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Unlocking Public and Private Finance for the Poor

The role of competition in the digital economy

The roles that competition plays in digital economies is increasingly important. Competition can be beneficial to the end user by reducing prices, improving quality, and increasing the variety of available products and services. At the same time, especially in the digital economy, competition laws and polices must be in place to protect the consumers and their data.

The brief, written in close collaboration with Macmillan Keck, seeks to identify specific roles of competition laws that can help policymakers and regulators build a digital economy that includes — and serves — everyone.

BRIEF

March 2022

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Summary

Competition law and policy seek to preserve and promote competition within markets and across the economy. Competition law prohibits business practices that are likely to undermine competition, such as abusive practices by dominant firms with significant market power, agreements among different firms that restrict competition, and mergers or joint ventures likely to result in excessive market concentration. Competition authorities monitor and review markets to identify violations and/or areas where competition could be improved, conduct inquiries and investigations into specific markets or firms, and enforce the law through appropriate civil and criminal proceedings and the imposition of specific remedies.

Competition in the digital economy has dominated law and economic policy debates in recent years. One focus is the dual role of dominant online platforms in using their own platforms to compete with retailers offering goods and services directly to consumers. Another focus is restrictive agreements among technology firms to increase market power. An emerging issue is the competition implications of the collection, control and use of massive amounts of personal data (see Data Protection Briefing Note). Another emerging issue is the adoption of harmful practises by online firms to gain and maintain the attention of their target audiences.

Considerations while reading this brief

1. Which challenges related to competition and the digital economy are most prominent in your market, both a) in general and b) for underserved groups such as women and low-income people?

2. Do competition regulations in your country address:
   - Digitization: The application of competition regulation to the digital economy?
   - Inclusivity: How competition affects engagement in the digital economy by women, low-income people, and/or other underserved groups?

3. Which entities are responsible for regulation of competition in the digital economy? Are responsibilities clear, and are mechanisms in place to avoid regulatory arbitrage? If not, how could this be improved?

Why do we need competition law and policy?

The benefits of competition

Competition refers to rivalry among businesses providing goods or services. In market-based economies, effective competition is the primary tool for organizing, operating and disciplining economic markets. It is a catalyst for improving efficiency up and down the value chain. Competition benefits consumers by pressuring firms to be efficient, innovative and customer-focused. As rival firms seek to attract and retain customers, they face pressure to reduce prices, improve quality and increase variety of their products and services.

This may lead a business to refine its processes and capabilities with existing resources and inputs, known as ***static efficiency*** gains, in order to improve productivity and over time pass the efficiency gains through to customers. For example, faced with competitive pressure, a local taxi service in a developing country may improve its efficiency by employing a dispatcher and communicating with drivers over their mobile phones. As a result, customers can call to arrange for pick up, drivers can optimise numbers of customers and routes, and the operator may strengthen its network of taxis.

The incentive to compete may also lead businesses to innovate through investment in new processes and technologies that improve efficiency or result in entirely new products and services, known as ***dynamic efficiency*** gains. For example, the same taxi service provider may choose to invest in a new ride-hailing mobile app that matches customers with the nearest available cab, eliminates the need for a human dispatcher and provides more accurate matching of available cabs and customers. This innovation may improve pickup and drop-off efficiency. The taxi service provider may also implement a digital wallet system to enable its drivers to accept mobile money payments for fares. This innovation may reduce the time required for the driver to collect payments with riders, facilitate auditing of ridership and fares by the taxi service provider, reduce the risk to the drivers and service provider of robbery and theft, and speed the settlement process between the taxi firm and its drivers. All of these changes may afford the taxi firm a competitive advantage and provide pass-through benefits to both its drivers and customers.

The rationale for intervention

When functioning well, a competitive market should enable customers up and down the value chain, and ultimately consumers, to purchase more and better goods and services at lower prices. Because of these benefits, competition law and policy seek to develop, preserve and promote competition within markets and, more generally, across the economy. This typically entails a liberal approach to economic activity whereby the interplay of supply and demand in markets, rather than regulation or other government intervention, determine prices, quality, volume and variety of goods and services. An effective legal framework governing competition ensures that market discipline, rather than political decisions, determines which businesses enter a market and succeed or fail.

However, markets do not always function well on their own. A sound competition framework must include a role for intervention when competition is weak or fails, and markets do not yield efficient outcomes. The framework should include market rules that are predictable and transparent. One key component of a competition framework is the establishment and enforcement of prohibitions on business practices that are likely to undermine competition.

While typically framed in terms of efficiency and economic theory, competition policy also represents the pursuit of a form of economic liberty. It seeks to enable people and firms to take business initiatives based on their own evaluation of risk and opportunity and ability to pursue profit.

Competition policy typically seeks to prevent incumbent firms from hindering others from entering or growing in the market. It may also seek to reduce barriers to market entry, such as regulations that get in the way. For example, ride-sharing apps have been blocked from entering many local markets in response to protests from incumbent taxi drivers who would face competition. In Mexico, the competition authority responded by recommending that local governments recognize transportation services provided by platforms, which led to removal of market entry restrictions through new regulations.[1]

Relationship to consumer protection

Consumer protection policy and competition policy are complementary in striving for the proper functioning of markets and promotion of consumer welfare. Competition policy focuses primarily on the marketplace for goods and services, aiming to maximize the range of choices available by optimizing the functioning of markets. Consumer protection addresses consumer interests at the individual transaction level, focusing on shortcomings in the ability of consumers to protect their interests even in a competitive market. It recognizes that while competition and customer choice can discipline supply-side behaviour on key transaction elements, such as price, they may not be effective regulators of other aspects of supply-side behaviour.

Some of the ways that firms in a competitive marketplace can exploit human biases and fallibilities include the following:[2]

- "using framing effects and changing the reference point, such that the price change is viewed as a discount, rather than a surcharge;
- anchoring consumers to an artificially high suggested retail price, from which bounded rational consumers negotiate;
- adding decoy options . . . to steer consumers to higher margin goods and services;" and
- using complex mechanisms to calculate interest rates, fees, and other charges that prevent typical consumers from effectively comparing prices.

While none of these is unique to competitive environments, increased competition may strengthen the incentives for firms to behave in this manner,[3] leading to a race to the bottom with respect to disclosure and transparency and higher costs for consumers. For example, Kenya has seen a large increase in access to short-term digital credit in recent years. Despite a proliferation of lenders, this credit is typically quite costly, with mean and median effective APRs of 280.5% and 96.5%, respectively. Furthermore, the average loan cost for borrowers who have consistently repaid on time has actually *increased* over time, which is due at least in part to a lack of effective mechanisms for sharing positive customer repayment history.[4]

Consumer protection laws impose minimum supply-side standards and offer aggrieved consumers a remedy when those standards are not met. This enables consumers to exercise their purchasing choices effectively, confidently and under fair conditions.[5,6] In the example of the taxi service operator, the competition framework and resulting market discipline impels the service provider to innovate, reduce costs and improve the quality of its service to stay ahead of its rivals. Consumer protection laws ensure that the pricing of the cab service is transparent, that drivers are properly trained and licensed, and that vehicles meet baseline safety requirements.

What business practices are typically prohibited?

Restrictive agreements

Competition frameworks seek to prevent firms from entering into ***restrictive agreements***, meaning agreements that have the effect of weakening or restricting competition in a market. What constitutes an "agreement" for such purposes is usually interpreted broadly to encompass any arrangement or coordinated behaviour, whether written or oral, explicit or tacit. Such agreements may be:

- horizontal, meaning between rival firms in the same market; or
- vertical, meaning between firms at different levels of production or service delivery, such as between a web content provider and the operator of the web platform hosting the content provider.[7]

Horizontal agreements are generally subject to heightened scrutiny in enforcement actions because they involve relationships between rivals and therefore directly impact competition. ***Cartel conduct*** is a subset of anticompetitive horizontal agreements in which multiple competitors directly collude with one another to thwart competitive pressure and increase their profits. Cartel conduct is generally considered a ***per se violation*** of competition law, meaning that the conduct is strictly prohibited without the need to consider the circumstances or the effects. In a digital economy, artificial intelligence and powerful algorithms may create more durable cartels that are able to maintain higher prices at consumers.[8] Cartel conduct typically includes:

- ***price-fixing***, when competitors agree on prices or pricing mechanisms, such as executives of mobile network operators agreeing on retail price floors at an industry conference;
- ***market division***, when competitors divide up a market and avoid competing within those divisions, such as a group of rival IT support firms agreeing to limit their sales efforts to distinct geographic territories; and
- ***bid rigging***, when competitors collude in a tender process to pre-determine the winner or inflate the award amounts, such as a group of software firms deciding among themselves who should win each of a series of government tenders and crafting their bids to assure the agreed outcomes and maximize profits.[9]

Vertical agreements generally pose less threat to competition than horizontal agreements and are typically held to a more lenient standard. For example, a potentially prohibited vertical arrangement is ***exclusive dealing*** (such as where a large firm in one layer of the value chain prohibits a supplier or customer in another layer of the value chain from trading with the large firm's rivals), as witnessed in the form of exclusivity of mobile money agents in the early days of mobile money. Another example is ***resale price maintenance*** (such as where a large supplier requires its resellers to charge a minimum resale price).[10] Antitrust agencies and courts have typically relied on a rule of reason framework to assess vertical mergers because of the need to weigh the benefits of these arrangements against their potential harms.[11] Vertical agreements may have potential procompetitive benefits that may be considered when assessing whether they should be prohibited. For example, exclusive dealing agreements may align the interests of suppliers and distributors, promoting more effective competition between suppliers of competing products or may encourage suppliers to provide services or information to distributors that benefit consumers.[12]

Competition frameworks typically make accommodations to permit the operation of industry groups, professional organizations and cooperatives that inherently require rival firms or firms with vertical relationships to work together in a common enterprise. Many frameworks also permit businesses to apply in advance for ***exemptions*** or ***authorizations*** to permit them to engage in otherwise prohibited arrangements. An applicant must typically show that the arrangements are necessary for a legitimate business or public purpose, do not have significant adverse effects on competition, or otherwise produce a net public benefit that outweighs any anticompetitive effects. An example may be for rival telecom firms to invest together in shared fibre optic infrastructure to achieve greater economies of scale than would be possible if they built multiple separate fibre networks.

Frameworks differ regarding the types of agreements that are eligible for exemptions or authorizations, with many carving out cartel conduct as ineligible.

Abuse of dominance

When a firm can raise and profitably maintain its prices beyond a level that would be predicted in a competitive environment – essentially when it can act independently of competitors and customers – that firm may be considered ***dominant*** (also sometimes referred to as having ***significant market power (SMP)***) in the relevant market.[14]

The factors used to determine whether a firm is dominant vary across jurisdictions. Dominance may arise if there are significant regulatory, financial, or other barriers that prevent potential competitors from entering the market to challenge the firm. In some countries, and some sectors of the economy, a presumption of dominance may arise if a firm commands a market share that exceeds a certain threshold, but such presumptions are often rebuttable because high market share does not always indicate dominance.[15] Dominant positions often arise in the digital economy due to ***network effects***, where the value of a particular platform increases exponentially as the number of users of that platform (e.g., buyers, sellers, and other users) grows.[16]

Dominance is also often assessed based on a prospective view of the market, considering entry barriers and the existence of potential rivals. Sometimes a first mover in a new market with low entry barriers quickly attains a very high market share and may retain that market share for several years while potential rivals who have become aware of the market opportunity undertake the necessary steps to enter the market. For example, Canadian firm Research in Motion initially skyrocketed to the head of the global market for handheld data devices with its Blackberry offering, bypassing long-time incumbents in the 2G mobile phone manufacturer market. However, the incumbents quickly embraced smart phones, which combined voice and data in a single device, and Blackberry's fall in market share was almost as quick as its rise.

In most competition frameworks, being big is not viewed as inherently bad. Typically, a finding of dominance does not itself constitute an anticompetitive practice, indicate market failure, or require immediate intervention. A firm may have achieved dominance because it offers consumers a superior product or service or is uniquely able to translate efficiencies in production or distribution into lower prices. However, when the conduct of a dominant firm harms the competitive process itself, such as by unreasonably excluding rivals or impairing their ability to compete fairly, the conduct may amount to an anticompetitive abuse of ***dominance***.[17] Recently, Italy's competition authority fined Amazon EUR 1.13 billion after concluding that Amazon leveraged its dominance in the e-commerce space to unfairly incentivize sellers to shift from other logistics service providers to Amazon's logistics service.[18]

Predatory pricing, a practice commonly considered an abuse of dominance, occurs when a dominant firm reduces its prices below its costs in a manner that drives competitors out of the market and/or discourages market entry. While the dominant firm may be able to absorb the ensuing losses for a time and recoup them later, the competitor may not be able to match the low prices and run a profitable business. Such predatory pricing is increasingly complex to identify in digital markets because services are often provided at prices that bear no direct relation to cost because the costs and profit are being recouped from other services. For example, online search is set at a monetary price of zero to the customer, but the costs are recouped and profit is generated from other services such as digital advertising.

A related abuse of dominance is a ***margin squeeze***, which arises when two firms are competing in a market and a dominant firm provides an input that the second firm needs to compete with the dominant firm, charging the second firm a price that makes it impossible for it to compete with the dominant firm on price. For instance, a telecom operator might operate a digital financial service, such as mobile money. It might also allow its telecom network to be used to access competing services of other digital service providers. If the telecom operator is dominant in the market for the relevant telecom service (e.g., USSD channel) and charges an excessive price for accessing that service, the imposition of this cost may prevent the competitor from competing effectively with the telecom operator in the provision of digital financial services.

Another abuse of dominance might occur where a dominant telecom operator sets its prices for on-net calls (those made by one of its customers to another of its customers) significantly below the price of off-net calls (those made by one of its customers to customers of another operator). This can be a problem especially where the dominant telecom operator's on-net call price is below the interconnection charge a small competitor must pay to the dominant operator when the former's customers call the latter's customers. The result may be that the small competitor cannot set a competitive price for calls to the dominant operator's customers, effectively preventing it from competing.

Tying occurs when a firm that is dominant in one market and not dominant in another market ties the products together to require customers to purchase both as a bundle. A firm may engage in tying to try to extend its dominance into new markets. Offering products together as part of a package can benefit consumers who want the convenience of buying complementary products at the same time and in the correct proportions. Offering products together can also reduce the supplier's costs for packaging, shipping, and promoting the products, and these savings are sometimes passed through as discounts for the bundle. For these reasons, tying arrangements are usually not per se violations. Digital markets are particularly vulnerable to anti-competitive tying and bundling practices, and the concept has been applied to assess the legality of software integration and prioritized display in search engine rankings.

Recently, debates have emerged over whether the massive personal data collection activities of a handful of dominant online platforms, which raise data protection and privacy concerns, should also be viewed through the lens of competition law and policy as an abuse of dominance.[19] Because many online services are provided free of charge to end users, the familiar predatory pricing angle is often not available to challenge the activities of the large tech firms.

Authorities responsible for competition promotion and protection may proactively conduct periodic or *ad hoc* reviews of markets to assess market power, identify businesses as dominant, and review conduct where there have been complaints against dominant providers.

Mergers resulting in concentration of market power

A ***merger*** occurs when two or more previously independent firms enter into a transaction that leaves them under common control of the same shareholder or shareholders or combines them into one entity.[20] Mergers usually involve one firm purchasing the shares or assets of another firm. However, joint ventures and other enduring arrangements among otherwise independent firms may fall within the scope of merger control under certain conditions.

Many mergers allow businesses to operate more efficiently and pass on cost savings to consumers. Weaker rivals in a highly competitive market may also merge in an effort to remain viable and competitive against larger rivals. This is particularly true in markets that are inherently concentrated due to the need for all suppliers to achieve large economies of scale, such as mobile telecom service markets. Merger activity among mobile operators has been brisk around the world over the past several years, as the number of sustainable networks in a country has shrunk from four or more to only two or three as a result of increasing operator costs and flat operator revenue during the transition from voice-centric to data-centric communications.
However, some mergers, especially those between competitors, may reduce or eliminate competition in a market and may ultimately harm consumers. For this reason, many jurisdictions implement ***merger control***, meaning processes carried out by

a statutory competition authority to identify and address the potential anticompetitive or procompetitive effects of mergers.[21]

Typically, mergers that reach a certain economic threshold (traditionally triggered by sufficient revenues or assets of the parties involved) are required to notify a competition authority of a potential merger. The authority then conducts a review of the notified merger to identify and quantify likely anticompetitive or procompetitive effects. The authority will ultimately approve the merger, prohibit the merger, or approve the merger subject to conditions designed to mitigate any identified anticompetitive effects. For example, in Egypt a merger between two ride-sharing services was recently approved subject to conditions, including mandatory sharing of certain data with competitors to reduce market entry barriers.[22]

These reviews are typically carried out before the merger (referred to as ***ex-ante review***) rather than after the merger (referred to as ***ex-post review***) because it is much easier to prevent the transaction than to undo it after the fact. This does not preclude a competition authority from later bringing competition enforcement actions against the merged firm, and competition remedies may even include an order to unwind the merger or spin off part of the merged firm. The traditional emphasis on economic thresholds to trigger merger review has recently been challenged by acquisitions among technology firms. Companies such as Meta Platforms (formerly known as Facebook) and Google may purchase fledgling rivals with little or no positive revenues, and as a result such transactions are not required to be notified to the authorities. Even if the parties to the merger notify the authority as a courtesy, the lack of significant revenues may not trigger an in-depth review. The purchase of these potential rivals by dominant businesses neutralizes challenges to their market power. Regulators in many jurisdictions are rethinking their approach to identifying mergers that should be scrutinized and are even revisiting prior acquisitions. For example, the US Federal Trade Commission recently initiated legal proceedings against Facebook seeking to unwind its acquisitions of Instagram and WhatsApp, which the antitrust agency had previously allowed to proceed in 2012 and 2014.[23]

Many jurisdictions permit or even require considerations beyond competition policy when reviewing mergers as part of a merger review. These ***general interest*** or ***public interest*** considerations may include policy matters such as national security, plurality in media, restrictions on foreign ownership, promotion of employment, racial inclusion, industrial policy, and international competitiveness of domestic industries.[24] They are often highly controversial because they go beyond traditional competition analysis and often involve political considerations.

How do institutions support competition policy?

Competition authorities

Competition policy frameworks are typically enforced by designated government competition authorities or agencies. In some jurisdictions, a general competition authority has a wide mandate across all sectors of the economy. These authorities are generally charged with enforcing applicable competition laws and issuing administrative regulations, rules, or guidance on compliance.[25]

Some sector regulators may also have a responsibility for competition in their respective sectors. This occurs particularly in network industries with natural monopoly characteristics of high fixed costs and increasing economies of scale, such as electricity distribution and transmission, telecommunications, toll roads and bridges, railways, water and sewer utilities, bus services, and even taxi services. In some cases, general competition authorities and sector regulators have overlapping jurisdiction. Competition authorities typically limit their interventions to *ex-post* remedies (with the notable exception of pre-merger reviews). In contrast, sector regulators often have a mandate to engage in proactive *ex-ante* market interventions to foster stronger competition in the inherently concentrated markets they are charged with regulating. Competition authorities and sector regulators may implement information sharing and coordination arrangements to ensure greater harmony and effectiveness in their respective roles.

Investigations

Competition authorities generally have extensive and intrusive powers to investigate suspected competition law breaches, including carrying out "dawn raids." They may act upon a complaint or the statements of a ***whistle blower*** (someone with inside knowledge reporting wrongdoings to the authorities) or based on their own observations of markets. For example, Turkey's competition authority launched a broad investigation in 2021 into the hiring practices of 32 leading technology, e-commerce, and media entertainment firms to determine whether informal agreements between these companies have anticompetitive effects on labour markets.[26] The focus of an investigation is usually a firm, but in some jurisdictions, authorities also have the power to investigate individuals.

Many competition authorities have implemented ***leniency programs*** to identify new investigative targets and support existing investigations into cartel conduct.[27] These programs encourage cartel participants to come forward and provide evidence against other participants in exchange for immunity from or reductions in administrative fines. These programs have proven very effective as a deterrent to cartel behaviour and in reducing the human and financial resources required to gather evidence to support a successful investigation. In the United States, these prosecutions resulted in criminal sentences with fines totalling over USD5 billion between 2014 and 2018 and convictions of several executives. In the automotive parts cases alone, the leniency programme has resulted in criminal charges against more than 60 individuals and more than 45 companies, and criminal fines totalling more than USD2.8 billion.[28]

Market studies and competition assessments

Competition authorities are often empowered to conduct *ad hoc* reviews of competition in particular markets. In some countries, sector regulators such as telecom and financial services regulators may also be empowered or mandated to conduct periodic sector reviews.

In ***market studies*** or ***market inquiries***, authorities gather information and study a particular market to assess whether competition is working effectively.[29] The findings of these studies may include policy recommendations or regulatory changes to address identified issues, designations of dominance, warnings to businesses to cease anticompetitive practices, or enforcement actions.[30] In ***competition assessments***, authorities scrutinize a proposed or existing policy or regulation and evaluate its effects or likely effects on competition.[31] The findings of a competition assessment may be used to advocate for policy or regulatory changes.

Advocacy and international coordination

Competition authorities often serve an advocacy role within government, encouraging legislatures and policymakers to implement pro-competitive laws and policies. They may also engage with their counterparts internationally to promote best practices and coordinate in investigations and enforcement.

Courts

Many competition frameworks provide firms with a right to judicial review of a competition authority's decisions.[32] This imposes a degree of accountability on the authority, potentially improving the quality of analyses and decisions and strengthening public confidence. Jurisdictions vary in the procedural details of such review, with many allowing direct appeals of adverse decisions to specialized courts or courts of general jurisdiction.

Remedies and penalties

Competition authorities have an array of potential remedies available to them to address competition issues. Firms may be designated as dominant, subjecting them to the tighter standard of conduct under the prohibition of abuse of dominance, as discussed above. Firms that have amassed market power through vertical integration may be required to separate their component businesses by various degrees. This might be done, for example, to reduce the risk of the firm's upstream business discriminating in favour of its downstream business to the disadvantage of competitors' businesses in that downstream market. A firm may in some cases be required to divest part of its business.[33] At the most extreme end, an authority may regulate prices, e.g., by setting price ceilings or even specific prices. In the merger review context, an authority may prohibit a proposed merger, require a consummated merger to be unwound, or approve a merger subject to conditions that mitigate anticompetitive effects.

Competition authorities may also impose significant fines on firms that are found to have breached competition laws. For example, in the European Union, such fines can reach up to 10% of the worldwide revenues of a firm and its affiliates.[34] In some jurisdictions, violations of competition law are considered a criminal offence[35] and individuals serving as directors or officers of a firm can be fined or imprisoned. Some jurisdictions also confer private rights of action on aggrieved individuals or firms, permitting them to bring claims for damages resulting from violations.[36]

Competition policy in the digital economy

Competition regulation in the digital economy has dominated law and policy debates in recent years. With their massive size and influence over the global economy, so-called Big Tech companies such as Amazon, Apple, Meta (formerly Facebook) and Alphabet (Google's parent company) have increasingly become the target of competition enforcement.[37]

Many competition enforcement actions have focused on the dual role that these firms play in some markets, providing retail products and services directly to consumers while also serving as a ***wholesale platform*** for rival firms to offer their own products and services. The concern is that the firm has a conflict of interest. It provides a service to other firms where they can buy and sell goods and services to customers (the wholesale platform). In doing so, it may be able to disadvantage the performance of the rival firm compared to the firm's own competing service. Or, it may be able to gather information about the firms using the platform to gain a competitive advantage in the retail market (e.g., it may use insights on the pricing of rivals' products to outcompete them systematically).

For example, in 2017, Google was fined €2.4 billion by the European Commission for abusing its dominance as a search engine.[38] Google was found to have manipulated its search results to favor its own retail services at the expense of its competitors. In another case begun in 2020, Amazon came under abuse-of-dominance investigation by the European Commission. Amazon similarly plays a dual role as a wholesale platform and a direct retail provider of products. The concern relates to its use of non-public data about its wholesale customers (i.e., the sellers in its marketplace) to enhance its own retail business.[39]

Other competition actions have focused on the interactions among these Big Tech firms. For example, in late 2020, the US Department of Justice announced an investigation into Google for payments of up to USD 12 billion to Apple.[40] The payments were allegedly made in exchange for Apple establishing Google, already the dominant provider in search, as the default search engine on its mobile devices at the expense of competitors. Also in 2020, nine state attorneys general in the United States filed a lawsuit alleging that Facebook (now Meta) and Google colluded to fix prices and divide up the market for advertising on websites and mobile apps.[41]

Emerging issues

Big data

When data is collected in large varieties and volumes and processed at high velocities, it is often referred to as ***big data***. Insights from data patterns can enable the design and implementation of more efficient public and private services that address trends in society. Big data also allows firms to more efficiently develop and deliver customised products and services, which could increase customer satisfaction and/or reduce costs to customers.

Digital platforms such as Meta (formerly Facebook) and Google provide free services to users about whom they accumulate massive amounts of personal data (see [briefing paper on data protection]). These platforms are multi-sided markets, where buyers and sellers can interact, with the platform generating revenue from advertising. These platforms depend on troves of big data, which they have acquired through years or decades of user interactions, to target advertisements to their users. Some critics contend that the control these firms exert over such data creates a significant barrier to market entry, as potential competitors are unable to amass sufficient data to compete for advertiser dollars. Other observers consider access to larger amounts of data as providing a limited advantage.

Competition authorities have struggled with how to address these issues. For example, the concept of market power is often understood in terms of the ability to set prices above competitive levels, but digital platforms often offer services for free to users. Some have considered whether the appropriate market to regulate is the online advertising market because the competitive advantage is in being able to use data to generate advertisement revenue, rather than regulating the retail market for these user-facing platforms. Some commentators have even advocated that big data should be treated as an ***essential facility***, something so indispensable to entering or competing in the market that it must be shared with competitors (see [briefing paper on fair access to communications channels]). The European Union is currently finalizing a Digital Markets Act intended to provide a framework for responsible behavior by large digital platforms, which it refers to as "gatekeepers".[42] The Act is expected to enter into force by October 2022.

The possibility of mandated data sharing raises its own data protection and privacy issues.

Defining markets in the attention economy

When competition authorities assess competition, they look at context-specific markets. Defining the ***relevant market***, i.e., the boundaries of the market to be considered for the purposes of assessing competition, is often the subject of some controversy. A broad market definition (e.g., online tools) versus a narrow market definition (e.g., online search engines) could make the difference in determining whether a particular business is deemed to have market power or dominance.

Online platforms such as Meta (formerly Facebook), YouTube, and Netflix provide very different types of content (social media posts, user-created videos, movies and subscription programming). Traditionally, these platforms would be characterized as operating in distinct markets. However, when seen as competitors for human attention, they may function within the same market. This ***attention economy*** has been at the centre of contemporary debates in the media and technology industries.[43] There are only so many hours in a day that a consumer may spend scrolling through a social media app, watching TV, listening to music, or streaming a video.

The recognition of an underlying similarity among these activities may begin to push competition authorities to view online businesses that vie for human attention as direct competitors in a broader relevant market. For example, a competition authority may view two attention economy platforms that operate via different media – and hence would traditionally be considered to be operating in separate markets – as part of the same relevant market when assessing the effects of a proposed merger. At the same time, when assessing dominance, such a broader relevant market definition may dilute the assessed market power of any one platform that would otherwise be considered to have significant market power. Therefore, the overall implications for competition enforcement are uncertain.[44]

Additional resources

Competition Policy Models

- UNCTAD Model Law on Competition, 2007
- A Framework for the Design and Implementation of Competition Law and Policy, 1998
- The United Nations set of principles on competition (The UN Set), 1980

Resources for further reading

- GSMA, Resetting competition policy frameworks for the digital ecosystem, 2016
- UNCTAD, Competition issues in the digital economy, 2019
- OECD, Big data: Bringing competition policy to the digital era, 2016

Organizations

- OECD (Competition Page)
- International Competition Network
- Concurrences
- International Bar Association, Competition Law International

Notes

[1] World Development Report 2021: Data for Better Lives, World Bank (2021) at p. 235. Available at https://openknowledge.worldbank.org/handle/10986/35218.

[2] Stucke, Maurice E. "Is Competition Always Good?". Journal Of Antitrust Enforcement 1, no. 1 (2013): 162-197. doi:10.1093/jaenfo/jns008.

[3] Steffen Huck, Jidong Zhou and Charlotte Duke, "Consumer Behavioural Biases In Competition- A Survey" London: Office of Fair Trading (OFT) from London Economics, 2011, https://webarchive.nationalarchives.gov.uk/ukgwa/20140402142426/http:/www.oft.gov.uk/shared_oft/research/OFT1324.pdf

[4] Putman et al. (2021), "Report on the Competition Authority of Kenya Digital Credit Market Inquiry", v-x.

[5] OECD Policy Roundtable, The Interface between Competition and Consumer Protection Policies, OECD, (2008). Available at https://www.oecd.org/daf/competition/sectors/40898016.pdf.

[6] Chapter I of the Manual on Consumer Protection, UNCTAD (2017). Available at https://unctad.org/webflyer/manual-consumer-protection.

[7] See, Model Law on Competition (2020), revised chapter III, UNCTAD (18 September 2020) at 4. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

[8] Policing Digital Cartels. Financial Times. 8 January 2017

[9] For an overview of cartel conduct, including the concepts described here, see, Model Law on Competition (2020), revised chapter III, UNCTAD (18 September 2020) at 7-12. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

[10] For an overview of vertical restrictive agreements, see, Model Law on Competition (2020), revised chapter III, UNCTAD (18 September 2020) at 12-13. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

[11] Global Antitrust Institute, Report on the Digital Economy, Vertical Mergers and Integration in Digital Markets (2020), Available at: https://gaidigitalreport.com/2020/08/25/vertical-integration-in-digital-markets/

[12] See, International Competition Network, Unilateral Conduct Workbook, Chapter 5: Exclusive Dealing, (April 2013) at Section V.B. Available at https://www.internationalcompetitionnetwork.org/portfolio/uc-workbook-exclusive-dealing/.

[13] For an overview of authorizations and exemptions and various approaches taken across jurisdictions, see, Model Law on Competition (2020), revised chapter III, UNCTAD (18 September 2020) at 14017. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

[14] For the purposes of this publication, we treat dominance and significant market power as synonymous. See, e.g., UNCTAD (2020), Model Law on Competition (2020), Revised Chapter IV, at 3.

[15] For an overview of dominance and how it is assessed across jurisdictions, see Model Law on Competition (2020), revised chapter IV, UNCTAD (18 September 2020) at 3-12. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

[16] See generally Tim Stobierski (2020), What are network effects?

[17] For an overview of abuse of dominance, including the specific behaviors discussed below and how these are treated across jurisdictions, see Model Law on Competition (2020), revised chapter IV, UNCTAD (18 September 2020) at 13-33. Available at https://unctad.org/system/files/official-document/tdrbpconf9L2_en.pdf.

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[22] World Bank (2021) at 233, supra.

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[31] For example, the Tunisian government initiated an OECD-assisted competition assessment of its tourism and banking sectors in the context of the Covid pandemic. See https ://www.oecd.org/daf/competition/fostering-competition-in-tunisia.htm.

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This publication was last reviewed in March 2022.

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