SDPFs' self-assessments against these guidelines.

METI can request that the JFTC intervene in a SDPF if it suspects that a violation of Japanese competition law has occurred.

So far, METI has designated several firms as SDPFs, including digital platform providers operating in the specific business categories of general online shopping malls selling goods (Amazon Japan G.K., Rakuten Group, Inc. and Yahoo Japan Corporation), application stores (Apple Inc. and iTunes KK and Google LLC), media-integrated digital ad platforms (Google LLC, Meta Platforms, Inc. and Yahoo Japan Corporation) and intermediary advertisements (Google LLC).

European Union: Digital Markets Act[75]

The Digital Markets Act (DMA) entered into force on 1 November 2022 and started applying on 2 May 2023. While it has significant overlap with competition law and is clearly inspired by competition cases, it does not function precisely as a competition law. Rather, it designates "gatekeepers," which will be defined below, and regulates them. The goals are to "ensure contestability and fairness for markets in the digital sector" particularly for "business users and end users of core platform services provided by gatekeepers."[76] It uses an *ex-ante* regulatory approach to accomplish these goals.

There are two elements to designating an undertaking as a gatekeeper; identifying the undertaking as providing a core platform service and a further test based on three criteria.

Core platform services (CPS) are: (i) online intermediation services, (ii) operating systems,

[72] https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001b.pdf.

[73] https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001c.pdf.

[74] https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/1012_001d.pdf.

[75] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925; https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live.

[76] The Digital Markets Act (7); https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925.

(iii) online search engines, (iv) web browsers, (v) online social networking services, (v) virtual assistants, (vi) video-sharing services, (vii) cloud computing services, (viii) independent interpersonal communication services, and (ix) online advertising services. A firm must provide a CPS to be considered a gatekeeper.

In addition, before the Commission can designate a firm as a gatekeeper, the firm must meet the three additional criteria of (i) having a significant impact on the internal market, (ii) providing a CPS which is an important gateway for business users to reach end users, and (iii) enjoying an entrenched and durable position.

The test sets out quantitative thresholds for each of these criteria. If the firm meets the quantitative thresholds, it creates a rebuttable presumption that the criteria are met.[77] The quantitative thresholds are: (i) the undertaking either has an annual turnover of EUR 7,5 billion in each of the last three financial years or a market capitalization of at least EUR 75 billion in the last financial year, and the undertaking provides the same CPS in at least three member States of the European Union, (ii) the CPS has at least 45 million monthly active end users (roughly equivalent to 10% of all citizens of the European Union) and at least 10,000 yearly active business end users in the European Union, and (iii) the second threshold has been met in the last three financial years.

If the quantitative thresholds are met, the CPS provider can rebut the presumption that the substantive criteria are met by presenting “sufficiently substantiated” arguments that “manifestly call into question” the criteria.[78] Importantly, justifications “on economic grounds seeking to enter market definition or to demonstrate efficiencies deriving from a specific type of behavior […] should be discarded.”[79]

[77] The Digital Markets Act Article 3(1)-(2).

[78] DMA Article 3(5).

[79] DMA Recital 23.

Once DMA started applying on 2 May 2023, providers of CPS that met the quantitative threshold had two months (until 3 July 2023) to submit a notification to the European Commission.[80] The Commission then had forty-five (45) working days to designate the CPS provider as a gatekeeper, and subject them to obligations.[81] For any undertaking that presented sufficiently substantiated arguments that they do not meet the criteria the Commission was required to either accept or reject the arguments, or conduct a “market investigation” to determine whether the undertaking providing the CPS should be designated.[82]

Additionally, the Commission can designate a CPS provider as a gatekeeper even if they do not fulfill the quantitative threshold if it considers the provider meets the substantive criteria on a qualitative basis, following an extended market investigation.[83]

In September 2023, the Commission designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as gatekeepers in respect of 22 CPSs between them. It also announced that it had opened four market investigations with respect to arguments presented by Microsoft (Bing, Edge and Microsoft Advertising) and Apple that their Bing, Edge, Microsoft Advertising and iMessage services should not qualify as gateways, and a fifth market investigation to assess whether Apple’s iPadOS should be designated as a gatekeeper despite not meeting the thresholds. It also accepted arguments put forward by Alphabet, Microsoft and Samsung that although Gmail, Outlook.com and the Samsung Internet Browser met the quantitative thresholds, they should not qualify as gatekeepers in respect of those services.[84]

After an enterprise is designated as a gatekeeper, the obligations and prohibitions apply after six months (projected to begin March 2024 for those designated in September 2023 based on quantitative criteria).[85]

[80] DMA Article 3(5).

[81] DMA Article 3(4).

[82] DMA Article 3(5) and 17(3).

[83] DMA Article 3(8) and 17(1).

[84] https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4328.

[85] https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live.

Articles 5, 6, and 7 of the DMA list the obligations and prohibitions for gatekeepers. Many of them are modelled after recent and ongoing competition law cases.[86] Nonetheless, unlike in competition law, the DMA does not require the Commission to define a market where a gatekeeper holds a dominant position, nor does it have to demonstrate that certain conduct has anti-competitive effects. Efficiency defences are not allowed. Article 8(2) of the DMA gives the Commission the ability to develop tailored obligations for an individual gatekeeper specifying how they must comply with the obligations in Articles 5, 6 and 7 (either on its own initiative or at the request of a gatekeeper). Finally, there is some limited scope for exemptions from and suspensions of the obligations and prohibitions in the DMA.[87]

The DMA also grants the European Commission powers to carry out inspections, send requests for information, interview employees of enterprises under suspicion of non-compliance, conduct market investigations, impose fines and periodic penalties. The Commission is permitted to issue fines for non-compliance of up to ten percent of the global turnover, or a fine proportionate to damages, although the fine will significantly increase if the firm commits multiple violations over an eight-year period.[88] If the Commission finds these violations rise to the level of "systematic noncompliance" even more serious penalties, including a ban on mergers and acquisitions, or a break up, could be implemented.[89]

The DMA will not supplant existing antitrust laws in the European Union. Instead, it will be used in conjunction with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The DMA will be another regulatory regime with which digital enterprises must comply, in addition to existing competition laws.

Finally, the DMA gives national enforcement bodies the power to cooperate with and support the Commission in the enforcement of Articles 5, 6, and 7. It imposes a duty on national courts to respect the European Commission's DMA decisions.[90] This adds significant power to the DMA and should make the digital markets more predictable throughout the European Union.

Proposals still under consideration[91]

Australia: Proposed Mandatory Code of Conduct[92]

In the fifth interim report for the Digital Platforms Services Inquiry, released in November 2022, the ACCC outlined a proposal for regulatory reform to address competition and consumer issues it has identified over the course of its ongoing Digital Platform Services Inquiry 2020-25,[93] its Digital Advertising Services Inquiry 2020-21,[94] and its first Digital Platforms Inquiry 2017-19.[95] Those inquiries identified concerns with high levels of market concentration among digital platform service providers and anticompetitive conduct in the forms of self-preferencing; tying; exclusivity agreements; impeding switching; denying interoperability; withholding access to important hardware, software and data inputs; a lack of transparency and the ability to degrade the quality of services on offer (including the terms on which services are provided to consumers); and acquisitions involving nascent or potential competitors. They also identified concerns in consumer protection relating to unfair trading practices, frauds, harmful apps, fake reviews and inadequate dispute resolution.[96]

The ACCC took the view that the enforcement of enforcement of existing competition and consumer laws alone is not sufficient and *ex-ante*, targeted

86 DMA Article 5(3) echoes the ongoing Apple App Store investigation by prohibiting business users from offering the same services/products to end users at different prices while using intermediaries than when selling directly; DMA Article 6(5) Takes from the Google Shopping case (Decision of the Commission 27 June 2017) which bars self preferencing (favorably ranking) services and goods offered by the platform itself; *See also* DMA Article 5(7) which prohibits gatekeepers from requiring users to use certain platform services (including payment services) an issue that was hotly debated in the Apple v. Epic Games suit in the United States.

87 DMA Articles 9-10.

88 DMA Article 30(1)-(2).

89 DMA Article 18(3).

90 DMA Article 38.

91 At the time of the drafting of this report, 31 October 2023.

92 https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25/september-2022-interim-report (fifth interim report for the ACCC's Digital Platforms Inquiry).

93 https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25.

94 https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/digital-advertising-services-inquiry-2020-21.

95 https://www.accc.gov.au/inquiries-and-consultations/finalised-inquiries/digital-platforms-inquiry-2017-19.

96 Fifth interim report for the ACCC's Digital Platforms Inquiry, 64 and 72.

and up-front obligations should be introduced to complement Australia's existing competition and consumer protection regime.[97] The ACCC's concerns about the adequacy of *ex-post* enforcement of existing competition and consumer law include the lengthy duration of court proceedings against digital platform service providers, the potential for harmful conduct to continue or its effects to be entrenched while enforcement action is taking place, the inability of case-by case enforcement to address broad and systemic conduct or evolving patterns of behaviour, issues with the analytical tools used to prove anti-competitive conduct when applied in the context of digital platform services, and gaps in the Australian Consumer Law.

To promote competition in digital platform services, the ACCC recommended the introduction of a new power to make legally binding, service-specific codes of conduct containing targeted obligations for "designated digital platforms". These obligations would be based on principles set out in legislation and targeted to address practices of concern.[98]

A regulator or minister would be responsible for designating certain "digital platforms" in relation to specific services based on criteria set out in legislation. The criteria would relate to the platform's incentive and ability to harm competition.[99] The criteria could include (i) quantitative criteria such as the number of active users of a platform's service and the platform's Australian and/or global revenue, and (ii) qualitative criteria such as whether a digital platform holds an important intermediary position, whether it has substantial market power in the provision of a digital platform service, and whether it operates multiple digital platform services.

Each code would apply to a particular type of designated service (e.g. app marketplace services, ad tech services or search services) and contain targeted obligations.[100] The relevant regulator will be required to develop those codes in consultation with the relevant policy agency based on principles set out in legislation[101] and considering the specific competition issues relevant to the service being regulated. If the decision-maker (e.g. the relevant regulator or minister) designates a platform in relation to a service, the designated digital platform will become subject to the obligations of any relevant code for that service once such a code is developed.. The obligations could provide for exemption mechanisms to reduce the potential for unintended consequences.[102]

The objective behind this proposed design is to achieve a form of regulation that is flexible (accounting for the dynamic nature of digital markets), targeted (applying only to platforms with the ability and incentive to harm competition and to the specific competition issues identified), clear and certain (to promote investment and innovation), and allows for the prioritization of areas where the risks to competition are the most immediate and significant and the codes would have the greatest net benefit.[103] The ACCC has specifically identified[104] self-preferencing,[105] tying[106] and exclusive pre-installation agreements[107] as forms of conduct that could usefully be addressed through such codes. It has also suggested that codes could be used to improve consumer switching, information transparency and interoperability between different services, and to better protect business users of digital platform services.[108]

The ACCC has suggested that the relevant regulator should also publish guidance materials to assist with compliance and noted that it will be essential for the relevant regulator to have adequate information-gathering and monitoring powers. It expressed the

97 Fifth interim report for the ACCC's Digital Platforms Inquiry, 47-54.

98 Fifth interim report for the ACCC's Digital Platforms Inquiry, 108-109 and 111.

99 Fifth interim report for the ACCC's Digital Platforms Inquiry, 114.

100 Fifth interim report for the ACCC's Digital Platforms Inquiry, 111 and 112-113.

101 Such as promoting competition on the merits, promoting informed and effective consumer choice, and promoting fair trading and transparency for users of digital platforms.

102 Fifth interim report for the ACCC's Digital Platforms Inquiry, 194.

103 Fifth interim report for the ACCC's Digital Platforms Inquiry, 11-12.

104 Fifth interim report for the ACCC's Digital Platforms Inquiry, 3 and 12-14.

105 For example, by preventing app store providers, search providers and ad tech providers (if they are designated digital platforms) from providing favourable treatment to their own services over those of third-party providers in specific circumstances, and to require the separation of data a designated digital platform collects in its role as an intermediary from data it collects in a related market.

106 For example, by prohibiting tying by app store providers and ad tech services (if they are designated digital platforms) in specific circumstances.

107 For example, by prohibiting app store and search providers (if they are designated digital platforms) from having their services exclusively pre-installed on devices, requiring them to allow default services to be changed, or requiring them to apply choice screens.

108 Such as by restricting the ability of a designated digital platform to impose unfair terms or prohibiting price parity clauses.

view that "there will need to be significant penalties attached to breaches".[109]

To improve consumer protections, the ACCC recommended that the Government introduce a prohibition on unfair trading practices, strengthen unfair contract term laws, and develop a suite of targeted measures to address various consumer protection concerns specifically relating to digital platforms; in particular, measures to protect consumer and business users of digital platforms against frauds, harmful apps and fake reviews, and to introduce minimum standards for digital platform dispute resolution processes and the ability for users to escalate complaints to an independent ombuds. The targeted measures would apply to all digital platforms that supply search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services.[110] Since the ACCC's recommendations, in October 2022, both Houses of Parliament passed the Treasury Laws Amendment (More Competition, Better Prices Bill 2022 strengthening unfair contract terms laws (among other changes).[111] In August 2023, the Treasury released a Consultation Regulation Impact Statement seeking feedback on policy options to address unfair trading practices.[112]

The ACCC did not propose specific measures targeted at its concerns about mergers and acquisitions involving digital platforms, noting that Australia's merger control regime is already under review and that any economy-wide reforms should consider the challenges posed by serial strategic acquisitions (including by digital platforms).[113] Similarly, it suggested that measures relating to consumer privacy should not be considered until after the introduction on any reforms resulting from the Attorney-General's Privacy Act Review Report.[114]

The ACCC indicated that, where possible, it had sought to align its proposals with measures being taken in other jurisdictions,[115] such as Europe and the United Kingdom (while the authors of this paper consider that its approach to competition measures involving service-specific codes of conduct more closely follows that of the United Kingdom). This was to reduce regulatory burden and ensure that any future pro-competitive changes rolled out in those jurisdictions would also be implemented in Australia for the benefit of Australian consumers. It also suggested that cooperation between relevant Australian government departments and agencies and with international regulators (given the global nature of the largest digital platforms) will be important for the success of Australia's regime.[116]

As at 8 November 2023, the Australian Government has not formally responded to the ACCC's recommendations.

Brazil: Bill No 2768/2022[117]

In November 2022, Bill No 2768/2022 was introduced to the Brazilian House of Representatives. It proposes to introduce an *ex-ante* regulatory regime for digital platforms. The Bill is based on the European Union's Digital Markets Act (DMA) and the proposed American Innovation and Online Choice Act from the United States of America. As of November 2023, the Congress Rapporteur for the Committee on Economic Development continues to consider the Bill following a public hearing held on 17 August 2023 to discuss international experiences in the development of digital markets as part of her consideration of the Bill.[118]

The regime proposed by the Bill would give Brazil's National Telecommunications Agency (ANATEL) the ability to regulate, inspect and sanction digital platforms that offer services to the Brazilian pubic, in particular those with the power to control essential access.[119] This role will be similar to that performed by the European Commission under the DMA, and

109 Fifth interim report for the ACCC's Digital Platforms Inquiry, 14.

110 Fifth interim report for the ACCC's Digital Platforms Inquiry, 72-104.

111 https://www.legislation.gov.au/Details/C2022A00054.

112 https://treasury.gov.au/consultation/c2023-430458#:~:text=The%20Consultation%20Regulation%20Impact%20Statement,in%20the%20Australian%20Consumer%20Law.

113 Fifth interim report for the ACCC's Digital Platforms Inquiry, 7.

114 Fifth interim report for the ACCC's Digital Platforms Inquiry, 13 and 168.

115 Fifth interim report for the ACCC's Digital Platforms Inquiry, 60-61 and 110.

116 Fifth interim report for the ACCC's Digital Platforms Inquiry, 14.

117 https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417.

118 https://tozzinifreire.com.br/en/boletins/anatel-possivel-agencia-reguladora-de-plataformas-digitais.

119 Articles 1 and 2.

expand ANATEL's existing responsibilities under the Brazilian General Telecommunications Law (Law 9.472/1997). The Bill sets out the high level principles for the regime, and would give ANATEL responsibility for developing more detailed rules and enforcement procedures.[120] The explanation in the Bill of its justification indicates that ANATEL was chosen as the relevant regulator because it is considered to have relevant expertise from its role overseeing interconnection and network access obligations. At the public hearing held on 17 August 2023, ANATEL confirmed that it is prepared to take on this role.[121]

The digital platforms that would be subject to the Bill are providers of certain types of internet applications where the provider is engaged in business or economic activities. Those internet applications are online intermediation services, online search tools, online social networks, video sharing platforms, interpersonal communication services, operating systems, cloud computing services, and online advertising services offered by a digital platform that provides any of the other specified types of internet applications.[122] The Bill includes a mechanism for this list to be expanded. Protections in the Bill would apply to end users of the digital platform and/or "professional users" (users who, in the context of professional or commercial activities – whether remunerated or not – use digital platforms to provide goods or services to end users).[123]

A digital platform is considered to have the power to control essential access if it earns BRL70 million or more of operating income annually from the provision of services to the Brazilian public (with this threshold to be updated annually according to the IGP-M).[124]

The Bill includes provisions to prevent the abuse of dominant positions by digital platforms, require greater transparency from digital platforms, and ensure that consumers have more control over their data. Digital platforms, particularly those with the power to control essential access, will be required to give effect to the principles of freedom of initiative, free competition, consumer protection, reduction of regional and social inequalities, repression of the abuse of market power, and expansion of social participation in the discussion and conduct of matters of public interest.[125] The further regulation to be developed by ANATEL on each of these principles is to give effect to the objectives of economic development with broad and fair competition among operators of digital platforms and other economic agents affected by their activities; access to information, knowledge and culture; the promotion of innovation and availability of new technologies and access models; encouraging interoperability through standards and open technologies which allow communication between applications, and data portability.[126]

Specific obligations for digital platforms with the power to control essential access relate to transparency and the provision of information to ANATEL, non-discriminatory treatment of end and professional users in offering services to them and proper use of any data collected. They would also be prohibited from refusing access to professional users.[127] In addition, ANATEL would be authorized to require functional and accounting separation and introduce other measures to prevent or mitigate the potential abuse of market power (such as data portability and interoperability requirements). In developing more detailed regulations for each obligation, ANATEL will be required to ensure that it adopts technical and non-arbitrary criteria, and that any intervention is proportionate to the risk and subject to a cost benefit analysis. It will also be required to impose specific obligations for each type of digital platform that are tailored to its specific characteristics and consider the level of competition for each type of digital platform.[128]

Digital platforms (whether or not they have the power to control essential access) would also be required to seek approval from Brazil's Administrative Council for Economic Defense (CADE) before engaging in any activities that involve economic concentration (including mergers).[129]

Finally, the Bill would establish a dedicated fund to guarantee the development of innovative digital products and services. The fund would be partly

120 Article 19.
121 https://tozzinifreire.com.br/en/boletins/anatel-possivel-agencia-reguladora-de-plataformas-digitais.
122 Article 6, definitions I and II.
123 Article 6, definition III.
124 Article 9.
125 Article 4.
126 Article 5.
127 Article 10.
128 Article 12.
129 Article 13.

financed by an obligation on digital platforms with the power to control essential access to contribute 2% of their gross operating revenue from Brazil to the fund.[130]

Failure to comply with any requirement in the Bill could expose a digital platform to a warning and requirement to adopt corrective measures by a specified deadline, a fine of up to 2% of the annual revenue earned by the digital platform's group in Brazil for each year in which a violation occurs, obligations to take or not take an action, a temporary suspension of activities or a prohibition against carrying out activities.[131]

The explanation in the Bill of its justification indicates that the Bill was developed with the objective of aligning with the European Union's Digital Markets Act, without being as detailed. The drafters of the Bill considered that this approach would facilitate faster action than *ex-post* enforcement of competition law allows, without being overly restrictive.

India: Digital Competition Bill[132]

At the time of writing, a Digital Competition Bill is shortly expected to be introduced to the Indian legislature for consideration. The Bill will be based on a December 2022 report of India's Parliamentary Standing Committee on Finance entitled "Anti-Competitive Practices by Big Tech Companies" which recommended the enactment of a Digital Competition Act to introduce sector-specific *ex-ante* measures targeted at key anti-competitive practices on digital platforms identified by India's Ministry of Corporate Affairs and the Parliamentary Standing Committee. Pending its introduction, this paper outlines the Parliamentary Standing Committee's recommendations for the Bill.

The practices proposed to be targeted by the Bill are anti-steering provisions, self-preferencing, bundling and tying, data usage, mergers and acquisitions (particular conglomerate mergers and acquisitions that are below the minimum asset and turnover thresholds for India's merger control regime to apply), pricing and deep discounting practices, exclusive tie-ups (including both exclusive dealing and platform price parity or most favoured nation clauses), search and ranking preferencing, restrictions on third-party applications, and advertising policies that allow for self-preferencing or conflicts of interest.[133]

The Parliamentary Standing Committee took the view that an *ex-ante* regime is necessary because digital markets are too fast-moving for *ex-post* measures to be effective, *ex-post* measures are costly, and *ex-post* monetary penalties are unlikely to be fully effective (and potentially even futile).[134] Particular challenges that the Parliamentary Standing Committee identified for taking timely *ex-post* action include evidential requirements, the need for procedural fairness, in investigative and adjudication processes, and judicial review of decisions.

The proposed Bill[135] would impose the measures on "systemically important digital intermediaries," or SIDIs, which the Parliamentary Standing Committee envisages would capture "the small number of leading players or market winners that can negatively influence competitive conduct in the digital ecosystem." The Parliamentary Standing Committee has not itself proposed a definition to identify a firm as a SIDI, but has recommended that stakeholders, the Competition Commission of India and India's central government work together to arrive at a definition based on revenue, market capitalization and the number of active business and end users.

Once identified, SIDIs would be subject to the Bill's additional measures to protect competition on digital platforms. A SIDI would be prohibited from favouring its own offers over the offers of its competitors when mediating access to supply and sales markets (which would extend to exclusive pre-installation of a SIDI's offers on devices and other ways of integrating them in the platform's offerings); forcing business or end users to subscribe to or register with any further services as a condition for using or accessing a core platform service; preventing business users from offering their products or services to end users at different prices or on different conditions through other online sales channels; and preventing third

[130] Articles 14 and 15.

[131] Article 16.

[132] https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf ("Report of India's Parliamentary Standing Committee on Finance").

[133] Report of India's Parliamentary Standing Committee on Finance, Chapter I.

[134] Report of India's Parliamentary Standing Committee on Finance, 26-29.

[135] Report of India's Parliamentary Standing Committee on Finance, Chapter III, Part II.

party apps and app stores that compete with the SIDI's services from prompting end users to choose a default app or app store. The Bill would restrict when and how a SIDI can use data collected or generated from one service across other services, including by specifically prohibiting the use of the personal data of end users who buy third party products and services making use of the platform for the purposes of providing online advertising services.

In addition, SIDIs would be subject to positive obligations to pre-notify the Competition Commission of India of any intended concentration involving services in the digital sector or that enable the connection of data, even if it falls below India's usual merger notification thresholds; provide on request any third party undertaking that offers online search engines with access to fair, reasonable and non-discriminatory terms for ranking, query, click and view data (which should be anonymized) on free and paid searches generated by end users on its online search services; allow and technically enable the installation and effective use of third party software applications and app stores using or interoperating with a SIDI's operating system and allow those apps and app stores to be accessed by means other than through the SIDI's core services, and allow end users to easily change their default apps or app store; and provide advertisers with daily information regarding the price paid by the advertiser and the remuneration received by the SIDI, and access to the SIDI's performance measuring tools and the data necessary to independently verify an advertisements inventory. In addition, regulatory provisions would be introduced to enable fair and transparent contract negotiations with news publishers.

More generally, each SIDI will be required to submit reports to the Competition Commission of India describing in detail and transparently the measures it is implementing to comply with its mandatory obligations and publish a non-confidential summary of report on its website. The first report will be required to be submitted within a specified number of months of its designation as a SIDI, and further reports will be required annually. A new Digital Markets Unit would also be established in the Competition Commission of India.

The Parliamentary Standing Committee's proposed measures were informed by a desire for harmony with other jurisdictions in order to reduce regulatory burden, integrate India's digital ecosystem to global standards, and enable Indian companies to compete successfully around the world, and for harmony with India's Consumer Protection Act 2020 and the e-commerce rules framed under it.[136]

United Kingdom: Digital Markets, Competition and Consumer Bill

The Digital Markets, Competition and Consumers Bill (DMCC) currently under consideration in the United Kingdom. It is intended to bolster the ability of the CMA to regulate the most powerful firms in digital markets. The new bill would also make "changes to the competition framework that will include streamlined decision making, updating merger and fine thresholds and protect consumers in fast-moving markets by tackling 'subscription traps' and fake reviews online."[137]

The objective of the DMCC is to lower barriers to entry and investigate competition concerns in digital markets and take enforcement actions more quickly.[138] To this end, the current bill would introduce an *ex-ante* regime to target competition concerns that is very similar to the DMA (discussed in more depth above) for powerful firms in digital markets with "strategic market status".

The *ex-ante* regime for digital markets in the DMCC only applies if the CMA designates an undertaking as having strategic market status.[139] The CMA may consider designating undertakings that meet the minimum turnover requirement of either GBP 25 billion globally, or GBP 1 billion in the United Kingdom.

[136] Report of India's Parliamentary Standing Committee on Finance at 29-30.

[137] Competition and Markets Authority, *Vertical Agreements Block Exemption Order – CMA Guidance*, July 12, 2022, available at: https://www.gov.uk/government/publications/vabeo-guidance; Chancellor of the Exchequer, *Autumn Statement 2022*, November 2022, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118417/CCS1022065440-001_SECURE_HMT_Autumn_Statement_November_2022_Web_accessible__1_.pdf.

[138] Department for Business, Energy & Industrial Strategy, Department for Digital, Culture, Media & Sport, *A new pro-competition regime for digital markets – government response to consultation,* available at: https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#part-1-introduction.

[139] DMCC, Chapter 2.

If those turnover requirements are met, as under the DMA, designating an undertaking under the DMCC involves a formal investigation, including consultation with the relevant undertaking. The first step is to identify whether the undertaking carries out a digital activity linked to the UK, and the second step is to assess whether the undertaking meets conditions for strategic market status in respect of that activity.

An activity is a digital activity if it involves the provision of a service by means of the internet, the provision of digital content, or carried out for the purpose of providing an internet service or digital content. A link to the UK could be established if one of three criteria are met relating to the number of UK users, where the digital activity is carried out, or if the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the UK.

The strategic market status criteria are met if the undertaking has both substantial and entrenched market power and a position of strategic significance in relation to the digital activity. Unlike the equivalent criterion on the DMA, the CMA's inquiry into whether the undertaking's market power is entrenched must be forward-looking.

If a firm is designated as having strategic market status, the CMA will have the power to issue a notice to that firm requiring it to comply with conduct requirements. The DMCC restricts the types of conduct requirements that may be imposed. First, a conduct requirement must be directed at promoting fair dealing, open choices, or trust and transparency in relation to the digital activity for which the firm is designated. Second, a conduct requirement must be of a type expressly permitted by the DMCC.

The CMA will also have the power to make pro-competitive interventions when, after an investigation, it has reason to consider that a factor or factors in relation to a digital activity are having an adverse effect on competition in the United Kingdom.[140] In these instances, the CMA will have broad powers to impose structural and behavioral remedies.[141] However, the DMCC also expressly allows the CMA to consider any benefits that may arise for UK users and customers when deciding what action, if any, it will take.

[140] DMCC, Chapter 4.

[141] DMCC, Chapter 4(3).

Finally, the DMCC will implement new merger thresholds to combat against killer acquisitions. The new merger controls will only apply when the acquirer has a thirty-three (33) percent share of goals or services, or a substantial part in the United Kingdom and turnover of GBP 350 million.[142] It will also impose a requirement on digital firms with strategic market status to report to the CMA on any potential merger they may be involved in that meet specified thresholds before completing the merger.

United States of America: proposed *ex-ante* bills

A series of (sometimes overlapping) bills have been introduced in the Congress of the United States of America proposing regulation of digital platforms to address antitrust concerns.

The proposed Open App Markets Act and American Innovation and Choice Online Act are similar to the European Union's DMA. They would prohibit app store providers from requiring developers to use in-app payment systems owned or controlled by the app store operators as a condition of distribution or accessibility of the developer's app through the app store, from requiring that pricing or conditions of sale on its app store be equal to or more favorable than those offered by the developer on another app store, and from taking punitive action against a developer for using or offering different pricing terms or conditions of sale through another in-app payment system or on another app store.[143] The bills also include prohibitions against tying or bundling practices directed at steering commercial users to use their other products and services and various interoperability requirements, using non-public data obtained from commercial users to develop or provide their own services, and particular practices directed at steering device users to use default or pre-installed apps belonging to the gatekeeper.[144]

[142] DMCC, Section 124 Schedule 4(5)(4D)-(4E).

[143] There were some differences in the versions of the American Innovation and Choice Online Bill reported back by the House Judiciary Committee and by the Senate, with the Senate version requiring the enforcing authority to prove a material harm to competition, and the House version instead including a defence if a platform could show that their conduct did not harm the competitive process by restricting or impeding legitimate activity by business users, or if it increased consumer welfare.

[144] https://sgp.fas.org/crs/misc/R46875.pdf at p 48.

The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act would also require digital platforms with users above a specified minimum threshold to facilitate user data portability and interoperability, to better enable users to switch between different platforms.

Finally, the proposed Ending Platform Monopolies Act would introduce a structural separation regime for digital platforms. Digital platforms would be prohibited from owning or controlling another line of business that uses the platform to sell products or services, that offers a product or service that the platform requires a business user to purchase or use as a condition for access to the platform, or that otherwise gives rise to a conflict of interest.

5. UPDATING EXISTING COMPETITION FRAMEWORKS AND RECOMMENDING CHANGE USING SOFT LAW APPROACHES

Other than the legislative initiatives explained above, some competition authorities have developed soft law approaches, for example, establishing guidelines to set rules and clarify their approaches towards certain types of conduct by digital platforms. Those documents have also drawn a line between acceptable and unacceptable business practices from competition authorities' perspectives.

Soft law initiatives often are not legally binding, and the extent of and limits to the influence they can have differs across jurisdictions. Even so, they provide greater legal certainty for businesses and consumers by outlining a competition authority's thinking, and depending on the relevant jurisdiction's legal settings can also influence or carry significant weight in court. Soft law initiatives also have the effect of an advocacy tool or a preventive measure which raises awareness about how competition law violations could arise, with the objective of helping businesses conduct their activities in a way that is less likely to raise concern. Soft law initiatives have the added advantages of being measures that competition authorities can develop independently of other agencies or the legislature. This means that competition authorities have more control over the development of soft law initiatives, including their timing.

Market studies are another tool that can be used to identify conduct and business practices that are problematic from a competition perspective, and recommend changes to that conduct or the regulatory and legal settings that may be allowing it to occur. They can also be a useful tool to identify areas for further investigation to assess if enforcement action is warranted.

This section illustrates i) guidelines and other similar documents, ii) market studies adopted by competition authorities around the world, and also provides examples of iii) *fora* to cooperate with other regulators to better understand and target problematic conduct in the digital economy.

a. Guidelines and other similar documents

Competition authorities in several jurisdictions have been issuing guidelines and similar documents (such as reports, strategy papers and documents outlining enforcement priorities)[145] which outline their approach to particular competition issues associated with the digital economy. These documents commonly fill perceived "gaps" in existing competition frameworks, or update analytical frameworks that had previously been considered ill-suited to the digital economy.

For example, several competition authorities have issued guidelines or other documents that outline updated approaches to market definition,[146] their approach to analysing competitive effects in zero-price markets,[147] their approach to "killer acquisitions",[148] and their approach to vertical or conglomerate competition issues and abuses of dominance that can arise when digital platforms broaden their activities in ways that place them in competition with their business users.[149]

The extent to which soft law initiatives can be used to update or fill gaps in existing legislative frameworks

145 Examples of documents outlining enforcement priorities include Mexico's 2020 digital strategy report and 2022-2025 Strategic Plan.

146 For example, Brazil's reports on digital markets, the Republic of Korea's Guidelines on abuse of market dominance, Nigeria's Notice on Market Definition, Singapore's guidelines on abuse of dominance in digital markets and the United States of America's draft updated Merger Guidelines.

147 For example, the Republic of Korea's Guidelines on abuse of market dominance, Nigeria's Notice on Market Definition and the United States of America's draft updated Merger Guidelines.

148 For example, Brazil's reports on digital markets, Singapore's guidance on abuse of dominance in digital markets.

149 For example, Japan's Distribution Guidelines, Japan's Digital Platform Guidelines, the Republic of Korea's Guidelines on abuse of market dominance and the United States of America's draft updated Merger Guidelines.

and encourage changes in behaviour will depend on the particular legal settings of each jurisdiction.

Brazil: Reports on digital markets

In recent years, Brazilian authorities have released several reports and statements on the future of competition enforcement. In 2019, Brazil's competition authority CADE addressed competition in the digital economy by stressing the importance of balancing intervention to protect consumers and competition against the risk of harming innovation.[150] In August 2021, CADE produced a report that further examined issues in the digital economy.[151] The report, which examined mergers from 1995 through 2020, reflected a significant increase in digital mergers in more recent years, particularly 2018 and 2019.

The report also explains how CADE has defined digital markets (including digital music, online travel, sporting goods, booksellers, cosmetic, multiproduct retailers, etc.) and cites relevant cases. It also examined barriers to entry into these markets.

In May 2020, CADE released a working paper entitled "Concorrência em mercados digitais", which examined some of the negative conduct in digital markets. This conduct included: privacy violations with customer data, imposing unfair terms of access on customers whose businesses depend on platform access, charging prices for platform access, and unfairly imposed commissions or contractual terms, using reputational instruments to harm competitors or consumers, and removing potential rivals via acquisitions or exclusionary strategies.[152] However, the paper was a summary of "the main international studies" and was not an independent study conducted by CADE itself. It therefore may not represent CADE's own views.

Finally, in 2021, the chairman of CADE, Alexandre Cordeiro, stated that examining a business plan for an acquiring firm in the digital economy is essential when evaluating the value of an acquisition. Business plans would be particularly significant when evaluating the acquisition of nascent competitors and the possibility of long-term market foreclosures.

Japan: Guidelines on distribution and on abuse of superior bargaining position[153]

Over the last few years, the JFTC has been actively researching, discussing and providing guidance on competition in the digital economy. Perhaps the most significant of these are the 2017 JFTC amended Guidelines Concerning Distribution and Business Practices (Distribution Guidelines) to modernize the structure and deal with e-commerce issues, and the 2019 Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information (Digital Platform Guidelines) 2020 to better define various issues in the digital economy. Additionally, the JFTC has produced numerous studies and discussion papers regarding digital markets. While this section will not touch on all of them, they demonstrate the increased scrutiny this economic sector is facing.[154]

The Distribution Guidelines

The Distribution Guidelines deal with a variety of issues, however, they are explicitly designed to address "e-commerce," enterprises using the internet and platforms, defined here as enterprises that offer services to two or more user groups such as consumers and those trying to sell products to them.[155]

To better assess these new enterprises, the Distribution Guidelines provide new standards for assessing the competitive effects of vertical restraints of trade. Rather than issuing a blanket censure of these restraints of trade, the JFTC provides a system that acknowledges network effects and the possible benefits of such restraints. If a vertical restraint of trade tends to impede fair competition it is found to

150 BRICS Competition Authorities' Working Group on Digital Economy, BRICS in the digital economy: competition policy in practice, 2019.

151 11 CADE, Mercados de Plataformas Digitais, August 2021.

152 CADE, Concorrências em mercados digitais, 5/2020.

153 https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf; https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/DistributionSystemsAndBusinessPractices.pdf; https://www.jftc.go.jp/en/policy_enforcement/mergers/; https://www.jftc.go.jp/en/policy_enforcement/digital/index.html.

154 https://www.jftc.go.jp/en/policy_enforcement/digital/index.html.

155 Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act Part I (1).

be unlawful. To determine the competitive effect of a behaviour the following factors are considered:

(a) the actual conditions of inter-brand competition (such as market concentration, characteristics of products in question, the degree of product differentiation, distribution channels, difficulty of new market entry, etc.).

(b) the actual conditions of intra-brand competition (such as the degree of dispersion in prices, and business types of distributors, etc. dealing in products in question, etc.).

(c) the position in the market of the enterprise that imposes vertical restraint (in terms of a market share, ranking, brand value, etc.).

(d) the impact of the vertical restriction on business activities carried out by the affected trading partners (such as the degree and manners of the restraint, etc.); and

(e) the number of trading partners affected by the restraint, and their positions in the market.[156]

The significance of each of the factors varies on a case-by-case basis. For example, platforms' vertical restraints should account for the state of competition between the platform and its competitors as well as "on a reflection of network effects."[157]

The JFTC considers both price and non-price vertical restraints as relevant to understanding whether an enterprise is "tending to impede fair competition.[158] Vertical price restrictions are practices that reduce or eliminate price competition amongst distributors. Vertical non-price restraints can differ based on case but include: (i) those which should not be considered illegal merely based on types of the restraints, but should be determined on a case-by-case basis whether tend to impede fair competition; and (ii) those which tend to impede price competition and is considered in principle to tend to impede fair competition, regardless of a position in market of an enterprise which imposes the restraint.

While these guidelines apply to many enterprises outside of the digital economy, the focus on network effects, vertical restraints, ease of entry, as well as the explicit mention of digital platforms suggest a heavy focus on digital platforms.

The Digital Platform Guidelines

On December 17, 2019, the JFTC published guidelines examining the interaction between competition law and digital platforms. The guidelines focused mainly on platforms that provide free goods and services in exchange for the acquisition of the users' data. They identify several ways in which digital platforms can gather and use personal and consumer data from their users in ways that disadvantage consumers and adversely affect competition.[159]

The Digital Platform Guidelines identify a disparity in negotiating power between consumers and platforms.[160] The extent of this disparity is so great that it would "impede the free and independent judgment of such consumers" and a platform "will also likely gain advantage over its own competitors."[161] When the disparity in bargaining strength is so great, particular uses of it can be characterized as an abuse, and thus be barred as an unfair trade practice.

Japan's Antimonopoly Act Article 2 Paragraph 9 Item 5 defines abuse of a superior bargaining position as conduct that causes disadvantage for the counterparty in continuous transactions by unjustifiably making use of one's superior bargaining position over the counterparty compared to normal business practices. Consumers' data, including data about all of a consumer's personal attributes and activities, has economic value. Therefore, as consumers engage with digital platforms they enter into continuous transactions with these platforms and are covered by the law.

Simply using the data is not sufficient, however, to demonstrate abuse of a superior bargaining position. It is also necessary to demonstrate that consumers are suffering detrimental treatment and are compelled to use the services provided by the digital operator, consumers are compelled to give the platform their data to have access to the platform, and the platform has a superior bargaining position relative to consumers.

156 Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act Part I (3).

157 Id.

158 Id. Part I(3)(2).

159 2019 Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information Introduction.

160 2019 Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information Section 1.

161 Id.

A superior bargaining position is established if: (i) there is no other digital platform operator that provides substitutable services to consumers; (ii) another digital platform operator does provide a substitutable service, but it is practically difficult to stop using the said service; or (iii) the digital platform operator providing the said services is in a position to control somewhat freely the trade terms, such as prices, qualities, and quantities of the services.

The guidance also instructs regulators to consider on an individual basis the normal business practices of these digital platforms, the specific form of abuses an individual firm can commit depending on the amount and type of data they have access to and how they use the data that they accumulate. All these factors and behaviours can have large scale effects on their anti-competitive information.

Finally, the JFTC has conducted a wide range of studies and policy papers on specific areas in the digital economy, including data markets, algorithms and artificial intelligence.[162]

Republic of Korea: Guidelines on abuse of market dominance[163]

The Korea Fair Trade Commission (KFTC) has adopted new guidelines aimed at online platforms. The new guidelines, entitled the Guidelines for Review of Abuse of Market Dominance by Online Platform Operators, took effect on 12 January 2023. The new guidelines are supplementary to existing abuse of dominance guidelines, but especially focused on behaviors associated with online platforms including multi-sided markets, network effects, effects of data concentration, innovation and other dynamic market effects. Additionally, they are expressly designed to target acts performed by foreign entities if they affect Korean markets.

The new guidelines identify online platform services that they will regulate. These services include: (i) online brokerage services, (ii) online search engines, (iii) online social networking services, (iv) digital content and media services, (v) operating systems, (vi) online advertising services and (vii) similar services the above that facilitate interactions between different groups of users to facilitate transactions and exchanges of information.

They also identify characteristics that can be used to identify the online platforms that they are designed to regulate. First, online platforms are likely to operate as multi-sided markets connecting different groups of users. Next, they are found to have cross-network effects, meaning that the number of one kind of user will have a direct effect on the utility of the platform for a different kind of user. The cross-network effect can lead to a "tipping effect," making it more difficult for new entrants to gather enough users to make themselves competitive and entrenching the position of online platforms. Moreover, because these platforms see lower costs as the number of users increases, they also achieve economies of scale. While this can have huge benefits to consumers, it can also unfairly raise the barriers to entry for new platforms.

Another identified characteristic is the accumulation and utilization of vast quantities of data. It is true that this data can be used to improve services for users and provide other normal competitive advantages, using systems that purposely limit data portability and interoperability will restrict competition.

Finally, online platforms are characterized by services that are nominally free. The guidelines point out that the platforms can use an isometric pricing structure in which some users are able to access the platform for free to attract them, while others must pay to interact with the "free" users. They also point out that the nominally free services are truly exchanged for the user's personal information, as well as their attention, all of which carries an underlying monetary cost. This new definition clarifies that digital operators can be subject to competition law enforcement even if they provide free services.

Under the platform guidelines, the KFTC can take a more dynamic approach to market dominance of online platforms. With the new guidelines the KFTC will consider the barriers to entry caused by network effects, platforms' positions as gatekeepers, the accumulation and use of data when making a market

162 https://www.jftc.go.jp/en/policy_enforcement/digital/index.html.

163 https://www.kimchang.com/en/insights/detail.kc?sch_section=4&idx=26661#:~:text=The%20Korea%20Fair%20Trade%20Commission,as%20of%20January%2012%2C%202023; https://www.leeko.com/upload/news/research/183/20230411143007669.pdf; https://globalcompetitionreview.com/article/korea-publishes-abuse-of-dominance-guidelines-digital-markets; https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/south-korea-kftc-boosts-antitrust-laws-stronger-regulation-and-pivotal-amendments.

dominance assessment. In addition, if sales value is not sufficient to calculate market share, the KFTC can also use the number of users, frequency of use and length of stay of each user as factors to make such a determination.

The new guidelines also specify various methods of assessments for anti-competitiveness. They allow the KFTC to balance anti-competitive effects against efficiency enhancing benefits. However, because online platforms operate differently than other businesses, anti-competitive activity will be assessed using factors other than price increases or output decreases. The KFTC will also consider decreases in the variety of products and services, diminishing quality, higher costs for certain classes of users and bars to innovation.

In addition, the KFTC can determine whether an online platform is employing its dominant position using its core services to exert influence over adjacent products and services. It also considers whether the platform can achieve dominance in these related markets and further solidify its dominance.

Moreover, even when the KFTC defines separate markets for each side of a multi-sided market, it can account for the relationship among these different sides in making a competitive analysis. Nevertheless, this is not an absolute determination. The KFTC can still find that it is unreasonable to link the harm dome to one group against the benefits enjoyed by another and vice versa.

The new guidelines also gave new review criteria based on the kind of act under investigation. These include new standards for restricting multi-homing, demanding most favored nation clauses, self-preferencing and tying.

Restricting multi-homing occurs when an online platform directly or indirectly limits their users from using a competing platform. This includes exclusivity agreements, but also more subtle ways of restricting the use of competing platforms such as economic incentives for single-homing or increasing the cost of using competing platforms. This does not wholly bar these restrictions, as there can be some economic benefits to single homing, rather it adds this as an area of focus for the KFTC enforcers.

Another area of focus are platforms demanding most-favored nation treatment. These refer to instances in which online platforms demand that business users trade goods on their platforms under equally or more favorable terms compared to those of other distribution channels. The guidelines note that the broader these agreements, the more likely they are to be considered anticompetitive. Most favored nation clauses are not banned outright; however, pro-competitive effects may be considered in their assessment.

Next, the guidelines address the issue of self-preferencing. This occurs when platforms give favorable treatment to their own products or services compared to their competitors on the platform. This can be direct or indirect. Direct treatment occurs when the platform promotes its own goods or results compared to its competitors. Indirect self-preferencing occurs when the platform promotes vendors who have a relationship with the platform over those that do not. The platform's position as a "rule-maker" and a competitor allows it to assert power over adjacent markets. The KFTC will balance the competitive advantages against the losses in competition.

Finally, the new guidelines flag tying as an issue to be monitored for digital markets. Tying is when an online platform forces its users to use other platforms and services as a condition to use the platform. Even "free" platforms can engage in tying according to these new guidelines.

It is important to note that these guidelines do not establish new regulations or standards, instead they provide guidance on how the KFTC will approach and prioritize in the digital sector.

Mexico: Reports on digital markets

In recent years, Mexico has paid increased attention to competition and digitalization. In 2018, Mexico's competition agency (COFECE) published an initial report assessing interaction between competition law and the digital economy.[164] In the following years, the COFECE'S President gave a speech highlighting the unique challenges that these emerging technologies

[164] COFECE, Rethinking competition in the Digital Economy, 2018, https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf.

pose for antitrust enforcement.[165] Finally, in March 2020, COFECE published a new document on its digital strategy.[166] The 2020 report highlighted numerous areas of concern that are characteristic to digital markets such as: a "winner take all" dynamic, algorithmic collusion, acquisition of nascent competitors, weighted consumer behavior, and exploitation of consumer data.

The term "weighted behavior of consumers" refers to consumers' unwillingness to try new brands in the digital space in part due to the cost and difficulty of migrating data between platforms. In addition, it refers to consumers' inability to differentiate among search results, and their tendency to choose the first among a list of options. This tendency can be used to steer the consumer towards certain search results.

Firms can also exploit consumer data in several ways. They can use the data to raise barriers to entry for their competitors. Additionally, enterprises can bar their competitors from accessing and using this data. Finally, firms can influence consumer decisions in a harmful way, for example, using the data to raise prices.

The report discusses particular features of the Mexican economy that have influenced COFECE's views on the appropriate response to the participation of digital platforms in Mexican markets. It suggests that "the high degree of concentration persistent in" Mexico's energy, telecommunications, finance and health markets means that elements of digital technologies that often raise concern in more developed economies may not yet have the same effect in the Mexican context, and the entry of large technology firms into highly concentrated traditional markets in Mexico could (and has) introduced beneficial competitive pressure, at least in the short term.

In light of those factors, the report indicates that COFECE will closely monitor the impact of digital supply on how markets evolve. It expresses wariness of overregulating in a way that would "unwarrantedly inhibit the new digital supply" and sees benefit in giving digital platforms the opportunity to compete with traditional providers. However, COFECE considers it necessary to pay special attention to whether markets in which global technology giants participate approach tipping points that could bring the challenges they present elsewhere.

The report proposed four strategies for digital enforcement. First, position economic competitiveness in the public agenda via a document containing public proposals so that digital markets can benefit Mexican consumers. Next, effectively apply competition regulations. Third, actively drive the prevention and correction of anticompetitive market structures via a forum with international experts and by strengthening its capabilities and technological infrastructure. Finally, strengthen enforcement by establishing a Competition in Digital Markets Unit.

COFECE has also identified digital markets as a priority sector in its 2022-2025 Strategic Plan, "with the purpose of making emphasis on them in its actions".[167]

Nigeria: Notice on Market Definition[168]

The Federal Competition and Consumer Protection Commission (FCCPC) released a Notice on Market Definition in 2021 that significantly addressed Zero Price Markets and Digital Markets.[169] It first addresses these issues while discussing how to determine market definition. In traditional market analysis, price is used, among other things, to determine if the market is defined correctly. However, in zero price markets, it can be impossible to determine what the relevant market is. Zero price markets include businesses whose services are nominally free but attract users into a multisided market. In such cases, the firms compete on a non-price basis using factors like quality and cost.

Moreover, in digital markets, the value of the services is affected by the number of users on a platform and how intensively they use the services the platform provides. When a business is structured in this way, the market should be determined with the "external or network effects" in mind.[170] These networks and multi-sided markets that bring together economic agents and manages the external effects between them is referred to as a platform.

165 COFECE, Digital market analysis, a challenge for competition authorities in the world today, 2019.

166 COFECE, Digital Strategy, 2020.

167 https://www.cofece.mx/wp-content/uploads/2022/11/PE2022-2025-ing-VF.pdf.

168 https://unctad.org/system/files/non-official-document/ccpb_IGECOMP2021_Nigeria_Irukera_en.pdf; https://fccpc.gov.ng/wp-content/uploads/2022/09/FCCPC-Notice-on-Market-Definition-2022.pdf.

169 FCCPC Notice on Market Definition 2021, https://fccpc.gov.ng/wp-content/uploads/2022/09/FCCPC-Notice-on-Market-Definition-2022.pdf.

170 FCCPC Notice on Market Definition at 18.

These platforms bring to light many issues that do not typically occur in conventional markets. For one thing, they raise the question of whether the many markets that they contain can be considered a single or separate markets. In addition, since the markets interact, to what extent can they be considered independent. Finally, how should zero price markets be properly assessed.

To address the last issue, the FCCPC suggests a variety of other factors to consider including qualitative and functional differences. Therefore, instead of using price-based analysis, enforcers would use quality and function to determine if there were relevant substitutes that consumers could use in place of the platform in question. In addition, the FCCPC would consider the industry participants tracking and responding to their rivals' price changes and their level of knowledge regarding a user's likelihood and ability to switch to another platform. Factors like reduction in quality, product variety, service and innovation all would point to anticompetitive activity by the platforms under examination.

The FCCPC also suggests a small but significant non-transitory increase in quality and currency tests using the small but significant non-transitory increase in price (SSNIP) framework. These tests would account for changes in quality and changes in cost based on non-monetary currency—meaning paying using personal data and similar resources. As with "normal" competition analysis it is imperative to investigate the substitutability of goods and services offered by multi-sided platforms with other firms.

The FCCPC also considers the commercial realities faced by consumers of digital platforms and the unique economic features that characterize digital platforms in the market definition process such as: (i) strong network effects; (ii) strong economies of scale and; (iii) marginal costs close to zero; (iv) high and increasing returns to the use of data; (v) low distribution costs that allow for a global reach; and (vi) data protection and privacy laws and regulations and compliance with such normative standards and consumer awareness.

Finally, the report acknowledges the complexities of conducting competition analysis between a single market firm and a two-sided (or more) sided platform. In these instances, it may be appropriate to weigh the external effects of the two-sided market, even if there are no equivalent factors in the single-sided market. However, this must be considered on a case-by-case basis.

Singapore: Guidance on abuse of dominance in digital markets[171]

In December 2021, the Competition and Consumer Commission of Singapore (CCCS) issued a guidance note for business and revised several guidelines to account for digital markets.

These include guidance on how to assess network effects on the market power of digital firms. Network effects occur when the number of users of a product or service improves its value. This is very common in online services and multi-sided platforms which facilitate interactions between the different kinds of users, creating value for sellers and buyers.

The new guidelines address abuse of dominance in digital markets, including by outlining factors to consider in these instances. These include: (i) the tendency of customers to switch to other suppliers, (ii) the control or ownership of key inputs such as physical assets, proprietary rights or data, (iii) the potential incentive and/or ability for customer to join or use more than one digital platform, (iv) the difficulty of competing effectively with a competitor that produces multiple products and enjoys economies of scope, and (v) whether an entity leverages its market power in one market to favor itself or any other undertakings, thereby affecting competition in another market.

In addition, the guidelines provide further clarity on how to assess mergers, with particular focus on digital markets. One significant change is an increase in focus on the effect the merger will have on innovation. This means that CCCS will consider the non-coordinated effects if one of the merging parties is an important innovator, even without significant market share. They also consider the data ramifications of mergers. First, it allows the CCCS to determine whether data protection is a significant parameter of competition in a specific merger. Next, whether proprietary rights and data may be considered barriers to entry and expansion.

Finally, the amendments to the guidelines discuss changes in market definition. The first change is the introduction of the "multi-sided platform." In making this assessment, the CCCS will consider innovation as an input for market definition. They also discuss the assessment of competition concerns outside of Singapore, although Singapore will only consider the effects on competition within its borders.

171 https://www.cccs.gov.sg/legislation/competition-act.

United States of America: draft updated Merger Guidelines[172]

In July 2023, the FTC and Department of Justice (DoJ) in the United States of America released an updated draft of their Merger Guidelines for consultation.[173] The stated goal of the updates in the draft is "to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law". These updates are comprehensive and are largely driven by the need to adapt to the digital economy, and also integrate concerns among those agencies about buyer power (particularly in labour markets). This overview of the draft updated Merger Guidelines will provide a high-level overview of their contents, with a focus on specific references they make to digital markets.

Principles for determining whether a merger is anticompetitive

The draft updated Merger Guidelines set out thirteen principles that the FTC and DoJ may use when determining whether a merger is anticompetitive and violates antitrust laws, providing comprehensive descriptions on how each of those principles could apply in different merger scenarios. Three guidelines that make specific reference to digital markets are outlined below, although of course any or all the guidelines could be relevant to mergers involving digital platforms.

Guideline 3 provides that mergers should not increase the risk of coordination. It highlights the risk of tacit coordination through observation and response to rivals and lists primary and secondary factors to assess how a merger may change the likelihood, stability or effectiveness of coordination. The discussion of how those factors apply includes specific explanations of how the FTC and DoJ will treat the use of algorithms and artificial intelligence. Their use to track or predict competitor prices or actions will be treated as increasing the transparency of a market and increasing the likelihood of strong and fast competitive responses from rivals in response to price changes, which are secondary factors that would indicate to the FTC and DoJ consider that a market may be susceptible to coordination.

Guideline 7 provides that Mergers should not entrench or extend a dominant position. One of the possible means that the draft updated Merger Guidelines identify to entrench a dominant position is to increase switching costs by giving a dominant confirm control of something customers use to switch providers, such as a data transfer service. Other identified means include depriving rivals of scale economies or network effects or eliminating a nascent competitive threat. The FTC and DoJ will also consider market realities specific to a merger, including entry barriers. For example, technological transitions may help reduce existing entry barriers, but "a dominant firm might seek to acquire firms that help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition." Alternatively, "a dominant firm might seek to acquire firms that might otherwise gain sufficient customers to overcome entry barriers" over the course of a technological transition.

Most significantly, Guideline 10 is targeted specifically at mergers involving digital platforms. It provides that when a merger involves a multi-sided platform, the FTC and DoJ may examine competition between platforms, on a platform, or to displace a platform. The guideline identifies some common key attributes of multi-sided platforms as having multiple sides which each involve the provision by the platform of a different type of product or service, a platform operator that controls access to the platform and can influence how transactions among platform participants play out, different platform participants on each side of the platform, network effects which can create a tendency towards concentration in platform industries, and the potential for conflicts of interest when a platform operator is also a platform participant.

Guideline 10 further explains that the FTC and DoJ will protect competition between platforms by preventing the acquisition or exclusion of other platform operators that may substantially lessen competition or tend to create a monopoly, and outlines types of mergers that they consider may lead to such a result. These are mergers that involve two platform operators and eliminate competition between them, a platform operator acquiring a platform participant (which can intrench the operator's position by depriving rivals of participants and, in turn, network effects), acquisitions of firms that provide services that facilitate participation on multiple platforms (also depriving rivals of platform participants), and mergers that involve firms that provide other important inputs to platform services.

[172] https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[173] https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

The agencies will protect competition on a platform by examining whether mergers that involve platform operators and platform participants could create conflicts of interest that would harm competition, because of its incentive to give its own products and services an advantage against other competitors participating on the platform.

Finally, they will protect against efforts (including relatively small accretions of power) by dominant platform owners to inhibit the prospects of the platform being displaced or to decrease dependency on their platforms.

Market definition

Appendix 3 of the draft updated Merger Guidelines sets out changes to the FTC's and DoJ's approaches to market definition. While it retains reference to the hypothetical monopolist test (now updated to also include a hypothetical monopsonist), it has expanded its analytical approach to this test. The traditional test of whether a hypothetical monopolist would likely undertake a small but significant and non-transitory increase in price (SSNIP) is now supplemented with an additional question of whether they would likely undertake a small but significant and non-transitory worsening of any other terms (SSNIPT). Those other terms could include equality service, capacity investment, choice of product variety or features, or innovative effort.

Appendix 3 also outlines considerations for market definition in specific settings. One of those settings is "one stop shops in markets," such as online retailers, where customers can select a combination of products to purchase at once. Where this is the case, the FTC and DoJ may define more than one market for assessing a particular merger. These could be a market for one-stop shops only, or a market that includes both one-stop shops and other shops such as specialty suppliers.

b. Market studies

The digital economy has become a popular subject for market studies. This section provides an overview of a small selection of recent market studies in the digital economy. Market studies can enable competition authorities to comprehensively review the operation and competitiveness of the digital economy and the behaviour of the different actors in it, no matter their size. This often includes examining practices that may not reach thresholds for illegality, but still have an adverse impact on competition either individually or in combination with other practices.

Mexico: Market study on retail e-commerce

In March 2022, COFECE initiated a market study into possible barriers to competition and essential inputs in the retail e-commerce market.[174] COFECE described this market study as its "first investigation" in digital markets carried out … through a special procedure, aimed at identifying whether barriers to competition and free market access and facilities exist".

South Africa: Online Intermediation Platforms Market Inquiry

In July 2023, South Africa's Competition Commission released its final findings and remedial actions from its Online Intermediation Platforms Market Inquiry.[175] Initiated in May 2021, the Inquiry was directed at understanding market features of online intermediation platforms that may impede, distort or restrict competition, and promote the participation of small and medium enterprises and historically disadvantaged persons (HDPs) in these markets. Specifically, the study examined app stores, Google Search, ecommerce platforms, online travel agency platforms, food delivery platforms, and platforms for property and automotive classifieds.

The provisional report for the Inquiry had initially floated a potential recommendation to develop regulation or legislation to address the competition issues posed by scaled or leading online intermediation platforms. This regulation would have provided mechanisms to identify leading platforms in online intermediation platform markets, and then prohibit specific categories of conduct which have adverse effects on competition.[176]

However, the Commission ultimately did not recommend regulation or legislation for the time being, on the basis that such an approach may be piecemeal and fail to systematically address the

[174] https://www.cofece.mx/wp-content/uploads/2022/04/COFECE-013-2022_ENG.pdf.

[175] https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf (Full Final Report and Decision), https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Summary-of-Findings-and-Remedial-action.pdf (Summary of Final Report Findings and Remedial Actions).

[176] https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-MPR-Chapter-9-Findings-and-Recommendations.pdf (Provisional Report, Chapter 9 – Summary of Provisional Findings and Provisional Recommendations).

overarching challenges of digital markets. South Africa's Competition Act enables the Commission to require remedial actions to be taken to address the matters identified in a market inquiry. Instead of recommending regulation or legislation,[177] the Commission chose to use this tool to require specific remedial actions by the relevant leading platforms and recommended continuing debate about how to best respond to the challenge of digital markets. The Commission suggested that the ongoing debate should include the possibility of a more comprehensive solution, potentially through regulations or legislative changes. It also noted the African Union's adoption of the Competition Policy Protocol for the African Continental Free Trade Area and its inclusion of digital gatekeeper provisions discussed in Section 3 in this paper, to which South African law should eventually align.[178]

The Commission identified concerns relating to a lack of transparency regarding advertising practices and potential differences in list prices on platforms and list prices for in-store purchases, insufficient constraints on app stores' commission fees combined with their use of anti-steering rules, the global business model of app stores resulting in limited curation and visibility of locally developed apps (even if they have particular relevance or attraction for domestic consumers), the evolution of Google Search over time to give more prominence to paid results relative to organic results, self-preferencing by platforms of their own offerings in its search results, the use of price parity clauses and price discrimination by platforms, and commission structures that disincentivize business users from multi-homing.

The specific remedial actions the Commission is requiring as outcomes of the inquiry include requirements to change the way results are presented (including clearly identifying where advertisers have paid for a boosted ranking position and improving the prominence of organic and South African search results), requirements to stop engaging in various practices of concern (usually imposed on the platforms themselves, but in at least once case targeted at franchisors' policies limiting which platforms their franchisees can use), requirements to periodically notify consumers of certain pricing information and to change or implement specified pricing policies, requirements to enable interoperability, and requirements to develop and implement specific schemes. Those schemes include a responsible advertising code, providing advertising credits, training and other support to specific types of South African businesses to better enable them to better compete on relevant platforms, and dispute resolution mechanisms. The Commission has additionally required one platform service to apply the measures required of it by Europe's Digital Markets Act in South Africa to address concerns about self-preferencing.[179] The Commission is also pursuing structural remedies, having already imposed requirements on one platform to operationally separate its retail division from its platform operations and indicating that it will make an application through the Competition Tribunal of South Africa to require national real estate agencies to divest their shareholdings in a leading platform for classifieds.

The objectives of South Africa's competition regime and the Inquiry include improving the participation of SMEs and HDPs. This means that the remedies are not only targeted at addressing factors relating to the market power of the digital platforms themselves. Some are designed to assist SMEs and businesses run by HDPs to better reach South African consumers and overcome the relative disadvantage they have against other firms using digital intermediation platforms to sell goods and services despite their relatively limited resources. While this means some of the remedies may not be appropriate for every country's local context, it is also an example of how local factors can influence the appropriate response.

United Kingdom: Mobile Ecosystems Market Study[180]

In June 2021, the United Kingdom's CMA launched a broad-ranging market study into mobile ecosystems, to assess whether competition is working well for consumers and citizens in the United Kingdom. The components examined were operating systems,

[177] Section 43D(1) of South Africa's Competition Act, 89 of 1998, as amended.

[178] Summary of Final Report Findings and Remedial Actions, page 13 and Full Final Report and Decision, page 15.

[179] The Commission chose this approach in the interests of facilitating Google's own regulatory compliance and oversight by the Commission.

[180] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138104/Mobile_Ecosystems_Final_Report_amended_2.pdf; and https://assets.publishing.service.gov.uk/media/62a228228fa8f50395c0a104/Final_report_summary_doc.pdf.

app stores and web browsers. The final report for the market study was published in June 2022.

It formed part of a "broader programme of work, which includes the establishment of a new pro-competition regulatory regime for digital markets in the UK, and [the CMA's] active competition and consumer enforcement work."

The market study found that Apple and Google had a duopoly and stranglehold over the key gateways of operating systems, app stores and browsers. Both had powerful positions and unilaterally determined the "rules of the game," making it "difficult for rival businesses such as browsers or alternative app stores to compete." Both firms were "well placed to leverage their power into other markets linked to their ecosystems, including new emerging ones," and businesses in the United Kingdom were highly reliant on access to their products and services for their operations. Neither Apple nor Google faced significant threats from other competitors because of (i) network effects, (ii) pre-installation, defaults and choice architecture, (iii) barriers to switching, and (iv) the difficulties of challenging large, interconnected and established ecosystems.

In making these findings, the CMA acknowledged that "Apple and Google's stewardship has helped bring benefits for people and businesses, such as substantial investment and popular trusted products." However, the restrictions they imposed were likely to result in consumers experiencing less innovation, less choice, and ultimately higher prices.

While the CMA had concerns relating to both Apple and Google, its concerns regarding Apple were greater given the more direct nature of the restrictions imposed by Apple. Key practices of concern by Apple included restrictions on the installation of non-Apple app stores on Apple devices, blocking "sideloading" of applications from the web, other restrictions on ways to access services, restrictions on browser functionality and the use of browser engines other than Apple's WebKit. Key practices of concern by Google related to agreements with and payments to Android device manufacturers to ensure that Google Chrome and the Google Play Store were prominently pre-installed on most Android phones, and that Google was the default search engine in many browsers, and not allowing alternative app stores to be downloaded through Google's Play Store (although they could be downloaded onto Android devices through other means, which may involve several steps and security warnings).

The CMA characterized the problems it identified as "entrenched" and unlikely to be resolved without interventions being made to open competition in browsers and app distribution, to remove or revise unnecessary restrictions, and to introduce safeguards aimed at ensuring fair and reasonable treatment of app developers.

As outcomes of the market study, the CMA recommended an *ex-ante* regulatory approach to oversee powerful tech firms, opened a consultation on a market investigation into mobile browsers and cloud gaming (although its later decision to open this investigation was ultimately successfully challenged by Apple before the Competition Appeals Tribunal (CAT), and the case remains stayed while the parties await judgment on the CMA's appeal of the CAT's decision to the Court of Appeal).[181] The CMA took enforcement action in respect of conduct of concern, including investigations into the app store payment practices of Apple and Google. The CMA did not reach any final views or carry out detailed design on the potential remedies, but suggested that the regulatory approach could include measures to:

(a) open the markets to help level the playing field for other businesses to compete, including by removing and revising existing restrictions and measures to enable users to make more active and effective choices (such as tackling the power of defaults).

(b) prevent Apple and Google from exploiting their power by making changes to ensure they cannot unfairly favour their own businesses, provide greater transparency and information about their decision-making, and ensure others can access their platforms on fair and reasonable terms (including on fair commission rates).

(c) safeguard app developers through measures such as requiring a fair and transparent app review process, restricting Apple and Google

[181] https://www.blackstonechambers.com/news/apple-inc-v-competition-and-markets-authority/.

from sharing and using data or insights from their operation of their app stores with their app development businesses, and not unreasonably restricting third party access to hardware and software (such as the NFC chip that enables contactless payments).

(d) open competition and address harms in app distribution.

(e) improve choice and quality in browsers.

The CMA considered there to be inherent challenges that would make opening competition in operating systems difficult but was "confident that changes in other parts of their ecosystem would have more impact."

Over the course of the market study, the CMA worked closely with other authorities. Domestically, this included the Information Commissioner's Office (the United Kingdom's data privacy regulator) in its consideration of competition issues that interacted with privacy concerns, with the CMA indicating that it will continue to work with other regulators through the United Kingdom's Digital Regulation Cooperation Forum. It also worked closely with other competition authorities around the world that had already undertaken similar work or were considering similar issues. The CMA highlighted the importance of working with the United Kingdom's European partners and other countries when developing an *ex-ante* digital regime, particularly considering similarities between the areas targeted and potential interventions in CMA's proposals and the European Union's DMA.

c. *Fora* for international and domestic cooperation

This section provides two illustrative examples of competition authorities engaging in *fora* to cooperate with other regulators to improve their understanding of the digital economy, the potential competition issues associated with the digital economy, and potential areas for enforcement.

The first example shows cooperation with other domestic regulators which have different mandates but may nevertheless be concerned with the same types of conduct as a competition regulator.

The second example shows cooperation with other competition regulators. As well as helping individual competition regulators build their approach and understanding, such fora can also help build consistency across competition frameworks in individual regions.

Canada: Canadian Digital Regulators Forum

In June 2023, Canada's Competition Bureau, Radio-television and Telecommunications Commission, and Office of the Privacy Commissioner announced the creation of the Canadian Digital Regulators Forum.[182] The purpose of the Canadian Digital Regulators Forum is to strengthen information sharing and collaboration between the three agencies on matters relating to digital markets and platforms. They intend to "exchange best practices, conduct research, and collaborate on matters of common interest, such as artificial intelligence and data portability" as they "keep pace with rapid changes in the digital economy."

According to its terms of reference,[183] the Canadian Digital Regulators Forum is an informal forum and does not provide formal advice. Instead, it aims to facilitate increased partnership and cooperation to help the participating agencies to expand their regulatory capacities and better fulfil their individual mandates.

The heads of the participating agencies will meet one to two times every fiscal year to confirm priorities and workplans. A core working group, consisting of senior officials and employees from each agency, will aim to meet quarterly to update each other on relevant developments, share knowledge, seek support, and advance agreed priorities and objectives. Stakeholders may be invited to observe meetings or present on particular issues, and other agencies may be invited to join as formal members in future.

Africa Heads of Competition Authorities Dialogue

In February 2022, the competition authorities of Egypt (the Egyptian Competition Authority), Kenya (the Competition Authority of Kenya), Mauritius (the Competition Commission), Nigeria (the Federal Competition and Consumer Protection Commission)

182 https://www.canada.ca/en/competition-bureau/news/2023/06/canadian-digital-regulators-forum-established-to-better-serve-canadians-in-the-digital-era.html.

183 https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/collaboration-and-partnerships/canadian-digital-regulators-forum.

and South Africa (the Competition Commission of South Africa) released a joint statement announcing the creation of the Africa Heads of Competition Dialogue.[184]

The creation of the Dialogue was driven by the rapid transformation in the global economy caused by digital markets, the challenges digital markets present for competition law enforcement and policy, and the need for competition authorities to consider how digital markets impact on domestic participation in the local and global economy and the terms of that participation. The members of the Dialogue stated that digital markets pose shared regulatory challenges for Africa, which necessitate that they "work more closely in order to share knowledge, develop capacity and mutual strategies and provide a stronger and collaborative approach with respect to the regulation of digital markets."

Accordingly, the members of the Dialogue agreed to collaborate on digital markets in five respects. First, to scope the extent to which conduct in digital markets investigated in other jurisdictions affects African consumers, businesses and economies, "with the purpose of fair regulation and enforcement in Africa." Second, to research "barriers to the emergence and expansion of African digital platforms and firms that may contribute to enhanced competition and inclusion" in digital markets in Africa. Third, to cooperate in the assessment of multijurisdictional mergers and acquisitions in digital markets, including harmonizing notification frameworks. Fourth, to share information in accordance with existing laws and applicable protocols. Fifth, to share knowledge and build capacity to deal with digital markets.

The members of the Dialogue issued a further statement following a meeting in February 2023,[185] with the addition of the competition authorities of COMESA (the COMESA Competition Commission), Gambia (the Gambia Competition and Consumer Protection Commission), Morocco (the Moroccan Competition Council) and Zambia (the Competition and Consumer Commission of Zambia) as participants to the meeting and signatories to the joint statement. The expanded members of the Dialogue reaffirmed the original joint statement of February 2022, and further agreed to a more detailed framework to collaborate on competition issues arising from digital markets. This involves setting up a working group on competition issues in digital markets, enhancing capacity building in digital markets enforcement among African competition authorities through cooperation and the use of their own resources, compiling and sharing a compendium of cases, studies and enforcement experiences in digital markets, cooperating on matters that affect African digital markets and raise mutual concerns, and setting an annual working plan to tackle matters of common interest in digital markets.

[184] https://www.compcom.co.za/wp-content/uploads/2022/02/Joint-Statement-of-the-Heads-of-Competition-Authorities-Dialogue-on-Regulation-of-Digital-Markets.pdf.

[185] https://comesacompetition.org/updates/press-release/joint-statement-of-the-african-heads-of-competition-authorities-dialogue-on-regulation-of-digital-markets/.

6. UPDATING EXISTING COMPETITION FRAMEWORKS THROUGH LEGISLATION

Some jurisdictions have gone further than relying on soft law initiatives to update their existing competition law frameworks, and have enacted legislation to achieve this. These changes can take longer to implement than soft law initiatives, but carry greater legal weight. Updating an existing competition framework is also likely to be less resource-intensive than developing an entirely new regime targeted at legislative frameworks. It is yet to be seen whether updates to existing legislative frameworks can "fill the gaps" (real or perceived) in existing frameworks well enough to displace the need for sector-specific regulation targeted at digital platforms.

This section outlines some legislative updates to competition law frameworks that are specifically targeted at competition concerns in the digital economy. It begins with amendments to competition legislation that have already been enacted, followed by proposals for amendments to competition legislation that are still under consideration.

a. Amendments already passed

China: Amended AML[186]

On June 24, 2022, China's legislature released a final version of their amended Anti-Monopoly Law of the People's Republic of China (AML). The law came into effect on 1 August 2022 and makes several significant additions and changes to the AML which demonstrate an increased focus on regulating digital markets.

The first significant addition is in Article 1 of the AML. Before the amendment, the law specified multiple legislative goals such as preventing and curbing monopolistic conduct, protecting fair market competition, and other goals. The amendment adds the phrase "encouraging innovation" to Article 1. This demonstrates an increased focus on preventing barriers to entry for digital firms.

The next change was the addition of Article 9 stating, "[a]n undertaking shall not use data and algorithms, technology, capital advantages, and platform rules to engage in monopolistic behaviors prohibited by this law." This addition, explicitly introduces digital factors into Chinese competition law, demonstrating the increased emphasis on competition enforcement in this area.

In addition, Article 19 was created. It says that "[a]n undertaking shall not organize other undertakings to reach a monopoly agreement or provide substantial assistance for other undertakings to reach a monopoly agreement."[187] While Article 19 does not deal explicitly with the digital economy, it seems to implicate collusion between digital platforms, including algorithmic collusion.

Finally, the portion of the AML that deals with the determination of market dominance has been amended to better address digital issues. While the Article has not been completely changed, a paragraph was added stipulating, "[a]n undertaking with a dominant market position shall not use data, algorithms, technologies, platform rules, or other means to engage in the abuse of a dominant market position as provided in the preceding paragraph."[188] Although this does not add new forms of abuse, it significantly expands on what is considered in competition analysis.

These changes demonstrate a renewed legislative focus on bringing competition enforcement to digital platforms. The addition of phrases that explicitly call upon digital activity appear to signal an intention to increase competition enforcement activity in this area.

Germany: Tenth and Eleventh Amendments

Germany has taken significant steps to regulate digital markets in the past several years. In January of 2021, it passed a tenth amendment to the German Competition Act (GWB), "the Act against Restraints

186 https://centrocompetencia.com/anti-monopoly-regulation-of-digital-platforms-in-china/.

187 Anti-Monopoly Law of the People's Republic of China Chapter III Article 19.

188 Anti-Monopoly Law of the People's Republic of China Chapter III Article 22.

of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions" (GWB-Digitalisation Act).[189] Additionally, on July 6, 2023, the German Parliament passed the 11th amendment of the German Competition Act, which came into force in November 2023.[190]

Tenth Amendment

Under the Control of Abusive Practices Amendment[191] (the Tenth Amendment), the Bundeskartellamt can prohibit practices by undertakings "of paramount significance for competition across markets" that pose a threat to effective competition even before such undertakings attain dominant market positions or in markets where they do not have a dominant position. The rule is aimed at "a small circle of companies predominantly active in the digital and internet sector…[because] they are particularly able to expand their position of power across market boundaries or protect their incontestability."

To determine if an undertaking is of "paramount significance", the following factors in particular are considered: the company's market position; the financial strength or its access to other resources; the question whether the company is active on several markets or in several areas and how they are related; the company's access to data relevant for competition; and the relevance of its activities for third-party access to markets and its related influence on the business activities of third parties.[192]

Once the declaratory decision is reached that a company is of "paramount significance," the Bundeskartellamt may prohibit it from engaging in certain activities. It can address the following conduct: self-preferencing; envelopment of non-dominant markets through practices such as bundling; creating or raising barriers to market entry using data processing; refusing interoperability of products, services, or data portability; providing insufficient performance information; and practices by way of which a company with paramount significance for competition across markets impedes other undertakings in carrying out their business activities in certain contexts or demands disproportionate benefits from handling third party offers.[193]

The German Federal Cartel Office (FCO) may impose prohibitions against companies engaging in the aforementioned conduct to the extent that the conduct is not objectively justified. The company bears the burden of proof to demonstrate that the conduct is "objectively justified."[194] In addition, companies with paramount cross market significance have an expedited appeals process in which appeals are brought directly to the Federal Court of Justice.[195]

The Tenth Amendment also details a modified approach to "traditional control of abusive conduct" and added further criteria to the law that specifically relate to platforms and data. These criteria include assessing access to data and the power of "intermediation."[196]

In addition to these competition law changes, the Ninth Amendment had already made several changes to the merger rules to make them more suitable for digital markets. It introduced an additional threshold based on transaction value in order to control acquisitions of companies with low turnover, but high competitive potential. The Tenth Amendment introduced further modifications to the merger rules that are not specifically directed at digital markets. These include, but are not limited to, increasing the revenue threshold within Germany for a merger reporting to lower the number of mergers being assessed, and a provision designed to allow orders by formal decision that an undertaking has to notify every future concentration below the usual thresholds in one or more specific sectors of the economy after a sector inquiry. Preconditions to such an order being made is that the acquirer's worldwide revenues must exceed EUR 500 million, its domestic market share must exceed 15%, and there must be objective reasons for concern that acquisitions could significantly impede competition in the sector concerned in Germany. Finally, the

189 GWB Section 19a Abusive Conduct of Undertakings of Paramount Significance for Competition Across Markets.

190 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/07_11_2023_GWB_Novelle.html?nn=3591568.

191 https://www.bundeskartellamt.de/EN/Abusecontrol/abusecontrol_node.html;jsessionid=C8CE0E25F23C661E51E5E0477843A5EA.2_cid387#doc3600026bodyText5.

192 GWB Section 19a(1).

193 GWB Section 19a(2).

194 Id.

195 GWB Section 73(5)1.

196 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html; GWB Section 18(3a)-(3b).

reporting requirement only comes into effect if the target's worldwide revenue exceeds EUR 2 million and two-thirds of their worldwide revenues are realized in Germany.[197]

Finally, the FCO adopted the European Competition Network (ECN+) Directive to strengthen cartel enforcement.[198] The European Commission created the ECN+ to allow member States to work closely to enforce EU antitrust rules.[199] In Germany, adopting these rules will require firms and some employees to cooperate in establishing the facts of cartel cases, and give broader powers for competition authorities to fine violators.

Eleventh Amendment[200]

The Eleventh Amendment grants the FCO further enforcement powers and integrates investigative powers related to the Digital Markets Act into German competition law.[201]

First, the Eleventh Amendment would introduce a new tool for the FCO to address competition concerns through a broad range of potential remedies. The new tool involves three steps. First, the FCO must conduct an in-depth inquiry into a specific sector. Second, the FCO can then issue an order to one or several of the firms within the sector identifying a "significant and persistent distortion of competition". Third, the FCO may order remedies.

The "significant and persistent distortion" must either be in at least one nationwide market, several individual markets or across markets. A "distortion of competition" includes unilateral supply or demand power; restrictions on entry, exit or capacity of firms to switch suppliers or buyers; tacit coordination or input; or customer foreclosure through vertical relationships.

To make these determinations, the FCO will consider the number, size, financial strength and turnover of the undertakings concerned, their market shares and the degree of concentration of undertakings; interconnection between the undertakings on upstream, downstream, and neighboring markets; prices, quantity, choice for end users and quality of the products or services; transparency and homogeneity of goods; agreements between undertakings; market dynamics and efficiencies on the concerned markets.

The distortion is considered "persistent" if it existed permanently over a period of three years or occurred repeatedly and there is no indication it is likely to stop within two years. However, businesses with a first mover advantage because of an innovation on their behalf may be exempt from this analysis.

The FCO must also demonstrate that its other intervention powers would be insufficient to "permanently eliminate" the distortion of competition. The FCO can rely on a "cursory review" to make this determination.

The FCO may then impose any behavioral or structural remedies, including that firms: grant access to data, interconnections, networks, and other facilities; provide specifications on the business relationship between undertakings on the concerned markets; create transparent, non-discriminatory and open norms and standards through undertakings; use certain contracts or contractual terms, including rights to disclosure of information; do not unilaterally disclosure information, which may favor coordinated behavior; or organisationally separate company or business divisions.

As a last resort the FCO may even order divestments of shares or assets to change an unfavourable market structure. However, the amendment has been edited to place some safeguards on this approach.

In addition, the Eleventh Amendment would further amend Germany's merger rules in connection with requests for notifications of future concentrations, mentioned above. It allows the FCO to demand that undertakings in the markets covered by the sector inquiry to notify any mergers if the acquirer's turnover exceeded EUR 50 million and the target's turnover exceeded EUR 1 million in Germany in the last financial year. Application of this provision would therefore further lower the thresholds set in the Tenth Amendment.

197 GWB Section 35 1-1(a); GWB Section 39a.

198 https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

199 https://competition-policy.ec.europa.eu/european-competition-network/ecn-directive_en.

200 https://dserver.bundestag.de/btd/20/076/2007625.pdf.

201 https://www.clearyantitrustwatch.com/2023/07/once-again-new-powers-for-the-federal-cartel-office-german-parliament-passes-the-governments-draft-bill-on-the-11th-amendment-to-the-german-act-against-restraints-of-competition/#_ftn3; https://www.allenovery.com/en-gb/global/news-and-insights/publications/11th-amendment-of-german-competition-act-enters-into-force-introducing-significant-reforms; https://www.whitecase.com/insight-alert/new-german-competition-enforcement-act-true-paradigm-shift.

Perhaps equally significantly, the Eleventh Amendment would introduce national investigative powers related to the DMA. While the European Commission is the public enforcement authority for the DMA, the new amendment gives the FCO the ability to assist the European Commission. The FCO may initiate investigations and generate reports on compliance before handing cases off to the European Commission. However, once the EC opens its own investigation, the FCO will no longer have jurisdiction.[202] Additionally, the Eleventh Amendment would implement the DMA by adopting a number of other provisions including provisions involving damages, compliance, statutes of limitations, and governing private enforcement of the DMA in Germany.

Russia: Fifth Antimonopoly Package

Federal Law No. 301-FZ On Amendment to the Federal Law "On protection of Competition," also known as the Fifth Antimonopoly Package, was signed by the President of the Russian Federation on 10 July 2023 and entered into force on 1 September 2023.[203] The law aims to curb abuse by digital market powers by introducing new approaches to analyse network effects associated with software and telecommunications services which facilitate other transactions.

It introduces new definitions of the terms "digital platform" and "network effect", which is a property of commodity markets, in which the consumer value of a digital platform varies depending on the change in the number of sellers and buyers making transactions through it. The Fifth Antimonopoly Package sets criteria for establishing that online trade aggregators have a "dominant position" based on "network effects". Additional criteria include if the aggregator's revenue exceeds 2 billion rubles for the last calendar year and if the aggregator's share of transactions in a certain commodity market exceeds 35%.

The Russian competition authority, FAS, states that Google and Apple as owners of application stores, as well as other Russian marketplace operators, are defined as "digital platforms" under this law.[204]

The law also introduces a new threshold for Russia's merger control regime, based on the price or value of a transaction (as an alternative to the pre-existing threshold based on the value or revenue of the merging parties).

In addition, the law extends the time that the FAS must consider petitions regarding transactions and other suspected activity. It also introduces a new system of expert examination for these new kinds of transactions.

Federal Law No. 426-FZ "On Amendments to the Code of Administrative Offences of the Russian Federation" was also implemented on 1 September 2023 as an integral part of the Fifth Antimonopoly Package. It clarified that the use of digital algorithms in cartel agreements would be considered an aggravating factor in determining the liability of companies involved.

b. Proposed amendments still under consideration

Canada: 2022 and 2023 amendments and ongoing review of Competition Act

Canada is partway through a process of updating its Competition Act. This process began with a consultation initiated by Senator Howard Wetston in 2021. The Canadian Competition Bureau (CCB) made a submission to this consultation. Shortly thereafter, the Canadian government made an initial series of amendments to the law in June 2022 under Bill C-19, and signalled that it would be conducting a broad consultation on further changes that could be made. In November 2022, Innovation, Science and Economic Development Canada (ISEDC) entitled "The Future of Competition Policy in Canada". In March 2023, the CCB made a submission to this consultation as well. In September 2023, the government published a summary of the feedback it received and introduced "a first set of legislative amendments to the Competition Act" following this process as part of a suite of cost-of-living measures contained in Bill C-59, *An Act to amend the Excise Tax Act and the Competition Act*. These amendments became law on December 15, 2023. On November 30, the government tabled an additional set of amendments to the Competition Act under Bill C-59, as part of a suite of measures previewed in the government's fall economic statement. This bill remains before Parliament.

[202] DMA Article 38(7)(2).

[203] http://en.fas.gov.ru/press-center/news/detail.html?id=55817; http://publication.pravo.gov.ru/document/0001202307100016?index=1.

[204] https://t.me/fasrussia/3181.

The proposals and amendments from these processes are wide-ranging. Some address changes explicitly or implicitly informed by challenges posed by the digital economy and digital platforms. These relate to merger control, abuse of dominance, competitor collaborations and cartel conduct, and simplifying and accelerating competition litigation. Others bring the Act more in line with international counterparts, including adding a framework for conducting market studies with information-gathering powers, removing the "efficiency defence" in merger reviews, and restructuring the test for abusing a dominant position.

Merger control

Relevant proposals and amendments to Canada's merger control regime relate to the treatment of merger efficiencies, better addressing "killer acquisitions," the limitation period for non-notified mergers, and merger pre-notification requirements. Most of these proposals and amendments are directed at concerns raised by the CCB about the difficulty of carrying out the necessary analysis to the level of certainty traditional legal standards require, in the context of highly innovative digital markets which can evolve rapidly and in ways that are difficult to predict (particularly for forward-looking analysis and when attempting to measure and quantify dynamic competition).

Canada's merger control regime had historically provided an efficiencies exception for anti-competitive mergers that allowed deals to go through if the efficiencies brought about by merger outweighedthe anti-competitive harms. Bill C-56 removed this efficiencies defence.

To better capture reflect digital economy developments, the following factors were added to the Competition Act's list of non-exhaustive factors relevant to the analysis of mergers, business practices and competitor collaborations as part of the 2022 amendments to the Competition Act:

(a) network effects as an example of a barrier to entry;

(b) the possible entrenchment of leading incumbents' market position;

(c) effects on both price competition and non-price competition, such as quality, choice or consumer privacy.

The Canadian Government also invited submissions suggesting other changes that could be made to Canada's merger regime so that it is better able to look beyond current market conditions and consider the future welfare of market participants in the 2022 discussion paper.

The CCB raised concerns that the limitation period of one year from completion to challenging a merger is too short and recommended that it be extended. Bill C-59 proposes to extend the limitation period to three years for mergers that are not notified to the authority. Bill C-59 also proposes that parties be temporarily prohibited from completing a transaction if the Bureau has applied for an injunction, until such an injunction is heard and decided.

Finally, the CCB raised concerns that existing pre-notification thresholds do not adequately recognize the competitive importance of sales into Canada which are not derived from Canadian assets, identifying this as a particular concern for the digital economy. The CCB recommended amendments to the notification thresholds to include such sales, and Bill C-59 proposes to address this gap.

Abuse of dominance

The definition of an "anti-competitive act" for the purposes of the prohibition against abuse of dominance was expanded in the 2022 amendments to include acts that have an adverse effect on competition, and not only acts that were intentionally predatory, exclusionary or disciplinary towards a competitor. This was in response to concerns raised by the CCB that the prohibition was too limited in its application, failing to capture conduct such as the use of price parity clauses by dominant retailers. The amendments add several factors that may be used when assessing the competitive effects of the conduct under review. These factors could include, effects on barriers to entry in the market, including network effects, and effects on non-price competition, including quality, choice or consumer privacy.

In addition, the non-exhaustive list in the Competition Act of business practices that might breach the prohibition was expanded to include a selective or discriminatory response by a dominant player to make it more difficult for a competitor to enter a market or grow, or to remove a competitor from the market. This was in response to concerns raised by the CCB about the ability of the abuse of dominance prohibition to capture anti-competitive conduct targeted at emerging competitors in the digital economy. The amendments also significantly increase the maximum Administrative Monetary Penalties (AMP) available under abuse of dominant position section.

The 2022 discussion paper highlighted particular conduct of concern to the Canadian Government in the context of the digital economy. The Canadian Government considered the following specific changes to Canada's unilateral conduct and abuse of dominance provisions to address that conduct:

(a) "better defining dominance or joint dominance to address situations of *de facto* dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market;"

(b) simplifying the legal test for remedial orders, including by revisiting the relevance of intent and/or anti-competitive effects;

(c) creating new bright line rules or presumptions for dominant firms or platforms in the context of behavior or acquisitions. This could be particularly effective if "aligned with international counterparts and tailored to avoid over-correction;" and

(d) consolidating the Competition Act's multiple unilateral conduct provisions into a single, principles-based abuse of dominance or market power provision, or repositioning them as being to protect fairness in the marketplace.

Amendments in Bill C-19 allow private parties to make applications to the Tribunal under the abuse of dominance provisions. While it is possible that private entities be better positioned than the Bureau to bring an application, prior to the amendments, only the Bureau could bring abuse of dominance applications.[205] Bill C-59 proposes to strengthen this private enforcement framework by easing conditions for private parties to obtain leave to bring applications, and providing a mechanism for private parties to seek financial awards.

[205] Please see Bulletin on Amendments to the Abuse of Dominance Provisions (canada.ca), October 25, 2023.

The December 15, 2023 amendments in Bill C-56 made a number of changes to the abuse of dominance framework. Prior to the amendments, to constitute an abuse of dominant position, the Commissioner needed to establish three elements: dominance, anti-competitive intent, and anti-competitive effects.

Following the amendments, the Competition Tribunal may make a prohibition order against a dominant firm (or group) if their conduct meets either the anti-competitive intent or effect requirement. This will provide a way of stopping dominant firm conduct that has either subverted competition in the marketplace or was intended to do so.

A broader range of remedies, including administrative monetary penalties, are available for instances where all three elements, i.e., dominance, anti-competitive intent and effects, are present.

Also, the practice of "directly or indirectly imposing excessive and unfair selling prices" has been added to a list of acts that may be considered a practice of anti-competitive acts when engaged in by a dominant firm (section 78).

Competitor collaborations and cartels

As previously mentioned in the discussion on merger control, the non-exhaustive list of factors which the Competition Act identifies as relevant to the competition analysis of competitor collaborations was expanded in 2022 to address concerns about the difficulty of proving the requisite harm to competition in digital markets where developments are rapid and difficult to predict.

The 2022 discussion paper also highlighted the increasing use and sophistication of artificial intelligence in the digital economy, and the challenges that algorithmic collusion in particular poses for competition frameworks. The Canadian Government sought comment on a proposal to deem or infer agreements more easily for some forms of civilly reviewable conduct to address the horizontal coordination (without an agreement) that algorithmic activity can produce. However, no legislative measures have been proposed on this topic.

Amendments contained in C-56 empower the CCB to take action and seek civil orders against collaborations that stifle competition and consumer choice, even if the parties to the collaboration are not competitors, if a substantial purpose of the agreement is to harm competition.[206] However, other than highlighting particular scenarios of concern around property controls in the groceries sector the practical effect of these changes is not yet clear.

Simplifying and accelerating civil competition litigation

The CCB recommended that litigation processes, which often take years, should be simplified and accelerated wherever possible to better keep pace with fast-moving markets. Specific proposals being considered through the 2022 discussion paper include:

(a) giving the CCB "more leeway" to act as a decision-maker, including "through simplified information-collection, or a first-instance ability to authorize or prevent forms of conduct;" and

(b) introducing new forms of civil enforcement as alternatives to criminal prosecution for certain actions.

Market study powers

Amendments contained in Bill C-56 provide the Bureau with the legal power to compel market participants to provide information in the context of conducting market studies. In the aftermath of the recent grocery industry study, the Bureau indicated that its studies will be more accurate if it could apply to the courts to receive orders requiring cooperation of the relevant industry participants.[207]

Greece: Amendment of Greek competition law

Greece has proposed a new provision[208] in their competition law, which would prohibit abuse of "position of power in an ecosystem" with paramount importance to competition, defining those requirements in detail.

[206] https://www.nortonrosefulbright.com/en-ca/knowledge/publications/03815b66/change-has-come-again-federal-government-introduces-further-amendments-to-canadas-competition-act.

[207] The Future of Competition Policy in Canada, Competition Bureau, March 15, 2023, para 5.

[208] Article 2A of the Greek competition law.

United States of America: antitrust bills

In addition to the proposals for new frameworks to regulate digital platforms that have been previously outlined, a series of bills have been put forward in the Congress of the United States of America to amend its existing antitrust legislation to better respond to competition issues arising from the digital economy.

First, the Competition and Antitrust Law Enforcement Act proposes revisions to existing antitrust laws applicable to mergers and anticompetitive conduct. The bill would also increase the annual budgets of the USA's antitrust agencies.

With respect to mergers, it proposes replacing the existing legal test which prohibits mergers that substantially lessen competition with a stricter legal test. The proposed new legal test would prohibit mergers that create an appreciable risk of materially lessening competition or unfairly lowering the prices of goods or wages because of a lack of competition among buyers or employers. Additionally, for some large mergers or mergers that concentrate markets beyond a certain threshold, the bill proposed shifting the burden of proof to the merging parties to prove that the merger does not violate the law.

Similarly, the bill creates a new provision to prohibit exclusionary conduct that presents an "appreciable risk of harming competition". It would also further define exclusionary conduct as conduct that materially disadvantages an actual or potential competitor or tends to foreclose or limit an actual or potential competitor's ability to compete. A rebuttable presumption would assume that any exclusionary conduct undertaken by a firm with a market share of at least 50% or that otherwise has significant market power presents an appreciable risk of harming competition. It would have also removed the need to prove a market definition as part of a case for an antitrust violation, except where the relevant statutory provision refers to a "relevant market," "market concentration" or "market share."

The bill would also implement a series of reforms to seek civil fines for antitrust violations, study the effect of past mergers, strengthen whistleblower protections, and establish a new, independent FTC division to conduct market studies and merger retrospectives.

Second, the Trust-Busting for the Twenty-First Century Act also includes proposals to update existing laws relating to mergers and exclusionary conduct. In relation to merger control, it would lower the threshold for prohibited mergers involving firms with market capitalisations above a specified threshold and create a presumption that acquisitions by "dominant digital firms [that] … possess dominant market power" are illegal. In relation to exclusionary conduct, it proposes limiting the availability of pro-competitive effects justification by introducing stricter requirements for what a defendant relying on it must prove. For both mergers and exclusionary conduct, it also proposes removing the need to prove a market definition when bringing claims for a violation.

Finally, the Platform Competition and Opportunity Act proposes introducing a merger regime specific to digital platforms. It proposes specifically prohibiting platform operators from engaging in any acquisitions above a specified value threshold unless they can demonstrate that the merger is already exempt from federal prenotification requirements, or alternatively that the firm being acquired did not complete with the platform and was not a nascent or potential competitor of the platform, and that the acquisition would not enhance or increase the platform's market position or its ability to maintain its market position for products or services offered on or related to the platform.

AfCFTA: Article 11 of Protocol on Competition Policy (prohibition on abuse of economic dependence) [209]

The African Continental Free Trade Area (AfCFTA) Agreement aims to significantly boost intra-trade across Africa through harmonization and coordination of industrialization and trade liberalization. It has been signed by fifty-four member States in African Union (AU). After delays in the negotiation process due to the COVID-19 pandemic, the text of Competition Policy Protocol was eventually approved in the 36th Ordinary Session of the Assembly of the AU on 16-17 February 2023.[210] The AU's member States are at various stages of ratifying and implementing domestic legislation to give effect to the Competition Policy Protocol. This may involve amending their existing competition law or introducing their first ever competition frameworks.

Article 11 of the Competition Policy Protocol includes protections against the abuse of economic dependence and other anticompetitive practices. It operates as part of the same protocol and uses the same mechanisms as the other competition provisions in the Protocol but is targeted at (a) undertakings on which other undertakings are dependent and (b) at gatekeepers. Aspects of Article 11 could be applicable to undertakings that are not digital platforms. However, some of the prohibitions within it are quite clearly targeted at, and would only be applicable to, digital platforms.

Article 11 deems economic dependence to exist "where undertakings as suppliers or purchasers of a certain type of goods or services are dependent on another undertaking or group of undertakings" in circumstances where switching to other third parties is not a sufficient or reasonable possibility, and there is a significant imbalance between the power of the undertakings and the countervailing power of other undertakings. The factors to be considered when deciding whether economic dependence exists are the market share of the undertaking, the relative strength of the undertaking, the existence or not of alternatives and the factors that lead to the situation of dependence. Article 11 also provides that the Council of African Ministers of State Parties to the Agreement responsible for trade will develop a regulation that designates undertakings as gatekeepers or core platforms.

If an undertaking is in relative position of economic dependence over a customer or supplier or if it is designated a gatekeeper, it is prohibited from abusing that position in a way that substantially affects the functioning and structure of competition in a market.

If an undertaking is designated a gatekeeper or a core platform, Article 11 prohibits it from engaging in a list of specified practices. Those are imposing price or service parity clauses on business users, imposing anti-steering provisions or otherwise preventing business users from engaging consumers directly out of a core platform, using business user data to compete against the business user, self-preferencing services or products offered by the gatekeeper on a core platform, differentiation in the fees or treatment against small and medium enterprises, restricting data portability and other actions that inhibit switching by business and end-users, failing to identify paid ranking as advertising in search results and allowing paid results to exceed organic results on the first results page, combining personal data sourced from different services offered by the gatekeeper, and requiring the pre-installation of gatekeeper applications or services on devices.

209 https://www.pymnts.com/cpi_posts/regulating-africas-digital-markets-what-to-do-and-what-not-to-do/; https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf.

210 Assembly/AU/Dec.854(XXXVI).

7. CONCLUSION: INTERNATIONAL COOPERATION TO BUILD CONSENSUS

There is no clear, single approach to addressing competition issues associated with digital platforms. Indeed, while there is widespread recognition that some forms of conduct by digital platforms can have adverse effects for competition, the point at which that that even becomes a concern differs for member States.

Although there is a trend towards introducing new specific regulations for digital platforms, this is not an "one-size-fits-all" solution that will be appropriate for all jurisdictions. Other policy options include amending competition laws, increasing the use of soft law approaches or a combination of those instruments. The most appropriate option will depend on the legal tradition, available resources, level of experience and culture of each country. For example, legal reforms may involve lengthy legislative procedures, but in return, provide more legal certainty and reduce barriers to enforcement for competition authorities. Guidelines, as a softer approach, may be easier to develop and require less time and effort to adopt.

As competition concerns raised by digital platforms are global challenges, they need global solutions. Efforts at the regional and international levels should continue to support exchange of information and knowledge and collective responses when feasible, and to encourage innovative approaches to promoting competition in digital markets.

This section outlines the benefits seeking to develop a more coherent approach to competition and digital platforms through regional and international cooperation. It then goes on to explore what cooperation on those issues could look like, including exploring how UNCTAD can contribute to that cooperation.

a. The benefits of regional and international cooperation

No matter what approach is taken to respond to the opportunities and challenges to competition that digital platforms present, competition authorities and governments should not underestimate the value of regional and international cooperation on digital issues.

First, such cooperation can increase effectiveness and reduce the risk of regulatory responses in light of the global nature of the digital economy. Sharing learnings with other, similar countries also promotes the timeliness of any responses, maximizing the scope for benefit and minimizing the scope for harm from the increasingly important role that digital platforms play in economies around the world. Where regulators across a region are publicly and visibly cooperating with one another, this increases the perceived risk that violations of the law will be detected, and that enforcement action will be taken. It also facilitates investigative processes, which can help ensure more timely enforcement action. These factors are especially important in the context of digital platforms, which tend to operate in multiple countries and operate in dynamic, fast-moving markets.

Second, greater coherence across regulatory frameworks (while still accounting for local priorities and contexts) can facilitate development by lowering the cost of doing business in an individual country and help promote investment. Aligned regulatory frameworks make it easier for businesses already operating elsewhere to enter individual countries and new regions. This is because any required compliance processes (whether those processes are required to comply with a detailed regulatory framework targeted at digital platforms specifically, or to ensure an operating understanding of competition laws) may already be in place. If they are not already in place, investment in common compliance processes can facilitate entry into multiple economies, making that investment easier to justify.

In the context of competition and digital platforms, the benefits of coherent or consistent regulatory frameworks are already being recognized. For example, the European Union has adopted a regulatory framework to apply across all of its members, and several other countries (such as Australia, Brazil, India and the United Kingdom) are also seeking to ensure any new regulatory frameworks that they introduce for digital platforms follow a similar form. The African Continental Free Trade Area has adopted a single protocol on competition policy to be ratified by all of its members, and the African Competition Heads of Authority Dialogue is a tool being used to ensure that its member competition authorities align their approaches where possible.

b. Possible forms of cooperation and assistance

Many developing countries have relatively young and small competition authorities with limited resources for taking on competition cases against global companies, making regional and international cooperation particularly important for those countries.

Support for these countries could take the form of sharing experiences and launching joint investigations and actions with their competition authorities. This will help overcome the challenges of their more limited resources and can help increase their leverage as against large global firms.

Section F of the United Nations's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UN Set)[211] includes a framework for international cooperation and exchange of best practices. Providing investigative assistance for a specific enforcement investigation (such as obtaining evidence on behalf of another competition authority, or sharing information about an ongoing investigation) may require entry into formal cooperation agreements with those authorities or law changes. UNCTAD encourages competition authorities to consider whether their legal settings allow for the efficient sharing of investigative assistance between member States.

c. Role for UNCTAD

UNCTAD's Competition and Consumer Policies Branch is undertaking a range of initiatives to help build international consensus on the best way forward to address competition issues associated with digital platforms. These include the organization of formal discussions within the annual meetings of the IGE on Competition Law and Policy and informal discussions through different events designed to help build consensus between all member States, as well as on a regional level.

UNCTAD holds annual meetings of the IGE on Competition Law and Policy as the intergovernmental machinery, where all member States competition experts and several relevant stakeholders, including other governmental officials, the judiciary, sectoral regulators experts, civil society representatives, academics, exchange information and discuss ways of improving worldwide cooperation on competition policy implementation and enhancing convergence through interactive debates and dialogues. The issues on competition in digital markets have been gaining attention of member States since 2019, and the twenty-second meeting of the IGE on Competition, to be held in 2024, will address the challenges and options for enforcing competition law in digital markets and ecosystems. If member States agree on other initiatives, namely pursuing the exchanges on specific issues in regular informal meetings for the discussion of concrete issues through consultations, or collecting additional related information and knowledge for dissemination, or through the drafting of best practices, they should present this proposal in the annual group of experts meeting approaching the UNCTAD secretariat.

UNCTAD, in view of the mandate given by Section F of the UN Set, continues its work to facilitate cooperation among competition authorities around the world on a range of issues, including the exchange of best practices, and improving understanding technological developments and developing areas of concern, relating to competition and digital platforms.

In addition, UNCTAD continues to support the work of regional cooperation initiatives. For example, UNCTAD has been providing capacity building to the AfCFTA Secretariat and its members, as they work to implement the new Protocol on Competition Policy, including Article 11. UNCTAD's technical cooperation in the field of competition law and policy can cover a wide range of areas that member States are in need of, and put particular emphasis on policies in the digital economy. Considering its experience and expertise in promoting information sharing and providing advisory services, UNCTAD is well placed to share international best practices with less experienced and other interested competition authorities of developing countries to identify the best suited policy options to effectively

[211] https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition.

address competition concerns raised in these markets.

UNCTAD welcomes any other initiatives proposed and/or requested by member States to build consensus on how to best address the competition issues associated with digital platforms, and will continue to support those initiatives where possible and consistent with UNCTAD's mandate.

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