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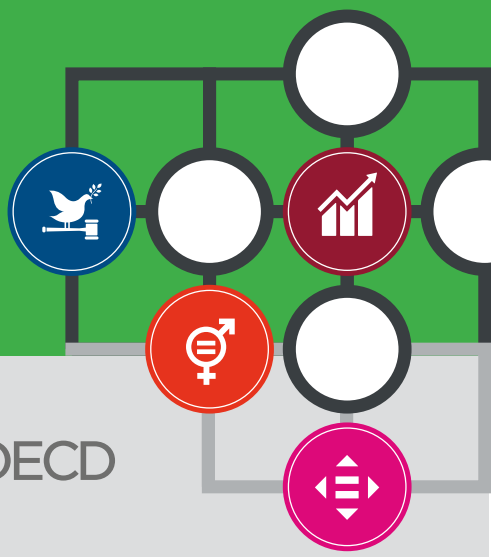

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Background note
Abuse of dominance in digital markets

The present background note was produced by the United Nations Economic and Social Commission for Western Asia (ESCWA) for a session on the theme "Abuse of dominance in digital markets" of the Fourth Arab Competition Forum 2023. It presents various forms of anti-competitive practices in digital markets, and showcases enforcement measures taken by competition authorities in that regard.

Background

Developing countries stand to benefit massively from the digitization of their economies, as long as existing digital infrastructure is mature enough to facilitate communication and exchange in areas where traditional infrastructure is lacking. Furthermore, digitization may contribute to inserting local firms into regional or global value chains, thus providing opportunities for micro, small and medium enterprises (MSMEs) to scale up and grow effectively and efficiently.

Digital platforms acting as intermediaries between businesses (such as suppliers, advertisers and content providers) and all users play a key role in these markets, some of which are concentrated and sometimes monopolized.

As the number of concluded transactions through digital platforms is growing exponentially, policymakers and competition authorities are either considering or have already put in place regulations and systems to prevent and deter any risk of abuse of dominance by giant digital companies operating in the markets. The purpose of the new regulations is to protect competition in the digital market, and consequently, safeguard consumers who are using their computers or smartphones to purchase goods and products, manage finances or request loans, download apps, communicate with each other, reserve trips, and search information and data. The broad range of consumers' online activities proves the extent to which digital platforms have become an integral part of the daily lives of consumers around the world.

Many digital markets exhibit certain characteristics, such as low variable costs, high fixed costs and strong network effects, that result in high market shares for a small number of firms. In some cases, these lead to "competition for the market" dynamics, in which a single firm captures the vast majority of sales. Firms in these concentrated markets may possess market power, the ability to unilaterally and profitably raise prices or reduce quality beyond the level that would prevail under competition.

However, the analysis of this harm can be potentially complex and give rise to the risk of error (resulting in either over- or under-enforcement). Aggressive enforcement that is not founded in economic theories of harm, or which does not address the risk of over-enforcement, may end up harming the consumers it was meant to protect, and undermine support for competition enforcement more generally. To balance these risks, it seems that both (1) an openness to abuse of dominance theories of harm, and (2) great care in selecting which cases to bring, are needed.

The present paper sets out the confirmed anti-competitive practices exhibited by digital companies, and the approaches adopted by both regulators and competition authorities to deter these unfair practices and anti-competitive behaviors.

I. Abuse of dominance practices in the digital market

Digital companies, through various practices, enlarge and enhance their consumer database to preserve their dominant position. In some cases, the adopted practices can constitute abuse of dominance. The following are some anti-competitive practices:

- Data usage: Given that the number of customers is significantly increasing on platforms, digital companies are collecting and expanding their databases through customer subscriptions. Customer data can be used by giant corporations to better understand their desires, and thus to maintain customer engagement exclusively to their platforms. Moreover, giant corporations who have subsidiaries or own other digital services (such as Meta owning WhatsApp, Instagram and Facebook) can compile (without customer approval) and benefit from an enormous amount of personal data, placing them in a highly advanced and dominant position in the digital market. For instance, on 11 January 2023, the Federal Cartel Office (FCO) in Germany issued a statement of objection against Google's data processing terms. According to FCO, Google has its own services and is able to also use several other websites to collect and combine data for various purposes. Consequently, FCO recognized that this practice allowed Google to establish detailed customer profiles.[1] Such process allows giant digital corporations to establish monopolies, exploit and misuse personal data, and impose barriers to new competitors, such as small and medium enterprises (SMEs) who wish to operate in the digital market.

- Limiting third parties' applications: Digital companies, in several instances, have had discretionary power to restrict third parties' applications on their platforms. For instance, complaints targeting Google and Apple were filed by developers

claiming that the removal of their independent applications was due to the elimination and undermining of competition in the digital market, which constitutes an anti-competitive practice. Another form of restriction for third parties' apps can be achieved when digital companies give preferential treatment to their own applications. For instance, such behaviour drove the Netherlands Authority for Consumers and Markets (ACM) to launch an investigation targeting mobile app stores to identify the extent of their influence on the selection of apps for customers, and whether such behaviour constituted abuse of dominance. ACM identified the following three conducts requiring further investigation: favouring own apps over apps from other providers, unequal treatment of apps in general, and a lack of transparency in ranking applications.[2]

- Bundling and tying: Digital entities have the ability and resources to link their products and/or services to other correlated and much-needed products also offered by them. Through this practice, digital firms are encouraging customers to always use their own services for all types of digital activities. This anti-competitive practice, which is considered abuse of dominance, allows giant digital corporations to leverage their market power solely in one platform (their own), thus excluding potential competitors from the digital market. In addition, big corporations tend to ensure their applications appear first in search results. This practice directly affects consumers, as it limits their freedom of choice.[3]

- Anti-steering: Often, giant digital corporations limit payment methods to their own systems, based on their particular terms and conditions. Such a move is considered an anti-competitive practice, since business developers are obliged to sell their services solely on giant platforms, which loses them the opportunity to move to another cheaper platform. This exclusivity can drive small and medium businesses out of the digital market, as they will not be able to support the financial burdens and fees of staying on giant corporations' payment systems.[4]

- Mergers and acquisitions (killer acquisitions): Given that the pre-merger notification threshold imposed by competition law cannot be met in many instances, giant entities benefit from this loophole to acquire SMEs, such as startups that do not possess many assets and/or that have insignificant yearly turnovers. Consequently, the acquisition of potential emerging competitors in the digital market harms the market and raises competition concerns. For instance, through acquisition, giant digital platforms profit from more data, which enables them to enjoy a bigger market share, impose barriers on competitors, and harm consumer interests by increasing prices and limiting choice, among other practices.

The above-mentioned practices make the digital market highly concentrated, meaning that the few corporations that possess market power have the ability to increase prices exclusively and/or reduce the quality of products and services. Consequently, policymakers and regulators have started to act by adopting a specific legislative system to effectively deter abuse of dominance practices in digital markets.

II. Importance of ex-ante regulation to tackle abuse of dominance

Competition law is considered ex-post, meaning that businesses are sanctioned after committing harm, such as anti-competitive practices. Regulators may also amend competition laws by increasing fines, another ex-post move. However, giant digital companies are often so financially powerful that a fine will not fully deter them from their anti-competitive practices. Consequently, ex-post measures may be considered too delayed to prevent harm from abuse of dominance by digital platforms.

This deadlock has pushed regulators to adopt another approach to regulating the digital market, known as ex-ante. The ex-ante measure is considered more preventive as regulators forecast the result of anti-competitive practices committed by giant digital corporations, meaning that forbidden practices are pre-determined and prohibited prior to their occurrence. Through this approach, big tech companies are familiarized with practices qualified as anti-competitive, an example of which is interoperability, which means connecting several digital products/services to each other. Moreover, based on specific thresholds and criteria, big tech has a duty to notify competition authorities, share with them important types of data, and fulfil particular obligations. Furthermore, ex-ante measures aim to complement competition laws by imposing fairness between competitors, guaranteeing innovation in the market, and lowering the prices of products/services.

Several jurisdictions are adopting the ex-ante approach (box 1).

Box 1. Ex-ante regulations

United Kingdom of Great Britain and Northern Ireland

In the United Kingdom, policymakers introduced an ex-ante regime to deter anti-competitive practices in the digital market and preserve competition. A special Digital Markets Unit (DMU) was established within the competition authority. The regime enables DMU to designate entities with a strategic market status, and have access to specific types of data. Based on the data assessment (case by case study), DMU can develop and enforce a code of conduct and regulatory measures to keep the digital market open. Moreover, the ex-ante regime in the country allows DMU to target a specific company or a group of companies to preserve competition in the digital market, by imposing binding obligations on them.

Source: European Commission and others, G7: Compendium of approaches to improving competition in digital markets, 2022, p. 34.

European Union

The European Union adopted an ex-ante measure through the Digital Market Act (DMA). This regulation targets digital players called "gatekeepers" and pre-determines specific harmful practices. To determine whether a digital company is qualified as a "gatekeeper", precise quantitative criteria, such as turnover, market capitalization and the number of users, are pre-determined. As in the United Kingdom, DMA can request and have access to the data of designated big tech companies, such as WhatsApp and Facebook Messenger. Big tech companies have a duty to cooperate and share data with the authority. As DMA has the power to impose some duties on specific big tech companies, when this occurs, "gatekeepers" have an obligation to comply with and respect a list of self-executing obligations, such as duties to adopt stringent measures to protect and preserve the privacy and security of customers.

Source: European Commission and others, G7: Compendium of approaches to improving competition in digital markets, 2022.

Japan

Japan enacted the Act on Improving Transparency and Fairness of Digital Platforms in February 2021. This Act imposes an ex-ante regulation on digital platforms by requiring them to disclose their terms and conditions and other information relevant to their transactions, and pre-notify when any changes are made; establish appropriate internal procedures to ensure the fairness of transactions or to settle disputes with platform users; and submit annual self-assessment reports regarding the status of transactions and disputes to the Minister of Economy, Trade and Industry of Japan. Failure to comply with this reporting obligation is subject to fines. The Minister reviews and evaluates the reports, discloses evaluation results and, if required, has the authority to issue recommendations and public announcements. If there is any suspicion of a violation of the competition law, it is referred to the Japan Fair Trade Commission.

Source: Jeffrey J. Amato, Japanese Legislature Passes Act to Regulate Big Tech Platforms, 2020.

While ex-post measures address the consequences of anti-competitive practices, which does not guarantee a strong deterrence effect against harm, the ex-ante approach prevents potential harm by imposing particular conditions and conduct on specific big tech companies.

In addition to the measures taken by regulators, competition authorities have a fundamental role in diligently imposing such measures in the market, and ensuring the full compliance of big tech companies with competition rules.

III. Enforcement actions taken by competition authorities

Competition authorities have started to enforce competition rules against violators who are abusing their dominance in the digital market, especially in the context of merger and acquisition transactions. Box 2 presents three decisions taken by authorities to monitor and deter giant companies' behaviour.

When analysing similar decisions and measures taken by various jurisdictions, such as the European Union, China and the Republic of Korea, it becomes clear that authorities, through detailed investigations, merger and acquisition reviews, and market studies, are investing a significant amount of time and resources in monitoring the activities of giant digital companies in the digital market. Moreover, given the monopolization risk that can derive from the acquisition of SMEs by giant digital companies, authorities are launching merger and acquisition assessments, even when the threshold is not met. Furthermore, given the financial power and data abilities of big tech companies to lower prices and offer free products and services to a massive number of customers, authorities are now shifting their focus when assessing anti-competitive practices. Traditionally, assessing anti-competitive practices and harms was based on prices. Today, however, the assessment takes into consideration other key factors, such as quality of services, privacy protection, and advertisement choices.[5]

Box 2. Decisions against big tech companies

United States of America - Federal Trade Commission

In July 2022, the Federal Trade Commission (FTC) challenged Meta's proposed acquisition of Within Unlimited Inc,[a] and filed its complaint in the federal court to seek a preliminary injunction.

Summary of the context: Meta is considered the largest provider of virtual reality devices, and a leading provider of online applications. Within Unlimited Inc is an independent virtual reality studio that developed a fitness application called Supernatural. According to the complaint, Meta is a potential entrant in the fitness application market, possessing an advantage because of its significant resources. However, rather than entering on its own, Meta chose to attempt to acquire Supernatural.

FTC decision: FTC stated that Meta's independent entry will increase consumer choice, innovation and competition. In contrast, the acquisition would eradicate the potential benefits of an independent entrance, resulting in weakened competition in the market. Furthermore, according to FTC, the acquisition contract aimed to expand the Meta empire by endeavouring to illegally buy Supernatural. As a result, FTC decided that the transaction would weaken competition, violating antitrust laws.

United Kingdom – Competition and Market Authority

The Competition and Market Authority (CMA) dynamically monitors and reviews mergers in digital markets. In September 2022, after concluding in its phase 1 investigation that the merger of Microsoft/Activision could lead to competition concerns in gaming consoles, CMA redirected the case to a detailed phase 2 investigation.[b]

Summary of the phase 1 investigation: Microsoft is a global tech company offering products and services with a global turnover of nearly £125 billion in 2021. Activision Blizzard is a game developer with a global turnover of £6.3 billion in 2021. Given the evidence that Microsoft has a leading gaming console, cloud platform and PC system CMA raised concerns that Microsoft would leverage Activision games with Microsoft's services and products. As a result, CMA concluded that the merger could harm competitors and damage competition in the gaming market.

Japan – Japan Fair Trade Commission

The Japan Fair Trade Commission (JFTC) reviewed the acquisition of Fitbit Inc by Google.[c]

Summary of the context and findings: Google is active in a wide range of fields, such as Internet search, cloud computing, software, and digital advertisement. Fitbit is active in the development, manufacturing and distribution of wrist-worn wearable devices. According to JFTC, even though the acquisition did not meet the threshold for notification, as stipulated in the Competition Law, the transaction was large, and so local consumers were expected to be impacted. Therefore, JFTC decided to assess the transaction. As a result of the assessment, JFTC considered that the acquisition transaction would not restrain competition in any trade fields, provided that Google and Fitbit would undertake the following strict remedies imposed by JFTC:

- Open API for 10 years.
- Third-party access to user health data (with user consent) for 10 years.
- Do not use user health data for Google's digital advertising for 10 years (can be extended for up to another 10 years).

a Federal Trade Commission, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within, 2022.

b GOV.UK, Microsoft/Activision deal could lead to competition concerns, 2022.

c Japan Fair Trade Commission, JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC, 2021.

IV. Considerations for the Arab region

Given the above-mentioned evidence, approaches and measures taken by Western and Asian jurisdictions, policymakers, regulators and authorities in the Arab region must start actively working to enact legislative reforms to tackle anti-competitive practices in the digital market. Such reforms may include the adoption of ex-ante regulations. Furthermore, given the financial power of big tech companies and their huge databases that can create a disequilibrium for MSMEs, Arab competition authorities must start developing their human capacity, tools, resources and skills to strengthen their knowledge and assessments of the digital market. Most importantly, Arab countries with well-established competition authorities and with an emerging digital market must carefully study their markets, and take appropriate measures and legislative reforms to safeguard customers and local SMEs from anti-competitive practices. Going forward, competition authorities seeking to address abuses of dominance in digital markets would benefit from deeper international cooperation, given the international scope of many digital firms. In addition, significant opportunities remain for the development of new methodologies that help authorities assess the unique circumstances in digital markets, and identify clearer conditions under which harm may emerge.[6]

Endnotes

1 Federal Cartel Office (FCO), Statement of objections issued against Google's data processing terms, 2023.

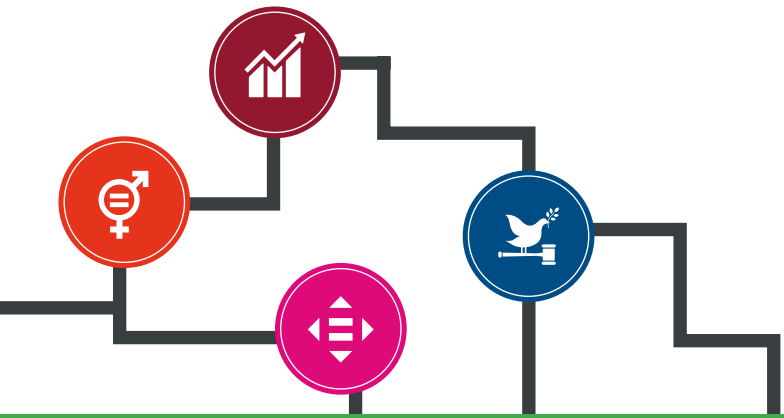
2 Authority for Consumers and Markets, ACM launches investigation into abuse of dominance by Apple in its App Store, 2019.

3 Obhan and Associates, Anti-Competitive Practices in Digital Markets by Big Tech under Government Scanner, 2023.

4 Ibid.

5 Baker and Miller, FTC v Facebook – where are they now?, 2022.

6 Organization for Economic Co-operation and Development (OECD), Abuse of Dominance in Digital Markets, 2020.



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