



**Asia-Pacific  
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**Advancing** Free Trade  
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# Competition Law and Regulation in Digital Markets

**APEC Competition Policy and Law Group**

March 2022





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Economic Cooperation**

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**FINAL REPORT**

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**March 2022**

APEC Project: CPLG 01 2020A

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APEC#222-EC-01.3

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## 1. Overview

### 1.1 Project background

Noting the fast-paced development of the digital economy, which is challenging traditional approaches to competition and regulation, New Zealand, with the co-sponsorship of Australia; Canada; Chile; Hong Kong, China; Malaysia; Mexico; Papua New Guinea; Singapore; Chinese Taipei; and Viet Nam, obtained funding for the Competition Policy and Law Group (CPLG) project CPLG 01 2020A Competition Law and Regulation in Digital Markets.

This project builds upon work undertaken in CPLG on approaches to competition law in digital markets and work in other APEC fora on regulating the digital economy by examining approaches across APEC member economies, and work underway across APEC on competition and regulatory issues arising from the digital economy and, in particular:

- Fast changing and highly innovative nature of digital technologies;
- Internet opens new markets but also creates new issues of scale and dominance;
- Close interplay between competition law and other forms of regulation, such as consumer policy and data privacy; and
- Practical ways of facilitating cross border cooperation.

As a first step in aiding this understanding, an issues paper was developed. As part of the development of the issues paper, the New Zealand Ministry of Business, Innovation and Employment (MBIE) developed a survey which was distributed to all APEC member economies and focused on: i) economies' experience in digital markets; ii) effects of COVID-19; and iii) level of cross border cooperation. Eleven APEC member economies—including Australia; Hong Kong, China; Republic of Korea; Mexico; New Zealand; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; and United States—responded. A summary of responses is set out in Appendix II.

The issues paper supported discussion at the two-day online event held on 7 and 9 September 2021, hosted by New Zealand. The two-day online event aimed to increase:

- Understanding of how the COVID-19 pandemic has affected the digital economy, the economic opportunities presented for growth, and the challenges for competition and regulatory agencies;
- Understanding of the interplay between competition law, consumer protection, privacy, and personal data protection when considering issues arising in digital platforms and markets; and
- Practical ways of facilitating cross border cooperation between competition and regulatory agencies that will complement the knowledge base of member economies regarding the policy options and issues arising in digital platforms and markets.

This final report takes into consideration the issues raised within the initial issues paper, and discussion and learnings from the online event, and sets out:

- How data and digitalization is changing markets, players, and the intersection and application of different types of regulation;
- Emerging uncertainty and regulatory issues across the region that have been amplified by digital players, and how this is playing out with current competition policy concepts, and broader digital regulation, such as data governance requirements; and
- How economies are beginning to address these issues, and how APEC member economies, and the region as a whole, can begin to apply these learnings.

### 1.2 Scope of issues

Digital technologies have transformed industries and businesses, and changed the roles people, products, and platforms play in key economic sectors, including finance, transport, tourism, logistics, healthcare, education, agriculture, and many others. Digital platforms have changed the economics of doing business across borders, bringing down the cost of international interactions and transactions. They create markets and user communities on a global scale, providing businesses with a huge base of potential customers and effective ways to reach them.

The ability of small businesses to reach new markets supports economic growth everywhere; as demonstrated by SMEs' contribution to GDP ranging from 40% to 60% in most APEC economies. SMEs also employ over half the workforce across APEC<sup>1</sup>. Further, individuals participate in globalization directly by using digital platforms to access information, to learn, find work, showcase their talent, and build social networks. These individuals gain social benefits from e-government services, are financially included, make purchases online, benefit from online education, or are assisted by remote medical facilities.

The use and value of data, digital technologies that leverage data, and digital platforms that are used in our daily lives, was already expected to grow as the processing and analysis of ever-larger amounts of data becomes easier with increasingly sophisticated technology. According to IDC's DataSphere growth projections, "the amount of digital data generated will grow from 33 ZB in 2018 to 175 ZB by 2025"—where a zettabyte (ZB) is a billion terabytes or a trillion gigabytes.<sup>2</sup> For example, global Internet traffic was estimated at 3 ZBs in 2020, which is the equivalent of every person in APEC member economies streaming 28 hours of high-definition videos per month. The COVID-19 pandemic accelerated this, with digital adoption rates leaping five years ahead in just eight weeks at the outset of the pandemic as businesses, schools and public sector moved their processes, interactions and service delivery online in response to mobility restrictions.<sup>3</sup>

Of the digitally connected sectors that COVID-19 has accelerated, those associated with teleworking using videoconferencing, e-commerce, remote and distance learning, connected supply chains, online payments and finance, and cloud computing, to identify just a few, are likely to become far more embedded and ubiquitous features of the economy, ways of doing business, and of social behaviors. These changes are having structural impacts upon the economy in terms of employment, economic growth, and social opportunity; but also, in terms of the rise of digital platform business models in replacing, or adding to, traditional channels for news, communication, commerce and entertainment, and in the patterns of trade within and between economies.

This changes the landscape for policymakers and regulators. As industries, markets, and pricing strategies are transformed, the traditional industry-specific approach to policy setting will increasingly fail to enable expected economic growth and social development outcomes. Even more challenging is the job confronting the regulator, with the traditional risk management-oriented approach failing to deliver expected regulatory control or provide adequate consumer protection. For example, are Uber, Grab, and Go-Jek taxi companies or are they software companies? Is Alipay a bank or non-bank financial institution, or is it a technology (or e-commerce) company? Moreover, what is a 'monopoly' and how should adequate market competition be assessed when platforms or aggregators are often present in multiple sectors? Previously dominant regulated companies have lost ground to a new wave of 'next generation' companies. Market definitions vital to regulators in identifying, for example, 'significant market power', are increasingly being perceived to be less effective in the face of cross sectoral digital business enablement, and cross-sector market support or subsidization models

Further, with the pandemic increasing reliance on the internet, the critical role digital platforms play in creating access to goods and services, and the control they have over key distribution channels by acting as gateways to markets and users has become more apparent. This is raising new challenges for regulators, including those related to competition, as well as security, privacy, and consumer protection—and the intersection of different policies and regulation. The governance, accountability and transparency of digital platform businesses are, as a result, coming under greater scrutiny.

These challenges are not unique to one economy. Given the complexities, the challenge of regulating the digital economy continues to be widely discussed and debated across the APEC region, and raises several questions:

- What is anti-competitive behavior in a digital landscape?
- What is the role of the competition authority in assessing digital services? To encourage innovation, to control prices, to promote local services? And how then should the competition authority work with other agencies (who are putting in place other forms of digital regulation) to make such assessments?

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<sup>1</sup> APEC (2021) Small and Medium Enterprises, <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises>

<sup>2</sup> IDC (2018) Data Age 2025, <https://www.forbes.com/sites/tomcoughlin/2018/11/27/175-zettabytes-by-2025/?sh=57d6244a5459>

<sup>3</sup> McKinsey Digital (2020) The COVID-19 recovery will be digital: A plan for the first 90 days, <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/the-covid-19-recovery-will-be-digital-a-plan-for-the-first-90-days#>

- How to understand *and measure* consumer welfare in a digital environment, and to what extent should this be the basis for competition and anti-trust measures?
- How to provide recourse for consumers (i.e., consumer protection) in an interconnected digital environment?
- How to consider the effects of adapting sectors and markets, and supply chain changes, evolution, and disruptions, because of COVID-19 and the implications for policy and regulation?
- How to integrate and address different regulatory concerns (e.g., privacy or market dominance)?
- Who has responsibility and who should have responsibility for regulating digital players? Who should have accountability and enforcement responsibility, and should this be the same agency?

Digitalization requires examination of who should be regulating various aspects of digital market participation, who should be ensuring accountability (and enforcement), and how those powers continue to work effectively in digital economy development. Increasingly, the intersection (and overlap in many cases) of regulatory responses—from anti-trust laws and competition policies to data governance requirements and emerging policy considerations—are being examined and called into question. Navigating this intersection—and integration—between competition policies and broader digital regulation will be crucial in ensuring effective and fit-for-purpose policy making for digital markets.

## 2. Understanding Digital Markets

New business models are altering what it means to be a buyer/seller, producer/consumer, employer/employee—effectively blurring, challenging, and even toppling traditional roles and responsibilities. Commonly known as ‘two-sided markets’, digital platforms serve, and possibly exploit, two sides of a market—both the consumers, and the business suppliers—that have been brought together to exchange products or services. Prominent examples of such two-sided or multi-sided digital platforms include Amazon, Facebook and Uber. Where digital platforms act as intermediaries between two or more parties, it is often unclear whether the platform is a party to the contract or who is legally considered a trader or acting on behalf of a trader.

This shift toward new digital business models is already impacting key areas such as competition policies, labor laws, tax frameworks, and social security systems—and is growing in intensity as healthcare providers, financial advisors, insurers, law firms, universities, and thousands of other sectors bring their services closer to users through boundary-bending platforms and applications.

This shift puts unprecedented pressure on regulators and policymakers. From an institutional and administrative perspective, their roles remain unchanged; a competition authority oversees competition matters, a labor body monitors work- and employment-related issues. Yet the landscape in which they operate is fast evolving, no longer following strictly compartmentalized hierarchies. Digitalization, and how it is changing markets and creating new ones, first needs to be understood to place within context how competition law, and broader regulation focused on ‘digital’ issues (such as data protection and privacy, consumer protection, intermediary liability etc.), is being applied, to which digital markets, and to which entities within those digital markets.

The assumption that regulations can be crafted slowly and deliberately—and within silos—and then remain unchanged for long periods of time, is no longer relevant in dynamically and ever-changing cross-border markets. As new business models and services emerge, regulatory and policy-making bodies are challenged with creating or modifying regulations, enforcing them, and communicating them to the public at an unprecedented pace. And they must do this while working within legacy frameworks and attempting to foster innovation.

### 2.1 Digitalization has enormous benefits, but has changed our understanding of markets

‘Going digital’ did not originally relate to going online, yet the implications of accessing digital programs, apps and content over the Internet has been fundamental in the creation of digital markets and marketplaces. For clarity, it is important to untangle these concepts. Digital programs can be used in isolation of connected systems and the first examples of connected systems were mostly confined to internal enterprise networks, often administrative systems or in the case of manufacturing, industrial systems. As soon as these were connected to the Internet, widespread and largescale online transactions between buyers and sellers became feasible.

Added to these digital developments was the importance of revenues from advertising online. For example, these had reached an annual USD140 billion in the US by 2020,<sup>4</sup> 16% of the USD860 billion online sales.<sup>5</sup> The basis of online advertising is to monetize the growing volume of data about potential consumers collected on websites. Hence arose several different models of e-commerce:<sup>6</sup>

- Sales revenue model: Provide additional sales channel online
- Advertising revenue model: Drive traffic to website through advertisements
- Transaction fee revenue model: Seller pays a fee for every transaction processed
- Subscription revenue model: Charge users at fixed intervals (i.e., monthly) for consuming content such as newspapers, TV shows, streamed music, or video conferencing
- Affiliate revenue model: Vendor pays an e-commerce platform business a percentage of the profits made from sales (including pay-per-click and percentage of sales made through banner exchange).

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<sup>4</sup> Statista (2021) Online advertising revenue in the U.S. 2000-2020, <https://www.statista.com/statistics/183816/us-online-advertising-revenue-since-2000/>

<sup>5</sup> Digital Commerce 360 (2021) US ecommerce grows 44.0% in 2020, <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>

<sup>6</sup> iThink Logistics (2020) A Detailed Guide on E-commerce Revenue Model 2020, <https://ithinklogistics.com/blog/a-detailed-guide-on-e-commerce-revenue-model-2020/>

Each of these digital business models offers enormous benefits in terms of choice of new and innovative services, availability or reach on a domestic and often international scale, and delivery over ever-faster broadband connections. However, each also has its own set of potentially anti-consumer and anti-competitive issues. In markets that are dominated by cross-border platform businesses, choice can be constrained by the marketing practices of the platforms concerned, for example, by limiting vendor access to the platform or by more traditional tie-in contracts and a refusal to transfer a customer's personal data to another service provider thereby undermining consumer mobility. Service providers can also carve out markets for differential pricing or product promotion and while this may not be anti-competitive it does raise contentious issues that also exist in the non-digital world, where consumers may wish to buy cheaper versions of the same product through parallel importation.

This demonstrate that anti-consumer and anti-competitive behavior is often not specifically related to whether the product or service markets are digital or analogue, but that digital offers different ways in which to exercise anti-consumer or anti-competitive behavior. The implication is that for the great majority of cases the principles are much the same even where the practices vary widely. However, to keep policies and regulations relevant it is **necessary to identify and understand the ways in which digital markets are different and how they operate.**

One of the key features of digital markets is the role played by data in the analysis of consumer behavior. This appears not only as a revenue source in its own right, but also as a means of thrusting upon consumers posts and offer notifications and other forms of intrusive and unwanted advertising. These are a sub-set of violations of personal data privacy concerns that may be using personally identifiable information (PII) without the consent of the data subject.

## 2.2 Digitalization results in interplay between competition policy and broader digital regulation

Among the first things competition regulators turn their attention to is to identify and define the market or markets of the entity to be regulated. The nature of digitalization is to widen the economies of scope or number of potential markets; for example, a mobile phone becomes a means of access to a range of different apps and services, while social media is forever widening the range of services available from chat to games to e-commerce. Economies of scope therefore pose for regulators the challenge of identifying multiple markets under one enterprise subject to regulation and making judgements as to how far market power in one of those markets extends into the others.

This is more likely when the adjacent markets are for complementary goods or services, such as markets for telephone calls, texting and video conferencing, or e-markets for the goods and services and digital payment systems. Facebook, for example, after acquiring WhatsApp made it to a degree interoperable with its other services, such as Instagram, Messenger, and Facebook itself. In the opposite direction is the monopolistic behavior due to sheer market dominance, that regulators need to be aware of, such as the display advertising services dominated by Facebook on social media; Google for all other areas outside social media platforms, and between video and non-video display ads.<sup>7</sup>

A force for fragmentation is the use of non-interoperable operating systems, such as iOS for iPhones (Apple) and Android (Google) for smartphones which creates two separate business models, one in which Apple dominates by setting the rules for app developers and requires the use of Apple Pay when purchases are made over an iPhone, and the other a more open system that advantages the use of Google search and related Google services.

As technology advances these fragmentations are less technologically determined and more commercially determined, for example the Windows PC operating system and the Mac (Apple) systems have become compatible after years of incompatibility. This poses an issue for regulators who on the one hand may see digital interoperability as a public good with externality benefits, such as interoperable ATM banking and payment systems, to be encouraged; on the other hand, premature regulatory initiatives may close off some technological innovations and the commercial incentive to develop them.

Beyond the economies of scope, there are the economies of scale that digital search engines and digital platforms have reached, scales that can be achieved only through huge investments and thereby set high

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<sup>7</sup> Australian Competition & Consumer Commission (ACCC) Digital Platform Services Inquiry, <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Service%20Inquiry%20-%20September%202020%20interim%20report.pdf>

barriers to entry for would-be competitors. Such cases come close to being natural monopolies and regulators need to distinguish between them and what economists call contestable markets—that is those parts of the market to which equal access is required to allow consumer choice, and those parts which can be commercially challenged by new entrants. Search is a good example of where two search engines—Google and Microsoft’s Bing—dominate crawling and indexing webpages across the entire Internet, and smaller search engines—such as DuckDuckGo—have entered into contracts to use their search results but compete in how they focus and present their results, and on their data privacy policies.

Regulation has an interest to ensure the terms and conditions of the former are not anti-competitive. Onerous and restrictive upstream policies can neuter competition downstream. In the case of social media in particular, network effects help accelerate scale by virtue of the fact that friends or businesses need to be on the same networks as those with whom they are communicating, such as Facebook or LinkedIn.

The combination of scale and scope poses a new range of challenges for regulators. One challenge is simply to gain knowledge of how these increasingly complex businesses work. And as many of these markets are two-sided—that is to say they provide services to vendors and other supply-chain companies and provide sales and services to the end users—there is a web of transactions and terms and conditions associated with those transactions that open up dangers of anti-competitive behavior. Many of these dangers pre-exist digital, such as tie-in contracts that prevent vendors using alternative platforms or using misleading sales tactics with consumers. The addition of digital to these processes offers greater scope for malpractices, for example, embedded algorithms that track and trace the behavior of customers.

At a business-to-business level, regulatory arbitrage is frequently used by these global companies to move their assets and their sale invoices around to avoid local regulations and taxes. This is avoidance, exploiting different regulatory regimes, but not illegal evasion. Different regulatory jurisdictions that are not in close harmony, which use different standards, and which have no treaties or arrangements to establish equivalence between each other, provide the gaps in the global trading system for such arbitrage.

Additionally, when the sale of goods and services are invoiced in one economy, but the purchaser resides in another, regulators need to establish a criterion for assessing which geographical market is involved. These issues are currently matters of discussion within the OECD to achieve a consistency and a certainty globally.

The challenge of how to determine which markets are involved and how to measure them is constantly shifting. In the case of aggregators such as Facebook and Google, often prices are reduced or even set at zero, but revenues topped up by monetizing the data collected from customers and anonymized before being auctioned to advertisers. Market share—typically a measure of market power—may be reflected differently when measured in actual sales or total revenues. The sale of data itself is controversial because consumers typically have little idea of what data and how much data is being collected about them, and despite anonymizing data, the triangulation of data from many different sources makes information about an individual and their identification quite easy, especially with the use of machine learning and artificial intelligence (AI). Methods of digital identification, for example a fingerprint or facial recognition or voice recognition in place of a password, add to the sum of data about known individuals.

Personal data privacy laws and regulations have become a major issue for regulators of digital entities and finding effective safeguards is an unending task, whether its substituting opt-in for opt-out, or defining certain types of personal data not to be harvested or giving persons the right of access to the data collected about them. Often apps that are downloaded, for example by mobile phone, will activate data-collecting.<sup>8</sup> Steps are being taken by Apple to curtail this practice—which has resulted accusations from some app providers that Apple is simply strengthening its own stranglehold on the iOS marketplace. Similarly, Google’s (now delayed<sup>9</sup>) phasing out of third-party cookies may reduce data collection but will similarly raise competition policy issues.

### **2.3 Digitalization requires examination of who should be regulating digital players**

The interplay between competition law and policy (e.g., defining markets, assessing dominance) and other forms of regulation that are being applied to digital markets and digital players (e.g., registration/local presence

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<sup>8</sup> Australian Competition & Consumer Commission (ACCC) Digital Platform Services Inquiry, <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Service%20Inquiry%20-%20September%202020%20interim%20report.pdf>

<sup>9</sup> Google (2021) An updated timeline for Privacy Sandbox milestones, <https://blog.google/products/chrome/updated-timeline-privacy-sandbox-milestones/>

requirements, data protection and privacy, consumer protection, etc.) makes **close collaboration between different regulators of increasing importance.**

Domestically, regulators covering different industry verticals are confronted with similar sets of issues because the companies they regulate all use data and are all digital. In the fields of telecoms and broadcasting, combining regulators is now common, whereas personal data protection usually falls under a privacy commission, cyber security under a separate specialist agency, digital banking and payment systems usually under a monetary authority but sometimes under a competition authority,<sup>10</sup> e-commerce under a fair-trade commission and most other mergers and acquisition (M&A) activity assessments under yet another competition or anti-trust commission. At the very least these agencies need to be exchanging ideas, methodologies, and remedies. This may mean in some circumstances, the competition authority is not the most appropriate or applicable agency to intervene (e.g., the privacy commission may be best placed to deal with data governance issues).

But regulators in different jurisdictions working within different legal and constitutional frameworks, as well as within different political and social cultures often have different approaches to cope with these challenges. That can make close collaboration between regulators internationally difficult to achieve, but the global nature of the internet and online digital businesses of all types, for example along global logistical supply value chains, makes such collaboration important to achieve.

### **Box 1: Regulation of OTTs Faces Coordination Hurdles in Korea<sup>11</sup>**

Over-the-Top (OTT) services can be defined as digital content distributed over the internet that bypass traditional communication delivery channels to reach end users, and that can potentially complement, collaborate or supplant not only traditional telecoms and media services but also a whole range of traditional industries. OTT service categories are expanding at a meteoric rate and will often overlap, but for the purposes of conceptualizing they can be distilled down to:

- those that compete with traditional telecom services;
- those that compete with traditional broadcast services; and
- downloads and apps that offer new categories of service, ranging from downloads of music, games, maps, timetables, etc., to sharing-apps, informational apps, e-commerce apps, etc.

Many services will increasingly become 'OTT' (or be impacted by OTT offerings e.g., tax, health, entertainment, public and government services etc.) as the world continues to digitalize, and regulatory frameworks (and economic models) are going to need to accommodate. This is driven by a realization that OTT delivery of services is not exclusively a 'large digital company' phenomena, but one benefiting—and often being driven by—local players and demanded by local consumers.

OTTs are often perceived by sector incumbents to have reduced the market share and revenues of traditional telecom providers and broadcasters. Given the expansion in services offered and the overall value being generated from the provision of such services, this is a rather simplistic or narrow interpretation, at best. OTT services have certainly changed the operating environment of traditional licensed operators and service providers. Traditional operators express concerns that OTT service providers are not subject to the same regulations and policy restrictions as they are, for example, in terms of the collection and use of customer data, or content restrictions, and because they are unlicensed, they pay no license fees despite competing in many of the same markets.

To address these issues, Korea has adopted a minimalist approach, despite growing concerns over local content issues for video streaming services. Rather than adopt an overarching policy towards the conditions of market entry of OTT service providers who are in competition with local and often more traditional content

<sup>10</sup> New Zealand Ministry of Business, Innovation & Employment (MBIE) (2021) Retail payments system, <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/retail-payment-systems/>

<sup>11</sup> Detailed case study set out in Appendix I

providers, each ministry has been given the authority to pick and choose areas that it can do well to revitalize the (domestic) OTT market. For example:

- The Korea Communications Commission (KCC) will continue its efforts to resolve the difficulties of OTT operators and to formulate policies to revitalize the market through cooperation between ministries.<sup>12</sup> KCC also issued proposed amendments to the enforcement decrees of the Information and Communications Network Act (ICNA)<sup>13</sup> and the Telecommunications Business Act (TBA) mandating internet operators to delete and prevent distribution of illegal photos.<sup>14</sup> These revisions to the TBA may be laying the groundwork for inclusion of foreign user-generated content services within the purview of other telecommunications regulations.
- The Ministry of Science and ICT (MSIT) amended the Enforcement Decree (ED) of the Telecommunications Business Act (TBA) requiring value-added telecommunications business operators that account for 1% or more of total domestic traffic and have over a million users to be held responsible for ensuring service stability. These include certain requirements such as working more cooperatively and closely with ISPs to inform them of traffic peaks or rerouting occurrences. Google, Netflix, Facebook together with Naver, Kakao, and Wavve have been explicitly named to be held accountable.<sup>15</sup>
- In the meantime, the Fair Trade Commission's (FTC) proposed OTT regulation bill (which aims to address unfair practices by e-commerce players) has been held up as KCC has raised objections.<sup>16</sup>

However, in order for this minimalist approach to OTT regulation to be effective in addressing emerging issues, there is a strong need for considered coordination between the different agencies.

### 2.3.1 Leadership and coordination required to drive cross-sectoral approach

Traditional public administration functions are based on vertical silos—wherein public servants' expertise is focused upon specific policy domains (such as transportation, education or health)—and the legislative and regulatory frameworks in which they operate define and reinforce such focus. The digital economy requires the breaking down of such boundaries so that opportunities can be jointly targeted and managed, and skillsets can be jointly applied.

Developing a whole-of-government framework enables and encourages agencies to move towards a more collaborative agenda. Such an approach needs to be both top-down and bottom-up. From the top, developing such a framework means that planning and resource allocation is done taking different constituencies into account. The Internet and related communications channels may be the enabling platform for growth, but that doesn't mean that the communications (or digital) agency knows how best to enable education sector growth. Similarly, education officials can be expected to understand what is required in their sector, but should not be expected to understand (a) the rollout of networks and accessibility, (b) the transformational potential of such network access, or (c) the skillsets required for a next generation of citizens growing up digital native.

This top-down approach will also force a rethink in the role of regulators, increase the agility of government policy, and create ongoing opportunities for cross-agency learning and exchange of knowledge.

Some APEC member economies have noted a lack of meaningful inter-agency collaboration, often with a cross-sectoral approach to 'digital' issues not being employed (e.g., multiple contradicting regulations are in place targeting digital platforms). In this context, a more bottom-up 'piecemeal' approach to enablement could be

<sup>12</sup> Korea Communications Commission (2021)

<https://kcc.go.kr/user.do?mode=view&page=A05030000&dc=K05030000&boardId=1113&cp=1&boardSeq=50841>

<sup>13</sup> Korea Communications Commission (2021)

<https://kcc.go.kr/user.do?mode=view&page=A02030900&dc=K02030900&boardId=1101&cp=1&boardSeq=49758>

<sup>14</sup> Korea Communications Commission (2021)

<https://kcc.go.kr/user.do?mode=view&page=A02030900&dc=K02030900&boardId=1101&cp=1&boardSeq=49757>

<sup>15</sup> Ministry of Science and ICT (MSIT) (2020) Enforcement of the Telecommunications Business Act related to the stability of additional communication services,

<https://www.msit.go.kr/bbs/view.do?sCode=user&mId=1113&mPid=1112&pageIndex=&bbsSeqNo=94&nttSeqNo=3179690&searchOpt=ALL&searchTxt=>

<sup>16</sup> The Korea Herald (2021) Antitrust watchdog's bill aimed to regulate online platforms faces hurdles,

<http://www.koreaherald.com/view.php?ud=20210222001063&np=1&mp=1>

adopted, even as a more holistic framework is being developed. The lack of an existing framework for cross-sectoral planning should not be an excuse for targeting specific issues and specific developments now.

Most economies have put some form of authority in charge of driving whole-of-government digital strategies—though their approaches vary widely. Configurations range from:

- A single, pre-existing ministry with broad or specific authority;
- A new agency working autonomously or under the authority of a ministry;
- A collaborative framework between ministries and agencies working autonomously or under a central authority;
- A set of specialized taskforces operating within a limited scope or a constrained timeframe (many instances, can exist simultaneously with the other configurations).

The agency or body driving digital transformation should also facilitate the identification of common priorities or themes across government. Multi-agency groups can be developed on these themes, with private sector engagement, to share experiences on themes that cut across. For example, Singapore noted that it often uses terms of reference between agencies to coordinate quickly, come to an agreement about who is to lead, and who is involved—enabling flexible and timely interventions with other agencies.

Newly formed ‘digital’ agencies require political support and mandate to drive transformation programs. Governments across the region have relied on forming ‘digital’ agencies to drive the transformation agenda. However, without sustained political support, these agencies struggle to push forward initiatives, blocked by senior, established agencies with deeply in-grained preferences for operating independently, and low appetite for risk-taking.

It should also be noted that specialized agencies alone won’t create a cross-sectoral communication process without establishing formalized communication channels and collaboration methods. Information sharing between agencies (particularly between competition authorities and other relevant and interested agencies during investigations) is of utmost importance, as often how easily and accessible documents are to different agencies affects how agencies can effectively collaborate. Some APEC member economies noted difficulties in sharing documents with other agencies (e.g., being able to utilize virtual document sharing libraries between agencies).

### 3. Digital Players

To understand who (e.g., digital players) we're trying to regulate, it is important to distinguish and define what we're talking about:<sup>17</sup>

- **Platforms:** Facilitate a relationship between users and third parties. Platforms (such as Apple's app store or Microsoft Windows) provide a foundation on which entire ecosystems are built.
- **Aggregators:** Intermediate the relationship between users and third parties. Aggregators (such as Google and Facebook) often have a critical mass of users and leverage access to those users to extract value from third parties.

Many of these digital services are by essence two-sided, allowing two user groups to benefit:

- **Demand side:** those who are consumers, buyers, users, browsers; and
- **Supply side:** those who are providing the goods, services, or information to the platform.

On the demand side, the business model may require a payment or subscription but very often access is 'free' in exchange for giving up some degree of personal data. This data is subsequently monetized by the platform or aggregator which either sells it or uses it to offer targeted audiences to advertisers. On the supply side, the platform or aggregator captures much of the data about the businesses using the service and their transactions, resulting in these platforms or aggregators often being accused of using the data to 'self-deal' or give preference to their own products and services over third parties using the service.

Digital platforms are as natural to a digital economy based upon internet highways, as bricks and mortar businesses are to an analogue economy based upon air and seaports, railways, and roads. So are the growth of monopolies, but their consequences are structurally very different. As digital platforms become dominant, they exhibit stronger networking effects on *both sides of the market*, thereby *enabling* them to become monopolists, for example in search, and monopsonists, for example in e-commerce. They also move away from product and service pricing models and towards data-based models, selling the data or using it to charge advertisers for targeted audiences.

However, economies should not move to a model that adopts 'regulation by exceptionalism'—whereby policies or regulations are put in place targeting large (often foreign) tech players (such as Google, Amazon, Facebook etc.). It is important to understand that OTT, or 'over-the-top', delivery of digital services has 'matured' from a loosely modeled all-encompassing term targeting digital platforms that were seen to be disrupting market definitions and traditional regulatory frameworks, to an understanding that many services will increasingly become 'OTT' as the world continues to digitalize—accelerated by COVID-19—and that regulatory frameworks (and economic models) are going to need to accommodate.

The 'maturing' process has been driven by a realization that OTT is not exclusively a 'large digital company' phenomena, but one benefiting—and often being driven by—local players and demanded by local consumers. Further, somewhat simplistically, almost any service *can become* OTT or be impacted by OTT offerings (e.g., tax, health, entertainment, public and government services, etc.). And all too often the drivers of the issue can be poorly understood by authorities and market players, leading to over-hasty regulatory responses. For example, a California law (which has now been tweaked) that was put in place to protect Uber and Lyft drivers, ended up restricting all freelancers.<sup>18</sup>

Much has been written about the digital enablement of economies—and the players involved—but there remains some confusion over the many terms used in this space. Decision-makers often talk about supporting the growth of digital platforms, products, services, and transactions, and fueling digital economy, trade, and innovation; and yet no definition of these concepts is universally agreed or understood.

APEC is uniquely positioned to play a role in navigating consensus over key common definitions, ensuring alignment and harmonization across economies.

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<sup>17</sup> Ben Thompson (2019) A Framework for Regulating Competition on the Internet, <https://stratechery.com/2019/a-framework-for-regulating-competition-on-the-internet/>

<sup>18</sup> The New York Times (2020) Uber and Lyft Drivers in California Will Remain Contractors, <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>

### 3.1 Digital ecosystems have resulted in gatekeeper concerns

Digital players, including those that own and operate online platforms have been expanding their business to develop large ecosystems of complementary products and services around their core service. There is a distinction to be made between a digital aggregator and a digital platform business, although in practice the two lines blur. An aggregator does just that, aggregates the inputs, for example videos, the posts, the songs, of users, such as Facebook or YouTube and harvests the data of those users. A platform business provides a platform for vendors or artists or whoever to offer their services, but also often provides the payment mechanisms to realize the sales and has access to their data such as sales volume and type. But aggregators also provide commercial platform services within the scope of their business. In both cases, the greater the scale and scope of their services, the more attractive they become to potential users and customers.

With digital aggregators and platforms alike, network effects often contribute to the development of market dominance, as the value of a product increases when its consumption by others increases. For example, Google's search algorithm improves with a higher search volume and Facebook's social features work better the more friends share content, and Uber's ride-sharing application is strongest when there are more than enough drivers to meet demand, the more sales done through Lazada's platform the more vendors wish to use it, and so on. In theory, network effects are beneficial for consumers, as they provide a wide range of services that can be obtained on demand and at lower costs, with consumers benefiting from a one-stop-shop.

But they can also contribute to the development of monopolies, as they can lead companies to use anti-competitive practices to dominate a market even when new and better technology is introduced. Such conduct can be very harmful for market competition, as they not only prevent the entry of potential rivals and are structurally difficult to compete with and allow for new entry, but they also give way to predatory pricing.

The concept of a 'two-sided market' has been used to characterize these platforms which attract both vendors and the suppliers of services, such as songs, on the supply-side of the market, and end-user customers on the demand side. The platform becomes the digital intermediary with the potential to dominate the marketplace for those types of goods or services.

This rise in market power of digital platforms in upstream, downstream, and horizontal markets results in large digital platforms engaging in unfair conduct such as self-preferencing practices, and ensuring a lack of contestability, for example, by restricting their vendors to only use their platform (e.g., exclusivity contracts or enforcing the use of certain payment systems), that is hampering competition and innovation in digital markets. The high barriers to entry or exit, including high investment costs and limited or no access to key inputs such as data, make the entry of new players difficult.

#### Box 2: Grab Fined for Unfair Business Practices<sup>19</sup>

In 2020, the Indonesia Competition Commission (Komisi Pengawas Persaingan Usaha (KPPU)) fined Grab, a so-called 'super app'<sup>20</sup> who provides ride-hailing, food-delivery, courier, and digital payment services amongst others, IDR30bn (USD2m) and its car rental partner PT Teknologi Pengangkutan Indonesia (TPI) IDR19bn (USD1.3m) for discriminatory practices against its driver-partners—resulting in monopoly practices and unfair business competition for non-TPI partners and individual partners.

The administrative fines were unprecedented in both applying a fine of over IDR25bn (USD1.7m) to one company in one decision, and for imposing fines based on each Article violation of Law No. 5 of 1999:<sup>21</sup>

- Article 14: "Business actors are prohibited from making agreements with other business actors aimed at mastering the production of a number of products included in a series of production of certain goods and or services in which each series of production is the result of processing or further processing, both in a direct or indirect series, which can result in unfair business competition and or detrimental to the community. "

<sup>19</sup> Detailed case study set out in Appendix I

<sup>20</sup> As there is no specific definition of what constitutes a 'super app', the term is used to broadly describe a single portal to a wide range of virtual products and services

<sup>21</sup> Komisi Pengawas Persaingan Usaha (KPPU) (2019) Perkara Nomor 13/KPPU-1/2-19, <http://putusan.kppu.go.id/simple/ lib/file/doc/Salinan%20Putusan%2013-KPPU-I-2019.pdf>

- Article 15: "Business actors are prohibited from making agreements with other parties that contain the requirement that those who receive certain goods and or services must be willing to buy other goods and or services from suppliers."
- Article 19 (d): "Business actors are prohibited from carrying out one or several activities, both alone and with other business actors, which may result in monopolistic practices and or unfair business competition in the form of: (d) discriminating against certain business actors."

As competition authorities continue to struggle with digital markets assessments, and remedies, KPPU's application of its current law may set the scene for continued flexibility or creativity in approach.

Many digital services are by essence two-sided, allowing two user groups to benefit from a digital platform. For example, search engines are used both by individuals to find information and by advertisers to target potential consumers. Multi-sided platforms, meanwhile, provide many types of services to many different user groups, blurring the line between user, customer, platform, and business. Facebook, for instance, holds a wealth of user data, which it leverages to provide paying customers with actionable marketing and advertising strategies. Businesses also pay Facebook to advertise to customers that best fit their market segment. Amazon—is many things—but at its core is both a platform and a retailer, and therefore competes with its suppliers whilst having an advantage of access to data and insights through control of the platform.

### Box 3: Investigations into Google's Self-Preferencing

The search engine giant, Google, has over the last couple of years been reprimanded by regulators in the EU for allegedly displaying anti-competitive behavior. In March 2019, the EU imposed a EUR1.49 billion fine on Google for hindering third-party rivals from displaying search ads between 2006 and 2016.<sup>22</sup> Google was found to be "imposing anti-competitive contractual restrictions on third-party websites", which is a violation of EU's antitrust laws. As a result of this move, Google's competitors were unable to enter the market, giving website owners limited choices for selling advertising space, hampering healthy competition. In 2018, EU's competition authority placed a record EUR4.34 billion fine on Google for using its mobile operating system, Android, to similarly block rivals. As per the Competition Commissioner, Google worked with Android handset and tablet manufacturers to pre-install the Google Search app and its own web browser Chrome in exchange for offering access to its Play app store. This incident followed a fine of EUR 2.42 billion for keeping out rivals of shopping comparison websites.

Similar cases were considered by the US Federal Trade Commission and the Turkish Competition Authority, although both were discontinued.<sup>23</sup> In dismissing the case, the FTC examined the impacts upon customers, and it decided that Google's main aim in implementing changes to search results was to improve the user experience and consequently generate greater advertising revenue. It concluded that the changes were not made to exclude competitors, and that Google was not abusing its dominant position in the market.<sup>24</sup>

Competition authorities have also become sensitive to the growing importance of data. Large amounts of data in and of itself may not be problematic, but there is an increasing need for data to be factored into assessments.

<sup>22</sup> BBC (2019) Google hit with €1.5bn fine from EU over advertising, <https://www.bbc.com/news/business-47639228>

<sup>23</sup> OECD (2020) Abuse of Dominance in Digital Markets, [www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf](http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf)

<sup>24</sup> Daria Kostecka-Jurczyk (2021) Abuse of Dominant Position on Digital Market: Is the European Commission Going back to the Old Paradigm? <https://ideas.repec.org/a/ers/journal/vxxiv2021ispecial1p120-132.html>

For example, the European Commission called out their interest in whether Apple's acquisition of Shazam<sup>25</sup> would give Apple access to commercially sensitive data about competitors' customers in connection with music streaming services, and whether such data could allow Apple to directly target its competitors' customers and encourage them to switch to Apple Music.<sup>26</sup> In this case, the Commission found that access to Shazam's data would not materially increase Apple's ability to target music enthusiasts, so any effect of the transaction would only have a negligible impact, leaving plenty of room for competing music service providers to operate. The Commission ruled that Shazam's user data would not confer a unique advantage to the merged entity because Shazam's data was not unique, and Apple's competitors would still be able to access and use similar databases.<sup>27</sup>

### 3.2 Regulators are grappling with market power definitions

Most APEC member economies have noted that market power definitions and merger control are key issues of concern in navigating a changing digital environment. Assessing the market position of companies can present many challenges, including gauging the market power of a digital platform. Additionally, member economies noted that the traditional toolkit used to define relevant markets may not be useful when apparently zero-price arrangements exist.

Regulators are particularly grappling with how to set a value on data. Data is not a singular economic input. There are different types of data and a varying worth of data. The definitions of data need to be more flexible in the competition space—as it is difficult to capture the value of data that is created, transferred, and processed—not least because data itself is increasingly both an asset input into supply chain processes, and is being traded as its own discernible commodity.

As economies move to address concerns, they must overcome challenges that the economic and technological features of digital markets pose to competition authorities when assessing mergers, dominance, and anti-competitive practices. For example, network effects and switching costs are salient features of digital platforms that cause markets to tip in favor of one or two dominant players, resulting in a handful of companies that hold significant market power. Network effects can serve as a serious obstacle to entering the market. The condition for entering the market is the achievement of a certain level of demand, a certain number of customers, comparable to the network effect achieved by a competitor.

Anti-competitive behavior may occur when dominant players leverage network effects to diminish competition, for example using exclusivity clauses that restrict merchants from engaging with competing platforms, or where dominant positions are utilized to unfairly undermine competition and consumer choice, such as through the modification of algorithms, using vertical integration or performing 'killer acquisitions'. To address these issues, competition authorities need to be able to identify market power and anticompetitive behavior in digital markets, which traditional assessment methods and approaches may not pick up on.

The traditional concept of market power in an analogue world was percentage market share or, more specifically, to what extent did a company exercise significant market power, meaning to what extent by changing its own prices could it significantly affect the prices, sales, or revenues of others. In a digital world new business models have arisen such as the platform businesses and the market power of large online platforms has caused concern that they act as gatekeepers, with the power to create their own rules resulting in unfair conditions for businesses and consumers.

Additionally, disruptive innovations can generate changes in market structure, so a dominant company could incur in exclusionary practices to reduce the possibility of success of a disruptive competitor or investing large

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<sup>25</sup> European Commission (EC) (2018) Mergers: Commission clears Apple's acquisition of Shazam, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_5662](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662)

<sup>26</sup> Debrauw (2018) Lessons from EU regulators' review of Apple-Shazam merger, <https://www.debrauw.com/legalarticles/lessons-from-eu-regulators-review-of-apple-shazam-merger/>

<sup>27</sup> Debrauw (2018) Lessons from EU regulators' review of Apple-Shazam merger, <https://www.debrauw.com/legalarticles/lessons-from-eu-regulators-review-of-apple-shazam-merger/>

resources in their own innovation processes.<sup>28</sup> Dominant agents could also replicate or face against innovations from their competitors.<sup>29</sup>

It is important to consider the effectiveness of replicability measures available to the gatekeeper's competitors, to compete effectively in those digital markets. These measures may include data sharing, infrastructure sharing, and access to key technical capabilities for innovation. As noted in the Australian Competition & Consumer Commission (ACCC) Digital Platforms Inquiry final report, digital players—such as Google and Facebook—enjoy substantial market power with high barriers to entry and expansion in the markets for the supply of general search and search advertising services, and for the supply of social media services and display advertising.<sup>30</sup>

#### Box 4: European Commission Forges Ahead

To address the negative competition effects of large dominant online platforms, the EU recently released its proposed Digital Markets Act (DMA) to establish obligations for these “gatekeeper” entities. The DMA's scope is limited to “core platform services” such as cloud computing and online intermediation services (e.g., marketplaces and app stores), where weak competition and unfair business practices are most apparent.<sup>31</sup> Among the proposal's stipulations are that gatekeepers cannot prioritize their own services and requirements for interoperability and data sharing.<sup>32</sup>

The DMA establishes a level playing field to foster innovation, growth, and competitiveness, both in the European Single Market and globally.<sup>33</sup> It requires qualified online platforms to allow:<sup>34</sup>

- Third parties to inter-operate with the gatekeeper's own services in certain specific situations;
- Business users to access the data that they generate in their use of the gatekeeper's platform;
- Companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper; and
- Business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform.

<sup>28</sup> Beata Mäihäniemi (2019) The Role of Innovation in the Analysis of Abuse of Dominance in Digital Markets: The Analysis of Chosen Practices of Google Search, [https://www.researchgate.net/publication/336663347\\_The\\_Role\\_of\\_Innovation\\_in\\_the\\_Analysis\\_of\\_Abuse\\_of\\_Dominance\\_in\\_Digital\\_Markets\\_The\\_Analysis\\_of\\_Chosen\\_Practices\\_of\\_Google\\_Search](https://www.researchgate.net/publication/336663347_The_Role_of_Innovation_in_the_Analysis_of_Abuse_of_Dominance_in_Digital_Markets_The_Analysis_of_Chosen_Practices_of_Google_Search)

<sup>29</sup> House of Representatives of the U.S.A (2020) Investigation of competition in digital markets, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519)

<sup>30</sup> Australian Competition & Consumer Commission (ACCC) (2019) Digital Platforms Inquiry Final Report, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report%20-executive%20summary.pdf>

<sup>31</sup> European Commission (2020) Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), [https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf)

<sup>32</sup> European Commission (2020) Europe fit for the Digital Age: new online rules for platforms, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en)

<sup>33</sup> European Commission (2020) Digital Markets Act: Ensuring fair and open digital markets, [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2349](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349)

<sup>34</sup> European Commission (2020) Digital Markets Act: Ensuring fair and open digital markets, [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)

## 4. Mergers and Acquisitions

Competition authorities are analyzing an increasing number of cases involving digital platforms.<sup>35</sup> There are concerns that:<sup>36</sup>

- Some platforms exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new entrants, irrespective of how innovative and efficient they may be;
- Acquisitions and integration of secondary business lines create conflicts of interest and impact competition in upstream or downstream markets;
- Large online platforms are engaging in unfair conduct like self-preferencing practices, namely, actions by a platform which are designed to favor its own products or services over those of its competitors; and
- Lack of contestability is hampering competition and innovation in digital markets. High barriers to entry or exit, including high investment costs and no or reduced access to key inputs such as data make the entry of new players difficult.

Further, the tools and information currently available to regulators to address these concerns may be lacking or inaccessible and need to be reviewed and revised so they are fit-for-purpose in the digital age.

### 4.1 Horizontal and vertical integration issues need to be understood

Horizontal integration is the process of a company increasing production of goods or services at the same part of the supply chain, typically via internal expansion, acquisition, or merger. This can result in having a hand in so many different types of activities that the company becomes almost difficult to avoid. Uber, Grab, and Go-Jek, for example, all started as ride-hailing applications, but have grown to provide food deliveries, courier services, mobile payments, and many other day-to-day services. Vertical integration refers to a digital service provider acquiring businesses at multiple and different points of the supply chain. E-commerce giant Amazon, for instance, runs data warehouses, provides cloud services, hosts websites, intermediates payments, manages logistics, and owns a fleet of delivery vehicles, to name but a few of its e-commerce activities.

Vertical integration involving digital platforms with dominance across several facets of the ecosystem could have a cascade effect of reducing competition and consumer choice. For example, within the streaming video-on-demand (SVOD) industry, the following areas give rise to dominance issues:

- **Customer base:** Digital platforms with core business in social media or e-commerce, such as Tencent and Amazon, have expanded into SVOD, where they enjoy not only funding advantages but also brand recognition and marketing, and an existing customer base to leverage;
- **Content:** Access to content libraries, and in some cases exclusive access to content, raises costs for new or competing players, and creates barriers to entry. SVOD players that also own or run studios that develop content also have an advantage as they can either decide to be the exclusive distributor of their content or choose to license it for a fee—either way restricting access to content;
- **Network:** Some SVOD platforms also either own or have partnerships with content distribution networks (CDNs) and Internet service providers (ISPs), which can provide reduced costs and prioritization of content over networks; and
- **Devices:** As an additional layer, SVOD players may create their own media streaming devices, or have agreements with device manufacturers so that their apps are available and accessible through the device; under this scenario, smaller SVOD platforms that are unable to negotiate agreements may lose out on opportunities for exposure, while larger SVOD players may still be required to pay or share revenue with device manufacturers depending on the deal reached.<sup>37</sup>

While vertical integration is not a new issue, the rise of digital platforms, along with the apparent cross-subsidization of different business lines, has led to a rethink of how to appropriately identify market dominance

<sup>35</sup> APEC (2019) <https://www.apec.org/Publications/2019/08/Competition-Policy-for-Regulating-Online-Platforms-in-the-APEC-Region>

<sup>36</sup> European Commission (2020) [https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf)

<sup>37</sup> Congressional Research Service (2020) Competition Among Video Streaming Services, <https://fas.org/sqp/crs/misc/R46545.pdf>

and market abuse, and subsequently, what regulations are needed to effectively address market dominance. Responses can be expected to change as understanding evolves of how digital platforms have challenged traditional interpretations of competition and application of competition policy.

## 4.2 'Killer' acquisitions require a conceptual shift

The impact of mergers between digital companies will tend to vary between companies that offer synergies (such as complementary software products which can foster service efficiencies and buyer benefits e.g., bundled services), and competitors where resulting economies of scale can be of benefit but can also mean the concentration of market power. Acquisitions by digital companies have become common where incumbents use their substantial cash reserves to buy-out competitors or emerging companies that offer innovations that have the potential to become competitors. These are sometimes referred to as 'killer acquisitions', especially in cases where the innovation is abandoned as a means of preventing competition.

However, another variant is where the innovative technology or service that arises from the acquired company is absorbed into the acquiring company, strengthening its position in the market as a result, which would be the genuine reason for the acquisition. Distinguishing between these two cases—the killer acquisition and the absorption of the acquired company's knowhow to enhance the market position of the acquirer—may be something that cannot be easily determined without a detailed knowledge of the situation, especially if the productive results of the acquisition take time to show themselves. One option a regulator may have in this situation is to have the acquiring company explain how they intend to enhance their business because of the acquisition, giving the regulator an opportunity to come to an *ex-ante* opinion.

While killer acquisitions are a way to ring-fence the success and ultimately market dominance of many digital companies, acquisitions of digital companies, especially of start-ups that have insufficient capital to scale up to become fully competitive without outside financing, are an important part of the digital ecosystem. The acquiring company can add to its resources valuable innovations, IP and skill sets in a timely manner to achieve a greater economy of scope of its business, while the acquired company offers market exit for those who invested in it on purely financial grounds, such as angel and venture capitalists or entrepreneurs who are not so interested in longer-term management. The digital marketplace characteristically quickens the speed of market entry and exit, and events such as the COVID-19 pandemic add to both the urgency of business agility and the opportunities to innovate with new business models.

However, even when the acquisition is for legitimate reasons of business development, the problem for both the merging or acquiring companies, and the regulator, is not necessarily knowing in advance whether the benefits will materialize, and if they do how they will be shared. If market power is substantially increased the chances of the benefits being equitably shared with consumers are lowered. As a member economy noted, deterring killer acquisitions also presents a dilemma since the company to be acquired is at too early a development stage to accurately determine if it will be competitive.

There is ample evidence that most mergers and acquisitions, both pre-digital age and after, fail to produce the benefits anticipated for them. Studies reported by the Harvard Business Review between 2011 and 2021 have repeatedly found between 70% and 90% of their sample cases had failed.<sup>38</sup> As the Joint Statement states, "Our experience suggests that merging firms often overstate the apparent efficiency benefits of mergers and how these will translate into more competitive outcomes for markets ... protecting competition may require the prevention of problematic mergers rather than the acceptance of submissions relating to purportedly procompetitive benefits that are difficult to verify and predict." A major part of the regulator's problem lies in the fact that investigating a proposed merger or acquisition involves hypotheticals and "it is not uncommon for some firms (whether suppliers, competitors, or customers) to be reluctant to provide information that may jeopardize their commercial relationship with the merged firm, particularly if the merged firm is a key customer or supplier."

The *ex post facto* challenge for regulators therefore includes the separate identification of a company's lines-of-business over the time since the acquisition and this becomes more complex in digital business models where the source of revenues can be highly variable. Regulators need to understand the business models in some detail. An *ex ante* approach might avoid a long term error, but would certainly require the same level of detailed understanding of the business model involved.

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<sup>38</sup> Harvard Business Review (2011) The Big Idea: the New M&A Playbook, <https://hbr.org/2011/03/the-big-idea-the-new-ma-playbook>; Business Chief (2020) Why do up to 90% of Mergers and Acquisitions Fail? <https://www.businesschief.eu/corporate-finance/why-do-90-mergers-and-acquisitions-fail>

## Box 5: Emerging United States' Response to Killer Acquisitions

Historically, mergers were seen to be positive and not watched closely by antitrust regulators, unless the effect of the merger raised consumer prices. This thinking has now shifted as other forms of harm have emerged, such as weakening small businesses and bullying them out of the marketplace altogether.

For example, in 2012 and 2014, Facebook acquired Instagram and WhatsApp respectively. Google also did a similar move by acquiring Doubleclick and AdMob in 2008 and 2009. Around the same time, Amazon bought Zappos.com. All of these acquisitions were approved by the FTC.<sup>39</sup>

A House of Representatives panel concluded its sixteen-month investigation into large digital players (e.g., Amazon, Apple, Facebook, and Google) in October 2020. It found that these digital players used 'killer acquisitions', to acquire nascent competitors and prevented them from becoming a threat in the future. The investigation also looked into whether existing levels of antitrust laws, policies and enforcements were sufficient to address the issues.

Both the Antitrust division of the Department of Justice (DoJ) and the FTC who enforce the federal antitrust laws, are looking into improper exercise of market power, and have announced enforcement actions against Google and Facebook respectively.<sup>40</sup> Both agencies have coordinated closely with US states attorneys general on enforcement actions in digital markets.

For example, Visa, a global payments company that operates the largest debit network in the United States, abandoned its USD5.3 billion acquisition of Plaid Inc., a financial services company that operates the leading financial data aggregation platform in the United States, in the wake of DoJ legal challenges to the move.

The DoJ reasoned that because Plaid was developing a payments platform that would rival Visa's payments system, and the acquisition by Visa may therefore have become a 'killer acquisition', the acquisition had to be blocked on grounds of competition.

US lawmakers are also currently considering legislative reforms to competition law, though this process is in the early stages, and it is too soon to know whether and what reforms may be instituted. Some of the proposals include lowering the standard that the antitrust enforcers must meet to challenge mergers, creating presumptions that would shift the burden from the administration to the merging parties, creating a new offense of "exclusionary conduct," and imposing new civil penalties for exclusionary conduct. Another piece of proposed legislation would create antitrust immunity for newspapers and other traditional media that want to collectively negotiate with digital platforms.

The complex task regulators have in deciding when market power is too powerful can be illustrated with Facebook, globally the most used social media platform by far. Facebook has come under increasing scrutiny in most of its large markets for the way it uses its market power, but mostly in terms of its collection and use of personal data, notably in the US Presidential Election.<sup>41</sup> In 2020, the FTC in the US, together with 42 states, filed legal proceedings to force the divestment of Instagram and WhatsApp. When Facebook acquired Instagram in 2012 for USD1 billion, the app had 30 million subscribers. By 2021 it had over 1 billion.<sup>42</sup> In 2014, Facebook

<sup>39</sup> Wired (2020) Why the FTC wants to revisit hundreds of deals by Big Tech, <https://www.wired.com/story/ftc-special-order-review-big-tech-killer-acquisitions/>

<sup>40</sup> Note in June 2020, Federal Judge James Boasberg ruled that the FTC and states didn't make valid claims that Facebook engaged in unlawful monopolization as in The Wall Street Journal (2021) Government Antitrust Lawsuits Against Facebook Thrown Out by Federal Judge, <https://www.wsj.com/articles/federal-judge-dismisses-government-antitrust-lawsuits-against-facebook-11624907747>

<sup>41</sup> TIME (2018) Facebook Suspends Trump Election Data Firm for Policy Breach, <https://time.com/5204387/facebook-suspends-cambridge-analytica/>

<sup>42</sup> Backlinko (2021) Instagram Demographic Statistics: How Many People Use Instagram in 2021? <https://backlinko.com/instagram-users>

acquired WhatsApp for USD19 billion and has retained its no-ad status until today.<sup>43</sup> But unilaterally data is shared from each app with Facebook itself.

But over time even the dominance of a company such as Facebook comes into question and that impacts upon its ability to monetize data by directing ads towards the most receptive categories of online users. Financial statements released by Facebook and its newly created company Meta for 2021 show that younger online users have for quite some time been turning to other platforms such as Tik Tok which specialize in short-form self-performance videos, mostly music and dance. Facebook's followed the traditional path in 2020 by creating a clone called Reels for Instagram but it has failed to dent the popularity of Tik Tok. Another factor that has impinged upon Facebook and other platforms is Apple's decision in 2021 to introduce privacy changes to iPhones that obstructed rivals, including Facebook, from targeting ads at consumers. As a result, Apple's revenues from all iPhone app downloads rose to 58% from 17% in 2020.<sup>44</sup>

Market developments such as these support the view that in a digital world creating barriers to entry is often difficult to sustain as the technologies involved—such as streamed video and new algorithms supporting innovations such as holograms—are constantly evolving and the nature of the content and its appeal to different sectors of users, by age and profession, changes at least by generation. From moments of rapid evolution and appearance of new business models to the time a market appears to settle upon growth around the success cases, market structures tend to shift from weak to strong oligopoly, until a new cycle starts over. This poses a dilemma for regulators who face a shifting target while looking for issues that remain constant causes of unfair competition or sources of consumer grievances. Undoubtedly one of those constants is the abuse of privacy and the potential misuse of data.

Data in this context is a way to monetize these apps without ads, so for regulators of either personal data privacy or anti-trust the question is when does public opinion determine that harm is being done to either or to both? Complaints by rival app operators that, for example, Instagram is used frequently to mimic their new services, such as Snapchat's photos that disappear after 24 hours, or TikTok's one minute video selfies, on their own is insufficient to prove there is abuse of market power. Competitive copying, so long as it avoids copyright violations, could be construed as the sincerest form of flattery, and Facebook can argue that without its resources, neither app would have reached the global scope and scale they have.

Nevertheless, regulatory action may be required to reassure markets and the public that compliance to competitive principles are observed. For example, competition authorities, such as the ACCC have indicated that transactions need to consider both the likelihood that a transaction could remove a potential competitor and the *amount and nature of data* that may be acquired in a transaction.<sup>45</sup>

### 4.3 Investigative tools need to be reviewed in the digital age

The issue for anti-trust or anti-monopoly policies has never been the fact of business dominance as such, but the abuse of market power. Mergers and acquisitions are judged in terms of the likelihood of reduced competition in a defined market. In this regard, regulators have two options:

- *ex-ante* presumption that market power will lead to abuse of power, in which case the merger or acquisition is either forbidden or re-structured; or
- *ex-post* assessment of whether abuse has occurred or not, and whether product and technology innovations and new entrants after the merger or acquisition have changed the market.

In the pre-digital economy, the balance of expert opinion was towards an *ex-post* stance, but sensible although not obligatory practice was for the parties involved to consult with the regulator before announcing a merger or acquisition, which in effect meant that an *ex-ante* judgement was possible.

The tools available broadly fall into two categories: i) behavioral strictures; and ii) structural remedies. Behavioral strictures would include compliance protocols and possibly reporting requirements. It is quite normal for companies before they complete a merger or acquisition to consult with a regulator to have their approval of

<sup>43</sup> FastCompany (2020) What if Facebook had never bought Instagram and WhatsApp?

<https://www.fastcompany.com/90584685/facebook-instagram-whatsapp-breakup-remained-independent>

<sup>44</sup> Financial Times (2021) Apple's privacy changes create windfall for its own advertising business

<https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d>

<sup>45</sup> Gilbert and Tobin (2018) ACCC seeks new regulations to curb digital platforms, <https://www.gtlaw.com.au/insights/accc-seeks-new-regulations-curb-digital-platforms>

process, but where this does not happen regulators can and do impose sanctions such as fines and desist orders. The European Commission for example has imposed substantial fines against digital companies, including Microsoft and Google over the years.

Where behavioral remedies are considered ineffective or too late to undo the damage, structure remedies such as divestments, structural or accounting separations can be imposed, although usually after a court ruling. Of note, authorities have reported difficulties in enforcing behavioral remedies, which in turn results in limited use of this type of tool.<sup>46</sup>

### Box 6: Remedies are Challenging to Put in Place in Time

Due to the fast-paced nature of digital players, several APEC member economies have been challenged to put in place appropriate remedies when reviewing cases.

For example, Google completed its acquisition of Fitbit prior to the ACCC finalizing its review. The ACCC had rejected behavioral remedies proposed by Google to address competition concerns, but given the nature of the clearance regime, there was no statutory requirement for the ACCC to finalize its review before Google could act.

Further, in March 2018, when Grab acquired Uber's operations in Southeast Asia, integrating its ridesharing and food delivery businesses, what followed was a variety of responses to the deal by competition watchdogs around the region:<sup>47</sup>

- The Viet Nam Ministry of Industry's Competition and Consumer Protection Department (CCPD) considered fining Grab for failing to inform them about their acquisition of Uber. CCPD's threshold for notification is 30-50 percent market share.<sup>48</sup>
- In May 2018, the Competition and Consumer Commission of Singapore (CCCS) saw the urgency to impose appropriate remedies when evaluating the Uber and Grab deal<sup>49</sup> and put in place interim measures. CCCS concluded that the deal was an infringement of competition laws and considered proposing fines.<sup>50</sup> In October 2018, Grab agreed to pay the SGD 6.42 million (approximately USD 4.6 million) fine imposed by CCCS, while Uber decided to appeal against the imposed penalty of SGD 6.58 million (approximately USD 4.7 million).<sup>51</sup> Uber argued that the entry of Go-Jek, Indonesia's ride-sharing company, addressed issues of anti-competitiveness.<sup>52</sup>
- The Philippines Competition Commission asked Uber to continue operations after the deal with Grab, with Uber declining as it had already exited the market.<sup>53</sup>

Since regulators' use of counterfactuals necessarily rely on predictions, their choice is generally one of risk of market power abuse versus the likelihood of the benefits to the public arising from the investment and innovations claimed in anticipation by the acquirer. One way to operationalize this is where the risk can be based upon an assessment of the availability of closely related but independent markets, while the benefits

<sup>46</sup> Clifford Chance (2019) The Antitrust Horizon: Our Insights into Antitrust Trends 2019, <http://globalmandatoolkit.cliffordchance.com/downloads/Clifford-Chance-Insights-into-Antitrust-Trends-2019.pdf>

<sup>47</sup> TechCrunch (2018) Grab's acquisition of Uber Southeast Asia drives into problems, <https://techcrunch.com/2018/04/24/grab-uber-deal-southeast-asia/>

<sup>48</sup> The Straits Times (2018) Viet Nam questions possible Grab monopoly in wake of Uber takeover in South-east Asia, <https://www.straitstimes.com/asia/se-asia/vietnam-questions-possible-grab-monopoly-in-wake-of-uber-takeover-in-south-east-asia>

<sup>49</sup> Competition and Consumer Commission of Singapore (2018) Uber/Grab merger: CCCS Issues Interim Measures Directions, <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/uber-grab-imd-13-april-18>

<sup>50</sup> The Straits Times (2018) Watchdog finds Grab-Uber deal anti-competitive, proposes fines, measures to restore competition, <https://www.straitstimes.com/singapore/transport/competition-watchdog-finds-grab-uber-deal-anti-competitive-lists-corrective>

<sup>51</sup> Business Times (2018) Grab will pay S\$6.42m anti-competition fine but Uber appealing Singapore watchdog's decision, <https://www.businesstimes.com.sg/transport/grab-will-pay-s642m-anti-competition-fine-but-uber-appealing-singapore-watchdogs-decision>

<sup>52</sup> ChannelNewsAsia (2018) Go-Jek launches pre-registration portal for drivers in Singapore, <https://www.channelnewsasia.com/news/singapore/go-jek-pre-registration-portal-drivers-singapore-10873608>

<sup>53</sup> Rappler (2018) PCC asks Uber, Grab to continue separate operations beyond April 8, <https://www.rappler.com/business/199625-philippine-competition-commission-uber-grab-separate-operations>

could be hedged by using *ex-ante* contractual agreements between the acquirer and the regulator that can be measured against *ex-post* assessments of actual outcomes. In the event of anti-competitive outcomes divestments agreed *ex-ante* would come into play.

For APEC, this could be a crucial area where member economies are able to learn from each other, if the essence of the issue and dispute has been identified and catalogued. Thus, while one economy may not be able to use counterfactuals when it must make a decision, subsequent economies may well be able to see how that decision has played out. This is important—as in the digital economy, business practices and models evolve very quickly. Investigations can take a long time, with remedies often coming after the fact. Although decision making should not be rushed, there is a need to increase the pace in which cases are processed as decisions provide guidance both to industry and to other regulators, both domestically and across the region.

Regulators across the region are also taking different approaches or adopting different tools—from amending existing laws, putting in place industry codes, or drafting specific regulation—to tackle these issues. For example, Singapore has adopted a three-pronged strategy: i) undertaking proactive monitoring and partnering with experts in order to pre-empt issues; ii) competition authority is working with various sectoral regulators on specific issues (e.g., CCCS and PDPC are jointly looking into data portability); and iii) looking at novel approaches to new issues such as two-sided platforms (e.g., consider data protection requirements and assess market power based on the amount of data held by firms).

The tools available to regulators, for example, to undertake a merger review, are much the same as those available to the financial and legal analysts who advise on M&As, starting with the company's accounts, its market shares for products before and after an M&A, the reaction of investors and stock markets, its ability to integrate the new with the old, its policies towards pricing and marketing, such as bundling, and in a digital context its access to vendor and customer data and its monetization of that data. More challenging is access to the company's international accounts and its post-M&A deployment of resources outside the jurisdiction of the regulator. There are only two sources of such information, from other regulators and from the company itself.

### **Box 7: Cross-border Cooperation**

In April 2021, the UK's Competition Market Authority (CMA), the ACCC and Germany's Bundeskartellamt issued a Joint Statement on Merger Control Enforcement,<sup>54</sup> to announce a common understanding that there was a growing concern at the concentration of market power in what were fast moving digital markets, and which had been accelerated by the onset of the COVID-19 pandemic. This coalition highlights an urgent need for greater cooperation between competition authorities.

The joint statement makes a point that it is easier to tackle potential monopoly behavior by pushing back on takeovers/acquisitions earlier, rather than trying to fix them afterwards. Further, the statement also indicates a general skepticism over merging parties' submissions and emphasizes the importance of third-party evidence to confirm these submissions. At the same time, it makes the point that competition agencies cannot base assessments on speculation or unfounded claims as to the impact of the pandemic—highlighting the need for more thorough research and evidence gathering.<sup>55</sup>

The tools regulators have inherited from the analogue age clearly need updating to take into account: i) new digital business models that can give rise to dominance and abuse of market position (notably two-sided platform businesses); and ii) enhanced role of data collection and data scraping from social media sites that arouse concerns ranging from consumer protection, personal data privacy and data security to interference in democratic and civic processes such as scams, voter fraud and fake news. These concerns among others have led in some cases to registration requirements for social media and online news sites and data localization requirements in the case of cloud service providers.

<sup>54</sup> Australian Competition & Consumer Commission (ACCC) (2021) Joint statement on merger control enforcement, <https://www.accc.gov.au/system/files/Joint%20statement%20-%20merger%20control%20enforcement.pdf>

<sup>55</sup> Norton Rose Fulbright (2021) A joint statement on mergers: Insights from the UK, Germany and Australia, <https://www.nortonrosefulbright.com/en/knowledge/publications/dec62e20/a-joint-statement-on-mergers-insights-from-the-uk-germany-and-australia>

## 5. Data Governance

Digital platforms and services rely on all types of data to be able to function properly. Whether they take place on an e-commerce platform or a food delivery application, digital transactions data needs to be transferred between users, customers, web merchants, payment system operators, card companies, and many other intermediaries. Access to data is thus becoming an undeniable cornerstone of competitiveness, with access to large pools of data being a central area of discussion in ongoing and forthcoming conversations on antitrust law and other mechanisms which aim to limit the market power of data-rich incumbents.

The **ability to generate and collect data can create a competitive advantage, and that an inability to access data can be a market barrier**. This understanding of how economically and operationally important data is, has been coupled with the need to develop appropriate frameworks around the collection, storage and use of data.

Across APEC member economies, data sharing arrangements, data protection frameworks and data portability schemes are being rolled out to address consumer welfare needs and ensure and promote continued innovation by increasing competition between existing competitors and promoting new entrants. Data sharing initiatives in particular promise to open access to wide pools of data which may allow businesses to pursue even more innovative use cases, while facilitating a democratization of data for civil society organizations, non-governmental organizations, and academic uses.

However, wider access to these datasets cannot come without the development of appropriately rigorous frameworks addressing their management. Efforts to build these frameworks should in turn be underpinned by a clear understanding and awareness of the issues which inform the contemporary understanding of what data is, how data is managed, and both practical and conceptual challenges data represent. Issues of trust rise to the fore in discussions of data, as do issues of ownership—both may serve as serious impediments to wider public investment in data sharing initiatives, and the use of data more broadly. Alongside these factors, operational challenges relating to search and switch costs, and a lack of data standards, may lead to difficulties in obtaining data for other players and new entrants, and high switching costs for consumers.

Given how fraught is the challenge of separating out these different components of data as a source of market intelligence and competitiveness and data as property where the right of access can be disputed, it is imperative that regulators don't bite off more than they can manage but do have the means to manage what they choose to bite off.

### 5.1 Clarity and consistency in data access is increasingly important

Discussions on the issue of data control—who has access to, and responsibilities and liability for data—are fraught, with different jurisdictions observing different norms. Difficulties surround clearly articulating schemata of ownership which would otherwise be easily established in the context of less abstract property rights. Broadly speaking, however, there is a consensus on the universality of certain roles within the practical life cycle of data, even if terminology and specific responsibilities are not completely aligned. These roles were codified within the EU General Data Protection Regulation (GDPR), which has been used as the basis for regulatory frameworks in many other jurisdictions. In Australia and New Zealand an approach has been taken to establish not data ownership as such but a right of access as a Consumer Data Right (CDR).<sup>56</sup>

Data subjects are individuals to whom data can be attributed, directly or indirectly. Data subjects are the basis for data, which can relate to their physical, physiological, genetic, mental, economic, cultural, or social identity.<sup>57</sup> As noted, the terminological basis for data subjects originated with the GDPR, with other jurisdictions often

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<sup>56</sup> OAIC (2020) 'What is the Consumer Data Right?' <https://www.oaic.gov.au/consumer-data-right/what-is-the-consumer-data-right/>

<sup>57</sup> GDPR-info.eu (2021) Definitions, <https://gdpr-info.eu/art-4-gdpr/>

using less specific terminology, such as ‘individuals’ or ‘users’, within their data protection or data access frameworks.

While data cannot exist without data subjects, explicit ‘ownership’ is effectively surrendered once consent is granted to third parties to collect or process data.<sup>58</sup> Mechanisms such as the right to be forgotten, the right to rectification and the right to access data, are nevertheless granting data subjects some degree of agency with regards to the use of their data—though this falls short of endowing full ownership privileges or liabilities.

Data controllers are individuals or organizations which have decision-making authority over the purpose and means by which data is processed.<sup>59</sup> Data controllers may independently collect data from data subjects, or they may purchase or otherwise acquire data from other data controllers. Regardless of the source of their data, data controllers bear the greatest responsibility and liability for the storage and security of data assets—as well as the greatest degree of agency with regards to accessing, processing, or transforming it. In some different frameworks, data controllers are referred to as ‘data owners’, reinforcing this relationship and the obligations that accompany it. Scenarios also exist where more than one entity can exert decision making authority over data, such as in the context of cloud computing. In such cases, all associated entities are joint controllers, with ownership often being clarified through legal instruments between them.

Data processors are individuals or organizations which are instructed to process personal data on behalf of controllers. Whether as entities external to the data controller, or as components of the data controlling entity itself, data processors function to process, modify and transform data in accordance with instructions from controllers. A single entity can be comprised of both a controller and a processor simultaneously, but the relationship between its controlling and processing function is likely to be clearly delineated, usually in contractual terms or through other legal instruments. Data processors do not own the data they process unless they are also controllers but have access to it for the purposes of processing it.

There are ongoing discussions regarding the ethics of allowing data controllers to commercialize data without processing it, and whether data subjects should be allowed to exert greater control over their data. The rights of data controllers to transfer collected data to third parties for various purposes may be vouchsafed by end-user license agreements, but proposed solutions have included the establishment of time-bound limitations to access to personal data, though a strong consensus on this issue has yet to be established.<sup>60</sup>

## 5.2 Safe and secure data collection requirements to enable innovation

The acquiring of consent in the collection of data is a challenge which the public sector and businesses continue to grapple with. Under GDPR, six rationales are outlined which would justify the collection, processing, and storage of personal data. Principal amongst these is the granting of consent by a data subject to their personal data for one or more specific purposes. In the context of the GDPR, consent must be freely given, unambiguous, informed and directed to specific purposes which data subjects understand their data will be used for.<sup>61</sup> Many economies have since taken reference from the GDPR and sought to introduce provisions within their own data protection frameworks which mandate the need to acquire consent.

However, a one-size-fits all consent rule does not work in an evolving technological environment and should be ‘future-proofed’—by allowing flexibility in obtaining consent appropriate to the context in which it is being sought to be used, within bounds that would not compromise data subjects’ awareness of the data they are allowing organizations to access. Consent provisions are often constructed based on either a paper-based environment or a web-based user interface. In those contexts, affirmative consent (in some cases, for each use of data) at the time the data was being provided by the data subject was the norm, as was the expectation that all uses for the information being collected could be anticipated.

With the advent of new interfaces, such as mobile apps and devices, and devices without text input (e.g., voice-input systems, or devices which collect potentially personal non-text data), and innovative data-driven

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<sup>58</sup> Lexology (2019) Big Data & Issues & Opportunities: Transparency, Consent, Control and Personal Data Ownership, <https://www.lexology.com/library/detail.aspx?g=4dc40a5e-0b29-419c-be54-b46fcfddd342>

<sup>59</sup> European Commission (2021) What is a data controller or a data processor? [https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en)

<sup>60</sup> European Institute of Innovation and Technology (2021) European Digital Infrastructure and Data Sovereignty – A Policy Perspective, <https://eit.europa.eu/news-events/news/new-report-european-digital-infrastructure-and-data-sovereignty>

<sup>61</sup> GDPR.EU (2021), What are the GDPR consent requirements? <https://gdpr.eu/gdpr-consent-requirements/>

interactions for users (algorithmic systems that use the information about a user's behavior to produce a result for the user), written or web-based advance express consent for the use of data is cumbersome and constrains innovation in features and services available to users. The promulgation of consent frameworks that integrate a modular approach to contracting that can be adapted to different scenarios, and iterated upon as necessary, could ensure the development of more flexible consent mechanisms that retain a high level of rigor vis-à-vis consumer protection while remaining friendly to innovation.

This raises the challenge of how to educate consumers to both know about and to exercise their rights to access their own data and data accuracy, not least in highly competitive markets. Competition authorities and legislatures can and do post information sheets, guidelines and advisories and consumer organizations likewise, but this can get lost in the fog of an active competitive marketplace. Strengthening consumer rights is a first step—such as the Consumer Financial Protection Bureau in the United States which brought 30 actions under the Fair Credit Reporting Act (FCRA) rules to support consumer complaints in inaccurate data in 2020<sup>62</sup>—but more sustained public communications are clearly necessary.

### 5.3 Personal data needs to be defined

As the public sector and businesses develop new and more innovative uses for personal data, the ethical dimension of how and what this data can or should be used for has attracted greater scrutiny. Concerns have arisen regarding the implications of big data applications such as machine learning on the rights of under-represented, vulnerable segments of society, such as indigenous people, women, minoritized communities, and people with disability.

The issue of sensitive personal data is one which has prompted mixed responses in different economies. Sensitive personal data has various definitions, with the GDPR's definition addressing personal data revealing race or ethnicity, religion or philosophical belief, trade union membership, genetic information, biometrics, health information, sex life and sexual orientation.<sup>63</sup> This definition is roughly echoed within the data protection regulations of economies such as Malaysia and Thailand—as are the existence of higher thresholds for consent, and more rigorous liabilities for security and protection which accompany them.<sup>64</sup> A definition for sensitive data is absent in Singapore's PDPA though restrictions exist on the collection of data related to Singapore's domestic ID Cards, reflecting the multiplicity of approaches to this issue.<sup>65</sup>

Challenges inherent to the management of sensitive personal data are further exacerbated by the increasing prevalence of digital functions which are dependent on the processing of biometric data. Such functions can include fingerprint readers, retina scanners, and facial or voice recognition software. Data used in these technologies is often associated with personal identity verification systems. However, the use of biometrics creates singular points of access which, if compromised, cannot easily be recovered. A compromised facial scan is effectively irreplaceable within an online database, as compared to a passphrase or PIN. This raises the risk of identity theft for users of technologies dependent on biometric data.

The use of sensitive personal data is further complicated by its potential use within machine learning algorithms. These algorithms are often developed using principles of deep learning, which seek to develop conclusions based on extremely large datasets which can often contain sensitive personal data. Conclusions made by these algorithms can prove to be inadequately reflective of lived realities due to the limitations developers may face in acquiring data of sufficient quantity and quality. Resultant algorithmically derived products and services—such as the ubiquitous AI applications currently in circulation—may accordingly reflect biases, which if unaddressed, may prevent socially or economically disadvantaged communities from enjoying equivalent standards of service.

The growth of data-driven products and services has been matched by the proliferation of ethical challenges related to data use, and particularly the use of sensitive personal data. Many of these challenges continue to permeate ongoing discussions on data governance and will have a direct impact on public trust for the public

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<sup>62</sup> FTC (2020) FTC Updates Congress on Efforts to Educate Consumers about Their FCRA Rights'

<https://www.ftc.gov/news-events/press-releases/2020/05/ftc-updates-congress-efforts-educate-consumers-about-their-fcra>

<sup>63</sup> GDPR-info.eu (2021), GDPR Article 9 – Processing of special categories of personal data, <https://gdpr-info.eu/art-9-gdpr/>

<sup>64</sup> Data Guidance (2021) Thailand – Data Protection overview, <https://www.dataguidance.com/notes/thailand-data-protection-overview>; Linklaters (2020) Data protected – Malaysia, <https://www.linklaters.com/en/insights/data-protected/data-protected---malaysia>

<sup>65</sup> DLA Piper (2021) Data Protection Laws of the World (Singapore) - Definitions, <https://www.dlapiperdataprotection.com/index.html?t=definitions&c=SG>

and private institutions that use data. Responses have thus emerged to address many of the noted issues, with the concept of cancellable biometrics being mooted to address the possibility that biometric data is compromised, and the field of algorithmic fairness arising to assess possible solutions to the issue of bias in machine learning algorithms.

#### **5.4 Organizations need to be held accountable for data transfers**

The need to combine and analyze data sets from different pools—often data sets that are collected or stored in other jurisdictions—is increasing. However, for information to be transferred across borders securely, economies have to recognize each other's data privacy and protection regimes. Data transfer mechanisms, such as certifications and data transfer agreements, help to bridge differences in data protection and privacy laws without requiring laws to be revised. In recent years, mechanisms that seek to facilitate interoperability across data protection/privacy regimes have emerged, providing an avenue to ease compliance costs and business uncertainty, allowing innovative digital offerings to penetrate local markets, and at the same time ensuring the safe and secure flow of data by holding organizations accountable.

Participating in activities which entail cross-border data transfers can be a daunting prospect for businesses if clarity with regards to accountability for data management do not exist. Public sector leadership have sought to limit this uncertainty by implementing regulations that clarify regulatory obligations on data transferred across borders.

For example, New Zealand introduced Privacy Principle 12 in its Privacy Act 2020, enabling businesses and other organizations to disclose personal information to foreign entities which are subject to comparable protections on private data.<sup>66</sup> With Privacy Principle 12, liability rests firmly on businesses, as they must ensure that they have reasonable grounds to believe that data is being disclosed to an overseas partner that provides adequate protections to those offered by the New Zealand Privacy Act 2020. Any disclosures to entities which do not provide such assurances—including in the context of using cloud services—must receive the express consent of data subjects.

#### **5.5 Search and switch costs need to be factored in**

Search cost refers to the resources which might be invested by a consumer to search for a service or product. Switch costs are the costs which might come about because of a consumer's desire to change the providers of a particular service or product. Resources expended in both cases can be measured in terms of time, effort, financial resources and in the context of other psychological factors. High search and switch costs contribute to low flexibility environments for consumers, and function to the detriment of legitimate competition between providers of products or services.

Data can play a key part in raising search and switch costs. A lack of access to relevant data can disproportionately raise search costs by severely limiting consumers' ability to compare products and services based on price, functionality, and reliability. At the same time, due to the ways in which search functions are becoming strongly dependent on data-derived algorithms tailored to the needs of specific customers, a lack of access to this consumer data can inhibit the utility of platforms which consumers might use to find items, further exacerbating search costs by forcing them to sift through excessive amounts of suboptimal recommendations.

An overabundance of consumer data concentrated within a single platform can, in contrast, disproportionately raise switch costs and thus inhibit fair competition. Users of platforms which use data to optimize service delivery may be disinclined towards switching to other services due to the inconvenience of having to provide information again or build user profiles from scratch. This can also apply in the context of more fundamental issues of access. A lack of data interoperability, and the absence of functional data transfer frameworks can prevent consumers in some sectors, such as finance and utilities, from switching operators at all without incurring excessive switch costs.

Careful management of data governance frameworks is thus key to ensuring that search and switch costs remain at manageable levels. Access to data has been key to the role search engines and other digital solutions have played in progressively lowering switch costs over the past decades. At the same time, first movers in the data economy benefit from virtuous cycles of data optimization and generation which enable them to shut out

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<sup>66</sup> Office of the Privacy Commissioner (2020) Privacy Principle 12, <https://www.privacy.org.nz/privacy-act-2020/privacy-principles/12/>

peers, raise barriers to entry for newcomers disproportionately, and stifle competition that would otherwise benefit consumers.

A model which has been used to address this aspect of data governance is being set out in Australia's CDR. The CDR is a data portability initiative intended to give consumers greater control of their own data and make moving between products and services easier by mitigating switching and search costs. It is designed to be an opt-in service for consumers, who will be able to direct current service providers to share data using a secure online system with a new provider of their choice—including accredited third parties who can advise on more efficient products and services.

The CDR is implemented sectoral, with service providers in designated sectors being beholden to data sharing and management obligations on certain classes of information, as indicated within relevant legislative instruments. The CDR was first introduced into the banking sector, allowing Australian consumers to easily transfer data between financial institutions. It is presently being implemented in the energy sector to allow consumers to switch electrical utilities providers more efficiently, and a sectoral assessment is ongoing on implementing the mechanism within the telecommunications sector.

The CDR is explicitly noted to be an attempt to address competition using data governance policy, and principally ensures that access to data cannot be used to inflate search and switch costs, while also implementing a rigorous data governance regime on key sectors and ensuring that government is well-positioned to circumvent anti-competitive or anti-consumer data practices.

#### **Box 8: Singapore's Comprehensive Approach to Data Governance<sup>67</sup>**

Singapore has adopted a whole-of-government and comprehensive approach to strike the balance between safeguarding consumer's personal data (e.g., holding organizations accountable through mandatory data breach notifications, and accountable for transfer of data) and ensuring continued innovation and competitiveness.

Singapore recently amended its PDPA to include: i) mandatory data breach requirements (if breach is likely to result in significant harm or impact, or is of a significant scale); ii) enhanced enforcement powers, including an increased financial penalty cap; and iii) facilitation of data processing to enable innovation and meet consumer needs (including expanding consent exceptions for business improvement, enhanced R&D, legitimate interests, and contract necessity in order to further facilitate processing of data).

The impending enforcement of amendments to the PDPA has been accompanied by a recent uptick in breach notifications to the Personal Data Protection Commission, with alerts tripling across February – March 2021 compared with December 2020 – January 2021.<sup>68</sup> It is anticipated that the increased financial penalty cap of up to SGD1 million (USD740,000) will motivate data controlling organizations to exercise greater care for the personal data they store, reducing the number of incidents overall.

This would be a marked difference between Grab previously only being fined SGD10,000 (USD7,499) for its fourth privacy violation whereas part of an app update, around 5,000 drivers' profile data was exposed before the app was rolled back to previous version and additional remedial action was taken.<sup>69</sup> The PDPC commented that Grab did not initially put in place sufficiently robust processes to manage app changes that potentially put personal data at risk. Although data breaches can be an expected outcome of managing large volumes of personal data, this is Grab's fourth violation (and second time making a very similar mistake albeit

<sup>67</sup> Detailed case study set out in Appendix I

<sup>68</sup> OpenGovAsia (2021) Singapore's PDPC Coping with a Rise in Data Breaches, <https://opengovasia.com/singapores-pdpc-coping-with-a-rise-in-data-breaches/>

<sup>69</sup> Channel News Asia (2020) GrabCar fined S\$10,000 for 4<sup>th</sup> user data privacy violation, <https://www.channelnewsasia.com/news/business/grab-car-hitch-pdpc-personal-data-risk-fine-13108144>

in a different part of the system). With the renewed PDPA, Singapore is now able to address continued breaches more effectively with larger fines.

The PDPA was also amended to recognize that any recipient holding a specified certification, such as the APEC Cross-Border Privacy Rules (CBPR) System, which provides government-backed accreditation to companies compliant with data privacy laws,<sup>70</sup> and Privacy Recognition for Processors (PRP) System certifications, are considered to provide comparable protection to that under the PDPA.<sup>71</sup> This clarification ensures organizations can transfer personal data overseas without being required to meet additional obligations.

Singapore has also enshrined seamless cross-border data transfer and active participation and promotion of APEC CBPR and particularly industry adoption, in its digital economy agreements, including the Singapore-Australia Digital Economy Agreement (SADEA).<sup>72</sup>

Taking heed from Australia's Consumer Data Right, the recent amendment to the PDPA includes a data portability obligation, with technical, security, and consumer protection requirements to be set out in a forthcoming regulation.

## 5.6 Data standards enable interoperability and interconnectivity across the region

Discussions regarding the role which standards can play in data management have been ongoing but will undoubtedly rise in prominence soon. Data standards determine how different types of data are formatted. What these covers can vary depending on the specific standard, and the use cases involved for the data in question. However, standards typically address the metadata associated with data, methodologies of storage and management, and file formats, along with accompanying documentation. Data standards can ensure the traceability, transparency, and quality of data, facilitating interoperability and data reuse by allowing different entities aligned with the same data standard to be assured of the usability of data they can acquire from accredited sources.

Interoperability and reuse are of vital importance, given growing calls for data portability as a fundamental tenet within personal data protection frameworks around the world—broadly as a measure designed to address the issue of high switching costs. Data portability calls for individuals to be empowered to control the transfer and reusability of their data across different data controllers. This allows data subjects to avoid becoming locked into a particular service provider, while also generally providing a regulatory framework to ease the migration of data from different institutions, for purposes such as ensuring data redundancy and secure storage. APEC member economies have noted that data portability represents a potential solution to competition issues that arise.

Competitive enforcement resources including data portability and interoperability measures could address a specific practice, dataset, or functionality in a defined set of markets. These measures could focus on a particular set of companies with market power (or a dominant position), or in specific companies undertaking a merger under review. Additionally, the simplest application of these measures would be in an abuse of dominant position, in which a dominant company has decided to limit the degree of data portability or interoperability

<sup>70</sup> APEC (2021) What is the Cross-Border Privacy Rules System? <https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System>

<sup>71</sup> Personal Data Protection Commission (PDPC) Singapore (2020) Singapore Now Recognises APEC CBPR and PRP Certifications Under PDPA, <https://www.pdpc.gov.sg/news-and-events/announcements/2020/06/singapore-now-recognises-apec-cbpr-and-prp-certifications-under-pdpa>

<sup>72</sup> Ministry of Trade and Industry Singapore (2021) Memorandum of Understanding between the Personal Data Protection Commission of the Republic of Singapore and the Office of the Australian Information Commissioner on Cooperation in Personal Data Protection, <https://www.mti.gov.sg/-/media/MTI/Microsites/DEAs/Singapore-Australia-Digital-Economy-Agreement/MOUs/MOU-on-Cooperation-in-Personal-Data-Protection.pdf>

associated with its product. In these cases, portability or interoperability could be a part of the analysis of the theory of harm.<sup>73</sup>

Another aspect closely related to data portability is definition of property rights over data. This is relevant to define the set of data that users can port from one digital service provider (platform) to another.

Data portability was enshrined within the EU's GDPR and has since emerged within many other data protection frameworks, such as Singapore's recently amended PDPA.<sup>74</sup> Australia has sought to roll the concept out in a more targeted way with the Consumer Data Right, which aims to provide consumers access to, and the ability to transfer, their data across trusted parties in the banking, electrical utilities and eventually, telecommunications sectors.<sup>75</sup>

Commonly adopted standards for information security include ISO/IEC27001, ISO/IEC27002, ISO/IEC38505-1 and ISO/IEC 277001.<sup>76</sup> Ongoing discussions regarding the development of further standards for data management are occurring at the multi-stakeholder level, through avenues such as the International Organization for Standardization's ISO/IEC JTC 1/SC 32 on Data Management and Interchange.

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<sup>73</sup> OECD (2021) Data Portability, Interoperability and Digital Platform Competition,

<https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf>

<sup>74</sup> SCL (2021), Singapore's Personal Data Protection Act: A review of the major changes ahead (Part 3): porting and data portability, <https://www.scl.org/articles/12128-singapore-s-personal-data-protection-act-a-review-of-the-major-changes-ahead-part-3-porting-and-data-portability>

<sup>75</sup> Consumer Data Right (2021) Consumer Data Right, <https://www.cdr.gov.au/>

<sup>76</sup> International Organization for Standardization (2013), ISO/IEC27001, <https://www.iso.org/isoiec-27001-information-security.html>; International Organization for Standardization (2013), ISO/IEC27002, <https://www.iso.org/standard/54533.html>; International Organization for Standardization (2017), ISO/IEC38505-1, <https://www.iso.org/standard/56639.html>; International Organization for Standardization (2019), <https://www.iso.org/standard/71670.html>

## 6. Emerging Issues

Complex, inter-connected technologies introduce new risks, new twists on old risks, as well as unintended consequences. Systems can fail and undermine market stability; AI and machine learning can make decisions with harmful, unintended consequences; and data—the lifeblood of the digital world—can be manipulated, misused, stolen or, because of its sheer volume and complexity, be used to disguise criminal behavior.<sup>77</sup>

This results in several emerging issues that confront APEC economies, including how best to protect consumers, what the role of digital market providers as intermediaries are, and the standards they should be held to.

### 6.1 Consumer protection requirements are shifting in the digital age

With e-commerce booming, and consumers increasingly comfortable transacting online, the expectation and entitlement of the same level of protection as if they were engaging in conventional ‘brick-and-mortar’ transactions has been well enshrined in the digital age. Online consumer protection involves measures to protect consumers from fraudulent, misleading, or deceptive conduct when they engage in electronic transactions.

Such transactions may involve local retailers and vendors or those located in other geographic regions. This means that many businesses and consumers transact in different jurisdictions with different e-commerce regulations. It has implications for advertising, cross-border cooperation, product recalls, and peer platform markets, the latter of which can blur the distinction between consumers and businesses.<sup>78</sup>

Despite the increase in choice in products and services available on the Internet, there are risks that consumers could be vulnerable to: i) misleading information provided by businesses including confusion on status and location of online vendor; ii) unfair commercial practices; iii) unfair contract terms and conditions; iv) poor online payment security; and/or v) no mechanism for redress, especially for cross-border online transactions. While some jurisdictions have a legislative framework for consumer protection which includes online transactions, others are not equipped to act against online rogue traders at the domestic or global levels.

One of the most common problems for consumers using digital platforms is the lack of transparency and information on how a platform works and the nature of the services it provides—thus preventing consumers from assessing the real value of the service they are getting, as well as the underlying contractual relationship and economic trade-off that is taking place.

Business models centered around the zero-price provision of products are not new: media companies have long made radio, television, or even newspaper content available for free, funding their product through advertising revenues and classifieds. In the digital economy, new zero-price markets have arisen with their own unique characteristics and vast scope; it has become almost impossible for a consumer not to use at least one free digital product or service throughout a typical day.

From mobile gaming applications to social networks, all technology companies offer some form of zero-price product or service, usually designed to either build customer loyalty, acquire user data, gain free publicity, or even destabilize competitors. The difficulty for regulators is the question of the nature of the transaction between user and free product/service provider—if there is one. If the nature of the transaction is difficult to assess, then it is likely that the relationship between business and consumer will also be hard to define, in turn making it difficult to apply the right regulatory measure or framework.

Many consumers are not also aware or are uncertain of their rights and responsibilities in consumer-to-consumer transactions or about who to turn to when something goes wrong. More transparency is also necessary with regards to pricing practices; search results on many platforms do not give the total price until it is difficult for a buyer to rescind an offer or a payment.

Terms of use and privacy policies are often long and complex, written in an obscure legal jargon that is very hard for consumers to understand. Rather than explaining to users what the conditions are, these texts are drafted with the purpose of being a liability waiver for the company, to which consumers, most often blindly,

<sup>77</sup> Ernst & Young (2018) How can regulation keep up as technological innovation races ahead, [www.ey.com/en\\_gl/banking-capital-markets/how-can-regulation-keep-up-as-technological-innovation-races-ahead](https://www.ey.com/en_gl/banking-capital-markets/how-can-regulation-keep-up-as-technological-innovation-races-ahead)

<sup>78</sup> OECD (2021) Going Digital: Digital Consumers, <https://www.oecd.org/going-digital/topics/digital-consumers/>

agree to be able to use the service. The shift towards mobile devices and the Internet of Things (IoT) only aggravates these concerns around terms and conditions, as it will become even more difficult for consumers to understand the extent and the ramifications of what they are agreeing to.

There is also a stronger focus on how digital platforms collect, use, and present personal information, advertising, and user engagement practices—and how this affects and/or is targeted at children.<sup>79</sup> The ubiquity of digital platforms in consumers' daily lives, combined with the rising sensitivity of the data they collect (social interactions, buying habits, personal preferences and interests, locations, personal schedules, and plans, etc.) makes user data an extremely valuable asset. Users are constantly tracked, monitored, and profiled, many times without their knowledge or consent.

AI algorithms enable advertising campaigns to be targeted with more specific understanding of an individual's customer's needs without substantial research cost, making marketing smarter and more effective. Another major business advantage is customer satisfaction since anticipating a customer's needs plays an increasingly important role in long-term retention. Indeed, an exceptionally designed recommendation engine can be the underpinning of an entire business model.

However, algorithms remain a mystery for consumers, in many cases by design.<sup>14</sup> Rarely do digital platforms offer any information on the way recommendations are selected, ranked, or displayed on content platforms, search engines, comparison sites, or online booking platforms. This has led to the emergence of consumer protection concerns stemming from the use of AI, most prominently the potential for profiling and the rise of discriminatory practices, such as price discrimination, that may negatively affect consumers.

## **6.2 Intermediate liability will require re-examination**

There is an increasing need for clarity as to where liability rests for intermediaries—which could include any players from data processors, digital platform service providers, or even banks etc.—and the extent to which intermediaries are subject to for the actions of their users.

Where digital platforms act as intermediaries between two or more parties, it is often unclear whether the platform is a party to the contract or who is legally considered a trader or acting on behalf of a trader. Online intermediaries often invoke the fact that they 'only host' certain services, limiting the possibilities for consumers to hold them accountable for questionable practices or processes. In this context, online platform providers have little to no incentive to ensure the correctness and validity of information provided on their platforms.

While the definition adopted by economies and their regulatory frameworks vary considerably across the region, most have adopted a conditional liability regime that exempts an intermediary from liability on the condition that it adopts certain measures or policies, such as the take-down of IP infringing, defamatory, or otherwise illegal content.

Intermediary liability protections ('safe harbor') have been fundamental to the growth of the open Internet, providing a safety net that allows digital intermediaries to operate with the certainty that they will not be legally liable for storing, hosting, processing, or transmitting content, since the flipside of that is that digital intermediaries face higher legal risks that they will try to mitigate through early or unnecessary blocking of content or censorship. At present, several advanced economies are considering introducing legislation that requires companies to make 'reasonable best efforts' to remove illegal content, marking a departure from current regulations that permit businesses to seek out and remove illegal content without rendering them liable for any such content that they still store or process.

## **6.3 Content moderation will increasingly be brought to the fore**

Content moderation—the practice by online platforms to screen user-generated content and ensure that the published content does not violate rules and guidelines against prohibited, illegal or inappropriate content—is a complex, global issue, which cannot be easily tackled by reactive legislative instruments. Measures need to be principles-based, adaptable to technological developments, and balanced (since under-moderation may result

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<sup>79</sup> Federal Trade Commission (2020) FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services>

in the spread of harm and abuse), whilst excessive content moderation requirements may give rise to concerns around censorship, bias, and constraints on social interaction.

Content moderation can be a predominant issue in certain jurisdictions when rules are unclear about *what* is considered prohibited content (e.g., porn, sexualization of children, hate speech, obscene or vulgar, illegal or against religious or societal values, or misinformation) and *who* it applies to (e.g., OTTs, video-on-demand (VOD)/ SVOD providers and user-generated content providers (UGCPs)).

When determining whether to hold digital platforms liable and accountable for removal of content, economies must seriously consider several factors, including:

- Impact on free speech and expression;
- ‘Outsourcing’ of decision-making regarding what constitutes illegal content to private companies; and
- Whether and how extraterritorial issues (where providers are not based in the same jurisdiction) are overcome in an effective way.

This extraterritoriality issue is of fundamental importance. Due to the borderless nature of the Internet—where a user may upload content in one economy, to a platform operated by staff based in a different economy, with comments left by other users in a third economy—poses challenges to economies (and platforms) in tackling the issue.

While we are seeing examples of economies beginning to impose measures that go well beyond their borders—problematic in and of itself as such actions may impinge on the rights and freedoms of citizens in other jurisdictions—how those measures are *enforced* cross-jurisdictionally remains an open question. For example, if one jurisdiction orders a social media platform to remove content not just from their jurisdiction, but globally, internet users in other jurisdictions may have their freedom to access information violated based on a foreign law.

Equally, or perhaps more, problematic is the impact such actions could have on the domestic digital economy, as it is likely only that that economy’s social media platforms will be able to be held directly accountable.

## 7. Recommendations

In the digital economy, business practices and models evolve very quickly. The rise of new (digital) platforms and services, and the paramount role of data, can effectively reshape existing markets and their competitive dynamics. A key challenge for regulators in the digital era is the fact that these shifts take place very quickly, and sometimes take shape in very subtle ways, manifesting themselves only once they have initiated complex, inter-connected regulatory urgencies. Growing and sustaining a budding digital ecosystem requires re-examining the effectiveness of existing regulatory mechanisms and giving regulatory bodies the ability to address emerging issues nimbly and proactively.

In this environment, it is important to ask and ensure that regulation remains fit-for-purpose. This is because investment in new industries, the ability of new firms to enter markets, and for new technologies to diffuse throughout the economy, can be nullified by poorly designed or implemented regulation, the protection of incumbents, and the absence of complementary policies, for example, in relation to standards and data access.

The recommendations set out below address this need for fit-for-purpose regulation, drawing upon the multiple avenues available.

### 7.1 Role of APEC in coordinating harmonized digital approach

In terms of addressing competition and digital regulation issues across economies, APEC member economies have noted in the survey responses that having new regulations or signing MOUs are no longer sufficient. Economies are now shifting towards taking actionable steps such as updating competition laws and forging international partnerships. APEC plays a key role in advancing measures to facilitate a robust business environment and set the right conditions. This ensures APEC member economies come together to ensure multilateral coherence and interoperability on core issues of utmost importance. Discussion between and within APEC member economies should be focused on:

- The need and opportunity for even greater information sharing, both across jurisdictions and between different agencies within economies, than currently exists; and
- How APEC can advance cooperation on these digital issues.

APEC is also uniquely positioned to play a role in navigating consensus over key common definitions, ensuring alignment and harmonization across economies and positioning itself as a coordinated digital services market.

#### Recommendations

1. APEC could play a coordinating role by facilitating discussion between **existing working groups and fora** to fast-track digital discussions.

For example, by bringing together CPLG and the Digital Economy Steering Group (DESG), this would facilitate **the exchange of experiences and expertise** on core issues such as AI and data sharing for both competition policy and broader digital regulation.

2. APEC could **develop a digital services market framework**.

For example, this may include consensus on key definitions including digital trade, and the players involved (e.g., digital platforms and aggregators; and data owners, processors, controllers, and originators), as well as developing: a typology of platforms; consideration of what constitutes digital market dominance; and a set of good practices for digital services regulation and digital trade standards to enable and support ongoing capacity building.

### 7.2 Competition policy for the digital age

Regulatory approaches do not grow out of nowhere, they are embedded in the legal frameworks of economies, but they can develop and adapt to new challenges. To ensure competition and broader digital regulation is fit-for-purpose, several considerations should be considered. It should be noted that even in the most developed economies, this remains a learning process.

In the digital economy, business practices and models evolve very quickly. Investigations, on the other hand, can take a long time, with remedies often coming after the fact. Although decision making should not be rushed, there is a need to increase the pace in which cases are processed.

Judgements or decisions provide guidance to new and existing players, provide a set of foundational principles, and generally improve knowledge of competition policy issues in the digital sphere. However, there are currently a lack of decisions guiding the market.<sup>80</sup> The UK CMA has recently flagged it would like a 'full portfolio' of cases against digital players to draw from.<sup>81</sup>

To address these challenges and ensure APEC member economies can make effective assessments, APEC can promote cooperation within and between economies. This knowledge sharing will address resource constraints and capacity building for developing economies; joint understanding or investigations for economies where digital players are present in multiple jurisdictions; and importantly increase required subject matter expertise (e.g., increasing understanding about the role of data and its importance in mergers and acquisitions<sup>82</sup>), especially as pointed out in survey responses, the impact of COVID-19 continues to disrupt work and life in the region, and accelerates the digitization of the economy.

### Recommendations

3. APEC member economies could consider **strengthening competition policies for the digital age** and aligning these approaches across the APEC region.

This may include amending current approaches to reflect the impact of digital players such as:

- Amending or adjusting merger control thresholds to capture acquisitions of firms with little turnover but that nonetheless may be a potential competitor of the acquiring due to data holdings, technology, user base, or other factors that may make the acquired a competitive threat to the acquirer (i.e., to capture acquisitions of "nascent" competitors);<sup>83</sup>
- Requiring prior advance notice of acquisition or merger;
- Taking into consideration innovation suppressing conduct (such as scraping content, and suppressing or preventing access to data) without sacrificing the trade benefits of innovation *per se*;<sup>84</sup>
- Ensuring that the concept of predatory pricing adequately addresses such strategies in digital markets;
- Considering the global scale and scope of digital markets, that data and other digital products often fall between different regulatory regimes, and that consumer behavior needs to be understood and not assumed;<sup>85</sup>
- More carefully considering the anticompetitive effects of vertical integration in digital markets;<sup>86</sup> and
- Being familiar with regulatory experiences and approaches in jurisdictions worldwide.<sup>87</sup>

<sup>80</sup> Damien Geradin (2018) What should EU competition policy do to address concerns raised by the Digital Platforms' market power? <https://www.competitionpolicyinternational.com/what-should-eu-competition-policy-do-to-address-the-concerns-raised-by-the-digital-platforms-market-power/>

<sup>81</sup> Financial Times (2021) UK competition regulator plans probe into Amazon's use of data, <https://www.ft.com/content/e169cee6-880d-4b8d-acf7-32c2f774f852>

<sup>82</sup> UK Competition and Markets Authority (2018) CMA's new DaTA unit: exciting opportunities for data scientists, <https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists/>

<sup>83</sup> Lina Khan (2017) Amazon's Antitrust Paradox, [https://www.yalelawjournal.org/pdf/e.710.Khan.805\\_zuvfyeh.pdf](https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf)

<sup>84</sup> WTO (2020) Defining innovation-oriented government policies and their evolution in the digital age [https://www.wto.org/english/res\\_e/booksp\\_e/wtr20\\_e/wtr20-2\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-2_e.pdf)

<sup>85</sup> Liza Quest, et al ((2021) 4 ways regulators must keep up with the global digital economy <https://www.weforum.org/agenda/2021/07/4-ways-regulators-global-digital-economy/>

<sup>86</sup> Lina Khan (2017) Amazon's Antitrust Paradox, [https://www.yalelawjournal.org/pdf/e.710.Khan.805\\_zuvfyeh.pdf](https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf)

<sup>87</sup> OECD (2021) Ex Ante Regulation and Competition in Digital Markets <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf>

4. To address the fast-paced nature of digital technology and evolving business practices and models, APEC member economies could consider ways to **increase the pace in which competition cases are processed, and the use of interim measures.**

For example, competition authorities could consider staged investigative processes, in which: i) complaints are initially examined and either rejected or formal proceedings commence within a certain time period; and then ii) proceedings are wrapped up within a reasonable time period.

5. APEC member economies could **promote cooperation and coordination between competition authorities and relevant public sector agencies responsible for broader digital regulation** (e.g., data protection authorities and digital economy ministries) to ensure fit-for-purpose policies and regulations, and responses.
6. APEC could facilitate **capacity building between economies** to address resource constraints, and ensure best practice development, adoption, and implementation of digital regulation.  
  
APEC economies could **encourage appropriate and relevant training** of all parties, including competition authority officials, to ensure ongoing use and understanding of policies and practices.
7. APEC could **promote knowledge sharing between APEC member economies** (and/or joint investigations) where digital players are present in multiple jurisdictions in order to ensure continued understanding and awareness of how digital markets are evolving.

### 7.3 Foundational requirements to ensure value of data for all

APEC economies could adopt or maintain adequate legal frameworks to protect personal information. The tools and techniques employed by digital platforms, such as how personal data is collected, used, and presented (and the use of AI algorithms),<sup>88</sup> has resulted in individualized and more convenient access to content—something that consumers have come to expect—but has also raised concerns, both in the competition policy space, and broader digital regulation.

Further, foundational data policy issues—such as consent, and processing of data—have been relatively slow to adapt to the changing realities of the digital economy. The sheer volume of data, and the enormous diversity of use cases for it, point towards the need to modify current data governance frameworks, as well as the assumptions and presuppositions which fundamentally inform those frameworks. Ensuring that such adjustments are made in ways that preserve the flexibility to develop new use cases for data while ensuring that appropriate protections are provided for data subjects, owners, and processors, will be key to ensuring an economy’s ability to address the needs of the digital age. APEC member economies noted that consumer protection and data portability requirements were key concerns, and to further build trust and enable innovation, existing data protection and privacy frameworks could be appropriately revised for the digital age.

#### Recommendations

8. APEC could consider the **development of a model data governance framework**, which encourages a holistic approach to data governance through promoting of data standards and their equivalence across member economies, robust privacy safeguards, and sets out considerations for a data sharing framework between member economies.
9. APEC member economies could **consider data portability requirements and/or interoperability**, providing consumers with greater control over their information, ability to compare products, and enable competition between service providers.
10. APEC and APEC member economies could progress **implementation of APEC CBPR** to facilitate safe, fair, and open competition in the transfer of data across borders.

This could include:

- Within APEC economies: Clarifying the benefits of participation—particularly the economic benefits—and then outlining these benefits for business, especially SMEs, through promotional campaigns to ensure understanding and increased participation;

<sup>88</sup> Federal Trade Commission (2020) FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services>

- Between APEC economies: Developing a model playbook for establishing Accountability Agents (AAs) as more member economies join CBPR; and
- Broadening the reach of CBPR: Outlining how transfer mechanisms can be extended to non-APEC economies.

## Appendix I. Case Studies

### Indonesia: Application of Policy to Digital Platform Practices

#### Who are the players involved:

Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha (KPPU)) fined Grab, who provides ride-hailing, food-delivery, courier, and digital payment services amongst others, IDR30bn (USD2m) and its car rental partner PT Teknologi Pengangkutan Indonesia (TPI) IDR19bn (USD1.3m) for discriminating against its driver-partners—resulting in monopoly practices and unfair business competition.

#### What was the core issue:

KPPU's findings revealed that Grab prioritized orders for TPI drivers, distributing less orders to non-TPI drivers. The scale of this issue spanned Greater Jakarta, Makassar, Medan and Surabaya,<sup>89</sup> This practice was seen to be discriminatory and anti-competition.

#### Why did this issue arise:

Grab and TPI had an agreement to defer car rental payment and offered cash to TPI drivers, to soften the economic fallout from the COVID-19 pandemic. This was seen as special treatment for TPI drivers, to which Grab has denied. According to a statement from Grab, this incentive was given to all driver-partners if they provided consistent quality service, and Grab promotes “productive orders” to driver-partners with strong performance records. A separate account was provided by TPI's competitor, Grab Drivers Cooperative, who have stated that they did not feel discriminated by the Grab-TPI partnership.<sup>90</sup>

#### When did this happen:

KPPU released its verdict on 2 July 2020, and Grab filed an appeal after this decision.

#### How was it resolved:

The court ruled that Grab had violated Article 14 and Article 19 (d) of Law No. 5/1999.<sup>91</sup> Article 14 states, "Business actors are prohibited from making agreements with other business actors aimed at mastering the production of a number of products included in a series of production of certain goods and or services in which each series of production is the result of processing or further processing, both in a direct or indirect series, which can result in unfair business competition and or detrimental to the community." Article 19 (d) states, "Business actors are prohibited from carrying out one or several activities, both alone and with other business actors, which may result in monopolistic practices and or unfair business competition in the form of: (d) discriminating against certain business actors."

Grab has appealed this verdict. South Jakarta District Court has since cancelled the fine for Grab and TPI on 25 September 2020. Grab's legal representative said that TPI only operated in four cities in Indonesia, with less than 10% market share. Based on Indonesia's anti-monopoly law, two or three business actors, or a group of business actors, are prohibited from controlling 75% or more of the market share of certain types of goods or services. As such, Grab was found to be not controlling the market, non-discriminatory and all fines were cancelled.<sup>92</sup>

#### What are the key learnings?

Since KPPU's verdict got overturned by the District Court, the message and tone to wider society remains unclear—was KPPU's initial verdict not supported with strong evidence, or do the District Courts present a

<sup>89</sup> The Jakarta Post (2020) Business watchdog fines Grab Rp30b for unfair business practices, <https://www.thejakartapost.com/news/2020/07/03/business-watchdog-fines-grab-rp30b-for-unfair-business-practices.html>

<sup>90</sup> The Jakarta Post, Business watchdog fines Grab Rp30b for unfair business practices, <https://www.thejakartapost.com/news/2020/07/03/business-watchdog-fines-grab-rp30b-for-unfair-business-practices.html>

<sup>91</sup> Tempo.co (2020) Court fines Grab Indonesia over illegal business practices, <https://en.tempo.co/read/1360672/court-fines-grab-indonesia-over-illegal-business-practices>

<sup>92</sup> Asia Business Law Journal (2020) Hotman grabs Indonesia competition case, <https://law.asia/hotman-wins-grab-indonesia-case/>

loophole for market players to exploit? Such cases are seen to be setting precedents and are closely watched by the industry, so there must be clarity conveyed in its rulings.

Further, the magnitude of the fines represented a very harsh penalty given out for monopolistic and unfair business practices and there were concerns that this KPPU verdict could set an unintended precedent and scare away potential investors, causing greater strain on business entities amid a global pandemic.

It's clear that as business models in the digital economy continue to evolve quickly, regulations are left trailing behind. This gap could present further challenges and uncertainty as outdated or ill-suited regulation is applied that does not achieve the desired outcomes.

## Republic of Korea: Coordination between Public Sector Agencies Required

### Who are the players involved:

The Fair Trade Commission (FTC) as the competition authority, along with the Korea Communications Commission (KCC) and the Ministry of Science and ICT (MSIT), as key digital public sector agencies, are grappling with how and in what manner to regulate digital players.

### What was the core issue:

Korea has adopted a principle of minimum regulation when it comes to Over-the-Top (OTT) providers—or digital players—and leaves it to each separate ministry to pick and choose areas that it can do well in order to revitalize the (domestic) digital market. However, this disparate approach to the promotion of competition and regulation of digital players has highlighted the need for considered coordination between agencies to effectively address emerging regulatory issues.

### Why did this issue arise:

There has been pushback from the KCC to the FTC's recent Online Platform Fairness Act, which targets digital players such as Google, Naver, and Coupang, noting that the regulation is excessive and redundant.<sup>93</sup> This has resulted in the OTT regulation bill (which aims to address unfair practices by e-commerce players) being held up.<sup>94</sup>

KCC continue its efforts to resolve the difficulties of OTT operators and to formulate policies to revitalize the market through cooperation between ministries.<sup>95</sup> KCC also issued proposed amendments to the enforcement decrees of the Information and Communications Network Act (ICNA)<sup>96</sup> and the Telecommunications Business Act (TBA) mandating Internet operators to delete and prevent distribution of illegal photos.<sup>97</sup> These revisions to the TBA may be laying the groundwork for inclusion of foreign user-generated content services within the purview of other telecommunications regulations.

Meanwhile, MSIT has amended the Enforcement Decree (ED) of the Telecommunications Business Act (TBA) to hold value-added telecommunications business operators that account for 1% or more of total domestic traffic and have over a million users to be held responsible for ensuring service stability. These include certain requirements such as working more cooperatively and closely with ISPs to inform them of traffic peaks or rerouting occurrences. Google, Netflix, Facebook together with Naver, Kakao, and Wavve have been explicitly named to be held accountable.<sup>98</sup>

### What are the key learnings?

Policymaking in the digitalised world requires a coherent, whole-of-government approach. Due to the cross-sectoral, and cross-jurisdictional, reach of digital players and digital technologies, regulation and policy making can no longer occur on a sector or agency basis (e.g., within silos), and continued communication between ministries and agencies is required in order to address cross-cutting issues and ensure fit-for-purpose policy.

Competition authorities need to put in place rules that promote clarity and certainty for the market. These rules should be based on standards and international best practice, and act as guidelines or pointers for the market—

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<sup>93</sup> The Korea Times (2021) Controversy arises over FTC's regulation on platform operators, [https://www.koreatimes.co.kr/www/tech/2021/01/133\\_303193.html](https://www.koreatimes.co.kr/www/tech/2021/01/133_303193.html)

<sup>94</sup> The Korea Herald (2021) Antitrust watchdog's bill aimed to regulate online platforms faces hurdles, <http://www.koreaherald.com/view.php?ud=20210222001063&np=1&mp=1>

<sup>95</sup> Korea Communications Commission (2021) <https://kcc.go.kr/user.do?mode=view&page=A05030000&dc=K05030000&boardId=1113&cp=1&boardSeq=50841>

<sup>96</sup> Korea Communications Commission (2021) <https://kcc.go.kr/user.do?mode=view&page=A02030900&dc=K02030900&boardId=1101&cp=1&boardSeq=49758>

<sup>97</sup> Korea Communications Commission (2021) <https://kcc.go.kr/user.do?mode=view&page=A02030900&dc=K02030900&boardId=1101&cp=1&boardSeq=49757>

<sup>98</sup> Ministry of Science and ICT (MSIT) (2020) Enforcement of the Telecommunications Business Act related to the stability of additional communication services, <https://www.msit.go.kr/bbs/view.do?sCode=user&mlId=113&mPid=112&pageIndex=&bbsSeqNo=94&nttSeqNo=3179690&searchOpt=ALL&searchTxt=>

rather than be an inflexible set of prescriptive rules that hamper innovation, and do not keep pace with technology or business models.

Prior to overhauling a specific set of rules or regulation, such as competition policy, the leadership also needs to consider whether amendments to other frameworks (such as data protection or telecommunications) may be better placed to address concerns.

## Mexico: Competition Authority Given Authority

### Who are the players involved:

Uber operates a mobile application that connects passenger users with driver users (Rides Business), through Uber Rides, and also offers on-demand delivery of food prepared and sold by restaurants that is distributed by delivery users (Eats Business), through Uber Eats. Cornershop is an on-demand delivery platform that allows users to order and buy groceries and goods from supermarkets and local retail stores (Groceries Business), through their app. These two entities intended to merge, and notified the Federal Economic Competition Commission (COFECE or Commission), which is the Mexican competition authority in charge of enforcing the Federal Economic Competition Law (LFCE) in all markets of the economy, except those in the telecommunications and broadcasting sectors.

### What was the core issue:

The Federal Telecommunications Institute (IFT), who has oversight on telecommunications and broadcasting sectors, requested the submission of the file to analyze it, contesting COFECE's competence on the matter. This generated a jurisdictional conflict between COFECE and the IFT.

### Why did this issue arise:

In June 2013, Mexico's Congress approved a constitutional amendment on competition and the telecoms sector, which resulted in the creation of two autonomous agencies: COFECE and IFT. IFT replaced the former telecoms authority with a broadened jurisdiction to become the telecoms regulator with full jurisdiction over the broadcasting and telecoms sectors, and also the competent authority for economic competition matters exclusively in these specific sectors. COFECE was appointed antitrust authority responsible for supervising, promoting, and guaranteeing free access and competition in all markets, except for the telecoms and broadcasting sectors.

Anticipating there could be cases which could affect the scope of action of both IFT and COFECE, Article 5 of the Federal Economic Competition Law establishes that in case of a jurisdictional conflict between COFECE and IFT, it would be the Collegiate Court Specialized in Economic Competition, Broadcasting and Telecoms ('Specialized Court') who would determine which authority is competent to resolve the matter in conflict.<sup>99</sup>

IFT regarded the merger application as involving two digital platforms operators, and hence should fall under their jurisdiction. They did not consider COFECE an appropriate authority to fairly investigate the Uber-Cornershop merger.<sup>100</sup> COFECE challenged this and requested the Specialized Court to resolve the dispute.

### When did this happen:

Uber announced its intention in October 2019, and that triggered the Specialized Court proceedings between COFECE and IFT. According to the aforementioned Article 5, the merger analysis should be suspended until the Specialized Court solve which authority has jurisdiction over the matter.

On 8 June 2020, the Specialized Court ruled that COFECE was the appropriate authority to investigate the proposed merger between Uber and Cornershop.

COFECE subsequently approved the merger between Uber and Cornershop on 14 December 2020.

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<sup>99</sup> International Bar Association (2021) Jurisdiction conflict between Mexican antitrust regulators (uber/cornershop case) and its impact on multi-sided digital platform, <https://www.ibanet.org/article/9F896DA8-4DF1-4065-9D92-EE2B3F361A3F>

<sup>100</sup> IFT considered having jurisdiction over the merger based mainly in the following arguments: (i) the technology and convergence evolution has made available the internet over telecommunication network, so this sector should comprehend the emission, transmission and or reception of signals, data, text, images, voice, sound or any kind of information that uses the telecommunication networks; (ii) digital platforms allow communication among users, whom emit, transmit and receive data and information over internet and through electronic and telecommunication networks; (iii) digital platforms belong to the telecommunication value chain; (iv) there is a strong interdependence of digital platforms and the telecommunication network operations; and (v) digital platforms possess common characteristics to telecommunications services.

## How was it resolved:

The Court declared that COFECE had jurisdiction over the merger, due to various considerations:

- Recognition that the telecommunications sector is not limited to concessionaires, but includes economic agents such as mobile operating systems, which have been recognized as part of the telecommunications sector;
- Services provided were not telecommunications, but logistics and intermediation services provided between users, drivers and deliverymen for markets such as people transportation, food, and groceries delivery;
- Notifying parties use the Internet as an input, which does not constitute the service of the platforms, nor does it represent the source of their income; and
- Operation of Uber and Cornershop's digital platforms is not the object of the analysis that the antitrust authority must carry out, but rather, the economic effects that such a merger could generate in the markets of each of the platforms, which do not correspond to IFT's jurisdiction.

Although there is no overlap between the main activities of Uber and Cornershop, the Commission explored the potential effects on the competition process in the face of the loss of potential competition derived from Uber's entry into the Groceries market through an acquisition, not through the development of its own platform.

The possible loss of competitive pressure from common stock holdings, and mainly from conglomerate effects, was also analyzed; focusing on creating an ecosystem where Uber could transfer the network effects of its promotions to the Groceries Business or vice versa. As a result of the analysis, it was considered that there are other economic agents that exert competitive pressure on the Groceries Business; in addition to potential competitors who could offer a competitive offer in said service in a relatively short time. Therefore, it was concluded that:

- The possible loss of a potential competitor and the possible relaxation of competition due to common shareholdings are not relevant;
- Uber would not be able to establish a profitable strategy to bundle its services in order to displace competitors or prevent them from entering the market; and
- COFECE considered that the Groceries Business has shown great dynamism, therefore, blocking the transaction would be counterproductive for the development of the market.

Since there were not enough elements to conclude that the operation would represent significant risks to competition, COFECE authorized the transaction to allow Uber and Cornershop to proceed with the merger in 2020.

## What were the key takeaways?

The Court set an important precedent in the definition of COFECE's powers regarding digital markets, by determining that the decision regarding the concentration between Uber and Cornershop corresponds to the Commission. This is relevant in the current context where commerce through digital platforms takes greater relevance in the economic life of the economy.

The Specialized Court decision clearly differentiates telecoms services with services that utilize digital platforms and internet access, and that do not belong to the IFT's sectors. Their ruling sets the tone and gives the green light for COFECE to be the authority on multi-sided market issues. This was further confirmed by the same Specialized Court, that determined that COFECE has jurisdiction over the markets of social networks, search engines (both of them considered as digital platforms) and cloud computing services.<sup>101</sup>

As digital platforms overlap with traditional industries, there will inevitably be issues that overlap, leading to disputes (even between regulators) that need to be resolved. Having a higher dispute resolution authority such as the Specialised Court in this example, to resolve matters like this promptly will be a positive signal to the market and investors.

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<sup>101</sup> This resolution comes from a jurisdictional conflict solved in July 2021 over the following markets: social networks, search engines, cloud computing services and mobile operative systems after an investigation opened by IFT in October 2020.

The evaluation of such mergers should always remain focused on outcomes for consumers. If there's a compelling benefit that increases consumer choices in the market, this factor should be strongly considered.

## Singapore: Holistic Approach to Digital Issues

### Who are the players involved:

Data protection watchdog, the Personal Data Protection Commission (PDPC), the Competition and Consumer Commission of Singapore (CCCS), and the Intellectual Property Office of Singapore, have adopted a whole-of-government and comprehensive approach to data governance.

### What was the core issue:

Singapore recognizes the value in ensuring continued innovation and competitiveness through access to data and has struck a balance with safeguarding consumer's personal data (e.g., holding organizations accountable) by amending its Personal Data Protection Act (PDPA), and studying the impacts of data analytics.

### Why did this issue arise:

Competition versus privacy is proving to be the current regulatory puzzle, and it requires multiple regulations and regulators to come into play. Singapore has acknowledged this, with the CCCS partnering up with the PDPC and the Intellectual Property Office of Singapore in a number of different avenues, including to study the implications of data analytics and sharing on competition policy and law, personal data protection regulation and intellectual property law in Singapore,<sup>102</sup> and on data portability.<sup>103</sup>

Further, it was noted that the PDPA needed to be amended to remain a valuable tool in holding organizations accountable. For example, Grab—a super app<sup>104</sup> that controls large volumes of personal data— was previously only being fined SGD10,000 (USD7,499) for its fourth privacy violation where as part of an app update, around 5,000 drivers' profile data was exposed before the app was rolled back to previous version and additional remedial action was taken.<sup>105</sup> The PDPC commented that Grab did not initially put in place sufficiently robust processes to manage app changes that potentially put personal data at risk. Although data breaches can be an expected outcome of managing large volumes of personal data, this is Grab's fourth violation (and second time making a very similar mistake albeit in a different part of the system).

### When did this happen:

The joint initial studies were finalized in 2019, with the PDPA being recently amended in 2021.

### How was it resolved:

Amendments to the PDPA include:

- Mandatory data breach requirements (if breach is likely to result in significant harm or impact, or is of a significant scale).
- Enhanced enforcement powers, including an increased financial penalty cap for data breaches up to 10% of an organization's annual turnover where such turnover exceeds SGD10 million or, in any other case, SGD1 million.
- Data portability obligations, giving individuals the ability to request the transmission of their data to another service provider (further technical, security, and consumer protection requirements to be set out in a forthcoming regulation).
- Recognition that any recipient holding a specified certification, such as the APEC Cross-Border Privacy Rules (CBPR) System and Privacy Recognition for Processors (PRP) System certifications, are considered to provide comparable protection to that under the PDPA.<sup>45</sup> This clarification

<sup>102</sup> CCCS (2019) Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights, <https://www.cccs.gov.sg/resources/publications/occasional-research-papers/data-engine-for-growth>

<sup>103</sup> CCCS (2019) Discussion Paper on Data Portability: Personal Data Protection Commission In collaboration with Competition and Consumer Commission of Singapore, <https://www.cccs.gov.sg/resources/publications/occasional-research-papers/pdpc-cccs-data-portability>

<sup>104</sup> As there is no specific definition of what constitutes a 'super app', the term is used to broadly describe a single portal to a wide range of virtual products and services

<sup>105</sup> Channel News Asia (2020) GrabCar fined S\$10,000 for 4<sup>th</sup> user data privacy violation, <https://www.channelnewsasia.com/news/business/grab-car-hitch-pdpc-personal-data-risk-fine-13108144>

ensures organizations can transfer personal data overseas without meeting additional requirements.

### What are the key takeaways?

This change brings Singapore in line with international standards and strikes a balance between the need for greater data protection and not obstructing innovation. This sentiment was echoed by the Communications and Information Minister S. Iswaran, "Consumers must have the confidence that their personal data will be secure and used responsibly... (and) organizations need certainty to harness personal data for legitimate purposes, with the requisite safeguards and accountability... The proposed amendments to the (Bill) seek to strike this balance."<sup>106</sup>

It is clear that a whole-of-government approach can be very effective in driving change in this area, striking a balance between safeguarding consumer's personal data and ensuring continued innovation and competitiveness. Further, in this fast-changing digital economy, high volumes of data will inevitably continue to be generated. Data protection laws need to be reviewed from time to time, to keep up and respond quickly.

This collaboration between the privacy commission and competition authority has also enabled CCCS to pre-empt digital issues and propose amendments to CCCS guidelines, including updating:

- *CCCS Guidelines on Market Definition* to provide greater clarity on issues related to market definition that may be relevant in the digital era;
- *CCCS Guidelines on the Section 47 Prohibition* (prohibition of an abuse of a dominant position) to provide greater clarity on issues relating to the assessment of market power and types of potentially abusive conduct in the digital era;
- *CCCS Guidelines on Substantive Assessment of Mergers* to provide greater clarity on issues relating to the assessment of competition issues in mergers involving digital companies.

Effective collaboration and coordination has enabled a whole-of-government approach to digital policymaking to be adopted and implemented by key agencies.

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<sup>106</sup> Ashurst (2020) Amendments to Singapore's Personal Data Protection Act, <https://www.ashurst.com/en/news-and-insights/legal-updates/amendments-to-singapore-s-personal-data-protection-act/>

## Appendix II. APEC Economy Survey Responses<sup>107</sup>

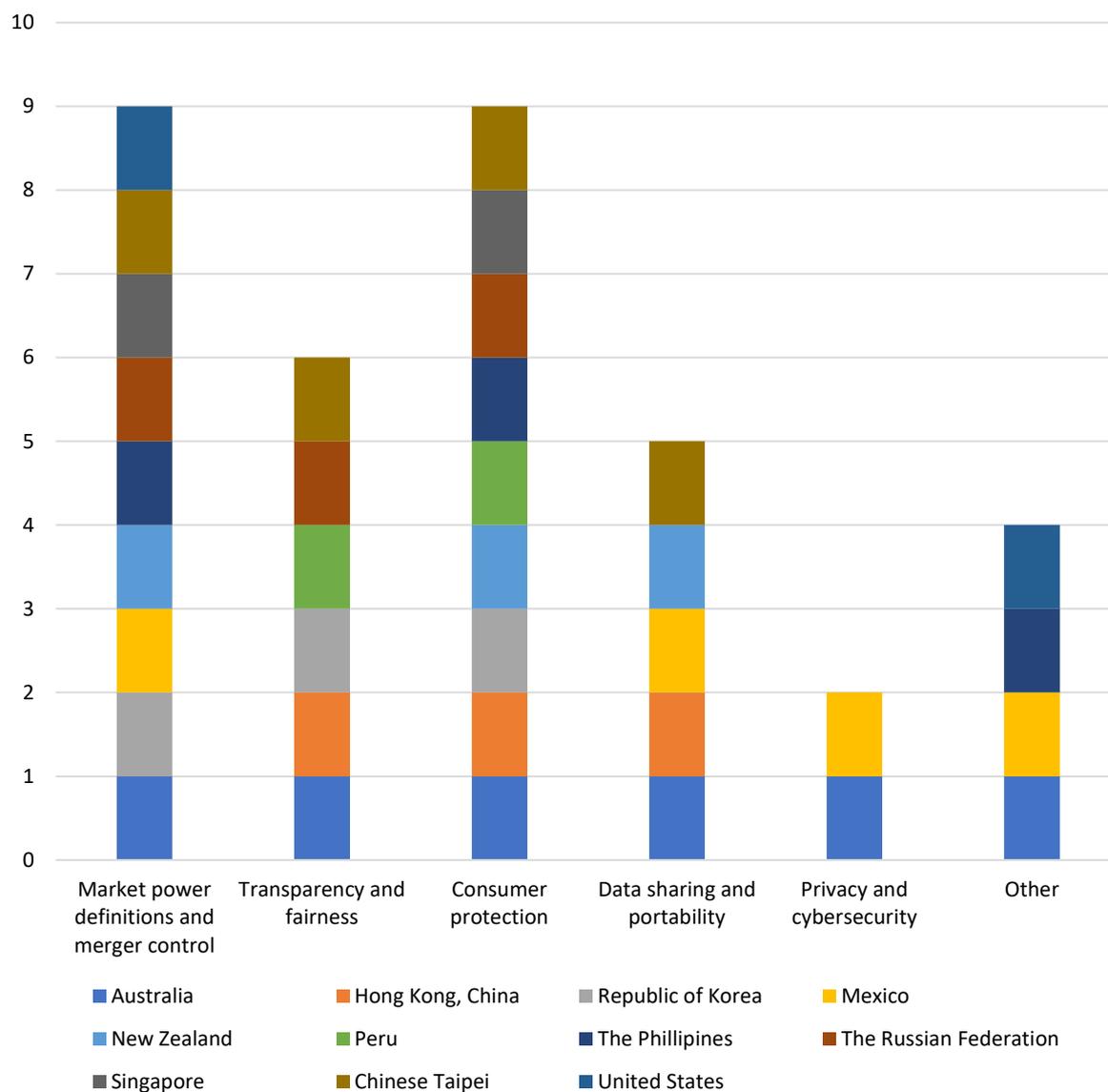
APEC Economy	Member	1. Existing competition laws and regulations
Australia		<a href="#">Competition and Consumer Act 2010 (CCA)</a> .
Hong Kong, China		<a href="#">Cap. 619 Competition Ordinance</a> (2015).
Republic of Korea		<a href="#">Monopoly Regulation and Fair Trade Act (MRFTA)</a> .
Mexico		<a href="#">Political Constitution of the United Mexican States, article 28</a> . The <a href="#">Federal Economic Competition Law (LFCE)</a> . Regulatory provisions, guidelines, technical criteria issued by the competition authorities, and competition chapters of Free Trade Agreements signed and ratified by Mexico.
New Zealand		<a href="#">The Commerce Act 1986</a> .
Peru		The current Competition Act, Legislative Decree 1034 for the Repression of Anticompetitive conducts, was enacted in 2008 and with its amendments was consolidated in <a href="#">Supreme Decree 030-2019</a> . The Premerger Review System Act and complementary regulation came into force in May 2021.
The Philippines		The <a href="#">Philippine Competition Act (PCA)</a> of 2015. See also the <a href="#">Implementing Rules and Regulations (IRR) of the PCA</a> as well as the <a href="#">2017 Philippine Competition Commission Rules of Procedure and Rules on Merger Procedure</a> supplement the PCA.
The Russian Federation		<a href="#">Federal Law as of July 26, 2006 No. 135-FZ "On Protection of Competition" (the Law on Protection of Competition)</a> .
Singapore		<a href="#">Competition Act</a> .
Chinese Taipei		<a href="#">Fair Trade Act (FTA)</a> .
United States		The <a href="#">Sherman Act</a> , <a href="#">Clayton Act</a> , and <a href="#">Federal Trade Commission (FTC) Act</a> . Some industries also are subject to sector-specific regulation that considers competition.

<sup>107</sup> APEC member economy responses have been summarized.

APEC Economy Member	2. Existing competition laws' applicability to digital markets
<b>Australia</b>	Yes, and there are specific regimes under the CCA relating to digital markets that are tangentially related Australia's competition laws. Notably these are the Consumer Data Right (CDR) and a new mandatory industry code of conduct regulated by the ACCC.
<b>Hong Kong, China</b>	Yes. The CO is applied to all sectors. However, the application of the merger rule is limited to the telecommunications sector (specifically, cases involving undertakings which hold a "carrier licence" under the Telecommunications Ordinance).
<b>Republic of Korea</b>	Yes.
<b>Mexico</b>	Yes. In accordance with article 1 of the Federal Economic Competition Law (LFCE), this law is applicable to all areas of economic activity (including digital markets), and its compliance is mandatory in the Mexican Republic.
<b>New Zealand</b>	Yes
<b>Peru</b>	[Yes.] The competition regulation applies to digital market as well as any other market in the Peruvian economy.
<b>The Philippines</b>	Yes. The PCA and the abovementioned rules and regulations are enforceable against any person or entity engaged in any trade or business.
<b>The Russian Federation</b>	[Yes.] The Russian antimonopoly legislation does not contain any industry-specific or other exceptions and is applied to economic entities in the same way and to the same extent, regardless of the organizational and legal form and place of registration of such entities.
<b>Singapore</b>	Yes.
<b>Chinese Taipei</b>	Yes. Currently, provisions have sufficiently captured such practices.
<b>United States</b>	Yes, our competition laws apply to digital markets. Specific industries that might be characterized as comprising "digital markets" may be subject to sector-specific regulation that considers competition.

<b>APEC Economy</b>	<b>Member</b>	<b>3. Aspects of competition law and regulation in digital markets that are unique to the economy.</b>
<b>Australia</b>		The CDR and the <a href="#">News Media Bargaining Code (NMBC)</a> .
<b>Hong Kong, China</b>		Given the merger rule is only applied to the telecommunications sector, the Commission has no statutory power to review any merger and acquisition cases in digital and other markets where an undertaking that directly or indirectly holds a “carrier licence” within the meaning of the Telecommunications Ordinance is involved.
<b>Republic of Korea</b>		Not listed.
<b>Mexico</b>		The Mexican economy has experienced the entry of some tech giants, causing competitive pressures for traditional firms. This competition is expected to have benefits insofar as it may contest already-existing monopolies. Authorities are also aware that there may come a tipping point, where regulation becomes necessary.
<b>New Zealand</b>		Not listed.
<b>Peru</b>		The Peruvian market has a limited digital presence, mainly due to deficiencies in accessibility and infrastructure. Whilst there is a growing number of entrepreneurs and start-ups that provide added value to the financial products and services traditionally offered, few fintechs have set up in Peru.
<b>The Philippines</b>		Consumer protection mandates are vested in other sector regulators. In order to improve competition in the digital market, a synergy between the competition authority and sector regulators is necessary.
<b>The Russian Federation</b>		The basis of companies’ market power and their ability to influence markets, monopolize industries, by linking them to digital platforms has significantly changed. The validity of some immunities is in question since they can contribute to abuse in digital markets and possible evasion of responsibility.
<b>Singapore</b>		Nil.
<b>Chinese Taipei</b>		Understanding of the characteristics of the digital economy industry; definition of relevant markets; application of economic analysis methods and tools; merger and anti-competitive practices; evaluation and analysis of the pros and cons of market competition.
<b>United States</b>		The United States’ economy has produced several of the largest and most innovative firms operating in digital markets, including Google, Facebook, Amazon, Apple, and Microsoft.

#### 4. Key issues for the economy in relation to competition law and regulation in digital markets



APEC Economy	Member	4. Other Responses
Australia		Media
Mexico		Competition for the market, zero-price, collusion, and algorithms. Regulation of social networks services; platforms interoperability; the use of competition policy tools vs ex ante regulation.
The Philippines		Digital infrastructure and affordability
United States		US FTC addresses consumer protection and privacy issues through specific consumer protection laws, regulations, and sections of the FTC Act.

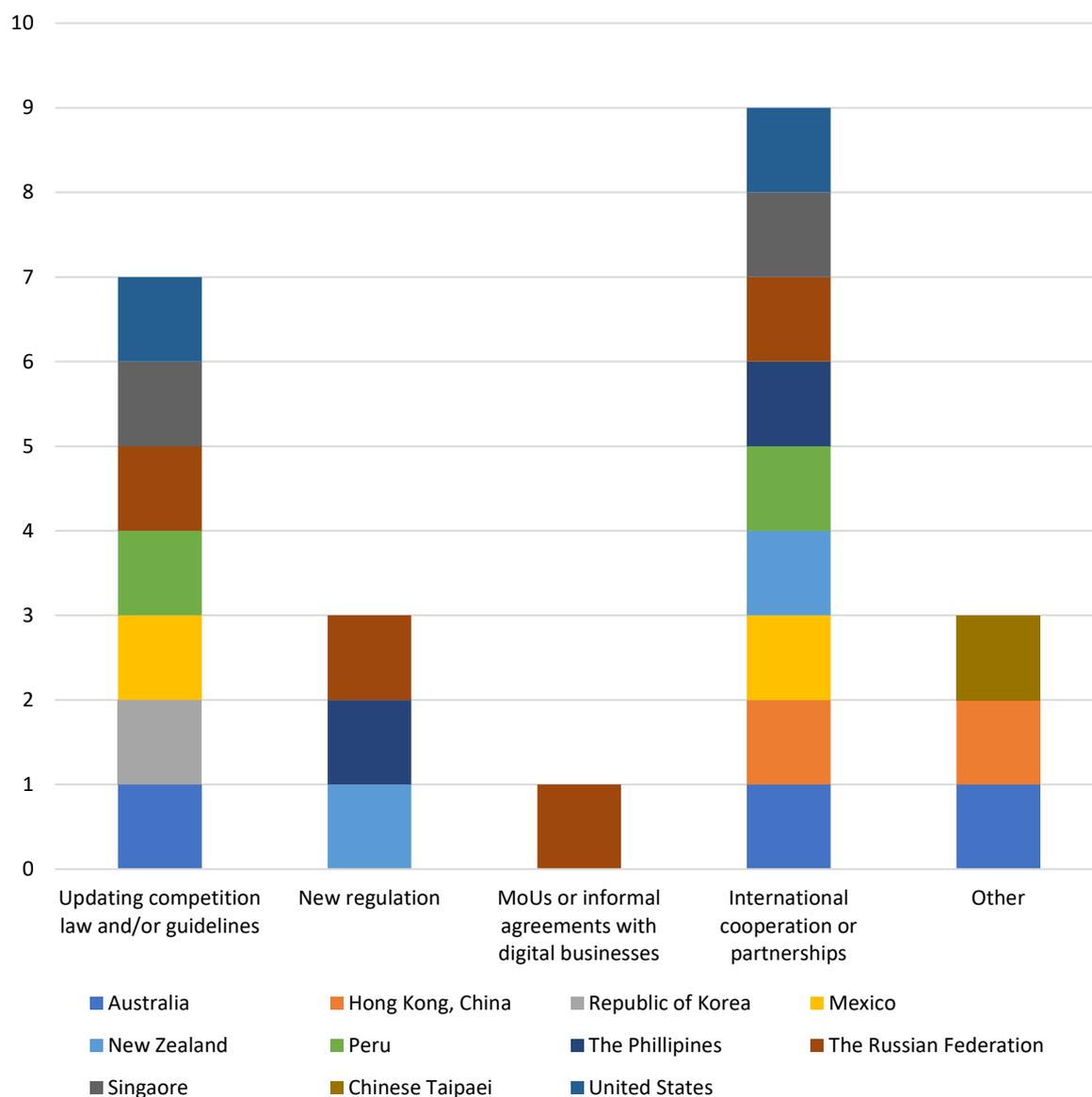
APEC Economy	Member	5. Rationale for identification of key issues
<b>Australia</b>	<p>The <a href="#">ACCC's Digital Platforms Inquiry (DPI) Final Report</a> found that digital platforms such as Google and Facebook enjoy substantial market power with high barriers to entry and expansion in the markets for the supply of general search and search advertising services (Google), and for the supply of social media services and display advertising (Facebook). There are also consumer privacy issues at stake.</p> <p>Data sharing and portability is a key issue in Australia because of the potential for it to enhance competition in digital markets, leading to better consumer outcomes. This was the main impetus for the creation of the CDR.</p>	
<b>Hong Kong, China</b>	Not listed.	
<b>Republic of Korea</b>	There are new types of anti-competitive practices and consumer harm caused by network effects and tipping effects in digital markets.	
<b>Mexico</b>	<p>Concentration of market power is entrenched by biased consumer behavior, such as the tendency to favor status quo or due to the costs of migrating information from one platform to another. Companies can wield market to exploit consumer data and information to prevent further competition in the market. Deterring 'killer acquisitions' also presents an analytical challenge since the company to be acquired is at too early a development stage to accurately determine if it will be competitive. Additionally, the traditional toolkit used to define relevant markets may not useful when zero-price arrangements exist.</p> <p>The use of algorithms fed by large amounts of data might increase the companies' capacity to fix prices or collude, even without the need of human intervention.</p> <p>Digitization has changed the dynamics of markets and the relationship between economic agents. Agents in the digital ecosystem compete through the development of new business models, which creates new markets and leads to the redefinition of the limits of relevant markets. New bottlenecks or barriers to essential inputs may appear, related to data, switching costs and vertical integration of new agents in the digital value chain. Therefore, the relationship between competition policy and regulation, in order to tackle concerns about aspects of digital services, such as privacy, cybersecurity, protection of users' rights and trust, innovation, and ex ante regulatory regimes is essential.</p>	
<b>New Zealand</b>	There are several concerns about how current regulatory settings, or a lack of settings in some cases, may be hindering consumer data portability in New Zealand. In some markets, digital and otherwise, this is leading to lower levels of competition and worse consumer outcomes than is ideal.	
<b>Peru</b>	<p>Regarding transparency and fairness, it is important to mention that digital markets are growing and evolving in Perú, especially after the COVID-19 pandemic. However, there are still relevant issues that need to be addressed such as the need of measures that will facilitate consumers' ability to search and compare products in digital markets.</p> <p>In addition, measures that will provide information to consumers and will reduce the effects of information asymmetry are needed (transparency of fees, charges, and product features, among others).</p>	
<b>The Philippines</b>	<p>It is difficult to define markets which are in constant flux, and whose geographic market is uncertain. There are also high barriers to entry in digital platforms.</p> <p>As for consumer protection, development in technology is very fast paced. Legislators must catch-up in enacting laws that would protect consumers in the digital market.</p>	

	<p>The issue of lack of digital infrastructure and cost can be attributed to barriers to entry. Currently, the restrictions on investment and the requirement of a franchise limit the participation of foreign firms resulting in high cost of internet and low number of telecommunications infrastructures in the Philippines (e.g., cell towers).</p>
<b>The Russian Federation</b>	<p>Assessing the market position of companies can present many challenges, including gauging the market power of a digital platform.</p> <p>Network effects can serve as a serious obstacle to entering the market. The condition for entering the market is the achievement of a certain level of demand, a certain number of customers, comparable to the network effect achieved by a competitor.</p> <p>In modern conditions it is important for competition authorities around the world, including the FAS Russia, to consider the impact of the results of the transaction on adjacent markets, the development of which is greatly influenced by innovative technologies.</p>
<b>Singapore</b>	<p>The unique features of data-driven markets, such as network effects, multi-homing, availability and access to substitute data and the dynamism of digital markets, make assessing market power challenging.</p> <p>The objectives of data portability and competition policy are aligned, in that consumers potentially benefit from having individual rights to data portability while market competition is enhanced by the existence of such rights.</p> <p>A data portability requirement could lower the barriers to entry and expansion, thereby enhancing competition.</p>
<b>Chinese Taipei</b>	<p>Law enforcement can be challenging to apply to two-sided or multi-sided platforms.</p> <p>Large platforms' acquisitions of start-ups may hinder competition.</p> <p>Competition issues on data have also been discussed in international forums. For example, the ability of Big Tech businesses in data collection, analysis and usage, data portability, data interoperability, transparency, and fairness.</p>
<b>United States</b>	<p>US competition law is focused on preventing the improper exercise of market power, whether acquired by merger or exercised through unilateral or coordinated conduct. Other issues, such as transparency and fairness, consumer protection, data sharing and portability, and privacy and cybersecurity are the subject of other laws and regulations. Although some sector-specific regulation may address these issues; the focus of US competition law is on limiting the improper exercise of market power.</p>

APEC Economy	Member	6. Economy's response to these key issues
<b>Australia</b>	<p>The <a href="#">ACCC's Digital Platforms Inquiry Final Report</a> recommends changes to Section 50(3) of the Competition and Consumer Act 2010 CCA's merger law.</p> <p>Several options for addressing competition, transparency and fairness are being considered, including new legislation against self-preferencing, promoting data portability, and the creation of an ombudsman for digital transparency.</p> <p>The ACCC also recommended amending the Australian Consumer Law to include a prohibition on unfair trading practices., and the introduction of an enforceable code of conduct for digital platforms.</p> <p>Consumer Data Right (CDR) was introduced to improve data portability.</p> <p>In February 2021, the News Media Bargaining Code was introduced to require digital platforms to share data with news media businesses, among other commitments.</p>	
<b>Hong Kong, China</b>	N/A	
<b>Republic of Korea</b>	<p>The KFTC plans to establish norms to promote fair transactions in digital market. Therefore, the KFTC proposed the Act on Fair Intermediate Transactions on Online Platforms (the Online Platform Act) and will work on a complete revision of the E-commerce Act.</p>	
<b>Mexico</b>	<p>In 2020, COFECE launched its <a href="#">Digital Strategy</a>. As part of this, a General Directorate of Digital Markets was created, with the aim of analyzing and regulating the digitization of the Mexican economy.</p> <p>A new Digital Markets Unit is responsible for analyzing the development of digital markets and their implications for competition, in tandem with other departments.</p> <p>The IFT published a <a href="#">Roadmap 2021-2025</a> to establish the temporary framework that will focus its actions and vision for the next years, following the principles of transparency and certainty. The Objective 2 of this Roadmap is to "Promote economic competition and free concurrence in the Telecommunications and Broadcasting (T&amp;B) sectors in the context of the digital ecosystem". In this regard, a strategy has been set to provide an environment for effective competition through monitoring and analyzing the markets in the T&amp;B sectors, in the context of the digital ecosystem, considering new technologies and business models in the digital markets, within the scope of attributions of the IFT.</p>	
<b>New Zealand</b>	<p>The New Zealand government is seeking to cooperate with other economies to improve enforcement of consumer protection law in cross-border business-to-consumer transactions.</p> <p>The Government released a discussion document on options for establishing a consumer data right in New Zealand. Establishing a consumer data right is expected to assist with the growth of the digital economy and in some digital markets provide conditions for greater competition. The Government is currently considering the appropriate model for implementing a consumer data right.</p>	
<b>Peru</b>	<p>The Technical Secretariat of the Commission for the Defense of Free Competition of Indecopi has been focusing on the payment card system. In that context, Indecopi has published its <a href="#">Preliminary Version of the Market Study of the Payment Card System</a> in Peru, which analyzes the existing competition conditions and provides recommendations to improve competition in that market. Moreover, the Technical Secretariat is planning to start an investigation into the fintech market, to analyze the factors that currently affect the conditions of competition in that market.</p>	

<p><b>The Philippines</b></p>	<p>The Philippines is responding to these key issues by enacting laws and regulations that would remove barriers to entry and enforce consumer protection in the digital market. One legislation currently pending is the Internet Transactions Act which aims to promote e-commerce in the economy, ensure fair business practices and promote secure online transactions. The Congress is also in the process of amending the Public Service Act which would lessen the barriers to entry by allowing foreign ownership to telecommunications and other public utilities.</p> <p>The Philippines is also in the process of adopting a domestic competition policy that would promote competition in the digital market. The domestic competition policy will direct sector regulators to review existing and future rules and regulations to ensure that these rules and regulations are pro-competition.</p>
<p><b>The Russian Federation</b></p>	<p>Amendments to the <a href="#">Law on Protection of Competition</a> are designed to ensure more effective application of antimonopoly law to actions in digital markets.</p> <p>New criteria for the "dominant position" in the digital markets will apply, factoring in data portability, economies of scale, and access to competitively relevant data. These antimonopoly rules will not apply to startups or small companies with the annual revenue of less than 400 million rubles.</p> <p>Over the past 6 years, FAS Russia have acted against Google, Samsung, Bayer and Monsanto, LG, JSC Solid-Commodity Markets and LLC A-Oil for a variety of anti-competitive practices with digital aspects or implications.</p>
<p><b>Singapore</b></p>	<p>Market studies, such as the <a href="#">Market Study on the Online Travel Booking Sector in Singapore</a> and the <a href="#">Market Study on E-commerce Platforms</a> have helped CCCS monitor digital developments.</p> <p>CCCS has partnered with Personal Data Protection Commission and Intellectual Property Office of Singapore to study the implications of data analytics and sharing on competition policy and law, personal data protection regulation and intellectual property law in Singapore, which culminated in the publication of <a href="#">a paper</a>. CCCS also partnered with PDPC for a <a href="#">Discussion Paper on Data Portability</a>.</p> <p>In 2020, CCCS issued the <a href="#">Guidance on Price Transparency</a> to provide greater clarity to suppliers on drip pricing, price comparison, discounts and use of the term “free”, which are commonly used by suppliers in e-commerce and could potentially mislead consumers.</p>
<p><b>Chinese Taipei</b></p>	<p>Set up a “Digital Economy and Competition Policy Task Force” and hold regular meetings to conduct a comprehensive study of economic and legal issues arising from emerging business models in the digital era, as well as collect and consolidate domestic and foreign expertise to serve as a reference for law enforcement and policy formulation.</p> <p>Conduct commissioned studies to invite scholars and experts to research on competition issues arising from digital economy and provide relevant suggestions on how to respond to the impact of competition brought by the digital market.</p>
<p><b>United States</b></p>	<p>DOJ and FTC are conducting investigations and bringing enforcement actions against companies that improperly exercise market power, including companies in digital markets. In addition, lawmakers in the United States have proposed new federal legislation intended to address market power and other issues related to digital markets.</p>

### 7. Measures considered to address competition and regulatory issues in digital markets



APEC Economy	Member	7. Other Responses
Australia		ACCC News Bargaining Code
Hong Kong, China		Dialogues with other local regulators such as those responsible for personal data privacy and consumer protection.
Mexico		Competition advocacy; inter-institutional collaboration.
Chinese Taipei		Collected foreign information for research and analysis and serve as a reference for law enforcement.
United States		Enforcement actions.

APEC Economy	Member	8. Rationale for these measures, the specific issues addressed, and their effectiveness
<b>Australia</b>		<p>Several measures to strengthen Australia's Privacy Act laws are being considered, including updating the definition of personal information, strengthening notification and consent requirements, and introducing direct rights for individuals to bring class actions before courts to seek compensation for Privacy Act infringements.</p> <p>The ACCC is party to the Multilateral Mutual Assistance and Cooperation (MMAC) Agreement, between the competition agencies of Australia, Canada, New Zealand, United Kingdom, and the United States, to facilitate the provision of mutual assistance, sharing of confidential information, executing searches and seizures and cross-border evidence gathering</p>
<b>Hong Kong, China</b>		<p>The Commission has participated in a tripartite discussion with the consumer protection and personal data privacy protection agencies in HKC, deepening the Commission's understanding of these issues.</p> <p>In its research into the matters, the Commission often refers to reports and studies conducted by our overseas counterparts and international/ regional organizations such as APEC and International Competition Network (ICN). The Commission has also reached out to its overseas counterparts for knowledge and experience sharing on a need basis.</p>
<b>Republic of Korea</b>		<p>The Online Platform Act that the KFTC proposed mandates platforms above a certain revenue threshold to write a contract including essential terms such as standard charging service fees. Also, it obligates platforms to notify the online stores in advance when changing the contract terms, or restricting or terminating the services. And through revision of the E-commerce Act, the KFTC will ensure that platforms fulfil their due responsibility to protect consumers in digital market.</p>
<b>Mexico</b>		<p>COFECE has begun a series of internal discussions to determine some of the challenges in digital markets (market definition, remedies, zero price, self-preferencing, among others) with a view to updating the Regulatory Provisions of the Federal Competition Law.</p> <p>Regarding the new regulation, despite the international discussion being in an early phase, the international discussion and experience is moving in a fast pace. At this moment, in addition to the internal discussions, COFECE is also analyzing the evolution of the international discussion and actions towards regulation.</p> <p>The IFT is empowered to implement any of the measures marked above according to its legal framework. It may issue new guidelines, regulation, international cooperation, advocacy and inter-institutional collaboration initiatives with national and international entities for the development and the promotion of economic competition of the telecommunications and broadcasting (T&amp;B) sectors and the digital ecosystem, in digital services and contents provided over the T&amp;B networks and over the Internet.</p> <p>The Board of IFT issues all guidelines and regulations after a process of public consultation. These actions are included in IFT's Annual Work Plan (PAT, by its acronym in Spanish), which is also issued by the Board at the beginning of every year, listing all the projects that will be carried out by the IFT. The Strategic Planning Bureau of IFT sets the indicators to monitor the implementation of projects and to evaluate their progress. Main IFT's developments may be found in the PAT.</p>
<b>New Zealand</b>		<p>In terms of international co-operation given the global nature of digital markets agency co-ordination and collaboration is very important. This can be simply drawing upon expertise in digital markets. It might involve co-ordination on solutions.</p>
<b>Peru</b>		<p>The elaboration of guidelines and market studies analyzing competition in digital markets would be useful for consumers, companies and for the competition authority</p>

	<p>itself to evaluate the competition conditions in the Peruvian digital market and issue recommendations. It also allows us to take account the experiences and comments of the stakeholders and, as a result, spur discussion for improving the competition conditions in dynamic markets.</p> <p>On the other hand, through international cooperation, our competition authority can learn from more experienced competition authorities about market definition and antitrust cases.</p>
<b>The Philippines</b>	<p>Current laws in competition and consumer protection may not be enough to address the issues and concern regarding digital markets. There must be a review of current legislation to ensure that digital companies do not abuse their dominance in the market and that consumers are protected.</p> <p>International cooperation and partnerships are important since transactions in the digital market are cross border. Consumers in the Philippines now have access to merchants all over the world and vice-versa. Referral or notifications by other jurisdictions as well as data sharing subject to privacy laws are helpful in the investigation of anticompetitive acts in the market.</p>
<b>The Russian Federation</b>	<p>The fifth antimonopoly package shall solve problems of digital economy and adaptation of antimonopoly regulation.</p> <p>In 2016 the FAS Russia developed a basic document that enshrines the principles of net neutrality, ensuring the open and non-discriminatory use of the Internet to distribute and gain access to information and services, although the document does not have the highest legal power.</p> <p>FAS has worked with the BRICS competition authorities to pay special attention to the identification and suppression of digital cartels concluded by using special algorithms and robots. This task is assigned to the BRICS Working Group on Cartels, established in 2019.</p>
<b>Singapore</b>	<p>CCCS has completed the public consultation on the updates to the CCCS Guidelines to provide greater clarity to businesses regarding market definition for cases involving multi-sided platforms and/or digital companies, assessment of market power and types of potentially abusive conduct in the digital era, and CCCS's assessment of merger and acquisitions involving digital platforms.</p> <p>At the government level, Digital Economy Agreements or "DEAs" are being negotiated to establish digital trade rules and digital economy collaborations between two or more economies.</p>
<b>Chinese Taipei</b>	<p>The regulation of the digital market is a new topic that involves cross-industry and cross-border. It is still necessary to refer to foreign enforcement situations and comprehensive assessments in order to formulate policy directions.</p> <p>The operation of the "Digital Economy and Competition Policy Task Force" pays close attention to the digital economy issues such as big data, algorithms, platform operators, and the global trend of competition regulations related to digital economy.</p>
<b>United States</b>	<p>With respect to efforts undertaken by the US competition agencies, DOJ and FTC have announced enforcement actions against leading digital platforms Google and Facebook, respectively.</p> <p>US lawmakers are currently considering legislative reforms to competition law, though this process is in the early stages. Some of the proposals include lowering the standard that the antitrust enforcers must meet in order to challenge mergers, creating presumptions that would shift the burden from the government to the merging parties, creating a new offense of "exclusionary conduct," and imposing new civil penalties for exclusionary conduct.</p>

APEC Economy Member	9. Effect of COVID-19 on competition issues in relation to digital markets
<b>Australia</b>	<p>It further highlighted the market power imbalances in digital platform markets. Online social media and private messaging were already characterized by high levels of concentration prior to the pandemic.</p> <p>The financial pressure that COVID-19 placed on Australian news businesses due to reduced advertising revenue also accelerated the development of the mandatory code of conduct to address the bargaining power imbalance between these businesses and major digital platforms.</p>
<b>Hong Kong, China</b>	No.
<b>Republic of Korea</b>	There has been an acceleration towards the digital and contactless economy driven by COVID-19. Accordingly, concerns are raised that platform giants are likely to abuse their monopoly power in digital market or misuse personal information.
<b>Mexico</b>	<p>The measures in response to COVID-19 implemented by governments around the world, such as lockdowns, social distancing policies and working from home, have accelerated the digitalization of the economy, and certainly generated a greater dynamism in the digital markets.</p> <p>COFECE has been attentive to these developments and to competition concerns that could be raised in these markets. Thus, in 2020, the Commission initiated an investigation for possible anticompetitive conducts in the market for digital advertising; and cleared a merger between the digital platforms Uber and Cornershop.</p> <p>The IFT faced the COVID-19 pandemic using its regulatory and competition powers to collaborate and supervise anticompetitive conducts in the telecommunications industry, to ensure the continuity of mobile and fixed communications and broadcasting services, and to adapt its procedures in order to support the digitalization of services and other economic activities, including health and education. The IFT also enabled competition procedures, related to merger control and the provision of general guidance on competition issues, through electronic means.</p>
<b>New Zealand</b>	COVID-19 has highlighted the need to enable markets to move to digital in order to serve consumers more effectively and remotely.
<b>Peru</b>	The COVID-19 pandemic has increased the growth on ecommerce and digital payment mechanisms.
<b>The Philippines</b>	With the implementation of lockdowns, there is a surge of activity related to e-commerce. More people have made their purchases online. Due to this, there is also a surge in demand for delivery services for food and small packages. Likewise, there is also an increase in the usage of digital payment platforms and use of e-wallet.
<b>The Russian Federation</b>	<p>Those businesses most adapted to the pandemic were those equipped with digital technologies. Conversely, enterprises that were less adaptable due to the specifics of their activity have already taken significant losses during the period of forced downtime or are forced to start bankruptcy procedures and stop their activities.</p> <p>Even as the coronavirus pandemic isolated several economies, it also allowed enterprises in different sectors of the economy to discover a "new plane" of opportunities.</p>

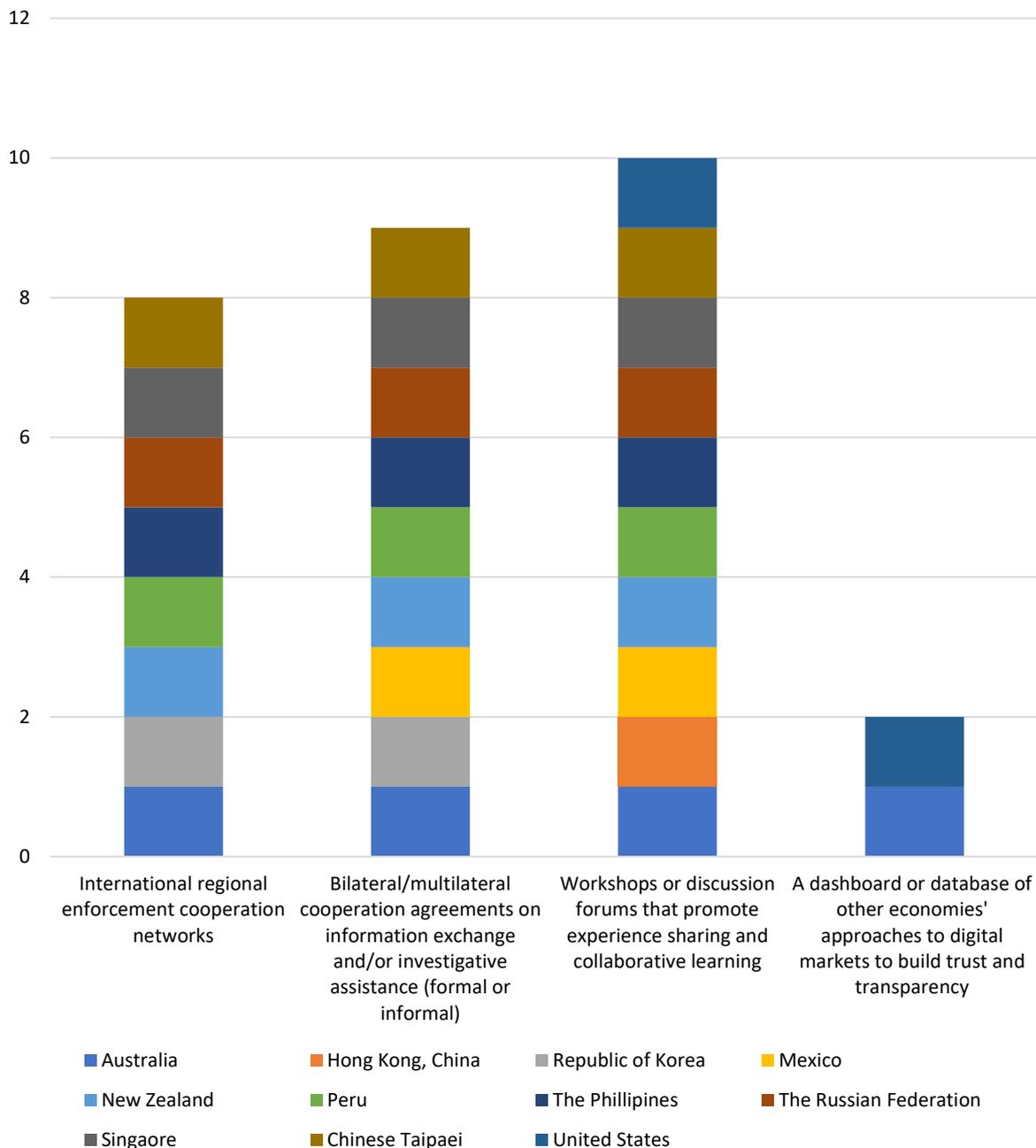
<b>Singapore</b>	Growth and market share of e-commerce platforms could escalate very quickly thus giving them market power to charge higher fees. During COVID-19, the growth and market share of these e-commerce platforms grew as businesses have to use these platforms, especially those with larger consumer reach, in order to survive. This resulted in businesses having little bargaining power in the fees and the terms & conditions when using these e-commerce platforms. While there are other e-commerce platforms which the businesses can use, these other platforms do not have the extensive consumer reach as the bigger e-commerce platforms.
<b>Chinese Taipei</b>	No.
<b>United States</b>	No.

<b>APEC Economy</b>	<b>Member</b>	<b>10. New competition law or regulatory measures being considered to help respond to the impacts of COVID-19</b>
<b>Australia</b>		No.
<b>Hong Kong, China</b>		No.
<b>Republic of Korea</b>		Not answered.
<b>Mexico</b>		<p>Yes, some proceedings and liaisons between businesses and the competition agency have been digitalized.</p> <p>In Mexico, the legislative power can initiate and approve any procedure for law creation or modification. The IFT is empowered to issue any technical guidelines for the substantiation of its attributions, established in the LFCE. As a timely measure given the Covid-19 mobility restrictions, in the PAT 2021, the IFT has scheduled the development of the: "Guidelines for the substantiation, by electronic means, of the investigations carried out by the Investigative Authority of the IFT".</p>
<b>New Zealand</b>		A technical amendment was made to the Commerce Act to allow the Commerce Commission to fast-track applications for authorization of arrangements that might lessen competition but which the applicants believe would be in the public interest.
<b>Peru</b>		Indecopi is preparing a regulatory proposal to clarify certain regulatory gaps in consumer protection, including the right to "repent" for purchases made via the Internet. More information can be found <a href="#">here</a> .
<b>The Philippines</b>		The PCC is monitoring the surge of activities and its effects in the digital market. The PCC continues to coordinate with sector regulators in order to promote competition in the digital market.
<b>The Russian Federation</b>		The issues of antimonopoly regulation of digital markets and the circulation of information remained unresolved. This aspect is planned to be covered in the fifth antimonopoly package.
<b>Singapore</b>		No, the current competition law or regulatory measures are sufficient to respond to the impact of COVID-19.
<b>Chinese Taipei</b>		No.
<b>United States</b>		There are no proposals for new competition laws or regulatory measures to help respond to the impacts of covid-19. DOJ and FTC have used their existing tools with success and continue to engage with relevant regulatory agencies.

APEC Economy	Member	11. Cross border collaboration initiatives to improve competition and consumer outcomes in digital markets
<b>Australia</b>	<p>The ACCC is part of a data analytics working group to discuss initiatives, such as the creation of digital web scrapping tools, developing cartels screening tools and analyzing algorithms.</p> <p>The Multilateral Mutual Assistance and Cooperation (MMAC) Agreement aims to improve competition and consumer outcomes in digital markets through information-sharing and collaboration on investigations while the ICN Intersection Project provides cross border collaboration between agencies. The ACCC has also taken part in webinars with different agencies to discuss digital regulatory policy options through the International Competition Network (ICN).</p>	
<b>Hong Kong, China</b>	<p>As mentioned above, for capacity building purposes, the Commission has participated in various workshops/ webinars organized by overseas enforcers and regional/ international organizations. The Commission has also spoken with its overseas agencies to exchange knowledge and experience when necessary.</p>	
<b>Republic of Korea</b>	<p>The KFTC actively attend international conferences including OECD Competition Committee, ICN Annual Conference, UNCTAD IGE and discussed competition law policies and enforcements in digital market with global competition authorities.</p>	
<b>Mexico</b>	<p>A Digital Markets Unit was created after consultation with other economies about similar agencies.</p> <p>There has been collaboration with UK and German competition agencies to strengthen COFECE's technical capabilities.</p> <p>COFECE has also contributed to other jurisdictions initiatives. In 2020, COFECE participated in the public consultation launched by the CMA on the creation of a Digital Markets Taskforce. See <a href="#">COFECE's response</a> to the CMA's call for information.</p> <p>The IFT participates actively in international discussion forums to establish and strengthen bilateral and multilateral relations with other competition and regulatory authorities and international organisms, to encourage cooperation and information sharing. The IFT seeks proactively the exchange of experiences, using different mechanisms such as bilateral dialogues, informal networks or cooperation projects.</p>	
<b>New Zealand</b>	<p>Pursuant to MMAC the CMA and ACCC organize regular conference calls between staff to discuss current and prospective digital work programs, including data analytics work. The NZCC has participated in these calls.</p>	
<b>Peru</b>	<p>Our agency has benefitted from Webinars and Workshops made by the International Competition Network, OECD and other institutions in competition and digital market matters. Also, Indecopi is in constant communication with other competition agencies, to consult and compare experiences. The agency hosted the OECD Regional Centre for Competition in Latin America which provides training to officials in the region on enforcement of competition law and advocacy, focusing on updating staff skills on new competition issues and analytical methods for competition enforcement.</p>	
<b>The Philippines</b>	<p>The PCC has existing Memoranda of Understanding with other competition authorities to facilitate collaboration and coordination for cross border merger review and enforcement of competition law. The PCC is actively communicating with other competition authorities for the possibility of executing MOUs.</p>	
<b>The Russian Federation</b>	<p>FAS Russia uses bilateral/multilateral consultations, exchanges of experience, seminars, etc., as well as the study of the world's best practices (such as in Austria, China, Germany, India, Japan, and the European Commission) for assessing competition in the digital economy. FAS is also cooperating internationally on cases</p>	

	such as Apple, Booking, as well as the transactions of Bayer/Monsanto, Siemens/Alstom.
<b>Singapore</b>	CCCS actively engages its overseas counterparts and participates in global/regional platforms. The ASEAN Experts Group on Competition (AEGC) established the ASEAN Regional Competition Framework (ARCF) and the ASEAN Competition Enforcers' Network (ACEN) to facilitate enforcement cooperation among ASEAN Member States. A case related to digital markets emerged in 2018 when Grab acquired Uber's Southeast Asian business without notifying CCCS. This raised competition concerns, and effective cooperation facilitated investigations on the case.
<b>Chinese Taipei</b>	Digital markets involve not only multiple industries, but also international commercial and regulatory activities. Cross-border cooperation between economies requires the coordination of multiple agencies. How to implement it still needs to be further studied and put forward.
<b>United States</b>	The USDOJ and USFTC routinely coordinates with other competition authorities on specific competition cases that involve the same parties. For example, USDOJ and USFTC staff often will coordinate with non-US competition authorities on merger investigations when the merger is subject to review in other jurisdictions.

**12. Future cross border collaboration initiatives which would be helpful in supporting the economy in digital markets**



APEC Economy	Member	12. Other Responses
Australia		Sharing findings and policy recommendations with counterparts that have studied digital markets
United States		Discussion and development of joint measures within the framework the activities of different international organizations.

APEC Economy Member	13. Rationale for these proposed cross border collaboration initiatives
<b>Australia</b>	Competition agencies do not have a lot of experience enforcing competition law in digital markets. There are common difficulties agencies face in that digital businesses often operate across borders and have remote headquarters. In addition, agencies lack the legal mechanisms and relationships to cooperate closely on investigations.
<b>Hong Kong, China</b>	As an emerging competition agency, the Commission is keen to learn about how overseas counterparts address similar issues, either via enforcement or advocacy tools. The initiatives (selected above) provide an effective platform enabling the Commission to keep itself abreast of these fast-evolving issues in digital markets in the region.
<b>Republic of Korea</b>	Not answered.
<b>Mexico</b>	<p>Cross-border collaboration is relevant for the efficient functioning of digital markets around the world. COFECE embraces all efforts aimed at international collaboration and actively seeks to strengthen cooperation with competition agencies from other economies.</p> <p>To promote cross-border collaboration for capacity building, COFECE plans to organize workshops in which public officials working in Digital Units in competition authorities from around the world share experiences and build shared knowledge. This would be useful, given the fact that most of these Digital Units are of recent creation and are currently identifying their own approaches to digital markets.</p> <p>Cross-border initiatives might be very helpful to support competition assessments of digital markets, given that the effects can affect multiple jurisdictions. Informal assistance in investigations, the strengthening of cooperation networks and the promotion and participation in workshops and forums are highly valued by IFT. A dashboard or database with a benchmark of Asia-Pacific economies approaches to digital markets will be very useful for Mexico's IFT, particularly if the data is comparable.</p>
<b>New Zealand</b>	COVID-19 has highlighted the need to enable markets to move to digital in order to serve consumers more effectively and remotely.
<b>Peru</b>	Establishing cooperation networks improves inter-agency communications and allow smaller competition agencies to benefit from the knowledge of more-experienced agencies. The possibility of receiving investigative assistance through cooperation agreements can be very beneficial for developing competition agencies such as Indecopi, because it facilitates communication and allows for competition agencies to receive guidance and orientation when analyzing competition in digital markets. This will ensure an effective and rapid response to the challenges of the digital economy.
<b>The Philippines</b>	International cooperation is necessary since digital markets involve cross border transactions. Online transactions are no longer limited to a single geographic market. Also, experience sharing is important, especially for those jurisdictions with recent competition laws. Through experience sharing, mature jurisdictions can impart their knowledge of implementing competition law in the digital market, and these best practices can be adopted and translated into new competition policies.
<b>The Russian Federation</b>	International collaboration allows FAS to use the most effective and efficient practices to achieve the best results in competition policy and creates clear rules for exchange of information. Workshops can help to get a wider view on competition policy and law enforcement in member economies as well as deepen skills and knowledge of participants.

<p><b>Singapore</b></p>	<p>Singapore is a small, open, and digitally connected economy, and online suppliers providing goods and services to Singapore may be located outside Singapore. Thus, competition issues in the digital markets from overseas can affect CCCS's enforcement work. It is therefore helpful to collaborate with other competition agencies in APEC to deal with digital markets.</p> <p>Leveraging the experiences and expertise of other competition agencies would shorten the time required to build the capabilities required to deal with competition issues arising from digital markets. Building up such capabilities quickly is especially crucial as the competition issues in the digital markets can be complex, fast-evolving and require quick responses.</p>
<p><b>Chinese Taipei</b></p>	<p>International enforcement cooperation about information exchange or investigative assistance has significant benefits. Participating in seminars or discussion forums related to competition issues in the digital economy is helpful for understanding international enforcement experiences and trends.</p>
<p><b>United States</b></p>	<p>Existing networks and cooperation agreements are sufficient. The US has a long history of participating in networks such as the ICN. It also has a long history of entering into cooperation agreements with other competition authorities. The digital economy, however, presents new challenges that call for greater understanding of the efforts of others, which may be facilitated by workshops or an APEC website.</p>