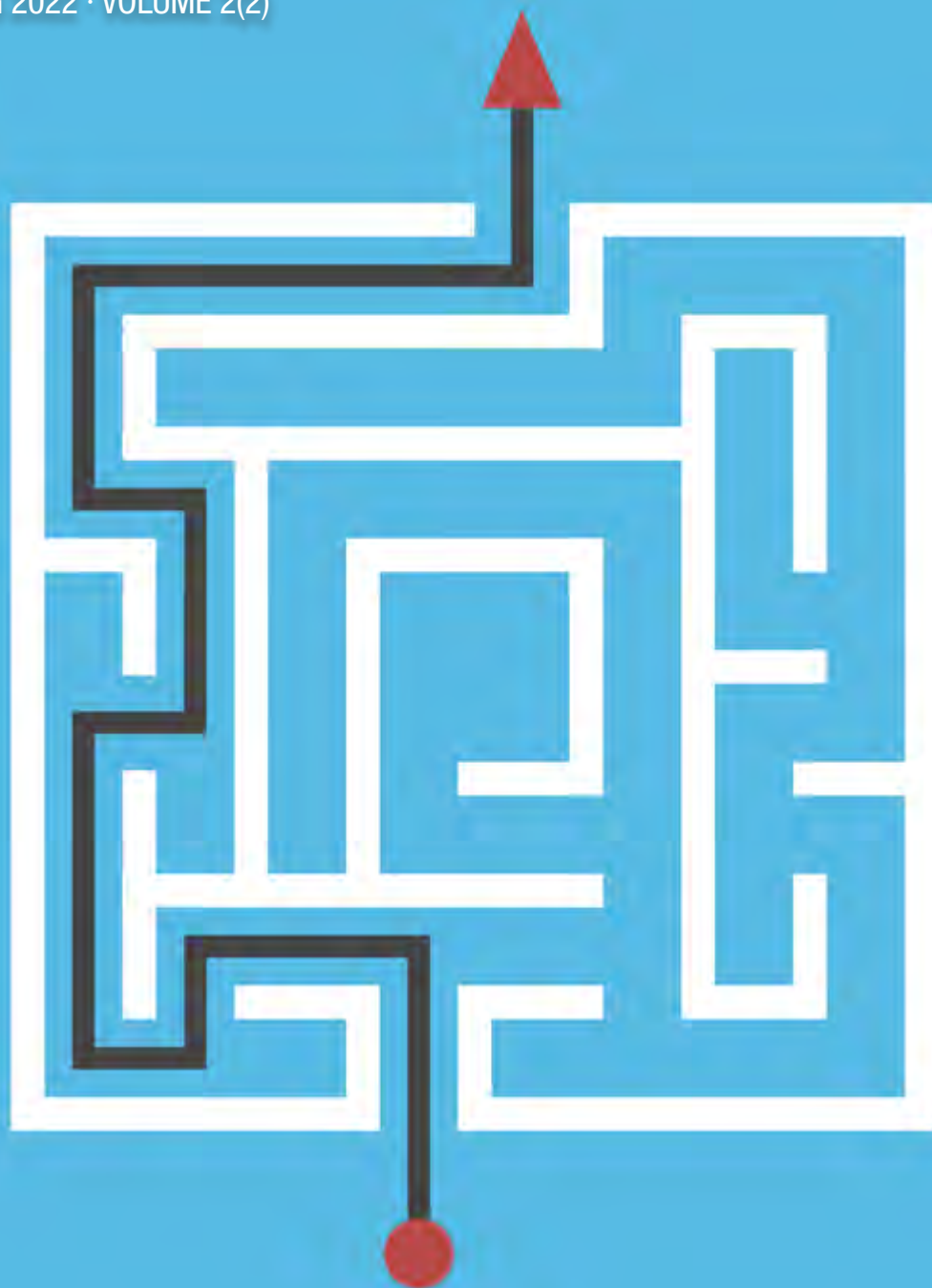


Antitrust Chronicle

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Intermediaries

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LETTER FROM THE EDITOR

Dear Readers,

In antitrust policy discourse (particularly, but not exclusively, concerning the digital economy), there is often a background assumption that intermediaries impose a consumer and societal cost. Thus, the colloquial phrase “cut out the middleman” – which, translating from the vernacular to the parlance of antitrust means “disintermediate” the consumption of goods – is a formulation that will never lose currency.

One therefore commonly sees arguments that consumer welfare would be enhanced if only end-users could freely combine products from different providers. This commonly takes the form of arguments against bundled goods, walled gardens, and other forms of intermediation. These arguments often have great merit, but, as always, the true picture is more nuanced and complex.

Current debates in this regard take place in the context of accelerating reform of competition and other rules, particularly as they apply to the digital economy, and – arguably – a newly invigorated trend in antitrust enforcement in the EU, the U.S., and worldwide. The articles in this Chronicle draw out various aspects of the role of intermediaries in the economy (both digital and physical) and in antitrust analysis.

Dr. Christophe Carugati discusses the EU’s proposed Digital Markets Act (“DMA”). The DMA will impose obligations and prohibitions on large online platforms that act as so-called “gatekeepers.” The same platforms are already under investigation in Germany under a DMA-like competition law that also imposes prohibition rules *ex ante*. Similarly, other European countries are considering similar rules. This raises the question of how the DMA should interact with national competition laws. Inconsistency would hamper the effectiveness of both the DMA and those existing rules. The article draws from the lessons learned in Germany in order to explore how this dilemma might be resolved.

Similarly, **Daniel F. Spulber** considers U.S. and EU antitrust policies regarding digital intermediaries. The article emphasizes the need to apply advances in the economics of markets and platforms in developing such policies, particularly in light of the fact that intermediaries can improve economic efficiency through innovations that lower transaction costs and make new types of transactions feasible. To promote consumer welfare and economic efficiency, antitrust policy should deter anticompetitive conduct without diminishing the many economic contributions of intermediaries.

Diana L. Moss looks to the question of supply chains. As they have grown in sophistication and complexity, so too have the competition rules governing them. Bottlenecks in supply chains have a number of important implications. For example, dominant firms and oligopolies in intermediate markets can give rise to market power on both the buyer side and seller side. Moreover, strong incentives for players to bulk up to counter the bargaining power of suppliers and distributors has exacerbated consolidation, with serious implications for the stability and resiliency of supply chains—as we have seen during the COVID-19 pandemic. The article examines the problem of market power in supply chains using the pharmaceutical and food & agriculture sectors as case studies. It highlights allegedly weak merger control in the U.S. as a source of the problem and proposes key priorities to address it.

On a more theoretical note, **Alexander White** draws a contrast between textbook economics, whereby a monopoly is by definition inefficient and adding competitors lowers prices and provides consumers with enhanced choice. By contrast, in modern digital platform industries where network effects are key, it has been recognized that such competition does not necessarily have such a positive effect. Unlike in idealized worlds of textbook “perfect competition,” in markets where network effects are prevalent, there can be advantages to market concentration. Nonetheless, there is the potential for negative effects in terms of spillover effects and how policy should deal with certain outlying entities. This article addresses these concerns and offers a useful theoretical framework to address them.

This view is also reflected in the piece by **Dirk Auer & Lazar Radic**. As their article explains, viewpoints castigating “middlemen” as “vampire capitalists” ignore the potential value brought by intermediation and the trade-offs between different business models or forms of intermediation. The authors argue that the ongoing *Epic v. Apple* proceedings are a good example of why it is important to respect the role of intermediaries in digital markets, and the benefits they can bring to consumers.

Finally, **Maria Andrea Latapie Aldana & Natalia Patricia Patiño Espinosa** look at the impact of digital intermediaries on retail formats (including online and offline sales channels) in Mexico. Like in other countries, the retail value chain has evolved, due to the emergence of e-commerce and the integration of digital technology into all areas of a business. Despite this revolution, the authors conclude that considering that Mexican antitrust authorities already have tools to analyze antitrust risk in markets transformed by digitalization, regulators should resist introducing inflexible *ex ante* rules that could have adverse effects in evolving retail markets.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

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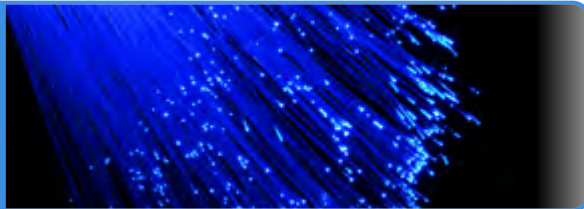


THE IMPLEMENTATION OF THE DIGITAL MARKETS ACT WITH NATIONAL ANTITRUST LAWS

By Dr. Christophe Carugati

The December 2020 Commission proposal for a Digital Markets Act (“DMA”) reached a compromised text with the Council and the Parliament on March 24, 2022. While the text that will impose obligations and prohibition rules on large online platforms acting as “gatekeepers” before any wrongdoing *ex-ante* is due to enter into force in October 2022, the same platforms are already under investigation in Germany under a DMA-like competition law that also imposes prohibition rules *ex-ante*. Other countries in Europe, including Italy, are considering following Germany and implementing new competition rules to adapt to the digital economy. How should the DMA implement with national competition laws? This question is crucial because inconsistency will inevitably hamper the effectiveness of both the DMA and national competition laws. The paper addresses this question by studying the DMA and German implementation framework. Section I explains how legislators envisage the implementation of the DMA with national competition laws. Section II then considers the implementation of the DMA-like national competition rules by focusing the analysis on Germany, which already enforced its new legislation in January 2022 against Google. Section III designs a cooperation model between the DMA and national competition laws. Section IV concludes.

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ANTITRUST POLICY TOWARD INTERMEDIARIES: DIGITAL PLATFORMS AND “BIG TECH”

By Daniel F. Spulber

The article considers U.S. and EU antitrust policies regarding intermediaries with digital platforms. The article examines antitrust concerns about “Big Tech.” The discussion emphasizes the need to apply advances in the Economics of Markets and Platforms in developing these antitrust policies.

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MARKET POWER IN SUPPLY CHAINS

By Diana L. Moss

As supply chains have grown in sophistication and complexity, so too have the competition issues they raise. Years of consolidation and rising concentration in the critical middle segments of major supply chains have created market power “bottlenecks.” These bottlenecks have a number of important implications. For example, dominant firms and oligopolies in these middle markets can often exercise market power on both the buyer side and seller side. Moreover, strong incentives for players to bulk up to counter the bargaining power of suppliers and distributors has exacerbated consolidation, with serious implications for the stability and resiliency of supply chains—as we have seen during the COVID-19 pandemic. This article examines the problem of market power in supply chains using the pharmaceutical and food & agriculture sectors as mini-case studies. It highlights weak merger control in the U.S. as a source of the problem and highlight key priorities for strengthening enforcement to address it.

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WHAT HAVE THE INTERMEDIARIES EVER DONE FOR US?

By Dirk Auer & Lazar Radic

Intermediaries may not be the consumer welfare hero we want, but more often than not, they are one that we need. Policymakers often assume that intermediaries and centralization serve as a cost to society, and that consumers are better off when provided with “more choice.” Concrete expression of this view can be found in regulatory initiatives that aim to turn “closed” platforms into “open” ones (see, in Europe, the Digital Markets Act; and in the United States, the Open App Markets Act and the American Innovation and Choice Online Act). Against this backdrop, we explain that, as with all economic goods, intermediation involves tradeoffs. Intermediaries emerge when it would otherwise be too difficult (or too costly) for groups of users to meet and interact. There is thus no guarantee that government-mandated disintermediation — such as that contemplated in the European DMA and the U.S. AICOA bill — will generate net benefits in a given case. The ongoing Epic v Apple proceedings are a good example of why it is important to respect the role of intermediaries in digital markets, and the unique benefits intermediation can bring to consumers. The upshot is that intermediaries are far more valuable than they are usually given credit for.

SUMMARIES

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PLATFORM ECONOMICS: RECENT FINDINGS AND FURTHER QUESTIONS

By Alexander White

How is platform competition different from regular competition? The first part of this article reviews recent findings from theoretical platform economics. It describes two novel ways in which more competition among platforms has been found to be potentially harmful. It then discusses results on two potential antidotes: multi-homing and interoperability. The second part of the article raises two issues facing the governance of platform industries and argues that they deserve further attention. The first is a distinction between standard network effects and “spillovers,” and the second is on the challenges of regulating firms that are, by their nature, outliers.

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DIGITAL TRANSFORMATION, RETAIL AND REGULATORY CHALLENGES IN MEXICO

By María Andrea Latapie Aldana & Natalia Patricia Patiño Espinosa

The present article explores the impact of digital transformation in the retail value chain. The integration of digital technology has mined the traditional retail structure, increasing competition by providing consumers with more choices and through the focusing retailers on satisfying consumers’ evolving needs through innovative multichannel strategies and. The article also analyzes the impact of digital transformation on global Regulatory and Competition Authorities, and the current debate on antitrust policies on the emergence and growth of digital markets. Finally, the discussion reaches antitrust policies in Mexico, with a debate regarding the question “should the tech companies that participate in digital channels be regulated?” with the Federal Economic Competition Commission engaging in a series of actions aiming to prepare the institution to answer this debate, in an attempt to avoid ex ante obligations that could jeopardize innovation and efficiencies in certain markets.

WHAT'S NEXT?

For July 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Leadership** ; and (2) **Platforms: Values & Harms**.

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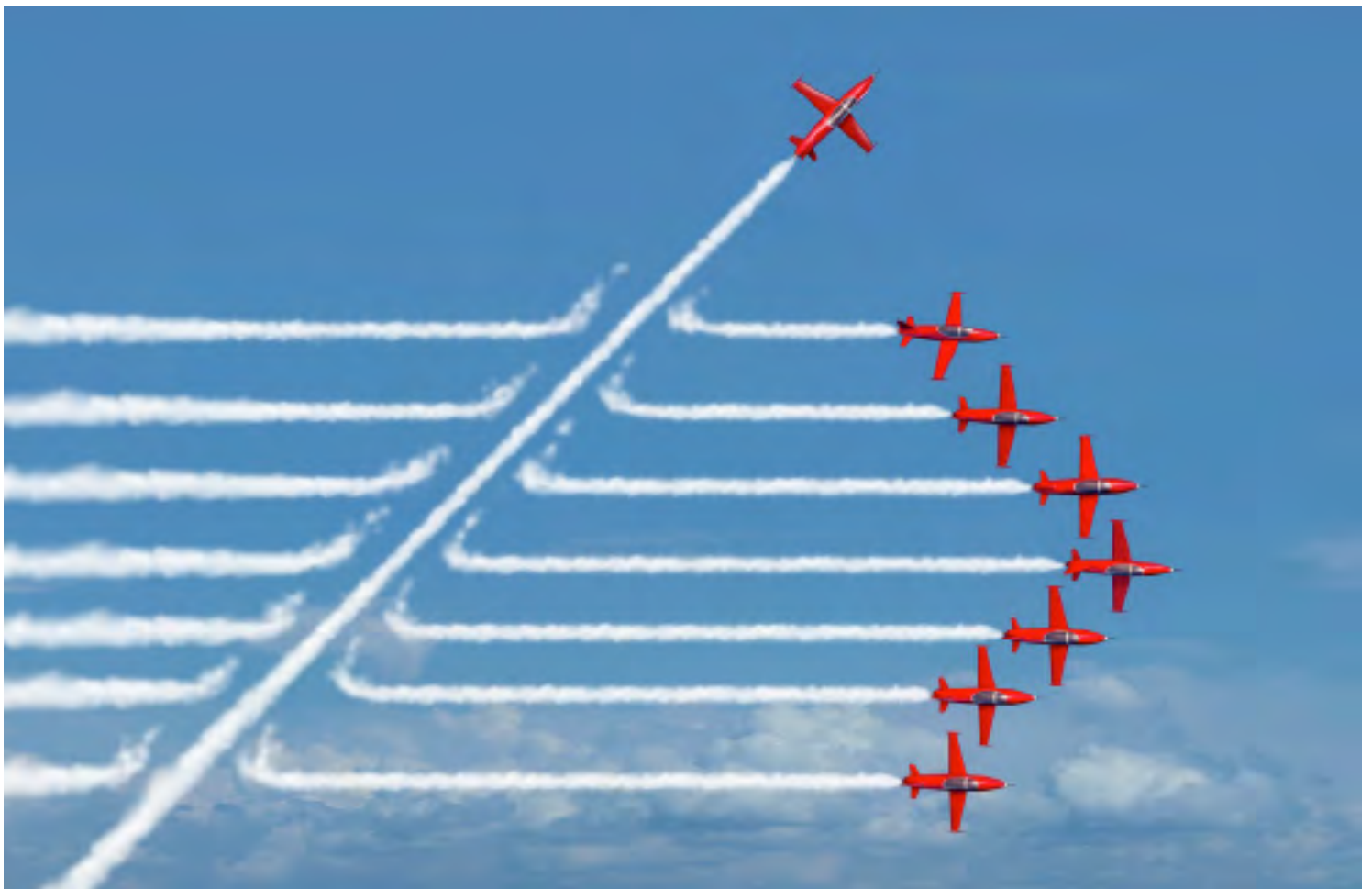
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THE IMPLEMENTATION OF THE DIGITAL MARKETS ACT WITH NATIONAL ANTITRUST LAWS

BY DR. CHRISTOPHE CARUGATI¹



¹ Dr. Christophe Carugati, Doctor in Law and Economics on Big Data and Competition Law, Paris Center for Law and Economics (CRED), Paris II Panthéon-Assas University. For correspondence: Christophe.carugati@bruegel.org. Dr. Carugati is an affiliate fellow at the economic think tank Bruegel working on competition and digital policies.

I. INTRODUCTION

The December 2020 Commission's proposal for a Digital Markets Act ("DMA") reached a compromised text with the Council and the Parliament on March 24, 2022.² While the text that will impose obligations and prohibition rules on large online platforms acting as "*gatekeepers*" before any wrongdoing *ex ante* is due to enter into force in October 2022, the same platforms are already under investigation in Germany under a DMA-like competition law that also imposes prohibition rules *ex ante*. Other countries in Europe, including Italy, are considering following Germany and implementing new competition rules to adapt to the digital economy. How should the DMA implement with national competition laws? This question is crucial because inconsistency will inevitably hamper the effectiveness of both the DMA and national competition laws. The paper addresses this question by studying the DMA and German implementation framework.

Section II explains how legislators envisage the implementation of the DMA with national competition laws. It underlines the complementary enforcement approach of both rules through the European Competition Network. Section III then considers the implementation of the DMA-like national competition rules by focusing the analysis on Germany, which already enforced its new legislation in January 2022 against Alphabet Google and in May 2022 against Meta Facebook. The legislation is likely to be effective after the DMA enters into force and could enable more enforcement actions. Section IV designs a cooperation model between the DMA and national competition laws. An implementation act should replicate the current cooperation model of the EU merger regulation between European competition laws and national competition laws. Section V concludes.

II. IMPLEMENTATION OF THE DMA WITH NATIONAL COMPETITION LAWS

The DMA is an asymmetric regulation that will dictate how some large online platforms acting as "*gatekeepers*" should behave in some digital markets before implementing a practice to ensure fair and contestable digital markets.³ The draft compromise text defines contestability as the ability of firms to effectively overcome entry barriers and expansion, such as network effects, and challenges gatekeepers on the merits of their products and services (recital 32 COREPER DMA text). It defines unfairness, not fairness, as the imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage (recital 33).

A gatekeeper is an unavoidable firm that sets how businesses and end-users can access and participate in its products and services. The draft COREPER text presumes that a firm is a gatekeeper if it fulfills the following three cumulative rebuttable criteria: (i) it provides the same core platform service in at least three Member States — namely providers of online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing, and online advertising services; (ii) it has an annual Union turnover of at least €7.5 billion in each of the last three financial year or a market capitalization of at least €75 billion in the last financial year; and (iii) it has on average at least 45 million monthly active end users and at least 10 000 yearly active business users in the Union in each of the last three financial years (art. 3). The Commission considers some gatekeepers' rules unfair and unduly favors them in a way that harms both competition and consumers, such as the preference of its own services over rivals.

Based on current and pending cases, the COREPER text thus imposes 22 *ex ante* rules. They will oblige or prevent the gatekeeper from behaving in a specific way without the need to proceed after the practice *ex-post* to the formal antitrust steps of defining a market definition, a market power, an anticompetitive practice, and a remedy (arts. 5, 6, and 7). The regulation will do all these steps in one, as the regulator would only need to demonstrate non-compliance with the rules to intervene. The proposed regulation thus addresses critics against slow and selective competition enforcement that impedes its effectiveness in digital markets.⁴

The Commission will be the sole enforcer (art. 38). The national competition authorities ("NCAs") will only support the Commission in enforcing and monitoring the DMA, including collecting complaints (art. 27), supporting market investigations (art. 16) and conducting market investigations into cases of possible non-compliance (art. Art. 38). Yet, the Member States will be able to implement their own national competition rules, including DMA-like legislations, insofar they pursue other public interest objectives than ensuring contestability and fair markets (art. 1 and recital 9).

2 Press release, Council, Digital Markets Act (DMA): Agreement Between the Council and the European Parliament (March 24, 2022) (accessed March 28, 2022). <https://presidence-francaise.consilium.europa.eu/en/news/digital-markets-act-dma-agreement-between-the-council-and-the-european-parliament/>.

3 Proposal For a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act).

4 Furman, J., et al., Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019.

National authorities, including national courts, could not adopt decisions that run counter to a Commission's decision and have a duty to cooperate and coordinate their enforcement with the Commission to ensure consistency (arts. 1, 37, 38, and 39). Furthermore, the Commission and NCAs could share information only for the purpose of enforcement coordination, including confidential ones, to ensure effectiveness (art. 38). In this context, they will have to inform the Commission of the opening of an investigation and their intent to impose obligations on gatekeepers, including interim measures, without the possibility for the Commission to veto the NCAs in its action (art. 38). Lastly, the Commission might consult the national authorities on the application of the DMA (art. 37). The compromised text thus contemplates complementary enforcement of the DMA and national competition rules.

The Commission and the NCAs will cooperate and coordinate within the European Competition Network (ECN) (art. 38). The network is a cooperation forum between the Commission and the NCAs to enforce consistently European competition laws. In Europe, the Commission shares its enforcement power of European competition laws with the Member States through a system of parallel competencies. After several years of practice, the network proves to be effective. Between 2004 and 2020, the Commission and the NCAs dealt respectively with 410 and 2394 antitrust cases.⁵ While in most cases, the Commission and the NCAs follow a similar approach, in some cases, they do not.

For instance, the Member States diverge with the anticompetitive wide and narrow Most-favored Nation ("MFN") clauses.⁶ Wide MFNs impose on suppliers of a retailer, such as an online marketplace, the same or better price and conditions on any other retailer. Narrow MFNs impose similar terms only on the supplier's own website. France, Italy, and Sweden, in cooperation with the Commission, found in the 2015 *Online Hotel Booking* antitrust case that wide MFNs are illegal, but narrow MFNs are legal.⁷ By contrast, Germany found both clauses unlawful in the same 2015 *Online Hotel Booking* case.⁸ This is problematic because Booking committed with France, Italy, and Sweden to replace wide MFN with narrow MFN. The inconsistency thus creates a situation where businesses must apply different conditions in different markets, thus fragmenting the goal of achieving a single market with one set of rules.

More recently, Italy opened in April 2019 an investigation against Amazon based on European competition law for allegedly favoring offers of third-party merchants that use Amazon's logistics and delivery services in the Italian market.⁹ A year later, the Commission opened in November 2020 an investigation against *Amazon* on a similar competition issue.¹⁰ The Commission's investigation covers the whole European market, except Italy due to the Italian's investigation. Amazon challenged in January 2021 before the General Court the Commission's decision to exclude Italy from its investigation to ensure a single decision rather than two. The October 2021 Court's ruling clarified the system of parallel competencies between the Commission and the NCAs that the 2003 antitrust regulation and the 2004 Commission's notice on cooperation within the ECN provide.¹¹ The regulation prevents the Member States from opening an investigation if the Commission opened an investigation against the same undertakings, the same allegedly anticompetitive practices, on the same product and geographic markets, during the same periods (art. 11(6) antitrust regulation). However, the Court stated that this provision does not imply a right for the undertaking to have a case dealt with in its entirety by the Commission.¹²

Interestingly, while the Commission notice defines an allocation system of competencies between the Commission and the NCAs, the Court noted that the notice does not lay down a rule on the allocation.¹³ It follows that an NCA can pursue a similar investigation and that the Commission can exclude a Member State from its territorial scope. The Court thus rejected Amazon's request. A few months later, Italy found in

5 European Competition Network, statistics, Aggregate figures on antitrust cases (accessed February 16, 2022). https://ec.europa.eu/competition-policy/european-competition-network/statistics_fr.

6 Chappatte, P., and O'Connell, K., *European Union – E-commerce: Most Favoured Nation Clauses*, GLOBAL COMPETITION REVIEW (December 3, 2020) (accessed February 16, 2022). <https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/european-union-e-commerce-most-favoured-nation-clauses>.

7 , Press release, Autorité de la concurrence, 21 April 2015: Online Hotel Booking Sector (April 23, 2015) (accessed February 16, 2022). <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/21-april-2015-online-hotel-booking-sector>.

8 Press release, Bundeskartellamt, Narrow 'Best Price' Clauses of Booking also Anticompetitive (December 23, 2015) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html.

9 Press release, Autorità Garante della Concorrenza e del Mercato, A528 - Amazon: Investigation Launched on Possible Abuse of a Dominant Position in Online Marketplaces and Logistic Services (April 19, 2019) (accessed February 16, 2022). <https://en.agcm.it/en/media/press-releases/2019/4/A528>.

10 Press release, European Commission, Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into its E-Commerce Business Practices (November 10, 2020) (accessed February 16, 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

11 Case T-19/21, *Amazon.com, Inc. and Others v. European Commission*, ECLI:EU:T:2021:730.

12 *Id.* para. 45.

13 *Id.* para. 46.

December 2021 that Amazon abused its dominant position while the Commission's investigation is still ongoing.¹⁴ Amazon argued before the Court that the situation could lead to diverging rulings that could undermine the European approach to its activities.¹⁵ While the Court noted that it is a likely outcome, it stated that Amazon could only challenge the Italian and European decisions at the end of their proceedings.¹⁶ Therefore, even though the antitrust regulation aims to ensure the effective application of European competition law, Amazon could face a diverging ruling on the same practice because the territorial scope is different.

The *Online hotel Booking* and *Amazon* examples do not mean that the ECN does not work, but that in some instances, it fails to achieve its goal of ensuring a common approach in enforcing European competition law. The ECN is thus the well-placed network of cooperation between the Commission and the Member States in enforcing the DMA and European and national competition laws consistently.

III. IMPLEMENTATION OF DMA-LIKE NATIONAL COMPETITION LAWS

In Europe, the Member States can apply their own national competition laws in parallel with European competition laws. The Member States have national laws to satisfy their preferences. While national laws cannot run counter to European laws, they can complement them.¹⁷ For instance, France, Belgium, Germany, Austria, and Italy have provisions against abuse of economic dependence that enables a competition authority to find an infringement in a bilateral relationship between two firms, whereas this provision is absent in European competition laws.¹⁸

Several Member States, including Germany in 2019,¹⁹ Italy in 2021,²⁰ and Greece in 2021,²¹ thus proposed modernizing their national competition laws to the digital economy. While the Member States want the tools to deal with digital cases, these initiatives will likely lead to a patchwork of DMA-like national competition laws with the associated risk of inconsistency, compliance, and transaction costs.

Germany is the first country in the world to enact rules against large online platforms to promote fair and competitive digital markets, following experts' call to modernize German competition laws for the digital economy.²² Germany thus prepared the 10th amendment to the German national antitrust law long before the publication of the Commission's proposal for a DMA.²³ The German Parliament passed it in January 2021, and it came into force the same month.²⁴ It modernizes the national antitrust laws in abuse control, abuse of economic dependence, and merger notification. It also adds a new provision to firms designated by the German competition authority as "*paramount significance for competition across markets*" in digital markets.

The latter imposes similar DMA prohibition rules *ex ante*, even though the provision is under competition law, not regulation. The new German rule thus requires two steps: the designation of a firm as "*paramount significance for competition across markets*" and then the imposition of prohibitions. The German competition authority *Bundeskartellamt* quickly opened several investigations against *Meta Facebook* in

14 Press release, Autorità Garante della Concorrenza e del Mercato, A528 - Italian Competition Authority: Amazon Fined Over € 1,128 Billion For Abusing Its Dominant Position (December 9, 2021) (accessed February 16, 2022). <https://en.agcm.it/en/media/press-releases/2021/12/A528>.

15 Case T-19/21, *supra* note 11, para. 35.

16 *Id.* para. 36.

17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Text with EEA relevance), recital 8.

18 Tombal, T., *Economic Dependence and Data Access*, INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW (IIC), ISSUE 51(1) (2020).

19 Weck, T., *The New Abuse Rules in the German Competition Act – What's in it for the EU?*, COMPETITION POLICY INTERNATIONAL (April 14, 2020) (accessed February 16, 2022). <https://www.competitionpolicyinternational.com/the-new-abuse-rules-in-the-german-competition-act-whats-in-it-for-the-eu/>.

20 Zampa, G. L. et al., *Italian Antitrust Authority's Proposed Reform of the National Antitrust Rulebook: What's in It for Digital Players?*, FRESHFIELDS BRUCKHAUS DERINGER LLP (March 29, 2021) (accessed February 16, 2022). <https://digital.freshfields.com/post/102guan/italian-antitrust-authoritys-proposed-reform-of-the-national-antitrust-rulebook>.

21 Omran, O., et al., *Special Competition Rules on Digital Ecosystems: Greece Joins the Club*, LEXOLOGY (September 7, 2021) (accessed February 16, 2021). <https://www.lexology.com/library/detail.aspx?g=75527f4b-11fd-4922-9be0-cbee540b80bd>.

22 Schallbruch M., et al., *A New Competition Framework for the Digital Economy*, Report By The Commission "Competition Law 4.0," September 2019.

23 Weck, T., *supra* note 19. According to the author, the draft bill dated at least from July 10, 2019.

24 Press release, Bundeskartellamt, Amendment of the German Act against Restraints of Competition (January 19, 2021) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

January 2021,²⁵ *Amazon* in May 2021,²⁶ *Alphabet Google* in May and June 2021,²⁷ and *Apple* in June 2021,²⁸ to determine whether they fulfill the condition of the first step and fall within the scope of the new provision. The authority concluded in January 2022 that Alphabet Google, and in May 2022 Meta Facebook falls within the scope. Google and Facebook Meta did not contest the decision and will have to comply with the prohibitions imposed by the new act.²⁹ Following the decision, Google even proposed commitments in the German *Google News Showcase* case based on the new German rule that examines whether Google might favor its own services over competing services and impose unreasonable and discriminatory terms and conditions.³⁰

Germany has thus already enforced its DMA-like national competition law. It is still too early to conclude whether the act is efficient and effective at addressing competition issues in digital markets. However, one might wonder whether the act will be effective after the DMA's adoption as the Member States could not adopt a measure that would run counter to a Commission's decision. The antitrust regulation provides a similar provision that prevents NCAs applying European competition laws from taking decisions that would run counter to a Commission's adopted decision to ensure consistency. This means that if the Commission does not adopt a decision, the Member States can decide at their discretion. The act is thus likely to be effective after the DMA's adoption, thus requiring defining a cooperation model between the DMA and national competition laws.

IV. COOPERATION MODEL BETWEEN THE DMA AND NATIONAL COMPETITION LAWS

The COREPER text mandates that the Commission and the NCAs establish principles of cooperation and coordination in an implementing act to ensure consistency, effectiveness, and complementary enforcement of the DMA and national antitrust laws (recital 99).

In Europe, a similar situation arises in merger control between European competition law and national competition laws. The 2004 EU merger regulation ("EUMR") states that the Commission has exclusive jurisdiction to review mergers falling within the Community thresholds and NCAs to review mergers falling below it (art. 1 EUMR). In addition, the EUMR provides a referral system for efficiently allocating competencies between the Commission and the NCAs. The parties or NCAs can request a referral from NCAs to the Commission (arts. 4(5) and 22(1) EUMR), and vice versa, they can request a referral from the Commission to NCAs (arts. 4(4) and 9 EUMR) to review a concentration under certain conditions.³¹ In practice, the EUMR enables an efficient allocation of resources and a consistent merger review. In the digital sector, the Commission reviewed some important mergers that did not fall within the Community threshold thanks to the referral mechanism, such as *Facebook/WhatsApp* or *Apple/Shazam*.³²

25 Press release, Bundeskartellamt, First Proceeding Based on New Rules for Digital Companies – Bundeskartellamt also Assesses New Section 19a GWB in its Facebook/Oculus Case (January 28, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html.

26 Press release, Proceedings Against Amazon Based on New Rules for Large Digital Companies (Section 19a GWB) (May 18, 2021) (accessed February 16, 2022).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html.

27 Press release, Bundeskartellamt, Proceeding Against Google Based on New Rules for Large Digital Players (Section 19a GWB) – Bundeskartellamt Examines Google's Significance for Competition Across Markets and its Data Processing Terms (May 25, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html; Press release, Bundeskartellamt, Bundeskartellamt

Examines Google News Showcase (June 4, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html.

28 Press release, Bundeskartellamt, Proceeding Against Apple Based on New Rules for Large Digital Companies (Section 19a(1) GWB) – Bundeskartellamt Examines Apple's Significance for Competition Across Markets (June 21, 2021) (accessed February 16, 2021).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/21_06_2021_Apple.html.

29 Press release, Bundeskartellamt, Alphabet/Google Subject to New Abuse Control Applicable to Large Digital Companies – Bundeskartellamt Determines "Paramount Significance Across Markets" (January 5, 2022) (accessed February 16, 2022).

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html.

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https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html.

30 Press release, Bundeskartellamt, Google News Showcase – Bundeskartellamt Holds Consultations on Google's Proposals for Dispelling Competition Concerns (January 12, 2021) (accessed February 16, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/12_01_2022_Google_News_Showcase.html.

31 Carugati, C., *Reforming Merger Control Notification Thresholds*, *CONCURRENCES N° 2-2019*, ART. N° 89868 (2019).

32 *Id.*

An implementing act to the DMA should replicate the EUMR. The Commission should have exclusive jurisdiction to review practices falling within the DMA threshold and the NCAs to review practices falling below it. In addition, the act should also provide a referral mechanism where the NCAs could request a referral from NCAs to the Commission, and vice versa from the Commission to NCAs, to review a practice under certain conditions.

To refer a practice from the NCAs to the Commission, the act should use the two criteria of article 22 EUMR. First, the practice affects trade between the Member States. Second, the practice threatens to significantly affect competition within the territory of the Member State or States making the request. In that case, the Commission should review the practice under European competition law, not the DMA, because the practice is outside the DMA threshold.

To refer a practice from the Commission to the NCAs, the act should use two criteria. First, the practice falls within the national thresholds of the Member State making the request on its own initiative or upon the invitation of the Commission. Second, the Member State should prove that it has the expertise and resources to deal with the case, including prior actions in enforcement and advocacy, experience in local platforms and conditions, and investment in technological tools. Moreover, the Commission should supervise the NCAs' enforcement actions through similar mandatory information and guidance powers that the European antitrust regulation provides to the Commission to ensure the single market.³³ The Commission should thus guide the Member State on how it can apply its national competition law consistently with the DMA. It is worth noting that Germany, France, and the Netherlands proposed a similar model in a September 2021 amendment paper. The Commission would have shared its enforcement power based on a delegation mechanism within the ECN, but the Council did not retain the amendment.³⁴

V. CONCLUSION

The implementation of the DMA with national antitrust laws will be an important factor in the effectiveness of the regulation, thanks to an efficient allocation of resources and consistent decisions. A cooperation mechanism with clear rules on case allocation would avoid the risk of inconsistency that would undermine the single market.

³³ Council Regulation (EC) No 1/2003, *supra* note 17, art. 11.

³⁴ German, French, and Dutch Ministers for Economic Affairs, *Strengthening the Digital Markets Act and its Enforcement*, September 2021.



ANTITRUST POLICY TOWARD INTERMEDIARIES: DIGITAL PLATFORMS AND “BIG TECH”

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I. INTRODUCTION

The United States and the European Union are developing major antitrust policies targeting digital platforms with a focus on “Big Tech.” The U.S. Congress is considering the *American Innovation and Choice Online Act* (“AICO”) (S.2992) and the *Open App Markets Act* (S.2710).² The EU approved a provisional version of the *Digital Markets Act* (“DMA”).³ These antitrust policies are likely to have significant effects on competition and innovation in digital platforms. These antitrust policies also could have far-reaching consequences for economic growth and development.

Antitrust policies should not be aimed at companies simply because they are both “Big” and “Tech.” Antitrust enforcement in the U.S. has long emphasized anticompetitive conduct rather than market power or market share. Antitrust enforcement in the EU involves greater scrutiny of large firms but their conduct must exhibit “abuse of a dominant position.”⁴ Targeting companies based on their size and technology risks mischaracterizing both competitive strategies and anticompetitive conduct. Such antitrust policies could penalize innovation competition and yet miss monopolization and exclusionary activities.

Antitrust policies toward “Big Tech” should apply economic analysis to address innovation and competition. In this article, I argue that antitrust policy toward digital platforms and “Big Tech” can benefit from advances in the Economics of Markets and Platforms.⁵

Antitrust policy faces two main challenges. First, “Big Tech” firms are economic intermediaries that own and manage digital platforms. Economic intermediaries are central to the economy because they create and operate markets. The Economics of Markets and Platforms can help policy makers distinguish competitive strategies from anticompetitive conduct.

Second, “Big Tech” firms engage in innovative competition by introducing transaction innovations. Transaction innovations improve the efficiency of economic transactions and foster new types of markets. To address innovation competition, I observe that antitrust policy should consider advances in the Economics of Technology & Innovation.⁶

I began to study the economics of intermediaries in the early 1990s.⁷ My motivation was to better understand how markets worked. I noted that the textbook frameworks of perfect competition and imperfect competition did not offer satisfactory explanations for how markets form or how markets operate.

The perfect competition framework does not specify how an economy achieves market-clearing prices and outputs. This framework assumes that buyers and sellers take prices as given whether in a single market (partial equilibrium) or across multiple markets (general equilibrium). But, if buyers and sellers are price takers, how do markets attain an equilibrium? Market clearing then would require a force outside the market such as a hypothetical auctioneer.

The imperfect competition framework addresses price adjustment but does not offer a comprehensive description of how markets form. In the imperfect competition framework, firms with market power choose prices, with buyers continuing to take prices as given. This framework emphasized pricing decisions of producers without examining transaction costs or market formation.

In considering these issues, I observed that intermediary firms solve these problems in most markets. I found that intermediary firms contribute between a quarter to a third of the total value generated by the U.S. economy.⁸ Intermediary firms create markets by bringing buyers and sellers

2 See Eric Cortellessa, *The Strange Coalition in Congress Poised to Score a Major Win Against Big Tech*, May 31, 2022, *Time*, <https://time.com/6182329/the-strange-coalition-in-congress-poised-to-score-a-major-win-against-big-tech/>.

3 Deal on Digital Markets Act: EU Rules To Ensure Fair Competition and More Choice for Users, March 24, 2022, <https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users>, Accessed June 4, 2022.

4 Judgment of the Court of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Dominant position, Case 85/76, European Court Reports 1979 -00461, at 497. (“for Article 86 to apply there must be a connexion between the dominant position and the conduct of the undertaking concerned; the conduct complained of must spring from the undertaking's strength and must only be possible by reason of its dominant position.”)

5 Daniel F. Spulber, *The Economics of Markets and Platforms*, 2019, *Journal of Economics & Management Strategy*, 28(1), 159–172, <https://doi.org/10.1111/jems.12290>.

6 For a discussion and overview of these issues, see Daniel F. Spulber, *Antitrust and Innovation Competition*, 2022, *Journal of Antitrust Enforcement*, forthcoming, <https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnac013/6593929>.

7 Daniel F. Spulber, 1996, *Market Microstructure and Intermediation*, *Journal of Economic Perspectives*, 10, 135-152.

8 Spulber, 1996, *id.*

together. Intermediary firms act as market makers and match makers.⁹ Intermediary firms communicate with buyers and sellers, handle the details of transactions, and help adjust market prices.¹⁰ The activities of intermediary firms help explain how markets are formed and how markets operate.¹¹

Intermediary firms also drive technological change in market transactions. Intermediary firms create transaction innovations that improve the efficiency of markets. Intermediaries introduce new types of transaction methods and improve the efficiency of transactions. Entrepreneurs embody innovations in startups and new firms.¹² What I have termed the “Business Revolution” involves innovations in transaction methods, e-commerce, and digital platforms.¹³

Firms that create and operate digital platforms, including “Big Tech,” generally are intermediaries. This suggests that antitrust policy toward “Big Tech” should preserve the benefits provided by intermediaries, while also addressing problems caused by anticompetitive conduct. Antitrust policy toward intermediaries should be designed to protect innovation competition, while deterring conduct that impedes innovation.

In this article, I consider some aspects of the Economics of Markets and Platforms that shed some light on these significant policy developments. I offer an economic definition of intermediaries and discuss some of the economic literature. I offer some observations about identifying competitive and anticompetitive conduct in the digital economy.

II. THE ECONOMICS OF MARKETS AND PLATFORMS

From the earliest merchants to mass marketers, intermediaries have played important roles in the economy. Despite their historic significance, the economic functions of intermediaries have long been misunderstood. The emergence of digital platforms and eCommerce have clarified the economic contributions of intermediaries as never before.

The Bureau of Economic Analysis (“BEA”) reports that the digital economy contributed 10.2 percent of U.S. gross domestic product (“GDP”) in 2020.¹⁴ This consisted of infrastructure, e-commerce, and priced digital services. The BEA’s definition of e-commerce includes “digitally-ordered, digitally-delivered, or platform-enabled transactions,” including business-to-business (“B2B”), business-to-consumer (“B2C”), and peer-to-peer (“P2P”).¹⁵

The U.S. Census Bureau found that for 2019, “e-commerce shipments of U.S. manufactures were \$3,887.6 billion,” and “[r]evenue from electronic sources for service industries in the United States was \$1,295.3 billion.”¹⁶ The U.S. Census Bureau also found that in 2019 e-commerce sales were \$578.5 billion for U.S. retailers and \$2,873.1 billion for merchant wholesalers.¹⁷

Formulating antitrust policy toward digital platforms and “Big Tech” requires an economic definition. Elsewhere I introduce a definition of a platform as an economic institution that has five basic elements. (a) A platform has a ‘location’ that can be geographic, virtual, or some hybrid. (b) A platform has ‘sides’ consisting of buyers, sellers, and other groups. (c) A platform has ‘intermediaries’ such as market makers, match makers, and other firms that manage transactions. (d) A platform has ‘transaction technologies’ that handle purchases and sales, contracting, communication, market making, and matching. (e) A platform has ‘coordination mechanisms’ that provide incentives to participate and handle participation decisions by members of the sides of the market.¹⁸

9 Daniel F. Spulber, 1998, *The Market Makers: How Leading Companies Create and Win Markets*, McGraw Hill.

10 Daniel F. Spulber, 1999, *Market Microstructure: Intermediaries and the Theory of the Firm*, Cambridge University Press.

11 Daniel F. Spulber, 2009, *The Theory of the Firm: Microeconomics with Endogenous Entrepreneurs, Firms, Markets, and Organizations*, Cambridge University Press.

12 Daniel F. Spulber, *The Innovative Entrepreneur*, 2014, Cambridge University Press.

13 Daniel F. Spulber, 2011, Should Business Method Inventions be Patentable?, *Journal of Legal Analysis*, 3(1), 265-340.

14 Tina Highfill & Christopher Surfield, 2022. New and Revised Statistics of the U.S. Digital Economy, 2005–2020, May, Bureau of Economic Analysis (“BEA”), <https://www.bea.gov/system/files/2022-05/New%20and%20Revised%20Statistics%20of%20the%20U.S.%20Digital%20Economy%202005-2020.pdf>, accessed June 6, 2022.

15 Kevin Barefoot, Dave Curtis, William Jolliff, Jessica R. Nicholson & Robert Omohundro, Defining and Measuring the Digital Economy Working Paper 3/15/2018, BEA, <https://www.bea.gov/sites/default/files/papers/defining-and-measuring-the-digital-economy.pdf>.

16 <https://www.census.gov/newsroom/press-releases/2021/e-estats-report-electronic-economy.html>, accessed June 6, 2022.

17 U.S. Census Bureau, *id.*

18 Spulber, 2019, *supra* note 6.

Formulating antitrust policy toward intermediaries and digital platforms also requires consistent terminology. Economic discussions of this subject have developed several threads that have a lot in common. These threads are sometimes disconnected from each other, leading to fragmented economic research and potentially inconsistent policy conclusions. To improve the clarity of policy discussions, it is helpful to treat these overlapping analyses in a unified way. The Economics of Markets and Platforms studies these closely related economic institutions. As I explain elsewhere, there are at least ten closely related terms.¹⁹

- Markets
- Platforms
- Intermediaries
- Market makers and match makers
- Market microstructure
- Organized exchanges
- Two-sided and multi-sided markets
- Two-sided and multi-sided networks
- The Sharing economy and Peer-to-Peer (P2P) markets
- Ecosystems

There are many types of intermediaries operating in the economy. Intermediaries have been around long before the rise of digital platforms and “Big Tech.” Characterizing intermediaries is of fundamental importance for economics because it helps in understanding firms, markets, and competition.

Retail intermediaries purchase from manufacturers and wholesalers and sell to households, institutions, and businesses.²⁰ Wholesale intermediaries sell or arrange transactions for merchandise.²¹ Intermediaries also include companies in Finance and Insurance that raise funds, pool risk, or provide services.²²

Intermediaries purchase and resell products and adjust prices for buyers and sellers that balance supply and demand. Intermediaries provide liquidity and immediacy, so that buyers and sellers can find trading partners or transact with the intermediary. Intermediaries match buyers and sellers who then engage in direct transactions of goods and services. Intermediaries manage transactions, keeping track of purchases, sales, and payments. Intermediaries reduce transaction costs as compared to direct exchange by monitoring the quality of goods and services. Intermediaries establish markets and provide incentives for buyers and sellers to participate in exchange.²³

III. ANTITRUST AND INTERMEDIARIES

The new antitrust policies focus on the economic functions of intermediaries. The new policies consider competition and anticompetitive conduct in digital markets. This section examines how the new antitrust policies address intermediary firms and considers some economic issues related to these policies.

A. Antitrust Policies Toward Intermediaries

The AICO Act addresses intermediaries in digital markets. The AICO Act defines an “online platform” as “a website, online or mobile application, operating system, digital assistant, or online service that enables” sharing content, transactions in products and services, and user searches.²⁴

The EU DMA states “[d]igital services in general and online platforms in particular play an increasingly important role in the economy, in particular in the internal market, by enabling businesses to reach users throughout the Union, by facilitating cross-border trade and by open-

¹⁹ Spulber, 2019, *supra* note 6.

²⁰ Bureau of Labor Statistics (BLS), <https://www.bls.gov/iag/tgs/iag44-45.htm>.

²¹ BLS, <https://www.bls.gov/iag/tgs/iag42.htm>.

²² BLS, <https://www.bls.gov/iag/tgs/iag52.htm>.

²³ Andrei Hagiu & Daniel F. Spulber, 2013, First-Party Content and Coordination in Two-Sided Markets, *Management Science*, 59(4), 933-949.

²⁴ https://www.klobuchar.senate.gov/public/_cache/files/b/9/b90b9806-cecf-4796-89fb-561e5322531c/B1F51354E81BEFF3EB96956A7A5E1D6A.sil22713.pdf, at 6, accessed June 4, 2022.

ing entirely new business opportunities to a large number of companies in the Union to the benefit of consumers in the Union.”²⁵ The EU DMA identifies “online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services, virtual assistants, web browsers and online advertising services, including advertising intermediation services.”²⁶

Policymakers anticipate that these new antitrust policies will make sweeping changes in the marketplace. Senator Amy Klobuchar (D-Minn.) states

American prosperity was built on a foundation of open markets and fair competition, but right now our country faces a monopoly problem, and American consumers, workers, and businesses are paying the price. As dominant digital platforms — some of the biggest companies our world has ever seen — increasingly give preference to their own products and services, we must put policies in place to ensure small businesses and entrepreneurs still have the opportunity to succeed in the digital marketplace. This bill will do just that, while also providing consumers with the benefit of greater choice online.²⁷

Senator John Kennedy (R-La.) says that:

As Big Tech has grown and evolved over the years, our laws have not changed to keep up and ensure these companies are competing fairly. These companies have continued to become a larger part of our everyday lives and the global economy, controlling what we see and how we engage on the internet. Big Tech needs to be held accountable if they behave in a discriminatory manner. Our bill will help create a more even playing field and ensure that small businesses are able to compete with these platforms.²⁸

Andreas Schwab, Member of the European Parliament, stated “The agreement ushers in a new era of tech regulation worldwide. The Digital Markets Act puts an end to the ever-increasing dominance of Big Tech companies.”²⁹ Schwab adds that “[f]rom now on, they must show that they also allow for fair competition on the internet. The new rules will help enforce that basic principle. Europe is thus ensuring more competition, more innovation, and more choice for users.”³⁰

The new antitrust policies in the U.S. appear to target specific companies. The 2020 House Report studies four companies: Amazon, Apple, Facebook, and Google.³¹ The House Report emphasizes that these companies are intermediaries that serve “as gatekeepers over a key channel of distribution.”³² According to the House Report, these companies have three things in common.

First, as gatekeepers, “[t]hey not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them.”³³ Second, using their gatekeeper position, the companies “have surveilled other businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats.”³⁴ Third, “these firms have abused their role as intermediaries to further entrench and expand their dominance. Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant.”³⁵

25 Regulation (EU) 2022/... of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), at 4, <https://www.consilium.europa.eu/media/56086/st08722-xx22.pdf>, Accessed June 4, 2022.

26 Regulation (EU) 2022, *id.* at 13.

27 Kennedy, Klobuchar, Grassley introduce American Innovation and Choice Online Act to rein in Big Tech, October 18, 2021, <https://www.kennedy.senate.gov/public/2021/10/kennedy-klobuchar-grassley-introduce-american-innovation-and-choice-online-act-to-rein-in-big-tech>.

28 *Id.*

29 Deal on Digital Markets Act: EU Rules To Ensure Fair Competition and More Choice for Users, March 24, 2022, <https://www.europarl.europa.eu/news/en/press-room/20220315IPR25504/deal-on-digital-markets-act-ensuring-fair-competition-and-more-choice-for-users>, accessed June 4, 2022.

30 Deal, 2022, *id.*

31 House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, 2020 (hereafter “House Report”), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf, accessed June 8, 2022.

32 House Report, at 6.

33 House Report, at 6.

34 House Report, at 6.

35 House Report, at 6.

Reflecting these concerns, the AICO Act addresses various forms of “unlawful conduct” by digital platforms that would “prefer the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform in a manner that would materially harm competition” and “limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered platform operator in a manner that would materially harm competition.” According to a CNBC report, “[t]hird-party sellers, who account for more than half of Amazon’s retail volume, have in recent years expressed frustration over the costs they pay to stay in good standing, the amount Amazon charges them for ads and Amazon’s inability to rid the marketplace of scams and bad actors.”³⁶

The new antitrust policies also address app stores. The House Report asserts that “the ability for consumers to sideload apps — installing apps without using an app store — does not discipline the dominance of Apple and Google in the mobile app store market. Apple does not permit users to sideload apps on iOS devices, and few consumers have the technical savvy to ‘jailbreak’ an iOS device to sideload apps.”³⁷

The *Open App Markets Act* “prohibits a covered company from (1) requiring developers to use an in-app payment system owned or controlled by the company as a condition of distribution or accessibility, (2) requiring that pricing or conditions of sale be equal to or more favorable on its app store than another app store, or (3) taking punitive action against a developer for using or offering different pricing terms or conditions of sale through another in-app payment system or on another app store.”³⁸

B. Economic Analysis of Antitrust Policy

The Economics of Markets and Platforms provides insights into how intermediaries compete. Antitrust analysis of competition should consider how intermediaries interact on both the buyer and seller sides of the market. Antitrust scrutiny of anticompetitive conduct also should examine intermediaries’ interactions on the buyer and seller sides of the market. Antitrust policy should evaluate competition among digital platforms as well as competition between digital platforms and hybrid and bricks-and-mortar intermediaries.

Defining the relevant market is an important step in antitrust analysis. When firms act as intermediaries, market definitions must be adjusted to reflect the firms’ interactions with both buyers and sellers.³⁹ It is often useful to think about intermediaries as suppliers of transactions. For example, the Supreme Court decision in *Ohio v. American Express* notes that transaction platforms “facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network.”⁴⁰

Because intermediaries maximize profits, their decisions regarding prices and other transactions on both sides of the market are interconnected.⁴¹ Antitrust tools such as Critical Loss Analysis (“CLA”) can be adapted to two-sided markets.⁴²

In earlier work, I characterized search as the gateway to the Internet. I introduced the concept of the “circular flow of information” to describe intermediation by search firms such as Google.⁴³ I noted that “search firms are intermediaries in the two-sided market consisting of consumers and advertisers. They induce both consumers and advertisers to reveal information through self-selection behavior.” I raised concerns

36 Annie Palmer, Amazon Sellers Reject Efforts by an Executive to Rally Their Opposition to Big Tech Antitrust Bill, June 8, 2022, <https://www.cnbc.com/2022/06/06/ama-zon-executive-encourages-sellers-to-oppose-antitrust-bill.html>.

37 House Report, at 97.

38 Summary: S.2710 — 117th Congress (2021-2022), <https://www.congress.gov/bill/117th-congress/senate-bill/2710>. (“A covered company may not interfere with legitimate business communications between developers and users, use non-public business information from a third-party app to compete with the app, or unreasonably prefer or rank its own apps (or those of its business partners) over other apps.”)

39 Alexei Alexandrov, George Deltas & Daniel F. Spulber, 2011, Competition and Antitrust in Two-Sided Markets, *Journal of Competition Law and Economics*, 7(4), 775-812, at 775. (“In two-sided markets, firms typically intermediate between buyers and sellers, so that market power measures must reflect firms’ interaction both with buyers and with sellers.”)

40 *Ohio v. American Express Co.*, 585 U. S. ____ (2018)

41 Alexei Alexandrov & Daniel F. Spulber, 2017, Sufficient Decisions in Multi-Sided and Multi-Product Markets, *Journal of Industrial Economics*, 65(4), 739–766.

42 Alexandrov et al., 2011, id. See also Lapo Filistrucchi, Damien Geradin, Eric Van Damme & Pauline Affeldt, 2014, Market definition in Two-Sided Markets: Theory and Practice. *Journal of Competition Law & Economics*, 10(2), 293-339.

43 Daniel F. Spulber, 2009, The Map of Commerce: Internet Search, Competition, and the Circular Flow of Information, *Journal of Competition Law and Economics*, 5(4), 633-682.

that intermediaries could exercise market power to the extent that they could control the “map of commerce.”⁴⁴ This suggested that a “dominant firm with market power in search may adversely affect consumer benefits in the design of its privacy policies.”⁴⁵ Economic efficiency requires that consumers be aware of how search firms and other intermediaries gather and use their personal information.

The new antitrust laws may have adverse effects on innovation and competition because of imprecise concepts and terminology. The American Bar Association Antitrust Law Section expressed concerns about “ambiguous terminology in the [AICO] Bill regarding fairness, preferencing, materiality, and harm to competition on covered platforms.”⁴⁶ The Section recommended that “these definitions direct attention to analysis consistent with antitrust principles: effects-based inquiries concerned with harm to the competitive process.”⁴⁷

The EU DMA identifies some critical aspects of digital markets including economies of scale, network effects, and technology lock-in.⁴⁸ It is not evident that these features of digital platforms call for antitrust intervention. Economies of scale are not confined to online services but are present in most industries. Contestability depends on low barriers to entry not economies of scale. Economies of scale are consistent with contestable markets because competition for the market and potential entry limit the market power of incumbents.⁴⁹

Network effects with intermediaries exist when buyers benefit from greater seller participation and sellers benefit from greater buyer participation. Network effects need not impede competition because they are potentially available to all the firms in the industry. Intermediary firms can benefit from network effects by providing coordination and incentives for buyers and sellers to participate in the market.⁵⁰

Technology lock-in is said to occur if markets get stuck with inferior technologies. There is, however, little if any evidence of lock-in. Rapid technological change in information and communications technology (“ICT”) and in online markets suggest that lock-in is not a problem.⁵¹ Coordination by standards organizations also helps markets choose the best technologies and develops technological specifications so that products interoperate.⁵²

It is not sufficient to simply identify intermediaries as monopolists. There must also be conduct such as monopolization, exclusion, or unfair practices. The DMA maintains that large digital platforms are gatekeepers with significant market power. The DMA recognizes, however, that there must also be limited contestability or unfair practices.⁵³

IV. CONCLUSION

The Economics of Markets and Platforms shows how intermediary firms make the economy work. Intermediary firms create markets, bring together buyers and sellers, and adjust prices to clear markets. The emergence of digital platforms has increased the economic contributions of intermediary firms. Intermediary firms improve economic efficiency through transaction innovations that lower transaction costs and make new types of transactions feasible.

44 Spulber, 2009, *id.*

45 Spulber, 2009, *id.*, at 682.

46 Comments of the American Bar Association (ABA) Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress, April 27, 2022, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at-comments/2022/comments-aico-act.pdf, accessed June 7, 2022.

47 ABA, *id.*

48 EU DMA at 12. (“Weak contestability and unfair practices in the digital sector are more frequent and pronounced for certain digital services than for others. This is the case in particular for widespread and commonly used digital services that mostly directly intermediate between business users and end users and where features such as extreme scale economies, very strong network effects, an ability to connect many business users with many end users through the multisidedness of these services, lock-in effects, a lack of multi-homing or vertical integration are the most prevalent.”)

49 Harold Demsetz, 1968, Why Regulate Utilities?, *Journal of Law and Economics* 11.1, 55-65; William J. Baumol, John C. Panzar & Robert D. Willig, 1982, *Contestable Markets and the Theory of Industry Structure*, Harcourt; Daniel F. Spulber, 1989, *Regulation and Markets*, M.I.T. Press.

50 Daniel F. Spulber, 2008, Consumer Coordination in the Small and in the Large: Implications for Antitrust in Markets with Network Effects, *Journal of Competition Law and Economics*, 4, 207-262,

51 Daniel F. Spulber, 2008, Unlocking Technology: Antitrust and Innovation, *Journal of Competition Law and Economics*, 4(4), 915-966.

52 Daniel F. Spulber, 2019, Standard Setting Organizations and Standard Essential Patents: Voting and Markets, *The Economic Journal*, 129(619), 1477–1509.

53 EU DMA at 12. (“it is necessary to focus only on those digital services that are most broadly used by business users and end users and where concerns about weak contestability and unfair practices by gatekeepers are more apparent and pressing from an internal market perspective.”)

Antitrust policy toward intermediaries must continue to protect competition and preserve incentives for efficiency and innovation. The digital marketplace raises new antitrust issues concerning exclusion, consumer privacy, and usage of data by digital platforms. To promote consumer welfare and economic efficiency, antitrust policy should deter anticompetitive conduct without diminishing the many economic contributions of intermediaries.



MARKET POWER IN SUPPLY CHAINS



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I. INTRODUCTION

Supply chains in critical sectors are becoming more complex. A number of factors may account for this, including the rise of middlemen that facilitate transactions between levels, sophisticated risk management and trading services, especially in commodities markets; large information technology platforms; value-added processing; and multi-channel distribution. Supply chains came sharply into focus during the COVID-19 pandemic.² In the protein sector, for example, pandemic-related disruptions forced the closure of meat processing plants, resulting in wasted food, empty grocery store shelves, and skyrocketing meat prices for consumers. As disruptions continue, it is clear that they are symptomatic of fundamental, and unique, competition issues in supply chains.

Competition issues involving supply chains have evolved with their growing sophistication. Horizontal and vertical ownership patterns have created large “wingspans” of corporate ownership in supply chains in sectors like agriculture, healthcare, and energy. Concerns over high concentration at individual levels and the emergence of dominant players and tight oligopolies in critical markets within supply chains are now common. These features create incentives for strategic competitive conduct at both individual levels and across levels in supply chains. But rising concentration also creates incentives for players in other parts of a supply chain to “bulk up” through merger to gain bargaining power vis-à-vis more powerful suppliers or customers.

This article explores the foregoing issues. The focus is on the middle levels of supply chains where there is often limited competition. These market power “bottlenecks” significantly enhance the risk of harm to consumers and producers and create instability and a lack of resiliency in critical supply chains. While these effects are becoming more visible, they have not been addressed in any coherent way through more aggressive antitrust enforcement or comprehensive competition policy. To advance this discussion, we take a closer look at two sectors, pharmaceuticals, and food & agriculture, that have been home to particularly significant changes in supply chains.

II. CONCENTRATION IN THE PHARMACEUTICAL AND FOOD & AGRICULTURE SUPPLY CHAINS

Players in the middle of supply chains implement business models with different value propositions. For example, the pharmaceutical supply chain features drug manufacturers, pharmacy benefit managers (“PBMs”), drug wholesalers and distributors, health insurers, and retail pharmacy outlets. In food and agriculture, key middle players include commodity buying, trading, and processing; food manufacturing; wholesaling and broadline food distribution; and retail grocery. The food & agriculture supply chain also features important input markets involving agricultural biotechnology, farm equipment, and fertilizers, which are essential for the production of proteins and crops.

Some middle players offer benefits to both producers and consumers through the value they add to products and services, or in facilitating connections between sellers and buyers. For example, PBMs and drug distributors can achieve scale, scope, and network economies from large drug formularies and multiple distribution channels. These organizations can reduce transactions costs by aggregating demand and negotiating favorable prices on behalf of multiple buyers. In food & agriculture, risk management and trading are mechanisms to protect market participants against commodity price volatility and facilitate exchange. Wholesalers and broadline food distributors exploit economies of scale and scope through access to broad product portfolios and lower costs through distribution network economies.

Many of the middle players in supply chains share one thing in common — the levels at which they operate are often highly concentrated. As shown in Table 1, the top three firms, Mylan, Sandoz (Novartis), and Teva, control over 65 percent of the generic drug market.³ Pharmacy benefit management in the U.S. is dominated by three large players that control over 75 percent of the national market: CVS Caremark, Express Scripts, and Optum Rx.⁴ Three firms control over 90 percent of the national drug distribution market: McKesson Corp., AmerisourceBergen Corp.,

² See e.g. *When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains*, AMERICAN ANTITRUST INST. (May 7, 2020), <https://www.antitrustinstitute.org/work-product/when-covid-19-is-the-symptom-and-not-the-disease-consolidation-competition-and-breakdowns-in-food-supply-chains/>.

³ Tiash Saha, *The World's Biggest Generic Pharmaceutical Companies in 2018*, PHARMACEUTICAL TECH. (Apr. 3, 2019) <https://www.pharmaceutical-technology.com/features/biggest-generic-pharmaceutical-companies-2018/>.

⁴ José Vasquez & Gina Lohr, *Pharmacy Benefit Managers, Explained*, ADVISORY BOARD (Nov. 13, 2019) <https://www.advisory.com/daily-briefing/2019/11/13/pbms>.

and Cardinal Health Inc.⁵ Further downstream, we see high levels of concentration in the health insurance markets where the majority of states are served by three or fewer major health insurers that account for 80 percent or more of the market.⁶

Table 1: 3-Firm Ratios in Key Segments of the Pharmaceutical Supply Chain

Market or Segment	Market Share of Top 3 Firms
Generic Pharmaceuticals (2018 global net sales)	~65 percent
Pharmacy Benefit Management (2018 prescription claims)	~75 percent
Drug Distributors (2018 revenue)	~90 percent
Health Insurance (2018 enrollments)	~80 percent

As shown in Table 2, the food & agriculture supply chain has a similar profile of concentration in critical middle segments. For example, the four largest firms, Tyson Foods, JBS SA, Cargill, and Smithfield Foods (WH Group), control about 75 percent of the meat processing market in the U.S.⁷ Four firms control about 85 percent of beef processing, in particular.⁸ In agrochemicals, four firms — Bayer, Corteva, BASF, and ChemChina — control about 65 percent of U.S. sales. Likewise, four firms control 80 percent of agricultural commodity trading in the U.S.: Cargill, COFCO, Archer Daniels Midland, and Bunge.⁹ And four large grocers, Walmart, Schwarz Group, Kroger, and Aldi, control about 60 percent of the retail grocery market.¹⁰

Table 2: 4-Firm Ratios in Key Segments of the Food & Agriculture Supply Chain

Market or Segment	Market Share of Top 4 Firms
Meat processing (2019 U.S. revenue)	~75 percent
Agrochemicals (2018 U.S. sales)	~65 percent
Agricultural Commodity Trading (2018 U.S. sales)	~80 percent
Retail Grocery (2018 U.S. sales)	~60 percent

The foregoing examples illustrate the broader problem of high concentration in markets that form supply chains. This sets the stage for a better understanding of the implications of limited rivalry in critical middle segments where market power bottlenecks create competition concerns within and across markets in a supply chain, but also around the stability and security of the supply chain itself.

III. THE EFFECTS OF HORIZONTAL AND VERTICAL INTEGRATION IN SUPPLY CHAINS

High concentration in the interconnected markets in supply chains can enhance incentives to engage in exclusionary practices and anticompetitive agreements. Horizontal mergers, especially in the middle levels, drive higher levels of market concentration, potentially creating dominant firms and tight oligopolies with significantly reduced incentives to compete on price, quality, or innovation. A unique feature of concentration at middle levels of a supply chain is that a dominant firm or oligopoly can exercise market power on both the buy side and sell sides of a market. This

5 Adam J. Fein, *The Big Three Wholesalers: Revenues and Channel Share Up, Profits Down*, DRUG CHANNELS (Oct. 2, 2019) <https://www.drugchannels.net/2019/10/the-big-three-wholesalers-revenues-and.html>.

6 *Market Share and Enrollment of Largest Three Insurers – Individual Market* (2018), KAISER FAMILY FOUNDATION, https://www.kff.org/private-insurance/state-indicator/market-share-and-enrollment-of-largest-three-insurers-individual-market/?currentTimeframe=1&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7B%7D%7D,%22states%22:%7B%22all%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Total%20Individual%20Market__Enrollment%22,%22sort%22:%22desc%22%7D.

7 Plate Tectonics: Mapping Corporate Power in Big Food, ETCGROUP.COM (November 2019), at 18-19, https://www.etcgroup.org/files/files/etc_platetectonics_a4_nov2019_web.pdf.

8 *Annual Report 2018*, U.S. DEPT. AGRIC., AGRIC. MKTG. SERV., PACKERS & STOCKYARDS DIV., at Table 5. See also, *Structure of U.S. Cattle Markets*, Report: GAO-18-296, U.S. Government Accountability Office (Apr. 2018), and *2019 Top 100 Meat & Poultry Processors*, PROVISIONERONLINE.COM.

9 Plate Tectonics, *supra* note 7, at 16-17.

10 *Id.* at 20.

squeezes agricultural producers, who receive less for their commodities and often pay high input prices for crop seed and fertilizer. But it also squeezes consumers, who are subject to budget constraints, through higher prices for food.

The U.S. Department of Justice's ("DOJ's") challenge to the 2009 merger of JBS and National Beef is a good illustration. The government's complaint alleged that the merger would create strong incentives for beef packers to collude, rather than compete. Indeed, the resulting tight oligopoly of packers would likely drive down prices of fed cattle paid to ranchers, *and* raise the prices of boxed beef to consumers.¹¹ Further consolidation since the *JBS-National Beef* merger has exacerbated market power concerns in beef packing, as indicated by pending private antitrust class actions alleging illegal price fixing by the major packers.¹²

The pattern of successive mergers in PBM markets over time also illustrates the risks of market power bottlenecks. For example, the FTC's approval of the PBM mergers of CVS and Caremark (2007) and Express Scripts and Medco (2012) effectively created a duopoly in the national PBM market. The large PBMs then turned quickly to vertical integration to broaden their control over markets in the pharmaceutical supply chain. Vertical mergers that combine firms operating in adjacent markets, such as pharmacy benefit management and health insurance, can increase incentives for a merged firm to foreclose rivals from access to inputs or customers. Harmful vertical mergers can also facilitate anticompetitive coordination between market participants through the exchange of competitively sensitive customer information shared by a small number of rival firms. High concentration in one or both markets affected by a vertical merger increases the likelihood of these anticompetitive outcomes.

For example, the vertical merger of large PBM, CVS, and leading health insurer, Aetna, was opposed by the American Antitrust Institute and other consumer advocacy organizations. High concentration in the PBM market, where CVS and Express Scripts accounted for more than 50 percent of the national market, and in the health insurance market, raised the specter of post-merger foreclosure of smaller rivals.¹³ For example, a merged CVS Caremark-Aetna would have had stronger incentives to cut off smaller PBMs, mail order pharmacies, and independent pharmacies from access to Aetna as a customer, or to cut off rival health insurers from access to CVS PBM services. The potential effect of the CVS-Aetna merger would be higher prices and lower quality to consumers, and less innovation. The DOJ complaint did not address these vertical concerns, alleging only that the merger would eliminate competition in a small overlap market for Part D prescription drug plans.¹⁴

Observers of merger control in the U.S. and elsewhere know that other supply chains have also been home to significant horizontal and vertical integration. In the U.S., antitrust enforcers have been permissive of mergers that contribute to rising concentration and that combine firms in highly concentrated adjacent markets. Viewed through the narrow lens of traditional market-by-market analysis, this approach has set the stage for the creation of significant market power bottlenecks in the middle segments of supply chains.

IV. REACTIVE CONSOLIDATION AND THE STABILITY AND RESILIENCY OF SUPPLY CHAINS

Incentives for consolidation in supply chains are not exclusively related to the accretion of market power, or achieving alleged short-term cost savings and longer-term efficiencies around quality and innovation. The incentive to bulk up to gain bargaining power *vis-à-vis* customers and suppliers has been a significant factor in driving concentration in critical supply chains.¹⁵ Consolidation in the interconnected markets that form supply chains, therefore, cannot be viewed in isolation. For example, this dynamic affects competition between PBMs in negotiating with health insurers on prescription drug plans, and drug manufacturers in negotiating rebates with PBMs. By growing larger through horizontal merger, retail grocery chains amass bargaining power to drive down prices charged by powerful food processors and manufacturers.

As a general matter, consolidation in the food & agriculture supply chain has been exacerbated by an apparent lack of coordination between the DOJ and FTC in reviewing mergers that affect supply chains. For example, the clearance process has resulted in the FTC reviewing transactions involving the downstream part of the supply chain, including food manufacturing and retail grocery. However, the DOJ reviews mergers in the upper part of the supply chain, such as food processing (e.g. grain milling, dairy, and meat packing) and biotechnology inputs.

¹¹ See e.g. U.S., et al. vs. JBS SA and National Beef Packing Co. LLC, Complaint, Case No. 08CV5992 (N.D. Ill., Oct. 20, 2008), at 3-4.

¹² See e.g. Memorandum Opinion & Order Granting in Part and Denying in Part Motion to Dismiss, In re Cattle & Beef Antitrust Litig., Case No. 20-1319 (D. Minn. Sept. 14, 2021).

¹³ See Letter to AAG Makan Delrahim Re: Competitive and Consumers Concerns Raised by the CVS-Aetna Merger, AMERICAN ANTITRUST INST. (Mar. 26, 2018), at 7-10, https://www.antitrustinstitute.org/wp-content/uploads/2018/09/ CVS-Aetna_AAI-Letter_3.26.18.pdf.

¹⁴ *United States, et al., v. CVS Health Corporation and Aetna Inc.*, Complaint, Case No. 1:18-cv-02340 (D.D.C, Oct. 10, 2018).

¹⁵ Germaine Gaudin, *Vertical Bargaining and Retail Competition: What Drives Countervailing Power?*, 128 ECON. J. 2380, 2380 (2018).

“Dividing up” critical supply chains in between agencies limits the holistic deployment of important expertise and perspective that could strengthen enforcement.

Bargaining power is a poor defense for consolidation, yet it continues to surface in merger proposals. Its failures are notable. For example, bargaining between powerful suppliers and distributors results in prices that are set through negotiations, not by a competitive process. The quest for bargaining power within a supply chain also increases pressure to engage in “reactive” consolidation, speeding the emergence or fortification of dominant firms and oligopolies in critical markets, especially at the middle levels.¹⁶ Finally, that a merger allows a firm to countervail bargaining power does not justify the elimination of horizontal competition, either directly through horizontal merger, or indirectly through vertical integration. Such mergers risk further entrenching market power and fostering collusion, and may raise barriers to entry to smaller market participants.¹⁷

The market power bottlenecks that result from reactive consolidation also affect the stability and resiliency of a supply chain. It is clear that competition plays a critical role in promoting diversity and redundancy in supply chains. Those that feature robust competition, especially in the middle levels, are far more likely to ensure the reliable and stable production and distribution of essential products. For example, if some parts of the supply chain are disrupted by extreme weather, pandemic, or conflict, more competition works to ensure that rival suppliers fill the void to meet demand. But as the COVID-19 pandemic illustrates, supply chains with concentrated middle segments are fragile and lack the resiliency to withstand external shocks.¹⁸

The foregoing discussion builds on the notion that high and rising concentration, especially in the middle levels of supply chains, exacerbates market power bottlenecks. It highlights that incentives for reactive consolidation, which is a phenomenon unique to the bargaining power dynamics in supply chains, worsen market power bottlenecks and contribute to the instability and lack of resiliency in critical supply chains.

V. IS MERGER CONTROL FAILING TO KEEP UP WITH MARKET POWER BOTTLENECKS?

Merger control is designed to prevent acquisitions that are likely to substantially lessen competition. This includes acquisitions of head-to-head rivals, customers or suppliers, and potential rivals. Vigorous enforcement prevents harmful outcomes by stopping illegal mergers in their “incipiency.”¹⁹ To be sure, the DOJ and FTC, especially under the Obama administration, have prevailed in a number of attempts to block major mergers in the pharmaceutical and food & agriculture supply chains. For example, the DOJ successfully prevented the merger of beef packers JBS and National Beef (2009) and health insurers Anthem-Cigna (2016) and Aetna-Humana (2016).²⁰ The FTC also successfully blocked the merger of the two largest broadline food distributors, Sysco and US Foods (2015).²¹

Despite these aggressive enforcement actions, there have been some notable failures. The DOJ has taken no enforcement decisions involving beef processing since 2009, including declining to move to block the acquisition of Iowa Premium by National Beef — projected to adversely affect the important cash market, which determines the base price for cattle sold on contracts or formulas.²² The FTC approved the merger of retail grocers Safeway and Albertsons (2015), settling the case with divestitures of almost 150 stores to a regional west-coast grocer, which failed to maintain the assets and shuttered the stores.²³

16 See Letter to AAG William Baer Re Antitrust Review of the Aetna-Humana and Anthem-Cigna Mergers, AMERICAN ANTITRUST INST. (Jan. 11, 2016), at 3, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/Health-Insurance-Ltr_1.11.16.pdf.

17 Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea*, AMERICAN ANTITRUST INST. (Oct. 15, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/10/AAI_CountervailingPower10-15-20.pdf.

18 *Supra* note 1.

19 15 U.S. Code § 18.

20 *United States et al. v. Aetna Inc. and Humana, Inc.* Complaint, Case 1:16-cv-01494 (D.D.C., Jul. 21, 2016); *United States v. Anthem, Inc.*, Complaint, Case 1:16-cv-01493, (D.D.C., Jul. 21, 2016).

21 *U.S. v. JBS SA and National Beef Packing*, *supra* note 11; and Federal Trade Commission, et al. v. Sysco Corporation and USF Holding Corp. and US Foods, Inc., Complaint, Case No.1:15-cv-00256-APM (D.D.C., Feb. 20, 2015).

22 See e.g., Wyatt Bechtel, *Purchase of Iowa Premium by National Beef Completed*, DROVERS.COM (Jun. 12, 2019), <https://www.drovers.com/markets/purchase-iowa-premium-national-beef-completed>.

23 Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J. (Oct. 9, 2015).

Moreover, the DOJ allowed the vertical PBM-insurer mergers of CVS-Aetna (2018) and Express Scripts-Cigna (2019) to proceed. This created, in a matter of months, a market in which the largest PBMs were vertically integrated with major health insurers.²⁴ Aside from the heightened risk of exclusionary and coordinated conduct raised by these mergers, industry observers are watching carefully to assess the extent to which they have raised barriers to entry to smaller rivals that do not operate vertically integrated businesses.

More generally, merger control in both the pharmaceutical and food & agriculture supply chains has been exceptionally weak, exacerbating the emergence of market power problems in the middle of supply chains and creating pressures for reactive consolidation. For example, between 1998-2019, almost 1,300 mergers in the processing, manufacturing, and food distribution sectors were reported to the U.S. antitrust agencies.²⁵ The majority of those deals involved food processing and manufacturing. About 25 percent of transactions cleared to either the DOJ or FTC received a “second request” for additional information.²⁶ While this enforcement rate is typical across sectors, it has declined over time. Moreover, the rate at which the government challenged food & agriculture mergers is below the average across all sectors.²⁷

Merger enforcement involving the pharmaceutical supply chain has also been lax. For example, a 2020 AAI study revealed that between 1994-2020, the FTC challenged 67 pharmaceutical company mergers totaling almost \$1 trillion.²⁸ But the Commission moved to enjoin only one of those transactions and settled the rest with divestitures. Notably, about 60 percent of the relevant markets identified in complaints involved 3-2 and 2-1 mergers and about 75 percent involved 4-3, 3-2, and 2-1 mergers.²⁹ In the vast majority of cases, therefore, the effect of pharmaceutical mergers has been to increase concentration in already highly concentrated markets.

The AAI report also examined patterns of divestitures across challenged pharmaceutical mergers. The study reveals that many firms were purchasers of divested assets in multiple proceedings where the FTC settled challenged mergers with consent orders. Moreover, many purchasers of divested assets included firms that were party to other mergers across the period 1994-2020. These “serial” purchasers accounted for almost 70 percent of total purchases of divested assets by merging parties. The effect of the FTC’s merger policy to approve mergers subject to divestitures has led to critical assets “trading hands” within a shrinking group of drug firms.³⁰ The effect of this policy on increasing concentration and paving the way for conduct violations is clear in the growing number of private, state, and federal non-merger antitrust litigations. Indeed, the AAI study finds that of the 70 drug companies that are current defendants in past and pending litigations, 55 percent were formerly parties to previous mergers and/or purchasers of divested assets, and non-merging buyers of assets.³¹

In sum, enforcement statistics and outcomes bear out the concern that merger control in pharmaceuticals and food & agriculture has been lax in the U.S. Massive consolidation and growing evidence of failed remedies has created strong pressures in key parts of supply chains that have contributed to market power bottlenecks. These bottlenecks, in turn, spur reactive consolidation in other parts of the supply chains, thus reinforcing concerns over their stability and security.

VI. CONCLUSIONS

This article sets the groundwork for a long overdue dialogue around the importance of widening the lens on merger control involving supply chains. It walks through a multi-part analysis that builds a compelling case for why new approaches to strengthen enforcement are needed. Among other takeaways, the article highlights several priorities, which respond to the unique features of competition in supply chains, including the phenomenon of market power bottlenecks, reactive consolidation, and their stability and resiliency. First, the unique competitive dynamics in supply chains, and the outsized effect of mergers that create incentives to exercise market power at horizontal levels emphasize the need for

24 See also *Vertical Integration Isn't Great for Health Care Consumers or Purchasers*, PBGH.ORG (Aug. 23, 2021), <https://www.pbgh.org/despite-claims-vertical-integration-isnt-great-for-health-care-consumers-or-purchasers/>.

25 *Supra* note 2.

26 *Id.*

27 *Id.* The rate of second requests and challenges is based on total transactions cleared to either agency.

28 See Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission's Merger Policy in the Pharmaceutical Sector*, AMERICAN ANTITRUST INST. (Sep. 3, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf.

29 *Id.* at 13.

30 *Id.* at 15.

31 *Id.* at 18.

stronger presumptions. This means consistent enforcement of the “structural presumption” in horizontal mergers,³² and the need for statutory reforms that create presumptions of illegality for vertical mergers and acquisitions of nascent rivals.

Second, an apparent lack of coordination between the DOJ and FTC in reviewing mergers along the supply chain highlights the importance of a unified, coordinated enforcement system. This means more coordination between agencies on mergers that affect different parts of the supply chains, or clearing mergers involving different parts of critical supply chains to a single agency. This would minimize the risk that an agency fails to fully account in its investigations for the influence of competitive dynamics across levels across supply chain. Finally, it is vitally important for enforcers and courts to be alert to the effects of “successive” mergers on increasing concentration and to reject any defenses for mergers based on reactive consolidation, or bulking up for the purpose of gaining bargaining leverage over upstream or downstream players.



³² See e.g. *Herbert Hovenkamp & Carl Shapiro, Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 *YALE LAW J.* 1742 (May 2018).

WHAT HAVE THE INTERMEDIARIES EVER DONE FOR US?



SUPER!

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I. INTRODUCTION

One assumption that undergirds much of today's policy discussions is that intermediaries are inherently parasitic on the groups they intermediate among. While this notion has been translated into modern language, the sentiment is ancient, as it taps primal prejudices that are as old as time. Over the centuries, an array of folk wisdom has been employed to castigate various middlemen, from tradesmen to insurers to mortgage and travel brokers to, of course, Marx's vampiric "capitalist," who "intermediated" between workers and consumers.² As economist Abba P. Lerner observed in 1949:

At least since the 18th century, social discontent has tended to focus on the figure of The Middleman, who is conceived to be a kind of parasite earning his living in some obscure way at the expense of the "productive" elements of society. This conception of the parasitic role of the trader has played an important part in political movements of the Left and the Right, both on a popular and on a high ideological level.

Lerner was right, but the impulse arguably harkens back even further. In ancient Rome, "all trade was stigmatized as undignified... the word mercator [merchant] appears as almost a term of abuse."³ Earlier still, Plato's "Republic" — a work that laid the foundations for Western political thought — held that "all the classes engaged in retail and wholesale trade... are disparaged and subjected to contempt and insults."⁴

What these social taboos throughout history share have in common is the view that intermediaries are — as Lerner put it — an "excrescence on the body economic." They are profiteers, exploiters, go-betweens seeking to profit from the hard work of others. In sum, the intermediary is the classic modern villain.

The latest iteration of this view takes particular aim at intermediaries in digital markets, especially the so-called platforms. The platforms' critics posit that consumers would always be better off in a decentralized system that minimized the role of "the middleman" and allowed them to freely combine products from across the spectrum of potential trading partners.⁵ This would expand choice and reduce prices, or so the story goes.⁶ According to this logic,⁷ platforms are especially to be regarded with suspicion when they offer bundled goods or operate "walled gardens" (i.e. closed or semi-closed systems), while interoperability, open source, and decentralization are always laudable features of any market.

Concrete expression of this view can be found in regulatory proposals that have emerged on both sides of the Atlantic that aim to turn "closed" platforms into "open" ones (see, in Europe, the Digital Markets Act; and in the United States, the Open App Markets Act and the American Innovation and Choice Online Act).⁸ In addition, several recent decisions and pending antitrust cases raise similar claims: that intermediaries arbitrarily decide who can be on the market, that they charge "too much," that they don't innovate enough, or that they exploit app developers and even consumers.⁹

2 See Adam Hayes, *Middleman*, INVESTOPEDIA (Aug. 24, 2021), <https://www.investopedia.com/terms/m/middleman.asp>; Dave Lindorff, *Insurance Industry: The Parasite That Feeds on US Public Health System*, COMMON DREAMS (Mar. 25, 2009), <https://www.commondreams.org/views/2009/03/25/insurance-industry-parasite-feeds-us-public-health-system>; <https://daily.jstor.org/marxferatu-teaching-marx-with-vampires/#:~:text=True%2C%20Marx%20did%27t%20write,the%20more%20labor%20it%20sucks.%E2%80%9D>; <https://www.commentary.org/articles/abba-lerner/the-myth-of-the-parasitic-middlemanproductive-and-unproductive-labor/>; Matthew Wills, *Marxferatu: Teaching Marx with Vampires*, JSTOR DAILY (Oct. 30, 2018), <https://daily.jstor.org/marxferatu-teaching-marx-with-vampires/#:~:text=True%2C%20Marx%20did%27t%20write,the%20more%20labor%20it%20sucks.%E2%80%9D>; Abba P. Lerner, *The Myth of the Parasitic Middleman: "Productive" and "Unproductive" Labor*, COMMENTARY (July 1949), <https://www.commentary.org/articles/abba-lerner/the-myth-of-the-parasitic-middlemanproductive-and-unproductive-labor/>.

3 Marian L. Tupy, *Sadly, Trade and Commerce Have Always Been Vilified*, HUMANPROGRESS (Sept. 2, 2016), <https://www.humanprogress.org/anti-capitalism-has-deep-roots-in-human-history/>.

4 PLATO, *THE REPUBLIC OF PLATO* (Benjamin Jowett trans. Clarendon Press 1881) (1840). https://www.google.it/books/edition/The_Republic_of_Plato/uqcnAAAAQAAJ?hl=en&gbpv=1&printsec=frontcover.

5 See Ross Schulman, *We Need Alternatives to Big Tech. These Decentralized Tools Might Be the Answer*, NEW AMERICA (Jan. 12, 2021), <https://www.newamerica.org/oti/blog/decentralization-competition/>.

6 See Margrethe Vestager (@vestager), TWITTER (Jan. 11, 2022, 7:45 AM), <https://twitter.com/vestager/status/1480883454954946565>.

7 See Ross Schulman, *supra* note 5.

8 See *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector*, SEC (2020) 437 final (Dec. 15, 2020); Open App Markets Act, S. 2710, 117th Cong. (2021); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); ACCESS Act of 2021, H.R. 2849, 117th Cong. (2021).

9 <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf>. See European Commission Press Release IP/22/2764, *Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay* (May 2, 2022). Autoriteit Consument & Markt, *Summary of decision on abuse of dominant position by Apple* (Aug. 24, 2021), <https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf>.

As this piece explains, however, these stories ignore the tremendous value brought by intermediation and the trade-offs between different business models and different forms of intermediating. If left unchecked, this unhappy narrative can permanently damage digital ecosystems and transfer choices rooted in legitimate product differences from markets, where they belong, to legislators and judges, where they do not. The ongoing *Epic v Apple* proceedings are a good example of why it is important to respect the role of intermediaries in digital markets, and the unique benefits intermediation can bring to consumers.¹⁰

II. THE VALUE OF INTERMEDIARIES

In Monty Python's "The Life of Brian," a group of would-be revolutionaries bent on overthrowing their Roman overlords gather underground to prep-talk themselves into action. "All the Romans have ever done for us is exploit our fathers, and our fathers' fathers, and their fathers" – they chime. "But what have they ever *done for us?*" their leader, played by the legendary John Cleese, asks rhetorically. As the scene comically reveals in classic Monty Python fashion, quite a bit, actually.¹¹

From arts dealers to insurance and travel brokers to marketplaces, intermediaries have been around for millennia for a reason: they have a huge potential to create value.¹² Like John Cleese's rag-tag band of conspirators, however, we have come to take the benefits of some such practices for granted and now only focus on what we perceive, in isolation, as downsides. Instead of this narrow view, we would do well to take a more holistic approach and place intermediaries in their proper context.

Intermediaries emerge when it would otherwise be too difficult (or too costly) for groups of users to meet and interact. In Coasian terms, they reduce the transaction costs that suppliers and customers would face if they tried to do business directly. As Professor Daniel F. Spulber puts it:

Markets have two main modes of organization: decentralized and centralized. In a decentralized market, buyers and sellers match with each other and determine transaction prices. In a centralized market, firms act as intermediaries between buyers and sellers.

[W]hen there are many buyers and sellers, there can be substantial transaction costs associated with communication, search, bargaining, and contracting. Such transaction costs can make it more difficult to achieve cross-market coordination through direct communication. Intermediary firms have various means of reducing transaction costs of decentralized coordination when there are many buyers and sellers.¹³

This echoes the findings of Nobel laureate Ronald Coase, who observed that firms emerge when they offer a cheaper alternative to multiple bilateral transactions:

The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism. The most obvious cost of "organizing" production through the price mechanism is that of discovering what the relevant prices are. [...] The costs of negotiating and concluding a separate contract for each exchange transaction which takes place on a market must also be taken into account.¹⁴

These economic principles are easily illustrated with a simple example. For most products sold in a supermarket it is inconvenient (if not practically impossible) to buy directly from the producer (especially in the limited quantities that define retail shopping). Absent intermediaries, there would be tremendous costs involved in finding, reviewing, the negotiation the price and subsequently shipping each individual item. Not to mention the tremendous efficiencies supermarkets can achieve in terms of cost savings, reduced carbon emissions (because consumers make fewer store

¹⁰ See *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303 (N.D. Cal. Sept. 10, 2021).

¹¹ See Monty Python, *What Have the Romans... - Monty Python's Life of Brian*, YouTube (Jan. 14, 2009), <https://www.youtube.com/watch?v=Qc7HmhrqTuQ>.

¹² See Michael Stevenson, *The Art Market, its Intermediaries and the Components of Value of Art Works in an Historical Perspective* (Aug. 1992) (Ph.D. dissertation, University of Cape Town) (OpenUCT)

¹³ Daniel F. Spulber, *Solving the Circular Conundrum: Communication and Coordination in Internet Markets*, 104 Nw. U. L. Rev. 537, 540 (2010).

¹⁴ R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390 (1937).

trips), and other benefits of intermediation.¹⁵ We would thus expect intermediaries to emerge in such settings, as whatever costs the operation costs they add to the final price of goods are likely outweighed by the aforementioned cost-savings.

In more concrete terms, intermediation can provide desirable goods/services/features that would be costly to replicate via bilateral transactions.

Curation is one such example. A consumer purchasing from a trusted intermediary is faced with a selection of goods it is likely to enjoy, based on past experience or the intermediary's reputation and brand. For instance, out of the millions of goods available on the market, grocery stores select a handful based on relevance, quality, and price. This saves time and reduces searching costs for the consumer. It may also help to avoid the paradox of choice by streamlining (and delegating) a chunk of the selection and decision-making process which might otherwise prove daunting.¹⁶ No wonder then, that in a world of almost crippling abundance and choice, many companies and services differentiate themselves not by the ample range of goods offered but in precisely the opposite, i.e. their expertise and sophistication in picking out the best or most relevant.¹⁷ Think of Spotify's personalized "Discover Weekly" playlist, but also more traditional brick-and-mortar shops that offer an assortment of goods and personalized services in stark contrast with the seemingly infinite range on available at megastores. This de-emphasizes quantity in favor of quality, and shifts the locus of competition from knowing how to offer as much as possible, to knowing what to offer to whom and when.

Intermediaries may also increase safety and security by screening products and producers before they reach users. A hypothetical grocery shopper can be safe in the knowledge that the chicken breasts it buys have been carefully vetted. Admittedly, safety regulations also ensure that producers don't cut corners, but the sellers themselves have a strong vested interest in making sure that what they sell is safe for consumption, and in dropping any producers that prove unreliable.¹⁸ Of course, this doesn't 100 percent guarantee safety, but it likely a more cost-effective way of achieving safety than if shoppers had to screen for safety and security themselves.

Finally, and crucially for digital markets, intermediaries can significantly increase economic output by nurturing externalities that exist between different groups of users. In simple terms, intermediaries can bring together users that want to transact but could not otherwise find each other.¹⁹ Think of online platforms such as Amazon, Uber, Airbnb, or LinkedIn. In these two-sided markets, intermediary increase total output by creating feedback loops that capitalize on the number and quality of users on each side of the platform. The more rooms there are on Airbnb (and the better they are), the more users will join the platform, making it more valuable to owners, etc. Virtuous circles of this sort lead to ecosystems that ultimately benefits businesses and consumers alike. This is notably the case for small businesses that offer niche goods and can reach a wider audience by piggybacking on the ecosystem created by the intermediary. In short, intermediaries can harness cross-group externalities to create vibrant ecosystems.

III. TRADEOFFS, TRADEOFFS

All of this does not mean that intermediaries are always a net benefit and every transaction should be intermediated. Instead, the critical point is about the competitive process. There are vast differences between centralization that stems from government fiat and that which emerges organically.

15 See Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. OF APPLIED ECONOMETRICS 1157 (2007); George Nott, *Is Online or In-store Food Shopping Better for the Planet?*, THE GROCER (June 4, 2021), <https://www.thegrocer.co.uk/sustainability-and-environment/is-online-or-in-store-food-shopping-better-for-the-planet/656712.article>.

16 See BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2016).

17 See Stuart Jeffries, *Why too Much Choice is Stressing Us Out*, THE GUARDIAN (Oct. 21, 2015), <https://www.theguardian.com/lifeandstyle/2015/oct/21/choice-stressing-us-out-dating-partners-monopolies>.

18 Kevin Boudreau and Andrei Hagiu compare this to the famous "market for lemons" problem. See Kevin J Boudreau & Andrei Hagiu, *Platform rules: Multi-sided platforms as regulators*, 1 PLATFORMS, MARKETS AND INNOVATION, 163 (2009). ("The main reason was a 'lemons' market failure: because it had not developed a technology for locking out unauthorized games, Atari was unable to prevent the entry of opportunistic developers, who flooded the market with poor-quality games. At a time when consumers had few ways to distinguish good from bad games, bad games drove out good ones. The videogame market was resurrected six years later only when Nintendo entered with a set of draconian policies to regulate third-party developers more tightly. Central to Nintendo's strategy was the use of a security chip designed to lock out any game not directly approved by Nintendo.")

19 David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, 7 (Nat'l Bureau of Econ. Research, Working Paper No w18783, 2012). ("A multi-sided platform "has (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst to facilitate value creating interactions between them.")

(Dis)intermediation is an economic good. Markets thus play a critical role in deciding how much or little of it is provided. Intermediaries must charge fees that cover their costs, while bilateral contracts entail transaction costs. In typically Hayekian fashion, suppliers and buyers will weigh the costs and benefits of these options.²⁰ Intermediaries are most likely to emerge in markets prone to excessive transaction costs and competitive processes ensure that only valuable intermediaries survive.

This has important consequences for policymakers. Indeed, there is no guarantee that government-mandated disintermediation — such as that contemplated in the European DMA and the US AICOA bill²¹ — would generate net benefits in any given case. Of course, the market does not always work perfectly. Sometimes, market failures give rise to excessive (or insufficient) centralization. And policymakers should certainly be attentive to these potential problems and address them on a case-by-case basis. Policymakers should thus ask themselves whether today's most successful intermediaries are merely (or at least mostly) the result of market failures. In the negative, they should be careful not to undermine the valuable role these platforms perform.²²

Questions surrounding the future of the cryptocurrency space offer a good illustration of this evolutionary dynamic. For instance, Tyler Cowen recently appeared to sing the praises of decentralization when discussing the future of Web 3.0:

One person may think “I like the DeFi options at Uniswap,” while another may say, “I am going to use the prediction markets over at Hedgehog.” In this scenario there is relatively little intermediation and heavy competition for consumer attention. Thus most of the gains from competition accrue to the users. . . .

I don't know if people are up to all this work (or is it fun?). But in my view this is the best-case scenario — and the most technologically ambitious. Interestingly, crypto's radical ability to disintermediate, if extended to its logical conclusion, could bring about a radical equalization of power that would lower the prices and values of the currently well-established crypto assets, companies and platforms.²³

While Cowen has a point — disintermediation would indeed have some benefits — it is important not to overlook the tradeoffs involved. For instance, social science literature has long recognized not all consumers are equally sophisticated (think e.g. of Barry Schwartz' distinction between “satisficers” vs. “maximizers”).²⁴ The underlying logic is that consumers vary in terms of tastes, knowledge, priorities, and sophistication. So, what may work for one group may not work for another.

For instance, besides being a renowned scholar, Tyler Cowen is also an extremely savvy investor. What he sees as fun investment choices may be nightmarish (and potentially dangerous) decisions for less sophisticated consumers. So, while a user like Cowan may well be able to reap all the benefits of a decentralized system with almost none of the risks, a less vigilant user may fall easy prey to scams, security breaches, or just terrible investment advice. For Cowen, the intermediary may be a nuisance because it appropriates some of the surplus which would otherwise have been entirely his. For many others, however, the intermediary is a safeguard against financial self-destruction.

In short, it is wrong to assume consumers would be better off if every interaction with producers was “decentralized” (or the opposite, for that matter). Instead, most consumers would benefit from being able to choose between intermediation and disintermediation. Turning every grocery store into an “open” system — essentially, a bazaar — would destroy the benefits of intermediation. But turning every bazaar into a boutique would be equally senseless. Paradoxically, by turning everything into the same thing for the sake of “choice” and “fairness,” policymakers would end up *eliminating* choice by government fiat, instead of letting the users decide.

20 See F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

21 See *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector*, SEC (2020) 437 final (Dec. 15, 2020); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).

22 See Dirk Auer, *On the Origin of Platforms: An Evolutionary Perspective*, TRUTH ON THE MARKET (July 7, 2020), <https://truthonthemarket.com/2020/07/07/on-the-origin-of-platforms-an-evolutionary-perspective/>. (“Digital markets could have taken a vast number of shapes, so why have they systematically gravitated towards those very characteristics that authorities condemn? For instance, if market tipping and consumer lock-in are so problematic, why is it that new corners of the digital economy continue to emerge via closed platforms, as opposed to collaborative ones? Indeed, if recent commentary is to be believed, it is the latter that should succeed because they purportedly produce greater gains from trade. And if consumers and platforms cannot realize these gains by themselves, then we should see [other] intermediaries step into the breach — i.e. arbitrage. This does not seem to be happening in the digital economy. The naïve answer is to say that this is precisely the problem, the harder one is to actually understand why.”).

23 Tyler Cowen, *How Crypto Could be Like the Music Industry*, BLOOMBERG (Dec. 20, 2021, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2021-12-20/how-crypto-could-be-like-the-music-industry>.

24 See Barry Schwartz, Andrew Ward, John Monterosso, Sonja Lyubomirsky, Katherine White & Darrin R Lehman, *Maximizing versus satisficing: happiness is a matter of choice*, 83 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 179-190 (2002).

IV. IMPLICATIONS FOR COMPETITION POLICY IN DIGITAL

It's easy to see the implications of the above for today's competition-policy debates, and for the online intermediaries that many critics would like to see decentralized. Particularly salient examples include app store platforms (such as the Apple App Store and the Google Play Store); online retail platforms (such as Amazon Marketplace); and online travel agents (like Booking.com and Expedia). Competition policymakers have embarked on countless ventures to "open up" these platforms to competition, essentially moving them further toward disintermediation. In most of these cases, however, policymakers appear to be fighting these businesses' very *raison d'être*.

For example, the purpose of an app store is to curate the software that users can install and to offer payment solutions; in exchange, the store receives a cut of the proceeds. If performing these tasks created no value, then to a first approximation, these services would not exist. Users would simply download apps via their web browsers, and the most successful smartphones would be those that allowed users to directly install apps. Forcing these platforms to "open up" and become neutral is antithetical to the value proposition they offer.

Calls for retail and travel platforms to stop offering house brands or displaying certain products more favorably are equally paradoxical. Consumers turn to these platforms because they want a selection of goods. If that was not the case, users could simply bypass the platforms and purchase directly from independent retailers or hotels. Critics sometimes retort that some commercial arrangements, such as "most favored nation" clauses, discourage consumers from doing exactly this. But that claim only reinforces the point that online platforms must create significant value, or they would not be able to obtain such arrangements in the first place.

The above explains why characterizing these firms as imposing a "tax" – as critics of intermediaries have always done, and continue to do – on their respective ecosystems is so deeply misleading. The implication is that platforms are merely passive rent extractors that create no value. Yet, barring the existence of market failures, both their existence and success is proof to the contrary. To argue otherwise places no faith in the ability of firms and consumers to act in their own self-interest.

V. THE EXAMPLE OF APPLE

The above themes have all played out in one form or another in the recent Epic v Apple case.²⁵ Succinctly, Apple's App Store is a multisided platform connecting app developers and app users, with Apple acting as the intermediary.²⁶ However, unlike some of its competitors', Apple's platform is "closed" or "semi-closed," meaning that iPhone users can only download apps through Apple's App Store: the iOS doesn't support third-party app stores or what is commonly referred to as "side-loading," i.e. downloading apps directly from the internet. Apple also doesn't allow third-party in-app payment systems on its platform — with the upshot that any such purchases must go through the App Store and pay Apple a 30 percent commission (the industry standard).

Epic Games, the developers behind the massively successful online multiplayer game Fortnite which was distributed (amongst other places) on the App Store, lodged a complaint under the Sherman Act arguing that Apple's model foreclosed competition from other potential app stores and payment systems.²⁷ Leaving aside the multiple legal shortcomings of Epic's case, there are a wealth of economic reasons why it is unsound to turn Apple's "closed" platform into an "open" one by judicial decree — as Epic essentially wanted.²⁸

It is important to understand, in this connection, that "open" and "closed" platforms both have distinct benefits and drawbacks; one is not inherently superior to the other.²⁹ Closed proprietary platforms like Apple's iOS create incentives for companies to internalize positive indirect network effects, which can lead to higher levels of product variety, user adoption, and total social welfare. As Andrei Hagiu has written:

25 See *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303 (N.D. Cal. Sept. 10, 2021); Geoff Manne, Dirk Auer, & Lazar Radic, *Assessing Less Restrictive Alternatives and Interbrand Competition in Epic v Apple*, TRUTH ON THE MARKET (Apr. 1, 2022), <https://truthonthemarket.com/2022/04/01/assessing-less-restrictive-alternatives-and-interbrand-competition-in-epic-v-apple/>.

26 See DAVID S. EVANS & RICHARD SCHMALENSEE, *MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS*, 1 (2016).

27 See FORTNITE, <https://www.epicgames.com/fortnite/en-US/home> (last visited May 18, 2022).

28 See Brief for International Center for Law & Economics as Amicus Curiae, *Epic Games, Inc. v. Apple, Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303 (N.D. Cal. Sept. 10, 2021).

29 See Jonathan Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861, 1868-69 (2011). ("If open and closed structures (and all intermediate variants) simply reflect strategic approaches to the underlying trade-off between controlling host opportunism and enabling cost recovery, then the choice of organizational form would appear to be a matter of social indifference that provides no basis for government intervention to guide market outcomes.)

A proprietary platform may in fact induce more developer entry (i.e., product variety), user adoption and higher total social welfare than an open platform.³⁰

For instance, by filtering which apps can access the App Store and precluding some transactions from taking place on it, a closed or semi-closed platform may ultimately increase the number of apps and transactions on its platform, where doing so makes the iOS ecosystem more attractive to both consumers and developers.

Further, there are important and complex inter and intra-group tradeoffs between “open” and “closed” platforms. On the user side, for instance, more vigilant users might be better served by an “open” platform because they find it easier to avoid harmful content; whereas less vigilant ones may want more active assistance in screening for malware, spyware, or software that simply isn’t optimized for the user’s device. Similarly, some users might genuinely prefer a highly curated, selective experience when it comes to apps — while others may bridle at any such limitations.³¹

Comparable tradeoffs exist on the developer side: Apple’s model lowers the cost to join the App store, which particularly benefits smaller developers and those whose apps fall outside the popular gaming sector. In a nutshell, the 30 percent commission on in-app purchases cross-subsidizes the delivery of services to the approximately 80 percent of apps on the App Store that are free and pay no in-app fees. Subscribing to the App Store also gives developers access to Apple’s software tools and marketing (approximately 70 percent of small developers don’t have a marketing budget).

Of course, Apple’s way of doing things isn’t the only way — nor should it be. Notably, its main competitor, i.e. Android, has a different business philosophy which allows for a more “open” platform with a more hands-off approach to content distribution and moderation i.e. intermediation between users and distributors. Clearly, to the extent that operating systems and phones can be seen as a form of intermediation between users and developers — they are inherently valuable regardless of the model adopted. But a subtler point is that, as a more active intermediary, Apple brings unique benefits which are not replicated by Android and, *vice-versa*.

In consequence, forcing Apple to adopt the “open” platform model that Epic champions — and that Android embodies — on the basis of the assumption that less intermediation is somehow always better is unwarranted and bad policy. It is also misguided from an antitrust perspective because, in the context of two-sided platform businesses, this would mean sacrificing systems-level competition for the sake of a superficial increase in competition among a small subset of platform users. Thankfully, the district court recognized as much in its ruling.

VI. CONCLUSION

In *Das Kapital*, Karl Marx differentiated between “productive” and “unproductive” labor. He argued that capitalists belonged to the latter group because they were parasites that appropriated the surplus value generated by labor. As Jonah Goldberg has observed in *Suicide of the West*, in doing so, Marx secularized a recurrent religious theme in human societies: the distaste for those that make money without physically appearing to create anything.³² This has traditionally included, amongst others, tradesmen, money lenders (“usurers”), and of course, the owners of the means of production themselves: the capitalists.

In a sense, digital intermediaries are the new “capitalists” unto which all the scorn, rhetoric and irrationality of the “enemies of the market” is now poured on. And, like other middlemen through the centuries, the new breed is intuitively seen by critics as creating little worth and merely appropriating the value generated by app developers by leveraging the demand of a “captive” (or “locked in”) customer-base.

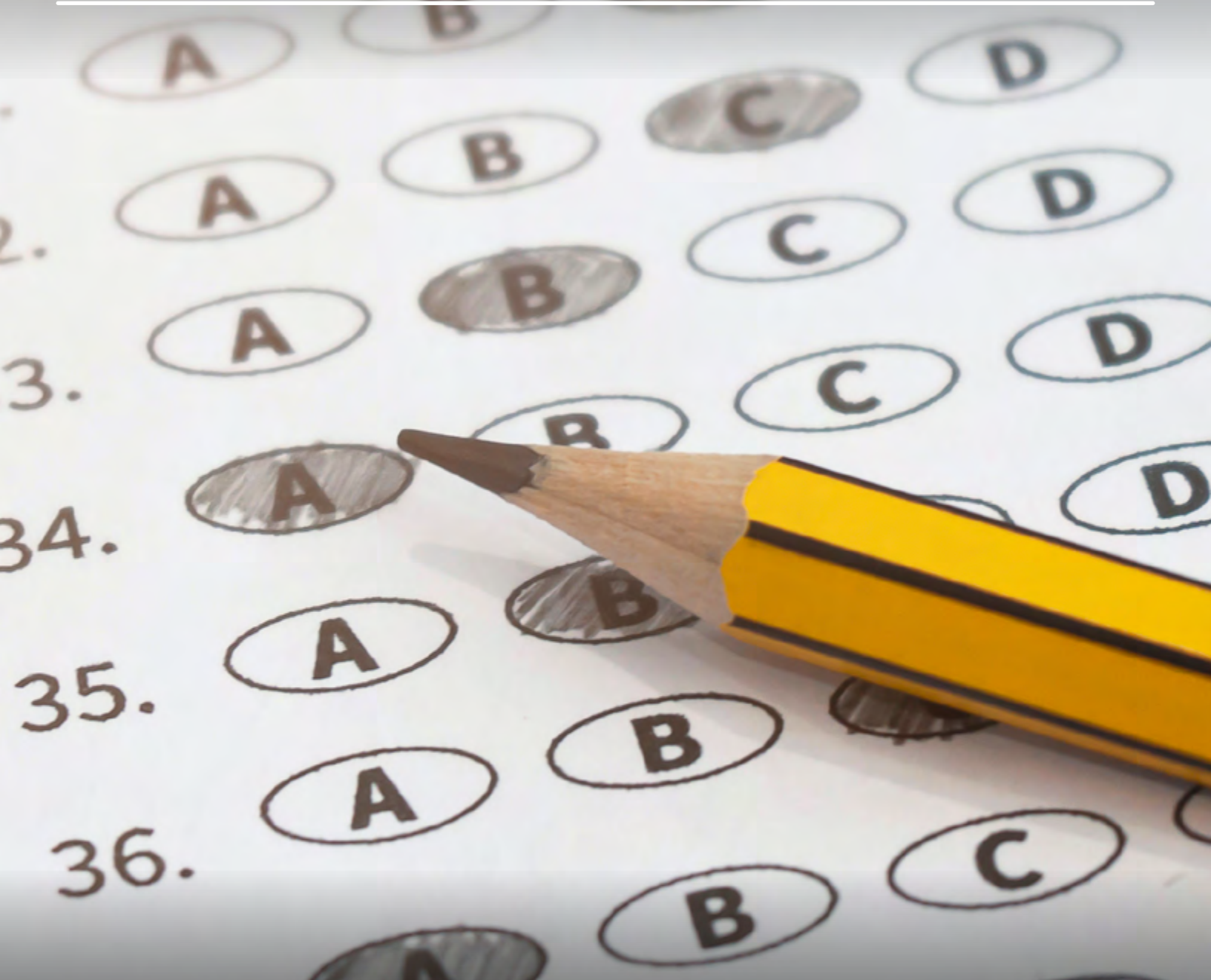
As we have argued, this story of exploitation is disingenuous. Some of the biggest improvements in human welfare have come from savvy intermediaries that connected two groups of people. Indeed: the entire logic of markets, and therefore capitalism, is grounded in this principle. This is not to say that intermediation is always necessary, or a net social benefit. But, if any presumption is going to apply to intermediation, history tells us that — despite our reactionary and primitive instincts — it should be in the opposite direction. Indeed, intermediaries have done — and continue to do — quite a bit for us.

30 Andrei Hagiu, *Proprietary vs. Open Two-Sided Platforms and Social Efficiency*, 15-16 (AEI-Bookings Joint Ctr., Working Paper No. 06-12, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=980755.

31 See Sam Bowman, *Breaking Down House Democrats’ Forthcoming Competition Bills*, TRUTH ON THE MARKET (June 10, 2021), <https://truthonthemarket.com/2021/06/10/breaking-down-house-democrats-forthcoming-competition-bills/>.

32 See JONAH GOLDBERG, *SUICIDE OF THE WEST: HOW THE REBIRTH OF TRIBALISM, POPULISM, NATIONALISM, AND IDENTITY POLITICS IS DESTROYING AMERICAN DEMOCRACY* (2018).

PLATFORM ECONOMICS: RECENT FINDINGS AND FURTHER QUESTIONS



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I. INTRODUCTION

In textbook economics, a standard lesson is that monopoly is inefficient and adding competitors improves the situation by lowering prices and providing consumers with more choices. In industries with network effects, which are a key feature of platform intermediaries, it has long been recognized that it is not so obvious whether competition has such a positive effect. After all, unlike the fictional world of “perfect competition,” in which the presence of many suppliers leads to zero markups and maximization of total surplus, when network effects are present, there are obvious benefits to market concentration. For example, when hailing a ride using your smartphone, you would probably prefer having all potential drivers in your area appear on a single app (e.g. Uber or Didi) to having them be spread out across 50 or 500 different apps.

Theoretical work in the economics of platforms has produced a set of findings that help clarify what forces come into play as platforms compete. In this short article, I first review four of the more recent findings that seem particularly of interest. The first two highlight possible mechanisms that could lead competition to either raise prices or, ironically, help reinforce the position of an already-dominant platform. The third involves the potential role of so-called “multi-homing” in restoring the benefits of competition, and the fourth focuses on the potential for interoperability requirements to help improve outcomes for users.

After discussing these findings, I then turn to two issues facing the governance of platform industries that I believe warrant further attention. The first of these issues is the distinction between a standard view of network effects and what I call “spillovers.” By this latter term, I mean situations where the adoption of platforms by some people has a negative effect on others who have not adopted them. I argue that the significance of this distinction between network effects and spillovers may have been overlooked by economists due to a limited sense in which the two are sometimes technically equivalent. The second issue I shed some light on is the inherent difficulty of regulating firms that, in an important sense, are outliers. Here, I briefly consider certain perspectives from the three recent, high-profile reports on digital markets (Crémer et al., 2019; Furman et al., 2019; Scott Morton et al, 2019). In doing so, I argue that regulatory proposals intended to foster competition potentially run the risk of stifling innovation by startups.

II. THINGS WE’VE LEARNED ABOUT PLATFORM COMPETITION

A. The Effect of Increasing Competition among Platforms is Murky

Here, I discuss two warnings about the effects of competition among platforms, coming from recent research. The first warning is that adding more competing platforms can lead to higher overall prices. This result, which comes from Tan & Zhou (2021), arises in a setting in which all platforms are symmetric – that is, none is more dominant than any other. The key independent variable is how many such platforms operate in the market. Their model predicts the equilibrium prices that platforms will charge, as a function of the number of competitors. Here, one can think of the price variable as a fairly rough proxy. For example, in the ride-hailing example, it may encompass charges that platforms levy on both riders and drivers. Also, it may include any money paid to the platform, regardless of whether this takes the form of a recurring fee or a per-transaction charge.

The logic behind this phenomenon, which the authors call a “perverse pattern,” is as follows. On the one hand, in traditional industries, market prices are governed by production costs and a single markup term that reflects the level of market power each firm has. This markup term varies positively with the strength of the demand and negatively with the number of competitors. On the other hand, in platform pricing, an additional factor enters the picture, which we’ll call the scale discount. The crucial point is that when platforms in an industry enjoy greater scale, i.e. a smaller number of them serve the same number of users, they have an incentive to offer a larger scale discount. Although these basic ingredients of platform pricing were identified long ago, Tan & Zhou offer an approach that allows for a comparison between the relative speeds with which the traditional markups and scale discounts change, as a function of the number of platforms. Using this approach, they find that, theoretically, it is not far-fetched for an increase in the number of competitors to have a bigger effect in reducing the scale discount than it does on reducing the traditional markup. As such, more competition can mean higher prices.

The second warning is that platform markets can even exhibit entry-induced dominance. That is, the entry of more competing platforms into a market can potentially lead to the dominance of a single platform, or it can reinforce the leading position of an already-dominant platform. This result appears in a recent working paper, Ekmekci, White & Wu (2022), that two coauthors and I wrote. Our model can identify this phenomenon thanks to its ability to encompass scenarios in which platforms are asymmetric. This possibility, like the perverse pattern described above, owes itself to both the presence of network effects and the scale discount that is present in platforms’ pricing.

The key aspect that makes entry-induced dominance possible is that new entrants in a market do not necessarily exert an equal level of competitive pressure against each of the platforms that were already present. Instead, an entrant might turn out to disproportionately siphon off the user base of certain platforms and not others. To take the simplest possible example, consider an industry whose *status quo* involves two equally-sized platforms, 1 and 2. When a new platform, 3, enters the market, a reaction may ensue in which 3 mostly draws users away from 2. The consequence of this is a kind of snowball effect where 1 ends up with a larger market share than it had prior to 3's entry. This is aided by the fact 1's (now) large user base makes it seem preferable to both 2 and 3 in the eyes of the majority of users. This configuration is reinforced by the fact that 1's large size compared to 2 and 3 means that it can offer a larger scale discount.

Note that, purely from the short-run standpoint of users, such an outcome may not be a bad thing. Nevertheless, the possibility of entry-induced dominance merits concern on the part of policymakers, given the broad array of worries associated with tech giants' dominance. In particular, in policy discussions, it is not uncommon to hear it suggested that measures promoting the entry of more platforms could be a good idea in order to tame large platforms' dominance. This result shows that such measures could have the opposite effect.

B. Multi-homing and Interoperability Both have the Potential to be Helpful

In the above descriptions of both the perverse pattern and entry-induced dominance, a crucial point was that network effects were platform-specific. That is, in the settings imagined in those descriptions, the appeal to users of a given platform depended on how many users were active on *that platform*, not on how many users were participating on any platform operating in the same space. For example, in our ride-hailing thought experiment, the implicit assumption was that it would be inconvenient to live in a world with 50 or 500 similar, competing ride-hailing apps, because, when you went to hail a ride, the different potential drivers would be spread out across the many different platforms. Consequently, none of the platforms would offer a reliable service.

On the other hand, to take an extreme case, if all drivers in your area appeared on all of the many different ride-hailing apps, then, from your standpoint as a user, the situation would seem rather appealing. You would probably not need to check more than one app in order to find a nearby driver. Moreover, you could be confident that competition among the many different apps would keep prices low.

Two different arrangements that partially embody the essence of this latter situation are (a) those with so-called “multi-homing” by at least some users; and (b) those with (potentially mandated) “interoperability” across platforms. Regarding the former, “multi-homing” is jargon used to describe the case where users potentially join multiple competing platforms at once. Although this may seem obvious as a desirable feature for a model to incorporate, it is technically quite difficult to do so in an environment that is not otherwise highly constrained. Nevertheless, Liu, Teh, Wright & Zhou (2021) make a recent contribution in this area. They develop a sophisticated model in which users of different types (e.g., riders and drivers) all have the option to sign up for any combination of platforms they like. Once users have made these joining decisions, it is feasible in the model for any given (rider-driver) pair to get together for a trip on any platform that they have both signed up for. The authors study, in this setting, the effect of an increase in competition on prices. Although this model is not directly comparable to the aforementioned one of Tan & Zhou, the results stand in contrast. No perverse pattern emerges; instead more competition leads to lower equilibrium prices.

Interoperability across (or “compatibility” among) platforms also has the potential to bring about the same favorable situation, contemplated above, in which all drivers could be found by opening a single app. Indeed, this is roughly how some well-known networks already work, the most obvious of which is telephony. You may get your phone service from one carrier, and I may get mine from another, but our carriers are interoperable. In order to call each other, we don't need to worry about who is signed up for which carrier. In effect, the universal phone numbers that we use to call each other are part of an interoperable system, where, in certain respects, the platforms appear to play a more passive role.

In other, less established platform industries, would it be beneficial if the government were to require platforms to be at least partially interoperable with one another? In the aforementioned working paper, Ekmekci et al. (2022), my coauthors and I address this question and find results that are broadly optimistic, from the standpoint of users. A reason why this is a priori unclear is that, although an interoperability requirement opens up a set of new feasible consumption patterns (e.g. you might prefer to sign up for just Zoom and I might prefer to sign up for just Microsoft Teams, but we could still have video conferences with one another), platforms could potentially respond by increasing their prices. Our model, however, predicts that the quality benefits, brought on by the former expansion of connectivity, outweigh, from the perspective of users, any potential price increases.²

² Note that, unlike the work of Liu et al. (2021), which suggests that multi-homing makes competition more beneficial than it would otherwise be, in the current version of our work, we study just the direct effect of requiring interoperability, not its interaction with changes in the number of competing platforms.

Both multi-homing and interoperability are thus decidedly important factors to consider when trying to understand the behavior of platform markets. To some degree, the point about multi-homing has a more positive flavor, whereas the point about interoperability has a more normative one. This is because, on the one hand, some industries (e.g. ride-hailing) seem to give rise more naturally to widespread multi-homing than others (e.g. which type of mobile device to use). On the other hand, interoperability is typically spoken about as a regulatory proposal. Nevertheless, there is some overlap. For instance, ride-hailing platforms have, at times, demanded drivers sign agreements to drive exclusively for them and not competing platforms. The research described above suggests that, to the extent an authority relies on competition as a means to discipline the prices charged by such apps, it would also be well served to prohibit such exclusivity demands. Regarding interoperability, a limiting factor of our understanding so far is the degree of abstractness currently needed in order to model this issue. Further case studies on what such regulation might look like in practice in particular industries would be very welcome. As the final portion of this article argues, such regulation is not without its risks.

III. TWO ISSUES THAT DESERVE ATTENTION

A. Spillovers may be Important and have Different Implications from Network Effects

An aspect of platform markets that deserves more attention is the distinction between classic network effects, which directly affect only platform participants, and another type of externality. These other types of externality are those where the presence of many users on a platform or a set of platforms influences the well-being of nonparticipants, i.e. people who have not (yet) chosen to use the platform(s) in question. For the purposes of this discussion, let's call the former type of externality "network effects," and let's call the latter type "spillovers." Just to be clear, on the one hand, a situation purely exhibiting network effects would fit the following description: compared to a situation in which LinkedIn didn't exist, Alice finds it affirmatively preferable that it does exist, so long as she and her extended professional network also uses it. On the other hand, a situation purely exhibiting spillovers would fit this more Luddite description: Alice sure did prefer life before LinkedIn existed, but if she receives a few more email notifications from it regarding her professional acquaintances, she might bite the bullet and join it herself.

From the standpoint of economic theory, within a limited scope, these two types of scenarios are, in fact, equivalent to one another. In particular, when it comes to issues such as determining what prices arise at equilibrium and what prices are socially optimal, basic economic intuition correctly leads to the view that it's unnecessary to pay attention to the distinction between the network effect scenario and the spillover scenario. From a mathematical standpoint, the only difference is whether you set the problem up by putting a particular term on the left side of an inequality or on the right side. Regardless of which side you choose, the answers will be the same.

However, beyond a particular limited scope, this distinction becomes substantial. A specific question for which this distinction makes an important difference is the one of how much investment is socially desirable in a particular platform industry. Within a particular class of models that are equivalent to one another with respect to the above-mentioned pricing questions, one that exhibits more network effects and fewer spillovers would optimally call for more expenditure on fixed costs than one that exhibits fewer network effects and more spillovers. To put it another way, in the former version described above, in which people like Alice affirmatively benefit from LinkedIn, there would be a stronger argument for resources to be devoted to the market in which LinkedIn competes, compared to the latter version, in which people like Alice join by necessity merely to keep from falling behind.

To the best of my knowledge, little effort has been made to understand or measure the extent to which various platform markets fit the former network effect scenario versus the latter spillover scenario. From my perspective, it appears that, by default, standard models of platforms adopt the former specification, whereas casual observation suggests that a healthy dose of the latter scenario is not unrealistic. It seems plausible that, among platform economists, the equivalence of the network effects scenario and the spillovers scenario in some contexts may have caused some questions that depend substantively on this distinction to be overlooked.

B. Regulating Outliers is Tricky

A second aspect that deserves recognition is that the most successful platforms – and the ones that raise the most antitrust and regulatory concern – are, by their nature, outliers. In other words, any of the platforms that are now household names became that way because they were highly exceptional, at some point in their history, at setting off a process in which they attracted millions of users. There is no surefire recipe for a nascent platform to be able to do this. Instead, achieving mass adoption takes some combination of innovation and experimentation in many different unpredictable dimensions, relentless execution, and luck. This aspect presents the possibility of a tradeoff, which I'll describe here, that may have bearing on attempts to govern platform markets.

Summarizing very broadly, each of the recent, high-profile reports on big tech platform markets (Crémer et al., 2019; Furman et al., 2019; Scott Morton et al, 2019) distinguishes between competition in the market and competition for the market.³ Roughly speaking, the former refers to a more plain-vanilla form of competition where different suppliers compete on somewhat even footing in a given market. The latter refers to something like “potential competition,” under which dominant incumbents face the possibility that they may at any point be displaced by an innovative startup.⁴ At the same time, the reports are generally sanguine about the prospect of regulating platform markets. Possible modes of regulation include requirements for interoperability, whose theoretical benefits are lauded above in this piece, and portability, designed to make it simple for users of one platform to switch to another.⁵ Furman et al. (2019) also propose that the largest platforms be subject to what they call a “code of conduct.”

An apparent feature of such regulation seems to be an attempt to codify platforms’ activity by defining what their crucial dimensions are. This raises the question of whether well-intentioned regulatory attempts might, by doing so, foster an environment that turns out to be favorable to incumbents rather than to innovative startups, whose potential for success depends on being able to innovate in unpredictable dimensions. Observably, incumbent platforms seek to play a role in influencing the way their industries are regulated. Undoubtedly, in exerting any such influence, they face an incentive to try to reduce the kind of unpredictability that might be crucial to startups’ prospects. In view of this, it would be useful to have further examination of this potential tradeoff between, on the one hand, encouraging less friction in platform markets and, on the other hand, preventing them from becoming ossified.

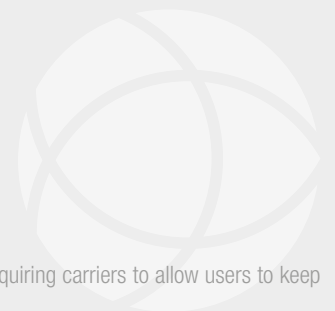
IV. CONCLUSION

In this article, I do two main things. First, I review four notable results from recent research on platform competition. The former pair of these results are more pessimistic about the effects of competition itself, and the latter pair are more optimistic about the role multi-homing and interoperability can play in the markets where platforms compete. In the second part of the article, I raise two questions regarding platform markets that I argue deserve further investigation. The first question regards the distinction between classic network effects, in which platform users have a positive effect on one another, and “spillovers,” whereby platform users exert a negative influence on non-adopters. Here, I argue that a limited technical form of equivalence between these two types of situations may have led us to ignore substantive implications of spillovers. Finally, the second question I raise regards the challenges of regulating outliers. I argue that there may be an important tradeoff facing regulation in environments where (a) a crucial disciplining device against dominant firms is potential competition from startups and (b) startups’ ability to credibly fulfill their role as potential competitors depends on their having leeway to execute complex, unpredictable strategies.

³ See White & Jing (2022) for more on this distinction and its role in these reports.

⁴ Competition for the market has some resemblance to theories of “contestable markets,” which gained prominence in the 1980s.

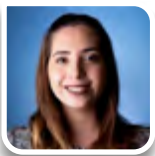
⁵ As with interoperability, various countries’ telephony markets provide an easy-to-understand example of portability, with regulation requiring carriers to allow users to keep their same phone number when they switch to a competitor.



DIGITAL TRANSFORMATION, RETAIL AND REGULATORY CHALLENGES IN MEXICO



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I. IMPACT OF THE DIGITAL TRANSFORMATION ON RETAIL

Many retail formats, including online and offline sales channels, have emerged to satisfy the demands of consumers. The retail value chain has been changing, due in large part to the so called “digital transformation” including the emergence of e-commerce and the integration of digital technology into all areas of a business.

The digital transformation has focused on satisfying consumers’ evolving needs, mining the traditional retail structure. This change in the traditional retail chain has increased competition since consumers now have more choices to satisfy their particular needs. We are a long way from the time where the customer was required to shop at the corner store retailer and purchase products offline, in store. Today the big retailers have their traditional stores but also serve consumers through online channels including virtual marketplaces that have become valuable channels for customers and sellers. Today, the internet of things (“IOT tech”) is increasingly allowing manufacturers to engage directly with consumers over the lifecycle of their products. For example, white goods manufacturers, like Samsung, now sell their consumables by enabling their washing machines to order washing detergent automatically after a given number of washing cycles.²

Moreover, this transformation in retail – which has been ongoing for decades – was accelerated by the COVID-19 pandemic. Digital channels have allowed manufacturers and retailers to engage with customers through innovative multichannel strategies. Even small business shifted to multichannel distribution by engaging with online channels, such as Uber, Rappi and Cornershop in Mexico. The COVID-19 pandemic contributed to the evolution of the retail market, particularly, by pressing businesses to expand to multichannel digital strategies and strengthening in consumers the habit to use multiple retailers through multiple channels (multihoming) and to price compare products across many retailers, online and offline, through real-time access to digital price comparison tools.

II. IMPACT OF THE DIGITAL TRANSFORMATION ON GLOBAL ANTITRUST POLICY

The impact that the digital transformation has had in retail and all markets, especially after it was exponentiated by the COVID-19 pandemic, has consequently impacted the policy discussion among Regulatory and Competition Authorities around the world. The last couple of years the question “should the tech companies that participate in digital channels be regulated” has been in the center of most policy discussions.

According to Giuseppe Colangelo, the current debate of antitrust policy is driven by two arguments: (i) so-called digital markets move too fast to be supervised *ex post*, hence antitrust enforcers would often intervene after the tipping point; (ii) the emergence of platform-based companies enjoying a brand-new type of market power implies greater responsibilities and justifies specific responses.³

The European Union (“EU”) has taken the lead in this discussion through by working to finalize its proposed Digital Services Act (“DSA”) and Digital Markets Act (“DMA”). The DMA is intended to regulate “tech companies” based on their size and other criteria for defining their position as “gatekeepers,” including: (i) its “significant impact” on the European market; (ii) whether the service it provides is an “important gateway” between businesses and final consumers; (iii) whether the “gatekeeper” has or will likely soon have an entrenched and durable position.⁴

However, the ongoing legislative discussions have raised controversial debates regarding the digital services that will be included in the DMA and the ex-ante obligations for the gatekeepers. At this stage, DMA includes basically all relevant digital service: online marketplaces, social media, digital advertising, interpersonal communications (like WhatsApp), cloud services, even virtual assistants (like Siri or Alexa) and smart TVs. Therefore, any provider of these services could become a gatekeeper and be subject to the DMA’s ex-ante obligations.

There are several criticisms regarding the DMA, both, internationally (especially since the DMA, in its current form, only impacts U.S. companies) and within the EU. The key concern across different stakeholders (international and regional) highlights the dangerous effect that the regulation could have on market innovations, as well, as on related markets affecting them as collateral damage. For example, the DMA may

2 Reinartz, Wiegand, Imschlo (2019) The impact of digital transformation on the retailing value chain. Available at <https://reader.elsevier.com/reader/sd/pii/S0167811618300739?token=D125099ED785C4E6B6C0BFD2F5809484CA0609E6F8E320FC3C7EA7BE0B443CF54980406961F613C1B907F3EAB321C1F3&originRegion=us-east-1&originCreation=20220307053156>.

3 Colangelo. The European Union’s Digital Markets Act: A Primer. Available at https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/#_ftn168.

4 Wall & Lostri (2022) The European Union’s Digital Markets Act: A Primer. Available at [https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20\(DMA,legislation%20aimed%20at%20such%20platforms](https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20(DMA,legislation%20aimed%20at%20such%20platforms).

intervene in the “startup life cycle,” as it can prevent big tech companies from preempt future competition, something that is good for the tech ecosystem as it creates a win- win scenario for both parties (it gives tech giants the upper hand and it brings them up to date and it gives startups initial capital to start their business). As well, DMA may have a harmful impact on Europe’s small and medium sized enterprises (“SMEs”) and will devalue cloud services, something that SMEs heavily rely on.⁵

III. IMPACT OF THE ANTITRUST POLICY GLOBAL DEBATE IN MEXICO

The policy debate regarding the question “should the tech companies that participate in digital channels be regulated” has also reached Mexico. The Federal Economic Competition Commission (“COFECE”) has engaged in a series of actions aiming to prepare the institution to answer this debate. In 2020, COFECE issued its Digital Strategy as a mid-term strategic planning exercise to “*execute actions that contribute to approach the digitization phenomenon.*” COFECE’s Digital Strategy set forth five actions to be executed before 2021, namely to:

1. Produce a document with public policy proposals for digital markets to benefit more Mexican consumers.
2. Organize fora with international experts to permanently update and strengthen the knowledge of COFECE’s personnel on the operation of digital platforms, particularly of big technological companies.
3. Strengthen capacity building and technological infrastructure to gather and analyze large amount of data. COFECE will develop a plan for managing the exploitation and processing of Big Data.
4. Create a specialized Digital Markets Unit for the analysis of the development of the digital economy and its repercussions on the processes of competition.
5. Strengthen international cooperation with competition authorities and regional and international organizations.⁶

In the first action COFECE’s Digital Strategy aimed to produce a document with public policy proposals for digital markets to benefit more Mexican consumers. Among other issues, this document was intended to address the specific effects of digital markets on the Mexican economy and the possible measures to face them, including the following:

“— Whether it is necessary to identify under specific categories those digital platforms with certain capacities to influence or distort markets; (...)

—Whether it is necessary to take into consideration specific regulations to limit conducts from digital platforms that fall under said categories or that may otherwise distort the markets; (...)

*— Assess the need to modify or extend the existing functions and powers of competition authorities to: allow the implementation of remedies to potential problems posed by digital platforms; impose sanctions to market-distorting conducts currently not foreseen in norms and particular to this kind of platforms; (...)*⁷

However, COFECE has not released or published a document to answer these questions regarding the antitrust policy that should be taken to handle the challenges and market changes related to the digital transformation. Therefore, in Mexico the debate is still staring with multiple questions but few answers.

5 Wall & Lostri (2022) The European Union’s Digital Markets Act: A Primer. Available at [https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20\(DMA,legislation%20aimed%20at%20such%20platforms](https://www.csis.org/analysis/european-unions-digital-markets-act-primer#:~:text=The%20Digital%20Markets%20Act%20(DMA,legislation%20aimed%20at%20such%20platforms).

6 COFECE’s Digital strategy. Available at https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf.

7 COFECE’s Digital strategy. Available at https://www.cofece.mx/wp-content/uploads/2020/03/EstrategiaDigital_ENG_V10.pdf.

Indeed, COFECE's Digital Markets Unit was created and today it is "responsible of analyzing the development of digital markets and their implications in matters of economic competition and free market access"⁸. The following are among the principal functions of COFECE's Digital Markets Unit:

- (i) To analyze and develop regulation proposals for digital markets that have as a purpose promoting and protecting competition and free market access.
- (ii) To provide technical support to the competent areas of the Commission in the elaboration of opinions on draft regulations, legislative initiatives, laws, rules, agreements, decrees, official Mexican standards, and other provisions of general observance that have as their purpose protect or promote economic competition and free market access in the digital markets.⁹

Therefore, it seems that COFECE's Digital Markets Unit will play an important role in Mexico regarding the policy debate about the establishment of regulation for tech companies that participate in digital channels.

The task in the hands of COFECE's Digital Markets Unit is not an easy one. The unanswered questions on COFECE's Digital Strategy will press the authority to analyze the benefits and dangers of the creation of categorizations, ex- ante obligations (specific antitrust regulation), and tailored faculties to sanction or correct situations related to the digital transformation of markets. Waiting for the results of the EU experience, the results of the application of the DMA and the DSA, could give some light to help COFECE with this debate. However, the impact that of the DMA and the DSA will not be clear in a considerable time.

But COFECE and regulators throughout the region must recognize that "traditional" markets have been transformed by digitalization, and that so-called big tech companies are very different from each other. Therefore, one size fits all regulation – like the DMA – would likely result in unintended consequences for consumers.

For example, the DMA proposes general obligations for the gatekeepers taking into consideration problematic issues previously investigated by Competition Authorities, such as so-called self-preferencing practices. The European Commission's decision in *Google Shopping* has raised this specific concern that now is being prohibited ex ante by the DMA obligations for gatekeepers. However, self-preferencing, particularly in retail, is a legitimate and common business practice that can be good for customers and actually promote competition.

In retail, digital transformation is increasing the consumer's needs. The digital era has helped the passive customer that used to shop in the big institutional retailer into an active player that demands personalized interactions with retailers and expects improved convenience and multichannel selection options. This characteristic is making the retail market a high demander for data and self-learning artificial intelligence solutions to attend customer segmentation. But many companies, including omnichannel retailers, already make it easy for customers to access, manage, and delete their personal data any time.

Therefore, considering the vast differences across digital economies and differences in the business models of "big tech" companies, the creation of general *ex ante* antitrust obligations, rigid categorizations and tailored faculties to sanction or correct situations related to the digital transformation of markets could significantly affect innovation, competition, and consumer welfare in a very different manner between markets.

IV. MEXICO'S ANTITRUST TOOLS AGAINST THE DIGITAL TRANSFORMATION OF MARKETS

This is not the first-time antitrust law and policy has faced pressure from market dynamics transformations. In fact, some decades ago, the policy debate questioned the capacity of the antitrust tools and doctrines to assess and correct market dynamics on retail, when the big institutional retailers (like Walmart) became dominant. Today we know that antitrust had the necessary tools to prevent unlawful exercise of monopoly power of those big institutional retailers. Daniel Sokol, a professor at the University of Southern California, has stated that "[i]n a world of continuous change, antitrust is what remains constant. It has the tools to police against unlawful exercise of monopoly power and adapts to changes in economic theory and empirics."¹⁰

⁸ Article 36 TER of the Organic Statute of The Federal Economic Competition Commission. Available at https://www.cofece.mx/wp-content/uploads/2022/01/ESTATUTO-ORGANICO-ENG_.pdf

⁹ Article 36 TER 1 of the Organic Statute of The Federal Economic Competition Commission. Available at https://www.cofece.mx/wp-content/uploads/2022/01/ESTATUTO-ORGANICO-ENG_.pdf

¹⁰ Daniel D. Sokol, (2020) Antitrust's "Curse of Bigness" Problem. Available at https://gaidigitalreport.com/2020/10/04/evaluating-the-case-for-ex-ante-regulation-of-digital-platforms/#_ftn168.

To avoid generalizations and a Nietzschean debate regarding history repeating itself as memory fades, it is useful to deeply assess if the Mexican Competition Law and the prevailing doctrine have the adequate tools to guard the competition dynamics in the digital era. Mexican Competition Law was reformed in 2013 to introduce important new competition tools to assess markets, considering that, as COFECE has pointed out that the Mexican markets have important particularities:

“The Mexican economy has the particular characteristic that, as a consequence of the high degree of concentration persistent in some traditional markets in our country (i.e., energy, telecommunications, finance and health), (...).”

The main new tool established in Article 94 of the Law, was based on the essential facilities theory that was developed in the 19th century by the United States to control bottlenecks in railroad networks that enabled gatekeeping monopolists to exclude competitors from crucial markets. It was deemed necessary for the Mexican competition toolkit due to the high degree of concentration that characterize regulated markets in Mexico. However, today, it offers a useful tool for analyzing competition between offline and online channels in retail, and for avoiding ex-ante obligations that could jeopardize innovation and efficiencies in certain markets.

Article 94 allows the Competition Authority the imposition of regulatory-type remedies after a procedure of investigation that is ruled by the safeguards and formalities that apply to the investigations of monopolistic practices on a case by base analysis. The former president of COFECE, Alejandra Palacios, has considered that this tool could be relevant to analyze the problems that have recently been addressed by antitrust policy debate and even to address *“behavioral barriers used by economic agents who, despite having no substantial market power, can still engage in conducts that accelerates the “tipping point” and may affect the competitive process.”*¹¹

Considering that Mexican antitrust authorities already have tools to analyze antitrust risk in markets that have been transformed by digitalization, including sectors like retail that have robust competition between online and offline channels, regulators should resist inflexible ex-ante proposals that may have adverse effects in evolving markets, like retail, and could end up discounting consumer welfare and undermining economic growth and innovation.

¹¹ Palacios (2021) Competition tools for Digital Markets in Mexico: Section 94 of the Economic Competition Federal Act. Available at <https://www.competitionpolicyinternational.com/competition-tools-for-digital-markets-in-mexico-section-94-of-the-economic-competition-federal-act/>.



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