Organisation for Economic Co-operation and Development

DAF/COMP/WD(2022)63

Unclassified English - Or. English

16 June 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 14 June 2022

The Evolving Concept of Market Power in the Digital Economy – Summaries of contributions

22 June 2022

This document reproduces summaries of contributions submitted for Item 5 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03497881

Table of contents

The Evolving Concept of Market Power in the Digital Economy

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "The Evolving Concept of Market Power in the Digital Economy" held during the 138th OECD Competition Committee meeting on 22-24 June 2022. 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 *.

Australia

The submission primarily draws on the Australian Competition and Consumer Commission's (ACCC) experience in conducting several sector inquiries into the competitiveness of digital platform services markets.

The ACCC is Australia's national consumer protection and competition regulator and is responsible for enforcing compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA). Relevantly, the CCA deals with conduct engaged in by a firm with substantial market power that would substantially lessen competition in the market and prohibits acquisitions that would do the same.

The ACCC has found that, whilst assessing market power in digital platform markets involves many of the same issues and inquiries as other markets, there are some differences. These include differences in identifying competitive rivals (particularly in multi-sided markets), the importance of potential competition and the importance (and role) of data.

Many digital platform markets are prone to the accumulation of substantial market power, which can readily become entrenched. Digital platform markets have characteristics that make them prone to high degrees of concentration and significant barriers to entry. Whilst many of these characteristics are not unique to digital platform markets, their strength and combined presence gives them greater significance in market power assessments. There is also growing recognition of the important role many digital platforms play in the operation of other markets in the economy, and particularly the 'gatekeeper' status of these platforms.

Whilst the ACCC recognises the significant benefits and sources of innovation that these services provide, we are concerned that several markets may already have 'tipped' in favour of one or two dominant firms. And that their market power is becoming increasingly entrenched and is expanding into related markets. The ACCC has also identified numerous significant and potentially long-lasting harms associated with exclusionary conduct by these firms, reduced competition in the market, bargaining imbalances and lack of sufficient consumer and business protections.

The ACCC considers that the existing economic and legal analytical tools of competition law – including those for assessing market power – remain broadly applicable for digital markets and do not need to be adapted. However, the duration, limited scale and inefficiency of enforcement action, plus limitations in the current merger control regime, mean that the CCA may not, of itself, be sufficient to fully address the identified competition and consumer concerns.

The question of whether regulatory reform is needed will be the subject of the ACCC's fifth interim report in its inquiry into digital platforms, due to be provided to the Australian Treasurer in September 2022. We are yet to form views on this question and, if so, what regulatory tools could be used to address the identified harms (in addition to the existing competition law tools). If reform is needed, it is likely the ACCC would recommend to the Australian Government that this would only apply to designated digital platforms and/or their services, characterised by certain criteria. The ACCC is closely following international developments and has identified several thresholds or criteria which may be relevant. These factors suggest that the concept of market power – whilst highly relevant – is not the only consideration when seeking to develop new regulatory regimes.

Austria

One important effect of digitalisation has been the increasing number of digital mergers that competition authorities have had to handle over the past decade or so. Many digital mergers have not been reviewed at all for lack of sufficient revenues. In traditional markets, competition authorities have already gathered sufficient experience, as partly reflected in antitrust laws, to both catch mergers and determine potential competition concerns. In digital markets, they are still apprentices and more experience is needed to make them adequately prepared for the challenges lying ahead. In order to help achieve this goal, this note shares the experience of the Austrian Federal Competition Authority (AFCA) in an important digital merger case: Facebook's acquisition of GIPHY.[1]

The most important lesson for the AFCA in this case has been the necessity to identify indirect users of GIPHY's GIF library to establish both the nexus for jurisdiction and assess the possible impact on Austria. Whereas direct users use GIPHY via its website or apps, indirect users access its GIF library via integrated interfaces in third-party services such as Facebook, Twitter, or Tiktok, to name just a few. Since it is the indirect users who underpin the indirect network effects, they are central for GIPHY's current or potential monetarization strategy. Competition authorities will have to consider this distinction between direct and indirect users in order to be able to assess the full economic potential of the parties involved and the likely effect of a merger on competition.

The increased significance of non-revenue-based measures in digital markets has already been acknowledged by competition authorities in the recent past. In the Facebook/GIPHY case, non-revenue-based measures were indispensable for the AFCA to determine the obligation to notify the merger in the first place and to assess both parties' current and potential market position in the relevant markets in the subsequent merger review. Here, it has to be emphasized that there would not have been any legal grounds for the AFCA to initiate an in-depth review of the merger and eventually refer it to the Austrian Cartel Court without the Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) which allows the AFCA to catch mergers that are potentially harmful to competition but fall below traditional revenue thresholds. Therefore, competition authorities will have to resort to a more flexible approach that takes account of the faster and disruptive competitive dynamics in digital markets.

[1] Since the economic analyses had been taking place before the rebranding in October 2021, we will use Meta's former name, Facebook, throughout the note.

BIAC

Business at OECD (BIAC) appreciates the opportunity to comment on the assessment of market power in digital markets. The digital economy is all encompassing. The digital economy spans from online retail to real estate listings to concert tickets to travel booking to social media. Consequently, there is not a universally defined digital market. While digital markets are dynamic and evolving, as many markets are, digital market innovations in some segments are not as groundbreaking as they once were. In a similar manner, prominent digital market characteristics are not unique to digital markets. Print newspapers are multi-sided markets. Broadcast radio is zero-price. Just as competition authorities were well equipped to assess market power in these traditional markets, they remain well equipped to assess market power in digital markets. Traditional market power concepts are not static, but rather flexible concepts that can be applied across industries, new and old.

Even so, BIAC understands that competition authorities may wish to consider how to better measure market power in digital markets. Such considerations should factor in legal certainty and enforcement predictability, so as not to chill innovation and development efforts, and to engage with market participants before taking action. Legal and evidentiary standards should remain high and the burden of proof should remain with the enforcement agencies when assessing market power in digital markets, especially when novel theories of market power or harm to competition are being proposed or applied.[2] Given the blurry nature of digital markets and the variety of digital platforms, BIAC cautions against "one size fits all" approaches, including the use of default thresholds for creating presumptions, in determining market power whenever a digital market, regardless of precise structure, could arguably be implicated.

This submission adds to BIAC's previous contributions on similar topics, including ex-ante regulation and competition in digital markets,[3] abuse of dominance in digital markets,[4] consumer data rights and impact of competition,[5] personalised pricing in the digital era,[6] and quality considerations in digital zero-price.[7] Section 2 examines the unique characteristics of digital markets and explains that not all of these characteristics are exclusive to digital markets. Section 3 provides an overview of competition authorities' robust market power toolset. Section 4 considers some of the market power concepts proposed for digital markets and analyzes their connection to traditional market power concepts. Section V concludes that traditional market power concepts are adaptable to digital markets.

---

2 OECD, News Media and Digital Platforms—Note by BIAC, DAF/COMP/WD(2021)76, ¶ 30 (Nov. 26, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)76/en/pdf.

3 OECD, Ex-Ante Regulation and Competition in Digital Markets—Note by BIAC, DAF/COMP/WD(2021)7 (Nov. 23, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf.

4 OECD, Abuse of Dominance in Digital Markets—Note by BIAC, DAF/COMP/WD(2020)38 (Dec. 8, 2020), https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf.

5 OECD, Consumer Data Rights and Competition—Note by BIAC, DAF/COMP/WD(2020)46 (May 28, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf [hereinafter BIAC Consumer Data Rights Note].

6 OECD, Personalised Pricing in the Digital Era—Note by BIAC, DAF/COMP/WD(2018)123 (Nov. 21, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)123/en/pdf.

7 OECD, Quality Considerations in the Zero-Price Economy—Note by BIAC, DAF/COMP/WD(2018)151 (Nov. 23, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)151/en/pdf.

*Brazil**

This paper discusses how the dominance concept applies to digital markets within the Brazilian jurisdiction. It demonstrates how difficult it is to determine what dominance means in abstract terms. After discussing the subject, from the point of view of legislation and precedent, the article shows that the Brazilian legislation is comprehensive enough to eventually incorporate new concepts of market power or new theories of harm created in this type of market.

Several questions must be answered simultaneously when one is trying to assess market power. For instance: What type of conduct or merger is under analysis? What is its context? Who are the involved players? What methodology is applied to assess players' profitability and market share? How market power evolves dynamically over time? Moreover, other issues may affect the concept of dominance. Authorities may perform a structural analysis, based on a market share calculation or on the direct evidence of competitive harm, which eliminates the need for the former. There are a myriad of ways an antitrust authority can explore to define a relevant market, to assess profit margin, and to determine the incentives and capacity players may have to engage in anticompetitive conduct. This vast array of methodologic options on how to assess market power also exists in merger analysis.

In Brazil, an anticompetitive conduct is any practice adopted by an economic agent that may, even if potentially, cause damages to free competition, even if the infringer has no intention to cause damages to the market. This concept is sufficiently open to include new theories of harm.

CADE's Guide for Horizontal Merger Review provides that the authority can assess cases in which there is the elimination of maverick firms (which have a disruptive degree of rivalry) and potential competition. As for the latter, the authority evaluates whether a firm is on the brink of entering a market; whether it has relevant assets that can be used easily to return to the market without incurring significant sunk costs; whether it can bear the costs needed for entering the market in a relatively short term; amongst others. Similarly, the Guide points to the necessity of adapting merger review for two-sided markets and relativizes market power analyses that employ classic concentration indexes such as the HHI since, amongst other reasons, they are only an initial assumption about the parties' market power. Therefore, Brazilian laws are adaptable to new concepts of market power as they are not limited to a structuralistic view of antitrust analysis founded on market shares.

EU

In EU competition law, the concept of market power plays a central role in the application of both the merger control and antitrust rules, including in digital markets. Market power is qualified as a position of economic strength, which enables an undertaking to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.

Digital markets present certain characteristics that raise challenges for both market definition and the competitive assessment. Nevertheless, the EU competition rules' principles and basic concepts are sufficiently flexible and adaptable: this has enabled the Commission to assess market power and theories of harm in the digital sector, factoring in its analysis all the specific features of digital markets, dynamics and business models.

At the same time, while the Commission can intervene in relation to market power in digital markets under the current antitrust and merger framework, it has also proposed the introduction of a new regulatory instrument, the Digital Markets Act (or "DMA"), to tackle systemic issues arising in digital markets from the presence of so-called gatekeepers. The purpose of the DMA is to address upfront the most problematic conducts by means of ex-ante rules. However, while the DMA and its obligations draws inspiration from competition law experience, including as regards the notion of gatekeeper, it remains a separate instrument, which complements but does not replace competition law.

Germany

Characteristics of digital markets give rise to a variety of challenges for legislators and enforcers. Some legislators employ a two-pronged approach: on the one hand they update and modernise existing tools, on the other hand, new approaches which sometimes have a "regulatory touch" are developed in order to address, in particular, the special role of large digital companies that are active in a number of different markets, oftentimes orchestrating large ecosystems of different products and services.

This note will focus on how this approach deals with – and to some extent reconsiders – the role of market power. As will become clear below, digital markets have a number of specific and important characteristics (explained in more detail in ch. 2) which need to be taken into account when establishing the market power of a company. Importantly, however, it seems prudent to acknowledge that especially in digital markets, large companies can hold special positions of economic power which extend beyond one specific market, requiring the traditional concept of market power to be appropriately complemented to capture these specificities of digital markets.

Hence, in a number of jurisdictions around the world, legislators have introduced or are considering new tools for competition authorities to address the economic power held in particular by large digital platforms. This includes the Digital Markets Act in the European Union, the debate on a regime for firms which have "strategic market status" in the United Kingdom as well as proposals in the United States such as the American Choice and Innovation Act.

Germany has been one of the first countries to introduce new provisions into its competition law, such as Section 19a of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*; hereinafter "GWB") which explicitly focuses on companies that are of *paramount significance for competition across markets*. In this concept, being dominant on one (or more) market(s) is only one of the factors potentially contributing to the status of paramount significance for competition across markets. Other factors include for example the intermediation power of the company as well as its vertical integration and its activities on otherwise related markets (for more on this, see ch. 3).

The Bundeskartellamt has already applied these new provisions in a number of cases (see ch. 4). Most notably, Google and Meta (formerly Facebook) have already been designated as having paramount significance for competition across markets.

Greece

Economic power is multidimensional. The traditional concept of "market power" reflects a specific yet pervasive form of economic power in which a firm can affect equilibrium quantities or prices in a market by reducing the extent of competition with its rivals selling substitutable products or services ("horizontal competition"). However, other forms of economic power particularly relevant to understanding power relations in value chains and ecosystem exist.

In this note, we present another form of economic power that allows to measure bargaining power within value chains and ecosystems: "vertical market power". Moreover, we illustrate how it can help improving the measurement of economic power at the firm and the ecosystem or value chain levels using real data from a supermarket sector inquiry led by the Hellenic Competition Commission in 2021[8].

In particular, we present a firm-level metric and a metric at the value chain or ecosystem level. The former is given by the following equation:

Equation 2: Resource-based vertical market power based on differential dependency for a node x

$$\mathrm{SSBC}(\mathrm{N}_X) = \frac{\mathrm{SBC}(\mathrm{N}_X)}{\sum_{\mathrm{i}=1}^{\mathrm{n}} \mathrm{SBC}(\mathrm{N}_i)}$$

where 'SSBC' stands for 'share of square betweenness centrality', 'SBC' stands for 'square betweenness centrality', N_x for 'node *x*' and *n* is the total number of nodes/firms in the value chain or ecosystem.

Using data from the aforementioned supermarket sector inquiry, we show how using this metric can reduce false positives and false negatives when detecting dominance, as opposed to using market shares.

The indicator at the value chain or ecosystem level is given by the following equation:

Equation 3: Vertical HHI indicator for a value chain or ecosystem with *n* firms

$$VHHI = \sum_{i=1}^{n} [S\mathrm{SBC}(\mathrm{N}_i)]^2$$

where $S\mathrm{SBC}(\mathrm{N}_i)$ stands for 'share of square betweenness centrality' calculated as given by Equation (2).

Using panel data from the supermarket sector inquiry, we calculate the distribution of vertical market power across 11 relevant markets for years 2015 to 2019 using the VHHI index. This allows us to compare the level of vertical market power within a relevant market across time and between markets at a given time.

[8] See https://www.epant.gr/en/enimerosi/press-releases/item/1338-press-release-publication-of-hcc-s-final-report-on-sectoral-inquiry-into-basic-consumer-goods.html

India

The experience of CCI shows that the assessment of market power in digital markets broadly follows similar principles as applicable to the traditional markets; however, with appropriate changes necessitated by the unique features of the digital markets. The CCI has examined these features in various cases involving digital markets while assessing market power.

Unlike other jurisdictions, the digital market cases in India have been or are being examined either under Section 4 of the Act (for abuse of dominant position) or Section 3(4) of the Act (for vertical agreement/restraint). The statutory framework guiding CCI's assessment, provides for various factors which can be looked into while assessing an entity's position in the relevant market [Section 19(4) of the Act]. Such factors *inter-alia* include parameters based on market shares, entry barriers and countervailing buyer power. Besides, CCI is also empowered to take into account any other factor which it may consider relevant for the determination of dominance. In digital market cases, CCI, while recognizing the limitation of market shares as an indicator of market power, has rather relied on factors such as strength of network effect, entry barriers, and assessment of strategies adopted by the players to assess dominance.

The approach of CCI in dealing with data driven multi-sided ecosystems demonstrates a case-by-case assessment, based the specificities of the digital market, having due regard to the attending circumstances.

Guided by such consideration, CCI has looked beyond traditional parameters to focus on how competition in digital economy is evolving around non-price parameters, including network effects, lack of interoperability between platforms, psychological barriers to switching to an alternative platform, privacy, homing decisions. Thus, CCI has acted in a nimble way by suitably modifying its assessment framework while dealing with the diverse nature of products/services in the digital market. While doing so, CCI has been constantly endeavored to strike a fine balance between ensuring fair & competitive markets and preserving innovation.

Israel

The Israel Competition Authority (**ICA**) has recently conducted a study in the industry of payment apps that provide payment transfer services between individuals. In view of the Routable on the Evolving Concept of Market Power in the Digital Economy, this contribution describes the ICA’s study, its conclusion and the corresponding policy recommendations. It will also place the study in the broader context of the rising digital economy related competitive concerns, and depict the ICA's unique advocated policy measures.

The payment apps currently operating in Israel commenced operations in 2017 and are all owned by local banks (two of which are owned by the two largest banks): Bit by Bank Hapoalim Pay by Bank Leumi and Paybox by Bank Discount. The main service provided by these payment apps up until recently was executing person-to-person payment transfers (hereinafter: **P2P transfers)**.

The ICA's focus on the field of P2P transfer services stems from the importance of competition in the provision of banking and payment services, alongside various concerns regarding the high level of concentration in this field. The main purpose of this study was establishing a factual infrastructure regarding developments between 2017 and 2020, enabling the drawing of evidence-based policy recommendations.

Furthermore, this study also serves an important role when viewed in the digital economy broader perspective. Over the recent years, competition authorities around the world are more frequently challenged by digital platforms that benefit from a network effect in the consumption of the services they provide. The competitive dynamic that characterizes these markets is strong competition for the market, but once that's decided, competition tends to converge to a winner-takes-all market. At this stage, market entry barriers are so high that a potential entrant, even one offering a preferential service, will not be able to successfully enter the market.

Another characteristic 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.

Key factors for preserving competition in digital platform markets are maintaining consumers' ability to consume the product from a number of suppliers (hereinafter**: multi-home**), and reducing barriers to transitioning between different service providers. That is mainly by ensuring interoperability of platforms and customers' data portability.

ICA's study presented in this contribution provides empirical evidence for the manner in which digital markets evolve, focusing on its extremely rapid dynamics. It also offers a follow up discussion on mitigating competition concerns in such markets.

The main questions at the heart of the study, are the following: (1) Is there significant growth potential in the field of P2P transfers in payment apps beyond current use? (2) Is there a network effect in this market? (3) Does competition tend towards a-winner-takes-all market structure? (4) What is the scope of multi-homing in the market and can it diminish competition concerns? (5) Is there differentiation between existing payment apps? (6) What is the scope of payment apps' use by small and very-small businesses? The database used in this study covers the vast majority of P2P transfers executed using payment apps between 2017 and 2020

Japan

As digitization advances and new business models expand, the Japan Fair Trade Commission (Hereinafter referred to as "JFTC".) has taken various measures to promote fair competition in the digital sector.

For instance, fact-finding surveys on digital markets conducted by the JFTC point out that digital platform operators are likely to hold dominant or influential positions in the market due to various characteristics of digital platforms, and in such cases, they tend to hold superior bargaining position over many business partners. In addition, the services provided by digital platform operators have network effects and economies of scale, which closely relates to issues concerning importance of data as inputs and switching costs for users.

In the area of law enforcement, the JFTC has been paying close attention to competition in the digital sector. In addition to the above-mentioned fact-finding surveys, the JFTC has conducted investigations based on the Antimonopoly Act into the conduct of large digital platform operators and has promptly eliminated alleged violations.

In addition, taking characteristics of digital platforms into account, the JFTC has identified new elements to be considered in reviews of business combination regarding the market power of digital platform operators and clarified its view on market definition in multi-sided markets and on assessment of the importance of data, etc. Furthermore, to appropriately handle the cases so-called "killer acquisition", the JFTC has made it clear that, the JFTC reviews business combination plans, even though they do not meet the notification threshold, when the total amount of the acquisition is large and the business combination is expected to affect domestic consumers.

The contribution paper first describes the characteristics of digital platforms, and then explains: how the JFTC evaluates and analyzes market power in the digital sector through the introduction of the fact-finding survey reports on digital markets; investigation cases where the conduct of digital platform operators may constitute abuse of superior bargaining position, private monopolization, and unfair trade practices; and the revision of the merger guidelines.

Korea

Market dominance assessment is the starting point to determine whether there is an abuse of market dominant position. The basic legal framework for defining a market and enforcing laws against abuse of market dominance is still effective in the digital economy, but the unique characteristics of the digital economy should be taken into account. Therefore, this report will narrow the scope of discussion to online platforms—the core part of the digital economy—and review how market dominance is assessed in this sector.

Online platforms have unique characteristics different from traditional industries such as multi-sided markets, cross network effects and free services, and these characteristics affect market definition and examination of market share and entry barriers. Assessment of market dominance of a firm consists of two steps: defining a market and determining whether the company has market dominance. As the two steps are closely intertwined, we need to review the process step by step to see how online platforms affects market competition.

When defining a market in the digital economy, we need to consider the followings: multi-sided online platforms affects product substitutability due to cross-network effects; as platforms provide users with free services, alternative variables other than price should be considered; things are rapidly changing in the dynamic digital economy. Also, when determining a dominant player in a market, we need to look at multiple factors: multihoming restrictions; market tipping caused by cross network effects or economies of scale; dominance transferred to adjacent markets through vertical integration.

Considering online platforms' characteristics mentioned above, the Korea Fair Trade Commission (KFTC) carried out the assessment in antitrust cases involving abuse of market dominance by Google LLC, Naver Shopping and Naver Real Estate. The Commission analyzed platforms' market dominance by adopting innovation market definition and reviewing supplementary indicators (e.g. page views and the number users) as well as their characteristics (two-sided markets where the actual transactions are made outside the platforms). The Commission has been making continuous efforts to enforce the Monopoly Regulation and Fair Trade Act (MRFTA) while paying attention to these unique qualities of online platforms.

Furthermore, the KFTC has been trying to establish the Guidelines on Abuse of Market Dominance by Online Platforms. The Guidelines provide criteria for market definition and dominance assessment and demonstrate how the MRFTA was actually enforced in previous cases so that they increase enforcement predictability. Along with the continuous efforts for prompt enforcement and improved guidelines, the KFTC will remain committed to conduct more accurate assessment of market dominance in the digital economy.

Mexico

In Mexico, the Federal Economic Competition Law (LFCE) establishes the elements that must be considered for the determination of substantial market power, among them, the estimation of market shares and the assessment of barriers to entry. This contribution presents the experience of the Mexican Federal Economic Competition Commission (Commission or COFECE) in the determination of substantial market power (in particular, on market shares and barriers to entry) in digital markets, using as an example the Walmart/Cornershop merger. It also highlights that the Commission will continue analyzing the concept of market power in the digital economy markets, as well monitoring the development of this subject in other jurisdictions and international organizations, with the aim of determining whether the concept currently established in the LFCE is sufficient or not to correct the problems present in some digital markets in Mexico.

Romania

RCC followed in its efforts on strengthening its capacity to deter companies with market power from abusing it, in this ever-changing market environment.

The competition authority finalized its first major abuse of dominance case in the digital field, against the biggest marketplace in Romania, a case that further shaped the line of action that must be taken to ensure that the consumer is protected.

Also, the competition authority strengthened its internal structure, by introducing a new digital task force that functions across two departments (the Services department and the Consumer Goods department). This task force will apply new tools like DMA, DSA, P2B.

To further evaluate the new markets and new players that have emerged, 4 new preliminary analyses were initiated by RCC in 2021.

Spain

This contribution by the Spanish National Markets and Competition Commission[9] (CNMC) addresses the topic of the Roundtable on "The Evolving Concept of Market Power in the Digital Economy" to be hosted by the OECD in June 2022.

To that end it relies on the CNMC's experience in analyzing market power in digital markets in the areas of competition enforcement and advocacy.

From the enforcement perspective, the CNMC has assessed market power in digital markets both in antitrust and in merger control. Specific cases have dealt with online food delivery, ride-hailing apps, classified websites, online search and other digital markets. Several common and interrelated issues arise. First and foremost, the appropriate appraisal of multi-sided markets and whether each side has to be considered separately or not. Secondly, the relevance of data, which increases the role of scale/scope/network economies through dynamic learning effects, creating potential barriers to entry. Thirdly, the need to consider alternative criteria to calculate market shares (other than value), the use of zero pricing strategies and the importance of ecosystems.

From the advocacy perspective, the CNMC has examined the effect of digitalization in several documents, such as the Fintech and the online advertising market studies. These analyses do not focus specifically on how to define or measure market power. Yet, the in-depth analysis of sectors affected by digitalization is key to understand the general nature of market power in digital markets and to identify competition problems and barriers to entry, which can hamper competition and be a source of market power. Indeed, the analysis in our market studies reaffirms the existence of competitive challenges posed by digitalization, and identifies some barriers to entry, such as economies of scale and scope, learning economies and network effects. They also endorse the relevance of data as a source of market power. The studies recommend combining competition policy with digital and privacy regulations, and with inter-institutional cooperation, in order to face these challenges.

[9] This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.

Chinese Taipei

This paper presents the key aspects that the Chinese Taipei Fair Trade Commission (CTFTC) takes into consideration when it assesses market power in the digital economy and illustrates this with an example of how the CTFTC determines market power of a digital platform.

Under the traditional analytic framework, market share is often used as a proxy for a business's ability to influence prices and exclude market competition. Nevertheless, barriers to entry arising from network effects and characteristics of two-sided markets have played a key role in assessing a business' market position in a digital market.

In 2021, the CTFTC concluded that food-delivery platform foodpanda imposed restraints on its partner restaurants by requiring them to maintain their platform prices consistent with in-store prices and by restricting restaurants from refusing customers' pick-up orders. Such business practices constituted vertical restraints that were likely to impede competition. The CTFTC therefore imposed a NT$2 million fine on foodpanda and demanded that foodpanda ceased its illegal practices.

In addition to market shares on each side of the platform, the CTFTC also considered entry barriers stemming from network effects. Given the following considerations, the CTFTC concluded that foodpanda held substantial market power. First, foodpanda had first-mover advantages in entering the market earlier than other competitors. In comparison with the new entrants, foodpanda enjoyed noticeable advantages from market coverage, brand awareness, marketing and operating resources, and the number of partner restaurants. Moreover, foodpanda benefited from indirect network effects due to the large number of users it had on each side of its platform. Potential competitors and new entrants were in a disadvantageous position, reducing their incentives to establish a business scale viable for growth to the point that they could impose a competitive threat to foodpanda.

There is no single factor for determining a platform's market power because most factors in digital markets are interrelated, such as network effects, economies of scale and scope, or competitive advantages arising from possession of data or intellectual property. While fundamental principles and analytical frameworks under competition laws remain, challenges to methodologies and tools for market definition and market power assessment will inevitably call for adjustments in response to the industrial features of digital markets to enable the CTFTC to conduct more appropriate competition assessments.

United Kingdom

Assessing market power is central to the CMA's cases, including cases involving digital markets. Over the past few years, we have adapted our approach to deal effectively with digital markets and revised our guidance to reflect such approach, and have been mindful of specific market features, business models and competitive interactions which are typical to those.

In dealing with digital cases, we have not found that a new notion of market power was needed specifically for the digital space or for it to be able to capture our concerns in digital markets. However, given the prevalence of certain features in digital markets, we focussed on certain types of evidence or analyses as most informative for our assessment.

From a process perspective, we have revised our guidance to reflect the way we conduct assessments. This includes placing less emphasis on a formalistic market definition exercise, which may be more difficult to perform and less informative in digital markets. At the same time, we have placed more emphasis on dynamic constraints and considered innovation as the current process of rivalry through investment decisions and incorporated the threat of entry when determining current competitive constraints. Further, we have considered characteristics like multi-sidedness, network effects and any resulting tipping dynamics in performing our assessments.

While we do not think a new concept of market power is needed, we believe our current tools sometimes struggle to deal effectively with digital markets for reasons including their speed of change, complex nature and tendency to tip in favour of a few industry participants which then become difficult to displace. Therefore, we recommended the introduction of a new ex ante regulatory regime to proactively shape the behaviour of particularly powerful digital firms and to prevent consumer harm from arising. As part of our recommendation, we proposed a test to identify what firms should be subject to this new regime which includes, as an integral part, a market power assessment.