Are Current Competition and Consumer Regimes Fit for Purpose in the Digital Economy?

Abstract: Compared with traditional market structures, many digital markets are prone to tipping and exhibit entrenched positions of power. While market concentration may generate efficiencies, economic theory has long cautioned against the potential for fettering competition and stifling innovation. Consumer trust also risks erosion as the capacity of consumers to make informed choices may be impaired with the evolution of complex technologies.

To help inform optimal government policy in the digital economy, this paper begins by discussing the effectiveness of existing competition and consumer protection tools. The casework of many jurisdictions indicate that current competition regimes are generally versatile enough to tackle anticompetitive conduct in digital markets. Some jurisdictions, such as Germany, have elected to inject greater certainty into digital antitrust by updating their competition legislation. Moreover, consumer protection law is often technologically neutral and broad enough to cover new business models.

On closer analysis, however, one can identify at least three shortcomings in existing competition and consumer regimes which could allow market failures to perpetuate in the digital landscape. First, emerging digital technologies have the potential to exacerbate traditional forms of consumer detriments and render present consumer regimes no longer fit for purpose. Second, current merger regimes engender the systemic underenforcement of mergers between dominant digital players and start-ups with significant competitive potential. Third, the widespread accumulation of data

by dominant companies has become a structural problem in some digital markets. Approaches to incrementally address these challenges are suggested.

Finally, this paper proposes that institutional adjustments be made on both the domestic and international plane to fully unlock the benefits of digital transformation. Within national borders, the interrelationship between diverse legal regimes calls for an integrated whole-of-government approach. At the international level, there is a heightened need for international cooperation between competition and consumer authorities.

I. Introduction

Characterised by platform-based business models, unprecedented levels of data accumulation and widening information asymmetry between consumers and businesses, the digital economy behaves differently from many traditional market structures.

Most significantly, digitals markets are prone to tipping (i.e. “winner-takes-most” outcomes) due to the interplay between economies of scale and scope, network effects and high returns to data. The unique combination of these features results in many digital markets exhibiting huge barriers to entry and entrenched positions of power. This was reflected in a high-level assessment by the Digital Competition Expert Panel in the UK (“**UK Report**”) which concluded that many digital markets are dominated globally by one or two large companies.[1]

[1] Furman (2019), *Unlocking Digital Competition: Report of the Digital Competition Expert Panel.*

While market concentration may generate efficiencies, economic theory has long cautioned against the potential for fettering competition on the merits and stifling innovation. At the same time, consumer trust risks erosion as the capacity of consumers to make informed choices may be impaired with the evolution of complex technologies.

To help inform optimal government policy in the digital economy, this paper will first discuss the effectiveness of existing competition and consumer protection tools in correcting market failures in digital markets. It will then identify inadequacies in the current legal and regulatory frameworks, before proposing institutional adjustments that are aligned with digitalisation.

II. Effectiveness of existing competition and consumer protection tools

The experiences of many jurisdictions lend support to the joint acknowledgement of the G7 competition authorities and the European Commission ("**EC**"): "recent casework shows that competition law generally provides competition authorities with the tools and flexibility to tackle anticompetitive conduct in the digital economy".[2]

For instance, through the Grab-Uber merger, the Competition and Consumer Commission of Singapore ("**CCCS**") demonstrated that its competition toolkit was sufficiently versatile to analyse distinguishing features of digital platforms. When

[2] G7 Competition Authorities (2019), *Common Understanding on "Competition and the Digital Economy"*.

defining the relevant market, CCCS recognised the multi-sidedness of ride-hailing platforms and considered the substitution possibilities available to both riders and drivers. CCCS also took into account how indirect network effects escalated barriers to entry and reinforced the incumbency of existing players; this was not offset by the ability of drivers to multi-home due to exclusivity restrictions and incentive schemes implemented by the merging parties.

Additionally, the Grab-Uber merger disclosed a powerful instrument in the arsenal of many competition authorities: interim measures. To ensure that the market remained contestable during investigations, CCCS issued interim measures directions requiring the parties to, among others, preserve pre-transaction pricing. As observed by the Competition and Markets Authority ("**CMA**") in the UK: "in fast-moving and dynamic digital markets, there is a risk that, by the time an authority has completed its investigation, competitors may have already been forced out of the market or the market may have evolved such that remedies are ineffective".[3] This reveals a critical role for interim measures to protect competitors at risk from irreversible harm through quick and effective intervention.

Reference could also be made to EC's Google Search decision, which evinces the amenability of competition regulators to depart from the black-letter law of statutes or guidelines in order to address novel anticompetitive issues on a case-by-case basis. In 2017, Google was fined for abusing its dominance on the web search market by giving prominent placement to its own comparison shopping service while demoting

[3] CMA (2018), *Modernizing Consumer Markets Green Paper: CMA Response to Government Consultation*.

the visibility of rivals. This decision brought to light the strategic gateway position that multi-market digital firms hold in one market, which they are able to leverage in adjacent markets and give themselves an unfair advantage through self-preferencing. Notably, Akman analysed the relevant case law under Article 102 of TFEU and found that the facts in Google Search did not fit into the three most likely theories of abuse: refusal to deal, discrimination and tying.[4] Singing the same tune, former president of the European Court of First Instance opined that Google Search established a new non-discrimination theory.[5]

Meanwhile, other jurisdictions have elected to inject greater certainty into digital antitrust by updating competition legislation. For instance, the German Parliament amended the Act against Restraints of Competition ("**AARC**") in 2017 to introduce new criteria aimed at assessing the market power of digital platforms (e.g. network effects) and clarify that the provision of free services did not preclude the finding of a market. This revision was intended to crystallise the recent practices of EC and the Federal Cartel Office ("**FCO**"). A transaction value merger threshold was also added to existing turnover thresholds, responding to the growing threat of "killer acquisitions" designed to eliminate young but innovative rivals with substantial competitive potential.

Germany's initiative in rooting out anticompetitive practices in the digital economy can be traced to FCO's Facebook decision. In this landmark case, FCO broke new legal ground by finding an abuse of dominance based on data protection infringements. According to FCO, Facebook's data policy, which enabled it to combine user data

[4] Akman (2017), *The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law*, Journal of Law, Technology & Policy, 301(2).
[5] Vesterdorf (2015), *Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin?*, Competition Law & Policy Debate, 4(1).

collected from various sources, violated the General Data Protection Regulation ("**GDPR**"). Since users were obliged to accept Facebook's illegitimate data policy by virtue of its dominance, the GDPR infringement constituted an abuse of Facebook's dominance. Given that better data access confers a competitive advantage in digital markets, this precedent would significantly help FCO assure their contestability. While the decision was preliminarily squashed by the German court, citing the failure to demonstrate any causality between dominance and abuse, it appears to be reinstated in a draft amendment bill of AARC.

Moreover, consumer protection law, with the goal of ameliorating economic imbalance between consumers and businesses, is often technologically neutral and broad enough to cover new business models. As an illustration, EC and EU consumer protection authorities undertook a co-ordinated sweep of e-commerce websites in 2018, revealing a series of irregularities which exploited consumer behavioural biases. These included the offering of deceitful discounts and the practice of drip pricing where additional fees are imposed along the purchasing process. This was mirrored by CCCS' market study on the online travel booking sector in Singapore, which identified concerning practices such as drip pricing and pre-ticked boxes, and culminated in the development of industry recommendations and (draft) guidelines on price transparency.

Finally, the increasing reliance on consumer law to tackle data protection issues is worth highlighting. There are strong criticisms that data protection law alone, with its informed consent model, does not sufficiently safeguard digital consumers' interests. For instance, where users have little choice but to agree to data processing as a

prerequisite for using digital services, it is doubtful that any consent given is meaningful. Consumer law can thereby fill this gap by sanctioning the scrutiny of data policies on unfairness grounds. This was illustrated by the Norwegian Consumer Ombudsman's enforcement action against Tinder for unfair user terms granting Tinder far-reaching rights and control over users' data.

III. Inadequacies in the current legal and regulatory frameworks

On closer analysis, however, one can identify at least three shortcomings in existing competition and consumer regimes which could allow market failures to perpetuate in the digital landscape.

First, emerging digital technologies have the potential to exacerbate traditional forms of consumer detriments and render present consumer regimes no longer fit for purpose. Developments in the internet of things ("**IoT**") provide a good example. As products and services become increasingly interdependent and the variety of actors evolves (e.g. product manufacturers, data analytics companies, software producers), the difficulty of ascertaining where liability lies grows. New security and privacy risks are also presented as hackers are provided with more vulnerabilities to exploit, leaving consumers dependent on manufacturers to release security patches. Additionally, the capability of IoT devices to communicate with one another and transfer data autonomously to an external partner tends to obscure how data processing occurs, thus limiting consumers' ability to identify data protection breaches and exercise their rights.[6]

[6] OECD (2019), *Challenges to Consumer Policy in the Digital Age*.

These issues, while not captured in most consumer regimes, find alignment with key principles set out in the United Nations Guidelines for Consumer Protection: effective consumer redress; protection from hazards to health and safety; and protection of privacy. An adapted legal framework which adequately addresses these issues would help promote consumer trust and bolster the uptake of IoT devices, thereby stimulating innovation and investment. California's recently enacted Internet of Things Security Law could serve as a model for intervention. By imposing a duty on IoT manufacturers to incorporate "reasonable security" measures by design, this legislation appropriately allocates the cost of IoT vulnerabilities to businesses which possess far greater resources than consumers.

Second, current merger regimes engender the systemic underenforcement of mergers between dominant digital players and start-ups with significant competitive potential. In the UK Report, it was observed that Amazon, Apple, Facebook, Google and Microsoft have cumulatively made almost 250 acquisitions over the past five years; yet none were notified voluntarily to CMA or called in for investigation.[7] Most of these acquisitions involved technology companies operating in adjacent markets, whose competitive threats have been subdued as their innovations were discontinued or used to consolidate the digital ecosystems of entrenched incumbents.

Criticising the way digital mergers are currently assessed, a study by Lear on past UK merger decisions advanced two compelling reasons for reform. The first is that it is especially difficult to identify the appropriate counterfactual when targets are young

[7] *Supra* n 1.

firms in dynamic digital markets, with the consequence that competition authorities are often unable and/or unwilling to intervene. Second, false negatives (i.e. incorrect merger clearances) can be particularly costly in highly concentrated digital markets where the main mechanism left to discipline incumbents is competition *for* the market rather than *in* the market. This makes potential competitors even more valuable than they are in traditional markets.[8]

Consequently, various remedies have evolved, each with its own challenges. Introducing a transaction value test where all mergers above a certain value are subjected to review, as was done in Germany, is unlikely to comport with the voluntary merger notification regime adopted in countries like Singapore. It also seems disproportionate to apply such a resource-intensive measure across all sectors to accommodate one difficult sector. The Stigler Committee on Digital Platforms in the US suggested a sector-specific merger regime for the digital economy that shifts the burden of proof to merging parties,[9] but the associated administrative burden and transaction costs are easy to perceive. The UK Report recommended replacing the existing "more likely that not" standard of proof with a "balance of harms" approach, which involves quantifying merger costs and benefits and their probabilities of realisation.[10] However, this would likely prove impracticable, hampering the market need for legal certainty. A proposal by the Commission "Competition Law 4.0" in Germany could provide a workable template: where digital market positions are so entrenched that competition is restricted to competition *for* the market, and there is no better-placed potential competitor, the merger should be presumed anticompetitive

[8] Lear (2019), *Ex-post Assessment of Merger Control Decisions in Digital Markets*.
[9] Stigler Committee on Digital Platforms (2019), *Final Report*.
[10] *Supra* n 1.

even if the probability of the target developing into a potential competitor is low.[11] By creating a carve-out which is clearly defined and properly delimited to the root of the problem, unnecessary transaction costs and legal uncertainty are avoided.

Third, the widespread accumulation of data by dominant companies has produced structural barriers to competition and innovation in some digital markets. This stems from how better data access precipitates self-reinforcing feedback loops: more data enables a company to improve its products and services, which will grow in demand, in turn generating a larger pool of data for future innovation.[12] Coupled with the presence of network effects, new entrants in data-driven fields would be competing against overwhelming odds.

In an attempt to liberalise the UK retail banking market, previously plagued by low levels of competition and innovation, CMA implemented Open Banking in 2018. This initiative mandated the largest banks to let customers share their account data on an ongoing and standardised basis with authorised third parties. Through targeting the data advantage of incumbent banks, Open Banking has spurred a vibrant payment services arena.[13]

In much the same way, digital markets with high data barriers to entry can benefit from sector-specific data access regulations directed at dominant firms. This is especially since existing solutions are limited. Data portability under Article 20 of GDPR is, for example, not designed to cover ongoing data transfer nor does it require parties to

[11] Commission 'Competition Law 4.0' (2019), *A New Competition Framework for the Digital Economy*.
[12] *Ibid*.
[13] Fingleton and Open Data Institute (2019), *Opening Banking, Preparing for Lift Off*.

develop standardised formats for effective data processing.[14] Moreover, while refusal to supply data access by dominant undertakings can constitute abuse under current competition frameworks, the threshold for intervention is typically very high and proceedings tend to consume considerable time and resources.

IV. Institutional adjustments aligned with digitalisation

In parallel with the incremental adaptation of current legal frameworks to digitalisation, it is proposed that institutional adjustments be made on both the domestic and international plane to fully unlock the benefits of digital transformation.

Within national borders, the interrelationship between competition and consumer laws and other legal regimes calls for an integrated whole-of-government approach in the digital economy. Progress in one sphere must not be made at the expense of another; synergies should be exploited where possible. Rather than attempting to resolve issues in silos, competition regulations should collaborate with relevant agencies at an early stage to ensure coherent policy across all areas. A solution suggested by the UK Report is to establish a specialist digital markets unit with the necessary powers to coordinate inter-agency cooperation and carry out systematic market observation, among other functions.[15]

At the international level, the borderless nature of many digital businesses reinforces the need for international cooperation between competition and consumer authorities.

[14] *Supra* n 1.
[15] *Supra* n 1.

As observed in a white paper on Competition Policy in a Globalized, Digital Economy by the World Economic Forum, not only would convergence in regimes level the playing field, inject competition into local markets and reduce compliance costs, it could also support international trade as many value chains are cross-border.[16] Such consensus can be built on existing initiatives such as the International Competition Network and the International Consumer Protection Enforcement Network.

V. Conclusion

As digitalisation continues to bring about radical structural changes in markets both old and new, a robust competition and consumer framework remains the cornerstone of an open and well-functioning economy. Although significant strides have been made, regulators should stay committed to forging a 21st century legal regime or risk the concentration of innovation and critical data in a few mega-firms.

[16] Accessible at <http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf>.