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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Ex Ante Regulation and Competition in Digital Markets – Summaries of contributions**

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This document reproduces summaries of contributions submitted for Item 2 of the 136<sup>th</sup> OECD Competition Committee meeting on 1-3 December 2021.

More documentation related to this discussion can be found at:  
<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

Please contact Mr. Antonio Capobianco if you have any questions about this document  
[E-mail: [Antonio.Capobianco@oecd.org](mailto:Antonio.Capobianco@oecd.org)].

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## *Summaries of contributions*

This document contains summaries of the various written contributions received for the discussion on Ex Ante Regulation and Competition in Digital Markets (136th Meeting of the Competition Committee on 1-3 December 2021). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *Brazil*

There is no current debate in Brazil about a comprehensive ex ante competition regulation related to digital platforms or the digital economy. The Brazilian antitrust authority has never acted in this manner, and adopts especially ex post interventions (i.e., after requested to act) in reviewing mergers and sanctioning abusive behaviours, two of its three core activities (the other being competition advocacy).

Ex ante control of digital markets in Brazil is, to date, carried out by sectoral regulatory authorities. To illustrate, the Central Bank has recently regulated open banking, which resulted in pro-competitive effects on several markets connected to the payment and financial service sectors.

This contribution introduces examples of CADE's precedents related to digital platforms (e.g., Ipiranga's consultation, concerning the use of algorithms; the Expedia, Decolar and Booking case, concerning MFN clauses; and Google's AdWords case). The cases merely illustrate that CADE's work has so far focused on a case-by-case examination of issues related to digital markets.

Competition advocacy and cooperation with other public authorities are two other means CADE employ to respond to the challenges of the digital economy. As for competition advocacy, CADE assists other government bodies, such as regulatory agencies, governmental authorities, and the Brazilian Congress, seeking to encourage the promotion of competition in public policies, regulations and pending bills.

Regarding cooperation, CADE seeks to coordinate with public policies developed by other authorities, such as the Brazilian authority for data protection (ANPD) and the Brazilian secretariat for consumer protection (Senacon). CADE signed several cooperation agreements with other authorities, which should help resolving conflicts with digital platforms. Moreover, as an example of effective cooperation, CADE has recently participated in a joint recommendation issued by different authorities regarding WhatsApp privacy changes, which could have raised competition concerns. The company agreed to cooperate and resolve the raised concerns.

To face challenges posed by the digital economy, CADE consistently promotes training for its personnel, develops studies and issues technical opinions in the field of the digital economy. Recent examples of such documents include a review of expert reports on digital markets, a benchmarking study on the relationship between antitrust and data protection authorities across several jurisdictions and a review of CADE's case law as to digital platforms.

The preventive role of competition advocacy and CADE's collaboration with other public bodies are of great value to promote competition in the digital economy and to support the authority's probing activities, allowing for greater effectiveness and the harmonisation of antitrust, consumer protection and personal data protection policies, despite the inexistence so far of ex ante competitive regulation of digital markets.

## *Germany*

The impact of digitalisation on the competitive landscape has been a major focus of competition policy discussions for some years. To address the challenges of the digital economy the German legislator updated the traditional competition law in January 2021. The amendment to the German Competition Act allows the Bundeskartellamt to intervene at an early stage, faster and more effectively, in cases where companies of paramount significance for competition across markets engage in certain types of conduct. The Digital Markets Act (DMA) of the European Commission is in principle welcome as an additional tool. However, national competition authorities should be a complementary relay for enforcing the DMA.

## *Korea*

A natural monopoly arises in the digital market due to its network and first mover effects accompanied by data concentration. This nature of the digital market requires ex-ante regulation. On the other hand, innovative, for-the-market competition is important in the digital market and to this end, market players need to be provided with incentives to develop new digital services. Ex-ante regulation, however, could undermine innovation.

The Korea Fair Trade Commission (“KFTC”) is seeking balanced regulatory measures to minimize concerns about undermining dynamism and innovation of the digital market while effectively responding to major platforms’ abuse of monopolistic dominance. The KFTC’s priority is to execute and elaborate ex-post regulations in an effective and timely manner to protect competition in the digital market. At this stage, the KFTC approaches ex-ante regulation as a means to complement ex-post regulation.

The KFTC is now establishing ‘the Guidelines for Examination of Unilateral Conduct in Platform Markets’ to enhance timeliness and effectiveness of ex-post regulation, aiming to prevent anti-competitive practices of platforms. The guidelines provide criteria to take the characteristics of cross network effects, economies of scale, importance of data, and free services into account for the major abuses of dominant position, such as restricting multi-homing, imposing MFN clauses, tie-in sales, and self-preferencing.

The KFTC plans to introduce minimum ex-ante regulation in P2B and P2C relationships. This is why we are pushing forward to enact the “Act on Fairness in Online Platform Intermediary Transactions (OPA)” to enhance transparency in transactions between platforms and online stores and amend the “E-Commerce Act” which obligates platforms to provide more information to consumers.

Moreover, the KFTC plans to cooperate with relevant authorities including the Ministry of Science and ICT in order to enhance data portability and interoperability. The KFTC will take part in the National Data Policy Committee to seek appropriate measures of ex-ante regulation that can promote strengthen competition advocacy and competition in relevant industries.

## *Mexico*

This note aims to share the state of the formulation and discussion of ex ante regulation on digital markets in Mexico, providing a brief background of the legal framework surrounding economic competition and regulation in these markets; describing the nature of the debate over this kind of regulations; as well as the institutions involved and its attributions.

In addition, the IFT reviews recent reforms to the income and value-added tax (VAT) laws, concerning digital services of audio and audiovisual content, gambling, gaming, intermediation, dating and remote education; and describes three legislative initiatives to regulate digital markets: 1. the initiative for regulation of digital platforms that provide access to audiovisual content; 2. the initiative to reform the Federal Telecommunications and Broadcasting Law (LFTR) in the matter of freedom of speech in social networks; and 3. the initiative to enact a Federal Digital User Law. This note presents their main provisions, the context of their conception and development, and takes stock of the opinions and recommendations issued by the IFT on these regulation proposals.

## *Spain*

Digitalisation is having a deep effect on the advertising sector, creating new goods and services and causing the entry of new players and new media channels. This has produced substantial efficiencies, such as improved personalisation of ads and better data on campaign's performance. Additionally, CNMC estimates that online advertising has grown at double digits in Spain in the last few years, as it has happened in most advanced economies, to reach an income of 3,450 million euros in Spain in 2019. This figure is higher than the income of all non-digital media combined in Spain, a situation that, once again, is similar in other advanced economies.

This sector also presents several competition challenges that may ultimately harm consumer welfare, through, for instance, higher prices, less choice or higher demands on firms and consumers (such as greater data requirements) from online advertising suppliers. In particular, this sector is concentrated in a few players, with Google and Facebook estimated to account for more than 70% of revenues in Spain. By segments, Google has more than 90% of income in search advertising and between 50% and 70% in the various open display intermediation services, while Facebook can account for more than 40% of revenue in display advertising. Concentration is a consequence of the essential role of data in this sector, since it is key to personalise ads and optimise advertising campaigns.

Second, there is opacity and lack of transparency. Advertisers, agencies and medium-sized publishers receive insufficient information to optimize their decision-making, in favour of certain operators, particularly vertically integrated ones. Opacity may also entail the discriminatory imposition of certain conditions or technical standards that unduly restrict interoperability.

Third, there are risks of competition-distorting behaviour due to the high levels of integration and concentration registered in the sector. It could lead to several problems such as the extension of market power from one market to another (leveraging) or discrimination in favour of one's own services (self-preferencing).

To address these challenges, the CNMC presents a series of recommendations in our Market Study, which are complementary and, therefore, should be jointly implemented. First, competition authorities must keep enforcing competition policy continuously and decisively in this market as the first line of defence against anticompetitive conducts. Second, competition policy tools should be complemented by specific regulation on digital platforms. Third, national and EU legislators must consider the complex relationship between privacy protection and the promotion of competition in digital markets in order to empower consumers and ensure their maximum welfare. Fourth, institutions should adopt a multidisciplinary and cooperative approach. Finally, regulatory and competition authorities need to reinforce their capacities and means to face the challenges posed by the digital economy.