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Platform Governance

Syncing Antitrust and Regulatory Policies to Boost Competition in the Digital Market

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Ahandful of tech giants have enormous clout in key digital markets, and competition authorities around the globe are concerned about their domination of the market. In many countries, privacy and regulatory policy makers are similarly working to rein in tech power. As it seems clear that neither antitrust nor privacy rules alone are adequate to protect consumers and promote robust competition, countries must find ways to make all their policy interventions support complementary goals. The global nature of digital markets now makes such policy collaboration equally important across national boundaries.

The explosive growth of Google in the search engine and a suite of other popular service markets, of Facebook in social networking and of Amazon in online retailing illustrate the winner-take-all characteristics of many digital markets. Each of these companies has made extensive upfront investments to build platforms characterized by network externalities (for example, that consumers prefer to buy and suppliers to sell where everyone else is congregating), strong economies of scale and scope due to low marginal costs, and increasing profits based on control of data.

This combination of features means that these digital markets feature large barriers to entry. The leaders in search, social networking and other platforms have a large cost advantage with their scale of operations and a large leg-up from the scale of their data. Entrants cannot generally overcome these without either a similar customer base (network effects) or a similar scale (scale economies), both of which are difficult to obtain quickly and cost-effectively.

Consumers' tendencies to seek easy, simple, one-stop-shopping on digital platforms generate more barriers. As the final report of the Stigler Committee on Digital Platforms (2019, 29) noted, consumers tend not to "scroll down to see more search results, they agree to settings chosen by the service [provider], they single-home on [stick with] one platform, and they generally take actions that favor the status quo and make it difficult for an entrant to attract consumers."

In addition, the role of data in the digital sector fuels the advantages of companies such as Google, Facebook and Amazon. These companies' ability to collect massive amounts of personal data of all types allows for targeted advertising to consumers. It appears that the profits generated from gathering more data about and from more people grow larger as more dimensions of data are available to each platform, creating even more advantages for incumbent dominant service providers. Advantages are easily preserved by platforms that require consumers to agree to terms of service that are unclear, difficult to understand and constantly changing, which prevents consumers from understanding how their personal data is being monetized.

A common way for companies that obtain a dominant share of service on a platform to increase profits is to make all necessary complements to platform services themselves or to position themselves as necessary "bottlenecks" between partners and customers. By attempting to maintain complete control over the user relationship, dominant platforms can limit the possibility for independent complementary services to gain meaningful traction and challenge the platforms' power. Similarly, dominant platforms often use exclusive contracts, bundling or technical incompatibilities to restrict entry of competitors. When such practices succeed, investors become wary of putting money behind an independent start-up that would directly or indirectly seek to challenge a dominant platform. Venture capitalists will tend to put money behind companies that seek to be acquired by a dominant platform at an early stage, which reduces opportunities for disruptive investment and innovation.

As Europe presses the limits of antitrust enforcement and other nations slowly follow, we will soon see how much progress antitrust can make on its own to address and unwind examples of market dominance. However, regardless of the outcome of specific cases, antitrust law cannot upend the natural economics that drive digital markets toward a winner-take-all outcome. Eliminating anti-competitive behaviour that tilts the scales and market practices, even asset acquisitions that undercut competition, may not do enough to offset the benefits enjoyed by large networks with declining costs and massive data advantages over all other market players. Coordination among competition authorities should offer enormous opportunities to understand what works and what doesn't across jurisdictions. However, much more policy synchronization is likely necessary to control data-gathering practices and to create opportunities to grow competition.

Perhaps the most important change we need is to introduce competition-expanding regulations that address the problems antitrust cannot solve. A new expert regulator equipped with the tools to promote entry and expansion in digital markets could actually expand competition to benefit consumers, entrepreneurship and innovation. The regulatory authority could be housed within an existing agency or, better yet, be a new expert body, focused on digital markets.

The new regulator should also be responsible for consumer protection regulations relating to digital platforms, such as privacy protections for users. These rules may also have pro-competitive benefits. For example, if the incredibly detailed data dossiers that the large platforms collect on their users are significantly curtailed by data protection legislation that limits collection and use of personal data, it may be easier for smaller or new companies that don't have access to data to compete. But these rules are also crucially important to protect users' rights and people's freedom from the type of control that detailed data collection gives companies.

The primary goal of the regulator, however, should be to actively *promote* competition, not simply to maintain existing competition. This is an important distinction: given the economic constraints described above, there is not enough competition now to be "maintained" — digital platforms need an extra jolt from a regulator to promote *new* competition. To achieve this goal, the regulator must be equipped with three key tools: interoperability, non-discrimination and merger review.

Interoperability

First, the agency should be authorized to require dominant platforms to be interoperable with other services, so that competitors can offer their customers access to the dominant network. For example, if Facebook, with its dominant position in social networking and ownership of Instagram and WhatsApp, were required to allow Snapchat users and similar alternative platforms to communicate with their Facebook friends easily using these other services, Facebook's network effect advantages would be reduced, and competition could more easily expand.

Of course, a rule requiring the transfer of user data depends on strong privacy protections, either as part of the rule or *guaranteed* by another statute, such as comprehensive privacy legislation. However, it's also important to ensure that privacy improvement efforts don't inadvertently make

interoperability harder or impossible, for example, by banning any transfer of data from one company to another. The data protection and data empowerment tools that must be joined with interoperability should be the responsibility of the same regulator or carefully coordinated across two agencies.

Creating open interoperability regimes for the digital economy is a complex task that should be undertaken by an expert regulator, not generalist law enforcers. A regulator is especially useful for a tool like this because it will require technical detail, frequent updates and speedy dispute resolution to make sure the interoperability requirement actually promotes competition effectively. Antitrust enforcers, focused on competition, are not well positioned to effectuate user intent and protect users' personal data.

Non-discrimination

Competing against an incumbent digital platform can happen in two ways: head-to-head platform entry and expansion from one vertical to many. Recently, there have been few market entries into areas where one platform has gained enormous market share, such as with Google in search and Facebook in social networking. Therefore, it is important to assess other ways in which competition may grow.

Online platforms know that companies that use their platform can "disintermediate" them by connecting directly with the consumer, effectively cutting out the platform middleman. Online platforms know that a company that competes with them in one vertical can expand to compete in other verticals, becoming stronger as it takes advantage of synergies from the multiple verticals. This means that for platforms, the companies that use the platform are also potential competitors. Because of this competitive dynamic, some platforms have the incentive and ability to discriminate in ways that may harm competition. The platform has a variety of mechanisms it can use to disadvantage companies that pose a competitive threat, including its access to transaction data, its prioritization of search results and its allocation of space on the page. In the most extreme versions of this behaviour, antitrust can prevent abuse, but it is less useful to prevent many subtle discriminatory practices.

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The new regulator should monitor and ban discrimination by digital platforms with bottleneck power that favours their own services and disadvantages their competitors who rely on their platform to reach customers. Non-discrimination is another tool that particularly requires speedy adjudication and an expert regulator. It is difficult to identify which aspects of business are features of a platform, and which are products competing on the platform. For example, an app store may be an essential part of a smartphone operating system, so preferencing the operating system's own app store by having it preloaded on the phone may not be appropriately understood as "discrimination." In contrast, a grocery store is probably not an inseparable part of an e-commerce platform, so preferencing Whole Foods, an Amazon acquisition, over a competing grocery retailer on the Amazon Marketplace might be a good example of discrimination. The slow pace and complexity of antitrust litigation does not lend itself to fast-paced digital markets where discrimination can quickly make or break a competitive outcome.

Similarly, the agency should be authorized to ban certain "take it or leave it" contract terms that require companies doing business with a dominant digital platform to turn over customer data for the dominant platform to use however it pleases. Such terms effectively bundle the service the companies need with data sharing that could undermine their competitive market position. By prohibiting these practices, we can give potential competitors a fighting chance.

Merger Review

Another major concern with digital platforms is their acquisition of potential competitors. Acquisitions of potential or nascent competitors are often small, even falling below the value threshold for pre-merger notification of the competition authorities under the Hart-Scott-Rodino Act in the United States and similar thresholds in other countries. It is difficult to assess the likelihood that such companies in adjacent markets will be potential competitors. The small size or lack of pre-existing direct competition of these mergers can make it harder for antitrust enforcement agencies to block them, even if there are indications the merger may be anti-competitive. Markets move quickly, and a competitor's window of opportunity to gain traction against the

incumbent is narrow, not only making mergers an even more effective tactic at preventing competition, but also making effective merger enforcement that much more important.

Thus, the regulator should also have the power to review and block mergers, concurrently with the existing antitrust agencies. For particularly important industries, such as communications, energy and national security, the United States has an additional merger review structure on top of antitrust. Similarly, digital platforms that have become essential in our economy and society, and that face inadequate competition, require merger review under a new and different standard, besides traditional antitrust review.

The new regulator would have a different standard than the antitrust agencies. This different standard should place a higher burden on dominant platforms to demonstrate their overall benefits to society, which antitrust enforcers do not have the tools to thoroughly measure. It should assess mergers involving platforms with bottleneck power, and it should only allow those mergers that actually *expand* competition. Also, there should be no size limit for mergers to warrant pre-merger review by the agency. Any acquisition by a platform with bottleneck power should be reviewed for its competitive impact. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain. Mergers that provide no clear competitive benefit would be blocked. The standard also must take account of the particular ways that competition happens in digital platforms. For example, non-horizontal mergers may be particularly harmful here due to the economies of scope in data-driven platforms, as well as the importance of interoperability between complementary products.

Jurisdiction

To which types of companies should these regulations apply? Some of the regulations, such as limits on data collection and use, are not related to levels of competition and therefore must apply broadly to be effective. Some others, like the requirement of non-discrimination, need only apply to especially powerful digital platforms that have the incentive and opportunity to disadvantage competitors. Identifying which platforms are powerful enough to be subject to those rules will require some additional work by the agency. Using the definitions of market power from the jurisprudence of antitrust is likely not sufficient. Instead, the regulator would need to make a determination of which companies hold important bottlenecks in the marketplace. This might be because they hold the buying power of so many customers that anyone who wants to sell must be on their platform to reach those customers. Or it might be because they have a monopoly on a key product that's complementary to many others, creating lock-in for a suite of related products as well. The Stigler Center report referenced above describes "bottleneck power" as a situation where buyers or sellers "primarily single-home and rely upon a single-service provider, which makes obtaining access to those [buyers or sellers] for the relevant activity...prohibitively costly" for other companies.

This type of regulatory power, alongside strong antitrust enforcement, stands the best chance to expand opportunities for competition on and across digital platforms, while also securing and limiting data gathering to protect consumers' privacy. However, restrictions such as non-discriminatory contracting or transparency requirements in one country may not succeed if those dependent on dominant platforms need similar treatment in other markets to make such protections profitable. Similarly, data protections that limit data portability and competition in one country may undermine another jurisdiction's effort to expand competition through broader access to data. It is therefore important for competition authorities to work with their own regulators and those across the globe to ensure that policy tools designed to promote competition and to protect consumers can truly achieve their goals.

Works Cited

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After serving as president and CEO of Public Knowledge for five years, Gene Kimmelman handed over that leadership role in 2019 and is now the senior adviser. Previously, Gene served as director of the Internet Freedom and Human Rights project at the New America Foundation, and as chief counsel for the US Department of Justice's Antitrust Division. Prior to joining the Department of Justice, Gene served as vice president for Federal and International Affairs at Consumers Union. Gene has also served as chief counsel and staff director for the Antitrust Subcommittee of the Senate Judiciary Committee and as legislative director for the Consumer Federation of America. Gene began his career as a consumer advocate and staff attorney for Public Citizen's Congress Watch.

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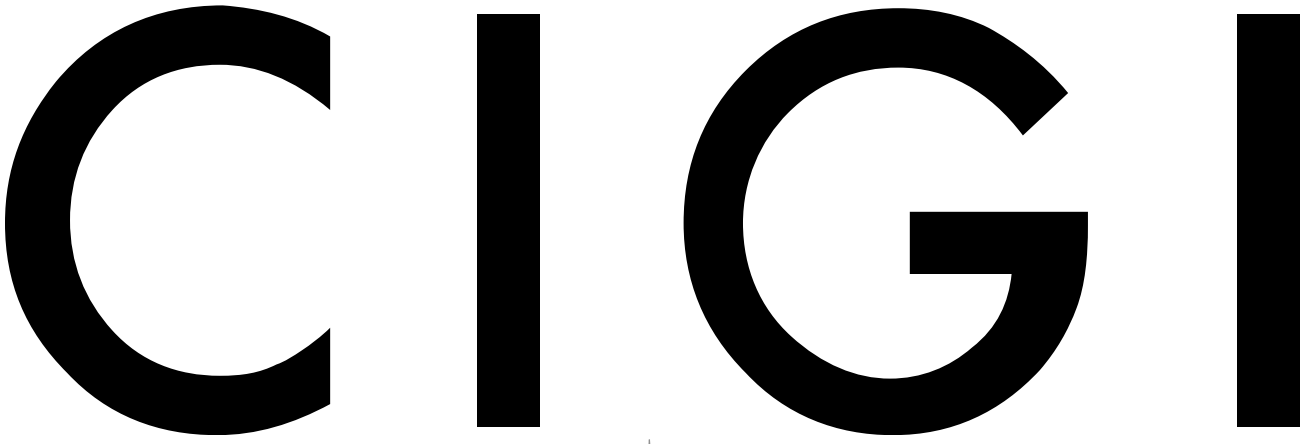

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