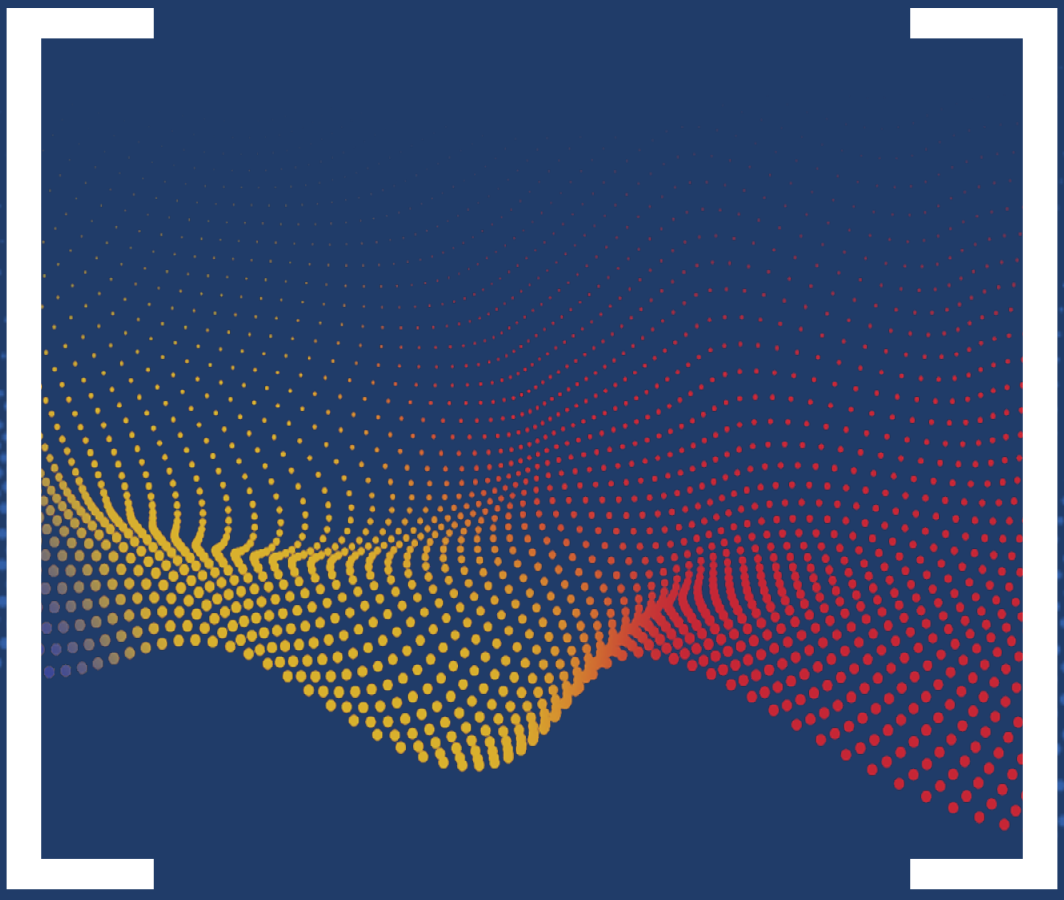
COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Competition enforcement and ex-ante regulation in digital markets



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
Newsletter No. 21, January 2023

OECD RCC OECD-GVH HUNGARIAN COMPETITION AUTHORITY

Inside a competition authority: **ROMANIA**

Contents

Saperavi wine to toast the Regional Centre!

Renato Ferrandi
Coordinator of the Regional Centre, OECD

When God created the world, He (or most probably She) divided the land up to the different peoples of the earth. The Georgians were late and God was so upset that he (sorry, She) decided that they deserved no land. However, the Georgians explained that they were late because they had been drinking toasts in her honour. God was so touched that She decided to award them the best piece of land – the one She was reserving for Herself: the land of Georgia.

I am not sure that this story is bullet proof in terms of historical evidence (for example, I was convinced that the best piece of land is italy…), but I guess that many Georgians would be ready to swear it is true, particularly after a few good bottles of Saperavi. Whether true or not, it is a matter of fact that Georgians treasure their traditional feasts called Supra, in which the master of ceremonies (Tamada) proposes a few toasts and then encourages the guests to contribute their own toasts. I discovered this beautiful tradition when I attended the first International Conference on Competition and Consumer Protection held in Tbilisi in November 2022.

Toasting is an amazing experience, not only because it makes drinking an act of socialization and friendship, but also because it makes you reflect on the many gifts you have received and to be grateful for them.

Approaching the end of my mandate as the manager of the OECD-GVH Regional Centre for Competition (I will be more precise in the next edition), I feel the need to bring out a bottle of delicious Saperavi wine and toast the magic of our Centre.

You might expect me to propose a toast to the contribution made by the Centre to the impressive improvements and achievements of our 18 beneficiary competition authorities over the last 18 years. Well, I will not. I would like to propose a toast to the friendships that our seminars triggered. Each of our seminars has been a fantastic opportunity for participants to interact with the delegates of all the other economies. In every single seminar, participants arrived as strangers – sometimes even political enemies – and left as friends. This is what I wish to toast: the joy of meeting individuals different from you and opening your heart to discover and value those differences. I believe it is the best antidote to war. Let's make a toast to friendship and to our Regional Centre!

The July edition of our review will focus on ***merger control,*** *which is also the topic of our next RCC seminar taking place in February 2023. We encourage you to share one or more key cases addressed by your competition authority. What were the theory of harm and the issues at stake? How did you organize and perform your analysis? What were the challenges you had to overcome? What arguments did the merging parties bring up? What was the outcome of the merger review: prohibition, remedies or clearance? And most importantly, what are the lessons learned? If you intend to contribute, please inform Mira (email address) as soon as possible and then send us your article* ***by 15 May 2023.***

Programme 2023

A. Seminars on competition law	
14-16 February	**Seminar - Merger control in times of uncertainty** Merger control is a forward-looking exercise that requires a complex skill set, particularly in times of uncertainty. This seminar will focus on theories of harm for merger cases, basic economic methods, investigative steps and effective merger remedies. Special emphasis will be put on the adequate treatment of innovation. Merger control experts from OECD countries will present case studies, and participants will practise their merger skills in hypothetical exercises.
28-30 March	**Seminar - Intellectual property rights and competition policy: friends or foes?** The objective of intellectual property rights is to protect investments in research and creative activities. With digitalisation, the importance of intangible assets has increased and IP rights have taken on a prominent role. This seminar will discuss in what circumstances IP rights can give rise to competition concerns and how competition authorities can address these concerns without undermining firms' incentives to invest and innovate.
25-27 April	**Outside Seminar in Moldova – Competition policy in energy markets** The energy sector has a number of unique characteristics and specificities that need to be considered in competition enforcement and advocacy. The goal of this seminar is to illustrate international practices relating to cartels, abuse of dominance, mergers and competition advocacy in this fundamental sector of modern economies.
25-26 May	**Competition Lab for Judges – Stepping up with the fundamentals of competition law: Key developments in digital markets and regulated industries** (subject to EU funding confirmation) This seminar will address key developments in the notions of market power, dominance and abuse are examined, initially in 'traditional' settings and then in digital markets, to better highlight how to apply the traditional competition law concepts to digital markets. The sessions on regulated markets will examine key developments in the pharmaceuticals, telecommunications and energy sectors both under an Article 102 TFEU and an Article 101 TFEU angle, in the latter case with a focus on horizontal cooperation agreements.
September 3 days	**Joint Seminar - Competition advocacy to embed competition principles in regulations (with supporting competition authority)** Some laws and regulations may unduly restrict competition, insofar as they go further than necessary to achieve their policy objectives. Building on the OECD's Competition Assessment Toolkit, this seminar will showcase the experience of advanced competition authorities with identifying unnecessary restraints and developing alternative, less restrictive measures that still achieve government policy objectives. Special consideration will be given to effective way to approach policy makers.
October 2 days	**GVH Staff Training** **Day 1 – Tbd** **Day 2 – Breakout sessions** In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the economics section, the consumer protection section and the Competition Council of the GVH.
November 2 days	**Competition Lab for Judges – Stepping up with the economics of competition law: Between competition and regulation** (subject to EU funding confirmation) This seminar will explore the economic concepts underlying competition law enforcement in digital markets and regulated sectors. Through references to case examples and recent key developments, the seminar will address market power, abuse of dominance, theories of harm, while highlighting the impact of regulation on the competitive landscape.

B. Training video project - "Key Competition Topics explained in few minutes"
Three additional videos
Two special videos for Judges

C. RCC review "Competition Policy in Eastern Europe and Central Asia"
Two issues of the review (January and July), both in English and in Russian
Possible special edition of the review on "Competition in Ukraine: Thinking Ahead"

D. RCC Annual Report
Edition on the RCC Activity 2022, both in English and in Russian

COMPETITION ENFORCEMENT AND EX-ANTE REGULATION IN DIGITAL MARKETS

Digital issues for competition policy: Remarks and suggestions for young competition authorities – OECD

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Deputy Head of the Competition Division, OECD

Renato Ferrandi
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Digital markets have changed our life forever. They did not simply transform our shopping experience: they changed the way we chat with friends, work, travel, play, learn and keep informed. Most probably they changed the way we think. These developments have not taken place gradually, but established themselves as a sudden disruption of the status quo.

The work of competition authorities across the globe has been equally disrupted, in the face of a profound transformation in how our economies operate, with digital service providers playing an ever-greater role as intermediaries in the day-to-day activities of consumers around the world. The new unique opportunities brought about by large digital platforms are not without challenges.

1. New challenges

1.1. Market concentration

The first, general competition concern is an increase in concentration in digital markets, which has coincided with broader economic trends that have raised concerns about competitive intensity. Across the OECD, business dynamism has been falling, with fewer firms entering and exiting markets. While digital start-ups still attract significant equity and venture capital investment, they are increasingly acquired by larger players before they have a chance to grow and thrive. Meanwhile, across the wider economy, relatively few firms have adopted digital technologies, causing a large and growing gap in productivity between more digitally adept firms like online platforms, and the rest of the business population. These trends are a major concern because evidence shows that healthy market competition is essential for lower prices, greater innovation, and long-term growth and well-being.

At the OECD, we are focusing our efforts to capture the benefits while managing risks of the digital transformation – in which digital platforms play a major role.

1.2. Platform competition – a new business model has emerged

Perhaps the most archetypal digital business model in digital markets is the online platform, a digital service that enables interactions between multiple distinct sets of users via the Internet. Online platforms can open new markets and opportunities, enabling transactions and interactions that would have otherwise been impossible, including through the provision of tools that enable trusted transactions between unknown third parties. Platforms also often provide new, high-quality products and services at low, or even zero prices. Online platforms have disrupted incumbent, analogue businesses, and enabled the spread of information to help consumers make informed choices, including switching between multiple services.

In the early days of the Internet, experimental business models rose and fell rapidly. However, the mid-1990s heralded the emergence of a handful of online platforms that have since become household names and continue to attract attention, skills, data and enormous revenues. Although online platforms are not all the same – they differ in terms of size, users and functionality – policy and public interest have largely focused on this handful of digital giants. Since their emergence, this group has grown to take the lion's share of major online markets including e-commerce, search, online advertising and social media.

1.3. Features of digital markets that may give rise to competition problems

If, on the one hand, digitalisation has led to the introduction of new markets, the reshaping of old ones, and a transformation in how consumers obtain information and make purchases, academic, policy and legal experts have also argued that certain digital platforms enjoy durable market power, noting particular features that characterise digital markets and affect their efficient functioning.

These include:

- **Strong network effects**, meaning that as the number of users grows, the value of the platform to users increases. As a result, digital platform firms enjoy significant scale advantages. These platforms operate in markets with several interconnected sides (e.g. consumers of content who generate data, advertisers, data aggregators), each with their own specific competitive dynamics.
- **Substantial economies of scale and scope**, since many digital markets exhibit high fixed costs and low or zero variable costs. Firms can therefore rapidly scale up, expand their geographic coverage, or potentially use their assets in one market to enter another, creating ecosystems.
- **Ecosystem economy** where firms may seek to leverage their market power from one market into another, for example with bundling and tying strategies that foreclose competition for a digital "ecosystem" of products.

- **Reliance on large amounts of user data** that can be difficult to replicate and costly to analyse.
- **Switching costs,** for example users may have invested time and effort to create a profile on a social network or a reputation as providers on an exchange platform, which they may lose by switching. As a result, users may be "locked in" to certain services. Switching costs may also be enhanced by the creation of product ecosystems.
- **Often important intellectual property rights,** including patents which grant the owner a limited-term monopoly over the use of a technology or method.
- **Low or zero prices** associated with business models that earn revenue from the collection of consumer data, the sale of advertising or the use of customer relationships to sell "premium" or other paid products. These business models are of increasing importance: seven of the ten largest global companies provide zero price products and services in digital markets.
- **Disruptive innovations** that dramatically reduce transaction and intermediary costs, and may be offered outside of established regulatory frameworks that limit competition by incumbents.
- **Vertically-integrated and conglomerate business models** which may give rise to specific concerns about anticompetitive conduct when digital platforms act as "gatekeepers" between downstream firms and their customers. For instance, gatekeepers may be the subject of competition concerns if they provide advantages to their own downstream operations.

While some of these characteristics, such as network effects or zero price business models, are not new, they are taking on a new prominence in digital markets, with significant consequences for market dynamics.

2. Challenges for competition enforcement and advocacy

The specific features of digital markets illustrated above make both competition enforcement and competition advocacy particularly challenging and complex.

As regards competition enforcement, suffice to highlight some specific elements that add on to the normal intricacy of antitrust investigations.

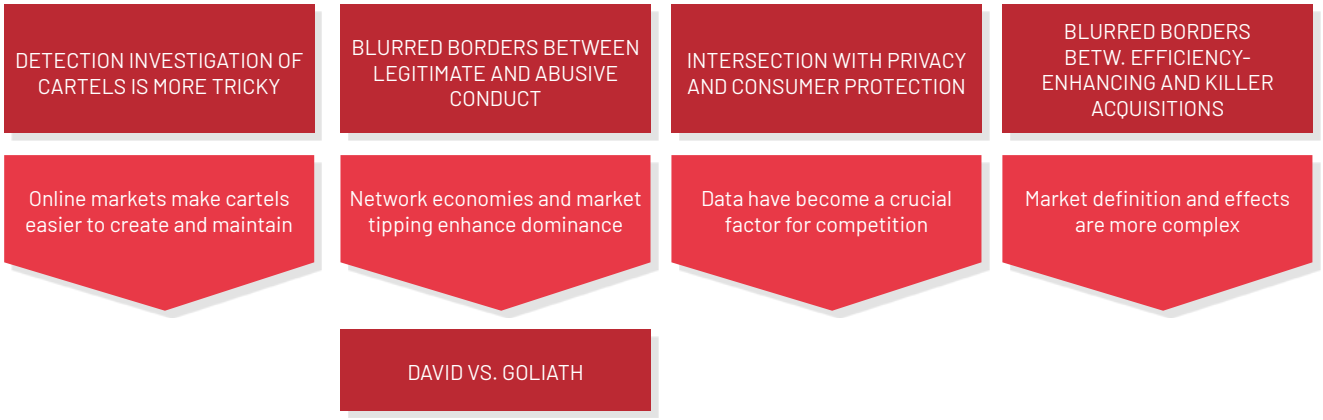
Cartels have been traditionally associated with oligopolistic markets offering homogeneous products or services, because a high number of players or differentiated goods made potential horizontal agreements unstable and difficult to govern. With the advent of algorithms and smart contracts, new and more sophisticated tools to establish, monitor and maintain cartels have become available even in fragmented markets, while detection and investigation have become more difficult for competition authorities.

Platform competition, the key role played by gatekeepers, network economies and tipping effects, combined with the tendency of large digital companies to "invade" new markets, often make the distinction between legitimate competition on the merits and abuse of dominance less obvious. This couples with a sort of "David versus Goliath" situation: the professional and financial resources that a competition authority can devote to an investigation are necessarily limited, while large digital platforms involved in antitrust cases have incentives to deploy huge resources. Moreover, the investigated parties usually hold the data that can shed light on their conduct, and in some cases corroborate the allegations.

The emergence of data collection and processing as a crucial asset for competition in digital markets raises questions that often require a holistic, multidisciplinary review. As a consequence, it may be advisable for competition authorities to liaise and cooperate with other regulators, e.g. data and/or telecom regulators, or consumer protection agencies, to take into account all interests at stake and come to a comprehensive decision.

Finally, when it comes to merger control, competition authorities are often confronted with conglomerate effects, which are less complex to examine than horizontal and vertical effects. In fast moving markets, the boundaries and the correlation between apparently different services may not be clearcut, even more so when it is necessary to predict future evolutions. This is coupled with a heated debate about the actual effectiveness of traditional thresholds for notification, based on turnover. In markets characterized by zero-price business models, in which the real value lies in data collection and profiling, are those thresholds still able to capture the relevant transactions?

Competition enforcement in digital markets



At the same time, competition advocacy may be paramount in digital markets. Indeed, policymakers may decide to take action to curb the power of some very powerful digital operators. While it is not for competition authorities to question the public policy objectives underlying regulatory initiatives, it certainly falls within the duties and responsibilities of competition authorities to support policymakers in identifying measures that do not introduce unjustified or disproportionate competition restrictions. Policymakers should be aware that certain benefits in the short term may translate into serious harm in the longer term if the level playing field is unduly tilted.

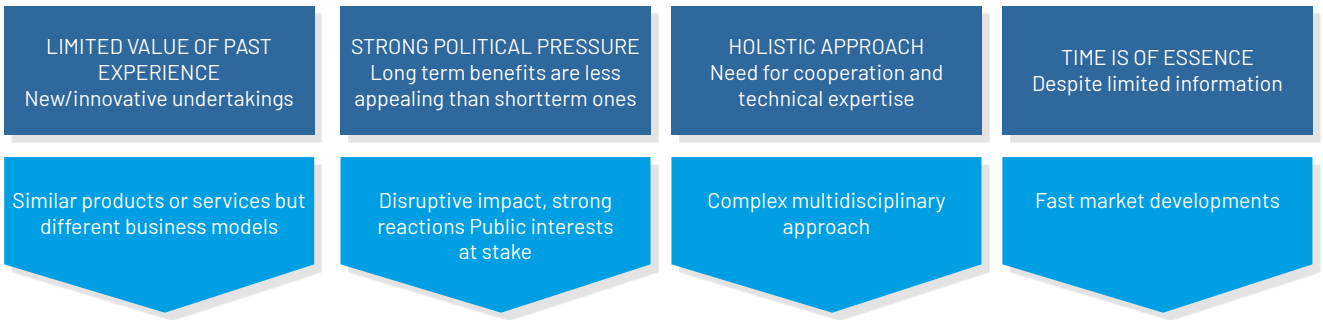
Again, for competition authorities it does not seem to be easy. First, usually competition authorities can build their advocacy interventions on past experience regarding a specific market or a neighbouring one. This is not the case whenever they address innovative undertakings, which use a new business model. The products or services in question may be very similar to traditional ones, but the economics behind them is totally different.

Furthermore, advocacy often takes place in turbulent conditions, in which business for the incumbents has been heavily disrupted, with serious social implications, e.g. on employment. This may result in strong political pressure on competition authorities, which must find the right words to be heard and understood.

As already observed, the multi-faceted nature of the issues at stake might require a multidisciplinary approach and the ensuing need to find a common ground with other public institutions, which might have different priorities and sensitivities.

Finally, fast market developments require swift reactions. The window for effective competition advocacy might be very narrow, and competition authorities must deal with a trade-off between fully informed and timely advice.

Competition advocacy in digital markets



3. Possible responses

3.1. New competition law tools and regulatory approaches

It is undisputed that the innovations brought by digitalisation have generated substantial consumer benefits in many markets, including lower prices, greater accessibility and convenience, more variety, and brand new products. At the same time, the market characteristics described above may raise questions about how existing regulatory frameworks can adapt to digitalisation, and whether further action is needed from policymakers to ensure that digitalisation reaches its potential in terms of broad economic benefits.

One particular issue that has been highlighted is the issue of economic concentration in digital markets. Powerful network effects, switching costs, economies of scale, and the growing importance of data may lead to markets dominated by one firm, or a small number of large firms. These effects may extend across the economy, raising concerns about systemic risks, labour markets, the future of innovation and productivity, and rent-seeking (e.g. through lobbying activities).

From a competition perspective, however, big is not always bad, and competition for the market dynamics may simply be the result of the structural features of a market. A leading position in a market may also be the result of higher productivity, and evidence shows that the productivity gap between the leading firms and their competitors is growing in several markets. A key question to ask, therefore, is what is happening to competitive intensity in digital markets?

According to OECD research, several indicators suggest that competitive intensity in digital markets is on the decline. In particular, mark-ups (a measure of market power) are on the rise, start-up creation has fallen, and the share of large firms' revenues in digital sectors is growing. This suggests that digital markets may be less contestable, and more subject to durable market power than in the past, and prone to tipping, potentially as a result of:

- **Anti-competitive conduct**, for example when an incumbent firm is using its position to exclude competitors from a market, or acquiring potential emerging competitors simply to prevent their products from reaching the market.
- **Competition distortions from regulation** that allows incumbent firms to maintain a dominant position for reasons unrelated to the attractiveness of its products to consumers.
- **Features of demand or supply that prevent entry by new firms, or expansion by dominant firms' competitors,** including very strong network effects or economies of scale and scope, information asymmetries between firms and consumers, switching costs, or consumer behavioural biases (such as a low tendency to switch to unambiguously better offers).

Competitive pressure is crucial for digitalisation to deliver the benefits described above by incentivising productivity and innovation, and encouraging low prices as well as high quality. There is a wealth of evidence demonstrating that competition is associated with broad macroeconomic benefits as well, includ-

ing stronger productivity, higher economic growth and lower income inequality.

Some concerns about dynamics in digital markets fall squarely within a competition enforcement context, namely with respect to anticompetitive conduct and mergers giving rise to durable market power. However, competition authorities may need to adapt their analytical tools to the unique conditions of digital markets, including multi-sidedness and business models involving a price of zero. They may also need to grapple with new theories of harm that may not fall within established frameworks, and which will require legislative or at least analytical changes to apply. Further, they must adapt their processes to match the speed of evolution in digital markets and ensure that potentially anticompetitive conduct is scrutinised.

Other concerns in digital markets cannot be addressed by competition authorities, or at least not directly. The size and reach of large digital firms across multiple markets has led some to highlight the potential for systemic risks, rent-seeking (for example, through lobbying activities) and inequality. While vigorous competition in markets can mitigate each of these risks, competition enforcement and competition policy more broadly may not be equipped to tackle them head-on.

Many concerns fall within a grey zone between these two categories – in other words, it is not always clear what can be addressed by competition enforcement, and what cannot. Competition authorities have begun to explore issues ranging from labour market power by large firms to consumer privacy. These efforts include both enforcement work, as well as broader competition policy and advocacy efforts. Going forward, competition authorities will need to identify the boundaries of competition enforcement, and clarify where other regulators, such as consumer protection authorities, will be better-suited to address an issue. A range of proposals have also been made for new digital regulators to be established. These regulators could promote competition outside traditional competition enforcement frameworks, and pursue additional policy objectives, acting essentially as a sectoral regulator. Even where competition authorities may not be involved in enforcing these new regulations, however, they have a role to play in advocating for procompetitive regulatory design.

In response to these concerns about competition in digital markets, several jurisdictions have undertaken studies to assess whether existing competition policy frameworks must be adapted to digitalisation. This has culminated in specific reform proposals, which include:

- the creation of **new regulatory regimes** for digital markets (such as new ex-ante measures focused on designated "gatekeeper" firms).
- **more aggressive enforcement** of some harms (such as abuses of dominance through self-preferencing).
- **new enforcement approaches** (such as shifting the burden on dominant firms to show that certain types of conduct is not harmful).
- **adjustments to merger control** (for instance changing merger notification thresholds to capture anticompetitive acquisitions of nascent competitors.
- **adaptations to analytical tools** (such as multisided markets) and a particular focus on promoting innovation, consumer choice and dynamic competition.

3.2. Regulatory initiatives

Many countries have adopted traditional competition enforcement tools, increased the technical capacity of authorities and prioritised enforcement in digital markets. In addition, and in recognition of the structural characteristics of digital markets that may lead to concentration, many jurisdictions have moved beyond traditional tools by proposing or implementing additional regulatory initiatives that apply specifically to a limited set of firms, usually including the largest online platforms. While these regulations differ substantially, they often include:

- **Measures to address data-related concerns**, including obligations to grant competitors access to important datasets and implement data portability and interoperability measures.
- **Measures to address the perceived 'gatekeeper' status of online platforms**, including measures to limit self-preferencing their own goods and services and bundling.
- **Measures setting out transparency and fair business practice obligations**, including mandatory codes of conduct, and requirements for transparency of algorithms, advertising practices and data collection.
- **Additional merger requirements**, including an obligation for targeted firms to inform regulators of all relevant mergers and acquisitions.

Although such regulations have a common goal of promoting competition online and share common features, the proposed measures differ substantially across jurisdictions. A fragmented legislative landscape for platforms carries costs for both firms and consumers, increases uncertainty, and may preclude welfare-enhancing innovation. Moreover, because the largest online platforms straddle the world, the effects of regulations in one jurisdiction can spill over into other areas. A coherent global approach would enhance regulatory effectiveness, and ensure that digital markets remain competitive, contestable, and contribute to economic well-being.

At the OECD, we believe that broad **divergence can threaten the effectiveness of new regulatory efforts** in this area, and we encourage international co-operation whenever possible. After all, these proposals all share the same core objectives and concerns about digital markets. This also suggests that there is room for agreement on certain key principles, particularly the need to keep markets contestable. We propose **three baseline principles**:

- **First**, tackling anticompetitive conduct by large incumbents more quickly and comprehensively;
- **Second**, considering a broader range of competition concerns in mergers, including acquisitions of nascent competitors and the role of data in contributing to market power; and
- **Third**, considering new regulatory approaches to promoting market dynamism, such as mandatory data portability and interoperability.

At the same time, regulation should not impose excessive burdens, stifle investment or make it harder for innovative new firms to enter markets and grow – all of which would be counterproductive.

Here, the principle of **proportionality** is important: regulation, as well as enforcement, should be proportionate to the

actual or potential harm for markets and consumers, and should not target firms without a sound justification.

We should also identify and foster opportunities to strengthen competition policy beyond new regulatory measures. **Competition Authorities, for example, need the right resources and the right toolbox to support competitive digital markets**. In some jurisdictions, this may require legislative changes to update the assessments authorities can make regarding mergers or anticompetitive conduct. Policymakers should also consider soft tools, such as market studies, which allow authorities to improve our understanding of competition in digital markets, and the ability for Competition Authorities to use a broad set of policy levers to address any concerns.

4. Suggestions for younger competition authorities

There are at least four main initiatives that younger (and less experienced) competition authorities can undertake to make sure they are duly equipped to face the complexity of digital markets.

1. **Promote competition knowledge and culture.** Positive outcomes of competition enforcement and advocacy require both internal competence and external support. Internal knowledge can be strengthened through capacity building, both on basic and traditional notions – to rely on solid foundations – and on specific digital matters. Other initiatives can complement these efforts, including hiring digital experts and considering adjustments to the institutional design. In parallel, external support can be enhanced by outreach initiatives aimed at explaining the (often log-term) benefits of competition to different stakeholders, from the business community to the government, from the media to the general public.
2. **Engage in cooperation**. As mentioned, competition issues in digital markets require a holistic approach. Inter-disciplinary cooperation with other national agencies (privacy, consumer protection, sector regulators) provide complementary perspectives. At the same time, regional and international cooperation with other competition agencies can be a precious resource. Sister agencies can be a relevant source of information and can help ensure the most appropriate case allocation, while fostering consistency and mutual comity in the decisions.
3. **Strengthen the competition toolkit**. Several initiatives may improve agency effectiveness. In some jurisdictions, amendments in the domestic competition law have been introduced, *inter alia* to try to better capture relevant mergers, to assess market power more accurately, to detect cartels more effectively, or to better collect and manage huge amounts of data points.
4. **Consider performing market studies**. Market studies are resource intensive and may take a long time, but are a powerful tool to gain a better understanding of key sectors. If duly conducted, they enable more credible, evidence-based advocacy and more informed enforcement. In some cases it is not even necessary to devote significant resources: informative market studies on several digital topics have been carried out by advanced competition authorities over the last few years, and are fully available.

5. Conclusions

Digital markets have posed significant challenges for competition law and policy frameworks in recent years. Many well-established theories of harm and core concepts will be vital to ensure that digital markets are dynamic and innovative. Anti-competitive mergers, agreements among competitors and vertical restraints can produce as much harm in digital markets as in traditional ones – in fact, some features of the digital markets may amplify this harm. At the same time, there will be a need for a solid understanding about the particular competitive dynamics in digital markets, increased attention to potential novel forms of misconduct and merger harms, and tailored remedies. There is also a growing consensus that at least some parts of the competition policy framework must be adjusted in response to digitalisation.

While competition law frameworks are fit to meet the challenges raised by digitalisation, authorities have been looking at building expertise and skills that allow them to apply well-established principles in fast-changing and dynamic markets. New theories of harm have been explored and new tools adopted when necessary. But antitrust enforcement cannot be the only tool in the hands of governments.

Digital regulations should aim at supporting competitive and innovative markets, as well as helping consumers use digital platforms in an informed and safe way. At the same time, regulations should be proportionate, to avoid dampening innovation and to ensure a level playing field. While jurisdictions may take different approaches based on their specific circumstances, the common challenges posed by increasingly large digital platforms, which go beyond national borders, are best solved collectively through regulatory cooperation and exchange.

There is, therefore, a great deal of work to be done to address competition concerns in digital markets, and to ensure that the current regulatory frameworks are up to the task. The OECD remains committed to helping our members and partners in this mission.

Data portability: Empowering users while fostering competition – OECD

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Data portability has become an essential tool for enhancing access to and sharing of data across digital services and platforms. It empowers users to play a more active role in the re-use of their data and increases interoperability which enhances competition and innovation by reducing switching costs and lock-in effects. While data portability may bring about considerable benefits, its effectiveness in promoting competition depends on data transfer conditions and whether competitors make use of the data. Data portability measures may unintentionally reduce competition by setting overbroad interoperability standards in rapidly developing markets and, by enabling data transfers to multiple destinations, data portability can also increase digital security and privacy risks. This article presents five key ways in which data portability arrangements can be implemented (i.e. sectoral scope, beneficiaries, type of data, legal obligations, and modus operandi).

Data portability is the ability of users to request that a data holder1 transfer to them or a third party data about them in a structured, commonly used and machine-readable format (OECD, 2021[1]). Data portability can empower users (natural and legal persons) to play a more active role in the re-use of their data across digital services and platforms. It is in line with the individual participation principle of the revised OECD Recommendation concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (hereafter, the "OECD Privacy Guidelines") that provides that individuals "should have the right to obtain from a data controller, or otherwise, confirmation of whether the controller has data relating to them [and] to have communicated to them, data relating to them within a reasonable time; at a charge, if any, that is not excessive; in a reasonable manner; and in a form that is readily intelligible to them" (OECD, 2013[2]).

When used to allow systems to communicate with one another, data portability can enable interoperability generally through the use of interoperable specifications including technical standards and application program interfaces (APIs) – the software specifications used for the real-time data transfers between digital services. Data portability has thus become also an essential tool for enhancing access to and sharing of data across digital services and platforms, while empowering users and fostering competition and innovation.

Whilst data portability may bring about significant benefits, it can also carry certain risks. In particular, while data portability may increase competition, data-driven innovation and consumer choice, it may also generate dis-incentives to invest and unintended adverse effects on market structures. Whilst data portability can facilitate access to and sharing of data, transferring the data to destinations that are not controlled by the original data holder can lead to privacy and digital security risks. Therefore, there is a need to "support personal data and privacy protection by assessing the impact of related technology trends, and by fostering regulatory and cross-border co-operation, as well as trust, innovation and competition based on fair and responsible data practices" as called for by the OECD Declaration on a Trusted, Sustainable and Inclusive Digital Future. (OECD, 2022[3])

Data portability: opportunities and challenges

Data portability measures are typically motivated by their potential to: 1) increase competition and consumer choice and 2) facilitate data flows and data sharing while enabling informational self-determination and strengthening individuals' control and agency over data concerning them. However, these benefits also bring considerable risks that policy makers need to address. These range from digital security and privacy risks and liabilities, to possible unintended adverse effects on market structure that may dis-incentivise data-related investments and innovation.

In addition, implementing data portability can involve significant (compliance) costs to the data holder and to potential data users. Most compliance costs are generally one-off expenses for implementing data portability rather than for ongoing operations. They may include technical costs for developing or accessing a secure API; transactions costs associated with getting consent from other data subjects when data are related to multiple parties; and legal costs such as compliance audits and regulatory fines.

1 The term "data holder" is used in this report as the more generic term to "data controller". The latter is reserved for data holders of personal data in line with the definition of the OECD Privacy Guidelines: "'data controller' means a party who, according to national law, is competent to decide about the contents and use of personal data regardless of whether or not such data are collected, stored, processed or disseminated by that party or by an agent on its behalf".

Increasing competition and consumer choice

From a competition perspective, data portability measures seek to address a range of broad concerns about competitive dynamics in online markets, including: consumer lock-in associated with network effects, anticompetitive conduct enabled by vertically-integrated and conglomerate business models, demand-side concerns such as consumer inertia, and the role of data feedback loops in reducing market contestability. Data portability can also harness digital technologies to promote competition in specific sectors such as banking, energy and transportation to name a few.

Data portability measures aimed at promoting competition aim to reduce user switching costs and the frictions associated with trying new services. This could, in turn, stimulate competition by making it easier for new entrants to attract users and potentially alleviate barriers to entry associated with data access (in those markets for which individual level data is valuable). Further, data portability could promote competition beyond the markets in which the data were originally collected, as a given data flow may have various applications. In the medium to long term, this effect may even allow the development of firms outside a market to eventually challenge incumbents within the market.

Where it enables interoperability through the real-time data transfers between online services, data portability could allow users to multi-home and make markets more contestable. Depending on their design, interoperability measures can promote competition *among* digital platforms (or ecosystems), by allowing users to preserve network effects on new services, and *within* digital platforms (or ecosystems), by allowing users to mix and match different complementary services from different providers.

However, the effectiveness of data portability measures on competition may be limited if the scope of the data is too narrow, if user-initiated data portability requests are not sufficient to generate economies of scale, if there are no current or potential firms that would benefit from the data, or if network effects limit the value of new digital services regardless of data sharing.

Further, data portability could create risks in terms of market transparency (potentially facilitating collusion), or enhancing incumbents' positions by improving their access to personal data (both from rivals and consumers, since consumers may be more willing to provide data when it can be ported). When a dominant digital platform faces no rivals (including potential entrants with sufficient capacity to compete), these measures may be more appropriate for promoting competition in related and complementary markets than in enabling the emergence of rivals to the core platform. Thus, data portability measures, if implemented on their own with competition objectives in mind, may need to be considered for markets where:

- Access to personal data provide competitive value to recipient firms;
- Some competition is already present or expected (thus network effects and data-driven economies of scale do not completely preclude effective competition);
- The data in question can be used in clearly defined applications and in a standardised format;
- The data in question do not involve significant intellectual property (IP) rights or other ownership complexities; and/or
- Consumers are comfortable with sharing the data in question across platforms.

Measures that aim to enhance interoperability, for instance by enabling continuous data transfers (thereby improving the utility of data for recipients and thus allowing consumers to retain network effects when transferring to a new service), can address some of the limitations associated with one-off (static) data portability. However these measures also have risks, since without sufficient oversight and careful design, they may entrench incumbent technologies, disincentivise data-related investments and innovation, and create risks for exclusionary conduct or tacit collusion. Asymmetric approaches may be needed (either through competition enforcement or regulation), ensuring that the burdens are focused on large incumbents and do not create barriers to entry for new firms.

Facilitating data flows and data sharing, while enabling informational self-determination

Data portability gives data subjects (i.e. the individual that is identified or identifiable through personal data) more power over their data (i.e. to ask an organisation to verify if it has information about them). In so doing, data portability can be a means to implement the individual participation principle of the OECD Privacy Guidelines, and it can help address the power imbalance between consumers and digital service providers. Specifically, the ability of a data subject to download their personal data collected by a data controller could increase transparency, and allow data subjects to determine whether they wish to take further action (such as correction or deletion).

In addition, the ability to transfer personal data between data controllers can help individuals move from a data controller with poor privacy and data management capabilities to one with policies and practices that better align with their privacy and data governance expectations. Data portability may also protect against loss or unavailability of personal data should a provider go out of business. An individual would be able to request transfer to a new provider, rather than losing their customer history and having to start afresh. All this contributes to users' informational self-determination.

Despite the possible benefits, the potential of data portability to help achieve informational self-determination is not always realised. The benefits of empowerment may be conditional on the extent to which data portability can be effectively and securely implemented. For example, the data transfer may not be secure enough or data subjects may not be aware of how the new data controller could protect their personal data and privacy. Therefore, there should be clarity on the circumstances under which the data holder or the data recipient may be held liable for incidents.

Furthermore, there is a risk that data portability could facilitate over-collection and over-sharing of data with new service providers (including comparison services). As highlighted above, data portability is a means for data collection. Some have raised concerns that consumers could be pressured to provide their data to other additional data holders, which could be used against their interests.

An often presented example is the possible request of an insurance company to a consumer to transmit its social network data as a condition for contracting. This propensity of certain service providers to collect and ask for more data as a condition for contracting could also lead to a re-intermediation of personal data controllers. Gal and Rubinfeld (Gal and Rubinfeld, 2019[4]) warn "the easier it is to share data, the greater the concern that private data will fall into more hands." Further, MacCarthy (MacCharthy, 2020[5]) argues that "[u]sers who trust their information with one online company might not be pleased to share their sensitive data with any and all potential rivals." In this context, it is therefore critical to underline the obligation of data users to minimise data use, and the importance in the choice of data formats that can affect data minimisation.

Conferring on individuals a right of data portability arguably affects organisations' ownership and control over the data they collect. Indeed, one of the main rationales for data portability is to reduce lock-in and increase competition by facilitating data sharing in accordance with users' preferences. However, this raises certain questions. What are the obligations of data controllers to ensure recipients have adequate data management and security and privacy processes? When, if ever, are data controllers liable for recipients' mishandling of data (particularly when controllers were just complying with a data subject's request for data porting)? Will organisations be less incentivised to robustly manage data security risks if they feel they have lost ownership or control of it? How does data portability affect organisations' and users' rights over the data, including personal data? These implementation challenges are addressed in the next section.

Mapping approaches to data portability

Data portability initiatives vary significantly across jurisdictions in terms of their nature, purpose, scope (i.e. who has the right to have data ported and what data can be ported), technical and legal requirements, and implementation. While there are significant differences, some data portability arrangements and initiatives share some commonalities that reflect common approaches to data portability. The following five key dimensions can be used to categorise data portability arrangements and initiatives. Combined, they provide a taxonomy that can be used for mapping and analysing data portability initiatives in the private and public sectors:

- ***Sectoral scope***, including whether they are sector-specific or horizontal and thus directed potentially at all data holders across all sectors.
- ***Beneficiaries***, including whether only natural persons (i.e. individuals) or also legal persons (i.e. businesses) have a right to data portability.
- ***Type of data that is subject to data portability arrangements***, including whether data portability is limited to personal data and whether it includes volunteered, observed or derived data.
- ***Legal obligations***, especially the extent to which data portability is voluntary or mandatory and if the latter, whether data portability consists of an *ex ante* regulatory measure or an *ex post* enforcement action.
- ***Modus operandi***, or modalities of data transfer reflecting the extent to which data transfers are limited to or include ad hoc (one-time) downloads of data in machine-readable formats (regarded as "data portability 1.0"), ad hoc direct transfers of data to another data holder ("data portability 2.0"), or real-time (continuous) data transfers between data holders that enables interoperability between their digital services ("data portability 3.0").

Sectoral scope

There is a major distinction between general cross-sectoral or horizontal data portability approaches and sectoral approaches. General cross-sector or horizontal data portability approaches include EU General Data Protection Regulation (GDPR), California Consumer Privacy Act (CCPA) of 2018 and the California Privacy Rights Act (CPRA) of 2020. Conversely, sectoral approaches include the United Kingdom's Open Banking Initiative and the Payment Service Directive for Payment Businesses in the European Union (PSD2). The latter are most frequently used for critical infrastructure including financial services (open banking and the EU Second Payment Service Directive of November 2015 [PSD2]), transportation and mobility (the EU Regulation on Motor Vehicles of May 2018), energy (e.g. EU Electricity Directive of 2019) and health care (e.g. HIPAA).

Australia's Consumer Data Right (CDR) is also mainly used for critical infrastructure, although it can be best classified as a hybrid approach in this respect. The CDR is implemented at a sectoral level based on requirements defined with market participants (primarily in infrastructural sectors such as energy, banking and telecommunications). However, it is a horizontal framework that ensures a common approach across sectors. Following the CDR's strategic assessment, the CDR is moving towards 'targeted datasets' (Australian Government, 2022[6]). The strategic assessment outcomes identifies 'open finance' as the likely next priority area to expand the CDR. Open finance is anticipated to include datasets from across sectors, including general insurance, superannuation, merchant acquiring and non-bank lending service providers.

Horizontal data portability initiatives usually focus on a specific type of data, mainly personal data. In other words, "there are no data [portability] rights that are guaranteed across sectors for all data types" (Specht-Riemenschneider, 2021[7]). In an analysis of the legal framework on data portability in the European Union (EU), CERRE (Streel, Kramer and Senellart, 2020[8]) similarly shows that horizontal data portability initiatives focus either on personal data or non-personal data (Table 1), with competition law being the exception in many respects. On the other hand, sector-specific data portability initiatives usually cover a range of data types.

There are certain reasons to adopt sectoral approaches rather than horizontal approaches to data portability. For instance, sector-specific approaches can better address the specific legal, organisational and technical requirements of individual sectors, given that requirements for data transfers may vary by both data type and sector. Cross-sectoral approaches may nonetheless facilitate data sharing both across and within sectors more effectively. This becomes possible as certain industries may not have sufficient incentives to develop a user-driven, data-sharing framework on their own. Furthermore,

sector-specific approaches may create asymmetries. In these cases, certain businesses may act as data "gatekeepers", while others may be required to share their data. As an illustration, the revised PSD2 enables non-banks to access consenting clients' payments data when they are authorised as third-party providers. However, banks are not given similar access to the comparable data sets, which could lead to unfair competition (de la Mano and Padilla, 2018[9]; Di Porto and Ghidini, 2020[10]; Kerber, 2021[11]).

Table 1. Eu legal frameworks for data portability and sharing

	Personal data	Non-personal data
Horizontal	Art. 20 GDPR – Right to data portability	Art. 16 Digital Content Directive – Obligations of the trader in the event of termination
		Art. 6 Free Flow of Data Regulation – Porting of data
Sector-specific	Art. 66(4) and 67(3) – Second Payment Service Directive (PSD2)	
	Open Banking initiative in the United Kingdom	
	Art. 61 Regulation on Motor Vehicles (2018) – Access to vehicle diagnostic, repair and maintenance information	
	Art. 23(2) New Electricity Directive	

Source: (Streel, Kramer and Senellart, 2020[8]).

Given the difference in their sectoral scope, combined with their various objectives, such as privacy and data protection, innovation and consumer empowerment and competition support and enforcement, data portability measures may require cross-agency co-operation among different regulators and policymakers. This includes in particular co-operation between enforcement authorities in charge of competition, privacy and consumer protection. Other regulatory domains may also be concerned where data portability is implemented at a sectoral level (e.g. open banking). Co-operation across policy perspectives will be particularly valuable in terms of avoiding unintended consequences of data portability measures, and developing the most suitable oversight approach. Further, given experience with these measures is limited, the sharing of lessons learned across regulators and jurisdictions will prove particularly valuable. Governments therefore need to plan which regulator will have primary oversight of the initiative to ensure efficiency, streamlined processes and beneficial outcomes.

Beneficiaries

The majority of data portability initiatives tend to focus on individuals as the only beneficiary of the right to data portability. This reflects the common rationale of most data portability initiatives, specifically the desire to empower individuals, notably consumers. It is especially the case with privacy and data protection frameworks that include a data portability right, such as the EU GDPR and the CCPA/CPRA.

However, more recent initiatives also allow users more broadly (including organisations) to request that a data controller transfer their data to the user or to a third party. Australia's CDR, for instance, extends the right to certain businesses. More specifically, the legislation defines one of its three categories of actors as "CDR consumers", which can include individuals businesses. CDR consumers can hold rights to access data held by data holders (the other category of actor) and direct that data be shared with accredited data recipients (the third category of actor).

Similarly, the EU Free Flow of Data Regulation (FFDR) (European Union, 2018[12]), promotes data portability of non-personal data in business-to-business (B2B) relationships. "The Regulation instructs the Commission to contribute to the development of EU Codes of conduct to facilitate the porting of (non-personal) data in a structured, commonly used and machine-readable format including open standard formats" (Streel, Kramer and Senellart, 2020[8]). The FFDR aims, among other goals, to enable easier switching between cloud service providers for professional users. The European Commission has been working with stakeholders on "facilitating self-regulation in this area, encouraging providers to develop codes of conduct regarding the conditions under which users can move data between cloud service providers and back into their own IT environments" (European Union, 2018[12]).

Noting "the limited efficacy of the self-regulatory frameworks developed in response [to the FFDR], and the general unavailability of open standards and interfaces", and the necessity "to adopt a set of minimum regulatory obligations on providers of data processing services to eliminate contractual, economic and technical barriers to effective switching between data processing services", the European Commission (European Commission, 2022[13]) proposed the Data Act (issued on 23 February 2022). The Data Act has a number of relevant provisions on data portability, e.g., provision to further enable the switching between cloud and edge services and address existing lock-in effects (most notably Article 29). It will also aim to improve interoperability with regard to the building of common European data spaces, where necessary (European Commission, 2022[13]).

The Data Act will be complemented by the Digital Markets Act (DMA) (adopted on 19 July 2022), which also includes data portability obligations. In particular, the DMA provides for an obligation on designated gatekeepers to ensure effective portability of data (see Article 6(9) of the DMA). Recital 59 of the DMA gives further details on the rationale for this obligation and on how it should be carried out to be effective. It also specifies that this obligation complements the right to data portability under the GDPR (European Commission, 2022[13]). Articles 6(10) and 6(11) of the DMA (and related recitals) are also relevant. Article 6(10) provides for data access for business users

to data associated with their services, real-time free of charge and Article 6(11) provides for data sharing for ranking, query, click and view data (subject to anonymization for personal data) at fair, reasonable and non-discriminatory (FRAND) terms.

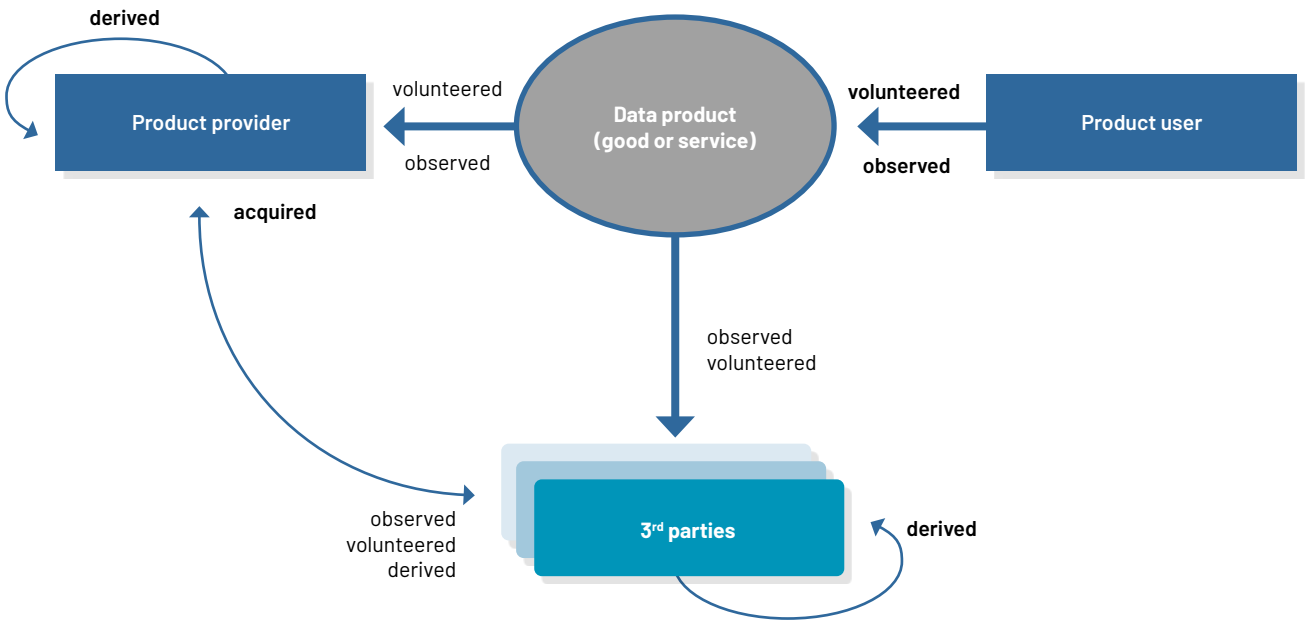
Data that is subject to data portability arrangements

Data portability initiatives may differ significantly based on their scope, especially in regard to which data should be made portable. Work on enhancing access to and sharing of data and data governance revealed that policy makers should not treat data as a monolithic entity, but they should rather differentiate between the different types (OECD, 2015[14]; OECD, 2019[15]). Data portability initiatives will also have to (to the extent they do not already) distinguish between different types of data to address various stakeholder interests. In the context of data portability, the OECD (OECD, 2019[15]) distinguishes between:

- ***Volunteered (or surrendered, contributed or provided) data*** are data provided by individuals when they explicitly share information about themselves or others. Examples include entering credit card information for online purchases or creating a social network profile.
- ***Observed data*** are created where activities capture and record data. In contrast to volunteered data, where the data subject is actively and purposefully sharing its data, the role of the data subject in the case of observed data is passive; the data controller plays the active role. Examples of observed data include location data of cellular mobile phones and data on web usage behaviour.
- ***Derived (or inferred or imputed) data*** are created by data analytics processes, including data "created in a fairly 'mechanical' fashion using simple reasoning and basic mathematics to detect patterns" (OECD, 2014[16]). In this case, the data processor plays the active role. Data subjects typically have little awareness over what is inferred about them. Examples of derived data include credit scores calculated based on an individual's financial history.
- ***Acquired (or purchased or licensed) data*** are obtained from third parties based on commercial contracts or licences (e.g. when data are acquired from data brokers) or other non-commercial means (e.g. when data are acquired via open government initiatives). As a result, contractual and other legal obligations may affect the re-use and sharing of the data.

The above categories are not exclusive to one another. This categorisation reflects the extent to which different stakeholders are involved in the creation of data and acknowledges that stakeholder involvement might take place at different times. This includes cases where users (consumers and businesses) interact with a data product (good or service) such as a social networking service or a portable smart health device (**Figure 1.**). Data portability initiatives tend to focus primarily on volunteered data and to some extent on observed data. Some uncertainties remain on whether observed data should be subject to portability rights.

Figure 1. Data products and the different ways data originate



Note: *Arrows represent potential data flows between the different actors and a data product (good or service). The type of data is highlighted in bold to indicate the moment at which the data are created.*

Source: (OECD, 2019[15]).

The right to data portability enshrined in Article 20 of EU GDPR, for instance, only applies to personal data "provided by" the data subject under two specific legal bases for lawfulness of processing (i.e. data collected with consent, or where the processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract). The European Data Protection Board (EDPB), which endorsed a former opinion by the Article 29 Working Party (adopted on 27 October 2017), includes within the scope of "data provided by the data subject" both (i) data provided with the individual's consent, and (ii) data provided by the individual by virtue of the use of the service or the device, "from the observation of his activity" ("observed data"). However, it should not include personal data that are inferred or derived, which include personal data that are created by a service provider (for example, algorithmic results).

In Australia's CDR, the relevant Minister designates the classes of data that will be available for data sharing in a specific sector, should the consumer wish to do so. Only 'volunteered' or 'observed data' is currently required to be shared. Depending on the industry, the type of data made available to consumers can differ significantly, reflecting sector-specific risks and requirements. For instance, in the banking sector data holders are required to share data on financial products such as credit and debit cards, deposit and transaction accounts, and data on mortgages. Data holders are able to share additional data on a voluntary basis.

Legal obligation and enforcement action

Data portability regimes can be classified based on whether data portability consists of an *ex ante* regulatory measure or an *ex post* enforcement action. Data portability measures tend to be of the former type, which the exception of those implemented in the context of competition enforcement mechanisms (OECD, 2021[17]). In the latter case, data portability may emerge as the subject of, or remedy to, a competition enforcement theory of harm. For this to occur, several conditions must be met, including the importance of the data or platform access, the lack of technically and legally-feasible workarounds (such as data scraping), and the ability of firms with market power to benefit from the alleged misconduct.

Degrading data portability (or interoperability) could be a method of implementing anticompetitive margin squeeze, bundling, or switching cost strategies, and could thus be considered in abuse of dominance or merger proceedings. The conditions of digital platform markets may better fit these theories than essential facilities-type theories regarding data access in some instances. However, it may be challenging to assess these theories in cases in which there were no pre-existing portability or interoperability arrangements. Collusive arrangements among market participants to deter entry through selective interoperability may also arise. More broadly, data portability and interoperability may be considered as remedies to address fundamental market conditions giving rise to competition concerns in abuse and merger cases. Competition authorities in some jurisdictions have also imposed or recommended portability and interoperability measures through market studies, market investigations and advocacy activities.

The benefit of addressing interoperability and portability through competition enforcement and market studies or investigations is a focus on competition harms, and the source of those harms, such as a dominant firm. In addition, competition law remedies can be flexibly designed according to the situation of a given market, and adapted as the market evolves. However, these remedies will require substantial oversight, which may be a significant challenge for authorities to design and monitor.

Given these challenges, *ex ante* regulation may be a possible alternative approach, particularly when the regulation is tailored to a specific sector, and there is a sector regulator in place to provide surveillance and dispute adjudication. This approach may also be faster or more preventative than competition enforcement. Examples of a regulatory approach include data protection regulation, open banking (which has been used to enable multi-homing, shopping around, and mixing and matching), and proposed new measures focused on gatekeeper digital platforms.

Modus operandi

Data portability is commonly characterised by the provision of data in a structured, commonly used and machine-readable format. Nevertheless, the structured and machine-readable data can be provided to the user in several different ways. This typically includes the following two mechanisms:

- ***(Ad hoc) downloads***, whereby the data are stored (in a commonly used machine-readable format) and made available on line (e.g. via a website). However, even when commonly used machine-readable formats are employed, data interoperability, and hence the re-use of the data across systems, is not guaranteed (OECD, 2019[15]). These formats may enable data syntactic portability, i.e. the transfer of "data from a source system to a target system using data formats that can be decoded on the target system" (OECD, 2019[15]). However, they do not guarantee data semantic interoperability, defined as "transferring data to a target such that the meaning of the data model is understood within the context of a subject area by the target". In addition to common machine-readable data format, data semantic portability requires mutually understood ontologies and metadata to assure a common meaning of the data. Furthermore, data downloads are typically only suitable, for one-time access, but not for continuous real-time data portability.
- ***APIs:*** As applications increasingly rely on data, accessing data without human intervention becomes essential. APIs enable service providers to make their digital resources (e.g. data and software) available over the Internet. APIs thus enable the smooth interoperability of the different actors, their technologies and services by enabling continuous real-time data portability. Data holders can implement several restrictions via APIs to better control the use of their data, including means to assure syntactic and synthetic portability. Data holders can also control access based on the identity of API users, and the scale and scope of the data used (including over time). They even can control the extent to which the information derived from the data could reveal sensitive/personal information. Last, but not least, a dedicated API may reduce the per-

ceived necessity of "data scraping" (or "screen scraping"), which requires users to third parties access to their online account and "scrape" the data from the online interface and, in some cases, to execute transactions on the customer's behalf. In this way, data portability regimes that take advantage of APIs can increase the security of, and trust underpinning, data transfers.

By considering how data are provided, including mechanisms for these transactions, data portability initiatives can be categorised according to the extent to which they encourage or mandate the adoption of the above mechanisms to enable data portability.

The delay between the user's request and the transfer of data is another consideration. For example, Article 12(3) of the GDPR requires that the original data holder provides the data subject with information on action taken in response to a request "without undue delay" and in any event within one month of receipt of the data subject's request. This one month period can be extended to a maximum of three months for complex cases where the data subject has been informed about the reasons for such delay within one month of the original request. In contrast, the CCPA requires that businesses that receive a verifiable request from a consumer must:

> *promptly take steps to disclose and deliver, free of charge to the consumer, the customer's personal information (…) by mail or electronically, and if provided electronically, the information shall be in a portable and, to the extent technically feasible, readily useable format that allows the consumer to transmit this information to another entity without hindrance. (California Civil Code Section 1798.100[d])*

As another example, PSD2 provides that:

> *(t)he account servicing payment service provider shall: (…) (b) immediately after receipt of the payment order from a payment initiation service provider, provide or make available all information on the initiation of the payment transaction and all information accessible to the account servicing payment service provider regarding the execution of the payment transaction to the payment initiation service provider.*

Data portability arrangements may also distinguish the types of data recipients, in particular whether third-party data recipients need to be accredited to receive data. Australia's CDR, for instance, limits participation to third-party data controllers that have demonstrated particular security measures to ensure the security of any personal data they receive (OAIC, 2021[18]). To be able to receive consumer data, third-party data recipients must be accredited by the Australian Competition and Consumer Commission (ACCC). Once accredited, they are referred to as "accredited data recipients" (ADRs) or "accredited providers" and can "use a CDR brand mark to help consumers recognise that the business is able to receive their data securely and manage it in line with the rules and safeguards of the CDR system" (OAIC, n.d.[19]).

Conclusion

Even when commonly used machine-readable formats are used, in the absence of common standards, interoperability may not be guaranteed. APIs – the software specifications used to facilitate communication and data sharing between information systems – can help implement the necessary safeguards, including for identity management, and reduce the necessity of "data scraping". More work is needed to develop common standards for better interoperability. In particular, governments should promote standards for data portability and, where conditions are suitable, interoperability requirements. Trusted third parties can then help implement these standards.

The considerable differences across data portability initiatives, including in terms of their purpose, scope (who has the right to have data ported; what data can be ported, including in cases where data refer to third parties; whose data should be portable) have introduced significant uncertainties for market participants and users. This has been exacerbated by uncertainties related to liabilities, such as circumstances under which the data holder or the data recipient may be held liable for incidents violating privacy rights or IPR.

Freeing up the transfer of personal data may increase personal data flows, but also increases digital security and privacy concerns. There should be clarity on the circumstances under which the data holder or the data recipient may be held liable for incidents. More awareness raising is needed to clarify issues of liability and obligations. In particular, governments should raise awareness among the public about the benefits of data portability. This should further clarify liabilities and obligations of the original data providers and recipients. It should also strengthen cross-agency regulatory enforcement cooperation and coordination.

Most compliance costs related to data portability are generally one-off expenses for their implementing rather than for ongoing operations. They may include technical costs for developing or accessing a secure API; transactions costs associated with getting consents from other data subjects when data are related to multiple parties; and legal costs such as compliance audits and regulatory fines. Trusted third-party intermediaries can stimulate the creation of new business models around data portability that reduce transaction and compliance costs. This could include helping to reduce costs for data holders and recipients to ensure compatibility with different technological specifications and costs to create numerous data links for portability, standards, interoperability and compatibility.

However, an expanding role for intermediaries will drive the centralisation of data transfer schemes, potentially creating risk related to competition, privacy and consumer protection. Analysis is needed to better understand the potential implications of such centralisation and if the criteria for "trusted" intermediary should be reassessed.

Last, but not least, data portability initiatives address issues at the intersection of competition, privacy and consumer protection. Other regulatory domains may also be concerned where data portability is implemented at a sectoral level (e.g. open banking). As data portability initiatives may span multiple regulatory domains, governments need to plan which regulator will have primary oversight of the initiative to ensure efficiency, streamlined processes and beneficial outcomes. There is also an increasing need for co-operation across the various regulatory and policy areas.

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Digitalization, data and platforms: Implications for Competition Policy – UNCTAD

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1. Features of the evolving digital economy

The COVID-19 pandemic has been accompanied by an acceleration of digitalization of economic and social activities. The use of e-commerce and other aspects of digital trade rose and appears to have been largely sustained.[2] The increased reliance on digital solutions has also been observed in the increased uptake of digital trade, telemedicine, telework and online education. Meanwhile, data-sharing was essential for developing the coronavirus vaccines in record time. However, the capabilities to harness digital technologies still vary considerably, with a widening of digital and economic divides as a result.

The expansion of the digital economy is driven by two main factors: digital data and digital platforms. In the past decade or so, the ability to collect, use and analyze massive amounts of machine-readable information (digital data) about practically everything has greatly expanded. Digital data arise from the digital footprints of personal, social and business activities taking place on various digital platforms. According to one forecast, global IP traffic in 2022 is expected to exceed all the Internet traffic up to 2016.[3] And still these are only early days of digital transformation. With ever more people and business going online and with the rising use of the Internet of Things (IoT), Big Data and Artificial Intelligence (AI), data traffic is anticipated to continue to surge.

The second driver is platformization. A plethora of digital platforms have emerged using data-driven business models, and disrupting existing industries in their wake. Platform growth is directly linked to their capacity to collect and analyze digital data, which gives them a significant competitive advantage with regard to capture monetary gains from the data-driven digital economy and cross-border data flows.[4]

2. Data matter

How we handle data will greatly impact the world's ability to achieve the Sustainable Development Goals (SDGs). If handled well, data flowing within and between countries can help address many of the main global development challenges, such as climate change, health pandemics and food security. If not, there is high risk that the data-driven economy will result in widening divides and inequalities.

The development and policy implications of data collection and use depend on the type of data involved: personal or non-personal; private or public; for commercial or government purposes; etc. An entirely new "data value chain" has evolved, comprising firms that support data collection, the production of insights from data, data storage, analysis and modelling. Value creation arises once the data are transformed into digital intelligence and monetized through commercial use. Control over data access is strategically important in this context. Unsurprisingly, data-centric business models are being adopted not only by digital platforms, but also, increasingly, by lead companies across various sectors.

3. Two countries dominate the platform landscape

Network effects, combined with access to data and economies of scale and scope, have led to monopolistic trends and great market power of the world's largest digital platforms. They have reinforced their positions through various means, including strategic acquisitions of other companies, expanding their reach into new sectors, lobbying of lawmakers and entering into strategic partnerships with traditional sectors.[5] For example, in the area of mergers and acquisitions (M&As) of start-ups active in the AI segment, during the period of January 2016 to January 2021, 308 M&A deals worth $28.4 billion were observed. The top five acquiring companies in this period were Apple, Google, Microsoft, Facebook and Amazon, which together undertook one quarter of all the deals.[6]

The leading platforms are mainly based in the United States and China, which together accounted for 90 percent of the market capitalization value of the largest such companies in 2021. They include in particular Alibaba, Amazon, Apple, Facebook (Meta), Google (Alphabet), Microsoft and Tencent, which are all investing strategically in all parts of the global

2 See "The COVID-19 Crisis: Accentuating the Need to Bridge Digital Divides", https://unctad.org/system/files/official-document/dtlinf2020d1_en.pdf,
3 See Cisco, 27 November 2018, Cisco Predicts More IP Traffic in the Next Five Years than in the History of the Internet.
4 UNCTAD. *Digital Economy Report 2021: Cross-border Data Flows and Development: For Whom the Data Flow* (Geneva and New York, 2021).
5 UNCTAD, *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries* (Geneva and New York, 2019) and UNCTAD. Competition issues in the digital economy. Note by the UNCTAD secretariat. TD/B/C.I/CLP/54. Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy, Eighteenth session, Geneva, 10–12 July 2019.
6 UNCTAD. *Digital Economy Report 2021: Cross-border Data Flows and Development: For Whom the Data Flow* (Geneva and New York, 2021).

data value chain: data collection through the user-facing platform services; data transmissions through submarine cables and satellites; data storage (data centres); and data analysis, processing and use, for instance through AI.

The United States and China are prominent in other ways too in the digital economy. Together they account for half the world's hyperscale data centres, the highest rates of 5G adoption in the world, 94 per cent of all funding of AI start-ups in the past five years, and 70 per cent of the world's top AI researchers.[7]

The growing power of digital platforms has global implications. It has led to high level of global market concentration in certain segments of the digital economy, such as search, social media, cloud storage, mobile applications and e-commerce. The platforms also account for a growing share of global digital advertising revenue. From 2015 to 2022, the combined share of five platforms rose from 50 percent to more than 70 percent.[8]

4. Implications for competition policy

Given the network effects and the tendency towards market concentration in the digital economy, competition policy was set to play an important role addressing the concerns raised by the market power of dominant platforms. Since 2019, competition experts and enforcers' views have evolved favorably towards competition law amendments and "ex ante" regulation, in addition to the collection and analysis of data in investigations and the use of market studies and some new tools.[9] A need to adapt existing frameworks to digital market features is based on the insufficiency of measuring harm to consumers in the form of higher prices. The analysis should be broadened to consider, for example, data protection and privacy, as there are increasingly intersections, and consumers are demanding stronger data protection. There is a growing number of jurisdictions adopting data protection legislation and a strong need for collaboration between competition authorities and data protection authorities whose goals are not necessarily the same.[10]

Furthermore, it is now consensual that platforms should be regulated "ex ante" so that certain types of conduct that affect competition and consumers such as self-preferencing are addressed and to preempt abusive behavior. Fair and transparent access to digital platforms by micro and small and medium sized enterprises (MSMEs) has also been identified since the pandemic outbreak as a major challenge to the resurgence of MSMEs after COVID-19.[11] Due to the global and cross-border nature of digital platforms, international cooperation in competition law enforcement is crucial, especially for developing countries with less experienced competition authorities, which should fully explore joint actions against common challenges within regional frameworks, namely existing regional economic organizations.[12]

Whichever option is chosen, developing countries need to improve their policies and legal frameworks to strengthen their capacity to effectively fight anticompetitive behavior of digital platforms through a combination of law enforcement, appropriate regulation and soft law instruments. Efforts at the regional and international levels should continue to encourage exchange of information and knowledge and collective responses when feasible.

Conclusions

Data-driven digitalization is disruptive in nature and changes the nature of markets and business models. This raises new challenges for policy makers, not only in the area of competition law and policy, but also in other fields to respond effectively to new realities. This applies, for example, to labour market, education, entrepreneurship, intellectual property, data and infrastructure policies. Coping with the need for policy adjustment in such a broad range of areas simultaneously is a tall order for any government, but especially so for those in less advanced economies.

Most developing countries have relatively young and small competition authorities with limited resources for taking on competition cases against global companies in an increasingly concentrated world economy. Adopting "ex ante" regulation may help to establish a more predictable framework for platforms and associated to strong market monitoring and vigorous law enforcement by competition authorities and other regulators better equip them to tackle abusive conduct in digital marketplaces. Considering the limited resources of competition authorities in several developing countries, it is worth reflecting on how regional and international cooperation may strengthen the instruments available, enhance their position and ultimately lead to stronger action.

With a view to ensuring more inclusive and sustainable outcomes from digital transformation, it is of high importance that the development community scales up its support in the area of digitalization for development. Regrettably, available data on the share of Aid for Trade funding going to the digital suggest that it levelled off in 2020 at 2.7 percent of the total, rather than continuing to grow.[13] In the coming years, particular attention is needed to the multiple aspects of policymaking for ensuring more inclusive and sustainable outcomes of digitalization.

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7 Ibid.

8 Ibid.

9 UNCTAD Competition law, policy and regulation in the digital era. Note by the UNCTAD secretariat, TD/B./C.I/CLP/57 Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy, Eighteenth session, Geneva, 7-9 July 2021.

10 UNCTAD 2022 Outcome Report Data and Digitalization for Development, eCommerce Week 2022, high-level session on Digital platforms, competition, and data protection (organized by UNCTAD), 15-16.

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12 T Moreira, 2021, International cooperation in competition law enforcement: Is regional cooperation the best option for developing countries?" Foreword l Concurrences N° 3-2021, www.concurrences.com; T Moreira, 2021, Competition policy's role in the economic recovery process from the COVID-19 pandemic crisis: Insight from UNCTAD, Journal of Antitrust Enforcement, 9(3):407–412

13 UNCTAD (2022). *E-commerce and Digital Economy Programme: Year in Review 2021.*

To regulate or not to regulate: an age-old question in the digital age – EBRD[14]

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Big tech platforms raise new competition challenges. But the traditional antitrust approach is too slow for fast moving digital markets. To speed things up, the EU and the UK have decided to regulate the big platforms. Is this approach fit for all countries?

The verb 'to google' translates in as many as there are languages in Eastern Europe and Central Asia. Гуглити in Ukranian, *a googăli* in Romanian, гуглање in Macedonian. These neologisms are the linguistic markers of a solidifying economic fact: the prominence of Google and other big tech players (global and local) across the region[15].

Competition concerns in digital markets

For a long time policymakers were not especially worried about high concentration in digital markets[16]. They assumed digital champions faced competition 'for the market', that is, competition from outside players keen on becoming tomorrow's winners. After all, Facebook outcompeted MySpace. Google overtook AltaVista. Nokia once looked unassailable.

But the competitive dynamics of the early days of the internet no longer seem to hold. While the primacy of AltaVista lasted one year (and Myspace three years), a decade of that of Google and Facebook has now passed. High market share is a fair reward for ingenuity and hard work. But in the digitalised economy, leadership can quickly turn into unassailable dominance.

Masses of data, cheap machine learning technologies and refined business models have entrenched leading positions, conferring incredible bargaining power to set commercial conditions and terms unilaterally (e.g. to expel, charge high fees, manipulate rankings). Such power leaves platform users vulnerable to abuse.

Competition authorities around the world are now reckoning with a state of digital concentration. In the US, the FTC alleges that Facebook illegally acquired innovative firms to escape competition. In Turkey and the EU, Google was found to have abused its market dominance as a search engine by giving an illegal advantage to its own shopping service. In India, competition authorities opened an investigation into claims that Google used its dominant position to give itself an advantage in the smart-television market[17].

The limits of antitrust enforcement

In novel and complex digital markets, antitrust investigations tend to be long and resource-intensive. The analytical pillars of antitrust cases are market definition and assessment of market dominance. Both are notoriously difficult to establish in multisided digital markets: what may amount to a market on one side of the platform (e.g. users of music streaming services) may not clearly extend as a market on the other (e.g. online music publishers). The fact that many digital goods are provided for free (e.g. email services) also challenges traditional price-based methods for assessing market power. The complexity of digital cases only exacerbates the great asymmetries in technology, resources and knowledge between big tech players and competition enforcers.

Examples like the Google shopping case illustrate the limits of the antitrust approach in digital markets. The case took the European Commission seven years to investigate (and another few years in the courts). By the time the Commission issued its decision, Google's business model had changed considerably. And for affected competitors, the damage has been done: seven years is a lifetime in fast-moving markets.

Another limitation of the antitrust approach stems from the company-specificity of competition remedies, which are ill-equipped to address market-wide issues. In digital markets, systemic failures fuel many of big tech's problematic practices, including behavioural biases. Consider the tendency to stick to the default option: on devices where Google is the default search browser, 97% of searches are made on Google. On those where Bing is the default, 86% are made on Bing[18]. Forcing one platform to change does little to prevent other digital player from doing the same.

The regulatory alternative

In an effort to overcome the limitations of antitrust, the EU and the UK have decided to regulate digital markets (the Digital Market Act "DMA" in the EU and the Digital Market Unit "DMU" in the UK). This entails the creation of a specialised unit within the EU and EU competition authorities, tasked with enforcing a series of obligations on big tech players. Obligations include allowing small messaging services to interoperate with those of big tech (e.g. WhatsApp and iMessage). The new rules will also restrict pre-installed software on computers or phones, among other measures.

The regulatory approach is less precise than antitrust enforcement, but it is faster and more certain. By setting out clear rules from the outset and creating a specialised body, the

14 The contents of this publication reflect the opinions of individual authors and do not necessarily reflect the views of the EBRD.
15 Global big tech dominate the markets for web search, online advertisement and social media, while domestic leaders tend to capture e-commerce and web portal markets. Data not available for Central Asia. Source: Amazon Alexa, Zenith, IAB Europe.
16 Background sections are largely based on Anderson and Mariniello (2021), 'Regulating big tech: the Digital Markets Act', Bruegel. Available at https://www.bruegel.org/blog-post/regulating-big-tech-digital-markets-act
17 https://www.nytimes.com/2021/07/29/technology/google-turkey-regulators.html
18 CMA, 2020. 'Online platforms and digital advertising - Market study final report'

regulatory approach fixes problems upstream; enabling competitors to emerge and preventing big tech from killing innovators. It also enables fast and far-reaching interventions in case of violations: the rules concern all big tech players, all of the time.

Where (and when) to regulate?

In the words of Frédéric Jenny, chair of the OECD Competition Committee, "[d]igital platform cases are generic and not country specific," that is, the problematic behaviours identified in these cases affect users in the same way everywhere[19]. The same cannot be said of competition authorities' powers and resources: they are country specific and certainly not the same everywhere.

Competition authorities in Eastern European and Central Asian countries are young and operate with fewer resources than their EU and UK peers, including limited access to specialised skills. In this context, the regulatory approach may be desirable to the extent that it provides arguments for increasing the resources of the competition authorities. In the EU, lawmakers are calling for additional 150-180 full-time staff dedicated to implementing the new rules—a staff increase unlikely to be seen without the creation of a new function. In many countries however, the creation of a regulatory framework for digital markets would likely not be supported by an adequate expansion of resources.

For now, the resources required to support the new regulator are likely prohibitive for most governments. If setting up a new regulator is expensive, creating a new kind of regulator is exorbitant (as illustrated by the expansion of staff for this purpose in the EU). The fixed costs of entry include sorting through the implementation details, which will be fiercely argued over by public and private stakeholders. Consider the DMA's interoperability requirements: agreeing on common technical standards will require years of extensive input from expensive technical experts (as was the case for similar requirements under the EU's PSD2). Rules will likely require frequent adjusting in the first years.

At this stage, therefore, the best approach for competition authorities exploring the regulatory approach may be to follow international developments closely; to let the EU and the UK work through the most difficult questions and benefit from their experience in 3-5 years.

In the meantime, competition authorities may consider coordinating efforts (through the International Competition Network for example) or working towards closer cooperation with EU under specific provision for third countries (as is for example the case for telecommunication regulators)[20]. The latter approach is particularly relevant for EU candidate countries.

Targeted market studies can also be useful intermediary measures, allowing competition authorities to build in-house capacity and expertise on digital markets, while pursuing identified issues under competition law and highlighting gaps in existing frameworks. Market studies are also an opportunity to identify technical limitations related to the processing of large and complex data.

The EBRD can support these efforts

Promoting competition is at the core of the mandate of the European Bank for Reconstruction and Development (EBRD) to foster transition towards sustainable and dynamic market economies. Over the last 10 years, the EBRD has supported competition authorities through a wide range of technical assistance programmes including technical trainings, advocacy support, and legal advice.

Digitalisation recently became another top priority for the EBRD. As part of its strategy for 2021-2025, the bank is committed to using all of its tools — investments, business advisory and technical assistance — to support the digital transformation of the countries where it operates[21].

But as the EBRD invests in the growth of the digital economy, it remains vigilant to the competition challenges that tend to follow digitalisation. The bank's digital approach highlights the risks of digital concentration on innovation and consumer welfare and calls on governments to enable a trustworthy and fair digital economy through robust regulatory and competition frameworks[22].

Part of these efforts is to engage with competition authorities and provide targeted support where it is needed. For digital markets, these include specialised skills, advanced analytical tools, and effective cross-governmental advocacy around digital issues that cut across policy lines (such as data protection).

The EBRD's efforts also target overall efficiency gains within the competition authorities, to free capacity for increasingly complex cases. In this regard the antidote may be in the poison, as digitalisation itself can help authorities improve their capabilities and drive better and faster competition enforcement.

Consider bid-rigging for example. Competition agencies can now benefit from tools that screen public markets for suspicious bidding behaviour (provided e-procurement data is available)[23]. The EBRD is supporting the digitalisation of procurement data in many countries (ProZorro in Ukraine is one successful example) and is keen to support competition authorities in making full use of this new data. Bid-rigging screens can drastically reduce the need for routine monitoring activities, thus freeing staff time for more complex investigations. They also help protect public finances from fraud and misuse and thus build a strong case for better resourcing of competition enforcement.

Antitrust predates any *a googăli*, but it remains an effective tool to pursue competition challenges in novel digital markets. It is, however, much slower than Гуглити and much harder than гуглање. The regulatory alternative is not quite a Google away, but competition authorities can count on the EBRD to support state-of-the-art (if old-school) enforcement tools in the meantime.

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19 https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets

20 Which allows for the participation of third countries in the Body of European Regulators for Electronic Communications (BEREC).

21 EBRD 2021-2025 'Strategic and Capital Framework'. Available at: https://www.ebrd.com/what-we-do/strategy-capital-framework

22 'The EBRD's approach to accelerating the digital transition, 2021-25 November 2021'. Available at: https://www.ebrd.com/ebrd-digital-approach.html

23 OECD (2022), Data Screening Tools in Competition Investigations, OECD Competition Policy Roundtable Background Note, www.oecd.org/daf/competition/data-screening-tools-in-competitioninvestigations-2022.pdf.

Digital markets – the Hungarian enforcement experience, traditional and innovative solutions

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In the last decade, the number of people shopping online in the European Union multiplied, increasing from 63% in 2016 to 74% in 2021 (in percentage of people using the internet). Also, according to Eurostat, over the last five years the largest increase in online shopping among internet users was recorded in the Czech Republic (+27 pp), Slovenia, Hungary and Romania (all +26 pp), as well as Croatia and Lithuania (both +25 pp).[24]

According to recent studies, digital markets and digital commerce in Hungary have grown enormously in the past few years (also because of the effect of the Covid-19 pandemic). The indicators for the Hungarian market are now very close to those of the more developed Western European markets.[25]

The rise of digital commerce is an obvious and inevitable fact, and it has brought undeniable advantages to consumers. Initially there seemed to be more price transparency and also more price competition because of price comparison websites, online marketplaces and other platforms that allow consumers to search and compare different offers of goods and services and their prices with only a few clicks.

However, the rapid development of online commerce also presented a new challenge for the suppliers of goods and services, as they had to adjust their traditional distribution models to find a new balance involving both the online and offline channels. In this adaptation process they had to pay attention to the new, increasingly powerful platforms, as well as traditional offline retail and consumer preferences. Brick and mortar shops also had to face this evolutionary challenge from the online channel. In this process, in some cases the race for the new markets, and tensions in the distribution chains have led some market players to use anticompetitive means.

The Hungarian Competition Authority ("GVH") has also witnessed this development and had to step in in a number of cases.

Starting about a decade ago, in the early 2010s, we detected and prosecuted RPM practices where manufacturers started using various methods to control online prices, such as (i) forcing online retailers to use the recommended prices as the retail price[26], or (ii) by fixing the maximum amount of discounts that can be granted online[27], and also (iii) by prohibiting the prices to be displayed online[28].

Sometimes offline retailers were also complicit in such practices. In our recent Yamaha case, actually it was the retailers who had started off with price coordination in the face of online price pressure. Later on, they even convinced a maverick online webshop to join their ranks, and Yamaha also decided to join in the price coordination by putting in place an RPM regime[29].

So, it seems that in these cases, online competition has led to not more but less competition after all, as RPMs covered online and offline stores as well.

Besides, adapting the well-known RPMs to the online environment, the GVH has also taken action against some novel types of restriction specific to this new online environment.

Online retail parity clauses (or MFNs) have given a lot of headache to European competition law enforcers in the past few years, and the Hungarian authority was no exception. The GVH had an MFN case, although it concerned narrow MFNs and a food ordering platform, while other European cases mostly concerned wide MFNs in the hotel online booking sector. This practice seemed to have an effect of suppressing competition from other platforms, but the case was finally closed with commitments.[30]

Another of the GVH's Article 101 cases concerned the dual pricing of contact lenses: here the manufacturer gave lesser discounts to online retailers than offline ones. Again, our analysis indicated less price competition as a result. In hindsight, it was a very brave initiative to run such a case, without previous cases and experience. At the time of the decision it was only the Guidelines of the EU's Vertical Block Exemption Regulation which classified this kind of restriction as a hardcore restraint. In fact the decision was later annulled by the court, which was

24 See: Online shopping ever more popular - Products Eurostat News - Eurostat (europa.eu) https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20220202-1 (Downloaded: 10.11.2022).
25 In this respect see for example McKinsey & Company's Report: Digital Challengers on the next frontier (https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/digital-challengers-on-the-next-frontier-in-central-and-eastern-europe) (Downloaded: 10.11.2022)
26 See the GVH's press release: The GVH fines domestic wholesaler of Casio products for illegal price fixing - GVH (https://www.gvh.hu/en/press_room/press_releases/press-releases-2022/the-gvh-fines-domestic-wholesaler-of-casio-products-for-illegal-price-fixing)
27 See the GVH's press release: The GVH imposes a fine of HUF 100 million on Husqvarna Magyarország Kft. for fixing the online retail prices of its products - GVH (https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_gvh_imposes_a_fine_of_huf_100_million_on_husqv)
28 See the GVH's press release: The Hungarian Competition Authority imposed fines amounting to a total of over EUR 1.5 M on a number of undertakings for restricting the distribution of alarm equipment - GVH (https://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the-hungarian-competition-authority-imposed-fines-amounting-to-a-total-of-over-eur-1.5-m-on-a-number-of-undertakings-for-restricting-the-distribution-of-alarm-equipment-)
29 The GVH eliminated price fixing by audio equipment dealers - GVH (https://www.gvh.hu/en/press_room/press_releases/press-releases-2022/the-gvh-eliminated-price-fixing-by-audio-equipment-dealers)
30 See the GVH's press release: https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/netpincer_undertook_to_modify_its_contracts_signed

not convinced by the reference made to the VBER Guidelines in itself and demanded further analysis.[31]

The above shows that the GVH has faced a number of novel questions/issues like the above, some of which were not so clear cut and straightforward. MFNs and dual pricing are good examples of that.

Initially, there was a knowledge gap concerning digital markets to overcome, but gradually the GVH's experience has grown also thanks to its merger control and active consumer protection practice, as well as its market surveys on digital markets.

We have learnt a great deal about digital markets in our merger cases with regard to startups, market definition and assessment of competition in these markets. In this respect it is noteworthy that that the merger regime of the GVH was modified in order to catch killer acquisition. This was done by lowering the threshold introduced for mergers where it is not obvious that they do not significantly lessen competition[32], and by clarifying the reasonable grounds which may give rise to suspect substantial lessening of potential competition – if a company with significant market power (40%) merges with a company with minimal share on the market but with real prospect for significant growth on the basis of objective factors (e.g. innovation, future clients)[33].

In the merger field another novelty was the relaxation of non-compete obligations in case of investments into startups, allowing for a wider scope and longer period for imposing non-compete obligations on minority shareholders, taking into account the specific characteristics of such transactions and thereby facilitating financial investments.[34]

We also had market surveys on digital markets, such as on price comparison tools[35] and the collection and use of data in the online retail sector[36]. These revealed, for example, that the use of algorithms for price setting and data as a potential element in the competitive process is not at all widespread at the domestic level. However, the results were also alarming insofar as they indicted that ranking, highlighting and customer reviews are not transparent and create confusion. This latter finding is also reflected in our (very active) consumer protection practice, which also assists the GVH in fully understanding the business case of the market players in these markets and their commercial practices.

As a result, today we have a much better understanding of these markets, the nature of the restrictions, theories of harm and potential efficiency justifications.

However, experience also suggests that pursuing cases on digital markets are complicated, take time and can be controversial in courts, while market dynamics due to network effects are such that infringers can sometimes effectively wipe out competition in the meantime.

Therefore, from the GVH's perspective as a competition authority, EU-wide ex ante regulation, such as the DMA, is welcome, even so if the exact details of NCA involvement in enforcement are still a bit unclear at the moment.

At the same time, there will be plenty of room left for European competition authorities for enforcement under the gatekeeper level, and the GVH plans to use its resources in order to keep digital markets open and to make sure that there is vigorous competition in these markets, which really works in the interest of consumers.

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31 See the GVH's press release: https://www.gvh.hu/en/press_room/press_releases/archive/press_releases_2015/the_gvh_stepped_up_against_the_restriction_of_the_

32 A new provision to this effect was enacted as from 2017 (Article 24 (4) of the Hungarian Competition Act)

33 These criteria are set out in detail in Section 21 of the GVH's Notice No. 7/2017 on the condition of non-obviousness

34 See the GVH's press release: https://gvh.hu/en/press_room/press_releases/press-releases-2020/the-gvh-facilitates-investment-in-startups-with-a-guideline-decision

35 See the GVH's press release: https://gvh.hu/pfile/file?path=/en/resolutions/sectoral_inquiries_market_analyses/market_analyses/piacelemzes-a-digitalis-osszehasonlito-eszkozok-fogyasztoi-dontesre-gyakorolt-hatasai-feltarasara_a&inline=true)

36 See the GVH's press release: https://gvh.hu/en/press_room/press_releases/press-releases-2022/the-gvh-investigated-the-role-of-data-assets-in-online-retail

Summary of a digital case on self-preferencing carried out by the Romanian Competition Council

With the very rapid advancement of technology in recent years, the digital environment has become a key sector in the economy, both at regional/global and at national level.

As an integral part of the digital environment, online platforms have contributed decisively to the development and improvement of users' access to the multitude of products and services. While 15-20 years ago the retail market for products and services was local, and occasionally national, the emergence of online platforms facilitated the transition at least to national and regional markets. From the point of view of traders, online platforms have created an environment through which new businesses have been able to enter the market and the already existing ones to grow.

The multitude of online platforms that have seen strong growth *include marketplaces*. Both theory and practice have shown that the main opportunity presented by online marketplaces is that all parties involved win in one way or another:

- the platform generates income from various fees and commissions related to intermediation and other services rendered;
- the trader listed on the platform benefits from much better visibility compared to its own store, which can attract additional sales;
- certain costs of traders (marketing, promotion, transport, customer relations, etc.) are taken over by the platform;
- the final consumer has access to a much wider range of products and services, with the opportunity to instantly compare products and prices.

At the Romanian level, eMag Marketplace (EMAG) is the largest retail intermediary platform for new or resealed products in the non-food category. The platform is owned by Dante International S.A. ("Dante"), the main player in online commerce for IT & C categories in Romania prior to the development of the marketplace platform.

At the end of 2017, the competition authority prompted an ex officio innovative investigation which concerned Dante's possible abuse of dominant position on the online platform of intermediation services marketplace in Romania, as owner and administrator of the EMAG online platform, in relation to the direct competitors of Dante as retailers.

Being an unexplored area at the Romanian level and rather limited at EU level, an important element in analysing the company's market behaviour played its dual role:

- as a retailer, it is active in the market for consumer products, mainly IT & C products, electronics and household appliances to final consumers, and
- as owner and administrator of the online marketplace emag.ro platform through which especially consumer products are traded. Through the marketplace platform, Dante has the role of intermediating between the offers of products from the undertakings that list them on the platform and the demand for products from consumers.

The two lines of business were carefully analysed in the process of defining the relevant market. The definition of the relevant markets was done starting from the notion of marketplace, the manner of functioning and the services provided by these platforms, and taking into account that for the services provided, the marketplace platforms generate revenue. In the process of defining the market, internal studies were carried out, and studies conducted by the company were also taken into account. The analysis concluded that the relevant product market can be defined as *the market for intermediation services through online marketplaces*. Also, for the purpose of the case, but also on the basis of the information in the investigation, the relevant geographic market has been defined at national level.

As regards the dominance of the platform in the defined market, several elements were taken into account in the analysis: the evolution of market shares over time, their stability over time, the presence of other marketplaces on the market and their market shares, as well as the above-described context of existing barriers to market entry for other marketplaces and/or the expansion of existing marketplaces on the market. The analysis concluded that the company held a dominant position in the market for online intermediation services through the online marketplace platform in Romania between 2013 and 2019.

The development of the EMAG online platform and its attractiveness for brands facilitated the emergence of more and more traders who contributed to the increase of *inter-brand* and *intra-brand* competition, both at the level of the online platform, especially the increase of competition for the products listed by the platform owner, Dante.

The analyses carried out during the investigation concerned the contractual framework used by the platform in relation to its partners, the presentation and marketing of products on the EMAG platform, the existence and use of algorithms and other tools specific to listing and presenting product offers, the elements underlying and resulting from the practical implementation of decisions on the presentation and marketing of products belonging to affiliate partners on the EMAG platform.

The analysis focused on the policies, decisions and measures implemented by Dante in relation to the algorithm and other mechanisms for determining the main offer on the product page, and the algorithm and other mechanisms for selecting and positioning products on the offering pages including online promotional catalogues, the commission policy used in relation to affiliate partners, the delivery policy used in relation to these

partners, and the way of using the commercial data belonging to them.

Of all the elements analysed, the most important deficiencies concerned the algorithm and other means of establishing the main offer on the product page, placing the products on the EMAG platform and selecting and positioning the products belonging to the affiliate partners during promotional campaigns on the platform.

Therefore, the documents from the investigation showed that due to increased inter-brand and intra-brand competition between the product offers of related partners and Dante's product offer, it was necessary at company level to carry out interdepartmental analyses, to make certain decisions and to implement measures to counter the offensive from third-party traders, in order to protect its own product offering and to protect its own sales of products because:

- Dante's products were losing their main supply position more and more and the number of products/offers affected increased;
- the position of Dante products in the category pages was threatened by the much better offers of the affiliate partners;
- the position of Dante's promotional offers in the promotional catalogues was jeopardised by the sellers' promotional offers.

As regards the algorithm and other means of determining the main offer, the decisions taken by the undertaking holding the platform concerned the use and application of tools aimed at artificially increasing the visibility of its own products. The means and tools by which these objectives could be achieved included the use of flawed algorithms created in such a way as to favour its own commercial offer, the use of different indicators to position its own products, the possibility of the platform administrator to modify the formula and the elements of the algorithm for positioning the product offers as a 'main offer' according to their own commercial interests in selling products, the lack of adequate information provided to partners about the algorithms used and the elements taken into account by them.

Regarding the placement of products on the EMAG Marketplace platform, respectively the display of products in the category/subcategory, and regarding the organisation and running of promotional campaigns, respectively the selection and positioning of the products belonging to the affiliate partners during the promotional campaigns on the platform, Dante implemented a series of decisions and the use of specific tools in order to limit or block the manifestation of real competition between its own products and those of the affiliate partners. The means and tools by which these objectives could be achieved included the use of filters to block the views of the partners' offers, which could be manually activated from the platform's internal technical interface, the altered, manual positioning of the affiliates' products so that the visibility of their products on the platform diminished, the use of links specifically created to display only the products in the promotional offer of their own products and the allocation in the promotional catalogues to an extremely low number of promotional offers from sellers, and the refusal to include competitive offers from partners in the promotional catalogues.

These actions were possibly due to the lack of transparency in relation to partners and the non-use of objective and non-discretionary algorithms for establishing the main offer position, for allocating and positioning products on the platform and for allocating and positioning products in promotional catalogues.

In addition, the investigation found that, as regards the policy of using the data of affiliate partners collected through the EMAG platform, the strategic decisions with direct implications for the partners' business activity were made with the active involvement of the commercial departments of the platform responsible for their own sales. Although there were some working procedures in place at the company's internal level to limit access to the commercial data of related partners, in practice it was proven that some of the platform's sales staff had access to sensitive business data of the partners and used such data to adjust their own sales policy or to counteract certain adverse effects of the partners' trade policies on their own sales activity.

The investigation concluded that, in the light of the decisions taken and the measures implemented by Dante in relation to the related/affiliate partners, Dante's abuse of dominant position did not relate to its refusal to grant access to other traders on the EMAG platform, but to assessment of the management of the EMAG platform. As a result of the analyses of documents in the case file, it emerged that the decisions adopted and the measures implemented led to a complex set of factors that favoured its own commercial offer of products manifested by positioning and displaying the offers of Dante products more favourably in direct competition with those of the partners and limiting the affiliate partners' offers to display, which led to restraint of real intra-brand competition.

Dante acknowledged its actions and thus benefited from a reduction of the penalty imposed. Moreover, in addition to the relevant sanction, the Competition Council imposed the implementation of certain corrective measures at the level of the company in order to restore its normal competitive environment and prevent the occurrence of such deeds. The set of measures covers the following framework:

- Informing traders about the functioning of algorithms and building algorithms so that they take into account only those elements that are available/accessible to traders on the platform.
- Limiting manual interventions in the operation of relevant algorithms and implementing a register of traceability and control over manual/human interventions in the operation of the relevant algorithms.
- Developing procedures at the level of the organization regarding the creation, modification and operation of algorithms.
- Changing the organizational structure and the operation of the platform. The measure involves structural and organizational changes that will aim at aggregating the platform's information and making it transparent (in aggregated form) in an equivalent manner to all traders on the platform, including Dante who manages the direct marketing flow of products/services.

- Doubling the complaint-handling policy, i.e. implementing a mediation mechanism and a set of best practices for managing relationship with participants on the platform.

Therefore, the emergence and development of online marketing platforms and beyond is a beneficial factor for an economy as it drives the development of the respective field and other related areas (deliveries, payments, packaging, workforce). However, it poses a considerable risk that a large platform will strengthen or increase its presence on the market through anti-competitive deeds. That is the reason why the competition authorities must be alert and yet act cautiously not to prevent companies from developing and offering new opportunities in the market.

Market power in the Digital Era: A Spanish perspective

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Introduction

The recent changes in the economic framework, due to the emergence of new technologies and digitalization, have opened a relevant debate about the need for a review of competition policy tools so that they may, in turn, be adapted to the new realities of digital markets.

Such markets bring with them features that help create great opportunities for consumers, but also, naturally lead to higher levels of market concentration, increasing the market power of larger companies. This in itself presents great challenges from a competition perspective.

Market definition in digital markets

The growning digitalization of the economy has generated a profound transformation of business models and such changes have given rise to new developments in economic theory. The way in which we approach the concept of market definition and market power has gradually evolved accordingly.

In this context, the traditional tools that were used to identify relevant products and geographic markets can lead to misleading results. The specificities of platform markets require us to take into consideration two remarkable features that deserve further attention: the two-sided (or multi-sided) nature of markets and the data aspects.

General aspects

Two sided markets

Since the early 2000s, economic literature has explored the way in which the two-sided nature of some segments and/or markets complicates the definition of the relevant market.

The distinguishing feature of a two-sided platform is the existence of two categories of customers interacting with one another. Due to interdependence of the two sides of the platform, focusing on one of them alone may not fully capture the interplay of market power on both sides. This may lead to errors when defining the relevant market. Consequently, the usual analytical tools may need to be refined or adapted.

The fundamental question that emerges is whether it is appropriate to provide a defiition for a single market that encompasses both sides or to define two separate markets, one for each side, instead.

Data aspects

One of the most important features of the digital economy that must be taken into account is that of data being a highly valuable asset[37].

Consequently, mergers in these markets require us to assess the rationality of the operation in order to detect whether one of the objectives of the merger is to gain access to customer information, which can raise concerns as to whether that could place the acquirer's competitors at an unjustified disadvantage.

Other relevant dimensions of data include the use of zero-pricing strategies and the importance of ecosystems[38].

Market power analysis at CNMC: An example of interconnection between merger analysis and enforcement

Many jurisdictions determine merger control thresholds based on the annual turnover of the undertakings involved in the merger as the main criteria to evaluate the level of market power of firms and therefore the foreseable impact of the merger. Other jurisdictions, including Spain, have put in place an additional threshold that takes into account the market shares of the companies concerned.

Spanish competition law establishes a compulsory notification system for the CNMC for any concentration representing a certain market share or level of turnover. Both of those criteria are based on the relevance that such operations have either for the markets being affected by the concentration (market share threshold) or for the Spanish economy in general (turnover threshold).

The market share threshold carries with it, as a potential drawback, an increase in uncertainty for the notifying parties. Such parties are required to make a provisional assesment of the definition of the market and the threshold itself prior to deciding over notification. However, these elements are not objetive and are not based on clear data that may be easily verified).

Nevertheless, the threshold based on market shares could be considered particularly useful to:

- review potentially problematic mergers that may have escaped scrutiny using just turnover threshold,
- refer to the EC potentially problematic mergers when they have international reach, but lacked a European Union dimension under the EC Merger Regulation (e.g. Facebook/WhatsApp merger, under art. 4(5) of the Merger Regulation, or the Apple/Shazam, under art. 22 of the Merger Regulation).

Those features have proven to be especially efficient in digital markets.

The Authority has not identified cases where its notification threshold has failed to capture relevant mergers in the digital economy (or where alternative options, such as transaction

37 OCDE "Big Data: bringing competition to the digital era", 2016, in https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm.

38 CNMC presented its position to OCDE. *Quality considerations in the zero-price economy* November 2018 https://www.oecd.org/competition/quality-considerations-in-the-zero-price-economy.htm#:~:text=Over%20the%20course%20of%20a,of%20products%20are%20not%20new.

value-based criteria or a lowered threshold for turnover, could have been more effective).

The assessment of market power does not only involve market share assessment. This is systematically being complemented by analyses of other features of the relevant market, such as its expanding or dynamic nature, barriers to entry and expansion, the effects on innovation, the competitive dynamics and business models as well as the regulatory context.

There are several sectors where the CNMC has analysed mergers related to digital markets[39]. A particularly interesting example of analysis at CNMC involves the multi-sided market of online food delivery services.

Just Eat-La Nevera Roja

The first merger case that was analysed by CNMC in this sector in relation with digital markets, in 2016, refers to *Just Eat/La Nevera Roja*[40].

The request involved the acquisition by JUST EAT, a multinational *online* platform offering food delivery services to restaurants and consumers, of a local rival. The sector had been undergoing considerable transformation with the rise of the internet.

The activity affected by the operation, involved two sides: food delivery platforms that deal with restaurants, on the one hand; and end-users, on the other. The interplay of the two sides of the market was a source of network effects.

The merging parties had very high market shares that would have traditionally granted them a high level of market power. Following the transaction, the parties would have had a market share of over 70%, which is *prima facie* indicative of a possible dominant position. In addition, the two firms were deemed to be close competitors operating similar business models.

The caveat of using market shares as *proxie* for market power in this case was soon clear, and the CNMC considered that those data could over-estimate the position of the merging parties. There were major multinational players which, at the time, did not hold strong positions in the relevant geographic market(s). Moreover, the analysis showed that the Spanish market was not mature and that there was, as a result, significant scope for expansion.

In such circumstances, the primary source of competition concerns was not so much the parties' position when measured in terms of market power, but the underlying economic dynamics (namely, the economies of scale achieved and the operation of network effects).

The merger was cleared in Phase I subject to commitments that consisted of removing exclusivity clauses in contracts with restaurants for a certain period.

Those solutions were aimed at preventing the merged entity from entering into exclusivity agreements with restaurants that could, in turn, hinder the entry and expansion of competing platforms.

A follow up on the effects of this solution was possible some time after, as explained below:

Just Eat Canary

In 2019, Just Eat presented a new request of merger JUST EAT/CANARY[41].

JUST EAT acquired exclusive control of Canary Delivery Company, S.L. (CANARY), a Spanish company established in 2014 and only operating in the Canary Islands.

The competitive landscape had changed significantly since the previous merger with a number of strong players successfully entering the market.

CANARY, which had been operating for several years, had a low turnover and only one employee. Additionally, it did not invest in R&D, and its pricing policy was very similar to JUST EAT´s.

As a result, the target could not be considered an innovative or aggressive competitor.

This merger was cleared without commitments in 2019, as the CNMC considered that it was not expected that the operation could involve a threat to competition in the relevant markets[42].

Exclusivity clauses in parallel networks

After the analysis conducted in the former cases, the CNMC decided to conduct an antitrust investigation in order to determine the effects that the obligation imposed on Just Eat — preventing the company from reaching exclusivity agreements with restaurants — could be having on the market.

A market investigation was carried out, and it revealed that new entrants had successfully joined the market and that they themselves had entered into exclusivity agreements with restaurants (which JUST EAT was prevented from using due to the regulations).

This led to the opening of preliminary proceedings to investigate the possible presence of parallel vertical restrictions affecting competition in the sector, and whether such restrictions could constitute an infringement of competition law under the reference *REDES PARALELAS EXCLUSIVIDADES PLATAFORMAS*[43].

The assessment of market power was based on many factors other than market shares themselves (as would have been the case in a traditional scenario).

At that moment, there were four main operators in the market, and none of them had a market share that, by itself, could have represented a threat to competition.

Taking into account the legal and economic context, parallel networks of vertical agreements featuring exclusivity on the

39 CNMC *The Evolving Concept of Market Power in the Digital Economy – Note by Spain*, June 2022 in https://one.oecd.org/document/DAF/COMP/WD(2022)28/en/pdf.

40 C/0730/16: JUST EAT/ LA NEVERA ROJA https://www.cnmc.es/expedientes/c073016.

41 C/1046/19: JUST EAT/CANARY https://www.cnmc.es/expedientes/c104619.

42 The CNMC assed another case in this sector, C/1072/19 MIH FOOD DELIVERY HOLDINGS/JUST EAT, which consisted in the acquisition of sole control of MIH FOOD DELIVERY by JUST EAT. The operation was finally cleared without commitments, as the acquired company´s presence in the relevant market was indirect (by minority shareholdings in some competitors) and such participation was so small that the CNMC reached the conclusion that it was not enough to distort competition.

43 S/0026/20 REDES PARALELAS EXCLUSIVIDADES PLATAFORMAS https://www.cnmc.es/expedientes/s002620.

part of individual operators were not considered likely to have a significant impact on the competitive position of current or potential third party competitors or to restrict competition to any significant extent in the affected markets.

Consequently, there were no indications showing that those agreements were likely to be restrictive in terms of competition, either individually or considering their cumulative parallel effect. Consequently preliminary proceedings were terminated.

Conclusions

The enforcement of competition law in digital markets has changed its frame of reference in order to achieve effective results. A new approach was needed to tackle certain problems, especially with regards to market definition and the assessment of market power.

Competition policy tools are flexible enough to adapt to the disruption driven by digitization, but the analysis must be refined given the complexities inherent to multi-sided markets, data-driven network effects, zero-pricing business models, eco-systems, etc.

Digitalization presents numerous advantages that can boost efficiency but it also poses important challenges when it comes to competition and can result in the creation of barriers to entry, leading to market power dynamics.

The analysis of competition conditions through reports and market investigations is relevant since it can help to understand the challenges posed by digitalization and help to achieve more effective execution of competition policy tools.

Rising Demand for Regulation of Digital Marketplaces in Azerbaijan

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Introduction

Azerbaijanis have quickly adapted to the growing global trends of shopping on digital platforms. This widespread adoption of digital habits over the past few years has led to the creation of rapidly expanding digital marketplaces in various goods and services sectors. In recent years, digital marketplaces have fostered a competitive market environment, predominantly in the fields of clothing, electronics, home appliances and other consumer goods. In terms of market structure, the locally established digital startups have a significantly lower market share compared to their international counterparts that managed to establish dominance in the domestic market. There are various reasons for that, including the scale of the local economy, the inadequate number of IT specialists, and expensive logistics. Consequently, compared with international digital platforms, the local competitors offer more expensive goods with limited selection and user experience. However, the benefit of shopping online via foreign marketplaces also brings its own regulatory problems.

Current market status

Locally, online purchasing habits have mainly evolved in two directions. The first direction involves ordering groceries and ready meal deliveries from supermarkets and restaurants using mobile application services. Currently, the market is mostly dominated by renowned international startups such as Bolt[44] and Wolt[45], despite the presence of domestic companies in this industry. Both of them exceeded their annual growth projections in 2020 and 2021, and expect to do so in 2022 as well, which indicates that Azerbaijanis are quickly changing their online purchasing habits, leading to significantly increasing demand for digital marketplaces. In response to that, domestic market conditions are expected to change accordingly to reflect these new purchasing trends and patterns.

The second direction involves online purchases from large established international digital marketplaces. Some Turkish digital marketplaces, such as Trendyol[46] and Hepsiburada[47], are among the most favored ones in Azerbaijan, though local platforms also exist[48]. Lately, Trendyol has gained significant popularity in Azerbaijan, with considerable growth in the sales volumes of clothing and other textile products. Practically, the prominence of Turkish digital platforms is associated primarily with linguistic, cultural and geographical proximity between the two nations as well as exposure of the local population to advertisement on Turkish TV channels, which are widely watched in Azerbaijan.

This article will highlight some new challenges to the local competition environment, resulting from a considerable increase in cheaper imports from foreign digital marketplaces. To address those issues, a number of propositions will be made. The first proposition will focus on protecting the domestic market players who legitimately import goods similar to those imported from foreign digital platforms, to sell them via offline stores located in the territory of Azerbaijan. The second proposition will concern protection of consumer rights, including the right to return undesired or damaged goods, to receive proper customer services and to be refunded under specific conditions.

Challenges for domestic retailers arising from increased e-imports

The majority of the international digital platforms' best-selling clothing and technology products are legitimately imported and sold by domestic stores operating offline in Azerbaijan. These resellers have contractual dealerships directly with manufacturers or regional brand owners. They incur labor, transportation, marketing and other costs in addition to customs duties and taxes. Due to the price competitiveness of international digital platforms and the fact that they do not have to incur costs similar to those of local importers, they sell their

44 https://food.bolt.eu/en-US/335-baku
45 https://wolt.com/en/aze
46 https://www.trendyol.com/
47 https://www.hepsiburada.com/
48 https://umico.az/ and https://shop.az/

products at a significantly lower price, which creates significant competitive problems to the domestic resellers. Here it is important to note that neither Turkish digital platforms nor any other similar foreign business officially sell their products to Azerbaijan. Therefore, an Azerbaijani customer has to open an account as a local customer, purchase goods locally as if purchased by a customer located in foreign jurisdiction, get them delivered to the address of a logistics company in the foreign jurisdiction and shipped them to Azerbaijan.

In the case of the most popular Turkish digital marketplaces, their accessible use, the huge devaluation of the Turkish Lira and the reduction in cargo fees pushed domestic customers to switch their purchasing habits for those products to Turkish digital giants such as Trendyol and Hepsiburada. Under these conditions, the profit margins of conventional domestic merchants could plummet dramatically, where many of them would be unable to expand and in some cases hardly manage to maintain their businesses. In addition to these circumstances, the Azerbaijani market could potentially lose its appeal to major clothing brands, with the increased likelihood of contraction in retail sector and potential loss of jobs, income and tax revenue. Moreover, the Azerbaijani market could become unattractive to potential digital entrants. Therefore, it is anticipated that a level playing field has to be created to allow competition between traditional importers and foreign digital marketplaces.

The second challenge associated with the widespread use of foreign digital platforms has risen due to the inability of domestic consumers to protect their rights. It requires a significant effort to manage orders from foreign digital marketplaces where the deliveries are inaccurate, missing, faulty, or, in the case of clothing items, imported in wrong sizes. Furthermore, the short return periods for products purchased on digital marketplaces[49], especially those located abroad, present additional difficulties, where the consumer is significantly disadvantaged.

Existing regulation and potential new solutions

In 2020 new customs regulations were introduced limiting the value exempted from customs duty for foreign online purchases to $300 per individual per month. However, it is still considered insufficient by some traditional vendors, who would want more domestic protection and argue that more protection will encourage the development of domestic digital marketplaces. In order to fully assess the impact the regulation of imports from digital marketplaces could bring, effects on both retailers and consumers should be considered. On one side of the argument, prices for consumers will increase, but their consumer rights would be protected. On the other hand, traditional retailers are being protected and able to maintain their stores domestically, contributing with job opportunities and tax revenues.

A potential regulatory measure to target the competition challenges presented by foreign-based digital marketplaces selling significant volumes of goods could be a requirement for establishing representative offices in Azerbaijan. Specifically, these representative offices could formally conduct business, import products directly from the relevant foreign digital marketplaces, and pay import duties and taxes. Thus, the free-rider problem of market failure that occurs when foreign digital platforms benefit from resources of the local market will be at least partially resolved. As a result, foreign digital marketplaces could benefit from the competitive advantage provided by their technological superiority, economies of scale and cheaper currency, while more equal market conditions for domestic retailers and importers could be achieved. Moreover, these measures might create conditions fostering local digital markets within the country.

Additionally, to solve the problem of consumer rights, foreign digital platforms should be required to have local customer service departments in order to help domestic consumers when faced with difficulties. For instance, conditions could be established for the regular imports of the most sold products maintaining the domestic reserves at around 30% to 40% of their sales volume.

Conclusion

Digital marketplaces bring significant changes to the traditional markets but also contribute to competition, leading to empowering customers, democratizing international trade and reducing prices. However, digital marketplaces pose some risks for the local economy and consumers, which should be managed. In doing so, there is a rising demand for additional regulation. The current challenges that domestic markets face might lead to significant negative consequences in the future. The proposed regulation on establishing representative offices might provide benefits for the local economy as well as protection of consumer rights, and facilitate fair trade and competition. However, there are advantages and disadvantages in both scenarios. Therefore, active discussion involving traditional importers, technology giants and, certainly, consumer groups, in identifying the best potential solutions that would improve competition and limit the negative impacts of recent developments will be required. The State Service for Antimonopoly and Consumer Market Control actively engages with market participants, and has access to the necessary data, econometric tools and analytical capabilities to provide research and lead the discussions.

49 Trendyol has increased its return period to 30 days following logistical difficulties during the COVID-19 pandemic. However, taking into account the cost of logistics as well as limited timing, it is still cumbersome for Azerbaijani customers to benefit from the same rights that are provided to Turkish customers.

Topical Competition Issues in Digital Markets: The Experience of the Eurasian Economic Commission

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Digital technologies are increasingly penetrating almost all spheres of life, and the success of their diffusion is due to the objective opportunity they create to optimise communication, business organisation, state and municipal administration, the various needs of individuals and households, etc. Thanks to digital technologies, businesses have been able to develop a presence practically all over the world without the additional costs of setting up offices and employing staff in each country. Just think of services such as food or grocery delivery, ordering a taxi, or various networking services. A single application allows users to get whatever they need without any extra effort through a simple to operate software, in most cases regardless of the country in which the user is located. Just ten years ago, this would have been hard to imagine.

It is worth noting that, in most cases, traditional services do not disappear from the market, as they address the needs of households whose behaviour has not changed significantly in the medium term. But with digitalisation, market players are beginning to interact under a single umbrella solution designed to streamline the process of receiving and delivering services. For example, various food and home delivery services are enabling producers and retailers to interact with their customers online by posting information about their products on a virtual platform through which customers place their orders.

Technology saves us time and makes it convenient for us to conduct certain routine transactions. However, the aforementioned umbrella solutions and global services, through their actions, can create risks for competition in their respective markets. The fact is that a digital service that accumulates a sufficiently large volume of users and information about them may start dictating its terms to the providers of goods and services themselves, thus limiting competition between market participants, and making it necessary for antitrust authorities to intervene so as to prevent competition from being harmed. It is important to note that antitrust authorities act within the framework of regulations which determine their competence, in other words, the possibility and right to make "corrections" to the legal relations of economic entities operating in the commodity markets in question. Based on the specifics of traditional commodity markets, the current regulatory framework has already undergone sufficient changes taking into account the continuous improvement dictated by the practice of law enforcement, while the practice of antitrust intervention in digital markets is just emerging.

The question of defining the line between a genuine and economically justified desire of digital ecosystems to improve their services to best meet the needs of users and the abuse of their dominant position or entering into anticompetitive agreements in the relevant markets remains debatable and should be considered on a case-by-case basis, taking into account the interests of all parties involved in digital ecosystem activities. A purely formal approach of antitrust response to the behaviour of market actors, especially with regard to the activities of digital platforms may create a situation where a justified antitrust intervention in the activities of a digital platform to suppress the interests of individual economic operators can have the effect of reducing the overall usefulness of the digital platform for a large number of its users.

Of course, one should remember that for such cases there are rules governing the permissibility of breaches of certain prohibitions set out in the competition law with regard to entering into anti-competitive agreements. For example,

- stimulating technical (economic) progress;
- increasing the level of competitiveness of the relevant services on the world market;
- consumers receive a proportionate share of the benefits acquired by the relevant digital platforms[50];

all of these criteria, if proven to be met, are conditions for declaring vertical and other anticompetitive agreements between business entities admissible. However, the very process of justifying the above effects requires in-depth, comprehensive analysis supported by empirical evidence. *In terms of such analysis in digital markets, the situation is complicated by the fact that, despite their rapid development, digital services and platforms are reluctant to disclose their technological features. The range of accumulated user data that enables the development of new mechanisms to meet their needs is not sufficiently transparent, nor are the logic and algorithms of the software products we use every day, that are shrouded in secrecy.* Clearly, it is technology that creates competitive advantages for companies participating in digital markets, and full disclosure will eliminate the effect of those advantages, but there is a *need for greater transparency with users, as well as for disclosure of those aspects of activity that will allow an objective analysis of the positive and negative effects on competition and the overall economic development of any given IT company activity in digital markets.* Such an assessment, including a toolkit for such an assessment, should take place in close dialogue between the regulator and the market participants.

In this context, recently the professional community has been increasingly raising questions about the specifics of antitrust regulation on digital markets, from the definition of terms and conceptual framework to the specifics of analysis and assessment of competition on such markets.

50 Paragraph 5 of Annex 19 to the Treaty on the Eurasian Economic Union, signed in Astana on 29.05.2014

The following will present some problematic aspects encountered by the Eurasian Economic Commission[51] in monitoring compliance with common competition rules in cross-border markets and in monitoring international experience in the application of antitrust rules in digital markets.

For example, our research shows that it is not always possible to correctly define the geographical boundaries of digital markets due to their global nature and, at the same time, a certain exceptional adaptability to local user needs. Issues also arise with respect to the correct definition of the product boundaries of digital markets. As we know, the process of defining the product boundaries of a market considers the distinctive properties of the goods as well as their substitutability with other goods by consumers. Digital services or products have very interesting characteristics in this respect. To a first approximation, the product or service in question may appear to be identical for all categories of users. However, further analysis may show deep customisation (adaptation, tailoring) of the same service to the specific requirements of the users, creating unique features of the service for them. For example, when a user is surfing and searching for a highly targeted content in a web browser, it creates a 'digital footprint' of these actions which can then be used by the search engine to produce the most relevant search result, matching it to the past preferences or interests of that particular user, while a user with a different 'digital footprint' may have a different result for the same search query.

The situation in analysing digital markets, given their novelty and rapid development, is also characterised by difficulties in obtaining the information needed for analysis. We are often faced with the *lack of official statistics and a single methodology for calculating the size of the digital services market. This is aggravated by the fact that reliable statistical data is, in fact, only held by the digital platforms themselves (potential abusers).* As part of the dialogue between the regulator and market players, quantitative indicators should be defined that would make it possible to assess the state of competition in the respective markets for digital services and a methodology for their calculation, with an accessible and transparent mechanism for market players to provide such data. The current methodology for calculating the volume of product markets and the share of economic entities on those markets is still based on certain assumptions, but, as already noted, there are certain difficulties with the availability of relevant data for analysis.

An important issue is the analysis of the quality and technical characteristics of digital goods and services. It seems advisable to deepen the interaction between experts in the field of digital technologies and competition authorities through the establishment of expert councils and thematic working groups. As practice shows, antimonopoly authorities are occasionally confronted with a situation of *insufficient information related to highly specialized expert assessments of the degree of technological interchangeability of digital services*, which in turn creates obstacles for the correct determination of product boundaries as well as the establishment of the dominant position of digital platforms based not only on quantitative but also qualitative characteristics, such as the ability to unilaterally influence the general terms of circulation of goods and the existence of technological constraints (unique features) for access to the product market.

The described specifics of how digital markets function point out the importance of finding a certain acceptable balance between a rational utilitarian approach to maximise the benefits of technological development and the need to prevent monopolisation of markets by the owners of the relevant technologies. As far as possible, a consolidated position by competition authorities, taking into account the global nature of digital markets, will help resolve this particular issue.

51 Permanent supranational regulatory body of the Eurasian Economic Union

Market Research: P2P Transfer Apps in Israel[52]

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In July 2021 the Israel Competition Authority (hereinafter: **ICA**) published a market research on the industry of payment apps that provide payment transfer services between individuals. This short paper will outline this market research, its conclusion and the corresponding policy recommendations.

Three different payment apps were operating in Israel while this research was conducted, all owned by large banks: Bit, the incumbent app and two competing apps, Pay and Paybox. The main service provided by these apps is the execution of person-to-person payment transfers (hereinafter: **P2P transfers**).

In recent years, competition authorities around the world have been increasingly challenged by digital platforms that benefit from a network effect in the consumption of services they provide. Digital markets are characterized by strong competition, but once that's decided, competition tends to converge to a winner-takes-all market. At this stage, the barriers to market entry are so high that a potential entrant, even one offering a better service, will not be able to successfully enter the market.

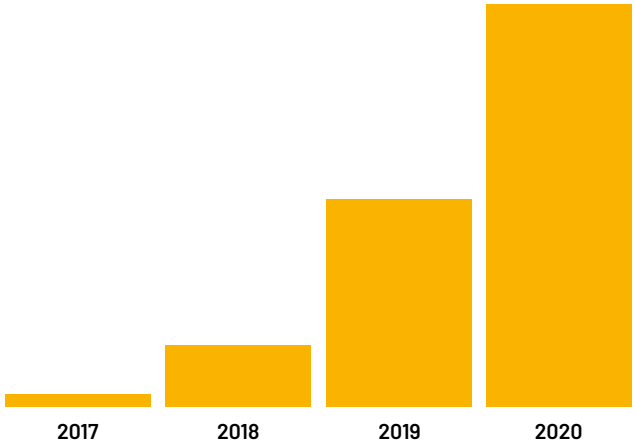
Another important feature of these markets is the central role of information, particularly user data obtained while using the platform. Obtaining this information enables firms to offer customers supplementary and additional services. As a result, a winner-takes-all market structure in a given market could give rise to high degree of concentration in other related markets as well.

The key factors for preserving competition in digital platform markets include maintaining the consumers' ability to obtain products from a number of suppliers (i.e. **multi-home**), and reducing barriers to transitioning between different service providers. That is mainly achieved by ensuring interoperability of platforms and customer data portability.[53]

Recent Development in the field of P2P Payment Apps in Israel

Since its launch in 2017, the field of payment transfer apps has enjoyed accelerated yearly growth by several hundred percent in both the number of transactions and the volume of operations. Though growth rates have relatively slowed over time, in 2020 growth was still remarkable and stood at approximately 100%.

Figure 1: Volume of Transactions in Banking Payment Apps 2017-2020



Source: raw data from App operators; Research Division calculations

Despite the rapid growth observed over recent years, ICA's estimates indicate that the market still has significant unrealized growth potentials. Mainly, estimates indicate that by the end of 2020 the number of registered payment app users reached a mere 65% of potential users.

The Market Structure: Market Share and Differentiation

Bit, the incumbent app was launched in January 2017, with Pay entering the market two months later. Paybox commenced its operations as an entrepreneurial project in 2014, and was acquired by Discount Bank in 2017. ICA's data shows that though Bit has been leading the market with the highest number of users since the first year of its operation, the significant gap between Bit and its competitors opened during the course of 2019, and has been widening ever since.

Particularly in digital markets, in which a network effect exists, the ability of small competitors to distinguish themselves from the leading incumbent firm is, often, a necessary condition for their successful entry into market, or for their business survival.[54] The ICA's examination has shown evidence of Paybox's differentiation from the other apps in a niche service, as the leading *group-payments* app[55]. It appears as though Paybox's relative advantage in this type of payments stems from the app's unique features. It is also evident that group payments constitute only a small portion of all the transfer transactions executed using the apps, and make for a small percentage of the monetary volume of P2P transfers.

52 This short paper outlines a market research conducted by economists from the Israel Competition Authority's Research Division: Dr. Anat Alexandron, Eviatar Guttman and Fatema Sayed Ahmad. The full report can be found here: https://www.gov.il/en/departments/publications/reports/p2pmarketresearch

53 OECD (2021), Data portability, interoperability and digital platform competition, OECD Competition Committee Discussion Paper, http://oe.cd/dpic; Crémer, J., de Montjoye, Y.-A. and Schweitzer, H. (2018). Competition Policy in the Digital Era. Report for the European Commission; Joint Paper of the Competition Authority, The Privacy Protection Authority and the Consumer Protection and Fair Trade Authority on the Right to Data Portability, published on January 3, 2021.

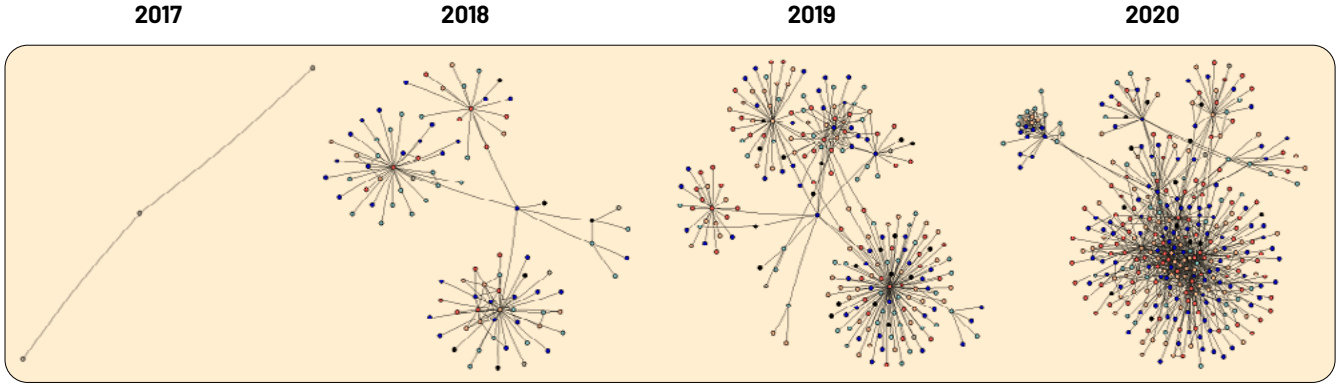
54 Crémer, J., de Montjoye, Y.-A. and Schweitzer, H. (2018). Competition Policy in the Digital Era. Report for the European Commission. (pp. 35-38)

55 Group payment is a type of P2P transfer that is used for various group arrangements such as PTA staff appreciation gifts, shared take-out meals, group gifts, etc.

Network Effect

Network effect is a phenomenon where the value that the users or consumers of a product or service derive from its usage increases as the overall number of users of the same (or a compatible) product or service rises. Thus, in the field of P2P transfers, the larger the number of customers who use the app, the larger the number of potential transaction partners per user. Therefore, the potential number of transfers that each user might make in the app increases as the network grows. Higher usability gives rise to greater utility for potential new customers considering using an app, leading to the principal source of the network effect in P2P transfers. Figure 2 below suggests the existence of network effect in Bit's P2P transfers network.

Figure 2: Illustration of the Network Effect[56]



Source: App Operator's raw data; Research Division's calculations

Previous economic literature demonstrates how network effect can lead to a winner-takes-all market structure.57 Such markets are often characterized by the incumbent firm's significant market power, which can be exploited either on the primary market or on adjacent markets. The network effect greatly increases the entry costs of new firms into the market, so much so that it can even prevent the market entry of firms offering better services. The incumbent firm's market power can be reduced when a sufficient number of customers are willing to use services from several suppliers (i.e. **multi-home**).

Two main quantitative signals may support the existence of network effect in the field of payment apps in Israel: (1) an increase in the usability of Bit as the number of users has increased; (2) greater usability of apps with a larger number of users. An empirical examination of these quantitative signals indicated that Bit's usability increase was positively correlated with the number of users. This correlated growth was found to be not linear, but rather convex, i.e., there is economies of scale in usability as a function of the number of users.

Multi-Homing: Consumption of Services from Multiple Suppliers

The willingness of the consumers of a product or service to multi-home between different suppliers might restrain the ability of the incumbent firm that enjoys a network effect to abuse its market power. In particular, it might enable a new firm that offers an innovative product or a niche product to enter the market and eventually challenge the incumbent firm.

In terms of the extent of multi-homing in registration for P2P apps, the data indicate that the share of users registered to more than one app ranges between 40% and 65%. The data also point to a significant difference between Bit and the other apps – whilst a large percentage of Bit users are exclusively registered on Bit, the majority of Paybox and Pay users are also registered on at least one other app. There is currently no registration fee for the Israeli payment apps. Hence, it is plausible that a user who is registered for a number of apps would in fact only make use of one app, or alternatively make use of different apps for different purposes. This suggests that from the user's point of view, the substitutability between the apps is limited. This finding provides additional evidence of the existence of network effect in P2P transfers and reinforces the concern of a winner-takes-all market structure.

To **summarize** the above, the ICA's study on payment app P2P transfers in Israel points to these main findings**: (1) there is a significant network effect in the consumption of P2P transfer services; (2) there is a tend towards a winner-takes-all – Bit; (3) this field still holds significant growth potential; and (4) Paybox is differentiated from other payment apps by its group payment transfer services.**

In light of these findings, the ICA has recommended to impose new measures to weaken the network effect by creating interoperability between the apps. The purpose of these measures is to enable each consumer to choose their preferred payment transfer app, regardless of the number of users on each app's network. Furthermore, the ICA has recommended allowing apps to use the data obtained from users while providing P2P payment transfer services. The recommendation was aimed at enabling apps to offer consumers additional financial services that best suit user needs.

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56 The figure illustrates the development of the transaction partner network of a randomly chosen Bit user between 2017 and 2020. Each node describes a user, and each line indicates that the two connected users performed one or more payment transactions between them. The different node colors represent the different levels of activity and reflect the "heat map" for the financial sum of all transactions of the represented user: moving from grey (low level of activity), through blue (medium level of activity) and up to pink (high level of activity).

57 Katz, M., & Shapiro, C. (1994). Systems Competition and Network Effects. The Journal of Economic Perspectives, 8(2), 93-115.

Addressing the challenges of digital economy – The experience of COFECE

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Competition authorities face different challenges to foster competitive conditions in the digital economy. This article describes three challenges identified in this area by and for the Federal Economic Competition Commission (Commission or COFECE).

- The use of competition tools vis-a-vis the proposals to regulate these markets;
- The need to develop robust technical capacity, useful for proceedings related to the digital economy; and
- The need for highly specialized technical teams and the challenges to retain this human capital.

Competition and regulatory challenges ahead of the digital economy

Technological evolution has generated a universe of applications, multi-sided platforms and business models that comprise the digital economy. Like most of the jurisdictions in the region, COFECE has enforcement tools against anti-competitive practices that have an impact on digital markets, as well as preventive merger control to address competition problems or potential market failures.[58]

However, the economic characteristics of digital markets, such as network effects and economies of scope and scale, the value and nature of data as well as the capacity for processing can lead to *feedback loops* that encourage market participants to compete for the market.[59] This can lead to highly concentrated markets with conditions that are not conducive to innovation and new entrants.

Over the past five years we have witnessed the international discussion on the implications of economic competition in the digital environment. Germany and the European Union are pioneers in the implementation of proposals to regulate companies in the digital economy under quantitative or qualitative criteria that will involve the imposition of *ex ante* regulation to correct market failures and generate pro-competitive environments.[60]

The United Kingdom is discussing the possibility of regulating certain market participants, a proposal that is still on the agenda.[61] The United States of America has begun to analyze various laws and other proposals to strengthen the competition authorities, especially regarding merger control.[62]

In Mexico there is no regulatory authority with powers to impose *ex ante* measures in digital markets. However, the current regulatory framework establishes the existence of the Commission, which is the authority in charge of guaranteeing competition and fee market access in all markets with the exception of the telecommunications and broadcasting sectors, and the Federal Telecommunications Institute, which exercises regulatory powers and is the competition authority exclusively in the aforementioned sectors.

This dichotomy has generated some gray areas, for which the Federal Economic Competition Law establishes a process in which specialized courts in competition, telecommunications and broadcasting decide whether the Commission or the Institute is responsible for analyzing a specific case. To date, the courts have confirmed COFECE's jurisdiction over ride-hailing and food delivery platforms as well as over social networks, search engines and cloud computing services.

In this regard, the Commission has deployed its powers over digital markets to achieve a deep understanding of business models, as well as a creative use of its competition tools, with the aim of finding useful solutions to address the competition problems of the digital economy.

Market enquiries are a useful tool to address the challenges of the digital economy, as they constitute a hybrid tool that allows COFECE to determine the existence of barriers to competition and to impose behavioral or structural remedies, as well as addressing the existence of an essential facility, in order to regulate its access.

This tool is a potential ally in remedies involving specific obligations directed at market participants, or even for data portability and interoperability. The Commission has recently begun an investigation using this tool on digital markets[63]

58 See chapter "Challenges in the enforcement of Competition Policy in the Digital Economy", in COFECE (2018) *Rethinking Competition in the Digital Economy* here.
59 See the concepts of *Attraction Loops, Attraction Spirals and Attraction/Repulsion Pendulum* referred to by Martin Peitz and Paul Belleflame in The Economics of Platforms (2021), p. 10-40.
60 See press release of the Bundeskartellamt here, and the official publication of the Digital Markets Act here.
61 See "*New pro-competition regime for digital markets*" by the Digital Markets Taskforce, here.
62 See the text of the Platform Competition and Opportunity Act, here.
63 See press release in Spanish, here.

posing one of the most important contemporary challenges, targeting successful cases in its application, and creating solutions that promote propitious conditions for competitive markets in the digital economy.

Strengthening technological capabilities as a tool against the challenges of the digital economy

Another challenge faced by competition authorities is the development of technological capabilities that serve as a tool in the analysis of digital markets. The growing use of large amounts of data in business models, the development of algorithms and artificial intelligence, among other characteristics of these markets, demand the deployment of strong technological expertise within the competition authorities.

In recent years, the General Directorate of Market Intelligence, from COFECE's Investigative Authority, has created a team specialized in data science for developing tools and techniques to digitalize the information of the investigations. This will allow the systematization and optimal processing of the large amounts of information collected at this stage,[64] which is even greater in digital markets.

The development of these skills will have to increase in order to tackle major challenges, such as the careful design needed for monitoring and verification mechanisms, as well as compliance with obligations based on behavioral or structural remedies that generate competitive conditions in these markets. Solutions such as portability and interoperability require highly technically trained competition authorities to be able to monitor the compliance of these solutions.[65]

This task requires considerable amounts of budget, usually limited for an authority, that can hardly be compared with the sums invested by companies as part of their core business.

Specialization in digital matters and the retention of human capital

Markets of the digital economy demand a level of work team specialization to meet the new challenges, such as dynamic aspects of competition, the existence of new theories of harm, specialized teams, and the creation of tools capable of processing large quantities of information and creating tools that favor investigations.

In March 2020, the Commission published its COFECE Digital Strategy, which established several actions to strengthen its capabilities in view of the challenges brought by the digital transformation.[66] As part of these actions, in July 2020, the General Directorate of Digital Markets (DGMD) was created to standardize specialized knowledge, and to advise and provide technical support to other units of the Commission with respect to digital markets.

The DGMD conducts the study and understanding of business models of the digital economy, as well as the current state of these markets in Mexico and their differences from other jurisdictions. The proper identification of these elements requires reasonable time to mature and generate results with plausible effects on the work of the Commission.

This process may be interrupted by invitations from the private sector to our specialized staff to join their work teams. Generally, an authority such as COFECE with a limited budget can hardly compete with the salaries and benefits that such companies can offer to our staff. In addition, these companies have state-of-the-art tools integrated into their services that can exceed our capacity as a public authority.

Facing this challenge, the Commission has sought to retain its specialized human capital, despite its disadvantageous position, through an attractive non-monetary complement consisting of permanent and continuing training plans for its public officials in order to keep them up to date on economic competition and digital markets.

Same challenges, different approaches to meet them

In order to face these three challenges posed by the digital economy, it will be fundamental to be creative in the use of our competition and regulatory tools, to develop technical training, and to create strategies for the retention of specialized staff. Besides these innovative responses, it is crucial to establish collaboration mechanisms with other authorities that are facing similar conditions in the digital environment.

The recent participation of the Commission in a session held on the margins of the Latin American and Caribbean Competition Forum of OECD has allowed us to see that certain problems usually considered local, are actually shared with several jurisdictions. At the Commission, we are certain that the exchange of ideas and experiences regarding these problems will enable the creation of effective solutions to benefit the competition process, but above all, the consumers and end users of these markets.

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64 See Commission´s contribution *Enfoques prácticos para evaluar mercados de plataformas digitales para la aplicación de la normativa de competencia* presented at the Latin American and the Caribbean Forum on Competition 2019, here.

65 See the role that authorities should play in setting portability and interoperability standards, in OECD (2021) *Data Portability and Interoperability and Digital Platform Competition*, p. 45 a 49, here.

66 See COFECE (2020) COFECE Digital Strategy, pages 3 and 4, here.

NEWS FROM THE REGION

AZTN hosted the OECD-GVH Regional Centre for Competition seminar on competition law in Zagreb

The OECD-GVH Regional Centre for Competition in Budapest and the Croatian Competition Agency held a three-day joint seminar on the regulation of digital markets.

On 28-30 September 2022, AZTN hosted a three-day seminar in cooperation with the Regional Centre for Competition in Budapest and the Croatian Ministry of Foreign and European Affairs in whose premises the seminar was held. Zagreb was chosen as the venue of the RCC seminar considering that the Croatian Competition Agency celebrated the 25th anniversary of its establishment on the opening day of the event. It is part of the tradition of the Regional Centre to organise one of its seminars jointly with a beneficiary authority, and the event in Zagreb was the first event of the Regional Centre abroad since the coronavirus pandemic.

Competition officials from 16 different economies in Eastern, South-Eastern and Central Europe (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Eurasian Economic Commission, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Montenegro, North Macedonia, Romania, Serbia) gathered in Zagreb to attend the seminar on ex-ante regulation and competition enforcement in digital markets.

Digital markets refer to online platforms or websites where buyers and sellers may exchange goods and services using digital means, such as the internet. Digital markets may include different types of transactions, such as the sale of physical goods, digital products and services. Examples of digital markets include online marketplaces such as Amazon and eBay, and e-commerce websites such as those of individual retailers. A key characteristic of digital markets is that they provide a convenient and efficient way for buyers and sellers to connect and conduct transactions. They also often have a global reach, allowing people from different countries to buy and sell from each other. Digital markets can also provide a level of transparency and accountability, as reviews and ratings from previous customers can help buyers make informed decisions. However, digital markets can be challenging due to serious competition concerns that may arise.

The competition law training – preceded by the Croatian authority's conference event – started with a welcome speech by Csaba Balázs Rigó, President of the Hungarian Competition Authority. Participants then had the opportunity to explore the ex-ante regulation and competition enforcement of digital markets with the help of Croatian and Hungarian experts (Ms Vlatka Butorac Malnar, Ms Jasminka Pecotić Kaufman, Mr Gábor Gál, Ms Mirta Kapural), as well as experts from the OECD (Ms María Pilar Canedo, Mr Antonio Capobianco, Mr Renato Ferrandi) and the European Commission (Ms Lea Zuber). The three-day seminar demonstrated how competition authorities can contribute to shaping the future regulation of digital markets and how they can use current provisions to ensure effective enforcement.

Highlights and conclusions of the competition and merger workshops for eastern european partnership countries in Poland

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Introduction

Europe and the rest of the globe have recently faced significant economic and business issues. The pandemic crisis, climate changes, Russia's invasion of Ukraine and the energy crisis - these and other challenges are being tackled by national competition authorities (NCAs) around the world. In order to meet these challenges and to act effectively and coherently, NCAs are making considerable efforts to develop cooperation among themselves on many levels and are taking measures to assist developing nations and their entities in strengthening their competencies, in order to effectively combat present and emerging economic threats in the future, and to contribute to the growth of national economies and prosperity in countries.

The need for international cooperation resulted in launching the projects titled "*Competition enforcement - best practices and tools based on the experience of the Polish Office of Competition and Consumer Protection and partners*" and "*Merger Control (Issues and Selected Sectors) - best practices and tools based on the experience of the Polish Office of Competition and Consumer Protection and partners*" by the Polish Office of Competition and Consumer Protection (UOKIK) together with the National School of Public Administration and the Ministry of Foreign Affairs of the Republic of Poland.

The main objective of the above-mentioned projects was to support and strengthen competition policies in Moldova, Georgia, and Ukraine. In particular, to provide participants with essential knowledge and tools for correctly identifying and solving competition related problems with the possibility of implementation in their countries as well as joint work of experts on competition enforcement in the course of European Integration.

The initiative of the experts from UOKIK to share their hands-on experience with participants has been supported by colleagues from Hungary, the Czech Republic, Spain, France, Portugal, Lithuania and the United States. Representatives from the European Commission, the Organization for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the Polish Ministry of Finance have also been involved in the workshops as experts and in the exchange of experiences and best practices with participants from Moldova, Georgia, and Ukraine.

Workshops on Competition

The first workshop in the field of "*Competition enforcement - best practices and tools based on the experience of the Polish Office of Competition and Consumer Protection and partners*" was held in Warsaw on 17-21 October 2022. The project provided an excellent opportunity for experts from Moldavian, Georgian and Ukrainian NCAs to come together, get to know each other and integrate, but more essentially to compare experiences in competition practices, as well as within the European Union countries. The workshop allowed the participants to review ongoing frameworks on competition policy, seeking an answer how to pave the way for effective law enforcement and competition protection.

During the workshop a wide range of topics were discussed, such as general legislation related to competition enforcement mechanisms applicable to the EU; case studies of antitrust actions; examples of judicial proceedings, or challenges caused by the development of new markets (i.e. digital markets).

Investigation process of anti-competitive concerted actions, leniency programme and confidentiality guarantees for the applicant

The lecturers focused on the main provisions of anti-competitive concerted actions and leniency programmes and covered the procedural aspects of investigation processes. In the framework of these themes, experts from Poland and the Czech Republic introduced three relevant cases: "Truck Dealer Cartel"[67], "Bid Rigging in Tender for the Study of High-Speed

67 Truck Dealer Cartel case: https://uokik.gov.pl/news.php?news_id=18186

Railway"[68], and "Bid Rigging in the Area of Electrical Installation Public Contracts"[69].

During the discussion with panellists, the participants presented their respective standards for these themes, shared their practices on how it works in their agencies, and identified differences in these processes between their countries. The most important conclusion of the first day was that many participants turned their attention to using a leniency programme, because it is an effective tool for detecting and, therefore, fighting cartels.

Beneficiaries and experts agreed that the Moldavian, Georgian, and Ukrainian NCAs should pay more attention to the use of this mechanism and take over the application of specific laws in their respective jurisdictions, including advocacy of leniency programmes and protection of whistle-blower confidentiality.

Dawn raids on entrepreneurs and inspections training

This theme is a relevant topic as inspections are an important tool during investigation processes. The Polish experts contributed their experience and knowledge in conducting inspections and dawn raids on entrepreneurs; acquiring and keeping electronic documents; and introduced in detail their department's work, problems and challenges faced during inspections. The expert from the European Commission explained in great detail about the inspections' preparation and methodology, as well as how they are conducted with their involvement.

Discussions focused on implementing dawn raids in Moldavian, Georgian and Ukrainian competition authorities. European experts use inspections to solve a large number of competition cases, while representatives from Moldova, Georgia, and Ukraine shared their experience on how the inspection tool functions or fails in their countries.

First, the experts recommended participants to draw the attention of their authorities to using inspection during investigation as it simplifies the handling of cases and significantly reduces the processing time. Second, the experts recommended not only to borrow experience from foreign colleagues, but also to educate their staff on implementing inspections internally and to develop their own guidelines and practices on inspections.

Competition in the digital market

Representatives from the OECD and the Commission shared their knowledge, views, and practical and theoretical experience concerning digital markets. During this panel the beneficiaries worked together in mixed groups to complete a real-life case study. This task generated a lot of discussion and many different opinions among the participants. Experts from Poland, Hungary and Spain shared information on how they manage to prevent issues that could potentially affect competition and how to combat anticompetitive behaviours in the digital markets.

Competition in digital markets was one of the most controversial topics, as for some countries and experts the regulation of digital markets is critical, and it is now the subject of focus for competition authorities because of its impact on various other sectors. After considering all the issues and experiences of the participants, the experts concluded that first of all, the representatives of the competition authorities from Moldova, Georgia and Ukraine should have a better understanding of the functioning of digital markets in their countries, which can be the basis for innovative actions, both from an advocacy and an enforcement point of view.

Also, it is necessary to carry out advocacy for digital markets, as well as roundtables with businesses and law offices, at the same time as raising the awareness of citizens, as the relationship between consumer privacy protection and the development of competition in digital markets needs to be considered.

During the two-day discussion on digitalization, both participants and experts concluded that strengthening cooperation in the development of the intended regulation, especially in digital markets, is increasingly important and that the countries would definitely benefit from cooperation and exchange of experiences.

Anti-competitive agreements in the agricultural sector

Polish experts introduced the Act of 17 November 2021 on counteracting the unfair use of contractual advantage in the trade of agricultural and food products.[70] This law implements regulations and procedures to counteract, in order to protect the public interest, the unfair use of contractual advantages by buyers of agricultural and/or food products as well as by suppliers of such products. Lecturers shared their experience and processes they carry out during investigations, presented a legislative mechanisms to control unfair trade practices through the use of discounts, and responded to all inquiries regarding how to prevent the unfair use of contractual advantage in the trade of agricultural and food products.

An essential subject of the discussion investigated chain stores' practices. Experts presented the implementation of their authority based on cases such as Biedronka[71]; Eurocash[72]; Kaufland[73]; and Intermarche[74].

Workshops on Merger

Following a successful Workshop on Competition with a positive response from beneficiaries from Moldova, Georgia

68 Bid Rigging in Tender for the Study of High-Speed Railway case: https://www.uohs.cz/en/information-centre/press-releases/competition/2963-railway-design-cartel-revealed-thanks-to-leniency-programme-the-office-imposed-fine-on-sudop-praha.html

69 Bid Rigging in the Area of Electrical Installation Public Contracts case: https://www.uohs.cz/en/information-centre/press-releases/competition/3029-spie-elektrovod-and-ase-were-fined-almost-czk-34-million-for-public-procurement-cartel.html

70 Act of 17 November 2021 on counteracting the unfair use of contractual advantage in the trade of agricultural and food products: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20210002262

71 Biedronka case: https://uokik.gov.pl/aktualnosci.php?news_id=17028

72 Eurocash case: https://uokik.gov.pl/aktualnosci.php?news_id=18056

73 Kaufland case: https://uokik.gov.pl/aktualnosci.php?news_id=18166&print=1

74 Intermarche case: https://uokik.gov.pl/aktualnosci.php?news_id=18135

and Ukraine, the UOKiK in cooperation with the National School of Public Administration and the Ministry of Foreign Affairs launched the second edition of workshops dedicated to "*Merger Control (Issues and Selected Sectors) - best practices and tools based on the experience of the Polish Office of Competition and Consumer Protection and partners*".

During the Workshops on Merger a wide range of topics were discussed, such as introduction to mergers and acquisitions; as well as investment control; comprehensive review of European and US legislation; examination of digital, pharmaceutical, energy and retail sectors; gun-jumping and also non-notified mergers.

Introduction to mergers: importance of merger review

On the first day of the workshop, experts from Poland, France, the European Commission, the United States and the OECD were introduced to the legislation, with interpretations and explanations of the laws, and recommendations applied by these agencies in the field of merger control.

It turned out to be not only a great opportunity to exchange views and experiences of the participants, but also allowed for further integration of the competition protection environment and provided crucial opening remarks. The participants agreed that there is general need to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the review process.

Mergers and specific sectors: digital, pharmaceutical, energy and retail

The next three days of the Workshops on Merger focused on several sectors that were the most interesting and crucial for competition authorities from Moldova, Georgia and Ukraine. The beneficiaries learnt about the details of the Digital Markets Act, how it will affect EU countries and, above all, countries aspiring to join the EU. The training on digital markets was complemented by a discussion on the LogicImmo/SeLoger[75] and the Empik/Merlin NFI cases.[76]

Finally, the delegates from Moldova, Georgia and Ukraine had the opportunity to participate in a simulated case study, which sparked a lively debate among the participants.

On the Workshop's subsequent days, the European Commission provided market definitions as well as developed practices in the pharmaceutical sector. Experts from Poland, Lithuania and Portugal provided thorough presentations to supplement this material. A key topic presented by lecturers from Lithuania and Portugal concerned issues surrounding 'gun-jumping'. Among the cases presented were: „Neuca/Intra"[77], „Polfarma/Polfa"[78], and „Svalbono klinika/INVL Baltic Sea Growth Fund, companies Litgaja and RP PHARMA"[79]. Lastly, Polish and U.S. experts presented case studies from the energy and retail sectors „PGE/EdF"[80], „Staples/Office Depot"[81], which completed the workshop material on concentration control in relevant markets.

The Commission indicated that merger remedies can be broadly used and should not be considered as a harmful tool. The topic on killer acquisitions and start-ups was received with great interest. Finally, participants discussed fines, their percentage size and application across countries in Europe. As a result of this, the Commission recommended a guideline which provides formulas on how to calculate particular types of fines.

Non-notified concentration – as the final topic of the workshop

To finish off the Workshops on Competition, the organizers invited experts from the Central Register of Beneficial Owners of the Polish Ministry of Finance. The presentation of this topic, seemingly distant from the leading theme of concentration control, aroused great interest among the participants. Experts from the Ministry of Finance discussed the survey of beneficial owners in detail, as well as the process of cooperation between law enforcement authorities, both nationally and internationally, emphasizing that up-to-date and easily accessible knowledge of entrepreneurs can significantly support the authorities in their daily challenges.

Conclusions

The experts from the OECD and the Polish and worldwide NCAs provided a rich variety of topics and expertise during the workshop organised for partners from Moldova, Georgia and Ukraine. The main goal was to share information not only on the present tasks the invited professionals are currently working on, but also to engage the beneficiaries in putting their knowledge into practice, and examining procedures and problems that in the future may be essential for their institution or country.

The workshops demonstrated the way in which Polish, European and US experts cooperate with other European countries and expand their international activities beyond the EU, helping aspiring EU members to develop and progress towards further European integration, namely by sharing their experience in implementing their approaches in competition enforcement.

The emphasis of these workshops was on making them more interactive. For this reason, question-and-answer sessions, participant discussions, moderated panels and collaborative case studies were provided. This format increasingly allowed participants to exchange experiences, to analyse problematic and specific subjects more deeply, and to understand how to implement them within their own authorities.

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75 LogicImmo/SeLoger case: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/01-february-2018-online-property-advertising
76 Empik/Merlin NFI case: https://decyzje.uokik.gov.pl/bp/dec_prez.nsf/1/D4178C419C05D603C1257EC6007B90D8?editDocument&act=Decyzja
77 Neuca/Intra case: https://uokik.gov.pl/news.php?news_id=12597&news_page=20&print=1
78 Polfarma/Polfa case: https://uokik.gov.pl/news.php?news_id=3328&news_page=88
79 Svalbono klinika/INVL Baltic Sea Growth Fund, companies Litgaja and RP PHARMA case: https://kt.gov.lt/en/news/merger-in-healthcare-sector-cleared-subject-to-commitments
80 PGE/EdF case: https://uokik.gov.pl/news.php?news_id=13534
81 Staples/Office Depot case: https://www.ftc.gov/legal-library/browse/cases-proceedings/151-0065-staplesoffice-depot-matter

News from the region - International Conference on Competition and Consumer Protection held in Georgia

Tamar Chakvetadze

Project Manager and Head of Donor Relations, Georgian National Competition Agency, Organizer of the First International Conference on Competition and Consumer Protection, Georgia

The first international Conference on Competition and Consumer Protection held on 16-17 November 2022 in Georgia allowed for high-level discussions and yielded substantive conclusions regarding regional and global cooperation.

The two-day event was jointly organized by the Georgian National Competition Agency, the National Bank of Georgia, the Georgian National Energy and Water Supply Regulatory Commission, the National Communications Commission, and the Insurance State Supervision Service of Georgia.

The topics discussed at the conference covered competition law, consumer rights protection mechanisms, activities carried out by regulatory agencies, and international practice. In addition to government and parliamentary teams, diplomatic corps, business, non-governmental and academic sector representatives, students and industry experts, delegations from fellow agencies of 20 countries took part in the conference. Among the guests were Teresa Moreira, Head of the Competition and Consumer Policies Branch at the United Nations Conference on Trade and Development (UNCTAD), and other invited international experts.

The aforementioned annual platform was founded last year, on 5 December 2021, in celebration of the World Competition Day, with the signing of a memorandum of cooperation between five regulatory agencies. The strengthening of cooperation between the agencies and the establishment of a joint format became especially important after the entry into force of the amended EU standard closing Law on Competition of Georgia on 4 November 2020 (a unified legal framework has been created for the separation of competences between the Georgian National Competition Agency and regulatory bodies. Accordingly, the authorities will operate on the same principle regarding the basic issues of competition policy. The regulators remain committed to enforcing competition in their sectors and will investigate the issues that concern only regulated entities. In all other cases, the competent authority is the Competition Agency.) Since then, on 1 June 2022, the Law of Georgia on Consumer Rights Protection entered into force within the framework of the Association Agreement signed between Georgia and the European Union, based on the directives of the European Parliament and of the Council, and will be enforced by the Competition Agency.

Holding the conference in an international format was particularly important for Georgia, a country waiting for EU membership, in terms of strengthening regional cooperation, as well as in a global format for discussing and sharing experiences on competition and consumer rights protection. It is worth noting the high level of support, recognition and assessment our initiative received from fellow agencies of different countries, as well as international organizations and experts.

Teresa Moreira, Head of the Competition and Consumer Policies Branch at the United Nations Conference on Trade and Development (UNCTAD), who was actively involved in the process of amending the Competition Law, in her speech highlighted the significance of fruitful cooperation between the five regulatory authorities of Georgia as an indicator of high standards. She also added that Georgia today is actively working on creating a business environment with equal opportunities that will facilitate sustainable development and present the most important leverage for businesses and citizens to operate effectively in the market. She noted that the significant changes implemented in Georgia in such a short period relating to the law on Consumers Rights Protection is still under discussion in many developed countries, and are one of the main indicators of the country's progress in the right direction.

It should be noted that the support extended by the OECD-GVH Regional Centre for Competition to our agency and for

strengthening cooperation between fellow authorities in the region, sharing experience and establishing fruitful communication is immense and meaningful. The head of the centre, Renato Ferrandi, who moderated the thematic session of the conference "Competition Policy on Regulated Markets/Inter-agency Cooperation," spoke about the importance of cooperation between regulatory and competition agencies, as well as proper and equal regulations, as a contributing factor to a sustainable economy. In particular, the cooperation established within the regional centre contributed to a consolidation among our conference participants, and we are especially grateful for this opportunity.

On the first day of the event, after a welcome and an opening session by five regulators, Teresa Moreira gave a keynote speech on the Impact of Competition and Consumer Rights Protection on Welfare and Development (with a focus on emerging economies), followed by six thematic working sessions on competition and consumer rights. Our goal in the working formats was to cover, as much as possible, all the significant issues and existing challenges in the field, in which all the invited guests from fellow competition authorities, international organizations, students, business and academic sector representatives, as well as legal and consulting companies could equally participate. The conference featured the following thematic sessions: Competition Policy and Sustainable Development, Competition Policy on Regulated Markets/Inter-Agency Cooperation, Legal Guarantees of Consumer Rights Protection and Features of Enforcement, Indirect Mechanisms of Enforcement – (Competition advocacy, sectoral inquiries and monitoring, recommendations, trade policy), Essential Facility and Refusal to Supply, Theory and Practice – (abuse of dominance, theoretical approaches and practical cases, essential trading partners) and European and Georgian Practice in Consumer Protection. Taking into account that highly qualified panelists and representatives of various fields and agencies participated in the sessions, they were conducted in a highly interactive and productive format. The engaged panelists included the representatives of competition and consumer agencies of different countries, such as Spain, Azerbaijan, Moldova, Lithuania, Poland, Ukraine, Albania and others. Representatives of the business and academic sectors, experts in the field of the European Union, as well as judges and heads of public institutions also took part in the conference.

Following the international format of the event, the media centre dealing with interviews of participants, live streams and distribution of information was arranged in compliance with the relevant standards and conditions during the conference. This allowed us to effectively and timely disseminate information about the conference, its content and importance in both local and international media.

On the second day of the event, the agencies of six countries – the competition authorities of Azerbaijan, Uzbekistan, Poland, North Macedonia and Albania, and the Consumer Rights Protection Agency of Lithuania signed a Memorandum of Understanding with the Georgian National Competition Agency. We believe that the collaboration between our countries and agencies in the field of protection of competition law and consumer rights will become even more intensive and fruitful. The signing of the memoranda will contribute to strengthening cooperation in various international formats and simplifying the mechanisms of exchange on current issues and convergence of views.

Holding the International Conference on Competition and Consumer Protection has been a great honour and experience for our country and our Agency. We are proud to note that, considering the top level of representation and evaluations, the highest level platform on competition and consumer rights has been successfully established in Georgia, and will be arranged every year. Based on the experience gained this year we can confidently say that the conference provided a solid basis for establishing highly resonant and fruitful relationships, cooperation, and the opportunity of planning future events in an even more effective and expanded format.

Thank you for all your support and invaluable cooperation.

The Georgian National Competition Agency has become the enforcement body of Consumer Rights policy in the country

The Georgian National Competition Agency (hereinafter: "GNCA") was created on the basis of the Competition Law of Georgia in line with the Government's Regulation in 2014.

The GNCA is an independent legal entity of public law that is accountable to the Prime Minister and the Parliament of Georgia.

The main objective of the GNCA is to implement the competition policy, to create and uphold the conditions for promotion of competition in Georgia, and for this purpose to prevent and eliminate all types of anti-competitive agreements and actions.

It is important to note that in 2020 the Parliament of Georgia adopted the law on the Introduction of Anti-Dumping Measures in Trade, with the GNCA becoming the responsible public body to enforce the above mentioned law from 1st January 2021, and to ensure the protection of local industry from dumping imports on the customs territory of Georgia.

In March, 2022 the Parliament of Georgia adopted the Law on the Protection of Consumer Rights establishing the main principles of consumer protection, the extent of regulation and all applicable terms, as well as the fundamental rights and obligations of consumers and traders. The purpose of the Law is to provide a high level of consumer rights protection similar to the standard set by the EU and to ensure that this level of protection is adequately enforced. This Law is in line with the relevant EU legislation and implements all the EU acquis provided by the Association Agreement between the EU and Georgia singed in 2014.

According to the Law on the Protection of Consumer Rights, the GNCA is responsible for enforcing consumer protection in Georgia, and in order to ensure the implementation of this Law, the Consumer Rights Protection Department has been established within the GNCA. The Department will be in charge of examining and ensuring proper decisions on consumer complaints regarding the alleged breach of the above mentioned Law from 1st November.

The Agency has been implementing an active advocacy campaign in close cooperation with EU experts (under the Twinning Program) in order to raise awareness of the Georgian society and different target groups. A hotline has also been set up in the GNCA to support the process, aiming to provide all stakeholders with relevant information regarding consumer rights.

New approaches in the activities of the Antimonopoly Authority of Kazakhstan

Arsen Iskakov

Director of the Strategic Competition Development Department of the Agency for the Protection and Development of Competition of the Republic of Kazakhstan

"The demonopolization of the economy is our national priority," the President of the Republic of Kazakhstan, Kassym-Jomart Tokayev said at a meeting with the heads of foreign diplomatic missions. At the same time, the Head of State emphasized that the new economic course adopted by Kazakhstan is aimed at building a truly free market economy. Of course, the antimonopoly authority, which is entrusted with strategically important functions and tasks to protect competition and restrict monopolistic activity, should play a fundamental role in this. In general, this required reformatting the work of the antimonopoly service and the system of antimonopoly regulation of the economy as a whole. The key innovation was the "restart" of competition policy and the institutional strengthening of its architecture. Thus, at the end of 2020, the Agency for the Protection and Development of Competition of the Republic of Kazakhstan was established with direct subordination to the President.

Since the establishment of the Agency, the most important system documents have been adopted. As a landmark event, in 2022 the Law on the Development of Competition (the fifth Antimonopoly package) was adopted, the development of which was carried out by the Agency. The key areas of the Law were:

1. providing access to key capacity ("essential facilities"). The concepts of key power, criteria for attribution of key power, and rules for equal access to key power have been defined. This will ensure equal access for market participants to the limited and capital-intensive resources of dominant and monopoly companies;
2. regulation of the activities of state and private monopoly entities. These entities are subject to the legal regime of the state monopoly (institute of special law), strict regulation (prices, prohibition of other activities), compensation for losses to competitors, and publicity. These amendments will eliminate the negative impact of monopolies on adjacent markets, as well as ensure transparency of their selection and activities. In general, it is planned further to reduce monopoly entities;
3. reduction of state participation in entrepreneurship. The analysis of state property (to accelerate privatization) and monitoring of the activities of quasi-public sector entities will be carried out. An exhaustive list of grounds for the allocation of state tasks, as well as methods of their consideration by the antimonopoly authority, has been determined;
4. ensuring equal access to state support measures. A requirement has been introduced to coordinate with the antimonopoly authority the new measures of state support (rules for their provision), and the criteria for determining priority areas for the provision of support measures have been established. Implementing the norms in practice will create equal conditions for access to state support measures, eliminate the facts of targeted support that distorts competition in commodity markets, and focus the state's attention on supporting new market participants. At the same time, a function has been introduced to monitor the activities of persons providing state support measures;
5. development of antimonopoly regulation instruments taking into account the practice of OECD countries. An assessment of the impact of regulatory legal acts on competition has been introduced. The authorized bodies will evaluate the new rules of state regulation before their entry into force in terms of their impact on competition. If the evaluation results indicate the possibility of deterioration of the competitive environment, the authorized body will have to find an alternative solution. For its part, the Agency will review the results of the assessment of impact on competition, providing its opinion on compliance with the procedures established by the regulatory authorities.

As for other significant events, it should be noted that the Presidential Decree approved the Concept of Protection and Development of Competition. The Concept presents an analysis of the current state of the competitive environment and identifies the key problems to be solved by 2026. Such problems include, among others, the weak involvement of industry regulators in taking measures to promote competition in the implementation of sectoral state policy, the dominance of state-owned companies in the most important sectors of the economy, the asymmetry of information that creates barriers to a reorientation of demand and prerequisites for the manifestation of unfair trade practices.

It is expected that the implementation of the Concept will contribute to:

- ensuring non-discriminatory access of business entities to key factors of production and measures of state support;
- limiting state participation in competitive industries;
- an increase in the effectiveness of preventive measures of antimonopoly regulation and the quality of decisions taken by the antimonopoly authority based on economic analysis;
- reduction and elimination of regulatory barriers to the development of competition, as well as, following the example of OECD countries, elimination of switching costs and barriers. It should be noted that one of the main directions for reducing administrative and economic

barriers to entry into commodity markets is provided for by the Concept. This is the optimization of the interaction of competitive and industry policies. So, the Agency will focus on intersectoral cooperation. To ensure this interaction, the Concept provides for the formulation of competition development roadmaps on an annual basis with sectoral state bodies. As a result, government agencies will be involved in the development of competition. Notably, the need for a government-wide approach to solving competition problems is noted in the Decree on the Development of Competition in the Economy. In addition to the classic antitrust line of defense against monopolization, this Decree provides for measures obliging industry regulators to protect the conditions of fair competition, as well as to cooperate with the antimonopoly service. By the end of 2022, Kazakhstan has already approved 4 roadmaps in the fields of healthcare, agro-industrial complex, oil and petroleum products, as well as coal. Roadmaps in the fields of civil aviation, telecommunications, rail transport, electric power, commercial gas, housing construction and financial markets are in the adoption phase. In general, information on the implementation of industry roadmaps for the development of competition is planned to be reflected in the National Report on the State of Competition in individual Commodity Markets.

At the same time, an important feature of the new competition policy is rebalancing towards the use of ex-ante measures. The focus of the Agency's activities has shifted to the prevention of antimonopoly violations. In addition, the Agency, taking into account the leading international practice, is developing new approaches to competition advocacy.

The digitalization of our activities is also an important direction.

Thus, the Agency, together with the Bureau of National Statistics of Kazakhstan, initiated the creation of a digital analytical map of the state of competition. The analytical map of the state of competition is an information panel (dashboard). The dashboard is at the testing stage. The Agency, together with the Bureau of National Statistics, worked out a list of 16 commodity markets with historically problematic issues to be included in the dashboard at the initial stage. The markets will be quoted according to 15 basic indicators. The list of commodity markets will be expanded continually. Additionally, the possibility of integrating information from other information sources into the dashboard, including data on export-import operations, information on economic activity, data from service aggregators, marketplaces, etc., is being developed. As a result, the dashboard will become an effective tool for structuring, analyzing and representing indicators, which will allow us to quickly assess the situation on commodity markets, identify potential problems, and take preventive measures in a timely manner. This will make it possible to prioritize the Agency's main activities in specific commodity markets and more effectively implement its functionality.

Moreover, in order to effectively identify cartel collusion in public procurement, the Agency has introduced the search information system "Ormek." This system was created on the platform of the "Single Window of Procurement" of the National Chamber of Entrepreneurs of the Republic of Kazakhstan "Atameken" (a non-profit organization representing the union of business entities) and allows to identify signs of cartel collusion at auctions. The Ormek system analyzes the behavior of and establishes indirect links between bidders with automatic notification of possible signs of collusion at auctions. The system covers public procurements starting from 2019. For example, using the system, it was revealed that in 2019, in tenders for 7 purchases for the repair of highways, the customers of which are local executive bodies, two companies jointly participated and alternately won almost without reducing the price, creating an imaginary competition for each other. Savings on purchases amounted to 0.01%. Signs of cartel collusion are also confirmed by the circumstances that these enterprises acted for each other as contractors and subcontractors for the execution of public procurement contracts. In general, after the introduction of the Ormek search information system, the Agency initiated 19 investigations against 38 market entities on the grounds of cartel collusion in public procurement.

Taking into account international best practices, the Agency has begun work on the implementation of corporate governance principles. The Agency has earned the Institute of Management from among the leadership of the department. The Management Board determines the Agency's short-term and long-term goals and makes decisions on key issues. It is also planned to create a Supervisory Board. Its main function will be to provide recommendations to the Board within the framework of the Agency's activities. In order to increase the transparency and efficiency of the Agency's work, including a better application of economic analysis, the office of the Chief Economist ("chief economist") has been created, in addition to a digitalization office.

In general, all that the Agency for the Protection and Development of Competition of Kazakhstan plans to implement will be built on the basis of new approaches and around the focal point associated with the demonopolization of the economy. At the same time, despite the great work ahead, the antimonopoly authority of Kazakhstan is ready for ambitious reforms taking into account the best practices of the OECD countries. Therefore, the Agency highly appreciates the support of the OECD RCC in transferring the best foreign practices in the field of protection and development of competition.

NEWS FROM THE OECD

OECD Competition Week 28 November – 2 December 2022

Tommaso Majer
Competition Expert, OECD

The roundtables held by the OECD Competition Committee from the 28th of November to the 2nd of December 2022 tackled critical policy questions for competition authorities around the world. The unprecedented increase in energy prices caused by the Russian invasion of Ukraine and the return of double-digit inflation after decades of stable prices have triggered calls for action for competition authorities. Two roundtables discussed the role of competition authorities facing high energy prices and high inflation.

Other roundtables covered data screening tools for competition investigations, the relationship between foreign direct investment screening and merger control and the disqualification of directors and exclusion of bidders. The Global Forum on Competition focussed on the growing debate about the goals of competition, the relationship between competition, subsidies and trade, the interaction between competition authorities and sector regulators, and, finally, remedies and commitments on abuse of dominance cases. This article provides a brief overview of the discussions during these roundtables.

The Working Party 2 discussed challenges faced by **energy markets**. While this was the eighth roundtable on energy since 2000, the Russian invasion of Ukraine led to high energy prices that triggered a wide range of policy measures. Most competition authorities are actively involved in identifying measures to bringing down energy prices. Many factors are affecting market dynamics. For example, the role of state-owned firms in global energy markets, how energy is transported or stored, and the inelastic demand that make supply shock have large impact on prices for consumers.

Governments have implemented several policies to curb their impact. Supply-side measures included price caps, widening the range of exporters, and increasing the effort to fill gas storage facilities. Demand-side measures aimed at reducing dependence on fossil fuel (specially gas), coordinating demand, exerting buyer power, and introducing time-dependant prices (for example in the UK). In addition, some jurisdictions introduced redistributive measures aimed at supporting vulnerable households and financed by windfall taxes.

The transition to net zero also poses challenges to disrupting market dynamics. In fact, the current pricing mechanism, combined with the decreasing trend in the marginal costs of renewables and their increased use pose risks to reduce the incentives to invest in new sources of renewable energy. While globally we are we are far from that, some countries are getting closer. What should competition authorities be aware of? The roundtable discussed that the presence of large providers increases the risks of abuses of market power and that the incentives to misbehave have increased, for example because more players can benefit from withholding production. And technology (eg, algorithmic trading) may exacerbate the problem.

The Working Party 3 discussed **data screening tools for competition investigations**. The roundtable covered i) cartel screening techniques, ii) the quality and access to data to be screened, iii) the value and risks of publicising cartel screens and iv) competition authority staff requirement for screening. The discussion showed that competition authorities are at different stages in developing such tools and it highlighted the value of inter-agency co-operation in developing and applying screening tools. During the roundtable countries shared their experience in using such tools. There was broad agreement among delegates on the importance of data quality, the need to have aggregate data sources, the need to have tools and resources to clean data and to analyse the unstructured format of documents.

The Competition Committee covered a range of topics, including the **disqualification of directors and the exclusion of bidders**. These are two debarment measures aimed at excluding individuals or companies following a violation of competition law. These measures may vary significantly in their design and application across countries. Delegates agreed that these measures deter from engaging in anti-competitive behaviour and preserve the integrity of the tender.

However, these measures also raise challenges, for example related to i) the standard of proof applied to the assessment to debar a director or exclude a bidder, ii) the impact on the exclusion on market dynamics, and iii) the co-ordination of the exclusion of the bidder with other detection and sanctioning tools. Competition agencies have an important role in ensuring that the use of such measures does not have a negative impact on competition.

Another roundtable of the Competition Committee covered the relationship between **competition and inflation**. This is currently a highly debated topic. Delegates discussed the role of the competition in reducing inflation and whether competition policy can be used to help in fighting increasing prices. Delegates broadly agreed that anti-competitive conduct can worsen inflation and that competition can reduce inflation over the longer term.

Delegates discussed whether the market concentration exacerbate or not the impact of shocks on the demand or the supply. For example, if inflation is used by firms to hide anti-competitive conduct, competition policy can provide some help, for example in markets where firms may find it easier to increase prices in a co-ordinated way. This may be because customers are less likely to complain when price increases are widespread. Advocacy can also be used to fight inflation. For example, some countries highlighted the importance of tools such as market study to investigate the drivers of price increases.

The Competition Committee (jointly with the Investment Committee) held a hearing to discuss the **relationship between FDI screening and merger control**. While merger control is well established among OECD members (e.g., the share of jurisdictions has increased from 45% in 1990 to 98% in 2022 and the share has been stable over the last years), there have been significant changes in FDI screening. Among other causes, this is due to the emergence of investors from jurisdictions that are not traditional partners of advanced economies and the increasing role of the state in foreign investment.

The hearing discussed the recent trends on foreign direct investment (FDI) screening and the reasons for the introduction of new screening mechanisms and the expansion of new ones. FDI screening and merger control pursue different goals. However, they may not be necessarily in conflict with each other, as it is possible that the protection of competition achieves security objectives. For example, both review mechanisms have concerns regarding single-supplier risks. Other circumstances may create conflicts, for example where the exclusion of certain potential acquirers leads to less competitive markets. Delegates were in broad agreement that, while such conflicts have not raised so far, it is possible that tensions become more common in the future, given the increased use of FDI screening mechanisms.

The first session of the Global Forum on Competition focussed on the growing debate about what the **goals of competition policy** should be. While many jurisdictions focus on promoting and protecting the competitive process, others consider competition policy as a tool to achieve other objectives such as fairness, growth, and pluralism. The panel explored the contribution competition policy can make to other welfare-enhancing policies (for example, how can competition law enforcement contribute to employment, gender equality, sustainability, or financial inclusion?) and how competition policy can be implemented in a coherent way, providing legal certainty.

The second session of the Global Forum focussed on the **relationship between competition, subsidies, and trade**. Trade has been discussed several times at the Global Forum because it is, together with competition, an important ingredient of policies aimed at stimulating economic growth. However, recent trade liberalisation policies have been sometimes criticised for negatively affecting competition and market dynamics. The session also looked at subsidies, that while can be justified by public policy objectives such as COVD-19 recovery or encouraging the green transition, may also distort the level playing field.

The session focused on the role of competition authorities to mitigate the negative effects of subsidies on competition, specifically regarding competition enforcement cases. The speakers discussed i) the recent trends in the use of subsidies and the implications for trade and competition, ii) the potential distortionary effects of government support and recent practices, and iii) the potential exclusionary effects of state subsidies by creating the ability and incentives to predate.

The third session of the Global Forum discussed the **interaction between competition authorities and sector regulators**. In many jurisdictions, the work of competition authorities may overlap with the work of sector regulators. This creates the potential for reaching inconsistent decisions and increase uncertainty of market participants. For this reason, co-operation is crucial. The roundtable discussed how co-operation between different bodies works in theory and how it is applied in practice, focussing on enforcement cases (rather than advocacy initiatives).

Delegates presented their experience of co-operating with sector regulators, describing different institutional designs, main legal tools and how these work in practice. In the most common set-up, competition authorities are stand-alone bodies responsible for competition enforcement in all sectors. However, some jurisdictions use models that aimed at facilitating co-operation, for example using regulatory authorities with competition powers or using concurrency arrangements.

The final session of the Global Forum focussed on **remedies** (imposed by a competition authority) **and commitments** (offered by the firms voluntarily during an ongoing investigation) **in abuse of dominance cases**. This is an important topic, because, while the number of abuses of dominance cases with settlement or commitments has declined globally since 2015, detection of abuse of dominance alone has limited positive effects if the remedy action is ineffective.

Delegates discussed the legal tools available to competition authorities as well as what worked well, and the challenges faced. The discussion also touched upon the design of optimal remedies, the optimal use of commitments and the need for competition authorities to have adequate resources and expertise.

INSIDE A COMPETITION AUTHORITY: ROMANIA

Agency Questionnaire

1. The Institution

The Chairperson

Bogdan M. Chirițoiu is the President of the Romanian Competition Council (hereinafter referred to as *RCC*). Formerly, he was State Counsellor at the Presidential Administration.

In 2021, President Chiritoiu was reappointed for his third five-year tern at the helm of the RCC.

Again, in 2021, the leadership of the institution was reinforced through the appointment of Mr. Dan-Virgil Pascu as Vice President of the RCC.

Members of the Board

Since 11 November 2022 the RCC's Board has had 3 vacancies out of its 7 positions.

Two members of the Board, namely Mr. Bogdan M. Chirițoiu, President and Mr. Dan-Virgil Pascu, Vice President will complete their respective five-year-term on July 13, 2026 whereas the other two Board members, Competition Counsellors Mr. Laszlo Gyerko and Mr. Dan Ionescu will complete their five-year-term on July 6, 2023.

Head of staff

Mrs. Daniela Victoria Bădilă has been the RCC's General Director since September 2015. The function of General Director is a civil service post. Formerly, Mrs. Daniela Victoria Bădilă was Director of the Consumer Goods Directorate within the authority.

Appointment system for the Chairperson and other key roles

The President, as any other member of the Plenum, is appointed by the President of Romania at the proposal of the RCC's Advisory Board, based upon subsequent endorsement by the Romanian Government, and the hearing of the candidates in the specialized Committees of the Romanian Parliament.

Decision-making on competition cases

The Board of the RCC takes the final decisions in Committees or in Plenum by majority vote.

Agency's competences in competition

- Antitrust (agreements and abuses of dominance)
- Mergers and acquisitions
- Advocacy to other public bodies
- Market studies

State aid[82]

- Other (specify): economic analysis, litigation before Courts, legal advice, advice to the high level management of the RCC and General Director, IT forensics, big data, institutional development, international relations and communication, monitoring and identification of legal obstacles faced by the Romanian undertakings on the European Single Market

Relevant competition legislation: Competition law 21/1996 republished

The provisions of Romanian Competition Law are fully modelled on the European Competition Law.

Other competences

RCC's competences outside competition in the 2020-2021 reporting period: state aid, regulatory surveillance in naval and railway transport areas, unfair competition, P2B EU Regulation (EC Regulation on promoting fairness and transparency for companies using online intermediation services), transposition of the unfair trading practices EU Directive on the food supply chain and of the EU Directive on foreign direct investment.

RCC's competences outside competition acquired in 2022: DMA, regulation of the abuse of superior bargaining position, and enforcement of the anti-speculation law.

Number of staff of the authority[83]

Total staff 2021	Case handlers	Administrative staff	Plenum assistance Unit	Managers
347	230	78	7	32
Total staff 2020	**Case handlers**	**Administrative staff**	**Plenum assistance Unit**	**Managers**
343	233	73	7	30

Number of staff working on competition

It should be noted that we cannot provide the figures of non-administrative competition staff allocated to the different areas of competition enforcement as requested. This is due to the mixed structure of RCC, i.e., a prevalent industry based-structure (three directorates dedicated to consumer goods, services, and energy and industry sectors), a horizontal structure, i.e. the Cartel Unit, a rather new Directorate dealing with monitoring and identification of legal obstacles to competition, and a regional structure (regional offices covering all 41 counties).

82 In its practice and interaction with international media, RCC prefers to regard state aid as a competence outside the competition area. That is why it is listed under other competences carried out by the RCC and disregarded under this classification.

83 The statistics provided in the table are also available in the 2020 and 2021 RCC Annual Reports.

Table 1 Number of staff working on competition in 2021[84]

Type of unit	Total staff working on competition enforcement	Management	Competition Inspectors (NAC Staff)	Paralegals (Non-civil servant staff)
	No.	No.	No.	No.
General Director's Office	5	1	3	1
Competition Units and Directorates	74	4	66	4
50% of Territorial Directorate in charge of competition (including territorial inspectorates)	38	1	34	4
Legal Directorate	21	3	16	2
Research Directorate (including Chief Economist Unit, IT forensics, big data and institutional development)	31	4	24	3
External Affairs Directorate (including Advocacy Unit)	24	3	12	9
Office of the President and Plenum Assistance Unit	15	1	3	11
Classified Documents Unit	1	0	1	0
Directorate for monitoring of competitive environment	11	2	7	2
Total staff working on competition (excluding administrative staff, internal audit, staff allocated to railway and maritime transport regulation, 50% of the Territorial Directorate strictly in charge of state aid and unfair competition)	221	19	166	36

Table 2 Number of staff working on competition in 2020[85]

Type of unit	Total staff working on competition enforcement	Management	Competition Inspectors (NAC Staff)	Paralegals (Non-civil servant staff)
	No.	No.	No.	No.
General Director's Office	4	0	3	1
Competition Units and Directorates	81	5	69	7
50% of Territorial Directorate in charge of competition (including territorial inspectorates)	43	1	39	3
Legal Directorate	23	3	18	2
Research Directorate (including Chief Economist Unit, IT forensics, big data and institutional development)	39	4	31	4
External Affairs Directorate (including Advocacy Unit)	21	2	15	4
Office of the President and Plenum Assistance Unit	15	1	3	11
Classified Documents Unit	3	0	1	2
Directorate for monitoring of competitive environment	10	2	7	1
Total staff working on competition (excluding administrative staff, internal audit, staff allocated to railway and maritime transport regulation, 50% of the Territorial Directorate strictly in charge of state aid and unfair competition)	239	18	186	35

Accountability

The RCC is an autonomous administrative authority. It has a legal obligation to issue an annual report regarding its activity that is made publicly available. The RCC can provide information about its field of activity to the Government, the Parliament, the public and the international specialised organisations without prior approval of any other authority.

84 The statistics are available in the 2021 RCC Annual Report, and also in the Global Competition Review, 2022 Annual Survey on Rating Antitrust Enforcement worldwide.

85 The statistics provided in the table are available in the 2020 Annual Report.

2. Antitrust enforcement over the last 24 months

Cartels

Number of cases

Infringement decisions	13
- With fines	*13*
- Without fines	*0*
Non-infringement decisions	3
Other (specify)	1 commitment decision
TOTAL	**17**

Fines

Total sum of cartel fines: RON 732,523,938 (EUR 150,120,730[86])

Leniency applications

7: 5 leniency applications out of which 3 leniency applications for type 1A immunity in 2021, and 2 leniency applications (for type 1A immunity) in 2020.

Dawn raids

13 cases involving possible cartels[87].

Main cases

The immunoglobulin cartel case

In a landmark decision, the Romanian Competition Council (RCC) has sanctioned five pharmaceutical companies, including suppliers of immunoglobulins and other medicinal products derived from human plasma, and an association representing the industry with fines totalling approximately EUR 71 million.

In 2018, the RCC initiated its investigation, aided by authorities in Italy and Belgium, finding that between 2015 and 2018 the five companies adopted a coordinated strategy aimed at limiting and even interrupting the supply of immunoglobulins to the Romanian market in order to put pressure on state authorities to suspend the clawback tax for medicinal products derived from human blood or human plasma.

One of the particularities of the case is that the fined undertakings are headquartered in Switzerland, Germany, Belgium and Italy, but not in Romania.

Another particularity of this case is that the association facilitated anti-competitive practices, and went beyond the scope of an association by attempting to influence the legislative process in Romania for the benefit of other suppliers.

Eggs market – Cartel within a professional association

In 2018, the RCC initiated an ex-officio investigation regarding a possible cartel on the retail and/or production market of eggs in Romania in the context of price increases at the end of 2017. The analysis revealed that Toneli Holding SA, Avicola Lumina SA, Super Eggs SRL, Avicola București SA, Albatros Gold SRL, members or their representatives within the board of directors of the Romanian Poultry Producers Association for the eggs sector, with the facilitation of this association, had conducted an anticompetitive practice on the Romanian retail and/or production eggs market between 2001-2018.

The general objective was to increase prices, by controlling the internal market, through restriction of supply, thus eliminating competition between undertakings.

Avicola București SA acknowledged its participation in the anticompetitive practice and benefited from a fine reduction. In addition, the competition authority imposed several mandatory measures on the Romanian Poultry Producers Association:

1. not to disclose to its members individualized data, but only aggregate information at the association level;
2. to provide full access to this aggregated information to unrelated undertakings requesting access in order to prepare their entrance to the market;
3. to inform partners about changes of the information system within the association.

In this case, the total value of fines imposed by the RCC was 13,471,039 lei (approx. 2.78 million euros) for violating both the national and the community competition law.

Rollers and garland rollers market – Cartel – bid-rigging

In 2019, the RCC initiated an ex-officio investigation regarding the anticompetitive behaviour of six undertakings on the Romanian rollers and garland rollers market.

In the context of the public procurement procedures organized between 2017-2018 by Complexul Energetic Oltenia SA and Centrala Electrică de Termoficare Govora SA for rollers and garland rollers purchasing, the competition authority had been notified by Complexul Energetic Oltenia SA about the fact that the companies associated themselves in order to share the market.

Following the investigation, it was established that the 6 undertakings united in order to participate with a common offer at 12 public procurement procedures organized by Complexul Energetic Oltenia SA and Centrala Electrică de Termoficare Govora SA between April 2017 and February 2019.

In most of the public procurement procedures, there was no competition during the analysed period, the only bidder being the association of 5 or 6 companies involved, with the exception of the procedure in which an association of 4 undertakings participated (Uzina Rominex SRL and Prelmet SA were not part of this association).

The parties involved were competing undertakings. In this case, each of the companies met the conditions in order to submit individual bids or bids of associations of fewer members, in which case there would have been uncertainty in the procurement procedures and, consequently, competition.

Therefore, 6 companies which concluded a concerted market share agreement involving price fixing elements on the rollers and garland rollers market were sanctioned by the competition authority with a total fine of 2,521,087 lei (around 521,000 euros).

86 Calculated based on the average EUR/RON exchange rate in 2020, respectively in 2021.
87 One of these cases is also envisaging a possible abuse of dominant position.

Non-cartel agreements

Number of cases

Infringement decisions	-
– With fines	-
– Without fines	-
Commitment decision	1
Non-infringement decisions	-
Other (specify)	-
TOTAL	**1**

Dawn raids

2 cases involving possible anticompetitive vertical agreements.

Abuses of dominance

Number of cases

Infringement decisions	2
With fines	*2*
Without fines	*0*
Commitment decision	2
Non-infringement decisions	0
Other (specify)	0
TOTAL	**4**

Fines

Total sum of abuse of dominance fines: RON 62,326,309 (EUR 12,779,899[88])

Dawn raids

10 cases involving possible abuses of dominant position[89].

Main cases

Delgaz abuse of dominant position case

The RCC sanctioned Delgaz Grid SA, a member company of the E.ON group, imposing a fine of about 30 million lei (approximately 6.1 million euros), for violating the national competition law by committing an abuse of dominant position on the market of services related to natural gas distribution, respectively on the market of technical verification and revision services of natural gas installations within the distribution area of Delgaz Grid SA.

Following the investigation launched in 2018, the RCC established that, between 10.03.2015 and 04.12.2018, Delgaz Grid SA, as a natural gas distributor, abused its dominant position by refusing access to authorized economic operators to an essential facility regarding the registration of records of technical verification/revision works in the distributor's database, discriminatory conditions being created for companies present on this market compared to the operator from its own group.

The market affected by the abuse of dominant position was defined as the market for the verification and overhaul services of indoor natural gas installations, a market in which Delgaz Grid SA was not present, but in which another member company of E.ON Romania operates.

Since 2009, the activities of verification and technical revision of natural gas installations had been carried out in competitive conditions by the authorized economic operators and selected by the final customer.

The anticompetitive actions undertaken by Delgaz Grid SA affected the market of technical verification and overhaul services provided in its distribution area, by limiting the access of economic operators in this market and preventing their development, and the consumers, by restricting the possibility to choose the providers of technical verification/revision services and by increasing the expenses with such services.

At the same time, according to the provisions of the Energy Law, as the dominant operator in the natural gas distribution market, in the areas where it owns the distribution network, Delgaz Grid SA had a special obligation to ensure non-discriminatory treatment to companies operating in related markets, avoiding favouring in any way companies that were part of the same group.

Delgaz Grid SA fully acknowledged the anticompetitive practice and benefited from a reduction of fine.

88 Calculated based on the average EUR/RON exchange rate in 2020, respectively in 2021.
89 One of these cases is also envisaging a possible cartel.

3. Judicial review over the last 24 months[90]

Outcome of judicial review in 2020-2021

No.	Year	Court	Entirely favourable judgements (decision entirely upheld):	Favourable judgements but for the fines[91]:	Partially favourable judgements[92]:	Negative judgements (decision overturned):	TOTAL:
1	2020	Supreme Administrative Court	33	1	-	9	43
2	2021	Supreme Administrative Court	56	3	-	5	64
TOTAL Supreme Administrative Court 2020-2021	**89**	**4**	**-**	**14**	**107**		
1	2020	First Instance Court	23	2	-	3	28
2	2021	First Instance Court	52	4	-	6	62
TOTAL First Instance Court 2020-2021	**75**	**6**	**-**	**9**	**90**		

Main sentences

The Energy Holding SRL case

By Decision No. 82/2015, the Romanian Competition Council found that Hidroelectrica SA, one of the main electricity producers in Romania, and some of its customers, including Energy Holding SRL, participated in an anti-competitive agreement consisting in limiting the marketing of electricity to other electricity suppliers and/or other eligible consumers in Romania, as well as limiting other producers from marketing to Hidroelectrica's contractual partners.

These agreements generated a vertically integrated market structure, such as to affect competition on the Romanian electricity market, without any positive effects having prevailed over the negative ones.

On the other hand, Energy Holding together with Alpiq Romindustries SRL and Alpiq Romenergie SRL coordinated their competitive behaviour during the course of long-term contracts concluded with the electricity producer Hidroelectrica SA in order to establish trading conditions, including the related prices, and there is evidence of this both in 2006 and between 2009 and 2012.

For the two infringements of competition law found against Energy Holding SRL, the Competition Council imposed a fine of 12,359,852 lei.

Energy Holding brought an action for annulment before the Bucharest Court of Appeal against Competition Council Decision No. 82/2015.

The Court dismissed the enterprise's application, upholding the Competition Council's decision in its entirety, as regards the infringement and the fine.

The Court held that Energy Holding SRL's infringement of the competition rules had been proved to the legal standard of proof, the documents on file showing that the agreements had been concluded for periods exceeding 10 years in many cases, and that their implementation entailed an increase in the quantities of electricity initially contracted and an extension of the contractual terms.

At the same time, the court pointed out that the selection of contractual partners by Hidroelectrica SA, including Energy Holding SRL, was made in the absence of objective criteria and/or economic considerations, given that Hidroelectrica SA refused approximately 458 requests for tenders during the period under review.

Energy Holding SRL appealed the judgement of the Bucharest Court of Appeal.

The High Court of Cassation rejected the company's appeal, with the consequence of maintaining the Competition Council's Decision No. 82/2015 as regards the infringement and the fine imposed. The decision handed down in the Energy Holding case was the first to confirm, definitively, the infringement established by Competition Council Decision No. 82/2015.

4. Merger review over the last 24 months

Number of cases

Blocked merger filings	0
Mergers resolved with remedies	4[93]
Mergers abandoned by the parties	5[94]
Unconditionally cleared mergers	131
Other (specify)	0
TOTAL CHALLENGED MERGERS	135[95]

90 The information presented below has been extracted from the 2021 Annual Report of the Romanian Competition Authority
91 In these cases, the court upheld the offence on the merits, but reduced the fine.
92 Partially favourable decisions of the Competition Council in which the fine was reduced are listed in section 2 of these statistics, "Favorable judgements but for the fines"
93 Cleared with commitments.
94 These 5 cases required no formal decision of the Competition Council.
95 Total number of merger cases finalized by formal decision.

Main cases

Glovo-Foodpanda case – Merger with commitments

The Competition Council authorized with conditions the transaction through which Glovoappro SRL took over the company Foodpanda Ro SRL and, indirectly, the Pandamart business, operated by Delivery Hero Dmart SRL.

Glovoappro SRL is the Romanian subsidiary of Glovo, whose main activity involves the development and administration of online food delivery service from restaurants to consumers through the platform bearing the same name. Also, the company carries out activities for taking orders and delivering other consumer goods (such as food, flowers, alcohol and tobacco, pharmaceuticals, toys, childcare products, books, etc.) provided by sellers, such as supermarket chains or local shops.

Foodpanda Ro SRL and Delivery Hero Dmart SRL are part of a group of companies owned by Delivery Hero SE, Germany.

Foodpanda Ro SRL provides online order picking and restaurant delivery services through the Foodpanda online service (application and website). In addition, Foodpanda Ro SRL has recently included other consumer goods (such as food, flowers, alcohol and tobacco, pharmaceuticals, toys, childcare products, books, etc.).

The merger created an opportunity for the competition authority to identify and define a relevant market that has not been analysed in the past. Thus, the relevant market for online food delivery platforms had been defined.

As a result of the analysis, a number of concerns were identified regarding the market power that Glovo was acquiring as a result of the transaction and the effect that this could have on its competitor's access to customers.

The transaction was authorized subject to compliance with commitments made by Glovoappro SRL in order to eliminate the identified competitive concerns.

Following an analysis of the information from this merger, the RCC informed the EC on its suspicions on a possible market sharing between the two undertakings. Subsequently, the EC opened an investigation on an alleged market sharing cartel.

5. Advocacy over the last 24 months

Regulatory approval

In 2021 and 2022, the RCC continued good institutional cooperation with the Government, the Parliament, the relevant ministries, and other authorities or public institutions, in the process of normative approval. The main measures aimed to fight the effects of the COVID-19 pandemic and the energy crisis that resulted from the Russia-Ukraine armed conflict. The RCC issued 511 opinions/viewpoints, with an increase in the degree of acceptance of the comments and recommendations.

Results: The RCC has significantly contributed to the awareness and promotion of competition or state aid rules among institutions that initiate public policy projects or normative act projects.

Initiation of normative acts

The RCC has carried out significant activities in terms of the legislative initiative consisting in the elaboration of draft normative acts with the ministries and public authorities, in order to ensure a pro-competitive and fair regulatory framework. The RCC has acquired new powers, becoming the implementing authority for European directives and regulations. The RCC has new mandates in the digital sector, respectively the monitoring of online platforms, the agri-food trade sector, respectively the application of the directive on the sanctioning of unfair competition practices in the agri-food chain, as well as the application of the Regulation on the authorization of foreign investments from outside the EU. Also, the RCC, the ANPC and the ANAF acquired control powers in order to fight speculative actions leading to unjustified price increases.

Results: OUG 84/2022, OUG 23/2021, OUG 46/2022, Law 81/2022, HG 1326/2022

Institutional cooperation

Regarding inter-institutional cooperation, during the reporting period the RCC updated the current protocols and initiated new relevant protocols to improve institutional activity.

Results: Collaboration protocols with: MIPE, MAT, Univ. Şollab cel Mare Suceava, Univ. Vasile Alecsandri Bacău. Discussions were initiated for the renegotiation/amendment/conclusion of some protocols with ANPC, BNR, Chamber of Deputies, Senate, INS, MTI.

6. Market studies over the last 24 months

Main initiatives

In 2020-2021, the RCC finalized;

- 3 sector inquiries (author rights and related rights, medical waste and recording/registering of mortgage endorsements/other collateral);
- 2 studies (the effects of the BigData platforms over competition, and human, veterinary and accounting/expertise services.

Interview with the Chairperson

Dr. Bogdan Chirițoiu has been President of the Romanian Competition Council since 2009.

In 2019, Bogdan Chirițoiu became a member of the Administrative Board of the European Agency for the Cooperation of Energy Regulators.

From 2005 to 2009 he served as Presidential Advisor and he was the Head of the Romanian Delegation to the EU Economic Policy Committee.

In 2008, he received his PhD in Economics (International Economic Relations) at the Academy of Economic Studies in Bucharest, developing a thesis on Public Health Insurance Systems in the CEE States. Bogdan Chirițoiu has an MA in political science (Central European University, Budapest, 1997) and an MSc in European Studies (London School of Economics and Political Science, 1998).

Dr. Bogdan Chiritoiu has been a lecturer on Public Administration and European Studies at the University of Bucharest since 1999. He is a member of several Romanian and European think tanks: the Romanian Society of Political Science, the Network of Institutes and Schools of Public Administration in Central and Eastern Europe – NISPA CEE, the Aspen Institute of Romania, and the Romanian Academic Society.

1. What are the main challenges that your authority is facing? What are your priorities for the near future?

Romania has similar challenges to the rest of Central and Eastern Europe: inflation, high wage demands, high energy prices and complaints on alleged cartels and price gouging issues in a series of industries including basic food, fuel, energy and motor vehicle civil liability premiums, which are not always borne out by the detailed investigations.

The Romanian Competition Council (hereinafter referred to as *RCC*) is focusing on its mandate (such as for example recently investigating a potential collusion of banks to fix interest rates), and introducing new tools to address the current climate such as expanding the law on unfair competition, but we are also cooperating with the Government as much as we can. For example, we managed to impose successful limits on recent energy price freezes by calling for some competitive market mechanisms to be maintained, and at the same time imposing a one-year review timeframe for the temporary measures.

As regards our core activity, antitrust, I would like to see an increase in the speed of our investigations as well as the ex-post assessment of the impact of our antitrust and merger decisions. Another priority in the current context is to support smaller players that are disproportionately affected by large structural market shifts by making use of the recently adopted legal framework regulating the notion of superior bargaining position (SBP), the abuse of which constitutes an unfair competition practice. We are also increasing our vigilance and price monitoring with respect to war – the impacted products include sunflower oil and grains, and we are constantly monitoring the availability of supply. We are also looking closely at food, fuel and gas in the retail market through the Price Monitoring online tool we have developed for consumers.

Also, the implementation of the cooperation mechanism provided for in the EU Regulation on the screening of foreign direct investments requires our active engagement in the coordination of the process of FDI screening on grounds of national security along with the competitive assessment of merger. As a complement, we are promoting structural reforms and sound corporate governance practices in the economy in view of the OECD standards, including improving the management of state-owned companies.

Internally, we will continue to implement our Big Data Project in order to begin specific data analyses to support our work in identifying bid rigging.

At the international level, the opening of the accession negotiations with Romania to join the OECD offers a new vehicle for strengthening our competition regulatory regime and the applicable legislative framework. We have completed the self-evaluation of 11 legal instruments and have voluntarily offered cooperation and contribution to many other legal instruments.

2. What are the points of strength and of weakness of your authority?

Strengths

I consider that **we have good rules in place to guarantee the independence of the RCC.** Here I am referring to the current process for appointing the President and the Board, which guarantees stability and independence, as well as an adequate professional scrutiny for the candidates involved. Another asset is that we have managed to reap one of the benefits from Romania's accession to the EU by **exercising and strategically capitalizing on our role of national contact point between Romanian state aid grantors and the EC and, implicitly, our advisory role to the Government**.

We have also demonstrated our capacity to adapt quickly. Nowadays, the RCC performs duties in areas related to its core activity, i.e. antitrust and state aid covering railway and maritime transport regulation, unfair competition with regard to digital and agricultural areas, and more recently, the implementation of the EU Regulation on Foreign Direct Investments.

We are also benefitting from valuable resources such as highly qualified staff and continuous digitalization of our activities.

We benefit from all necessary powers to exercise our preventive, enforcement and monitoring functions and an innovative and diversified toolbox of mixed legal instruments.

We have always done our best and succeeded in exercising a strong capacity to influence the regulatory framework on numerous occasions.

Additionally, I would like to stress our early involvement in the regulatory process. For this to happen, we have taken a series of measures such as implementation of the OECD competition checklist in the methodology for elaboration, implementation and assessment of public policies by the central administration in 2010, participation in preparatory Governmental meetings, and assistance granted to law makers. As a result, the vast majority of our opinions are taken into consideration even though our opinions are advisory.

Second, we are pursuing an intense stakeholder engagement with business associations and various sector regulators to facilitate information exchange and to have a common approach to competition rules.

Weaknesses

I would like to highlight the wage level and status of our employees, and the struggle to keep up with private sector wages. If this structural imbalance is not addressed, we could be losing some of our internal talent with an obvious impact on our work.

With respect to our situation in the broader political economic context, there is a great need, on the one hand, to explain our independence, and on the other hand, our role in protecting competitive markets. As populist and less knowledgeable stakeholders are arguing for price ceilings, we have to explain the danger of shortages and blocked markets.

We also have a specific challenge, like many other EU Member States, with respect to energy retail prices, as winter is virtually here, and the calls are growing stronger and stronger to protect consumers. More specifically, we must be able to target energy support for vulnerable consumers and preserve market mechanisms, especially in the wholesale markets. Internally, an additional weakness we are working on is the duration of our investigations, which we are striving to reduce.

3. Over the last two years, which decisions adopted by the authority made you particular proud, and what were the cases that could have been conducted better?

I am highlighting the following decisions not in view of the absolute size of the fine imposed, but because of their individual structural elements, and how consequential they were on those respective markets:

Immunoglobulin cartel, since it was a complex cartel limiting trade, with dawn raids conducted by the RCC in cooperation with its peers in Italy and Belgium and in which high fines targeted non-residential companies;

Eggs cartel; The main particularity of the case is that competition was restrained by coordinated actions of trade policies regarding delivery of products under the umbrella of a professional association;

EMAG case; It is a pioneer digital case on self-preferencing that fits the current trends in prevalent types of abusive conduct sanctioned at EU level;

Cartel for fixing prices of agricultural equipment, including those sold to EU-funded projects, involving a pair of machinery producers and seven distributors. It is a landmark case due to its particularities: a complex cartel case initially involving multiple parties, launched following clues coming from whistle-blowers in which the necessary evidence also required information from the regulator in the field.

With respect to the cases that could have been conducted better, we recently had a non-favourable final decision adopted by the Supreme Court in the Romanian Lottery case, which repealed a 9.02 million euro fine imposed by the RCC in 2013 against the main incumbent. The RCC decision retained that the Romanian Lottery, jointly with other three companies, reached an agreement concerning the implementation of a video-lottery program in Romania, by means of a non-competition clause within the supplier credit contract.

I also acknowledge a very recent European Court of Justice preliminary ruling in a request referred by the Romanian Supreme Court in the proceedings between Zenith Medica Communications and the RCC as to observance of the proportionality principle by the RCC in the individualization of fines imposed. The proceedings envisaged a 2014 RCC decision imposing a fine on that company.

The ECJ ruled that to calculate the fine imposed on an undertaking for infringement of Article 101 TFUE, a national competition authority is required to take account of the real economic situation of the sanctioned undertaking, and not necessarily the turnover reported to the tax authority.

In another instance, as we are building our capacity by negotiating binding commitments from companies which are then monitored to instil behavioural changes, we took a rather long time in negotiating and agreeing to commitments by Bucharest Airports (operator of two large airports in our capital city) and two other undertakings. The case required consultation and active cooperation with the European Commission, and the positive result was the opening up of 30% of the market for food and beverages services in the airport.

4. What is the level of competition awareness in your country? Do policymakers consider competition issues? Is competition compliance a significant concern for businesses?

The level of competition awareness in our country is, in general, satisfactory. For instance, we have made a series of achievements as a result of putting into place a registry for monitoring compliance with our viewpoints, recommendations and proposals.

Our whistle-blower program contributes to an improving competition culture and it is functioning well. Over the last years, we have opened a series of investigations based on information provided by whistle-blowers (160 complaints in 2021, up from 124 the year before).

We have the necessary methods and means in place to ensure that policymakers take into consideration competition issues. For instance, in cooperation with the Public Procurement Authority, we issued in 2020 a common opinion on the opportunities available to cartel offenders to restore credibility before the regulator as a means to participate in public tender procedures.

Further, to support the contracting authorities / entities that make the assessment on rehabilitation, the RCC publishes on its website an updated blacklist which includes the names of the undertakings involved in cartel investigations concerning bid rigging and the decisions establishing the infringement.

We have adopted a rather rewarding approach with regard to Competition Compliance. First, in order to help undertak-

ings adopt a compliance approach, the RCC published three guides, namely the "Guide on Compliance with Competition Rules", the "Guide on Compliance with Competition Rules by Business Associations" and the "Guide on Detection and Deterrence of Anti-competitive Practices in Public Procurement Procedures".

Second, an effective compliance programme in place is considered a mitigating factor in the individualization of fines for antitrust offences. We have made use of this legal provision in quite a few cases.

We could also look at **competition compliance in figures.** According to the results of a market study96, the practice followed by competition authorities is predominantly essential in the following sectors: energy and utilities, automotive, retail and e-commerce. Still, according to the findings of the market study, 67% of companies with a turnover below 10 million EUR never organize training sessions for employees, but the percentage of compliance efforts rises with the turnover. Also, when asked if they have a compliance program in competition matters elaborated according to the requirements of the RCC, the answers were positive relating to 52% of the subjects, and negative for the remaining 48%. As to developing compliance programs, 43% of those surveyed declared that the program was made locally, with external assistance, 36% stated that it was made by the group as a specific program adapted to the company, 14% said that it was made as a general program of the business group, while only 7% developed the program locally, using internal resources.

5. If you could make one major change in your national competition law tomorrow, what would you choose?

If we could make one major change in our national competition law, we should specifically link the employment conditions and status of our employees to the economic impact of the RCC regulations.

Additionally, the implementation of the ECN+ Directive would also enable the strengthening of the Romanian Competition Council's independence from a financial point of view, apart from its main objective of increasing the effectiveness of our investigations.

6. Do you find that international and regional cooperation is helpful? Is it working well?

First, our cooperation at regional and international level is now of paramount importance since it enables a response to the current challenges in a coordinated way with regard to both antitrust and state aid policy.

Second, since 2015 Romania, represented by the RCC, has been an associate to the OECD Competition Committee and its working parties.

Third, this year is a milestone for the evolution of Romania's relations with the OECD as it marks the opening of accession negotiations with Romania.

There is still room for improvement in this area. For instance, I would like to see a consolidated engagement and leading role of the RCC in our region and in the international arena by implementing and disseminating OECD best practices, and participating in projects of technical assistance for our peers at regional level, and in the activities of the OECD Competition Committee.

7. What is your opinion about the OECD-GVH Regional Centre for Competition? Do you have suggestions for improvement?

We greatly appreciate all the activities developed over the years by the OECD-GVH Regional Centre for Competition because they offer the Romanian Competition Council and other competition authorities in the region the opportunity to expand the knowledge of their staff on tackling competition issues common in the region. However, we feel that the Centre should continue to address specific regional problems. As an institution, we prefer to focus more on building institutional resilience, promoting successful internal working mechanisms inside the institutions and exchanging best practices between national competition authorities. There should also be more support and consultation with respect to data analytics systems and mechanisms, and even a regional pooling of capabilities, or at least of training support with respect to this area.

96 Quoted on the website: https://govnet.ro/uploads/files/36_Prezentare_GovNet_7_Noiembrie%202019_Adrian%20Ster.pdf.

Key competition topics explained in a few minutes: the online competition training course

Don't miss the new online training course „Key competition topics explained in a few minutes" created by the OECD-GVH Regional Centre for Competition in Budapest! The primary purpose of this project is to create short and engaging training videos that explain key competition topics in just a few minutes building on the discussion of our RCC seminars.

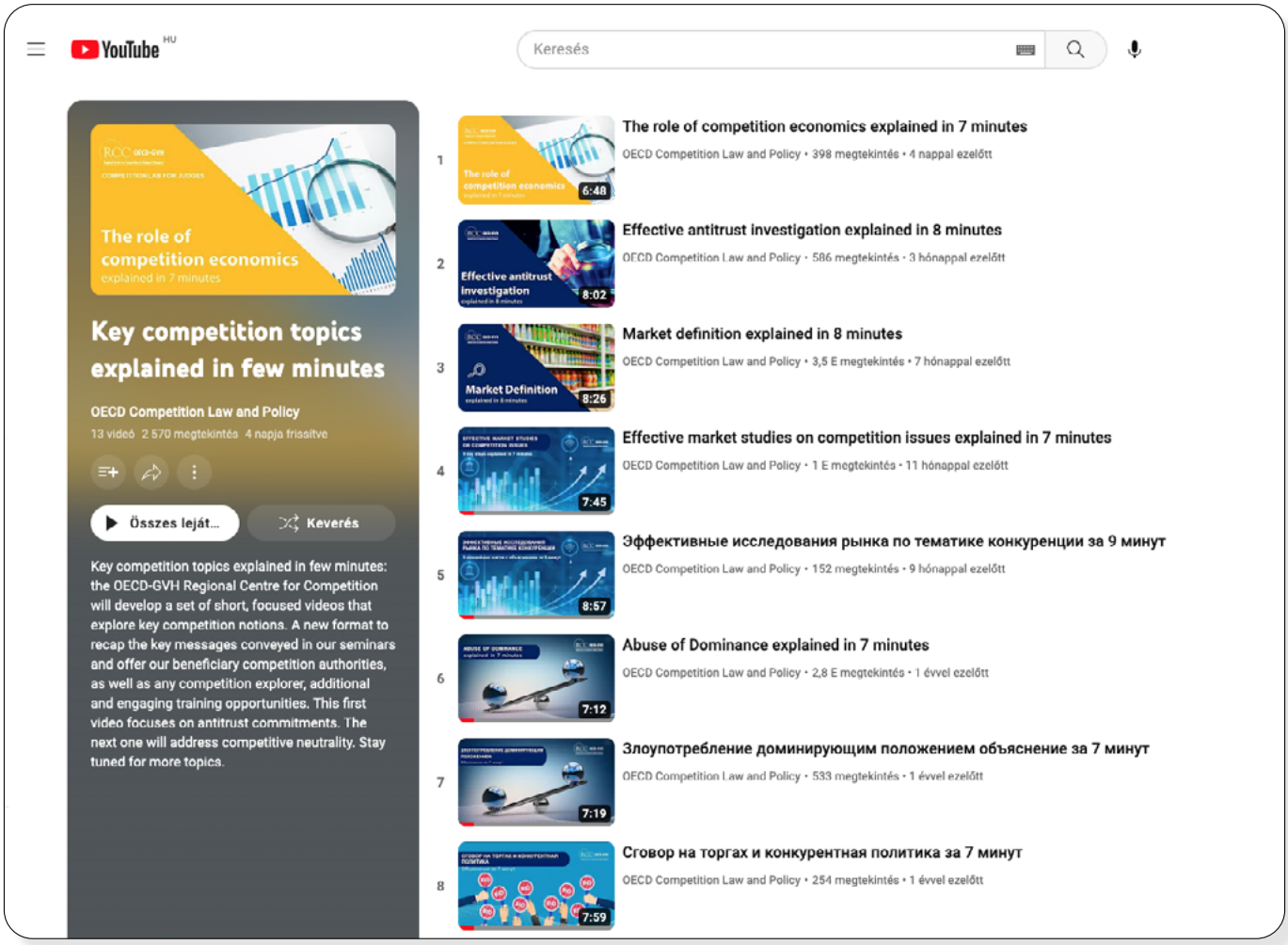
The eight videos already released address the following topics: bid rigging, abuse of dominance, market definition, competitive neutrality, antitrust commitments, the role of economics, market studies and effective investigations. They have proven extremely successful: the videos on "Bid rigging" and "Market definition" are the most often viewed OECD videos on competition, while the other videos are also quickly reaching top positions.

Https://www.Youtube.Com/watch?V=gritcq_vpeg&list=plybgvyeybnlq5nwcyuzri1-1xvmtnaf2n

Thanks to the enthusiastic support of the beneficiary competition authorities, these videos come with subtitles in up to sixteen different languages, including Armenian, Azerbaijani, Bulgarian, Croatian, Georgian, Romanian, Russian, Serbian and Ukrainian, in addition to Finnish, French, German, Italian, Portuguese, Spanish and Swedish.

Remarkably, the United Nations Economic and Social Commission for Western Asia signed an agreement with the OECD and the GVH creating the Arabic version of these training videos.

The next video will be issued in the spring of 2023 and will tackle digital challenges.



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Illustrations: Starline - Freepik.com