

# COMPETITION POLICY IN A GLOBALIZED, DIGITALIZED ECONOMY



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## I. BACKGROUND AND CONTEXT

The World Economic Forum is an independent, not-for-profit foundation established in 1971 and headquartered in Geneva.<sup>2</sup> It is “the International Organization for Public-Private Cooperation” which aims to shape global, regional, and industry agendas by engaging the “foremost political, business, cultural and other leaders of society.”<sup>3</sup> The Forum’s work is organized under “Platforms” one of which is the “Platform for Shaping the Future of Trade and Global Economic Interdependence.” This Platform’s aim is to strengthen trade and investment flows through modernising “international rules, national policies and behind-the-border trade facilitation strategies.”<sup>4</sup> The Platform “works with a range of stakeholders to inform business and policy debate on critical trade and investment issues” in order to drive “practical collaborative steps for growth and development.”<sup>5</sup> Current areas of focus for the Platform include “trade tensions, digital trade, investment and trade facilitation, and global tax and competition cooperation.”<sup>6</sup> It is in this context and following discussions at the World Economic Forum’s Annual Meeting in Davos in 2019 that the Platform commissioned a White Paper on Competition Policy in a Globalized, Digitalized Economy (the “White Paper”).

The background to the White Paper involves the recognition that although international trade and commerce, along with globalization and digitalization, have helped to lift hundreds of millions out of poverty, many citizens around the world feel “left behind” and businesses face uncertainty amid growing trade tensions.<sup>7</sup> In particular, for the purposes of the White Paper, there is an acknowledgement of the numerous benefits generated by online platforms and digitalization for firms and consumers while recognizing that these can also raise market concentration and competition concerns.<sup>8</sup>

The preparation of the White Paper was assisted by an initial workshop in Geneva in July 2019, which brought together stakeholders from the technology industry, practice, international organizations, consumer organizations, and academia to discuss the issues that should be covered in the White Paper. This workshop was followed by several rounds of consultations with and feedback from around twenty individuals with diverse backgrounds from different stakeholder groups who agreed to review the

2 See “Our Mission,” World Economic Forum, <https://www.weforum.org/about/world-economic-forum>.

3 *Ibid.*

4 See <https://www.weforum.org/platforms/shaping-the-future-of-trade-and-global-economic-interdependence>.

5 *Ibid.*

6 *Ibid.*

7 See *ibid.*

8 See World Economic Forum, “Competition Policy in a Globalized, Digitalized Economy,” Foreword, <https://www.weforum.org/whitepapers/competition-policy-in-a-globalized-digitalized-economy>, p. 4.

White Paper at numerous stages during its preparation. From its inception, the White Paper aimed to be a non-technical piece limited in length to maximize its effectiveness in reaching its audience of high-level representatives from different sectors of government, industry, and society. The Paper was published on December 11, 2019 in time for Davos 2020 taking place in January 2020. Notably, the new “Davos Manifesto” launched by the World Economic Forum to coincide with its 50<sup>th</sup> anniversary explains that one of the features of a company in the fourth industrial revolution is that it “accepts and supports fair competition and a level playing field” and it “provides a fair chance to new market entrants.”<sup>9</sup>

## II. THE WHITE PAPER

The White Paper comprises a foreword and five substantive sections: introduction; evolution of competition law; globalization, digitalization and competition law; cross-policy implications; and the way forward. After the introduction, the White Paper provides a brief overview of the evolution of competition laws across different jurisdictions and the reignited debate surrounding the objectives of competition policy, and in particular the “consumer welfare” standard.<sup>10</sup> The next section in the White Paper on globalization, digitalization and competition law makes up the bulk of the work and goes through various challenges and issues that arise in the context of applying competition law to practices of digital businesses and in particular multisided platforms.<sup>11</sup> These include issues surrounding the legal nature of multisided platforms; anticompetitive agreements (horizontal, hub-and-spoke, vertical); abuse of dominance (market definition, market power, abuse); and, merger control. The following section elaborates on the cross-policy implications by considering the application of competition law and policy in the digital context where it interacts and intersects with other policies such as data protection/privacy, industrial policy and international trade.<sup>12</sup> This section also touches upon the effects of globalization, “digital globalization” and the need for balancing various concerns bearing in mind that the digitalization of the economy has been mostly led by the developed world.<sup>13</sup> The final section of the White Paper presents the various findings and proposals put forward in different reports and studies, and offers a set of policy recommendations and insights to contribute to the debate on the optimal approach to competition law and policy in the digital economy.<sup>14</sup>

The White Paper proceeds on the basis that it is important to acknowledge the enormous benefits that the digitalization and globalization of the economy continue to generate for populations around the world.<sup>15</sup> Multisided, digital platforms are key players in the digital economy and in the generation of such benefits including lower transaction costs, creation of economic value from dormant resources, new employment opportunities, greater convenience and choice, ease of reaching scale for smaller businesses, etc.<sup>16</sup> It is also noteworthy that because many of the services of digital platforms are offered for “free” (i.e. at zero price), the economic value of such services is difficult to quantify and disregarded by traditional measures of economic activity such as GDP.<sup>17</sup> Against the benefits, concerns are raised regarding rising concentration in some industries, including the technology industry, labor’s falling share of income, and increasing income inequalities. Although not all of these concerns are associated with a lack of competition or a failure of competition policy/enforcement, calls have been made to break up the big technology companies or to regulate them like utilities to alleviate some of the concerns.<sup>18</sup>

Features of digital platform businesses such as multi-sidedness, zero-price, network effects, competition for the market, heavy reliance on data, and so on have led competition authorities and policymakers to rethink and question the validity of existing competition rules and tools. International differences have emerged regarding how much different authorities trust market forces and the ability of digital markets to self-cor-

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9 World Economic Forum, “Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution,” December 2, 2019, <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

10 White Paper (n. 8) p. 7.

11 White Paper (n. 8) pp. 8-12.

12 White Paper (n. 8) p. 13.

13 White Paper (n. 8) p. 13.

14 White Paper (n. 8) pp. 14-16

15 White Paper (n. 8) p. 5.

16 White Paper (n. 8) p. 5.

17 See White Paper (n. 8) p. 5 and the sources cited therein.

18 See White Paper (n. 8) p. 5 and the sources cited therein.

rect, leading to divergent approaches to competition policy and adding to trade tensions.<sup>19</sup> Against this background, the aim of the White Paper is to articulate the pertinent questions and considerations that can inform the optimal approach to competition policy in digital markets.<sup>20</sup> In contrast to many of the other reports written on the topic of competition policy in digital markets, most of which were written with a specific jurisdiction or region in mind, the White Paper adopted a more “international” approach due to its lack of focus on any given jurisdiction and its global outlook. From the start, it also had a specific focus on the cross-border implications and cross-policy challenges (e.g. data protection/privacy, international trade, industrial policy) of competition policy in a globalized, digitalized economy.

The rest of this piece presents some of the insights and findings advanced during the preparation of the White Paper and the recommendations of the Paper for the “way forward.”

### III. NO SUCH THING AS A “DIGITAL MARKET” OR “DIGITAL ECONOMY”

It becomes quite clear quite quickly when researching technology and digitalization that there is really no such thing as a “digital market” or a “digital economy.” Indeed, analysts predict that almost 25 percent of the entire economy could be “digital” by 2025 if governments can rise to the challenge to roll out the benefits of digitalization across all sectors of the economy to enable traditional sectors to benefit from digital productivity.<sup>21</sup> As digitalization transforms all aspects of economic life and permeates the economy, the line between offline and online businesses also increasingly blurs.<sup>22</sup> Consequently, the White Paper argues that for new regulations and policies to remain relevant and effective in the long-run, it is important that legislatures and policymakers do not treat “digital markets” or the “digital economy” as segments or sectors of the economy that can be distinguished from other segments or sectors of the economy. This point is particularly relevant in relation to proposals to create stand-alone “digital authorities” put forward in some jurisdictions to tackle the challenges of the digitalization of the economy.

### IV. ONE SIZE DOES NOT FIT ALL

Another feature of technology businesses that becomes clear very quickly in researching the different technology companies is that multisided digital platforms that are often bundled together in policy discourse involve very different business models and one-size policies will *not* fit all. Although platforms have important features in common in that, for example, every platform can be considered a “matchmaker” in essence,<sup>23</sup> the underlying business model and revenue generation model can significantly differ. Such differences in business model and revenue generation (e.g. whether the platform is funded by targeted advertising or transaction-based commission) have important implications for the relevance of data, extent of multi-homing, and the competitive dynamics at stake.<sup>24</sup> Therefore, regulatory and policy responses which are not fine-tuned to the underlying business model which they aim to encompass are unlikely to be effective and likely to lead to business and legal uncertainty.

### V. THE WAY FORWARD

The White Paper presents an overview of the proposals to change aspects of competition law and policy, and includes a discussion of some of the specific proposals contained in the several in-depth reports prepared over the last year or so concerning competition in digital markets.<sup>25</sup> The general sentiment in most of the reports is identified as that of existing competition rules and frameworks being broadly adequate for application

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<sup>19</sup> White Paper (n. 8) pp. 4-5.

<sup>20</sup> White Paper (n. 8) p. 5.

<sup>21</sup> Huawei and Oxford Economics, Digital Spillover: Measuring the True Impact of the Digital Economy, 2017, pp. 7, 9, [https://www.huawei.com/minisite/gci/en/digital-spillover/files/gci\\_digital\\_spillover.pdf](https://www.huawei.com/minisite/gci/en/digital-spillover/files/gci_digital_spillover.pdf).

<sup>22</sup> White Paper (n. 8) p. 5.

<sup>23</sup> See Evans, David S. & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, 2016.

<sup>24</sup> White Paper (n. 8) pp. 5-6.

<sup>25</sup> These include, but are not limited to, Furman, Jason, et al., *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, 2019; Crémer, Jacques, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era*, 2019; Stigler Center for the Study of the Economy and the State, *Report of the Committee for the Study of Digital Platforms: Markets Structure and Antitrust Subcommittee*, 2019; BRICS Competition Authorities, *BRICS in the Digital Economy: Competition Policy in Practice*, 1st Report by the Competition Authorities Working Group on Digital Economy, 2019; BRICS Competition Law and Policy Centre, *Digital Era Competition: A BRICS View*, 2019. Of notable importance is also the Final Report presenting the findings of the inquiry conducted by the Australian Competition and Consumer Commission (ACCC); Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry – Final Report*, 2019.

to digital businesses, with there being nonetheless a concern that there has been under-enforcement of the rules and/or that under-enforcement is likely to be more costly than over-enforcement in digital markets.<sup>26</sup> Another common theme across the various reports and studies is that some sectors, such as the digital advertising market which provides the main revenue source for ad-funded “free” platform services, are concerningly complex and opaque.<sup>27</sup> The White Paper identifies other recurring suggestions as those including the creation of separate digital authorities or units; data portability, data interoperability, and data access considerations; closer scrutiny of mergers involving incumbent digital platforms and start-ups; rethinking available tools such as interim measures to speed up enforcement; and specific rules to govern the relationship between platforms and their business users.<sup>28</sup> A caveat is also made in that the expert reports are not based on empirical studies of the relevant markets and do not contain impact assessments of any of the proposed solutions.<sup>29</sup> Consequently, the White Paper cautions against changes to policy or law on the basis of recommendations found in the expert reports without complementing such suggestions with empirical studies of the relevant markets, business models, and impact assessments of the proposals to conduct a cost-benefit analysis.<sup>30</sup>

The White Paper notes that the way forward for competition law and policy will involve “a mix of market-driven solutions and regulatory solutions alongside the use of competition, consumers and data protection enforcement tools.”<sup>31</sup> The right approach will have to employ a cost-benefit analysis to establish which solutions can best optimize the benefits of digitalization at the lowest cost.<sup>32</sup> With that in mind, the White Paper offers a set of ten recommendations building on the insights gained during the preparation of the Paper:<sup>33</sup>

1. **When it comes to platforms, one size does not fit all.** Authorities need to understand better different business models with digital operations. Insufficient appreciation of the differences among different platforms and their business models, the implications of the multisided nature of businesses or of different revenue generation models can lead to enforcement errors and suboptimal regulatory solutions.<sup>34</sup> The White Paper recommends the improvement of data analytics expertise and development of data tools at enforcer-level with the caveat that creation of separate “digital authorities” may not be meaningful in the long-run as digitalization permeates the entire economy.<sup>35</sup>
2. **Some competition law tools need rethinking.** Traditional methods used to define the relevant market, measure market power, scrutinize mergers, and weigh procompetitive and anticompetitive effects may be unsuited to features of digital business models and need to be rethought.<sup>36</sup> Similarly, existing economic models used for assessing competition may not capture the procompetitive or anticompetitive effects of certain business practices in the digital context. This results from the fact that the business models of technology companies challenge existing categories of anticompetitive conduct.<sup>37</sup> The White Paper identifies the following aspects of digital competition that require more research and a broadening of the knowledge base: the relevance of data for establishing market power; the role of intermediaries in vertical supply chains; ecosystem- and innovation-driven competition; machine-generated outcomes and collusion; and, theories of leveraging market power.<sup>38</sup>

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26 White Paper (n. 8) p. 14.

27 White Paper (n. 8) p. 14.

28 White Paper (n. 8) p. 14.

29 White Paper (n. 8) p. 14. These were not within the remit of the reports.

30 White Paper (n. 8) p. 14.

31 White Paper (n. 8) p. 14.

32 White Paper (n. 8) p. 14.

33 See White Paper (n. 8) pp. 14-16 for the list of recommendations.

34 White Paper (n. 8) p. 14.

35 White Paper (n. 8) p. 14.

36 White Paper (n. 8) p. 15.

37 White Paper (n. 8) p. 15.

38 White Paper (n. 8) p. 15.

3. **Upending established competition law frameworks appears unwarranted.** Existing competition rules have been applied in many cases those concerning practices of technology companies and multisided platforms as the rules are broad and flexible. These broad rules are coupled with a very wide range of enforcement powers that competition authorities have which include the power to break up companies, impose substantial fines and behavioral remedies, etc. The White Paper remarks that the question of whether the enforcement of the rules has been at an optimal level is a separate question to that of whether the law should be changed.<sup>39</sup> Upending established legal frameworks should be reserved for cases where there is robust evidence that the existing law *systematically* fails to achieve its aims, which does not appear to be the case with competition law.<sup>40</sup>

The White Paper raises a concern regarding proposals to change existing legal standards for proving infringements through the adoption of presumptions of unlawfulness for certain unilateral conduct or lowering judicial review standards.<sup>41</sup> Such proposals are perturbing given the fact that competition law sanctions are considered to be (quasi-)criminal in many jurisdictions (including the EU) and lowering thresholds for finding abuse in unilateral conduct cases can raise issues with rule of law requirements, including the presumption of innocence. This is particularly the case with administrative enforcement models where the enforcer is a fact-finder (i.e. prosecutor) and a decision-maker (i.e. judge) in the same case. Where new rules are to be created, the White Paper advises avoidance of reliance on underdeveloped concepts such as “self-preferencing.”<sup>42</sup>

4. **Global businesses in global markets require global responses.** International cooperation both at policy-making and at enforcement level and cross-border coordination are essential when dealing with practices of multinational digital businesses.<sup>43</sup> Capacity constraints are aggravated for developing country authorities when it comes to digital business models because of the data-driven nature of many of these businesses. Cooperation and coordination are necessary not just between competition enforcers, but also between competition and other authorities, most notably authorities entrusted with consumer protection and data protection.
5. **Predictability and convergence of regimes is important for promoting innovation and investment in technology.** Global businesses are currently subject to around 130 different competition regimes. In contrast, the underlying technologies are borderless and the business model is usually broadly the same across the world. Consequently, the White Paper raises the point that it may be time to reconsider an international set of competition rules which could not only reduce compliance costs, level the playing field internationally and inject competition into local markets, but also support international trade. Given the unlikelihood of reaching international consensus on the basis of a new paradigm, the White Paper suggests that – despite all its imperfections – a properly construed consumer welfare standard (which includes all relevant parameters of competition) could provide a common ground for international principles to be built upon.<sup>44</sup>
6. **Digital literacy is essential for both consumers and business users of digital services for effective competition in digital markets.** Empowered users of digital products/services who understand what is actually involved when they choose to use a certain digital product/service will drive companies to compete to offer better products/services to users. Sustaining effective competition in the long-run involves user education and improved digital literacy coupled with competition policy to reduce entry and expansion barriers and to encourage multihoming between users.<sup>45</sup>
7. **Competition enforcement and consumer enforcement tools are effective complements.** In the context of digital businesses and conduct, very often consumer protection and competition concerns are closely related. Thus, it makes sense to consider whether the enforcement powers regarding competition and consumer protection should lie in the hands of the same authority. At the very least, cooperation mechanisms should exist to facilitate the close working of competition and consumer protection powers and authorities.

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39 White Paper (n. 8) p. 15.

40 White Paper (n. 8) p. 15

41 White Paper (n. 8) p. 15.

42 White Paper (n. 8) p. 15.

43 White Paper (n. 8) p. 15.

44 White Paper (n. 8) p. 15.

45 White Paper (n. 8) p. 15.

8. **Compliance by design can alleviate certain concerns before they arise.** Technological capabilities and developments can solve certain problems before they arise through design innovation. Such problems that can be resolved through technological means include those surrounding algorithms, artificial intelligence and algorithmic collusion, as well as privacy choices and compliance with other similar consumer rights.
9. **Effective long-term solutions may require continuous input from stakeholders.** Given the informational disadvantage at which governments find themselves when it comes to the business practices of technology companies and the technologies involved, it may be in the interests of all parties involved that various stakeholders (including the businesses, consumer organizations, regulators, etc.) collaborate in the creation and monitoring of the applicable rules.<sup>46</sup> Such collaboration with stakeholders and their participation in the process of crafting the rules of the game can also ensure that any regulatory solutions or enforcement actions are not rendered irrelevant by the speed of innovation that is around the corner and are, instead, targeted at issues where market-driven solutions are unlikely to arise in the near future.<sup>47</sup>
10. **Competition authorities should become more creative in their approach to enforcement tools and remedies.** Competition authority action takes a relatively long time due to the necessity of observing due process requirements, collecting evidence, developing and testing theories of harm, etc. all of which necessarily require detailed and complex assessments. In comparison, technology moves very fast and technology-driven markets can change very quickly rendering any harm to competition irreparable due to the dynamic nature of competition. To counteract such effects, competition authorities could make more effective use of various tools including, and in particular, those such as “market investigations” which enable them to impose changes to market conditions without having to pursue individual enforcement actions. Similarly, interim measures and use of behavioral insights in designing effective remedies can increase the effectiveness of enforcement.

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46 For this concept known as “participative antitrust” attributed to Jean Tirole, see Schrager, Allison, “A Nobel-Winning Economist’s Guide to Taming Tech Monopolies,” (Interview with Jean Tirole), Quartz, 27 June 2018; Bethell, Oliver J., Gavin N. Baird & Alexander M. Waksman, “Ensuring Innovation through Participative Antitrust,” *Journal of Antitrust Enforcement*, 2019 (forthcoming); Furman et al. (n. 25), pp. 5, 9, 54–55, 58–59, 61.

47 White Paper (n. 8) p. 16.

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