



Chapter IV

Market concentration and competition in the creative economy





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Creative markets are often highly concentrated and possess unique characteristics that impact competition. Certain steps commonly used in competition policy need to be adapted for the creative economy. Like digital markets, which are increasingly interlinked with creative activities such as advertising, film and video streaming, and video games, creative industries often have blurred market boundaries, making it difficult to precisely define a firm's relevant market. This chapter explores the primary competition challenges in creative industries and policy considerations to address these issues.

Competition policy is a regulatory tool to promote market competitiveness, efficiency, and openness. It targets a spectrum of goals encompassing economic and non-economic dimensions. Competition policy is intricately linked to growth and positive macroeconomic impacts (OECD, 2014; UNCTAD, 2015).

From an operational perspective, competition policy encompasses three main action areas. The first is competition law enforcement, which aims to curb anticompetitive practices, which can be categorized as collusive practices designed to harm competition—such as cartels— or abuses of market power. The second involves merger review proceedings to rectify or prohibit mergers that could negatively impact or diminish competition. The third area relates to competition advocacy, which involves raising awareness among government bodies and stakeholders, as well as businesses and consumers, about the benefits of competitive markets.

There can be a trade-off between fostering competitive markets and nurturing domestic industries. Competition policy may have to balance protecting consumers and markets from dominant abuses while

supporting the growth of national industries that can compete globally, create jobs, and attract investments. This balance is important, for example, in promoting digital transformation and innovation while ensuring fair competition, but also for the creative economy, which has broader cultural and social impacts. Although both competition and industrial policies aim for economic growth and development, they can differ in their objectives, scopes, and means (UNCTAD, 2023d).

Some creative activities are increasingly interlinked with the digital economy. Despite the differences in the maturity stage of competition laws and institutions in different jurisdictions, there are challenges common to all of them related to digital economy issues and the need for international cooperation to deal with problems beyond each country's borders (Burnier da Silveira and Kovacic, 2019; UNCTAD, 2021b, 2024b).

Numerous competition cases from the creative industry have been brought before competition authorities, including both anti-competitive practices and merger cases. For instance, in *United States v. Paramount Pictures, Inc.* in 1948, the United



States Supreme Court ruled against film producers owning exhibitors (separating production and distribution from exhibition), driven by anticompetitive exclusive dealing arrangements between firms.¹⁷ The Court understood that several film studios at the time (Paramount Pictures; Twentieth Century-Fox; Loew's/Metro-Goldwyn-Mayer; Radio-Keith-Orpheum; Warner Bros.; Columbia Pictures; Universal; and United Artists) violated antitrust laws by entering into vertical arrangements. The de-verticalization of the movie chain had far-reaching effects on the entire production, distribution, and exhibition structure (De Vany and Eckert, 1991; Ornstein, 1994; De Vany and McMillan, 2004; Gil, 2008, 2015).

More recently, in 2023, a vertical merger within the creative economy attracted global attention as Microsoft acquired Activision Blizzard, marking one of the most significant deals in the video game industry in recent years. The merger sparked substantial debate and diverse perspectives on the issues. While the Brazilian Competition Authority (the Administrative Council for Economic Defense or CADE, in its Portuguese acronym)¹⁸ and the European Commission (Case *M.10646*)¹⁹ cleared the transaction, the Competition and Markets Authority of the United Kingdom of Great Britain and Northern Ireland granted clearance with the condition of adopting specific merger remedies to address competition concerns in the cloud gaming market.²⁰ In turn, in the United States of America, the Federal Trade Commission (FTC) is still challenging the merger before courts, even though the District Court has not suspended its

closing.²¹ This case and others discussed in this chapter ultimately illustrate the current and ongoing significance of competition matters within the creative industries, intensified in a dynamic and disruptive digital economy context.

Some developing countries may have limited capacity to formulate or implement competition policies, including for creative industries. However, knowing the experience of competition authorities in the creative economy in countries where this policy is well developed can also be of great value to less experienced authorities, as they can avoid policies that have proved insufficient or wrong for the desired purposes. On the other hand, successful experiences can inform and inspire countries less experienced in competition policy to take similar measures. Extracting insights from past cases, discerning the underlying concerns, and identifying proposed solutions can contribute to developing a well-suited competition policy framework. This can provide a solid foundation for effective competition law enforcement in the creative economy (Biswas, 2022; Hanssen and Hazlett, 2022; Norris, 2023).

A. Market structure: main concepts and challenges

Market structure, market entry barriers, and competitive rivalry directly contribute to shaping the functioning of creative industries. All these elements have particularities and challenges in the creative economy compared to other markets.

¹⁷ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) and <https://www.justice.gov/atr/paramount-decree-review> (accessed on 20 November 2023).

¹⁸ For the case records, see https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?1MQnTNkPQ_sX_bghfgNtnzTLgP9Ehbk5UOJvmyesnbE-Rf6Pd6hBcedDS_xdwMQMK6_PgwPd2GFLjH0OLyFX6gl2sGKAL6BCs1NvrGDcTA25PStaVelgicwm5iRue6 (accessed on 18 March 2024).

¹⁹ For the case records, see <https://competition-cases.ec.europa.eu/cases/M.10646> (accessed on 20 November 2023)

²⁰ For the case records, see <https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-ex-cloud-streaming-rights-merger-inquiry> (accessed on 20 November 2023).

²¹ For the case records, see <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter> (accessed on 20 November 2023).



1. The multi-sided nature of markets

Most creative industry markets are multi-sided, not only for consumers but also for producers, distributors, publishers, and advertisers. For example, in advertising, a newspaper contends with other newspapers for content production and may also compete for advertising spaces with numerous media and non-media competitors, such as outdoor advertisers.

Multi-sided markets

Multi-sided markets refer to markets characterized by an intermediary platform – digital or not – that creates value by facilitating connections between different types of producers and consumers on multiple sides of a given industry. The various sides of the market impact each other through network structures that make concentration or competition on any side influence the dynamics of the other.

This recurring characteristic of creative industries has significant implications for market access, including the eventual necessity of a firm to orchestrate an integrated entry into various market facets to compete effectively with its rivals (UNCTAD, 2019b).

Digitalization adds a layer of complexity to the creative economy, introducing the specific competitive features and dynamics of digital platform competition, such as the relevance of network effects, “winner-takes-all” dynamics, and increased switching costs. Additionally, it blurs the frontiers between market sides, such as content production, mobilization of workers in relatively restricted labour markets, and advertising (Evens and Donders, 2018; Geurts and Ceba, 2023).

2. Market entry barriers

Market entry barriers

Despite some variations throughout history, entry barriers can generally be understood as any practical obstacle to the entry of new competitors into a given market.

While entry barriers are common in several industries, new firms in creative industry markets face peculiar obstacles to entry.

Barriers to entry can be classified into three categories: state, structural, and strategic barriers to entry. State barriers to market entry refer to administrative market access regulations, such as taxi licenses, patents, etc. Structural barriers to entry are related to the nature of the market, such as economies of scale, investment requirements, advantages from experience and learning, etc. Established companies could create strategic barriers based on structural or state barriers to entry. These include strategies such as increasing rivals’ costs, strategic patent requirements, and the creation of incompatibilities and switching costs, for example. Barriers to entry could help to strengthen the dominance of a quasi-monopoly company and allow it to preserve and protect its market power, thereby increasing the possibility of abusing it.

In the creative economy, regulatory barriers, including licenses, influence competitive dynamics. This form of legal entitlement has the potential to establish temporary or permanent monopolies, impacting the regional distribution of market competition and dynamics based on companies’ licensed areas of operation (Wirth and Bloch, 1995). These barriers are almost constant in creative industries, protecting copyright productions while encouraging creation.



Economies of scale and scope may significantly affect competition in creative industries, especially as the importance of portfolio diversification and market reach continues to grow. They are particularly relevant, given substantial evidence indicating that economies of scale in the production of content and advertising are linked to concentration in markets, including in creative industries like publishing, newspaper, television, and cinema, among others (Wirth and Bloch, 1995).

Economies of scope and scale

The concepts of economies of scope and economies of scale are distinct forms of cost reduction within a given company. Economies of scope are related to decreased average total cost by producing diverse goods. In contrast, economies of scale involve the cost advantage gained through increased production levels of a single good.

Before digitalization, entry barriers to media markets included scarcity of frequencies, naturally limiting the number of broadcasting channels (radio and television programs). Following digitization, the Internet, and mobile technology, these structural barriers to entry have been replaced by barriers particular to digital markets and platforms. Digital platforms have made it easier for everyone to publish content, which is very important to producers offering their content broadly. On the other hand, this reality has led to information overflow for consumers of digital content, making it difficult for the consumer to make a well-informed choice as they cannot view all the content available on the Internet. This gave rise to promotion or multichannel networks, which took over the role of former editorial offices in selecting what is brought to the user's attention and what is not. These promotion networks interact with individualized search and recommendation algorithms of relevant platforms like Netflix, YouTube, etc. Promotion network

managers need to find ways to push their content (artists, videos, songs, movies, etc.) up on the recommendation lists to receive more users' attention. Without such effort, it is more difficult to effectively "enter" online markets, that is, to make content perceived by many users. This is an example of one of the structural barriers to entry in digitized media markets (Budzinski and Kuchinke, 2020). Other barriers include network effects, switching costs, and lock-in effects (UNCTAD, 2019c).

Research on behavioural tendencies shows a cognitive cost in switching platforms regarding time, effort, energy, concentration, and sustained thought required. Competition is not necessarily "one click away" (Candeub, 2014; *Wired*, 2012). Consumers need to understand default settings and how to change them and be willing to do so. Moreover, consumer biases and inertia prevent consumers from trying platforms other than the ones they are familiar with, further reinforcing dominant platforms' market power. High economies of scale and scope, data-driven network effects, control over data, switching costs, and consumer inertia could create high barriers to entry in digital markets (UNCTAD, 2019b).

For example, a study by the Angolan Competition Regulatory Authority (ARC) revealed concern about exclusivity agreements and the sale of packages in the pay-TV segment. For the ARC, this practice – which is common – when associated with the existence of market power can limit or prevent competitors' access to supply and distribution channels. For this reason, the ARC, in *Recommendation No. 01/2023*, dated July 2023, recommended the creation of rules limiting such practices (Angolan Competition Regulatory Authority, 2023).

3. Non-market dimensions

Another issue related to market access in the creative economy is the presence of important non-market dimensions. Creative industries are characterized by features beyond consumer output



maximisation, directly influencing competitive dynamics and commercial success.

For instance, the digitalization of video-on-demand (VoD) business models can raise competition issues regarding consumers' choice and diversification of products, especially in the context of increasing consolidation. In other words, the concentration of VoD services may reduce content variety, such as films from different countries and productions of various genres. Additionally, the fact that these markets are not necessarily characterized by competition related to price poses a challenge in defining relevant markets compared to traditional competition analysis tools (Budzinski et al., 2019; Budzinski and Lindstädt-Dreusicke, 2020). For example, in the case of Facebook, the platform provides access to a social networking platform at zero price. Access to Facebook is not really "free" because the individual provides his/her personal information on the platform. What creates competition between Facebook and other social networking alternatives is among others, the number of people using Facebook. This makes the platform more attractive to people as there is chances to connect with a much wider group of users. This example shows non-price competition factors in the case of "free" digital platforms.

For example, some critics pointed out that competition authorities failed to define the relevant markets involved in the 2014 Facebook and WhatsApp Merger since the case also encompassed potential privacy harm to consumers from increased market concentration (Wu, 2019). At this point, in Brazil, trying to overcome the challenges of defining relevant markets, CADE precedents in merger control cases involving creative industries suggest that it is more conservative to leave the definition of the relevant market open. In such precedents, CADE usually analyses different market share scenarios to assess the impact of a merger on competition.

Concerning the non-market dimensions of creative industries, challenges arise in applying price-related approaches to define

relevant markets and their concentration for competition policy purposes. Traditional mechanisms for defining the relevant market based on prices, such as the small but significant non-transitory increase in prices test, may be inadequate for identifying consolidation in areas more relevant and meaningful for consumers, such as privacy, consumer freedom of choice, and industry creativity, among others (Lianos, 2018). Moreover, new theories of harm directly related to these aspects may emerge.

Issues such as entry barriers, multi-sided markets, and non-market dimensions, though more prominent in the creative economy, do not imply a complete departure from concurrent industrial organization paradigms. Even though the primary paradigms of competition policy are under debate worldwide, there are no clear indications that the mainstream approach will be replaced shortly. While new developments in the field are being debated, traditional competition tools are still relevant and helpful in tackling contemporary issues in the creative economy.

B. Market concentration and its impacts

There is currently no systematic, comprehensive, and consistently available public data on market consolidation across various industries within the creative economy. The very definition of the relevant market and the subsequent assessment of market power is not a simple task (for a comparative analysis of media market definitions, for instance, see European Commission, Directorate-General for Competition, 2003). In addition, competition authorities worldwide have found it challenging to define the relevant market in digital market cases. In some cases, the analysis of the specific case is carried out without this prior definition. These developments are important for the creative economy, as many creative activities, such as film and music streaming, video games, and other creative content



production and distribution, are interlinked with the digital economy and platforms. Analysing specific markets suggests that creative industries often exhibit asymmetric levels of consolidation among competing entities, as illustrated below.

1. Market concentration in the creative economy

One critical challenge of studying the market concentration of creative industries is that, especially in developing countries, very little official data is produced to reveal the current and actual market concentration. The lack of data prevents an accurate market diagnosis and hinders the production of public policies in the creative economy. However, recent data suggest the existence of high concentration in some markets.

For example, according to UNCTAD, Google (90 per cent) and Facebook (66 per cent) dominate the global Internet search and social media markets, respectively. Amazon holds at least one-third of the world's cloud infrastructure services and online retail activity market (UNCTAD, 2019c).

The online advertising market in the United States of America is highly concentrated, with Meta and Alphabet/Google holding a 48.4 per cent share, divided into 28.8 per cent for Alphabet and 19.6 per cent for Meta in 2023. Despite a slight decrease in their market share in recent years, the dominance they established over the last decade remains (Axios, 2022).

Book publishing in the United States of America, for example, is dominated by the “Big Five” publishers (Penguin Random House LLC, Simon & Schuster, Inc., HarperCollins Publishers LLC, Hachette Book Group, Inc., and Macmillan Publishing Group, LLC) collectively holding approximately 80 per cent of market share. Penguin Random House LLC alone accounts for roughly 25 per cent of the market share (Vox, 2022). Moreover, some studies indicate that horizontal mergers significantly impacted

the concentration of the book industry (Greco, 1999). Just a few firms dominate Germany's and France's book publishing industries. Holtzbrinck, Bonnier, and Random House in Germany and Hachette, Editis, Madrigall and Médias Participations in France account for two-thirds of these countries' total revenues accumulated by their top 20 publishers (Wischenbart and Fleischhacker, 2020). The manga industry in Japan is similarly led by four publishers that own most of the popular circulating titles (Shueisha, Kodansha, Kadokawa, and Shogakukan). Shueisha alone accounts for about 30 per cent of the market (Wischenbart and Fleischhacker, 2020).

Similar concentration patterns can also be found in the film industry and the music streaming sector. In the United States, for example, a few movie studios (Disney, Lionsgate, Paramount, Sony, Universal, and Warner Bros) accounted for nearly 90 per cent of box office ticket sales in recent years (CNBC, 2019).

The Competition Commission of India conducted a market study on film distribution chains in 2022 and 2023. The study identified competition concerns within the sector, such as imbalances related to the superior bargaining power of some competitors, unequal revenue-sharing agreements, the challenges posed by new technologies in cinema, and tying and bundling agreements at the exhibition level. The Commission recommended self-regulation by the interested parties (Competition Commission of India, 2023).

Approximately 59 per cent of the global streaming music subscription market in 2021 was dominated by only three companies: Spotify (31 per cent), Apple Music (15 per cent), and Amazon Music (13 per cent). Therefore, while smaller competitors exist in the market, such as YouTube Music (8 per cent), it is still a relatively concentrated market (*The Verge*, 2022).

In China, AliPlay and WeChat hold an oligopoly in the mobile payment solution market (UNCTAD, 2019c).



2. Potential impact of market concentration

While market structures are not the sole factors influencing competitive dynamics in creative industries, as barriers to entry and efficiencies also play crucial roles, they are essential to understanding competition in a specific market. Competition authorities typically use market share as the first step in analysing anticompetitive practices and merger cases (regarding the influence and legacy of structuralism on competition policy, especially in the United States of America, see Crane and Hovenkamp (2013) and Hovenkamp (2014)).

Market concentration presents a nuanced blend of impacts on creative industries, fostering efficiency and innovation alongside certain eventual detrimental effects. It harbours the risk of stifling competition, as dominant players may leverage their market power to erect barriers to entry, diminish consumer choice, and inhibit the dynamism typically fuelled by a pluralistic market landscape. Such dominance can lead to the suppression of alternative and innovative ideas, which are critical for the vibrancy and diversity of creative industries. On the other hand, it should be recognized that the amalgamation of resources and capabilities often observed in concentrated markets can propel significant advancements in creativity and technology, providing firms with the requisite scale to invest in research and development.

The effects of market consolidation are evident in specific markets of the creative economy. For instance, some studies have demonstrated that concentration in the newspaper industry leads to economies of scale in advertising, distribution, and news (Dertouzos and Trautman, 1990). Other research indicates that consolidation in the scientific journals market is correlated with higher average prices, which, in turn, are positively correlated with quality measured by the number of citations they receive (Dewatripont et al., 2007). In the television market, the impact of economies

of scale on lowering prices depends on the extent of overlaps on channels that broadcast the same content, with increased overlap leading to a reduction in prices in equilibrium (Beard et al., 2005).

In the context of market concentration observed in some creative industries, some factors can amplify the competitive risks associated with market power. As outlined above, elements such as barriers to entry, multi-sided markets, and non-market dimensions can shape the creative economy's assessment and approach to market concentration by competition authorities.

3. The case of digital creative industries

The section collects recent competition policy cases from creative industries in the digital space, at the intersection of the creative and digital economy. Recent UNCTAD reports provide further discussions on digital markets, that become increasingly relevant for certain digital creative industries (UNCTAD, 2019c, 2024b).

The digitization of multi-sided markets has led to the emergence of ecosystems, including within the creative economy. Digital ecosystems could be understood as “decentralized set of firms, data and processes that are connected through their use of digital resources, particularly related to supporting online platforms” (UNCTAD, 2019c). The traditional methods of market definition have been evolving as the competitive dynamics of new economic structures, given their simultaneous conglomerate, vertical, and horizontal dimensions, cannot be fully comprehended using existing paradigms without new concepts and improvements (Jacobides and Lianos, 2021). The so-called “gatekeepers” can be identified within the ecosystems, serving as the central nodes and eventually wielding a unique form of market power (OECD, 2022a). Different forms of market power abuse are also becoming more common, including self-preferencing



practices, highlighting that this dominance is not solely rooted in market structure but in the privileged position of key competitors within an ecosystem (Bougette et al., 2022).

Gatekeepers

Gatekeepers are intermediaries that control access to critical factors within an ecosystem, whether digital or not (and whether in creative industries or not). From this standpoint, a gatekeeper may either control access to the ecosystem's users by external third-party commercial users or prevent access to the ecosystem's content, products, and services.

The concept of gatekeepers has received legal attention under various legal frameworks worldwide, including the *Digital Markets Act (DMA)*. In September 2023, the European Commission designated the first six gatekeepers under the DMA: Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft.

To address competition concerns arising from self-preferencing practices, Japan issued the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA). Since April 2021, five providers of online shopping malls and application stores have been designated subject to the regulations under TFDPA. Since then, these providers have been required to give advance notification of any changes to their terms and conditions and disclose the scope of use of the data obtained from digital platform users, among other obligations (Ministry of Economy, Trade and Industry of Japan, 2021).

The presence of gatekeepers and their influence are among the concerns of the Korean Fair Trade Commission (KFTC).

Self-preferencing

Self-preferencing is a strategy for leveraging market power in adjacent activities by using the market power a given company holds in its main activity. It is a practice in which a company favours its product over its competitors.

Vertically integrated platforms could have dual roles as platform operators and users of their own platforms. This could give an advantage of self-preferencing their own products or services vis-à-vis competitors on their platforms. For example, Google operates an Internet search engine whereby it can self-preference its comparison shopping services over that of rivals by ranking its own comparison-shopping website on the first page of its search results while demoting rivals' websites. Likewise, Amazon operates a marketplace and sells products in competition with independent traders on its platform. In 2017, the European Commission fined Google EUR 2.42 billion for abusing dominance as a search engine by giving anticompetitive advantage to its own comparison shopping service, which would come in the highest rankings in its search results. This decision was appealed before the European Court of Justice, and a final decision is still pending as of March 2024. In 2019, CADE shelved a similar case against Google in Brazil, understanding that the practices in favour of its own comparison shopping service were not anticompetitive.²² These opposing decisions among relevant competition authorities only reinforce the idea that cases involving abuse of market power must be analysed individually under the rule of reason (i.e., based on the effects of the respective practices in each jurisdiction). According to the KFTC, a platform's influence as a gatekeeper increases when users use only one platform (single-homing) or multiple platforms but use a particular platform more heavily than others (Korean Fair Trade Commission, 2023).

²² For the case records, see https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?2pXoYgv29q86Rn-fAe4ZUaXIR3v7-gVxEWL1JeB-RtUgqOwvr6Zlwyd0lhRNSr2Q22lByVKByYDYw sa13_JxqldakEIsAfM400_nlair2nln0NzF4h6tAzo-cc8tTVt (accessed on 18 March 2024).



In the United States of America, the Epic Games competition cases against Apple and Google²³ are examples of how the multi-sided nature of several markets in the creative economy, especially in a digital environment, can affect market concentration evaluation. The first dispute involved Apple's rules for app developers within the iOS App Store, including a 30 per cent commission in sales from other developers' apps. After numerous attempts to convince the company to open its closed platform, Epic Games breached the iOS App Store rules by introducing its own payment method independent from the iOS App Store, leading to its removal from the platform by Apple. Apple was not fined for its practices before Epic Games. However, the judicial decision in the lawsuit required it to allow developers to inform users about cheaper payment options outside the iOS App Store.

The Epic Games competition case against Google involves similar discussions of the *Epic Games, Inc. v. Apple, Inc.* (i.e., anti-steering), and a jury ruled in favour of Epic Games in December 2023. In both cases above, the United States Supreme Court declined to hear the appeals from the parties.

These lawsuits are noteworthy for their extensive debates on the nature of application stores as an ecosystem and the potential for foreclosure arising from the gatekeeper power of big platforms and technology firms like Apple, which can set the rules for access to their application stores by imposing their own payment systems on application developers.

In April 2023, the Korean Fair Trade Commission imposed a remedy and a fine on Google, as the company prevented mobile game developers from publishing games via its competing app marketplace. According to KFTC, the "*monopolisation of the app store market is particularly likely to negatively affect*

the entire mobile ecosystem" (Korean Fair Trade Commission, 2023).

In March 2024, the European Commission imposed a fine of over EUR 1.8 billion on Apple for abusing its dominant position in the distribution of music streaming apps to iPhone and iPad users (iOS users) through its iOS App Store.²⁴ The European Commission found that Apple applied restrictions on app developers, preventing them from informing iOS users about alternative and cheaper music subscription services outside the iOS App Store. These rules set by Apple are called "anti-steering provisions" and were understood as illegal under Article 102 of the *Treaty on the Functioning of the European Union* (TFEU) by the European Commission since they deprive users of cheaper choices and distort competition. The European Commission's decision is not final and could be challenged by Apple before European courts.

In a nutshell, these are good examples for policymakers and competition authorities in other countries. Instead of suggesting a complete reinvention of the competition toolkit or defining the illegality *per se* of certain levels of market concentration, they point to new areas and points of attention in addressing competition concerns in digital markets within the creative economy.

The distinctive aspects of the creative economy are better contextualized by precisely identifying the competitive risks and their genuine relationship with market concentration. Powerful competitors may deliver significant market efficiencies through essential economies of scale and scope.

For example, despite the concentration of streaming platforms, this disruptive innovation in creative industries has enabled more significant and direct access to new audiences for independent artists and limited or ended piracy in the music industry. However, competition concerns may arise from platform dominance,

²³ See *Epic Games, Inc. v. Apple, Inc.*, No. 21-16506 (9th Cir. 2023).

²⁴ For the case records, see <https://competition-cases.ec.europa.eu/cases/AT.40437> (accessed on 7 December 2023).



including self-preferencing or discrimination among content producers. This does not necessarily require the break-up of digital platforms or ecosystems but instead ensures the robustness of the platform's

competitive governance in eventual abuse of market power cases through behavioural measures – such as adopting compliance programs and transparency measures.



Box 5

South African inquiry on the media and digital platforms market

The issue of digital media and platforms is one of the current key concerns of the South African Competition Authority. In October 2023, the South African Competition Commission launched an inquiry designed to scrutinize the distribution of media content on South African digital platforms and the advertising technology markets that link buyers and sellers of digital advertising inventory. According to the Authority, *“the Commission initiated the inquiry as it has reason to believe that digital platforms that distribute news media content have market features that may impede, distort or restrict competition, or undermine the purposes of the Act, and which have material implications for the news media sector in South Africa.”* One of the Commission's main concerns is the effects on small to medium enterprises and historically disadvantaged persons, which must be addressed (Competition Commission of South Africa, 2023).

Source: UNCTAD based on Competition Commission of South Africa (2023).

Finally, as governments prioritize digital transformation, they may support specific sectors through legislative measures and subsidies. While competition law aligns with these goals, favourable treatment of certain firms (i.e., national champions) can distort markets and concentrate power. Therefore, involving competition authorities in digital policy is crucial to ensure fair competition. Recent regulations, such as the European Union's Digital Markets Act and Japan's *Act on Improving Transparency and Fairness of Digital Platforms*, underscore the importance of cooperation between competition and industrial authorities to balance innovation with market fairness (UNCTAD, 2023d).

C. Legal and regulatory environment

Despite competition policy's central role in developing the creative economy, it is not the only regulatory framework applicable to these industries. Companies operating in the creative economy, whether small or large,

start-ups or established firms, are generally subject to a wide range of regulatory standards. Some adjustments to these rules may be necessary to promote the creative economy, mainly when some of these measures constitute regulatory barriers that prevent the sector's development.

1. Privacy and data protection

Data protection rules have a substantial impact on the creative economy. Research on competition issues in the digital economy reveals the central role played by user data for the platform economy and the environment in which many creative industries develop (UNCTAD, 2021b). In the European Union, the *General Data Protection Regulation* (GDPR) stands out as a standard that has influenced the adoption of numerous national laws on the subject, including the *Brazilian Law No. 13,709/2018*, known as the *Lei Geral de Proteção de Dados Pessoais* (or LGPD, in its Portuguese acronym).



Data protection laws will largely determine companies' market behaviour. In cases involving a dominant position and possible harm to competition, competition authorities may impose measures such as interoperability and data-sharing obligations (Administrative Council for Economic Defense of Brazil, 2023) to prevent abusive conduct, such as market foreclosure.

Interoperability

Interoperability is a technical feature that allows computer systems to interact with each other, even when they come from different companies. It can be imposed as an antitrust or merger remedy to foster rivalry between competitors.

During 2022 and 2023, the Competition Commission of India conducted research on *Data Protection and Antitrust: Two sides of the same coin*. It intends to study the relationships and linkages between data privacy and protection and antitrust issues in the digital environment and prepare an issue paper based on the research (Competition Commission of India, 2023).

2. Internet regulation

Laws regulating the Internet also profoundly influence the development of the creative economy. In this sense, *net neutrality*, an obligation that can be applied, for example, to telecommunications operators offering Internet access, is of great importance.

Net neutrality

Net neutrality means that the firm responsible for transmission, switching, or routing must treat all data packets equally, without distinction as to content, origin and destination, service, terminal, or application (Wu, 2003).

Net neutrality is relevant to competition policy, mainly when vertical integration exists between a company that owns an

Internet access provider and a platform that provides services over the Internet. Being alert to the risk of last-mile network infrastructure owners blocking and reducing access to applications or content that compete with their applications should be on the radar of competition authorities.

3. Intellectual property rights

National intellectual property rights (IPR) regimes are also relevant to the creative economy. While IPRs protect authors of inventions or creators of products in the creative economy, they also create legal monopolies. Copyright protection can give rise to market power and its abuse while being shaped by competition dynamics at the same time (Nicita and Ramello, 2007; Cross and Yu, 2008). Similarly, other regulatory barriers, such as licenses and permits, can contribute to market dominance in these sectors and consolidate economic power (Motta and Polo, 1997; Smith and Woods, 2018). Therefore, there is a need to strike the right balance between protecting IPRs on the one hand and protecting competition on the other.

The impact of intellectual property rights on the creative economy in Latin America and the Caribbean has already been the subject of research (Inter-American Development Bank, 2022), identifying a series of challenges. Among the problems are excessive bureaucracy and high costs for accessing the intellectual property system, incorrect protection, outdated legislation using outdated concepts, little respect for the rules or the institutions in charge, and piracy.

Regulatory reforms or establishing parallel laws that address specific intellectual property issues could solve some problems. Some authors point to the *Bayh-Dole Act* in the United States as a positive example of legislation that allows the commercialization of inventions developed at universities (Inter-American Development Bank, 2022). One effect of the law was the increase in the number of patents applied for by universities.



The issue of intellectual property and the promotion of the creative economy, especially in developing countries, is the subject of intense debate. Although some authors advocate strengthening the laws and institutions in charge, others believe that the rights conferred by the current rules impose unnecessary market barriers, preventing the free circulation of artistic and intellectual content. The issue becomes even more complex when the systematic impact of new technologies is considered (i.e., the use of blockchains in regulation or protecting works created through artificial intelligence).

4. Licenses and requirements

Many regulatory rules represent legal obstacles to market entry. In some cases, excessive protection can discourage the full development of creative products and services. It is important to evaluate the concrete effects of national laws governing the exercise of professions, for example, to prevent restrictive requirements from market entry, especially by young people.

The artificial creation of barriers in the labour markets of tech industries should be on the competition authorities' radar. For example, in 2010, the United States Department of Justice reached a settlement with several companies (i.e., Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar), preventing them from entering into non-solicitation agreements for employees. The agreements eliminated significant competition, restraining qualified workers, diminishing overall competition, and adversely affecting employees deprived of competitively relevant information and access to better employment opportunities (United States Department of Justice, 2010).

The issue of excessive bureaucracy in carrying out economic activities also deserves attention. The excess of rules, the requirement to pay high or multiple taxes and fees and legal uncertainty lead many entrepreneurs, especially small and medium-sized businesses, to operate informally, especially in developing countries (Inter-

American Development Bank, 2022). The existence of a simplified, well-consolidated legal system and strong institutions are challenges developing countries face and directly impact the emergence of new business models. Law No. 13,874/2019 in Brazil, known as the *Lei de Liberdade Econômica* (or Brazilian Economic Freedom Law), was intended to address these issues. The law considers regulatory rules that increase transaction costs without demonstrating the effective social benefits and introduces instruments such as regulatory impact analysis as a requirement before the development of new rules.

D. Policy considerations

Successful regulatory experiences have facilitated the flourishing of creative products in several developing countries. The experience of some economies in promoting a competitive creative economy reveals two types of possible public policy measures: i) regulatory initiatives, which seek to oversee and support the market and indirectly favour competition, and ii) competition initiatives, tackling issues involving companies operating in the creative economy, used by competition authorities. Both measures are convergent and deserve attention from policymakers.

1. Regulatory measures

Regarding regulatory measures favouring competition, it is worth highlighting the design of public policies that promote new financing mechanisms for start-ups, including in the creative economy, considering the difficulties these ventures can find in accessing credit. Public-private partnerships can be an effective solution to this end.

Financing mechanisms

In Latin America, the Inter-American Development Bank (IDB) has carried out projects along these lines, such as the *2019 Bono Naranja*, created in partnership



with the Business Development Bank of Colombia, or the *Vouchers for Innovation in the Creative Industries Project*, implemented in Uruguay in 2016 (Inter-American Development Bank, 2023a).

The African Development Bank (AfDB) highlighted the relevance of investments and funding diversification for the African fashion industry, especially considering its potential (African Development Bank, 2016).

Southeast Asian governments have also adopted measures to support and boost creative industries (Sirivunnabood and Alegre, 2021). For example, Thailand has an agency that aims to promote and develop the creative economy.²⁵ The *Philippine Creative Industries Act* and the Philippine Creative Industries Development Council have similar goals in the Philippines.²⁶

Regulatory sandboxes

From the point of view of policymakers, creating a regulatory framework favourable to new financial ventures could be an important initiative. The use of regulatory “sandboxes” related to credit for entrepreneurship or establishing regulations that favour crowdfunding financing are paths to consider.

Regulatory sandboxes

Regulatory sandboxes serve as enclosed testing environments designed for experimenting with various regulatory approaches in a specific market, mainly to experiment with disruptive innovations.

In the United Kingdom, the Financial Conduct Authority (FCA) launched the world’s first regulatory sandbox in 2016 to promote more effective competition in the interest of consumers. It allows participating companies to test innovative business models, products, and services.

Also, the Information Commissioner’s Office (ICO) launched a data protection sandbox in 2019, where organizations can develop and test innovative products and services using personal data in ways that may not be fully aligned with existing data protection regulations, under the guidance and oversight of the ICO. This data protection sandbox has been particularly important in digital identity services, finance, and healthcare.

The Monetary Authority of Singapore (MAS) also established its regulatory sandbox in 2016. This sandbox allows companies to test their innovations in a more flexible regulatory environment for a limited period of time, significantly contributing to Singapore’s position as a leading fintech hub in Asia.

Successful initiatives also involve education for digitalization, especially for young people in vulnerable situations, considering that a significant part of the creative economy depends on the digital environment. In Colombia, a partnership between the government, companies, and the IDB led to the *Audiovisual Sandbox* (Inter-American Development Bank, 2023b), combining audiovisuals and education for young people.

Public-private partnerships

The Republic of Korea’s experience creating a public-private task force to establish guidelines on online platforms also deserves to be highlighted. These guidelines did not introduce new rules but pointed out online platforms’ main characteristics (i.e., multi-sided markets, network effects, economies of scale, and data usage). More importantly, the guidelines outlined criteria for assessing potential anticompetitive behaviour regarding restrictions on multi-homing, most-favoured-nation (MFN) treatment, self-preferencing, and tying (Korean Fair Trade Commission, 2023).

²⁵ See <https://www.cea.or.th/> (accessed on 3 January 2024).

²⁶ See https://lawphil.net/statutes/repacts/ra2022/ra_11904_2022.html and <https://www.creativeindustriessummitph.com/home> (accessed on 3 January 2024).



Cooperation between companies and international organizations also helps in creating opportunities in the creative economy. In the field of tourism, a study by the World Tourism Organization and Netflix identified the possibility of synergies between government actions and business interests in the creative economy. Providing the infrastructure that allows the production of series or films in regional locations, for example, can develop an interest in tourism in that location and attract visitors worldwide (World Tourism Organization and Netflix, 2021).

Opting for soft regulation or principles-based approaches has been recommended for the digital economy and the creative economy, to the detriment of the command-and-control approach, especially when rules can become outdated rapidly, considering the dynamism inherent in new technologies. In some cases, co-regulation and self-regulation are more appropriate ways of tackling problems. This is the case, for example, with the European Union's regulation of audiovisual media services, which aims to create a level playing field for emerging audiovisual media, preserve cultural diversity, protect children and consumers and safeguard media pluralism. Although it establishes guidelines on the subject, the *2018 Audiovisual Media Services Directive* also encourages Member States to use co-regulation²⁷ and foster self-regulation²⁸ through codes of conduct, recognizing their ability to produce consumer welfare (European Commission, 2023).

The example from the Indian film industry discussed earlier in this chapter provides another example of self-regulation recommended by national authorities to tackle market concentration (Competition Commission of India, 2022).

2. Competition law enforcement

Regarding competition policies used by authorities when facing cases in the creative economy, experience has revealed the need to constantly adapt and update guidelines in markets such as digital music and video on demand, for instance, to promote transparency, legal certainty, and rule updates. In 2023, the Brazilian Competition Authority updated its guidelines on digital platforms, justified by the increase in cases involving creative industries and the inherent dynamism of these markets (Administrative Council for Economic Defense of Brazil, 2023).

Competition policy steps must be adapted for the creative economy, where market boundaries are often blurred, making it difficult to define a firm's relevant market. Additionally, measurable criteria for mandatory merger filings, such as market share or turnover, may not capture significant cases. Therefore, competition laws need greater flexibility.

The verticalization of markets has become increasingly prevalent in certain creative industries, such as the digital games markets. Within just the past couple of years, there has been an increasing number of mergers and acquisitions of game-related firms, consolidating the power into the hands of a few significant players within the industry. Tencent, for example, has been increasing its investment in international video game holding companies and studios, exemplified by its high stakes in the French company Ubisoft Entertainment, purchasing of the Hong Kong (China)-based company Leyou Technologies Holdings, and acquisition of the United Kingdom-based company Sumo Group (*S&P Global*, 2022b). In this case, the approach to addressing competition concerns in digital markets introduced by

²⁷ In co-regulation, the regulatory role is shared between stakeholders and the government or the national regulatory authorities or bodies.

²⁸ Self-regulation constitutes a type of voluntary initiative which enables economic operators, social partners, non-governmental organisations and associations to adopt common guidelines amongst themselves and for themselves.



the European Commission in the DMA around self-preferencing and discriminatory conduct has provided a good basis for analysis by authorities around the world.

It is also essential to consider that strict competition law enforcement and/or excessive regulation in markets with low entry barriers can encourage informality and piracy. These circumstances are real challenges to tackle in developing countries. Finding the optimum point for the design of competition policy is essential for the creative economy.

Finally, official data is key for proper public policy development (e.g., national statistics about industry output, value-added, employment rates, market shares in some markets, etc.). The absence of primary information makes it difficult to understand the dynamics of businesses involving the creative economy, its impact on the country, and the bottlenecks it faces. It also prevents the creation of historical series that can be compared with other markets (Ministry of Culture of Brazil et al., 2023; Pinheiro et al., 2023).

3. Way forward

Some key regulatory and competition policy measures that can help countries develop their creative economy include the following:

- **Reviewing and modernizing regulations** to avoid establishing inefficient barriers to entry, especially on issues such as intellectual property rights, Internet, infrastructure, regulation of professions and personal data. In the creative economy, the risks associated with the obsolescence of regulatory frameworks should not be underestimated. For instance, the music industry's market structure and business models have drastically changed over the last thirty years. Therefore, rules should be updated to adapt to new market realities.
- **Prioritizing mechanisms of self-regulation, soft regulation, co-regulation or responsive regulation** over regulations based on a command-and-control approach. Such instruments offer an advantage in rapidly and adequately addressing changing creative industries as they imply lower political and bureaucratic costs than legislative changes. They are also more flexible forms of regulation, better suited to dynamic markets. This is particularly true for markets with intensive technology, like gaming.
- **Investing in international cooperation** to tackle the competition challenges posed by the creative economy. These mechanisms can positively impact enhancing competitiveness, both in national and global contexts, as various related Latin American experiences show. For instance, UNCTAD recently published *Guiding Policies and Procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, which recognizes the importance of cooperation among competition authorities in addressing anticompetitive practices and reviewing mergers. The interconnection of economies worldwide and the potential cross-border effects in creative industries reinforce the importance of international cooperation (UNCTAD, 2021c).
- **Creating and keeping up-to-date guidelines** on competition aspects of the creative economy. It is crucial to ensure that clear standards regarding the regulatory approaches authorities adopt are accessible to market participants. For example, some competition authorities worldwide regularly publish updated reports and guidelines on digital markets, covering various sectors within the creative economy. In Brazil, CADE has published a new version of its guidelines on digital markets (Administrative Council for Economic Defense of Brazil, 2023).
- **Considering the characteristics and unique dynamics of access and structure of the creative economy** when addressing competition



concerns. Authorities should evaluate cases involving the creative economy considering their specificities, especially the barriers to entry, who creates them, and the implications for competition in the market in the specific case (i.e., the fact that it is a multi-sided market in many cases).

- **Reviewing the applicability of the competition policy mainstream toolbox** giving up some requirements when necessary, always in a transparent, legal, and economically grounded manner. An example is the idea of the consumer welfare standard as an orienting principle for competition authorities. While excluding this parameter is not necessarily imperative, it can be expanded beyond price considerations to encompass diverse dimensions, such as quality measures in the creative industries. This expansion includes aspects relevant to consumers, such as the diversity of products and services, demonstrating the versatility of the standard to address various facets beyond traditional pricing concerns.
- **Awareness of the efficient design of competition remedies**, especially considering the inherent dynamism of the markets involved and the possible benefits of significant concentration levels. On certain occasions, less intrusive

yet effective remedies may be better suited. For example, when dealing with digital ecosystems, structural measures like divestments of a gatekeeper's business may impact the overall purpose of these organisations and their users. In contrast, other remedies that ensure openness and contestability, such as transparency or non-discrimination commitments, may be more desirable.

- **Avoiding one-size-fits-all approaches**, particularly considering nation-specific and industry-specific concerns, including national industrial policy priorities. While competitive aspects of the creative economy can be examined globally, it is essential to frame strategies locally. Less-experienced jurisdictions can and should draw on global experiences but must also consider their unique institutional and economic realities, and encourage cooperation between competition and industrial authorities when needed (UNCTAD, 2023d).
- **Investing in producing data about the markets involved**, such as companies' market share, the number of direct and indirect workers, and the volume of wealth produced. Good policies require a definition of relevant markets and an accurate diagnosis of the situation, which means having reliable data to work with.

