OSF Briefing Paper:
Digital Competition Policy Developments in Key Jurisdictions

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Issues at stake

The five largest US-based online platforms (and indeed firms in the US S&P 500 stock index – Google/Alphabet, Amazon, Facebook, Apple and Microsoft, or GAFAM) are world-historically valuable businesses, now collectively worth over US$8tn. China has several more trillion-dollar tech giants, including Alibaba and Tencent.

For many digital services, one or two companies already have an extraordinarily high share of significant numbers of national markets. The Furman review estimated this in the UK at close to 100% for mobile operating systems and online search, with social media above 90%. The European Parliament noted "with regret that one search engine that has over 92% of market share in the online search market in most of the Member States has become a gatekeeper of the Internet". In 2020, Facebook owned four of the top ten downloaded (non-game) apps worldwide (WhatsApp, Facebook, Messenger and Instagram), while Alphabet owned two (Google Meet and YouTube).

What's the problem for users and societies?

These gigantic platforms' presence in the everyday lives of billions of smartphone, PC, search and social media users gives them extraordinary and unprecedented economic and social power – which, to be blunt, some of them have not used carefully. US Senator Elizabeth Warren has warned: "Today's big tech companies have too much power — too much power over our economy, our society, and our democracy. They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation." Barry Lynn highlighted GAFAM's "power over the people who work for them, over capital markets and investors, and it blocks off the kind of competition that can bring innovation."

Rather than facing competition to improve the quality of its products – on, for example, privacy, freedom of expression, and the prevalence of hate speech – Cory Doctorow calls Facebook's users "hostages", given the company's relentless efforts to make it difficult for them leave. And "the more hostages they take, the more they can extract from advertisers – their true customers." It is not the only company with this business model.

Why do digital platforms often tend towards monopoly/duopoly?

These platforms frequently claim "competition is only a click away", and their market shares reflect the quality of their products. However, economists have found online platforms often benefit from "extreme returns to scale and scope". Since platform costs are mainly fixed, such as developing software, and building relationships with suppliers and other types of customers such as advertisers, they can support millions of additional users at low additional cost-per-user, and encourage users of one service to try a related service, making use of already-gathered data. These additional users can generate further revenues and investment, which can improve the quality of service further – while smaller competitors face more expensive finance and customer acquisition costs.

With their turbocharged shares, the largest tech companies can gobble up threatening competitors like "Pac-Man" (in a vivid analogy from Rebecca Kelly Slaughter, a US Federal Trade Commissioner), spending "at least $264bn buying up potential rivals worth less than $1bn since the start of 2021 — double the previous record registered in 2000 during the dotcom boom." Slaughter further noted "hundreds of smaller acquisitions can lead to a monopolistic behemoth."

These large firms can often enter new, related markets at a great advantage to their competitors, using their knowledge of customers in one or more markets they already dominate; and use customer information from those new markets, and integration of their services, to support their existing dominant position. For example, in China, "Both Alibaba and Tencent's efforts are centered around creating unique online ecosystems, which grant members access to their extensive resources in smartphone-based payments, big data and social media but shut out others."

Many platforms benefit from strong “network effects”, where each new user makes the service more valuable for all existing users (since, for example, they can message or share a photo with an additional person; additional videos can be used to train more accurate object recognition algorithms for all users; or a larger customer base encourages more apps to be developed). And it may be difficult for users to switch to, or even try out, competing services, if doing so requires significant quantities of user data to be transferred, and/or they lose contact with friends and family on that platform.

What should be done in response?

Some competition authorities (such as Brazil’s CADE), and many competition economists, take the position that existing competition law prohibitions on “abuse of a dominant position” are fully capable of dealing with potential anticompetitive behaviour in digital markets, particularly as precedents develop following enforcement actions (and merger decisions) by those authorities, and the courts (some disagree). Such cases could go as far as reversing mergers later deemed illegal, or breaking up the biggest companies, as famously happened to AT&T in the US in 1984.

But following 20+ recent major reviews, major jurisdictions (e.g. China, the EU, India, the UK and the US) have or are considering updating enforcement and merger rules to more explicitly take account of the characteristics of digital markets – particularly that platforms frequently buy startups much smaller than common thresholds for merger investigations, because of their *future* potential. Several jurisdictions are going further (including China, the EU, the UK and the US), putting in place new up-front rules in place specifically for the largest platforms (as shown in Figure 1).

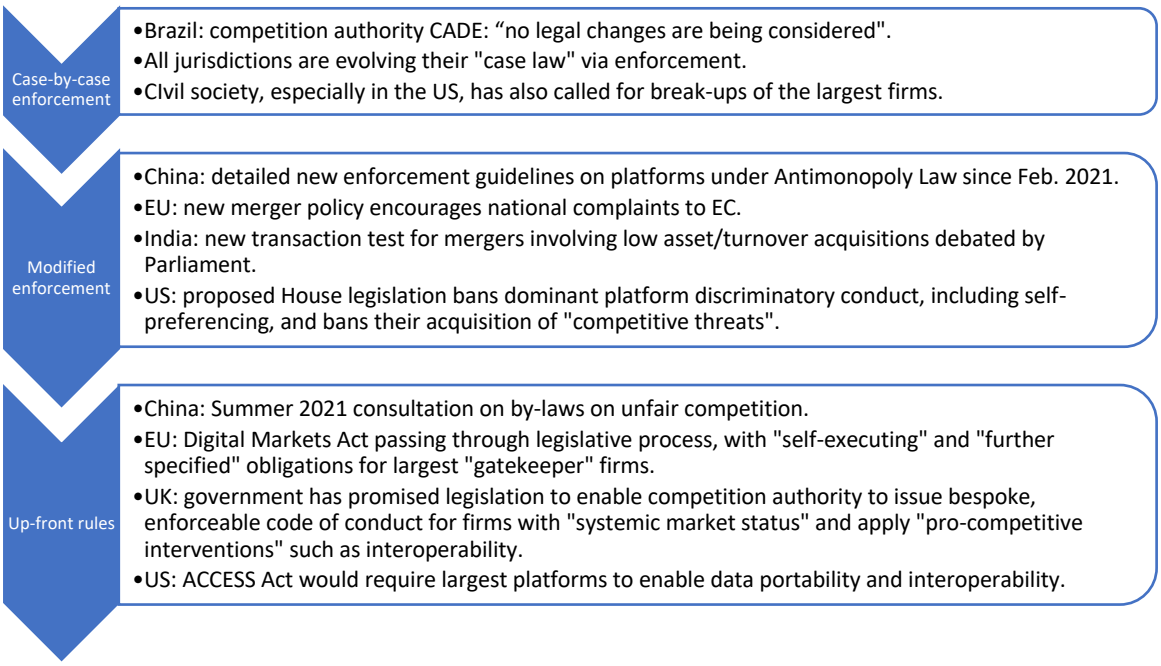

Figure 1 Spectrum of digital competition reforms

Those up-front rules (sometimes imprecisely referred to as *ex ante* or regulation) are intended to be more specific (in terms of prohibited behaviours), general (in terms of applicability), and easily enforceable than the more general competition rules (again imprecisely often called *ex post*), which can sometimes take a decade for a complaint to be finally determined by the courts given their complexity and consequences – with only a narrow precedent set.

By giving users genuine choice, enabling the entry and expansion of competitors to digital markets, modified enforcement and up-front rules can also increase the competitive pressure on platforms to better support privacy and freedom of expression. Common rules under consideration include:

Rule/enforcement	Effect	Examples
Data portability and interoperability	Some of the most fundamental economic drivers of digital monopolies are access to large numbers of users and their data. These requirements would enable competitors to gain access, with user consent, to data and connections – to facilitate user switching and multi-homing (simultaneous use of multiple services). Interoperability rules are already widespread in telecommunications regulation, and could allow e.g. the user of a privacy-focused social media or instant messaging service to communicate with their friends on Facebook and WhatsApp.	China, EU, UK, US
Limit data exploitation	Complementary to data portability, this reduces the ability of platforms without explicit user consent to combine personal data from their core services with data from their other services, track users around the web with tools like cookies and "like" buttons, or to use personal data for other purposes than it was gathered.	EU (and enforcement against Facebook by Germany)
No self-preferencing	Platforms must not nudge users towards their own complementary services (such as specialised search engines) by e.g. placing those services higher in ranked results, or prominent areas of user interfaces, or as default settings; or exempting the platform's own services from requirements placed on competitors (e.g. to display personal data usage in app store listings).	China, EU, UK, US
No dark patterns/ manipulation of user choices	Platforms must not manipulate user decision-making through design techniques such as making one choice much easier to make than another, including using defaults and endless confirmation screens (e.g. Android's default search engine, Google, being extremely time-consuming to change).	China, EU, UK
No use of platform third party seller data to compete with them	Platforms see data flowing between their different groups of customers, such as buyers and sellers on a marketplace like Amazon, or diners, restaurants, and drivers on a food delivery service like Just Eat. They should not use this data to compete with those platform users, for example in deciding which own-label products or foods to sell.	EU, US
Greater enforcement resources and technical expertise	While some competition authorities (including Brazil's) have protested that existing rules against abuse of dominance and cartels are sufficient to deal with digital markets, the lack of major enforcement successes in these markets since early 2000s cases against Microsoft have been a significant factor behind the growth of today's "hyper-scalers". Greater resources for enforcers (including more technical experts) could begin to reverse this.	China, India, EU, UK, US
Adjusted enforcement rules	Setting new tests for acquisitions by platforms (such as an anticompetitive presumption for mergers involving nascent competitors in concentrated markets) and investigations by competition authorities (including making referrals easier by national EU authorities to the European Commission) could make the creation/maintenance of digital "behemoths" more difficult.	China, EU, US
Structural separation	Enforcement action to reverse previous mergers, now seen as anticompetitive (e.g. Facebook's acquisitions of Instagram and WhatsApp), and/or legislative reform to e.g. enable the FTC to order platforms to spin off specific lines of business.	US

Table 1 Common proposed enforcement modification and up-front competition rules

The remainder of this briefing sets out what six key jurisdictions are doing in terms of digital competition legislative reform and enforcement actions – Brazil, China, EU, India, UK and US – and concludes with some suggestions for further reading on these topics.

National/regional developments

Brazil

Brazil's Administrative Council for Economic Defence (CADE) is the national competition authority. While the federal competition law was last revised in 2012, a 2019 General Law of Regulatory Agencies strengthened its administrative, budgetary and financial authority – one of the recommendations of an OECD peer review of the country's competition regime, following which Brazil became an associate member of the OECD competition committee. A further OECD review of Brazil's digital readiness recommended the main findings be implemented in communications markets, which were:

1. Ensure better separation between investigation and decision-making.	4. Increase the number of investigations into potential abuses of dominance by prioritising these cases, and by relying less on settlements.	7. Clarify the methodology for calculation of fines.
2. Establish a more transparent appointment system for CADE Commissioners and the General Superintendent.	5. Improve the scope and application of CADE's settlement policy by negotiating during the investigation.	8. Increase legal certainty and predictability through substantive guidelines.
3. Devote adequate resources to competition enforcement by hiring more economists	6. Ensure that only objectively quantifiable and readily accessible criteria are used as merger notification thresholds.	9. Clarify the respective advocacy powers and the roles of CADE and the Ministry of Finance.

Table 2 OECD peer review of Brazilian competition law and policy main recommendations

In a review note, CADE concluded that while further research was planned, "no legal changes are being considered at the moment, given that the concerns current at issue are related to abuse of dominance in digital markets… [n]or that abandoning current consumer welfare standards is desirable."

CADE has contributed to a BRICS digital competition report and in August 2021 published a study on digital markets. It also participates in the International Competition Network (ICN) and UNCTAD, and in mid-2019 hosted a conference on Designing Antitrust for the Digital Era. With Russia, it is co-chairing a BRICS working group on Research on the Competition Issues in the Digital Markets.

The country's new data protection authority ANPD is consulting during September 2021 on SME exclusions from the general data protection law, including a right to data portability, which also plays an important part in digital competition. And in June 2021, CADE published a working paper on International Benchmarking on Competition Enforcement and Data Protection Institutions.

Civil society advocacy

The CTS-FGV team (Center for Technology and Society at FGV) are preparing a consultation response to ANPD on data portability, arguing the right should be preserved and highlighting the ease with which it can now be implemented using most current software; the authority should "a) try to assist and provide guidance to SMEs rather than remove obligations; and b) should provide tools (both in terms of guidelines and APIs/software) to help SMEs dealing with their obligations."

Key enforcement actions

While CADE opened three investigations into Google during 2019, the agency found no evidence of "losses to competition related to the search engine market" or "abusive clauses in its ad platform contracts." CADE noted the latter case involved "involved an extensive market test, in which more than a hundred market agents were contacted, among large, medium and small-sized advertising agencies and advertisers, to understand the effects of the practice and market dynamics." In June

2020, CADE revoked a decision blocking a payments tie-up between WhatsApp and card processor Cielo.

Following a joint investigation with the Brazilian competition and consumer protection authorities and the federal prosecutor, the data protection authority published in May 2021 guidelines to WhatsApp on its new privacy policy, asking the company not to restrict functionality if users do not agree to the policy. On 24 August, the authority announced WhatsApp had agreed to comply, improving user transparency to EU levels; updating its business terms; preparing impact reports, and systematising internal controls. Negotiations between the company and the four government bodies continue.

China

The Chinese government's approach to digital competition is part of a broader agenda aimed, in the words of *The Economist*, at an authoritarian "techno-utopia… replete with 'deep tech' such as cloud-computing, artificial intelligence (ai), self-driving cars and home-made cutting-edge chips", where incumbents' market power is curbed to "redistribute some of their profits to smaller merchants and app developers, and to their workers" and smaller "cities will boast their own tech industries with localised services" – all "under the watchful eye of the government in Beijing." President Xi Jinping has called for "independent" innovation in "core technologies", and Chinese "self-reliance".

As part of this agenda, in February 2021, China's State Administration for Market Regulation (SAMR) issued new competition guidelines on digital platforms under the Antimonopoly Law, which ban platforms from requiring retailers to use a specific payment system, specify different mechanisms for calculating turnover depending on business model, and require platforms to monitor for anticompetitive activity. Where a potential low-turnover acquisition concerns a company with a free or low-price business model in an already-concentrated market, the agency will still investigate.

SAMR already published (in August 2020) anti-monopoly guidelines on intellectual property. And in mid-August 2021, SAMR published draft regulations on unfair competition and use of user data, with a public consultation closing on 15 September. These would ban business operators from using data or algorithms to "hijack traffic or influence users' choices", according to *Reuters*. (Automated translations of the platform guidelines and draft regulations are here.)

The Cyberspace Administration of China also in August 2021 released draft guidelines on algorithmic recommendation management, which include in Article 13 a ban on self-preferencing and improper competition. The State Council's 2021 work plan includes an amendment of the Antimonopoly Law.

The Economist fulminated in August 2021 (despite the more nuanced article cited above): "Now the party feels emboldened, issuing new rules at a furious pace and enforcing them with fresh zeal. China's regulatory immaturity is on full display. Just 50 or so people staff its main anti-monopoly agency but they can destroy business models at the stroke of a pen. Denied due process, companies must grin and bear it."

The following month, the Ministry of Industry and Information Technology organised a meeting to put pressure on the largest digital platforms to make their products interoperable. Tencent and Alibaba announced they would do so, while ByteDance, Baidu, NetEase, Huawei and Xiaomi also participated. While this ministry lacks legal power to compel such action, the *Financial Times* speculated the companies feared enforcement action by SAMR. So far, Alibaba appears to have taken more action than Tencent, mainly focused on enabling Tencent's WeChat Pay in its smaller services (but not yet its main shopping apps, Taobao and Tmall).

Since February 2021, the CSI Global China Internet Index, tracking the largest Chinese tech companies' market capitalisation, has fallen from over US$3tn to under US$2tn.

Key enforcement actions

The Economist noted in August 2021 "over 50 regulatory actions against scores of firms for a dizzying array of alleged offences, from antitrust abuses to data violations." A November 2020 review noted apparently higher scrutiny of mergers in China since 2017 than the US and EU, highlighting conditional approval for "HP/Samsung, Essilor/Luxottica, KLA/Orbotech, Infineon/Cypress and Nvidia/Mellanox" link-ups while the US and EU approved them without remedies.

In April 2021, in its "first major antitrust decision in recent years", SAMR imposed a record fine on Alibaba of US$2.8bn for abuse of dominance – a ban on sellers using other platforms. The agency also issued 13 penalty decisions in December 2020 and March 2021 on tech firms for failing to notify past transactions.

In July 2021, SAMR blocked the merger of Huya and Douyu, the two largest online-game streaming companies in China. Tencent, the largest online-games company, owns Huya and partly owns Douyu. SAMR is "reportedly getting ready to slap a $1bn fine on Meituan, a super-app that delivers meals."

In January 2021, the central bank released draft rules on the "non-bank payment industry" regulating e-payments. Financial regulators also required Ant Group to separate its consumer finance group, responsible for around one-tenth of non-mortgage consumer loans in the country, into a new firm. Regulators are now pressuring Ant to create a separate credit scoring joint-venture with the government, holding Ant data used for credit decisions.

European Union

The European Commission (the EU's executive arm) has proposed two key pieces of digital competition-related legislation, which are now being debated by the European Parliament and Council of Ministers (representing the 27 member state governments).

The goal of the Digital Markets Act (DMA) is to ensure "contestable and fair markets in the digital sector". It contains 18 separate up-front obligations (some applying to specific services) for the very largest digital *gatekeeper* platforms' core services designated by the European Commission, whose definition is shown in Table 3.

Digital Markets Act	Digital Services Act
"Gatekeeper" platforms (DMA Art. 3): European Economic Area turnover > €6.5bn or capitalisation > €65bn and for three years has > 45m EU users + 10,000 yearly active business users; Providing "core" services (Art. 2.2) of: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g);	DSA Art. 2 "(f) … a 'hosting' service that consists of the storage of information provided by, and at the request of, a recipient of the service" 2(h) "'online platform' means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information…" "Very large online platforms" (DSA Art. 25.1) "provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million"

Table 3 Services covered by the proposed EU Digital Markets Act and Digital Services Act

These obligations are in two lists: "self-executing" obligations in Article 5, and obligations capable of further specification by the European Commission in Article 6. They have been summarised by Michael Veale as follows:

Article 5. Platforms must:	Article 6. Platforms must:
- Silo data relating to core services. - Not forbid businesses from using other intermediaries too. - Allow businesses to contract with users outside the platform but fulfil contracts through the platform. - Not forbid businesses from reporting them to enforcement agencies.	- Not use data of their business users to compete with them. - Allow end users to uninstall preinstalled software unless it is technically essential and cannot be offered standalone. - Allow installation and effective use of 3rd party software/app store using and interoperating with an OS, and allow their access by means other than through a core platform service. - Not rank their own products better than others'. - Refrain from technically restricting the ability of end users to switch between and subscribe to different apps/services to be accessed using the OS, including internet access. - Allow businesses, in the offering of 'ancillary services' to interoperate with OS, hardware and software.

- Not force businesses to use a particular ID service. - Not bundle their core services together and force you to sign up to 2+. AND interestingly for ads: - Provide advertisers and publishers with the price/remuneration details (to stop intermediaries controlling market visibility).	- Provide advertisers and publishers with free analysis and verification tools/information. - Provide effective data portability AND tools for end users to facilitate its exercise (normal, download your data tools exist) INCLUDING CONTINUOUS and REAL-TIME access. - Provide business users with real-time aggregated/non-aggregated data generated by end-users in their interaction with the platform. Personal data only when it relates to that business user's services and where consent is provided. - Search engines must provide other search engine providers with anonymised "ranking, query, click and view data". - Apply non-discriminatory terms to app store terms and conditions

Table 4 Digital Markets Act obligations

Gatekeepers may apply to the European Commission for suspension of specific obligations if they would "endanger… the economic viability of the operation of the gatekeeper" (Art. 8) or for "overriding reasons of public interest" (Art. 9). And the Commission may add further obligations following a market investigation (Art. 10).

The Digital Services Act (DSA) contains specific requirements for *Very Large Online Platforms* (defined in Table 3). It is intended to "ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services."

Civil society advocacy

A key civil society competition-related advocacy goal in the DMA/DSA package has been to require the largest platforms to make their services **interoperable** with competitors. Civil society persuaded the European Commission to include an interoperability provision in its initial DMA proposal (Art. 6(1)(f)), relating to *ancillary* services. Since then, groups including EDRi, BEUC, Article 19, EFF and OpenForum Europe have been advocating the Parliament and Council extend this to the major platforms' core services, listed in Table 3. Several such amendments, and adding similar interoperability requirements to the DSA, have been proposed by centre-left and Green/Pirate parliamentarians, with some support from liberal and centre-right MEPs.

Civil society has also advocated for amendments to require genuine informed consent in certain circumstances from users, restricting firms' use of "**dark patterns**" in user interfaces, as well as more broadly speaking giving users more rights as opposed to focusing on business users.

Another priority for civil society is ensuring effective **enforcement,** increasing the resources allocated to the competition unit of the European Commission and potentially involving national regulators.

Timeline for DMA/DSA adoption

The European Parliament and the Council must each agree positions on the bills, after which it is likely they and the European Commission will negotiate final versions in a *trilogue* process.

The current (Slovenian) council presidency will present an updated DSA and DMA text to the Council's competitiveness council in November and expects the legislative process to be complete in one year. As part of this debate, the governments of France, the Netherlands and Germany published on 7 September 2021 a second paper on the DMA, calling for measures to increase its future proofness, and a greater role for national competition authorities in its enforcement.

Several European Parliament committees are scrutinising the acts and will vote on their final reports in autumn 2021. The Single Market committee (IMCO) is in the lead on both, with important DMA opinions also due from the monetary policy and economics committee (ECON) and justice committee (LIBE), and on the DSA from the culture (CULT), economics, industry (ITRE), legal affairs (JURI) and women's rights and gender equality (FEMM) committees. IMCO's final votes will be on 8 November 2021. The timeline for debates and votes until then is currently as follows:

Digital Markets Act	Digital Services Act
IMCO Consideration of amendments: 27/9 IMCO Consideration of compromise amendments: 27/10 CULT Vote: 27/9 ITRE vote: 28/10 JURI vote on amendments: 30/9 TRAN consideration of draft opinion 27/9 TRAN vote on amendments and adoption of draft opinion 27/9 TRAN final vote 27/9	IMCO Consideration of amendments: 27/9 ITRE vote: 27/9 CULT Vote: 27/9 JURI vote on amendments: 30/9 JURI final vote: 30/9 ECON Vote: week of 25/10

Table 5 Schedule for European Parliament consideration of the DMA and DSA

MEPs are aiming for final (plenary) votes in mid-December and agreement with Council and Commission during the French presidency of the Council in the first half of 2022. The DMA lead rapporteur's (German centre-right MEP Andreas Schwab) main priorities appear to be increasing the threshold for companies to be designated as gatekeepers (leading to US accusations of protectionism, since no EU firms would meet these tests), and to pass the Act as quickly as possible. While his and his party grouping's assistants have been sympathetic to interoperability amendments in lobbying meetings, it seems the latter goal has so far led him to avoid proposing them.

The European Commission executive vice-president Margrethe Vestager has recently stated the bills could be in effect by 1 January 2023, although this seems ambitious. 2024 might be more realistic, given a 6–12-month implementation period is likely even once the final texts are agreed.

Other developments

The Commission will also publish a proposal for a **Data Act** in late 2021, which will include provisions "ensuring fairness in how the value from using data is shared among businesses, consumers and accountable public bodies." A consultation on the proposal closed in June.

The prospect of significant EU legislative reform on merger control is limited, given the preference of significant Member States such as France for industrial policy building up "European champions." A "New Competition Tool" envisaged by the Commission as part of the DMA/DSA package disappeared from the final proposals. Germany has just published a legal opinion arguing merger control measures could be included in the Digital Markets Act, but other member states, and some academics, have argued the DMA's internal market harmonisation legal basis rules this out.

Instead, the Commission has since 19 February 2021 (before its updated merger guidance was even published) used its discretion under the Merger Regulation to encourage member states to refer cases that would not meet EU or even national turnover requirements, but "where the turnover of at least one of the companies concerned does not reflect its actual or future competitive potential. This could be the case of a start-up or recent entrant with significant competitive potential or an important innovator. It can be also the case of an actual or potential important competitive force, or of a company with access to competitively significant assets or with products or services that are key inputs or components for other industries."

One of the first companies investigated under this revised policy (Illumina) has already been granted an expedited hearing by the EU Court of Justice, likely in October 2021, with a ruling expected a few months later on the legality of this approach. On 20 September 2021 the Commission adopted a statement of objections to Illumina's announcement it had completed the acquisition of GRAIL before clearance.

Key enforcement actions

In November 2020, the European Commission notified Amazon of its preliminary view the company was illegally using non-public data to compete with sellers via its marketplace, and opened an investigation into whether the company was giving preferential marketplace treatment to its own products, and sellers using the company's logistics and delivery services.

The Commission is investigating claims Google favours its own services in its adtech supply chain, and considering an investigation into claims it is illegally forcing device makers to install Google Assistant as the default on Android devices.

In the final week of September 2021, the EU Court of Justice is hearing an appeal by Google against a €4.34bn fine for illegally restricting Android device manufacturers and mobile network operators in relation to its dominant search engine. Google is arguing against the Commission's market definition; claims default apps and search settings constrain user choice and its anti-fragmentation agreement unnecessarily constraints device manufacturers; and claim a revenue sharing agreement is an illegal exclusivity agreement.

In June 2021, the Commission opened an investigation into whether Facebook was illegally using advertising data to compete with advertisers in markets such as classified ads, and whether it has tied its Marketplace service to its social network. And in March 2021, the Higher Regional Court in Duesseldorf referred questions of competition and data protection law to the EU Court of Justice in a Facebook appeal against a Federal Cartel Office order.

The Commission has also notified Apple of its preliminary view the company has abused its dominant position in the distribution of music stream apps to require providers to use its payment services, and by preventing them from informing users of alternative payment options. In June 2021, it widened this investigation to cover all apps; and opened a second investigation into Apple's limitation of competitor access to iPhone "tap and pay" (NFC) functionality.

India

The Competition Commission of India (CCI) is responsible for enforcement under the Competition Act, 2002 (amended in 2009).

A review committee appointed by the Indian government concluded in 2019 the Competition Act was "sufficient to deal with the issues arising from new age markets", but recommended the "adoption of transaction value test for reviewing combinations in the new age markets as such combinations generally escape scrutiny due to low value of assets or turnover". The Ministry of Corporate Affairs published a draft Competition Amendment Bill in February 2020 implementing this recommendation, which was debated in Parliament but is still pending.

In January 2020, the CCI published a market study on e-commerce. This found significant growth in online sales of consumer goods (particularly mobile phones), travel and food service, with "an increased intensity of price competition" and a "central role" for concentrated online marketplaces. Most platform seller respondents were concerned with platform neutrality, with platforms competing against sellers and favouring "preferred sellers", a lack of platform competition, and exploitative contracts.

The Commission recommended greater transparency, and case-by-case investigations of unfair terms, platform parity clauses, exclusive agreements, and predatory pricing by dominant platforms. It proposed platforms adopt the following self-regulatory measures:

- Search ranking: describe main ranking parameters in terms and conditions, any effect of remuneration, while protecting algorithmic details that would facilitate third-party manipulation of results.
- Collection, use and sharing of data: publication of "clear and transparent" policy
- User review and rating mechanism: transparency and verification of purchases by reviewers, with measures to address fraudulent reviews.
- Revision in contract terms: give business users adequate notification.
- Discount policy: transparency policies, including platform-funded discount rates and the implications of participation/non-participation by sellers.

As a result of these grievances, the Indian government has published proposals for the Consumer Protection (E-Commerce) Rules, 2020. These would address a range of issues relating to liability, unfair trade practices, flash sales, (weak) data protection, and compliance (including with international trade law).

Civil society advocacy

The Centre for Internet & Society (CIS) responded to the consumer protection consultation with a number of suggested amendments, including avoiding overlap with competition law. IT for Change also responded, suggesting larger companies should face stricter regulation; robust cooperation is needed between the CCI and Consumer Protection Authority to avoid regulatory overlap; ranking algorithms should be made transparent; and government access to e-commerce firm data should be replaced with consumer and seller access to their own data footprint.

Groups not usually involved in digital issues have also taken action, including an affiliate of the governing party-linked Hindu nationalist organisation Rashtriya Swayamsevak Sangh. It demanded in December 2020 that the "nexus of [Multi-National Corporations] and Indian business should not be allowed to operate in India", due to the threat of online marketplaces damaging small retail stores.

Key enforcement actions

A December 2020 CCI report to the OECD noted complaints containing "allegations of anti-competitive practices by the e-marketplace platforms (against Amazon and Flipkart), Online search engine (Google), Online cab aggregators (UBER and OLA), Online Travel Agents (MakeMyTrip and

OYO), Online food delivery apps (Swiggy), instant messaging apps (WhatsApp) etc." Some were dismissed at the initial stage, while others are under investigation.

Since then, the CCI has opened an investigation in June 2021 into claims of an unfair condition on smart TV manufactures that all Google apps must be preinstalled on Android devices to offer Play Store, and illegal leveraging of dominance in Play Store to protect relevant markets such as video hosting services offered by YouTube. *Reuters* reported in September 2021 these claims had been upheld. And in March 2021, the Commission determined, following an own-initiative preliminary investigation, "the conduct of WhatsApp in sharing of users' personalised data with other Facebook Companies, in a manner that is neither fully transparent nor based on voluntary and specific user consent, appears prima facie unfair to users." It therefore opened a full investigation.

Most recently, Rajasthan non-profit "Together We Fight Society" complained in September 2021 to the CCI about Apple's requirement for apps to use its own payment mechanisms. The Commission has yet to decide whether to open an investigation.

United Kingdom

Following a government-commissioned independent review of digital competition, and an extensive 2018/19 market study by the Competition & Markets Authority (CMA) into online platforms and digital advertising, the government is consulting until 1 October 2021 on potentially significant legal changes (with many similarities to the EU's Digital Markets Act).

The CMA has set up an internal Digital Markets Unit (DMU), as well as a Digital Regulatory Cooperation Forum with the communications regulator and data protection authority.

The proposed reforms will give the DMU powers to designate firms in digital markets with "Systemic Market Status" (SMS); to create bespoke, legally enforceable codes of conduct for each designated firm; and to impose "pro-competitive interventions" such as interoperability. The consultation outlined the types of principles that could be included in legislation, shown in Figure 2.

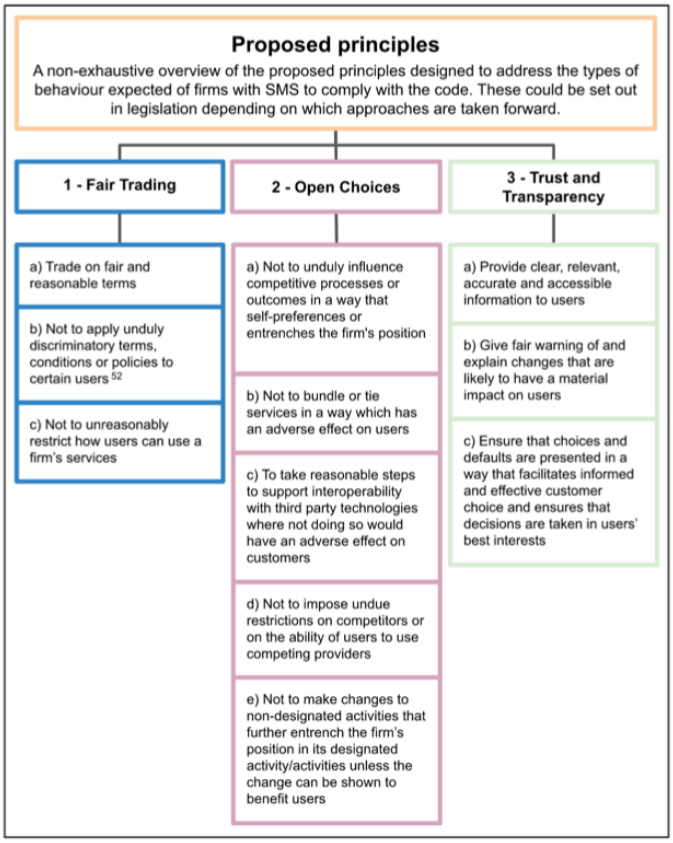

Figure 2 Proposed legislative principles for firms with Systemic Market Status

The UK is also continuing to develop its pioneering Open Banking programme (with similar programmes in dozens of other jurisdictions, including Brazil and India), in which the CMA has required the nine largest retail banks to jointly create a series of APIs to enable competitors to access customer data and initiate payments (with their explicit permission) to offer interoperable services. There are now over 3m users (in a country of around 67m people), with hundreds of "fintech" firms accredited to participate. The government is developing related Open Finance, Open Communications and Open Energy programmes.

Civil society advocacy

UK-based civil society groups such as Privacy International, Article 19 and Open Rights Group have been campaigning (also in Brussels) for strong interoperability requirements for gatekeepers/firms with SMS, and for social media platforms to unbundle their services so that users can choose different recommendation/timeline curation providers, giving them the option of services with

stronger freedom of expression and privacy protections. Article 19 has also emphasised the importance that tests of 'harms to competition' includes 'harms to consumers.'

Key enforcement actions

The UK Competition and Markets Authority (CMA) has provisionally found Facebook/GIPHY merger could cause a substantial lessening of competition in the supply of display advertising and social media services and is now consulting on possible remedies, of which a reversal of the merger is its preferred option. A final decision is expected later in November 2021. The CMA has recently cleared Facebook's acquisition of Kustomer, and is also investigating its use of advertising and single sign-on data in its classified ads and online dating services.

The Authority has two open cases relating to Google. It is investigating whether Google's replacement of cookies with a "privacy sandbox" in its Chrome browser would be anticompetitive; and whether Google or Amazon are causing consumer harm by lack of action on fake reviews.

In March 2021, the CMA opened an investigation into Apple's terms and conditions relating to its app store, particularly those requiring use of its own payment service. The CMA also "continues to coordinate closely with the [European Commission], as well as other agencies" to investigate this issue. In June 2021, it launched a market study into mobile ecosystems, and potential consumer harm within four themes:

1. Competition in the supply of mobile devices and operating systems.
2. Competition in the distribution of mobile apps.
3. Competition in the supply of mobile browsers and browser engines.
4. The role of Apple and Google in competition between app developers.

By December 2021, the CMA must decide whether to continue to a full market investigation. At the end of this process, it has powers to impose sweeping remedies on market participants if they are justified by evidence of harm to consumers.

United States

The Biden administration, and Congressional representatives from both parties, have promised significant competition reforms relating to digital markets. Biden has appointed reformers to key posts in the Federal Trade Commission and Department of Justice, and in July 2021 issued an executive order entitled Promoting Competition in the American Economy. This includes 72 initiatives across the federal government, including vigorous antitrust enforcement focused on labour, agricultural, healthcare and technology markets.

The order announces a policy of "greater scrutiny of mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by 'free' products, and the effect on user privacy." The US administration also plans closer regulatory cooperation with the EU via their joint Trade and Technology Council, meeting in Pittsburgh on 29 September.

Following a 16-month investigation, the US House of Representatives antitrust subcommittee introduced five bipartisan antitrust bills in June 2021 targeting the largest "critical trading partner" search, marketplace and user-generated content platforms (with at least 50m monthly active US users/100,000 business MAUs and market capitalisation > $600bn), alongside an additional bill on states' rights to bring cases. Senators Klobuchar, Blumenthal and Lee have also presented antitrust bills.

Bill	Objectives	Timeline
American Innovation and Choice Online Act H.R.3816 (Rep. Cicilline)	Bans discriminatory conduct by covered platforms, including self-preferencing and using their ability to "pick winners and losers" anticompetitively	Ordered to be reported 24/6/21
Platform Competition and Opportunity Act H.R.3826 (Rep. Jeffries)	Bans acquisitions of "competitive threats" or firms expanding/entrenching market power by covered platforms	Ordered to be reported 24/6/21
Ending Platform Monopolies Act HR3825 (Rep. Jayapal)	Gives the antitrust enforcement agencies a new tool to sue to break up a line of business from a covered platform	Ordered to be reported 24/6/21
Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act H.R.3849 (Rep. Scanlon)	Mandates data portability and interoperability via open APIs for covered platforms	Ordered to be reported 24/6/21
Merger Filing Fee Modernization Act H.R.3843 (Rep. Neguse, also S.228)	Increases Department of Justice (DoJ)/Federal Trade Commission (FTC) income from merger fees for antitrust enforcement	Ordered to be reported 24/6/21
State Antitrust Enforcement Venue Act H.R.3460 (Rep. Buck)	Prevents state antitrust actions being transferred to federal courts	Ordered to be reported 24/6/21
Competition and Antitrust Law Enforcement Reform Act S.225 (Sen. Klobuchar)	Require parties to mergers significantly increasing concentration, or extremely large, to bear burden of showing not anti-competitive; prohibit certain exclusionary conduct; enabled DoJ/FTC to seek civil monetary penalties for Sherman Act violations	Referred to Senate Judiciary Committee 2/4/21
Tougher Enforcement Against Monopolists Act S.2039 (Sen. Lee)	Consolidating antitrust enforcement in DoJ; new merger presumptions; safe harbour for data portability and interoperability efforts	Referred to Senate Judiciary Committee 14/6/21

Open App Markets Act S.2710 (Sen. Blumenthal, also H.R.5017)	Limits company controlling app stores with 50m+ users from requiring use of its own payment system, requiring most favoured terms, interfering with legitimate business communications with customers, using non-public information to compete, blocking alternative app stores, self-preferencing in search, and closing API access	Referred to Senate Judiciary Committee 11/8/21

Table 6 Current US Congress antitrust bills

The House antitrust subcommittee bills have already faced opposition from technology-firm supported trade groups and Californian Democrat representatives. While they have received some Republican support, the *New York Times* also reported the House Speaker is under pressure to slow consideration of the bills. And overcoming the Senate filibuster would require at least ten Republication votes. In September 2021, 58 civil society groups wrote to the House Speaker and minority leader supporting the six bipartisan bills marked up by the House Judiciary Committee, noting broad public support in recent polling and encouraging their passage.

Civil society advocacy

As well as legislative reform, civil society groups such as the Open Markets Institute, Public Knowledge, Public Citizen, the American Economic Liberties Project, and the Electronic Frontier Foundation have pushed for stronger enforcement action (welcoming the appointment of antitrust reform expert Lina Khan as FTC chair and the nomination of Alvaro Bedoya, advocating against mergers, and supporting federal and state lawsuits) and called for Big Tech companies to be broken up and regulated. EFF has worked both in the US, and closely with EU groups (see the earlier section), on interoperability mandates for the largest platforms.

Key enforcement actions

In October 2020, the US Department of Justice (DoJ) and 11 states filed a lawsuit alleging illegal monopolization by Google of search and search advertising markets. The judge has indicated the case will not go to trial until 2023. (Axios noted the 1990s DoJ case against Microsoft took five years, and 13 years against IBM in the 1970s.) 38 state and territory Attorneys-General (AGs) filed a parallel complaint in December 2020, alleging Google disadvantages specialised search engines by favouring its own results, and extends its search monopolies into new markets such as smart speakers. And 36 state AGs (and the District of Columbia's) sued Google in July 2021 for closing off its Android ecosystem to competition.

Facebook must respond by 4 October to an updated Federal Trade Commission (FTC) complaint alleging it has "bought or buried" competitors, and blocked access of competitors to its systems. The previous complaint (filed under the Trump administration) was rejected by the US District Court for the District of Columbia because of a lack of detail on calculations of market share. The updated complaint, filed under President Biden's new FTC chair, contains a wealth of metrics. The same court rejected a parallel claim by over 40 state AGs that Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014 were illegal and should be reversed. The states plan to appeal.

Games developer Epic has filed lawsuits in federal court against Apple and Google over restrictions on the use of alternative in-app payment systems imposed by both companies' app stores. In September 2021, the trial judge ruled Apple was not a monopoly, but had violated California's unfair competition law by preventing developers notifying users of alternative payment methods. Apple is expected to appeal.

Apple has also recently agreed with developers bringing a class-action lawsuit to relax some app store restrictions, relating to developers communicating directly with customers about alternative payment options, to base app store search results on objective criteria, and to create a $100m fund for small US developers. The same judge must approve the settlement.

In September 2021, Washington, D.C.'s attorney-general widened a lawsuit he filed in May in the Superior Court of D.C. against Amazon, alleging the company illegally prevents third-party sellers offering lower prices elsewhere, and requires they cover the cost of promotional price reductions.

The FTC recently announced it is seeking technology researchers, engineers, UX researchers, content strategists, data scientists, product managers to "work on a variety of technology-related consumer protection and competition issues throughout the agency."

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Australian Competition and Consumer Commission, Google's dominance in ad tech supply chain harms businesses and consumers, 28 September 2021 (announcing new report and proposing new sector-specific rules.)

UNCTAD, Digital Economy Report 21: Cross-border data flows and development, September 2021.