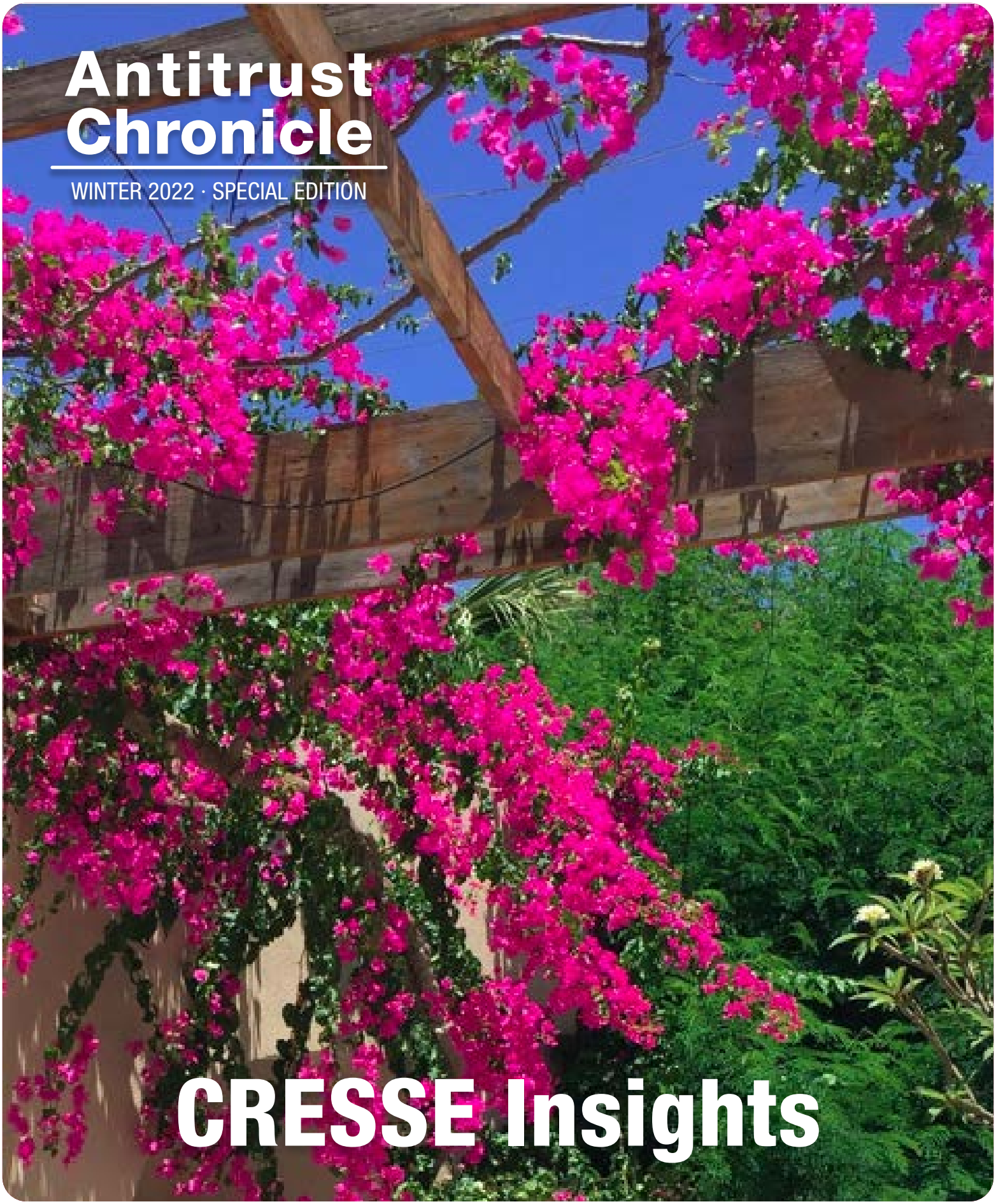

Antitrust Chronicle

WINTER 2022 · SPECIAL EDITION

CRESSE Insights

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The January 2022 CPI Antitrust Chronicle includes articles based on presentations from the Special Policy Sessions ("SPS") organized by CRESSE in collaboration with CPI in September 3-5, 2021. The contributions here include articles by a number of prominent economists and legal experts. The 2021 SPSs focused on the following topics:

Policy Design in Digital Ecosystems
Digital Disruption in Banking
Digital Markets: Big Data, Privacy Protection and AI
Systematically incorporating innovation in Competition Law Enforcement
Competition Policy Enforcement in Digital Markets: the case of BRICS
Screens, Presumption and Efficiencies in Merger Review
Digital Ecosystems: issues related to vertical relations
Enforcing Against Anticompetitive Behaviour in Labor Market
Algorithms and Competition Policy

CRESSE (**www.cresse.info**), is an international network of academics and other professionals, with an interest in competition policy and sectoral regulation. Every year, CRESSE organizes an international conference in Greece that is now widely recognized as one of the leading academic conferences in the economics of competition policy and regulation worldwide. CRESSE conferences offer an unparalleled breadth of academic insight, combined with topical policy discussions and insights into the most recent enforcement developments and challenges in the main jurisdictions around the world. The insights offered are relevant to enforcers, practitioners and academics alike. The issues discussed in CRESSE SPSs are examined by invited academics (economists and lawyers), policymakers, corporate representatives and relevant practitioners.

In July 1-3, 2021, CRESSE organized its 16th International Conference on "Advances in the Analysis of Competition Policy and Regulation" in Crete, Greece. **Keynotes** feature the **Competition Policy Lecture** by Jean Tirole (Toulouse School of Economics), the **J-J Laffont Lecture** by John Sutton (London School of Economics) and the **Lawyers' Lecture** by Einer Elhauge (Harvard University).

Below, we provide brief descriptions of the articles that are included in this volume.

STEERING DIGITAL MARKETS TOWARDS DEVELOPMENT

By Tembinkosi Bonakele

On May 19, 2021, the South African Competition Commission ("CCSA") launched its market inquiry into digital markets. While several competition agencies the world over have launched inquiries into digital markets, the CCSA's inquiry differs in two material respects: (1) it seeks to optimize market conditions for the growth of small businesses and firms owned by historically disadvantaged persons (or HDPs); and (2) its scope is limited to online intermediation platforms. As I write, the inquiry is conducting its first round of public hearings which are set to end on November 19, 2021. So far, the inquiry has received 134 written submissions from market participants and heard 51 oral submissions to date.

IS LOSS OF PRIVACY THE PRICE THAT CONSUMERS PAY FOR OTHERWISE FREE ONLINE SERVICES?

By Keith Waehrer

The intersection of online privacy policy regulation and antitrust enforcement has received significant attention recently. Commentators approaching this subject discuss it from at least three different angles. Keith Weahrer argues that competition over quality can be analyzed in similar ways as competition over price, despite the fact that measurement might be more difficult. He seeks to skewer a number of myths that appear to get in the way of antitrust enforcement relating to privacy and analyzing competitive effects on the consumer side of these services where the price appears to be free. In answer to the question of the title, in many ways competitive effects on privacy can be analyzed in ways that are quite similar to price, but generally equating the loss of privacy to a price risks losing some important differences between the two.

PROPOSALS FOR DIGITAL REGULATION IN THE UK: SOME TRADE-OFFS AND CHALLENGES

By Adam Cellan-Jones & Dr. Jenny Haydock

Digital markets are unquestionably a hot topic in competition policy globally. In the UK, the CMA has a wide-ranging portfolio of work in the digital space, reflecting its stated priority to foster effective competition in digital markets. This portfolio of work is designed to use the CMA's existing tools effectively to tackle potential problems in digital markets, while also deepening its knowledge of those markets. But it is also serving another purpose – to help the CMA establish what to prioritize if and when new powers are introduced for ex ante regulation of the most powerful digital firms. At present, the CMA houses a "shadow" digital regulator, the Digital Markets Unit ("DMU") – the hope is that this will gain formal powers in due course. Proposals for these new powers are currently being considered by the UK government, which has just completed a public consultation on the matter.

The proposals the government considered drew heavily on the advice of the "Digital Markets Taskforce," which was established in March 2020, led by the CMA. The Taskforce advice recommended that a regulatory regime be established, focused on the most powerful digital firms – those firms with Strategic Market Status ("SMS"). The key motive behind the Taskforce's recommendations was to achieve ongoing and proactive oversight of most powerful digital firms. It seems clear that this means shaping firm conduct in advance – preventing harm, rather than just identifying and remedying specific examples of poor conduct after they have occurred. However, while the regime should be able to move quickly to act where necessary, it should also offer predictability and legal certainty for stakeholders. The Taskforce was also clear that the regime should be evidence-based, proportionate, and targeted. The authors of this paper discuss some more specific ways in which that aim might be realized.

LIMITED DEVELOPMENT OF BIG TECH FIRMS IN CREDIT ACTIVITY: LACK OF INCENTIVES OR BARRIER TO ENTRY?

By Frederic Palomino & Miguel de la Mano

Digital-technology-based developments have matured to the point whereby a dramatic change in banking and other financial services is possible. Such developments explain the involvement of Big Tech firms in the financial service industry. However, the expansion of Big Tech firms into other financial industry sectors such as credit intermediation, deposit-taking activities, asset management or insurance is highly heterogeneous. For example, in Asia, companies such as Alibaba and Tencent cover the whole spectrum of activities. Ant Group (part of Alibaba), through its online bank subsidiary MYbank, grants credit to SMEs that sell on Alibaba's Taobao market platform. However, outside China, and more generally outside Asia, Big Tech firms are not particularly active as credit providers. The article discusses the limited expansion of Big Tech into retail banking activities in the EU (and the US) which is, at first sight, a puzzle.

COMPETITION POLICY RESPONSE TO DIGITAL BASED BUSINESS EXPANSION IN BRAZIL

By Eduardo Pontual Ribeiro, Svetlana Golovanova, Camila Pires-Alves & Marcos Puccioni de Oliveira Lyra

The investigation of business practices of digital platforms in merger and antitrust investigations requires the adoption of new economic analysis tools. They should consider multi-sidedness, cross-platform network effects, the role of relative prices, information-based technologies effects, dynamic efficiency, and other considerations. So-called "younger" jurisdictions have now also started incorporating two-sided logic in their analysis of merger and abuse of dominance cases. In particular, the report of the BRICS Working Group on the Digital Economy presented at the fourth BRICS Competition Conference in Moscow, 2019, marked the authorities' view on the challenges competition agencies face due to the digitalization of the world economy. This note discusses recent developments at the Brazilian Antitrust Authority – CADE – on handling digital markets and platform cases. It provides a brief overview of the Authority's opinions based on available documents and jurisprudence, and offers a perspective on specific topics of interest as they are likely to develop in coming years.

DATA, PRIVACY, AND COMPETITION: THEORIES OF HARM AND DATA MOBILITY

By Ana Sofia Rodrigues & Rafael Longo

The dynamics of competition in data-powered ecosystems are motivated by user-related network effects; and are centered around users. Incumbent platforms thus have incentives to build strategies to protect their market, aimed at shielding their user base from contestability by rivals. This includes users from related markets, which may serve as an entry point to the core market of the ecosystem, especially when related markets are data rich. Fostering contestability in ecosystems protected by data-driven network effects and switching costs is intrinsically linked to data portability and interoperability. In implementing such measures, there is scope to learn from past experience in financial services, as incumbents may have incentives to compromise the effectiveness of data mobility regulations.

As always, many thanks to our great panel of authors.

Yannis Katsoulacos
CRESSE Coordinator.

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PROPOSALS FOR DIGITAL REGULATION IN THE UK: SOME TRADE-OFFS AND CHALLENGES

By Adam Cellan-Jones & Dr. Jenny Haydock

In this paper we consider the proposals in the UK for regulation of the most powerful digital firms. We examine some key areas of debate and possible trade-offs that must be considered in setting up and implementing such a regime. This includes: the test for deciding which firms are within scope of the regime; whether the rules imposed by the regulator should be common across all regulated firms or bespoke; and whether and how efficiencies should be considered.

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IS LOSS OF PRIVACY THE PRICE THAT CONSUMERS PAY FOR OTHERWISE FREE ONLINE SERVICES?

By Keith Waehrer

One of the consumer harms from monopoly online platforms commentators point to is the loss of privacy. That is, privacy is a dimension over which platforms complete, and lack of competition has generated low levels of privacy. However, some view serious difficulties in bringing actions when the anticompetitive effect relate to quality instead of price. Thus, some commentators have argued that loss of privacy should be thought of as a price that consumers pay for otherwise free services. Here I argue that the difficulties in analyzing competition over quality are likely easier to overcome than most think. I show that at the profit-maximizing level of privacy consumers will generally prefer more privacy to less even with the worse advertising matches that would result. I also show in the merger context how to quantify the anti-competitive effects in quality without the need to specifically measure quality.

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DATA, PRIVACY, AND COMPETITION: THEORIES OF HARM AND DATA MOBILITY

By Ana Sofia Rodrigues & Rafael Longo

The dynamics of competition in data-powered ecosystems are motivated by user-related network effects and centered around users. Incumbent platforms thus have incentives to build strategies to protect their market, aimed at shielding their user base from contestability by rivals. This includes users from related markets, which may serve as an entry point to the core market of the ecosystem, especially when related markets are data rich. Fostering contestability in ecosystems protected by data-driven network effects and switching costs is intrinsically linked to data portability and interoperability. In implementing such measures, there is scope to learn from past experience in financial services, as incumbents may have incentives to compromise the effectiveness of data mobility regulations.

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LIMITED DEVELOPMENT OF BIG TECH FIRMS IN CREDIT ACTIVITY, LACK OF INCENTIVES OR BARRIER TO ENTRY?

By Frederic Palomino & Miguel de la Mano

The limited expansion of Big Tech into retail banking activities in the EU (and the U.S.) is, at first sight, a puzzle. Big Tech can leverage certain advantages like network effects and control over entire ecosystems to expand and disrupt the retail banking sector. However, the evidence suggests that Big Tech has made limited advances outside of payment systems in the wealthier countries. We advance several explanations for this puzzle. As it turns out, the overhaul of the financial regulatory framework following the 2008 financial crisis has significantly reduced the profitability of retail banking. To survive and adapt, banks have had to increase their efficiency significantly, further reducing the market's attractiveness for Big Tech. Despite this, Big Techs have likely exerted a beneficial competitive constraint on incumbent banks. This may have led to a period of innovation in retail banking and healthy competition without endangering financial stability. However, competition authorities and banking regulation must cooperate to ensure this balance is not disrupted, and barriers for Big Tech to expand into retail banking are not artificially raised.

SUMMARIES

WHAT'S NEXT?

For February 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Economics of Potential Competition**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES February 2022

For March 2022, we will feature an Antitrust Chronicle focused on issues related to the **Developments in China**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

PROPOSALS FOR DIGITAL REGULATION IN THE UK: SOME TRADE-OFFS AND CHALLENGES

BY ADAM CELLAN-JONES & DR. JENNY HAYDOCK[1]

1 Adam Cellan-Jones is an Assistant Director of Economics at the Competition and Markets Authority (CMA). Jenny Haydock is a Deputy Chief Economic Adviser at the CMA. Jenny led the economic analysis of the Digital Markets Taskforce, and both have worked on various matters involving digital technologies, but the opinions in this paper are their personal opinions only and do not necessarily reflect the views of their colleagues or of the CMA.

I. THE UK LANDSCAPE

Digital markets are unquestionably a hot topic in competition policy globally. In the UK, the CMA has a wide-ranging portfolio of work in the digital space,[2] reflecting its stated priority to foster effective competition in digital markets.[3] This includes: a market study into mobile ecosystems;[4] open Competition Act investigations into Google,[5] Apple,[6] and Facebook;[7] and a range of consumer enforcement work.[8] The CMA's Merger Assessment Guidelines were also recently updated, in part to ensure that mergers involving digital technologies would be properly assessed.[9] The CMA's Data, Technology and Analytics ("DaTA") team continues to grow, improving the authority's ability to understand and assess digital markets, and engaging in important research such as recent work on how the use (and misuse) of algorithms can reduce competition in digital markets and harm consumers.[10]

This portfolio of work is designed to use the CMA's existing tools effectively to tackle potential problems in digital markets, while also deepening its knowledge of those markets.[11] But it is also serving another purpose – to help the CMA establish what to prioritize if and when new powers are introduced for *ex ante* regulation of the most powerful digital firms.[12] At present the CMA houses a "shadow" digital regulator, the Digital Markets Unit ("DMU") – the hope is that this will gain formal powers in due course. Proposals for these new powers are currently being considered by the UK government, which has just completed a public consultation on the matter.[13] While we wait, the "shadow" DMU is supporting government in developing the regulatory framework and liaising with other regulators, stakeholders, and agencies in other jurisdictions.[14]

The proposals on which the government consulted drew heavily on the advice of the "Digital Markets Taskforce," which was established in March 2020, led by the CMA.[15] The Taskforce advice recommended that a regulatory regime be established, focused on the most powerful digital firms – those firms with Strategic Market Status ("SMS"). It was proposed that firms designated with SMS should face:

(i) an enforceable code of conduct, to prevent consumers and businesses being exploited or excluded;
(ii) the prospect of pro-competitive interventions (PCIs), to promote dynamic competition and innovation; and
(iii) a modified merger control regime, including a lower standard of proof at Phase 2.[16]

The key motive behind the Taskforce's recommendations was to achieve ongoing and proactive oversight of most powerful digital firms.[17] It seems clear that this means shaping firm conduct in advance – preventing harm, rather than just identifying and remedying specific examples of poor conduct after they have occurred.

The arguments for why existing tools cannot provide this are, by now, well-rehearsed. Existing tools are too slow, and the resulting remedies are largely static, one-time interventions that deal with a specific piece of conduct rather than a systemic problem. A more holistic approach is needed, which permits flexible and responsive action to avoid harms.

2 www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh.

3 www.gov.uk/government/news/cma-publishes-annual-plan-2021-to-2022.

4 www.gov.uk/cma-cases/mobile-ecosystems-market-study.

5 www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes.

6 www.gov.uk/cma-cases/investigation-into-apple-appstore.

7 www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data.

8 For example, www.gov.uk/cma-cases/online-reviews.

9 www.gov.uk/government/news/updated-cma-merger-assessment-guidelines-published.

10 www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers.

11 *The CMA's Digital Markets Strategy: February 2021 refresh*, Section 2A.

12 *The CMA's Digital Markets Strategy: February 2021 refresh*, Priority 1.

13 www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.

14 *The CMA's Digital Markets Strategy: February 2021 refresh*, Section 2C.

15 www.gov.uk/cma-cases/digital-markets-taskforce.

16 See e.g. *Advice of the Digital Markets Taskforce*, December 2020, Figure 1.

17 See e.g. *Advice of the Digital Markets Taskforce*, December 2020, paragraph 2.11.

However, while the regime should be able to move quickly to act where necessary, it should also offer predictability and legal certainty for stakeholders. The Taskforce was also clear that the regime should be evidence-based, proportionate, and targeted.[18] We agree with this, and in the rest of this paper we discuss some more specific ways in which that aim might be realized.

II. SOME KEY CONSIDERATIONS FOR THE DIGITAL REGULATOR

A. Who do the Rules Apply to?

A key question is the test for whether a firm has SMS. The Taskforce suggested that a firm would have SMS if it had substantial and entrenched market power and the effects of that market power were likely to be particularly significant and/or widespread (which was described as the market power conferring a "strategic position" on the firm).[19] This test was intended to focus on the circumstances that make ex ante regulation necessary – which the Taskforce felt was market power; specifically, market power that isn't remotely threatened and which has wide-ranging effects.[20]

This test is obviously not a tick-box exercise. Although the concept of market power is well understood, some judgement is required to decide whether a given example is in fact "substantial" and "entrenched." The test for a strategic position is novel, and the Taskforce suggested that it should be open to the DMU to consider "a variety of factors" in its assessment, which might vary from case to case.[21]

There could be an alternative approach: something more black-and-white that is simpler and clearer, and therefore arguably gives more certainty to firms as to whether they are in scope of the regulation. This is the proposed approach of the EC's Digital Markets Act ("DMA"), which essentially asks whether a firm is big (in terms of turnover or market capitalization and in terms of the number of active users of a given service) and whether its activities are on a list of "core platform services."[22]

When recommending how the SMS test might be designed, the Taskforce considered the question of how important it was that firms be able to self-assess – and felt it was less important than in traditional ex-post competition law. This was because an SMS designation must be made prior to any remedies being introduced and this designation would be subject to consultation and be appealable.[23] A firm would therefore face no obligations until it had been through that process. This meant the Taskforce felt able to weigh fairly heavily the need for the test to be flexible and future-proof, as well as providing a clear justification for intervention.[24] The need for the test to be simple and predictable was less important. This seems entirely correct.

Furthermore, there must be concern that the apparent simplicity and clarity of a tick-box-type test would not actually be reflected in practice. We would expect that even apparently very simple criteria would be subject to debate/appeal and be found to not be as simple as they first appeared. Some criteria might even be gameable, such that firms could evade regulation by restructuring their business or otherwise modifying their behavior (in ways that do not actually reduce the need for regulation). For instance, will certain measures of revenue always be available and reliable? How will it be decided whether a firm's activities amount to something from a particular list, especially if they can be described slightly differently? How are lists and thresholds to be updated over time?

The lack of clear advantages to the tick-box approach means that we feel it is better to have criteria that actually reflect the driving concern. This is key to ensuring that regulation is correctly targeted and proportionate – and future-proof. If, as seems likely, the intention is to designate only a handful of firms, then a relatively complex analysis for each seems entirely manageable.

It might be suggested that uncertainty about how the new regulatory regimes will work and concerns about unintended consequences mean that it is important to restrict these regimes as explicitly as possible to a very small number of firms. We disagree with this. First, this could

18 See e.g. *Advice of the Digital Markets Taskforce*, December 2020, paragraph 7.

19 See *Advice of the Digital Markets Taskforce*, December 2020, paragraph 4.4, and paragraphs 4.9-4.22.

20 See *Advice of the Digital Markets Taskforce*, December 2020, paragraphs 4.10-4.12 and 4.17-4.18.

21 *Advice of the Digital Markets Taskforce*, December 2020, paragraphs 4.19-4.20.

22 *Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, December 2020, Chapter II.

23 *Advice of the Digital Markets Taskforce*, December 2020, Appendix B, footnote 3.

24 *Advice of the Digital Markets Taskforce*, December 2020, Appendix B, paragraphs 4-9.

be seen as backwards-engineering a certain outcome – i.e. just identifying a known set of firms, but without explicitly saying their names. That has implications for future-proofing, but also, potentially, for legitimacy. We are also not convinced by an argument that the novelty and complexity of the task make this essential: as long as the regulator can prioritize certain firms (potentially based in part on their size), and is not obliged to give a verdict on every conceivably relevant firm, then what is gained by tying its hands for the future? The competition concerns raised by the positions and conduct of certain, very large, digital firms are undoubtably a key element in motivating the current push for regulation, but that is not (or should not be) because of their size alone. This is not to say that we think the SMS regime should look to designate more than a handful of firms; rather, it is that we do not agree with effectively locking in which firms those should be through rather blunt criteria that do not consider the factors that really matter.

If concerns remain about predictability or regulator discretion, one option would be to combine the substantive SMS test suggested by the Taskforce with, for instance, a revenue threshold. This would give comfort to smaller firms that they need not worry about an impending designation assessment. However, in the view of the authors, this would in no way replace the substantive SMS test and would instead function merely as a safe harbor. Care would also need to be taken to ensure that the safe harbor was set in the right place, could be moved if appropriate, and was not likely to be gameable or otherwise inaccurate.

B. Should the Rules be Tailored to Each Firm?

The proposals from the Digital Markets Taskforce suggested that each firm designated with SMS should face a *bespoke* code of conduct (as well as possible PCIs, which would by definition be case-specific).[25] This contrasts with the EC's initial DMA proposals, which set out a list of obligations and prohibitions that would apply to all regulated firms.

It is well-recognized that different firms have different business models and that this is probably true even within the small group of firms which might realistically be designated with SMS. This matters because it means the firms are likely to have different incentives and that there will be different concerns and potential harms associated with their conduct. Hence what the regulator needs to be concerned about will vary between firms. [26]

A failure to recognize these differences, instead adopting a one-size-fits-all approach, would run the risk of poorly targeted and ineffective interventions, including both over- and under-enforcement. Whether to include a rule, and exactly how to frame it (such as in terms of the possible exemptions or caveats to it, which we discuss further below), would have to be decided while thinking about all possible SMS firms simultaneously. If the rules could not easily be updated or changed, one would also have to consider firms that might be designated with SMS in future, potentially in relation to products and services not yet considered by authorities or even those yet to be created.

Relatedly, there is also a possible interaction here with the nature of the SMS test, or more generally the scope of the regime. A common set of rules means that one probably needs a very narrow field of firms to which they apply, otherwise the rules may be entirely inappropriate or disproportionate. It seems to us that if you have bespoke rules, then there is more scope to consider every potential designation on its merits, making the regime inherently more future-proof.

On the other hand, there are likely to be some practical benefits from a common set of rules – for example, not needing to assess the same practice on a case-by-case basis across multiple firms might speed up enforcement efforts. A common set of rules could help to avoid inconsistencies in how similar practices are treated across different firms which may create the perception of unfairness. However, as with the considerations about the test for firms to be included in the regime, we think that the focus on a small number of firms will mean that these practical benefits will be small relative to the benefits of flexibility and better-targeted interventions that bespoke rules would bring.[27]

C. When Should the Rules Allow Exceptions?

The final question we consider is about the extent to which a regulator of digital markets should be willing and able to carve out exceptions to its rules. When the regulator suspects that conduct by a regulated firm will generally be harmful to competition, should it prohibit the conduct outright, or should it allow for the possibility of permitting the conduct in certain cases if it may also bring about benefits to consumers?

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25 See e.g. *Advice of the Digital Markets Taskforce*, December 2020, paragraph 4.41.

26 See, for instance, *Advice of the Digital Markets Taskforce*, December 2020, Appendix C, paragraph 54 and voxeu.org/article/designing-regulation-digital-platforms.

27 It is also worth noting, as the Digital Markets Taskforce did, that it is likely that there will be some elements of the SMS codes of conduct that are common across firms, so some of the practical benefits mentioned will still be enjoyed. See *Advice of the Digital Markets Taskforce*, December 2020, paragraph 4.41.

The question of how to trade off harm to competition with efficiencies is not a novel problem for competition authorities and regulators. But it is likely to be a particularly relevant and pressing question when trying to regulate the conduct of the powerful digital firms. Network effects, economies of scale and the synergies created by vertical integration mean that the ecosystems built by these firms provide consumers with well-integrated products and services which are often high-quality, innovative, and easy to use – while at the same time serving to insulate these players from competitive challenge. Defaults shape consumer decision-making and can be used to hinder the growth of rivals, but they also create simple and convenient user experiences. And while access to unparalleled volumes of consumer data for the leading digital firms may give them a significant competitive advantage and could act as barrier to entry for smaller rivals, opening up access to this data more widely inevitably risks coming into conflict with users' demands for privacy.[28] While there will certainly be some areas in which these markets can be opened up to competition without losing the benefits to consumers, we think it would be misguided to imagine that this trade-off can be sidestepped completely.

To grapple with this trade-off, we need to ask ourselves a series of questions. First, should there be scope for the regulator to permit conduct that is likely to harm competition if that conduct would also bring about large benefits to consumers? Second, if so, how high should the evidential bar for demonstrating these benefits be set – both in terms of the size of the benefits and the certainty that they will come about? And third, should the burden of proof lie with the regulator, to show that any benefits from the conduct are insufficient to outweigh the severity of the harms, or with the regulated firm to show the reverse?

In answer to the first of these questions, we think that there is a clear case for regulators of digital markets to consider efficiencies, and to be able to permit otherwise prohibited conduct in cases where the conduct in question can be shown to benefit consumers sufficiently. Any consideration of how to regulate these markets and the powerful companies within them must acknowledge the enormous value they have created for consumers. As recognized by the Taskforce, digital markets have revolutionized our lives, providing consumers with information, connection and convenience, opening up new markets to businesses, and contributing billions to the UK economy.[29] While the leading players in these markets have also been able to extract significant profits from them, estimates of the consumer surplus created in digital markets suggest that these profits are far exceeded by the value created for consumers.[30]

This creation of consumer surplus by the most powerful digital firms does not of course negate the competition concerns that are raised by their activities and that have led to the current wave of proposals. The object of that regulation, however, should be to address the competition concerns without destroying the benefits to consumers that have been achieved by these companies – or preventing them from making their services more valuable to consumers. In our view, that is only possible if there is a way for the regulator to weigh up the competitive harms of practices by the regulated firms against benefits that might arise from those practices.

The Taskforce advice envisaged that the DMU should be able to ensure it could do this weighing up through the design of principles in the codes of conduct that applied to SMS firms. Where a principle in the code prohibited a certain type of conduct, it could also include an exemption where specific conditions apply, such as necessity or objective justification.[31] The consideration of efficiencies is slightly different for PCIs, as these involve requiring an SMS firm to make specified changes to promote competition, rather than prohibiting particular types of conduct. But a similar balancing exercise is proposed through the requirement that the DMU assess the proportionality and effectiveness of any proposed PCI.

The EC's proposals do not offer an equivalent way to trade off benefits and harms, but rather the list of "blacklisted" practices would be prohibited with exemptions permitted only in "exceptional circumstances" on grounds of public morality, health, or security rather than a wider consideration of benefits or justifications.[32] We recognize that there may be some practical administrative benefits of a clear, blanket approach as imagined in the EC proposals, but in our view, these are unlikely to outweigh the costs of forgoing a wider consideration of efficiencies that might offset harms to competition. However, others have proposed alterations to the DMA to create some scope for considering this trade-off – for example Germany's Monopolkommission has suggested the inclusion of an efficiency defense,[33] and a panel of economic experts established

28 A joint statement on competition and data protection in digital markets by the CMA and the ICO (the UK's data protection regulator) recognizes the potential tensions between competition benefits from data sharing and the objectives of data protection, and suggests that these issues need to be considered carefully on a case-by-case basis to reconcile the objectives of competition law and data protection law.

29 *Advice of the Digital Markets Taskforce*, December 2020, paragraph 2.2.

30 For example, Brynjolfsson and Oh (2012) estimate that free internet services created an increase in consumer surplus of $100 billion per year in the US. In the UK, Coyle and Nguyen (2020) find estimates of user valuations of a range of online services are significantly higher than those services' average revenues per user.

31 *Advice of the Digital Markets Taskforce*, December 2020, Appendix C, paragraph 35.

32 *Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, December 2020, Chapter III.

33 www.monopolkommission.de/en/reports/special-reports/special-reports-on-own-initiative/372-sr-82-dma.html.

by the EC to produce an opinion on the DMA proposals argue for some practices to be put on a "greylist," whereby they would be presumed anti-competitive but could be justified if shown to be pro-competitive in a particular case.[34]

After deciding to allow for exemptions to prohibited practices based on benefits, the question remains as to what the evidential threshold should be and where the burden of proof should sit. There are a few different considerations here, and the right answer might differ depending on the practice in question. From the UK perspective, the relevant trade-offs might also be different when considering codes of conduct as opposed to PCIs.

As to the level of evidence required to make exceptions, our starting point is that the bar should be set fairly high. When SMS firms – companies with substantial, entrenched market power and a strategic position – act in ways that are restrictive of competition, the effects are likely to be significant and so strong evidence of benefits should be required to permit such conduct.[35] And while (as we note above) we do not think that considerations of administrative efficiency can justify ignoring consumer benefits completely, the need for a regulator with finite resources to act quickly in fast-moving digital markets makes it important to set limits on the extensiveness of any assessment of benefits. This would suggest that the threshold should be set high enough that the regulator only has to give serious consideration to efficiencies in cases where these are clear and compelling.

A more complex consideration here is that the benefits from a practice and the harms from its restrictions on competition may have different timings. In general, the customer benefits a digital firm claims for a practice it wants to implement are likely to be fairly immediate and clearly specified, whereas the consumer harm arising from reduced competition may be more uncertain and take more time to develop.[36] This does not justify inaction by regulators: although it is right to put some more weight on the certain and the near-term, this can go too far if it results in ignoring effects which are potentially large but uncertain and difficult to measure. Indeed, the motivation behind the Taskforce and other regulatory proposals is that the benefits of introducing competition to these digital markets will be significant even if they take time to arise. However, this dynamic does suggest that it will be easier for the regulated firms to evidence benefits of their practices than it will be for the regulator to evidence harms. One implication of this is that, once the regulator has been through the exercise of showing that a practice is likely to cause harm, there should be a high bar for the evidence for claimed countervailing customer benefits (given they should be relatively easy to show, if they exist).

Turning to where the burden of proof should lie, there are a few relevant considerations. First, which party is better placed to gather evidence on the existence and extent of customer benefits? We might expect that the regulated firm should be able to provide evidence of any claimed benefits, and information asymmetries between the firms and the regulator may make it difficult for the regulator to gather the necessary evidence to show that these benefits do not exist – both of which would point towards the burden of proof lying with the regulated firm. However, if assessing the customer benefits would require evidence from a wider range of market participants, it may be more appropriate for the burden of proof to lie with the regulator.

Other factors include speed and effectiveness of enforcement – which may be hampered if the regulator must assess the benefits of each practice in detail before it can act – and clarity or certainty over the circumstances in which the regulator would allow an exemption. Put simply, if the regulator has not made clear what proof is required for a practice to be exempted from a general prohibition, it should take on the burden of proof as it will be in a better position than the regulated firm to determine what evidence is required.

In recognition of these various considerations, the Taskforce advised that the DMU should allocate the burden of proof in some cases to itself and in other cases to the SMS firm, depending on where the evidence is to be found, transparency about the actions of the SMS firm, and the clarity of criteria for exemption.[37] It also suggested that where the DMU initially takes on the burden of proof for a certain exemption, it may be able to reverse it later after gaining experience of the competitive issues in the relevant markets and so being able to more clearly specify the acceptable conditions for exemptions.[38] We think this variable approach makes sense in the context of the flexibility and adaptability envisaged in the DMU proposals – for proposals with a more fixed set of prohibitions and tightly defined reasons for exceptions, it may be that the burden of proof should sit consistently with the regulated firms.

34 https://publications.jrc.ec.europa.eu/repository/handle/JRC122910.

35 Of course, this will vary from case to case, and so for practices that are particularly likely to be harmful the regulator should demand correspondingly stronger evidence for benefits.

36 The same is true for regulations that attempt to end existing restrictive practices. Any customer benefits from the practice would be immediately halted whereas it will take time for potential competitors to take advantage of any competitive opportunities created – and they may not be successful in doing so.

37 *Advice of the Digital Markets Taskforce*, December 2020, Appendix C, paragraphs 38-42.

38 *Advice of the Digital Markets Taskforce*, December 2020, Appendix C, footnote 17.

III. CONCLUDING REMARKS

The prevailing winds in international competition policy are clearly blowing towards regulation of the most powerful digital firms, and it is great that the UK is in the vanguard of this. We also think that the UK proposals for regulation make good choices in terms of key trade-offs. That said, these are new and challenging areas for authorities and regulators, and while we strongly agree that there is a need for boldness, and that uncertainty cannot be an excuse for inaction, we also feel that a bit of humility is needed: no-one has perfect foresight, and all approaches will need to be reviewed as we go.

On a similar note, although we have highlighted some differences in the design of the regulatory regime between the Taskforce proposals and the EC's DMA proposals, in practice the differences in outcomes may not be very large, particularly in the short term.[39] It seems likely that the initial set of firms targeted by the two regimes will be very similar if not identical. It is also probable that the same kinds of restrictions on conduct will be imposed, even if there is some variation in how far certain restrictions apply to certain firms. In other words, while we prefer the more flexible proposals advanced by the Taskforce, we still think the EC approach is very worthwhile. This is in some sense a collective effort across jurisdictions, and we are all still climbing the learning curve.

39 Our discussion of the DMA in this paper is based on the EC's initial proposals, but we note that the regulation is still being developed and is liable to change before coming into force. Indeed, the version of the DMA text published by the European Parliament in November 2021 includes a number of changes from the initial proposals.

IS LOSS OF PRIVACY THE PRICE THAT CONSUMERS PAY FOR OTHERWISE FREE ONLINE SERVICES?

BY KEITH WAEHRER[1]

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I. INTRODUCTION

The intersection of online privacy policy and antitrust enforcement has received significant attention recently. Commentators approach the subject from at least three different angles. For some, concerns over privacy should play no part in the enforcement of competition laws. For those commentators, if anything, privacy concerns are primarily consumer protection problem rather than the purview of competition laws.[2]

Another group of commentators see privacy as a potential concern of competition laws but see privacy as a dimension of the quality offered consumers, and as with other types of product quality, these commentators see the methodological barriers that competition agencies face in trying to incorporate privacy concerns into their analyses.[3]

Yet another side to the debate decries the failure of competition laws to protect consumers from the intrusions on their privacy by online monopolists. These commentators tend to view the situation as a "crisis" that requires a major shift in priorities to fix.[4] This group tends to advocate for treating the data collected on consumers by online platforms as the price that consumers pay for using the platforms.

By defining loss of privacy as a price, the hope is that any difficulties associated with bringing actions based on quality competition will be short-circuited. Here I argue that there is a sense in which this view is correct but treating privacy as a dimension of quality competition need not hamper enforcement efforts.

The use of customer data and its effects on consumers and competition by online platforms will differ from case to case. Therefore, as is common in the analysis of anticompetitive effects, each situation usually requires its own fact-based enquiry. Here, the focus will be on platforms such as Google and Facebook, that offer their service to consumers without an explicit fee but monetize through the serving of targeted advertisements to consumers based on information collected from the consumers.

In this article, I argue that competition over quality can be analyzed in similar ways as competition over price despite the fact that measurement might be more difficult. I seek to skewer a number of myths that appear to get in the way of antitrust enforcement relating to privacy and analyzing competitive effects on the consumer side of these services where the price appears to be free. In answer to the question of the title, in many ways competitive effects on privacy can be analyzed in ways that are quite similar to price, but generally equating the loss of privacy to a price risks losing some important differences between the two.

II. COMPETITION LAWS PROTECT MORE THAN JUST PRICE COMPETITION

Analyzing competition over privacy protections runs into the same misunderstandings regarding price versus quality competition.[5] A frequently repeated refrain is that because online platforms often offer services to consumer for free there cannot be anticompetitive effects on consumers from the conduct or acquisitions under a consumer welfare approach. However, competition laws and guidelines do not purely focus on price effects. The tools for analyzing and quantifying price effects are more developed than those for quality effects, but harm to consumers through a decrease in the quality of the service offered is just as cognizable a harm and decrease in consumer welfare as an increase in price.

While it should be self-evident that firms do not compete on price alone, the fact that some products are provided at a price of zero tends to trip-up even competition professionals. In my view, competition derives from a firm taking a margin lowering action in order to attract

2 For example, JC Cooper ('Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity' (2013) 20 George Mason L R 1129–46) states, "[h]owever facially appealing it may be to combine privacy and antitrust, the merger of these two policy issues presents some serious concerns. Once we realize that publishers [use the data collected from consumers to improve the quality of their product], the analogy between [reductions in] privacy and [reductions in] quality breaks down. What's more, limiting a firm's ability to collect and use data is likely to suppress protected speech. Finally, the inherent subjectivity in the exercise will increase incentives to divert resources from marketplace competition to curry favor with antitrust regulators. It will also cause firms to underinvest in beneficial uses of consumer data. Collectively, these problems suggest that antitrust is the wrong vehicle to address privacy concerns."

3 For example, AP Grunes, 'Another Look at Privacy' (2013) 20 *George Mason L R* 1107–27.

4 For example, D. Srinivasan, 'Why Privacy Is an Antitrust Issue,' *New York Times*, May 28, 2019. P Swire, 'Protecting Consumers: Privacy Matters in Antitrust Analysis' [2007] https://www.americanprogress.org/issues/regulation/news/2007/10/19/3564/protecting-consumers-privacy-mattersin-antitrust-analysis/; and RH Lande, 'The Microsoft-Yahoo Merger: Yes, Privacy Is an Antitrust Concern' (2008) 714 *FTC Watch*.

5 There is also a serious question — one I do not deal with in this article — of whether consumers are equipped to effectively evaluate the level of privacy offered by the different services. If they cannot, one would not expect competition over privacy protections to resolve issues with the lack of privacy.

customers to its product or service. When customers chose that product or service in response to the action, those customers are usually lost by "competitors" offering a substitute product or service. Often the action would be offering a lower price, but such an action can also be to offer a higher quality product. When price for some reason is fixed at zero, competition will only be over quality.

Therefore, quality competition and thus competition over privacy is as worthy of legal protection as price competition, but commentators have pointed to several barriers that competition authorities face when trying to protect quality competition. These barriers involve the general difficulty of dealing with competition on nonprice dimensions that result from the subjective nature of quality and the difficulty with measurement. According to an Organisation for Economic Cooperation and Development ("OECD") report on the incorporation of quality competition in the enforcement of competition laws:

> [C]ompetition policy is just as concerned with quality as it is with prices. While the importance of quality is undisputed and issues about quality are mentioned pervasively in competition agency guidelines and court decisions, there is no widely-agreed framework for analysing it which often renders its treatment superficial. There are a number of reasons why in practice, courts and competition authorities rarely analyse quality effects as rigorously as they analyse price effects. First, quality is a subjective concept and therefore much harder to define and measure than prices. In addition, microeconomic theory offers little help in predicting how changes in the level of competition in a market will affect quality and it is usually up to empirical analysis to determine how quality will change in response to varying degrees of competition in the context of particular markets.[6]

The OECD report focuses on two reasons for the difficulty in incorporating considerations of quality competition into antitrust analyses: (1) Quality is often subjective, multidimensional, and difficult to measure relative to the measurement of price; and (2) "[M]icroeconomic theory offers little help in predicting how changes in the level of competition in a market will affect quality."[7]

However, for cases such as online services that charge a zero price and that price is not expected to change, economic theory is not ambiguous about how competition effects quality. The theoretical models that are described as suggesting ambiguous effects on quality as a result of changes in competition involve firms that compete on both price and quality dimensions; thus, they are not relevant in cases in which price is in some way constrained.

For the case in which price is constrained, as is the case when price is seemingly fixed at zero, it has long been understood that increased competition leads to higher levels of quality on a per unit basis.[8] When price is fixed, an increase in competition leads to firms to offer higher quality in order to hold onto/increase users and usage.

III. CONSUMER WELFARE AND PRIVACY

Exactly what is the source of consumer preference for privacy? Is it a preference that economists should take as given — an innate preference of the consumer — part of the consumer's utility function? Or is the source the preference for privacy based on the (perhaps perceived) negative consequences from the use of a consumer's data? Or, more likely, is it a combination of the two?

A recent strand of economic research on the use of consumer data by online platforms assume that data is used to price discriminate.[9] The resulting price discrimination in aggregate lowers consumer welfare. Informational externalities between consumers — data from one consumer provides useful information about other consumers — means that consumers need not be fully compensated for the value of their information and thus not be fully compensated for the aggregate decrease in consumer welfare from the use of the data generally. The subtext of these models seems to be that consumers' preference for privacy derives from the negative consequences of the use of consumer data to extract consumer surplus.

However, platforms according to many definitions provide value by matching two or more sides. In the case of Google and Facebook it is matching consumers with advertisers. Providing better matches of consumers to advertisers, itself generates value. Thus, models involving the use of data to price-discriminate are unlikely to be useful when analyzing platforms that use consumer data to improve matches.

6 OECD, *The Role and Measurement of Quality in Competition Analysis* (Paris 2013), cover page.

7 OECD, *The Role and Measurement of Quality in Competition Analysis* (Paris 2013), Overview.

8 See LJ White, 'Quality Variation when Prices Are Regulated' (1972) 3 *Bell J Economics Management Science* 425–436.

9 For a recent survey of this literature see, D Bergemann & ABonatti "Markets for Information: An Introduction" (2019) 11 *Annual Review of Economics* 85–107.

While consumers likely benefit from good matches with advertisers, the relevant question is whether at an online service's profit-maximizing level of privacy and advertising matching, would consumers prefer to an increase in privacy at the expense of somewhat less well-matched advertising. The trade-off between less privacy and better advertising matches for consumers will likely change depending on the level of privacy being provided by a service.

As I show below in Section IV, there is a profit incentive to decrease privacy and increase the quality of advertising matching to the point where consumers prefer more privacy and lower quality matches. Therefore, even if consumers benefit from well matched advertising, it is likely that at the margin consumers would prefer more privacy relative to the levels that services have a profit incentive to provide.

IV. A SIMPLE MODEL OF PRIVACY AND ADVERTISING REVENUE

The goal of most advertising is to induce consumers to take some action (e.g. purchase a product, register on a website, or vote in a particular way). Let p^A denote the price for advertising normalized for effectiveness such that p^A can be thought of as the price to induce a consumer to take the desired action. The effectiveness of advertising is sometimes called the conversion rate, which we can think of as the probability that a user exposed to the advertising takes the desired action. In the model of competition below we will assume that competing services are constrained by the market to charge the same price for advertising normalized by the conversion rate, i.e. effectiveness.

If r denotes the conversion rate and d denote the number of users (or some other measure of usage intensity), the advertising revenue for a service could be written mathematically as $d \times r \times p^A$, and the per-user advertising revenue would be $r \times p^A$. Note that advertising revenue of the service increases in the number of users and the conversion rate. Better-targeted advertising would increase advertising revenue by increasing the conversion rate.

Using this simple advertising model, it is easy to show that at the profit-maximizing level of privacy, consumer usage of an online platform should be increasing in relation to the level of privacy offered. Assume that increases in privacy protections decrease the service's ability to target ads and thus generates a lower conversion rate. An online service could continue to increase profit by decreasing privacy protections unless further decreases also generated lower usage. Thus, the profit-maximizing level of privacy has to be at a point where further decreases in privacy would lower demand.

To see this mathematically, define t as the level of privacy protection. Thus, an increase in t corresponds to more privacy. Both demand and the conversion rate will be functions of t and thus we can write these as $d(t)$ and $r(t)$. Assuming that per-user costs c are not affected by the level of privacy protections and are constant in usage, the online service's variable profit can be written as

$$\left[r(t)p^A - c\right]d(t).$$

If the profit maximizing level of privacy protections is t^*, then for all levels of privacy protections t,

$$\left[r(t^*)p^A - c\right]d(t^*) \geq \left[r(t)p^A - c\right]d(t).$$

This inequality can be rearranged such that

$$-\frac{d(t^*) - d(t)}{r(t^*) - r(t)} \geq \frac{d(t)p^A}{r(t^*)p^A - c} > 0.$$

Therefore, assuming a positive margin (i.e. $r(t^*)p^A - c > 0$) and positive usage and advertising price, an increase in privacy from the profit maximizing level must lead to increased demand and usage of the online service since it would decrease the conversion rate.[10]

While it is possible to generate counterexamples, usually an increase in demand indicates an increase in consumer welfare. Thus, at the profit-maximizing level of privacy, all-else-equal, consumers would tend to be better off with an increase in privacy.

10 A noteworthy assumption here is that increasing privacy protections does not decrease per-user cost, it only decreases revenue. If an increase in privacy (e.g. collecting less data on consumers) decreases per-user costs enough so that per-user margins might increase with privacy, the result here could reverse.

V. QUANTIFYING EFFECTS WITHOUT MEASURING QUALITY

Now consider the effects of a merger when competition is not over price but rather over the provision of privacy or another qualitative aspect of the service. I focus on the effects of a merger, because a merger without efficiencies is one of the simpler examples of a decrease in competition. Prior to the merger, services will set the level of privacy to maximize their own profits.

After a merger with a rival, the firm would internalize the profits that would have been lost from a decrease in privacy protections or quality, because some of the users who would have sought substitutes in response would use the merging partner's service. This creates a unilateral incentive post-merger to decrease privacy protections or quality. Note that this is exactly the same logic as for unilateral price effects from a merger.

To formalize these effects and show how they might be measured I extend the simple model presented above. Suppose that there are $n > 1$ online services that compete in the industry. I will add a subscript to the quantities and functions defined above to associated each with one of the services. I only need to focus on the two services that are merging. Assume these are services 1 and 2. Thus, t_1 and t_2 denote the level of quality including privacy offered by online services 1 and 2 respectively. The demand for service 1 is denoted as $d_1(t_1, t_2)$ and the demand for service 2 is denoted as $d_2(t_1, t_1)$.

These demand functions are written as functions of the firm's own privacy level and the other merged firm's privacy level, but each will be a function of many factors include the privacy levels of services other and 1 and 2. However, for my purposes here it is not necessary to write these out explicitly. Similarly, the conversation rates and per-user costs for services 1 and 2 are denoted $r_1(t_1)$, $c_1(t_1)$, $r_2(t_2)$, and $c_2(t_2)$. To simplify the notation, let $R_1(t_1)$ and $R_2(t_2)$ denote the per-user advertising revenue for the two service. (For example, $R_1(t_1) = r_1(t_1)p^A$.) As t_1 and t_2 denotes the level of quality including privacy offered by the services that otherwise do not charge a monetary price, I assume that per-user costs are a function of quality.

With this new notation I can write the variable profit functions of the two services as

$$m_1(t_1)d_1(t_1, t_2)$$

$$m_2(t_2)d_2(t_2, t_1),$$

where the variable per-user dollar margins are $m_1(t_1) = R_1(t_1) - c_1(t_1)$ and $m_2(t_2) = R_2(t_2) - c_2(t_2)$.

In the pre-merger Nash equilibrium in quality levels t_1^* and t_2^* (assuming differentiability and an interior solution) we have the necessary conditions,

$$\frac{\partial m_1(t_1^*)}{\partial t_1} d_1\left(t_1^*, t_2^*\right) + m_1\left(t_1^*\right)\frac{\partial d_1(t_1^*, t_2^*)}{\partial t_1} = 0 \qquad (1)$$

$$\frac{\partial m_2(t_2^*)}{\partial t_2} d_2\left(t_2^*, t_1^*\right) + m_2\left(t_2^*\right)\frac{\partial d_2(t_2^*, t_1^*)}{\partial t_2} = 0 \qquad (2)$$

The merged firm will set and to maximize joint profit

$$m_1(t_1)d_1(t_1, t_2) + m_2(t_2)d_2(t_2, t_1)\,.$$

The derivative of the joint profit function with respect to service 1's quality evaluated at the pre-merger quality levels is

$$\frac{\partial m_1(t_1^*)}{\partial t_1} d_1\left(t_1^*, t_2^*\right) + m_1\left(t_1^*\right) \frac{\partial d_1(t_1^*, t_2^*)}{\partial t_1} + m_2(t_2) \frac{\partial d_2(t_2^*, t_1^*)}{\partial t_1}$$
$$= m_2(t_2) \frac{\partial d_2(t_2^*, t_1^*)}{\partial t_1} < 0,$$

where the equality follows from condition (1) and the inequality from the assumption that $\partial d_2 / \partial t_1 < 0$. Hence, this indicates that post-merger there will be a unilateral incentive to decrease service 1's quality and by the same logic decrease service 2's quality.

A measure of the size of the incentive to decrease quality can easily be derived that is similar to the upward pricing pressure measure. I will refer to this as Downward Quality Pressure (DQP).[11] There are a number of specific ways one can do this, but one useful approach would be to determine the decrease in per-user cost that would be needed to eliminate the incentive to decrease quality post-merger. A cost decrease of Δ_1 eliminates the incentive to decrease quality post-merger of service 1 if t_1^* maximizes the post-merger profit function:[12]

$$\left[m_1(t_1) + \Delta_1\right] d_1\left(t_1, t_2^*\right) + m_2\left(t_2^*\right) d_2\left(t_2^*, t_1\right).$$

Using condition (1), results in

$$\Delta_1 \frac{\partial d_1(t_1^*, t_2^*)}{\partial t_1} + m_2\left(t_2^*\right) \frac{\partial d_2(t_2^*, t_1^*)}{\partial t_1} = 0.$$

Rearranging this we get

$$\Delta_1 = m_2\left(t_2^*\right) \times D_{12}, \qquad (3)$$

where D_{12} is the diversion ratio from service 1 to service 2. That is,

$$D_{12} = -\frac{\partial d_2(t_2^*, t_1^*)/\partial t_1}{\partial d_1(t_1^*, t_2^*)/\partial t_1}.$$

Put in terms of the percentage decrease in costs needed to eliminate DQP and measuring using the percentage margin, the DQP measure (3) can be rewritten as

$$\frac{\Delta_1}{c_1\left(t_1^*\right)} = \frac{m_2\left(t_2^*\right)}{R_2\left(t_2^*\right)} \times D_{12} \times \frac{R_2\left(t_2^*\right)}{c_1\left(t_1^*\right)}, \qquad (4)$$

which in words is that the percentage decrease in costs for service 1 needed to eliminate DQP is equal to service 2's percentage per-user margin times the diversion from 1 to 2 times the ratio of service 2's advertising revenue by service 1's per-user cost.

11 M.A. Salinger in "Net Innovation Pressure in Merger Analysis" (2019) (available at https://ssrn.com/abstract=3051249) derives an expression for the net innovation pressure from a merger. His approach differs from the model here in that the costs of innovation or quality improvement are entirely made up of fixed costs, while here I assume none of the costs to improve quality or privacy are fixed. Salinger also allows for R&D spillovers between the merging firms, and internalizing the externalities associated with those spillovers has important implications for the effects of the merger on innovation.

12 Assuming no merger-specific efficiency for service 2 in this derivation is the same simplifying assumption that J Farrell & C Shapiro ('Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010a) 10 *BE J Theoretical Economics Policies and Perspectives*, article 9) used to derive the simple version of the UPP formula. There has been some debate regarding the accuracy of this simple version. More complicated and possibly more accurate formulas tend to be more interventionist. For example, see R Schmalensee, 'Should New Merger Guidelines Give UPP Market Definition?' (2009) 12 *CPI Antitrust Chron*; J Farrell & C Shapiro, 'Upward Pricing Pressure and Critical Loss Analysis: Response' (2010b) *CPI Antitrust* J 1–17.

The quantities in the DQP formula above are generally not more difficult to quantify than those in the UPP formulas and do not necessarily require the actual measurement of quality. Premerger margins are an important input in UPP calculations; these are the same premerger margins that are inputs to the DQP formula. The diversion ratios associated with price effects need not be that different from diversion ratios associated with small changes in quality.

While demand estimation can provide a good estimate of the degree of substitution between products as a result of price changes, without a measure of quality or privacy protection a similar estimation would not be possible. However, it is only possible to estimate demand if there are the time, data, and budget, which is not common. Instead, diversion ratios for price effects are usually estimated in ways that could easily be applied to the case of quality effects.

As a starting point, diversion ratios are estimated using market shares. If services 1 and 2 have shares s_1 and s_2 and users leaving service 1 in response to a decrease in quality divert to other services in proportion to the other services' shares, then $D_{12} = s_2/(1 - s_1)$. This will not be the right assumption if there is significant diversion outside of the market used to calculate shares or if the merging services 1 and 2 are atypical competitors in the sense of being either close or far in product space.

Another common approach is to use switching data to estimate a diversion ratio. Even though the switching observed in the data is often not the result of price changes, this switching will often be used to inform the closeness of competition between the products of the merging parties. It seems just as legitimate to use such switching to quantify the diversion between merging services to quantify the diversion as a result of changes in quality.

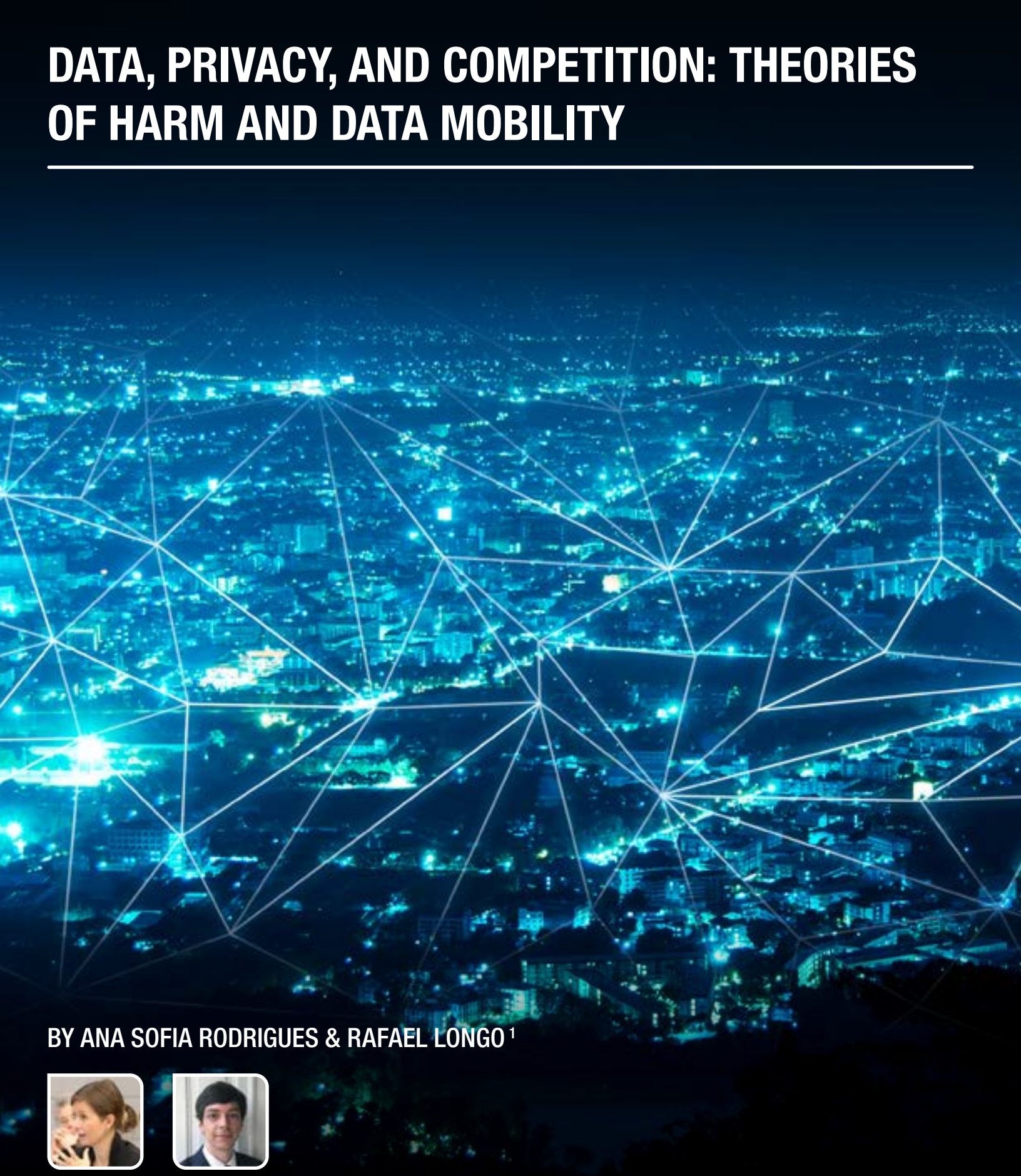
The effect of natural experiments is also used to inform the diversion ratio from price changes even when the "natural" event that drives the resulting changes in the market is usually not exogenous changes in price. In fact, one may be able to use discreet changes in quality to measure substitution patterns. Notice that it is unnecessary to measure the size of the change in quality, only the effect of that change on the number of service users.

As long as the online services make a trade-off between attracting more users through higher quality or providing more privacy protections and lower per user profits, then they are acting as if they are optimally setting the variables $t_1, \ldots, t_n$, as described above. The analysis above demonstrates that those variables need not be precisely defined to provide a quantification of merger effects similar to quantifications commonly used by competition authorities.

VI. CONCLUSION

As I have shown here, in many ways, we can think of a decrease in privacy as being similar to an increase in the price consumers pay for otherwise free online services. However, it is not clear what advantage is realized by using such rhetoric. Above, I have demonstrated how, when price is fixed at zero (as it tends to be for online services), one can easily treat privacy as one of the dimensions of quality, and analyze competitive effects over quality in ways that are not much more involved than the analysis of price competition.

DATA, PRIVACY, AND COMPETITION: THEORIES OF HARM AND DATA MOBILITY



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I. INTRODUCTION

The dynamics of competition in data-powered ecosystems are motivated by user-related network effects and centered around users.

Incumbent platforms thus have incentives to build strategies to protect their market, aimed at shielding their user base from contestability by rivals. This includes users from related markets, which may serve as an entry point to the core market of the ecosystem, especially when related markets are data rich.

Fostering contestability in ecosystems protected by data-driven network effects and switching costs is intrinsically linked to data portability and interoperability. In implementing such measures, there is scope to learn from past experience in financial services, as incumbents may have incentives to compromise the effectiveness of data mobility regulations.

II. DATA AS A SOURCE OF COMPETITIVE ADVANTAGE

Data is the key input for digital ecosystems and has become the driving engine of the digital economy. The ability to collect large and varied datasets and to extract insights from data is pivotal for digital platforms to gain a competitive advantage vis-à-vis their competitors.

However, data may also be a source of barriers to entry and expansion in the market. Using data carries costs and may not be easily replicable by other firms. There are several reasons for this, including the need for processing power, storage capabilities, large networks, access to users, data science expertise, and specific investments in the development of algorithms, often through trial error.

Access to users stands out as one of the most important data-related barriers in digital markets, as a source of strong network effects. Large and varied datasets allow platforms to build better products, which in turn attracts more users resulting in even more and better data.

The most valuable data is generated by the users themselves and either volunteered (e.g. user registrations) or user activity observed by the platforms. To the extent that digital platforms are competing for user attention, or there is rivalry in the consumption of the services provided by the platform, the data collected by one platform is not replicable by competing platforms.

In such cases, users are regarded by digital platforms as an asset – they form a data farm that must be managed – and it is paramount for platforms to build an environment to attract and keep users, and an infrastructure to collect data about them.

III. STRATEGIES BY DIGITAL PLATFORMS IN THE FACE OF DATA-DRIVEN ADVANTAGES

The number of active users in a platform/ecosystem, how often they use it (e.g. the total number of messages or time spent and other proxies for attention) are thus relevant dimensions of competition. This is because of both data-driven network effects and due to more standard network effects, such a user wishing to interact with family or friends.

Competing on users and on users' attention means that digital players have incentives to (i) attract and keep users in the ecosystem; (ii) prevent any user leakages to competing ecosystems; and (iii) bar competitor ecosystems access to users.

Digital markets may have many entry points. The direct route is perhaps the most challenging for entrants, as it can be difficult to surpass the incumbents' built-in advantages. However, digital products may have significant synergies with each other.

Synergies depend on the structural characteristics of the products and emerge depending on market innovations (e.g. smartphone). They may be either economies of scope or synergies of consumption, such as network effects across products. Sharing data between products in a digital ecosystem is perhaps the most important way these synergies materialize.

Digital synergies multiply the number of entry points to the market and make indirect routes potentially viable strategies for entrants. An entrant may seek, first, to build a competitive advantage in one adjacent market and then go for the target market where the incumbent is established.

Incumbents are, of course, well aware of this, and they may have incentives to close off the entry points to their core markets. If the market is relatively new, they may do so through what may boil down to an effective race to grab the market by quickly building user bases and network effects. If the market has already stabilized, incumbents may try to acquire their rivals or raise barriers to entrants' entry and expansion.

Internal documents disclosed by the Federal Trade Commission and the British Parliament make these incentives very clear for the case of Facebook.

Before acquiring Instagram, Facebook was concerned about Instagram rapidly gaining users and establishing its own independent user base. In internal messages, they worried that *"it seems like they double every couple of months or so," that "if they grow to a large scale they could be very disruptive to us."*[2]

Facebook also highlighted it was leaking users to Instagram: *"one concern trend is that a huge number of people are using Instagram every day (…) and they're only uploading some of their photos to FB."*[3]

At the time, there was a race for mobile. This was an emerging market and new entry point for digital platforms. Losing the race for mobile could threaten the position these platforms had on PCs. Facebook, in particular, feared that Instagram could beat Facebook in the race for mobile, or that Google bought Instagram, so that *"they could easily add pieces of their service that copy what we're doing now."*[4]

Facebook had similar concerns regarding WhatsApp. Facebook worried that messaging apps were *"using messages as a springboard to build more general mobile social networks,"* and feared that WhatsApp could be bought by firms like Google.[5]

Facebook also monitored its messaging app competitors closely, through the VPN service Onavo it acquired in 2013. Users were attracted to this VPN because it promised to reduce mobile data usage. As a catch, it allowed Facebook to monitor how their Internet usage on their phones. Facebook monitored WhatsApp this way prior to acquiring it, and also Snapchat.[6]

In addition, users are prone to inertia, and digital platforms are well aware of this. Inertia can be leveraged through the introduction of technical switching costs for users. Forcing users to rebuild lists of contacts and to re-upload their photos, or making it impossible for users to access their history of conversations and comments, are examples of such technical switching costs.

These are discussed internally by Facebook as possible ways on how they *"can make switching costs very high for users"* and that *"it will be very tough for a user to switch if they can't take those photos and associated data/comments with them."*[7]

The strategy in markets with these characteristics may thus be to rely on network effects to attract users, in a snowball effect, but then use switching costs to discourage them from leaving.

IV. DATA PORTABILITY AND INTEROPERABILITY AS A SOLUTION, AND SOME PRINCIPLES

Data portability – the right to transfer data – and interoperability – the technical ability to transfer data – may reduce barriers to entry. If there are significant data-driven network effects, data portability and interoperability may allow businesses to share network effects, preventing them from being siloed in closed ecosystems.

Data portability and interoperability may also facilitate switching and multi-homing by consumers.

There are already some data portability and interoperability practices in place. Digital players created these tools themselves, namely

2 See https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf, pp. 29.

3 *Idem.*

4 *Idem.* pp. 26-34.

5 *Idem.* pp. 35-42.

6 *Idem.* pp. 12-15.

7 *Idem.* pp. 26-34.

to link their services with third-party complements through APIs (e.g. Facebook's Graph API or Google Maps API). In general, however, these tools increase the value of incumbent platforms and do not give room for competitive threats to emerge, strengthening the incumbent's position.

Portability tools for non-complements also exist. Google and Facebook, for example, allow users to download their data in a readable format. Apple, Facebook, Google, Microsoft and Twitter contribute to the Data Transfer Project for API interoperability.

However, these tools are either still in their early stage or geared towards tech-savvy users who wish to back up their data. Most importantly, they seem to be unreliable for entrants to build a business model around them.

To have effective data access, there have been several legislative proposals, including the Digital Markets Act ("DMA") in the European Union, the new German competition rules for digital gatekeepers and the Digital Markets Unit in the United Kingdom.

The DMA includes several obligations on data portability and interoperability, to the benefit of both consumers and businesses, that aim at curtailing strategies by digital gatekeepers that may have a negative impact on competition. These include provisions imposing data silos within gatekeeper platforms; interoperability for ancillary services (e.g. payment services); limitations for dual role platforms on the use of business users' data to compete against them; real-time data portability tools, amongst others.

However, an effective implementation of these provisions hinges on ensuring that gatekeepers do not have the degrees of freedom to circumvent these obligations.

In Europe, we have already some experience on data access for payment services, with the implementation of the Second Payments Services Directive ("PSD2"), alongside with secondary legislation. This legislation aimed at promoting entry, competition and innovation via data mobility, but for payment services only. In order to provide their services to consumers, new market players should be granted access to account data.

The EU Directive imposes that banks must provide access to payment account data and infrastructure to new payment providers, through Regulatory Technical Standards ("RTS") that safeguard security while imposing data access and system interoperability.

Even though the PSD2 is only applicable to a narrow set of services and the data it concerns is well structure and defined, there are important lessons to learn regarding the frictions incumbents could introduce to thwart data mobility.

Chiefly, incumbents could take advantage of consumer biases. Often introducing mere inconvenience for consumers is enough to prevent competitors from ever becoming a threat. These strategies may include, for example, creating unnecessary hurdles in the customer journey for consent to use data in order to induce high consumer dropout rates.

The need to ensure that incumbents have to provide a seamless customer journey for consent, as well as API interoperability, fall back mechanisms and testing sandboxes was envisaged in the PSD2, in the RTS. However, the AdC identified at the time risks of delay and difficulties in implementing the Directive in Portugal. The AdC also put forward a recommendation in 2018[8] on the need to reduce incumbents' degrees of freedom, in secondary legislation to be drafted, with regards as to how data access tools for FinTech services are designed.

More recently, in 2020, the AdC conducted a survey to FinTech firms,[9] which reported several difficulties in accessing bank data in Portugal. For example, difficulties associated with poor API performance, lack of support from the API provider and unjustified obstacles to a seamless user experience, resulting in high drop-out rates. These problems can hinder FinTechs time-to-market and their ability to attract new users.

Accounting for potential frictions in any data access obligations is key to ensure effective interoperability and data portability. On this, the bespoke and periodic revision envisaged in the DMA is key for future proofing. The complexity of digital markets and the different types and uses of data mean that enforcers still need to go through a learning process. Because of this, it is important to have the sufficient degrees of freedom to adjust the tools to ensure that obligations work.

Nonetheless, we should not expect these policy instruments to be necessarily a panacea. Network effects unrelated to data and con-

8 See The AdC identifies barriers to entry of new FinTech firms and recommends measures to promote choice for consumers and companies in financial services in Portugal | Autoridade da Concorrência (concorrencia.pt).

9 See https://www.concorrencia.pt/en/articles/adcs-sector-inquiry-fintech-74-companies-operating-portugal-consider-there-are-barriers.

sumer inertia are common features in these markets. They may be enough to limit the reach of portability solutions in some markets. Rather, these tools must be seen as integrated and used in tandem with other policy instruments, namely merger policy and antitrust enforcement.

V. COMPETITION AND PRIVACY

There is a widespread perception of weak privacy practices in the digital economy. One key question is understanding to what extent the lack of competition in the digital economy has contributed to this situation.

There are multiple non-mutually exclusive perspectives regarding the relationship between privacy and competition. Privacy both shapes competition and is shaped by competition.

A. Privacy Shaping Competition

Emphasizing how privacy shapes competition means looking at privacy as setting the action space over which competition takes place, namely privacy regulations, enforcement and policies.

Privacy rules and enforcement determinate what data-driven strategies are legally available to digital players. Collecting and extracting insights from data are some of the most important dimensions of competition in digital players, such that there may be ever-present incentives for digital firms to push privacy rules and enforcement to their limit.

Changes to privacy rules and enforcement, therefore, change the incentives and the ability for firms to collect data, as well as the data-driven competitive advantages they may gain. This may have an effect on the dynamics of competition (e.g. how aggressively firms protect entry points to the market) and on market outcomes (e.g. market concentration, consumer welfare).

In addition, changes to privacy rules and enforcement shape the incentives and the ability to collect data, as well.

Likewise, digital gatekeepers often organize and determine a significant part of the activity in digital markets. Their privacy policies may, therefore, shape how competition plays out in these markets. In such cases, competition authorities must be mindful of the risk of privacy washing as a cover for self-preferencing, since gatekeepers are usually digital ecosystems as well.

B. Competition Shaping Privacy

User privacy may also be shaped by how competition is played out in the market, and by how competitive the market is. In such cases, privacy becomes intertwined with competition, as a dimension of competition.

The most straightforward case is to acknowledge that consumers see privacy as a good in itself and note that many products, such as messaging apps or search engines, differentiate themselves on privacy. In competitive assessments, privacy can therefore be taken as a dimension of quality.

Such an approach would mean that in merger analysis, for example, competition authorities must assess whether the target firm differentiates on privacy. If, following the merger, there would be a reduction of privacy as a result of eliminating choice and competitive pressure in the market, there may be harm to consumers. This is especially the case if there is a reversal of a long-standing strategy of a strong privacy protection policy of the target firm.

The most prevalent theory of harm in data related mergers, however, is the combination of datasets or data collection capabilities. In these cases, the focus is on how the target firm could use its data advantage as a leapfrog to put competitive pressure on the incumbent's core business, and not on privacy per se. Nonetheless, privacy and competition are invariably intertwined. The combination of datasets from different sources may have direct effects on the degree of privacy for users but, at the same time, may serve as an entry-deterrence mechanism for the incumbent, aimed at protecting its digital ecosystem or its core product.

Since data is a very broad term, heterogeneous and may sustain different business models, the main challenge in terms of competitive assessment in such cases is to anticipate how and what data might be combined and for what purposes. These difficulties are compounded if competition authorities have to ponder the effects of the merger for products that are yet to be developed.

Ultimately, this means the effects of combining data on consumer welfare are not straightforward. Of course, joining datasets may generate efficiencies for consumers. For example, a music recommendation algorithm may make better suggestions or a search algorithm may find more relevant results.

However, not all data combinations are born equal and there are different use cases for data. In addition to the potential of being instrumental to raise barriers to entrants, especially in adjacent markets, data combinations may result in efficiencies that are not passed down to consumers. It may also enhance firms' ability to extract consumer surplus. This is not just about price discrimination but all forms of discrimination towards consumers, namely price steering. Using data to distort choice and steer consumers to more expensive products may harm competition and consumers.[10]

VI. CONCLUSION

Regulatory developments in digital markets are currently still a moving train. The DMA is yet to be approved, as we wait for the negotiation between the Council, in representation of Member States, and the Parliament, on the proposal put forward by the Commission. Some of the key provisions, including those on the black and grey lists and the definition of a gatekeeper, are still under discussion. Once consensus is reached, implementation challenges will take central stage.

On data and privacy related theories of harm, there are still few cases. Insights produced by the existing decision, the ongoing debate and research provide a useful roadmap. Given that there are very diverse use cases for data, with very different competition implications, the decisional practice may yet fall short from providing a complete mapping of the potential theories of harm.

Decisions in the years to come, in the different jurisdictions, will certainly bring further insights. And in this regard, cooperation between the European Commission and national competition authorities is of particular added value

10 See Digital Ecosystems, Big Data and Algorithms, p. 57, published by the AdC in 2019.

LIMITED DEVELOPMENT OF BIG TECH FIRMS IN CREDIT ACTIVITY: LACK OF INCENTIVES OR BARRIER TO ENTRY?

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I. INTRODUCTION

Digital-technology-based developments have matured to the point whereby a dramatic change in banking and other financial services is possible. Such developments explain the involvement of Big Tech firms in the financial service industry.

In a geographically uniform manner, this entry materialized through the development of payment service activities. For example, M-Pesa, launched in Kenya by two telecom operators, Vodacom and Safaricom, pioneered money transfers outside the banking system, allowing millions without bank accounts to move from 19th-century paper money to 21st-century digital money in a single leap. Then M-Pesa developed its activity in neighboring African countries, in Asia and in Eastern Europe. Today, Google, Amazon, Facebook, and Apple (sometimes collectively termed "GAFA") have a payment service activity on the five continents, sometimes in partnership with other financial institutions. Apple Pay and Google Pay have become household names in some parts of the world.

However, the expansion of Big Tech firms into other financial industry sectors such as credit intermediation, deposit-taking activities, asset management or insurance is highly heterogeneous. For example, in Asia, companies such as Alibaba and Tencent cover the whole spectrum of activities. Ant Group (part of Alibaba), through its online bank subsidiary MYbank, grants credit to SMEs that sell on Alibaba's Taobao market platform. However, outside China, and more generally outside Asia, Big Tech firms are not particularly active as credit providers.

For example, although Rakuten offers asset management and insurance services, and NTT Docomo has developed a small business in the credit sector, the GAFAs have virtually no activity outside payments. In Germany and the Netherlands, they are not present in the market. In France, only a subsidiary of the leading telecom operator is in the market, and in US and UK, their lending volume is smaller than that of Fintech firms.[2] The only notable exception is Amazon, which has a small insurance and credit activity. [3]

The limited expansion of Big Tech into retail banking activities in the EU (and the US) is, at first sight, a puzzle .

First, Big Tech firms can leverage network effects (generated by e-commerce platforms, social networks, or search engines) and technology (artificial intelligence, machine learning using big data) to assess the quality of potential borrowers. For example, in China, based on the data generated by billions of transactions on the Taobao marketplace and historical default data on firm credit, Ant Group can construct automated credit scores and provide small loans to a large number of online vendors.[4]

The Bank of International Settlements reports that Big Tech firms' credit scoring techniques, based on (i) big data, (ii) predictive algorithms and (iii) machine learning, outperform traditional credit bureau ratings in predicting loss rates of small businesses.[5] Moreover, because their technology is already in use for other lines of their business, Big Tech firms can provide credit scoring services at almost zero marginal cost. [6]

Second, Big tech can reduce the costs of enforcing loan repayments. This cost is a key component of total financial intermediation cost. To reduce enforcement problems, traditional banks usually require borrowers to pledge tangible assets, such as real estate, as collateral to increase recovery rates in the case of default. An alternative mean of reducing payment default is monitoring. Banks spend time and resources to limit moral hazard issues such as clients implementing projects differently from what was agreed initially. Through monitoring, firms/borrowers and banks can develop long-term relationships and hopefully build mutual trust, making defaulting less attractive for borrowers. However, as this monitoring activity is costly and time-consuming, banks require compensation in higher interest rate spreads.

Big Tech firms can address moral hazard problems differently. For example, given network effects and high switching costs, Big Tech lenders can threaten borrowers with a downgrade or an exclusion from their ecosystem in case of defaults. Alternatively, suppose a firm/borrower has a large part of its activity related to an e-commerce platform of the lender. In that case, it may be relatively easy for the Big Tech lender to deduct the payments on a credit line from the borrower's revenues that transit through its payment account. As we see, this combination of

2 Cornelli *et al*, 2020, *Fintech and Big Tech credit, a new database*, BIS Working Paper, n°887.

3 *Ibid.*

4 Hau *et al*, 2018, *FinTech Credit and Entrepreneurial Growth, Swiss Finance Institute Research paper*.

5 Frost *et al*, 2019, *BigTech and the changing structure of financial intermediation*, BIS Working Paper 779.

6 Note that the drawback of such technological advantage is that if Big Tech firms screen out bad loans more effectively than the traditional banks (and the FinTech start-ups), then credit risk would be shifted to traditional banks, their investors and their depositors and lending may prove less efficient. See De la Mano and Padilla, 2018, Big Tech banking, *Journal of Competition Law & Economics*, Volume 14: 494–526.

massive amounts of data and network effects would, in principle, allow Big Tech firms to mitigate information and incentive problems traditionally addressed through the posting of collateral.

Third, Big Tech firms benefit from an "uneven" playing field in competition with licensed retail banks in their build-up phase. In some cases, they can partner with licensed banks or FinTech companies to avoid the prohibitive costs of being a regulated entity in compliance and capital requirements.

Despite these advantages, a recent empirical study of the Bank of International Settlements (BIS) confirms the limited presence of Big Tech in retail banking, particularly in high-income countries. The BIS reviews alternative sources of credit in 79 countries. It finds that Big Tech credit intermediation increases with GDP per capita when it is below the GDP per capita level of the 25 wealthiest countries (around $37,000). However, it decreases above that level.

One explanation for this finding is that Big Tech credit is more developed in jurisdictions with a less competitive banking sector. In addition, expected high margins make entry more attractive.

Second, stricter banking regulation is associated with lower levels of credit intermediation by Big Tech firms. This result refutes the argument that Big Tech benefits from an uneven playing field. It appears that it remains difficult for new entrants to launch new lending activities in countries with relatively strict prudential and bank licensing regimes.[7]

Third, in the wealthiest economies, the development of the banking system has gone hand-in-hand with economic development. As a result, a certain level of competition has been achieved and is maintained by competition law and the supervision of competition authorities. For example, the European Commission ("EC") released in 2019 a study on loan syndication. The EC identifies potential competition concerns in connection with (i) information exchange between lenders, (ii) the provision of ancillary services such as the sale of hedging products by syndicated banks, or (iii) the combination of advisory and debt arranging activities, and refinancing situations.

Fourth, following the financial crisis of 2008, recognition of the importance of the banking sector in support of the real economy has led to an overhaul of the supervisory and regulatory framework for financial institutions and, in particular, deposit talking banks. As a result, banks in Europe and North America have made significant investments in improving their efficiency to maintain profitability and restore their capital cushions. This results in thinner margins and fewer incentives for Big Tech to enter these traditional retail banking activities.

Fifth, Big Tech firms have a disadvantage vis-à-vis banks in terms of access to loanable funds. While Big Tech firms can borrow on the bond markets at lower rates than traditional banks,[8] they cannot access deposits. The development of a deposit management activity would come with regulatory constraints that would mitigate the benefit of the reduced cost of access to loanable funds. Also note that, in some jurisdictions, there are regulations imposing separation requirements between banking and commerce/industry. For example, in the U.S., Walmart was refused twice a banking license.[9]

Taking all these factors into account, it seems the expected return on investment is not as high as it is for other projects/activities. Thus, Big Techs may prefer to deploy their vast resources towards other, more profitable, and less risky, non-banking activities.

Big Tech firms' entry into retail banking activities has brought substantial benefits to customers in less developed economies, such as access to credit and overall financial inclusion . Should we worry about the absence of such Big Tech firms in credit intermediation in most advanced economies? In other words, in countries with a developed banking system and a high level of financial inclusion, is the entry of Big Tech into the market socially desirable?

This brings us back to the traditional debate on the trade-off between the level of competition and the financial system's stability. On the one hand, the entry of new firms in the banking sector is desirable as it fosters competition and reduces incumbents' market power. But, on the other hand, under supervision by a strong competition watchdog, a relatively concentrated banking sector is desirable because it favors financial stability.

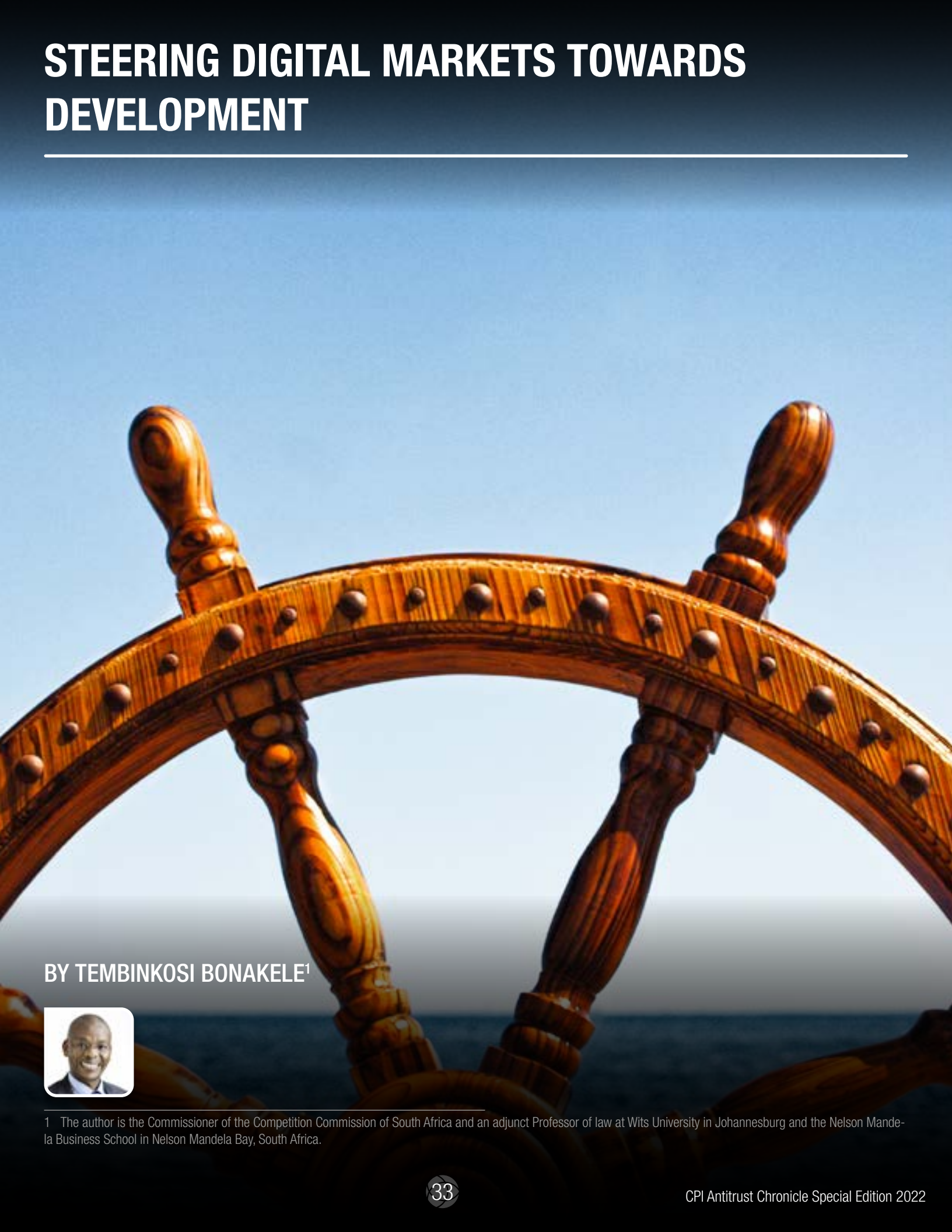
7 BIS, *Fintech and Big Tech credit, a new database*, BIS Working Paper, n°887.

8 BIS, 2019, *BigTech and the changing structure of financial intermediation*, BIS Working Paper 779.

9 OECD, 2020, *Digital Disruption in Banking and its Impact on Competition.*

At present, the evidence suggests that incumbent banks, including "too big to fail banks," have made significant investments in digitalization, partly in response to the Big Tech threat. As long as that threat remains, we can enjoy a "sweet-spot" period of continued innovation and financial stability. But, competition authorities, banking supervisors and central banks need to work together to ensure retail banking markets work well and systemic risk remains in check. More than ever, imposing unjustified constraints on Big Tech to expand into other services, like banking, could have unintended consequences and damage both competition and financial stability.

STEERING DIGITAL MARKETS TOWARDS DEVELOPMENT



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I. INTRODUCTION

On May 19, 2021, the South African Competition Commission ("CCSA") launched its market inquiry into digital markets. While several competition agencies the world over have launched inquiries into digital markets, the CCSA's inquiry differs in two material respects: (1) it seeks to optimize market conditions for the growth of small businesses and firms owned by historically disadvantaged persons or HDP's; and (2) its scope is limited to online intermediation platforms. As I write, the inquiry is conducting its first round of public hearings which are set to end on November 19, 2021. So far, the inquiry has received 134 written submissions from market participants and heard 51 oral submissions to date.

II. RATIONALE FOR THE INQUIRY

South Africa's economy is plagued by rampant unemployment, stark income inequality, and incessant poverty. The arrival and rapid rise of the digital economy presents South Africa with an opportunity to reverse this pervasive triple scourge of unemployment, inequality, and poverty. But in order to harness the promised benefits of digitalization, South Africa must create a commercial and regulatory environment designed to extract those benefits and distribute them in a way that ensures inclusive economic growth, that has greater participation by black and women-owned firms, and produces increased and meaningful employment.

Unfortunately, for all its promise, the digital economy in developing countries already threatens a new era of global concentration and, with it, the further marginalization of vulnerable countries and businesses. Therefore, specific regulation is required to avoid outcomes that could harm the development of small businesses, consumers and ultimately the economic growth so needed in South Africa's developing economy. The need for such regulation has become all the more urgent with the advent of COVID-19, which is set to move more products and services online at a rapid pace.

In pursuit of a focused and informed approach to digital markets, the CCSA published a report in early 2021 on how it views digital markets, their role in economic development, and the potential concerns arising from them that could hinder inclusive economic growth. The report highlights a feature of many digital platform markets, i.e. the tendency towards both product/service line and conglomerate concentration that is subsequently difficult to reverse once entrenched. This may in part be due to economic features of these markets, such as first-mover advantages arising from the positive network effects of two-sided markets, and further product development advantages arising from data accumulation.

However, it may also be due to deliberate strategies to retain early leadership (such as most-favored-nation ("MFN") pricing rules with partners), to acquire competitive threats (so-called "killer acquisitions"), and to leverage dominance in some areas to exclude or limit rivals in others (such as self-preferencing of data and platform access). This requires competition law to not only consider new theories of harm, but also to act proactively against potential entrenchment strategies to ensure that markets are contestable and to prevent irreversible concentration. Ensuring that markets are contestable also requires competition policy tools to facilitate access by potential entrants. The report concluded that market inquiries represent more effective tools to promote and retain competition in markets where common industry practices may collectively contribute to the hindering of competition.

Furthermore, it concluded that market inquiries provide a more effective means of drawing balanced conclusions and addressing barriers to participation in such markets, particularly by small businesses and firms owned by historically disadvantaged persons. The report indicated that digital platform markets were a case in point. The CCSA subsequently launched a market inquiry in order to address market features in these markets which might hinder competition or undermine the purposes of South Africa's Competition Act of 1998, as amended.

III. SCOPE OF THE INQUIRY

Given the very wide reach of digital markets, the CCSA sought to narrow the scope of the inquiry for high impact and relevant outcomes. Before zeroing in on a specific focus area for the inquiry, we split digital platform markets into three broad categories based on the type of online offering at issue, each of which had a different monetization strategy and, as a result, raised different competition and public interest issues.

The three broad categories were:

- platforms intermediating goods and services between businesses and customers, which were typically monetized on commission/sales business models. These would include e-commerce marketplaces, software application stores, so-called match making

platforms for accommodation or food services and aggregation services such as travel or similar classifieds;

- search and social media platforms which tend to be monetized through targeted advertising based on consumer data extracted from offering the service for free. These also include the associated digital advertising ecosystem developed around these services and content publishers; and
- a third distinct category was the fintech market, including new emerging payment systems operators. These were distinguished from the other two categories largely insofar as these technological platforms and start-ups usually operated within a pre-existing financial market regulatory context where prudential and customer security issues were highly prominent.

Each of these markets raised a slightly different set of competition and public interest issues to each other, but which were typically common across platforms within each of these categories. The broad concerns we identified in each category are summarized in Table 1.

Table 1: Broad competition concerns by category

Category	Concerns identified
Intermediating platforms	• Self-preferencing • Unfair trading terms • Extraction of business data • Potential distortion from ranking algorithms
Search and social media platforms	• Consumer data exploitation • Reduced revenue for advertising firms • Dominance to the detriment of advertising firms and publishers • Excessive pricing to domestic advertisers
Fintech platforms	• Gatekeeper role of traditional financial institutions may lead to (1) blocking access to consumer data; and (2) authorized access to accounts

After some consideration, the CCSA concluded that the competition and public interest aspects of fintech markets were best addressed through a collaborative approach with other regulators. In particular, given the key role of financial regulators in fintech markets, a collaborative approach would better achieve the competition objectives, in a manner that did not undermine prudential and data security considerations. Consequently, the CCSA opted not to include fintech markets in the market inquiry.

Digital advertising markets remained a concern for the CCSA, and indeed antitrust authorities globally, given the potential negative outcomes for domestic consumers, content publishers, and businesses using digital advertising. However, these markets were global in nature and the issues had become relatively well known. Interventions required to improve the contestability of these markets most likely needed to occur on a global scale for global competitors to emerge, even though the outcomes for domestic consumers and businesses could be addressed through interventions of a local nature. In addition, the competition issues simultaneously raised other concerns such as independent media funding and data privacy. For this reason, the CCSA chose not to include digital advertising markets in the market inquiry but left the door open for a future, more focused inquiry into some aspects of these markets.

The CCSA thus prioritized an inquiry into online intermediation platforms given their importance to business user participation in the online economy - especially by small businesses and firms owned by historically disadvantaged persons - and their ability to shape such markets domestically given that competition typically is shaped by contracts and investments within the domestic economy. We observed that the online economy had greatly accelerated during the COVID-19 pandemic, and access to online opportunities for domestic businesses would likely be critical for economic recovery and inclusive growth, as recognized in the Economic Recovery and Reconstruction Plan of the government. We were concerned that there could already be growing concentration and market leadership in many of these platform markets and therefore it was essential that market conduct and features were assessed to ensure that these markets were contestable, preventing any dominance that already existed from becoming durably entrenched. Given the potential dependency of business users on these platforms for accessing online consumers, it was also an imperative under the purposes of the Competition Act to ensure that small businesses and firms owned by historically disadvantaged persons were not the subject of exploitation and unfair treatment.

IV. FOCUS ON ONLINE INTERMEDIATION PLATFORMS

Informed by international studies and domestic experience, the CCSA observed that there were features of online intermediation platforms which could impede, restrict, or distort competition between platforms (inter-platform competition) but also competition between business users on those platforms (intra-platform competition). Furthermore, there were features of these markets which could undermine the public interest insofar as the potential exploitation of business users, including small businesses and firms owned by historically disadvantaged persons, which could hinder their effective participation in the online economy.

Table 2 below sets out the inter-platform and intra-platform competition concerns that the market inquiry set out to explore.

Table 2: Inter-platform and intra-platform competition concerns

Inter-platform competition concerns	**Intra-platform competition concerns**	**Concerns that straddle inter- and intra-platform competition**
Most favored nation or price parity clauses in contracts	Unfair terms and conditions	Self-preferencing where platform owner plays a dual role
Exclusive contracts that prevent multi-homing across different platforms	Excessive fees and commissions	Resale price maintenance by the platform owner
Volume rebates that disincentivize multi-homing across different platforms	Disproportionate transfer of risks or costs	Exploiting business user transaction data
Predatory pricing on e-commerce platforms		Ranking practices that disadvantage small and HDP businesses
Conglomeration of consumer data across multiple platforms within one stable		Volume discounts that disadvantage small and HDP businesses
Cross-promotion of platforms within one stable		

Aside from specific business model practices that exist among online intermediation platforms which may hinder competition or undermine the purposes of the Act, the CCSA observed that there were also general market features which could limit competition. These included: (1) the role of network effects in reinforcing a first-mover advantage; (2) large capital costs to sustain losses initially for later entrants challenging market leaders; (3) the general digital advertising model on search that benefitted those able to pay for position and bid on the search terms of new rivals.

Similarly, there could be other barriers faced by small businesses and firms owned by historically disadvantaged persons from participating in the online economy even through online platforms. These included the capital, systems and technologies required to interface and deliver against the platform requirements.

Ultimately the CCSA was concerned that there were substantial reasons to believe that there were market features of online intermediation platforms domestically that could impede, distort, or restrict competition, alternatively undermine the purposes of the Competition Act. This was reinforced by the fact that the CCSA had received complaints alleging anti-competitive conduct in certain platform markets. Furthermore, there was substantial benefit to an inquiry that could shed light on what was occurring in these markets and whether these features were impacting on platform competition and the participation of small businesses and firms owned by historically disadvantaged persons.

This was particularly in the context where it was important to pre-emptively act to ensure that any dominance or market leadership that could exist did not become durably entrenched such that it became irreversible, an objective shared by many competition authorities globally. It was also important in the context where online commerce had accelerated under the COVID-19 pandemic and was fast becoming an essential route to market for many South African businesses. Features which could undermine the participation of small businesses and firms owned by historically disadvantaged persons in online commerce would undermine inclusive growth and entrench traditional market concentration into the future.

V. HEARING SCHEDULE

As mentioned, the CCSA officially launched the online intermediation market inquiry on May 19, 2021. As part of the inquiry the CCSA received both written and oral submissions. Having received the written submissions, the inquiry now expects to hear oral submissions throughout November 2021. Included in the list of market participants that will make oral submissions are Takealot, Google (search travel and shopping), Wedash, UberEats, Travelstart, Flightstart, Safarinow, and Bolt Food.

COMPETITION POLICY RESPONSE TO DIGITAL BASED BUSINESS EXPANSION IN BRAZIL

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I. INTRODUCTION

The investigation of business practices of digital platforms in merger and antitrust investigations requires the adoption of new economic analysis tools. They should consider multi-sidedness, cross-platform network effects, the role of relative prices, information-based technologies effects, dynamic efficiency, and other considerations. These platform features have been discussed in economic literature[2] while the application of these theories in antitrust investigations has picked up only in the recent years. The multi-sided platform ("MSP") concept is actively discussed in mature jurisdictions. Detailed reports on platforms and digital markets have been presented in the U.S., Europe, Germany, and other OECD countries.[3] Younger jurisdictions have also started incorporating two-sided logic in their analysis of merger and abuse of dominance cases. In particular, the report of the BRICS[4] Working Group on the Digital Economy[5] presented at the fourth BRICS Competition Conference in Moscow, 2019, marked the authorities' view on the challenges competition agencies face due to the digitalization of the world economy.

This note discusses recent developments at the Brazilian Antitrust Authority – CADE – on handling digital markets and platform cases. It provides a brief overview of the Authority's opinions based on available documents and jurisprudence, and offers a perspective on specific topics of interest as they are likely to develop in coming years.

II. CADE'S INSTITUTIONAL FRAMEWORK AND EFFORTS ON DIGITAL MARKET ANALYSIS

The current Brazilian competition law - Law 12,529/2011, which came into force in May 2012 – is the main legal framework for Competition Policy in Brazil. The competition law and policy it sets out is considered to be modern and compatible with international standards.[6] Resolutions and best practice guidelines, such as the recent "Guide for Horizontal Merger Review,"[7] support law enforcement and increase the transparency of the analysis. However, so far, no guidelines have been issued or modified to meet the peculiarities of digital platforms.

Law 12,529/2011 created the Department of Economic Studies (CADE's Chief Economist Office), which is responsible for providing economic advice to both the investigative authority ("General Superintendence") and the decision-making body ("Tribunal"). The DEE has had a special role in the debate and knowledge capacity building at CADE, contributing to improve the analysis of new and challenging topics, such as digital markets.

Institutional and legal issues have been considered in the recent debate about digital markets and platforms across the globe. Particularly, in merger review, notification thresholds based solely on turnover or market shares have been called into question. This is due to the fear that relevant acquisitions are not being scrutinized by authorities even in major jurisdictions, because firms may have low or absent turnover. Austria and Germany made amendments to their competition laws to include transaction-value thresholds, and are leading this discussion worldwide. In Brazil, relevant cases such as *Facebook/Whatsapp* and *Google/Waze* were not notified to CADE due to low revenues from one of the parties.[8]

There is no clear or acknowledged intention of amendments in the Brazilian notification thresholds which would require changes on the law. As stated in the BRICS report and still valid as of 2021: "In Brazil, no particular formal changes in the legislation are under consideration to specifically address the digital economy. The same applies for changes in notification thresholds […]." This may be in part a consequence of the possibility given by the Law 12,529/2011 to CADE to request the submission of any non-notifiable merger in the country within one year of its

2 Rochet J.C., Tirole, J. 2003. Platform Competition in Two-Sided Markets, Journal of the European Economic Association 1(4), 990-1029 is often cited as a canonical paper, but the modelling can be traced to Blair, R. and Romano, R. 1993. Pricing decisions of the newspaper monopolist. Southern Economic Journal 59 (4) 721-732.

3 A collection of reports is available at https://research.chicagobooth.edu/stigler/events/single-events/antitrust-competition-conference/world-reports-digital-markets. A survey on the reports is found in Lancieri, F., Sakowski, P. Competition in Digital Markets: A Review of Expert Reports, Stanford Journal of Law, Business & Finance 26, 65-170 http://dx.doi.org/10.2139/ssrn.3681322.

4 BRICS is an acronym which refers to Brazil, Russia, India, China, and South Africa.

5 The Group was set up in the 2017 BRICS Competition conference in Brasilia.

6 E.g. the 2019 OECD peer review https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf.

7 https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf.

8 According to Brazilian law, a merger must be submitted to CADE when one party revenues exceed R$ 750 million (USD 132.84 million) and the other party turnover exceeds R$ 75 million (USD 13,3 million). Law 12.529/2011 article 88 and "Portaria Interministerial 994", 05/30/2012. See PIRES-ALVES, C. C.; GONZALO, M.; LYRA, M. P. O. (2019). Startups and young innovative firms mergers & acquisitions: an antitrust debate? Lessons from the ICT. Revista de Economia Contemporânea V.23, n.2, may/aug, 2019.

consummation. This possibility is rarely used by the authority.[9] However, CADE has suggested to be aware of the issue and may be monitoring acquisitions made by digital platforms in recent years.[10]

Although there have not been recent institutional changes directed at digital markets and platforms issues, CADE has been actively debating digital markets in the last few years, making efforts to better address the challenges presented by the digital era. Considering that the assessment of competition is by nature a global challenge (given the worldwide reach of some digital platforms), these efforts included participation by international actors.

In July/August 2019, CADE hosted the international event *Designing Antitrust for the Digital Era*, inviting local and international guests from competition authorities, academics, and private players. September 2019 saw the publication of the report *BRICS in the Digital Economy – Competition Policy in Practice* (2019). This put forth the views of BRICS countries competition authorities on a number of challenges is presented, including CADE's.[11]

First, when it comes to relevant market definition and market power assessment, CADE uses traditional tools to assess market power in digital markets, but there is an exception for multi-sided markets. Second, regarding innovation and dynamic aspects, the report briefly mentions that CADE considers such issues on a case-by-case basis, recognizing the difficulties of assessing the long run effects of competition policy interventions, but stating that considering post-merger incentives to innovate need to be considered. Third, acquisitions of nascent and innovative firms (often referred as startups) frequently do not trigger CADE's thresholds for merger submission, although, as mentioned, the Brazilian Competition Law allows CADE to review any merger. However, CADE notes the difficult balancing act that this type of acquisition raises. According to the report, while startup acquisition by large incumbents risk eliminating potential competition, a restrictive approach may discourage innovation. Furthermore, one needs to consider that these acquisitions could also lead to know-how and technology transfer to the acquired firm. Fourth, the Brazilian authority mentions that it monitors attempts to prevent entry by dominant platforms, specifically pointing to firms that leverage their user base and data concentration.

In August 2020, a working paper published by its Economic Studies Department[12] reviewed twenty-one documents produced by competitions authorities and specialized centers on some topics about competition in digital markets, such as the key features of digital markets, relevant market definition, assessment of price and non-price effects, specificities of different business models and possible solutions for the identified challenges. The report is an effort by CADE to study how international authorities and specialists are facing digital market challenges in order to improve its assessment of such cases. The emphasis in the paper is on online advertising markets. Many businesses in digital markets and platforms depend on advertising revenues for service provision, and there are indications that CADE will pay particular attention to the effects of increasing market concentration and the role of digital platforms on the advertising side of platforms in the coming years.

CADE's latest working paper on digital markets was published in August 2021,[13] and focuses on features related to digital platforms, along with an extensive overview of its case law. To begin with, the report lists the characteristics of digital markets: (i) positive direct network effects, (ii) positive indirect network effects, (iii) cross subsidies, (iv) scale without mass,[14] (v) low marginal costs, (vi) possibility of attracting consumers from all over the world, (vii) scale and scope economies, (viii) data generation and use, (ix) disruptive innovation, (x) switching costs, (xi) winner-take-all or winner-take-most markets. It is important to mention that not all these features are present in all digital platforms.

CADE lists three groups of digital platforms: subscription-based, ad-based, and open access, adapting the usual classification of transaction, non-transaction, and matching platforms in the academic literature.[15] In the first, the user pays a flat fee to access the service (e.g. video

9 Law 12,529/11, Article 88, §7.

10 See the recent Digital Markets Report, discussed below, and Market Monitoring n° 08700.002785/2020-21 "intended to monitor the history of acquisitions […] in the last 10 years" carried out by several players in digital markets.

11 A summary may be seen in Sakowsky and Park (2019). https://www.competitionpolicyinternational.com/cade-and-the-challenges-of-the-digital-economy/.

12 A version of the report has been published as Lancieri, F., Sakowski, P. Competition in Digital Markets: A Review of Expert Reports, Stanford Journal of Law, Business & Finance 26, 65-170.

13 https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/plataformas-digitais.pdf

14 Refers to the situations in which platforms grow faster and cheaper than physical goods markets as they present scale economies without a tangible good, being referred as scale without mass. The concept is taken from BRYNJOLFSSON, E. et al. (2008), "Scale without mass: Business process replication and industry dynamics", Harvard Business School Technology & Operations Mgt. Unit Research Paper No. 07-016, Retrieved from http://ebusiness.mit.edu/research/papers/2008.09_.

15 For example, Golovanova, S., Pontual Ribeiro, E. 2020. A Unified Presentation of Competition Analysis in Two-Sided Markets. Journal of Economic Surveys. doi: 10.1111/joes.12362

and music streaming services). In ad-based platforms, the user usually does not pay a monetary fee, and the platform generates its revenue through advertising and selling data which improves advertising effectiveness (e.g. non-subscription online news portals). Finally, open access platforms connect suppliers and users. They may charge the user and/or the supplier for selling or buying goods and services (e.g. app stores).

Most of the report reviews the case law. Features such as how CADE defines relevant markets, barriers to entry, rivalry and efficiency were discussed in several cases. Discussing the specificities of all these sectors is beyond the scope of this paper, but we can discuss a few interesting points from the report. CADE identified 143 merger cases related to digital platforms between 1995 and 2020 (around 35 percent related to online advertising and 20 percent to e-commerce). Most of them (around 86 percent) were assessed under the simplified procedure, with 14 percent under the ordinary, regular, procedure.[16] Almost all of them (140) were approved without restrictions, as only two were approved subject to remedies and one was abandoned by the parties. Cases handled by CADE included the following platform types: (i) online music services, (ii) e-commerce, (iii) online tourism, (iv) food delivery platforms, (v) digital mapping platforms, (vi) social networks, (vii) on-demand video services, (viii) ride hailing apps, (ix) online ticket sales, (x) online financial investments, (xi) online classified ads, (xii) platforms for searching, ads, and price comparison, (xiii) physical exercises apps, (xiv) apps for intermediating domestic services.

The report also finds that 16 alleged anticompetitive practices in digital markets were assessed by CADE between 1995-2020: six of them are still under investigation, nine were closed with no penalties and one was subject to conditions. Most of the cases relate to alleged abuses of dominant positions and exclusive dealing. The most relevant sectors were search, price comparison, and online advertising (37.5 percent) and ride hailing apps (31.25 percent). The latter represents half of the cases that have been subject to a final judgement (five out of ten).

III. RELEVANT CASES AND EVOLUTION

From the many cases listed at the recent survey by CADE's DEE and the review by Golovanova and Pontual Ribeiro (2021) mentioned above, we select a few merger or abuse of dominance cases that illustrate CADE's analysis of platform and/or digital cases.

From a multi-country perspective, BRICS countries comparison by Golovanova, Pontual Ribeiro (2021)[17] shows that CADE is an early user of platform antitrust concepts. It is also a leader between the jurisdictions in terms of the number of cases related to platform businesses and variety of markets investigated.

CADE demonstrates familiarity with the MSP concept starting from at least 2004. The first explicit mentioning of multi-sidedness of the markets and cross-side network effects were on credit/debit cards (*Visa Vale, 2004; Visanet* 2009-2010). More than a decade ago CADE correctly identified sides of the platforms (issuers and acquires; cardholders and merchants) and characterized the role of relative prices.

Case decision documents on abuse of dominance and merger cases also reveal the evolution of platform business practices analysis. For example, in the *Google/DoubleClick* merger (2008), CADE did not pay attention to multi-sidedness in defining the market as "ad serving services on the Internet." One year later, considering the merger of Microsoft and Yahoo, CADE stressed the need to match audience and advertisers to ensure a successful business. In 2013, in the *Google/Vevo* case, CADE recognized two interrelated relevant markets, as would be expected for non-transaction audience-providing platforms (an advertising market and a content market).

The *Itaú/XP* merger is another example of platform antitrust. The second largest bank, Itaú, acquired a portion of XP, an investment fund platform. The market for investment fund distribution through independent brokers was seen as a two-sided. The merger was cleared with remedies that explicitly addressed the two sides of the market: on one side, XP is not allowed to impose exclusive agreements in distributing the investment products of a specific bank or fund; on the other side, XP may not impose exclusivity agreements with the independent brokers. Interestingly the Central Bank of Brazil, which has also oversight on financial markets mergers, issued a decision with more strict restrictions on the merger, voiding the planned majority acquisition by Itaú.[18]

16 Simplified procedures refer to cases where small concentration in relevant markets does not generate the probability of anticompetitive effects. Ordinary cases refer to those cases where concentration levels (or a sequence of mergers in the same market) may raise the possibility of anticompetitive effects and require detailed analysis of the competitive forces affected by the merger.

17 Ref. footnote 16.

18 Up to 2018 CADE and the Central Bank argued in courts on the sole mandate to analyze mergers, possible creating a de fact sector exclusion from Law 12,529/2011 to the financial sector. This was solved by a joint agreement between the entities. The agreement indicates that CADE and BCB have simultaneous mandate over financial market mergers, with a unilateral mandatory decision by BCB if it understand there is a systemic risk to the financial sector without the merger; at the same time BCB recognizes CADE´s sole role in judging financial sector abuse of dominance cases. A law has been passed in the Senate PLS 350/15 and is pending a decision in the lower house of Congress.

The growth of the platform delivery business model forced CADE to look closely to this market. The *Naspers/Rocket* (or their better-known brands *iFood/PedidosJá*) decision from March 2018, has extensive use of platform concepts and recognition of its economic forces. The case documents refer often to the *Just Eat/Hungyhouse* decision in the UK by the CMA. The case documents discussed relevant markets in detail, concluding on a platform-orders only market. It concluded that concentration levels were low to generate an antitrust harm presumption. More interestingly, econometric evidence used at the case suggested that PedidosJá was not a close competitor to iFood. Nevertheless, the case decision document noted the possible anticompetitive effects of exclusive dealing with restaurants by a dominant online order platform. In an abuse of dominance case brought to CADE in late 2020, the Authority did place an injunction against iFood, blocking exclusive dealings with restaurants, given their continuing expansion and possible anticompetitive harm[19] in March 2021. The case has not been decided as of September 2021.

The above cases sample CADE's development on handling digital platform mergers. Its experience with abuse of dominance cases is more limited. Three types can be highlighted. First, cases on payment methods (credit and debit cards), where the Brazilian Antitrust Investigative body at the time ("SDE"), jointly with the Central Bank issued a detailed report on the industry and denouncing the vertical integration between scheme owners and acquirers. Since 2017, several cases or abuse of dominance in the acquiring industry have been carried out against Visa and Rede (formerly the acquirer associated with MasterCard), the two dominant acquirers (controlled in part or wholly by issuing banks). The earlier cases echoed the international investigations in markets that led to the regulation of interchange fees in Australia, United States, and some countries of Europe.[20]

Second, online travel agencies, namely, Booking, Expedia and a regional competitor Decolar most favored nation price agreements with hotels have also been investigated by CADE. The case was settled with the decision to allow narrow price parity clauses but banning wide price parity clauses. The decision referred ostensibly to similar cases in Europe.

Last, but not least, Google has been accused of abuse its dominance in the online sponsored search market. The cases were decided in 2019-2020 but refer to practices from the first part of the 2010 decade. One of them was under scrutiny in other jurisdictions regarding the algorithm implemented by Google on its sponsored search. While the decision in Europe led to the application of a multibillion euro fee on Google, in the case of Brazil the Tribunal was markedly divided with equal votes to convict of an abuse of dominance and to close the case. It was a heavily debated case with written opinions of all six voting members of the Tribunal at the time of the ruling.[21]

The casting vote by CADE´s president (that had already voted to close the case in the individual vote) let to the closing of the case without conviction. The debate rested on whether there was actual damage or not on price comparison websites once Google implemented its policy not to allow these price comparison websites to advertise on product listing ads ("PLAs"). Part of the Commissioners believed that the fast growth of Google Shopping was caused by the business practice at the expense of comparison websites, while the other half of the Tribunal believed that such harm, if present, would not have exceeded the possible benefits of an alleged improved more effective algorithm by Google.

Interestingly, the case illustrates CADE's handling of abuse of dominance cases trying to move beyond per se analysis. In the general perspective of rule of reason decision making at CADE, it is often the case that the analysis includes structural conditions to gauge the possibility of generating anticompetitive hard. Many cases are explicit in the possible efficiencies of the business practice, but few, if ever, effectively provide a balancing of the actual harm (at least in the quantitative sense) and procompetitive effects of the conduct under evaluation.

IV. CONCLUDING COMMENTS, GOALS AND CHALLENGES AHEAD

When confronted with the challenges of the digital era, Brazil's antitrust authority undertook intensive efforts to properly assess mergers and abuse of dominance cases, considering international developments and case specifics. This effort can be seen in the events it held and participated, the documents it produced and, most importantly, in the case law. As mentioned, a considerable number of mergers in digital sectors were assessed, while some anticompetitive practices were investigated. Considering the BRICS countries, CADE is an early adopter of the concepts and tools used for these cases.

19 Case number 08700.004588/2020-47.

20 The Central Bank of Brazil started regulating the interchange fee from 2019, in part influenced by the number of abuse of dominance cases handled by CADE.

21 In general, there are at most two detailed written decisions, by the designated Commissioner and the leading dissent vote, if present.

On one hand, the evolution of the assessment is clear. From the first use of the multisided-platform concept in 2004 to the recent Google and iFood cases, we can see a refinement in the use of economic tools. CADE's efforts in merger control are extensive, covering many sectors in digital services. On the other hand, CADE has still some ground to cover. The assessment of abuse of dominance is still timid and divided in its legal standard even in other industries.

Furthermore, the decision of assessing on a case-by-case basis not changing its merger notification thresholds as a response to the growing challenge of nascent and innovative firms' acquisition may be considered a conservative stand, especially given that other jurisdictions are applying more aggressive solutions. However, the legal possibility for CADE to require the submission of non-notifiable transactions may partially compensates this conservative position, when compared to other countries where there is no such prerogative. The OECD peer review released in 2019, taking into consideration the challenges posed by the digital economy, advised that Brazil should "[i]ntroduce a new notification threshold based on the value of the assets involved in the transaction" following other countries initiatives. It also broadly recommends that: "Brazil should regularly review its merger notification thresholds […] to consider a reform of the merger thresholds to reduce the number of non-problematic filings;" and "[e]xtend the deadline that CADE has to open an investigation against non-notifiable transactions from 12 to 24 months."

Some of the challenges to competition policy practice on digital platforms are global. CADE's DEE has shortlisted some of them in the Digital Platform Study cited above, namely: How to intervene in markets so dynamic? How to estimate long-term effects of competition policy? How to adapt measures to platform specificities? How to deal with and identify exclusionary practices by a dominant firm due do data concentration? How to deal with discrimination based on user data and profiling technology? How to deal with algorithmic collusion and vertical relations in retail? How to coordinate actions between privacy and competition policy?[22]

CADE is catching up. The results of its efforts are visible and especially important given Brazil's position as a developing economy and the lack of definitive answers by other national antitrust authorities on a number of issues. There are many challenges for which the answers are far from simple but facing them is on the agenda and CADE is up to the task, with transparency and engagement with the antitrust community.

22 CADE's chief economist Guilherme Resende discusses algorithmic collusion on a CPI Column. Check https://www.competitionpolicyinternational.com/algorithmic-collusion-competition-implications-and-anticompetitive-evidence-in-brazil/.

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