



Global report on antitrust enforcement in the digital economy



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1. Introduction

The digital economy is transforming economies and society globally. It is opening new markets and enabling consumers to keep up with news, share creative content and connect with people around the world. Technological developments, be they in relation to platforms, app stores, cloud computing or artificial intelligence ("AI"), as well as related data and privacy issues, continue to fuel the competition debate. Competitive dynamics and conduct of firms active in the digital economy have raised some concerns among competition authorities. In some cases, competition authorities have intervened to safeguard competition and innovation, which they fear may be stifled by firms with market power. This has resulted in a growing number of merger reviews, market studies and antitrust enforcement cases as well as several policy and legislative changes in the competition field.

A number of jurisdictions, including the **European Union ("EU")**, **Japan**, the **United Kingdom ("UK")**, **Germany**, **United States ("US")**, **China**, **South Korea**, **Australia** and **India**, either have introduced, or are planning or considering the introduction of, entirely new legislation specifically designed to deal with digital market firms. In the **US**, various federal and state legislators have brought proposals to modify the antitrust regime in respect of its enforcement in the digital economy, but none of these proposals have ultimately been adopted. **Turkey** has introduced legislation specifically dealing with merger control in digital markets and is consulting on draft legislation that would mirror the EU's Digital Markets Act ("**DMA**").

The majority of jurisdictions referred to in this Report have approached regulating digital markets by adapting the application of existing competition law tools underpinning their existing regimes, and some have done so by issuing new guidance. **China** has issued guidelines on the application of competition rules to the "platform economy"; similarly, **South Korea** has introduced guidance relating to the application of abuse of dominance rules to online platforms. In **Japan**, the authority has issued various reports and guidance, including in relation to digitisation, for data markets on application of competition law.

As AI is increasingly becoming an important input to various other technologies, as well as a tool that consumers directly interact with, governments are considering how best to regulate AI to deal with the technological, ethical and safety consequences thereof. The anticipated **EU** AI Act would set out core principles that all AI operators would be required to make best efforts to adhere to when developing and using any AI system or foundation model. These principles seek to promote a "coherent human-centric European approach to ethical and trustworthy AI". The AI Act would also regulate more strictly those AI practices that it categorises as high risk and prohibit certain AI practices entirely.

The ICC Task Force on Competition Law and the Digital Economy¹ has considered the approach of the competition regimes to the digital economy in 19 jurisdictions. This report provides a summary of the key aspects of antitrust enforcement in these jurisdictions, covering merger control, horizontal and vertical agreements, and abuse of dominance. Detailed country-by-country surveys prepared by ICC members and other contributors in each of the relevant jurisdictions are included in an Annex to this report. Further information in respect of each jurisdiction is available and may be reviewed in more detail in the Annex.

¹ The ICC Task Force on Competition Law and the Digital Economy is co-chaired by Alex Nourry, Georg Boettcher, Mathew Heim, Carel Maske, Susan Ning, and Yang Jianhui, and includes over 100 expert members from 25 countries.

Overall, the ICC Task Force on Competition Law and the Digital Economy supports the general approach of competition regimes to enforcement in the digital economy but considers it important to ensure that business models and digital markets continue to develop in a competition framework which enables both large and small players to thrive and delivers benefits to consumers. In particular, ICC would encourage greater global convergence and efficiency in the enforcement of antitrust laws in the digital economy and would make the following recommendations:

- **Enforcement should avoid inconsistencies across jurisdictions, as far as possible.** Given the international nature of digital firms and markets, consistency across jurisdictions is especially important. Inconsistent enforcement decreases legal certainty for companies around competition law risk when making business decisions. Additionally, requiring firms to adopt different conduct across jurisdictions would lead to increased costs, which is ultimately detrimental to consumers. Where possible, authorities should therefore be mindful of the enforcement context on other relevant jurisdictions. This is especially important in situations of potentially overlapping jurisdiction, such as the in the case of the European Commission ("EC") and EU member states.
- **Merger regimes should take care not to stifle start-up investment.** While ICC supports the use of merger regimes to detect and prevent mergers that could be harmful to competition, including so-called "killer acquisitions", authorities and governments should be wary of systems that have the effect of removing viable exit options for start-ups, thereby disincentivising founding teams, as well as their venture capital investors, and posing a risk to the valuable innovation of early-stage companies.
- **Authorities should ensure that obligations imposed by ex-ante regimes do not dampen incentives to innovate.** It is important to consider the potential impact of ex-ante regimes on incentives to innovate on the part of both large and smaller players. For example, restrictions on a provider favouring its own services could inadvertently have the effect of reducing the incentive for firms to introduce new, complementary services. Such restrictions would therefore be more effective and would not unnecessarily stifle benign or innovative practices if applied to cases of real market failures.
- **Remedies under merger control and conduct enforcement regimes should be proportionate, reasonable, and reviewable by courts.** Given the potentially onerous nature of structural remedies in particular, authorities should be cautious not to go further than is necessary to address competitive harm. Especially in the case of divestments, it is important that firms have the ability to seek review by an independent court. Competition authorities should also be more open to behavioural remedies which may be more limited and/or subject to review upon changing circumstances, and thereby potentially more proportionate and reasonable.

2. Merger control

Merger control regimes are designed to enable competition authorities to review transactions with a view to preventing, or placing conditions on, those that may have a harmful effect on competition. Such regimes typically only require notification of transactions meeting prescribed thresholds that are often based on revenue, market share or other measures of local presence. Some jurisdictions have introduced new requirements on certain digital firms to notify mergers or have developed guidance specific to the assessment of mergers in the digital economy. Among

other issues, competition authorities have become increasingly concerned about so-called "killer acquisitions" within the digital sector.

2.1. Merger control regimes and thresholds specific to the digital economy

While most jurisdictions represented in this report operate a single merger control regime that applies to all firms in the same way, whether or not they are active in digital markets, there are some instances of jurisdictions having introduced notification requirements or parallel regimes for these firms. The argument for lowering or removing entirely quantitative thresholds in respect of transactions involving some or certain digital platforms is generally that the market power of at least one party may be capable of having a harmful effect on competition even where they do not meet the regular thresholds.

Some jurisdictions, including the **EU** and its member states, have introduced new rules for digital platforms affecting M&A activity, working alongside the existing merger control regime. In the EU, the recently enacted DMA takes the approach of designating, by reference primarily to quantitative thresholds, digital firms as "gatekeepers" and imposing on those firms a special obligation to inform the EC of their M&A transactions. Gatekeepers are obliged to inform the EC of every M&A transaction in the digital economy (meeting the EU's regular definition of a concentration) before it closes, regardless of whether the transaction is notifiable to the EC under the EU merger control regime. This obligation will result in the EC and Member States being informed of nearly every M&A transaction carried out by a "gatekeeper", giving them the opportunity to consider whether to seek jurisdiction over those transactions.

The likelihood of review increases given the interaction between the DMA and the referral mechanism of Article 22 of the European Union Merger Regulation ("**EUMR**"). While Article 22 was initially intended for use by member states without a national merger review regime, the EC recently changed its approach to Article 22, encouraging referrals by all member states even where neither the national jurisdictional thresholds nor the EUMR thresholds are met. This was the intended approach of the EC's revised Article 22 guidance document, published in March 2021, which set out the EC's new policy of encouraging such referrals. Upon receiving a notification from a gatekeeper made under their DMA obligation, the EC will send a copy to each member state. Under Article 22, member state competition authorities can request that the EC reviews the transaction on the basis that it will affect trade between member states and threatens to significantly affect competition within the territory of the requesting member state. The EC's amended approach to Article 22 was recently confirmed by the General Court in *Illumina/Grail*.

Similarly, the **UK** government has published a draft Digital Markets, Competition and Consumers Bill (the "**DMCC Bill**"), which envisages a similar system of notification. Under the draft DMCC Bill, digital platforms which are designated as having strategic market status will be under a similar obligation to notify the Competition Markets Authority ("**CMA**") of their transactions before closing, even where they do not meet the regular thresholds of the UK's merger control regime.

In **Turkey**, the competition authority ("**TCA**") has recently introduced a new merger control regime which applies only to firms with certain activities, including digital platform and software firms. This regime requires notification of transactions in the prescribed sectors where firms operate, conduct research and development, or provide services in Turkey or to Turkish users, even where those transactions do not meet the notification thresholds of the regular merger control regime.

Brazil has not implemented any specific ex-ante rules relating to merger control with respect to the digital economy. However, in 2020 the Administrative Council of Economic Defence ("**CADE**") opened a retrospective inquiry into all acquisitions made in the previous 10-year period by certain tech companies, including Google, Amazon, Apple and Facebook. The inquiry is still ongoing.

While **Chile** has not introduced a separate regime nor adjusted thresholds targeting digital platforms, the 2022 Horizontal Merger Guidelines and National Economic Prosecutors Office Guidelines set out guidance as to the analysis of competition within the digital economy. The guidelines make the authority's position clear that such markets have distinctive characteristics, especially in that they are particularly driven by dynamic competition. Given the authority's position, some firms in the digital economy concluding transactions that do not meet the mandatory notification thresholds decide to make a voluntary notification for the sake of legal certainty.

Similarly, in **China**, while thresholds apply across sectors, the Platform Guidelines address the particularities of calculation of turnover generated by digital platforms.

In **Japan**, while the merger control regime applies to firms across all sectors, the Japan Fair Trade Commission ("**JFTC**") in 2019 amended the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination to provide additional guidance on market definition in the case of multi-sided platforms. The JFTC's 2022 position paper "Towards Active Promotion of Competition Policy Corresponding to Changes in Social Economy such as Digitalization" also discussed merger control in the digital sector and set expectations that the authority would request certain business internal documents during merger reviews so as to assess the intention of the merging parties as well as their expectations for the future development of the relevant markets.

While **France** does not apply any digital-economy specific notification or review regime, the French Competition Authority ("**FCA**") has also published reports and made observations as to the specificities of market power of firms in the digital economy that should be taken into account in merger reviews. Such characteristics include free services, multi-homing and the fast-moving nature of market dynamics, particularly as a result of network effects. An amendment to French merger rules was proposed, though never enacted, which would have enabled the FCA to designate certain companies which would be obliged to inform the authority of any transaction affecting France.

In **South Korea**, the Korean Fair Trade Commission ("**KFTC**") has announced plans to amend its Merger Review Guidelines to introduce guidance specific to transactions in the digital economy, so as to make reviews of acquisitions involving online platforms more effective. The notification thresholds remain sector-agnostic.

South Africa has not introduced digital economy-specific merger control rules, but the South African Competition Commission ("**SACC**") has published its Competition in the Digital Economy report setting out its view that the current legislative framework is insufficient for scrutiny of transactions in digital markets and recommending that the SACC should take a proactive and robust approach to its assessment of such transactions.

2.2. Notification and assessment of "killer acquisitions"

Some jurisdictions, while they do not operate regimes or impose thresholds specific to digital firms, have become concerned about the potential anticompetitive impact of so called "killer acquisitions". Such transactions, commonly involving purchases by a large company of a small, nascent firm with the potential to be a significant competitor, are often considered typical of the digital economy. Targets tend not to have yet achieved the level of turnover required to meet standard notification thresholds, but often have a valuation of a multiple of turnover that far outstrips those in other industries. As noted above, the **EU** DMA obliges gatekeepers to inform the EC of concentrations irrespective of whether they meet national or EU merger control thresholds. Some jurisdictions, such as **Germany**, are seeking notification of such transactions through the introduction of new thresholds based on target valuation or transaction consideration.

In **France**, the FCA has recently set up a task force designed to target killer acquisitions, focussing on the tech sector. The task force will consider transactions falling below the French notification thresholds, with a view to referring potentially concerning transactions to the EC under the Article 22 procedure.

In **South Africa**, the SACC has the ability to require notification of "small mergers" that do not reach mandatory notification thresholds. In its Guidelines on Small Merger Notification, the SACC specifically refers to transactions involving firms operating in a digital market, noting that notification is required where the acquiring firm meets the large merger threshold, and a deal value threshold is also reached.

In **China**, while there are no regimes or thresholds specific to firms active in the digital economy, the State Administration for Market Regulation ("**SAMR**") has recently introduced in the draft Implementation Rules on Notification Thresholds, expected to come into effect before 2024, an additional threshold for notification that intends to provide for the notification and review of transactions commonly termed "killer acquisitions". The new rules, to operate alongside the existing thresholds, will catch acquisitions of firms based on the target's valuation, rather than relying only on turnover. Further, the Platform Guidelines set out that where the authority is considering whether to investigate transactions even where they do not meet the mandatory notification thresholds, as it has been able to since 2008, it should pay particular attention to transactions between firms operating in the digital economy, including where the target is a start-up or nascent competitor.

Taking a similar approach, the **Competition Commission of India ("CCI")**, which operates a sector-agnostic notification regime, introduced in 2023 (not yet in force) an additional threshold to require notification of transactions based on deal value, regardless of the target's turnover or size (including those transactions that would have otherwise benefitted from the "small target" exemption). While the notification applies across sectors, it was introduced for the purpose of catching digital markets transactions.

In **Japan**, the JFTC in 2019 introduced a new policy emphasising its willingness to exercise its established power to review transactions that do not meet the mandatory thresholds, by explicitly encouraging voluntary notification where the valuation of the target meets a prescribed threshold. The authority has previously conducted reviews of both the acquisition by Google of Fitbit and the acquisition by M3 of Ultmarc, neither of which met the mandatory notification thresholds and both of which were only cleared subject to conditions.

Similarly, in **South Korea**, the KFTC has introduced in 2021 an additional threshold based on transaction size, which will also enable the regime to catch acquisitions of targets with low or no revenue. It is likely that this change was made in response to non-filing of certain transactions within the digital economy, including (then) Facebook's acquisition of WhatsApp.

In **Germany**, a new transaction value threshold has been introduced, to catch transactions in which the current turnover of the target and the purchase price differ to a disproportionate extent. The threshold applies across sectors, but it is understood to have been introduced with the digital and pharmaceutical sectors in mind.

In **Italy**, a new 2022 rule enables the Italian Competition Authority ("**ICA**") to require firms to notify mergers falling below regular merger control thresholds where they may raise competition concerns. The new rule provides that, among other circumstances, this power can be used where the undertakings concerned meet a combined worldwide turnover threshold, provided the transaction raises competition concerns in the Italian market, and mentions that potential detrimental effects on the development and growth of small enterprises with innovative strategies are relevant.

The merger control system in the **US** permits investigation by the agencies of any transaction, whether pre- or post- closing, regardless of whether it meets notification requirements. The agencies therefore can and do review anticipated acquisitions of nascent competitors without revenue, as well as closed transactions that have resulted in removal of such competitors from the market. There are examples of authorities seeking to block transactions they view as "killer acquisitions", including the proposed acquisition by Visa of Plaid, which the Department of Justice ("**DOJ**") argued was a nascent competitor capable of exerting a "unique threat" on Visa, and that the proposed acquisition was an attempt by Visa to eliminate that threat. The Federal Trade Commission ("**FTC**") has also filed a lawsuit, in December 2020 with trial expected to begin in late 2023 or early 2024, seeking to unwind Meta's acquisitions of Instagram and WhatsApp, made in 2012 and 2014 respectively.

In **Canada**, the Canadian Competition Bureau (the "**Bureau**") has a similar ability to review and challenge any acquisition, regardless of whether it is notifiable, up to one year after its completion.

In **Spain**, the merger control notification thresholds apply regardless of sector. However, Spain's regime includes a market share threshold that may be satisfied regardless of the turnover of the target, meaning that acquisitions of pre-revenue companies may still be caught.

The **UK** operates a merger control regime that includes a "share of supply" threshold that may be satisfied regardless of the target's turnover. The application of this test, requiring the parties to have more than a 25% combined share of supply of a particular good or service in the UK or a substantial part of it, is subject to wide discretion on the part of the CMA, and has been applied to enable review in cases of the target having little UK turnover. For example, the CMA investigated the completed acquisition by Meta (then Facebook) of Giphy, which had generated no turnover in the UK in the year prior to the CMA's review. The CMA ultimately ordered that the transaction be unwound. While the share of supply test requires an overlap in the parties' activities, the DMCC Bill, mentioned above, proposes a new filing threshold that will remove the need for any overlap in activities where one party has turnover greater than £350 million and a share of supply of at least 33%. This new threshold is understood to intend to capture acquisitions by large players of nascent competitors that may not have turnover or overlapping UK activity.

In **Australia**, while the regime is voluntary with no notification thresholds, the Australian Competition and Consumer Commission ("**ACCC**") in reviewing transactions takes into account whether a target is a nascent competitor that currently imposes, or is likely to in the future, a strong competitive constraint on the acquirer that would be removed as a result of the transaction. Such considerations were relevant to the ACCC's review of *Google/Fitbit*.

The recent proposed acquisition of Activision Blizzard by Microsoft has become high profile due to the varying treatment it has received from competition authorities globally. While it was blocked in the **UK** by the CMA, citing concerns about Microsoft's potential ability to foreclose rivals in the cloud gaming market, the **EC** cleared the transaction, accepting behavioural remedies. In the **US**, attempts by the authorities to block the transaction were denied by the court, although the decision may be appealed. The transaction was cleared unconditionally in **China, Japan, Brazil** and **South Korea** among many others. This left the UK CMA the only regulator having prohibited the transaction. Unusually, following prohibition, Microsoft has since submitted to the CMA a new merger notification relating to a restructured deal for fresh consideration. The restructured deal includes provisions similar to, but further reaching than, the commitments agreed with the EC. This case is an example of the difficulties resulting from divergent decisions by authorities when reviewing transactions involving global businesses.

3. Horizontal agreements

Key issues relating to agreements between horizontal competitors in the digital space include algorithmic collusion and the potential impact of data-related collaboration. Most jurisdictions covered in this report have not amended their existing antitrust rules to deal with these issues or others specific to digital platforms, though various competition authorities have published informal views or guidance on these topics.

3.1. Algorithmic collusion

In many jurisdictions, competition authorities have commented on the possibility of algorithmic collusion as well as the difficulty detecting of cartels operating through algorithms.

In **Japan**, the JFTC has commented in its 2021 report by Study Group on Competition Policy in Digital Markets, Algorithms/AI and Competition Policy, on the risk that algorithms could be used for monitoring and implementation of cartel activities. The report also commented that the use of similar pricing information collection and adjustment algorithms by various players within a market could lead to synchronisation of prices between competitors.

In **Mexico**, the Federal Economic Competition Commission ("**COFECE**") has similarly identified the potential for tacit collusion through parallel pricing facilitated by price adjustment algorithms and has commented that the use of the same pricing algorithms by competitors could be a form of collusion. The COFECE also recognises the potential for anticompetitive outcomes as a result of the operation of AI in transparent markets, including without the need for any explicit or tacit collusion.

In **Spain**, the Comisión Nacional de los Mercados y la Competencia ("**CNMC**"), in its 2023 Action Plan, noted that the Competition Directorate aims to design or procure its own software tool for use in detecting algorithmic collusion.

In **South Africa**, the SACC, in its Competition in the Digital Economy report, expressed that algorithms could give rise to new methods of cartel conduct, and that traditional methods of cartel detection (including dawn raids and corporate leniency programmes) are unlikely to be suitable for detection of cartels in digital markets. The SACC set out that it intends to employ the assistance of software developers to understand how software applications can be used in price setting.

The CMA in the **UK**, through the launch of its Data, Technology and Analytics unit, has begun a program through which it intends to improve its knowledge of data and algorithms and their potential effect on competition. As part of this initiative, it published a report in 2021 on the harm that algorithms may cause to competition. While there are few case decisions relating to algorithmic collusion reported by the jurisdictions contributing to this report, the CMA in 2016 made an infringement finding against sellers of posters and frames who had agreed not to undercut each other's prices and had monitored and enforced the agreement by way of automated repricing software.

Algorithmic collusion has been a concern in **Australia**, where the ACCC has established an analytics unit focussed on helping to protect consumers from "big data e-collusion."

In **France** and **Germany**, the FCA and the German Federal Cartel Office ("**FCO**") released a joint study on "Algorithms and Competition", looking in particular at pricing algorithms, which considered such algorithms could be used to monitor adherence to a collusive price policy and punish deviations. The report also noted that information exchanges could be facilitated by

algorithms and explored the possibility of "algorithmic communication", being interaction, via direct or indirect contact, between algorithms of different companies. The FCA has also considered whether the use by competitors of the same or similar algorithm provided by an external service provider could lead to knowing or inadvertent alignment of those competitors' conduct.

In **Italy**, the ICA together with AGCOM and the Data Protection Authority conducted the Big Data Sector Inquiry. The final report highlighted the proliferation of pricing algorithms and commented on their potential to create and strengthen cartels and produce market environments open to collusive outcomes.

In **Canada**, the Bureau has issued a request for comments on issues specific to the digital economy, including the use of algorithms and AI and their potential for facilitation of collusion. Canada's most recent consultation on the future of Canadian competition policy also identified the use of AI, including algorithms, automation, machine learning and language recognition as a potential for facilitation collusive outcomes.

In **India**, the CCI has examined instances of algorithmic collusion in two cases, involving flight pricing and ride-hailing apps. While neither led to an infringement finding, the cases demonstrate the CCI's willingness to consider collusion on the part of algorithms as a potential theory of harm.

3.2. Data pooling and the role of data

Various competition authorities have raised concerns that collaboration between horizontal competitors relating to data could lead to heightened entry and expansion barriers and accumulation of market power. However, jurisdictions have not commonly reported a diversion from the approach of traditional antitrust rules in dealing with data pooling.

For example, in **Turkey**, the TCA's 2022 guidelines recognised that where data is a significant input, data pooling agreements can lead to enhancement of market power and creation of barriers to entry and expansion.

In **Japan**, the Competition Policy Research Centre ("**CPRC**"), a research arm of the JFTC, published a report by the Study Group on Data and Competition Policy in 2017 commenting that data pooling could increase transparency and thereby promote parallel behaviour between competitors. Such pooling could be particularly problematic in markets in which data is an important input.

In 2018, the KFTC commissioned a study in **South Korea** that considered the issue of access to data and data pooling. This study resulted in a research project which set out that, (i) interference by players in the data trading market with a new enterprise's participation in the market for products that use data as an input, and (ii) refusal to allow a third party to use the data pool in order to exclude an existing enterprise from the market, could constitute an unfair collusive act.

In **Brazil**, the CADE reviewed the creation of a joint venture between firms in the automotive sector, the purpose of which was the creation of a cloud-managed network various firms would have access to. CADE's analysis focused on the possibility of foreclosure, via the creation of barriers to entry, as well as the possibility that the data sharing could facilitate the exchange of competitively sensitive information between horizontal competitors.

In **France** and **Germany**, a recent joint report produced by the FCA and the FCO considered the role of data in competition law analysis. In particular, the report considered that collection and exploitation of data could raise barriers to entry or expansion for smaller players and constitute a source of market power. The report also commented that collection and use of data could

contribute to the increased transparency of online markets, which, notwithstanding that market transparency can lead to improvements in pricing and quality, could be used by undertakings to restrict competition via coordination.

In **Canada**, the Bureau published a paper entitled "Big data and Innovation: implications for competition policy in Canada" which set out its views on horizontal agreements with respect to data.

In **Australia**, the ACCC has observed that, in the supply of digital platform services and ad tech services, limited access to data can result in significant barriers to entry and expansion. The ACCC has also commented that data portability could have the potential to promote competitive outcomes.

4. Vertical agreements

Vertical agreements tend to be considered by competition authorities as having less potential to harm competition when compared to horizontal agreements. Indeed, many jurisdictions provide a safe harbour for vertical agreements between firms where certain conditions are present, often expressed as a market share threshold. In the context of considering vertical agreements between firms active in the digital economy, competition authorities have considered issues including the approach to price parity or most favoured nation ("**MFN**") clauses, which have become a common feature of agreements involving operators of two-sided platforms.

While there are no specific laws regulating vertical agreements in the digital economy, there is an ongoing debate in **South Korea** as to whether it is necessary to regulate abuse by firms in such vertical relationships of a superior bargaining position. Such potential legislation would likely be relevant to firms in the digital economy.

4.1. MFN clauses

Wide and narrow MFNs have been viewed with varying degrees of suspicion by authorities across jurisdictions.

The FCO in **Germany** has taken a relatively strict approach to MFN clauses, having a critical view of both wide and narrow MFNs. In its case against the hotel portal HRS, the FCO considered wide MFNs unacceptable and in a case against booking.com, it set out its view that even narrow MFN clauses significantly restrict competition.

Similarly, **France** has adopted the position that all kinds of MFN, both wide and narrow, are forbidden, as they are deemed ineffective if they appear in a contract. The FCA also ran a case against Booking.com, coordinated with the EC as well as the national authorities of **Italy** and **Sweden**. The result was a commitment on the part of Booking.com to remove wide MFNs in favour of online-only narrow MFNs (enabling hotels to offer lower prices through offline sales channels as well as through other price comparison sites).

In **South Africa**, the view of the SACC is similarly that both wide and narrow MFNs are harmful to competition, taking a strict approach that such clauses should not appear in agreements.

Both the **UK** and **EU** have taken the approach that wide MFNs are more likely to be harmful to competition than narrow MFNs, such that wide MFNs will not benefit from block exemptions available in either jurisdiction. In the EU, the DMA prohibits those designated as gatekeepers from imposing both wide and narrow MFNs.

In **India**, the CCI's position is that wide MFNs are more harmful to competition than narrow MFNs, and it has acknowledged both competitive harms and potential efficiencies that can result from MFNs. The CCI has imposed penalties on MMT, a travel booking aggregator, for its imposition of wide MFNs, and is currently running an investigation into MFNs imposed on restaurant partners by firms operating food delivery apps.

In **Brazil**, CADE has considered two cases involving wide MFNs, both of which were subject to commitments including a commitment that wide MFNs would no longer be used. CADE has shown some willingness to accept arguments regarding free riding concerns in support of the suitability of narrow MFN clauses, but its attitude towards narrow as opposed to wide MFNs is not yet clear given that there is a lack of conclusive decisional practice as a result of cases ending in commitments.

Similarly, in **South Korea**, the KFTC regards narrow MFNs as generally less harmful to competition than wide MFNs, and in a case in the travel booking sector allowed commitments by firms to convert their wide MFNs to narrow versions, citing the issue of free riding as a reason for legitimate use of narrow clauses.

In **Japan**, the JFTC has considered some MFN cases in which it has accepted commitments; while it is clear that the JFTC considers wide MFNs to be inappropriate, whether it would treat narrow MFN clauses differently is not yet clear. The JFTC was also among the authorities to run a case into MFNs in the hotel booking sector, accepting commitments from both booking.com and Expedia. In another MFN case, the JFTC set out its view that MFNs could potentially cause harm to competition on the basis that they may restrict business activities of those subject to the clauses. They may distort competition as between those operators, and they may reduce incentives of those operators or potential entrants to innovate or to enter.

In **China**, while there have not been cases that definitively set out the authority's attitude towards MFN clauses, it is likely that the main focus will be on wide rather than narrow MFNs.

The **US** has not drawn a distinction between wide and narrow MFNs and has seen minimal enforcement against MFN clauses in online markets. In most cases, authorities consider MFNs to be benign, with enforcement agencies also acknowledging the potential procompetitive benefits of MFNs. However, the FTC and DOJ have explained that they may also cause harm to competition, depending on the facts of the case. In litigation relating to Apple e-books sales, the court held that MFNs played a role in allowing Apple to fix retail prices and eliminate competition.

While **Canada** has similarly not drawn a distinction between wide and narrow MFNs, the Bureau has expressed a view that MFNs could have an anticompetitive effect. While it considers that vertical agreements in general do not have a substantial adverse effect on competition, where the firms have a market share of 50% or more, further examination is generally merited, which could be of particular relevance to some digital markets firms.

In **Turkey**, the TCA has explained that it may assess MFNs in conventional markets differently to those in arrangements involving digital platforms, on the basis that in conventional markets the MFN is often in favour of the buyer, whereas in digital markets these clauses may be in favour of a party acting as intermediary or supplier. The TCA has not confirmed whether it will take a different approach towards narrow as compared to wide MFNs.

5. Abuse of a dominant position

Various competition authorities have relied on existing abuse of dominance regimes to address behaviour by digital firms. In doing so, authorities have had to consider various new behaviours

that have come to light as a result of the development of business models typical of digital firms, including two-sided platforms and the importance of data as an input. Some jurisdictions, in addition to adapting their application of existing antitrust rules, have also developed new regimes to deal specifically with conduct on the part of digital platforms.

5.1. Digital markets regimes

Some jurisdictions, as already mentioned in relation to merger control, have introduced (or are in the process of introducing) new regimes dealing specifically with the regulation of certain firms active in the digital economy. The **EU** DMA designates certain firms operating "core platform services" as "gatekeepers" subject to the regime and applies one-size-fits all conduct requirements to them, independent of their business model. Such conduct requirements have been inspired by the EC's past and ongoing cases under the abuse of dominance regime and include prohibitions against certain types of combination and cross-use of data favouring a gatekeeper's own services, and requirements to enable interoperability and provide access to data, among others. The deadline for firms to notify the EC that they meet the threshold to qualify as gatekeepers was 3 July 2023, and the EC announced that those who did so were Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung. The EC will designate gatekeepers by 6 September 2023, following which gatekeepers will have six months to comply with the DMA.

The DMCC Bill of the **UK** proposes to take a slightly different approach. Once firms are designated, the authority will apply tailored conduct requirements to them, based on their activity and the potential for harm to competition that the authority assesses exists in their specific circumstances. Designation of firms will follow an investigation by the CMA.

In **Germany**, in 2021 s19a of the Act against Restraints on Competition was newly introduced with the aim of providing the FCO with an expanded toolkit for dealing with firms in the digital economy. The law enables the FCO first to determine that a firm has paramount cross-market significance, following which the FCO may decide to prohibit conduct that exploits that position of market power across markets. While the relevant law provides examples of behaviours that may be prohibited, it is not exhaustive, such that the FCO is free to impose other conduct prohibitions. Since its introduction, the FCO has initiated proceedings against Meta, Google, Apple and Amazon.

In **Turkey**, there is no legislation specifically dealing with the digital economy, but the TCA is working on sector inquiries into both online marketplaces and online advertising, which aim to evaluate those markets with a view to introducing legislation to govern conduct of firms in the digital economy. Lawmakers have recently initiated a public consultation on draft legislation that mirrors the EU's DMA. While the draft may change before coming into force, it currently follows the DMA's approach of regulating conduct by certain digital firms operating core platform services.

In **Japan**, the government's Act on Improving Transparency and Fairness of Digital Platforms (the "**Transparency Act**"), has created a new framework regulating certain designated digital platform businesses. In March 2023, the government designated three providers of e-commerce services, Amazon, Rakuten, Yahoo! Japan; two app store operators, Apple and Google; and three digital advertising service providers, Google, Meta and Yahoo!Japan. While the Transparency Act does not prohibit certain conduct or lay down *per se* rules, it obliges firms to take measures to improve transparency and fairness in transactions with their users. Alongside the JFTC, the Digital Market Competition Headquarters ("**DMCH**") plays a role in policymaking for the digital market sector and in June 2023 published a report recommending that ex ante regulation is introduced to regulate mobile ecosystems markets, which it finds to be oligopolistic.

In **India**, the Big Tech Report was published by the Parliamentary Standing Committee of Finance in December 2022. The report recommended measures including the introduction of a new ex-

ante framework for designated platforms, which would be subject to a mandatory code of conduct and disclosure obligations. The proposals would also include the institution of a digital markets unit within the CCI. The efficacy of competition laws with respect to digital markets and the need for an ex-ante regime is also under review by the Committee on Digital Competition Law. The ex-ante regime would include imposition of 10 obligations on gatekeepers, who will be designated based on their user numbers and turnover figures.

In **South Korea**, the prohibition of abuse of dominance applies equally to all firms, but the KFTC has introduced Guidelines for Reviewing Abuse of Market Dominant Position by Online Platform Providers ("**Online Platform Review Guidelines**"). The Online Platform Review Guidelines identify network effects, economies of scale and the importance of data, among others, as key features of online platforms that should be considered in such assessments. Given the multi-sided nature of some online platforms, these guidelines set out that competition in both the market in which the platform is dominant and related markets should be taken into account, and provide that if a platform provider's conduct causes both anticompetitive effects and efficiency-enhancing effects at the same time, the infringement should be reviewed by way of balancing those two effects. Reports in May 2023 suggest that the KFTC may also be pursuing a bill on online platforms.

In **China**, while abuse of dominance rules apply to all companies, the Platform Guidelines provide explanations of how existing competition rules, including abuses such as refusal to deal, imposition of unreasonable trading terms, etc., should be applied to platform operators.

In **Australia**, the ACCC has conducted a Digital Platforms Inquiry and a Digital Platform Services Inquiry. These inquiries considered methods of establishing market power of digital platforms, including by user numbers and time spent on platforms, and made recommendations to impose mandatory codes of conduct for designated digital platforms, as well as targeted competition obligations, to address conduct such as providers favouring their own services, impediments to interoperability, data-related barriers, etc. The government has not yet formally responded to the recommendations.

There is no existing or planned digital markets regime in **South Africa**, but the SACC's Competition in the Digital Economy report provides that the SACC will initiate proactive investigations into conduct by dominant online firms that may be excluding rivals and entrenching dominance. The report also provides that the SACC will issue guidelines, institute a market inquiry into digital markets and engage in cooperation and coordination with other competition authorities globally in respect of addressing conduct of firms active in the digital economy, including Google, Facebook, Apple, Uber, Airbnb and Booking.com. Further, the SACC is shortly due to issue its Online Intermediation Platforms Market Inquiry report, which is likely to provide greater clarity on its approach to the digital economy.

Canada's competition regime applies across sectors, but the government has also indicated that it is considering further updating and modernising its competition laws to address challenges arising from the digital economy. The abuse of dominance regime was amended in June 2022 to take account of factors including network effects, consumer privacy, and the extent of change or innovation in a market. Canada's competition regime focuses on effects-based analysis, and the burden is on firms wishing to rely on efficiency defences (available in some circumstances) to demonstrate that there are pro-competitive factors outweighing the anticompetitive effects.

Portugal's Competition Authority (the "**AdC**") has recently created a Digital Task Force which comprises case handlers that conduct market inquiries and investigations into digital markets. In recent years, the Digital Task Force has been involved in the investigation into Google's digital advertising practices, which ultimately moved to the EC, and the sanctioning of Farmodiética - Cosmética, Dietética e Produtos Farmacêuticos, S.A., for fixing and imposing retail prices on distributors.

In **Italy**, rules prohibiting the abuse of economic dependence were recently amended to introduce some specific provisions focussing on digital platforms. In particular, where an undertaking uses an intermediation service supplied by a digital platform that has a determining role in reaching final customers or suppliers, there is a rebuttable presumption of economic dependence on that platform. The amendment also introduced lists of conduct of digital platforms that would be considered abusive under the rule.

5.2. Current theories of harm in the digital economy

Outside of regimes dealing specifically with digital markets, competition authorities have also developed new theories of harm in order to apply traditional antitrust rules to certain conduct of digital platform operators. Such conduct has included refusal to provide access to data or services, raising essential facility-type arguments, as well as favouring by platforms of their own products or services when in competition with business users of their two-sided platforms.

In the **EU**, the EC investigated Google's conduct in respect of its Google Shopping feature, i.e. favouring its own comparison-shopping service over competing services, in a case that is most likely the inspiration for the Digital Markets Act's prohibition against gatekeepers treating their own services more favourably than those offered by third parties. The EC is separately investigating Google in respect of its ad tech offering and has recently made a statement indicating that it considers that "a behavioural remedy is likely to be ineffective to prevent the risk that Google continues such self-preferencing conducts or engages in new ones," citing Google's market power on both the demand and supply side of the online advertising market. The implication is that the EC is likely to expect a divestment remedy in order to resolve its concerns. The EC has also confirmed that it will continue to investigate Google's practice of exclusively selling YouTube ad inventory through its own ad tech intermediary services.

In **Brazil**, CADE opened a similar investigation into Google Shopping.

In **China**, the Platform Guidelines recognise the relevance of refusal to supply access to an essential facility to the digital economy, particularly in the context of data as an important input for businesses, as well as refusal to interoperate with third party services.

The FCO in **Germany** has also considered that refusal to provide access to algorithms or information about them, data, or networks could foreseeably constitute an abuse. The FCO has also taken into account data protection law in its cases; in a decision against Meta, the FCO prohibited the firm from combining certain user data obtained from various sources without first obtaining consent.

In **Turkey**, the TCA has applied the essential facilities doctrine to the digital economy in a number of cases. The TCA's Study on the Reflections of Digital Transformation on Competition Law sets out that a firm's refusal to interoperate or provide access to data may result in a distortion of competition and commented that regulation of data access practices of platforms with significant market power would therefore be appropriate.

In **France**, the FCA has stated that refusal to supply access to data can be anticompetitive if the data constitutes an essential facility in some circumstances. The FCA has twice investigated Meta in respect of online advertising practices following third-party complaints. A complaint from Criteo led to commitments by Meta in respect of access to Meta's ad tech partnership programme and development of a new API for advertising service providers, while a complaint from Adloox has resulted in interim measures relating to Meta's viewability and brand safety partnerships criteria, pending a decision on the case. In a case against Google, the FCA has accepted commitments to create an information sharing framework to enable transparency with respect to related rights of press agencies and publishers.

In **Italy**, the ICA is investigating Google with respect to its approach to data portability and has found that Google's conduct is likely to result in a restriction of competition by limiting the ability of alternative operators to develop innovative ways of using personal data. Google has submitted commitment proposals that would require development and implementation of tools to facilitate access by users to certain data.

In **India**, in its application of existing abuse of dominance rules, the CCI has noted that any digital platform in a dominant position acting as a gatekeeper has a "special responsibility" towards the market not to abuse its position or allow its conduct to impair undistorted competition. While the CCI has not explicitly applied an essential facilities doctrine in the digital economy, it did seek to introduce a novel "must have" test in the context of abuse of dominance cases against Google, which it considered a "necessary trading partner" for publishers. In relation to data, the CCI has noted that exclusivity with respect to data access may increase a platform's bargaining power and entrench network effects, and that excessive data collection and related data sharing could lead to exploitative and exclusionary effects.

In **Japan**, the JFTC's 2019 Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information clarified that digital platforms' collection and use of an individual's data, provided by individuals in exchange for use of firms' services, could constitute abuse of a superior bargaining position. Further, the CPRC's report by Study Group on Competition Policy for Data Markets commented on the importance of ensuring data portability and interoperability to aid switching and multi-homing.

In **South Korea**, while the abuse of dominance rules apply to all firms, the Online Platform Review Guidelines refer to conduct that is likely to be more relevant in the digital economy, including restrictions on multi-homing, demanding MFNs, favouring own services over others, and tying. The Online Platform Review Guidelines also set out that conduct by online platforms could have effects that do not necessarily increase prices or reduce output, given that they may offer services that are free from payment, among other characteristics.

While the **US** does not operate any separate regime dealing with the digital economy, there is proposed legislation addressing data portability and interoperability within the digital advertising sector. The Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act, would mandate digital advertising exchanges to provide their advertiser and publisher customers fair access to certain data related to their transactions, as well as setting out standards of data ownership. Further, the American Innovation and Choice Online Act, which would apply to platform operators on the basis of their user numbers, their revenue and whether they are deemed a critical trading partner, would make it unlawful for those platform operators to restrict access to certain data generated by business users' activities on the platform, and for those platform operators to use data obtained from those activities to support the platform operator's own competing offering. The Open App Markets Act would provide some protections to users and developers of apps available in app stores and impose obligations on Apple and Google in respect of their operation of app stores, including preventing those operators from using non-public data generated by their app stores to benefit their own apps.

In the **UK**, the CMA has recently published proposed commitments in its case against Meta in relation to its use of advertising data in respect of its Marketplace feature. The commitments would require Meta not to use certain data (that which is generated by advertisers' use of elements of Meta's ad services where those advertisers are competitors of Meta) for certain purposes, including to develop and improve Meta's Marketplace feature and to determine which Marketplace listings are surfaced to users.

In **South Africa**, the SACC's Competition in the Digital Economy report identifies data portability as a "key area for regulation", and the SACC has commented that the government should "introduce frameworks that aim to promote data openness, portability and interoperability."

The members of the ICC Task Force on Competition Law and the Digital Economy would like to thank the contributors in respect of each of the jurisdictions covered in this report for providing the survey responses in the Annex to this report and are most grateful for their invaluable input and assistance. The ICC Task Force would also like to thank Caroline Inthavisay, Global Policy Lead – Competition, for her work in organising and managing the process.²

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ICC Task Force on competition enforcement and the digital economy

Country: Australia

Contributors: Luke Woodward et al. (King & Wood Mallesons)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	N/A: Australia currently operates on a voluntary merger notification regime, with no notification thresholds.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>As noted in Question 1, there are no notification thresholds in Australia.</p> <p>However, the Australian Competition and Consumer Commission (ACCC) considers whether a target is a nascent competitor that currently imposes a strong competitive constraint (or is likely to in the future), and whether the transaction therefore removes a strong competitive constraint that the acquirer would otherwise face (either now or in the future).</p> <p>For example, in the ACCC’s review of Google’s acquisition of Fitbit, the ACCC looked closely at whether the transaction would eliminate potential competition between Google and Fitbit in the supply of data-dependent health services (with the ACCC noting in its Statement of Issues for this transaction that “<i>Fitbit has the potential to grow in the supply of these services</i>”).</p>
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	<p>Generally, no.</p> <p>The ACCC has not provided any guidance as to when it might engage with other government agencies when reviewing specific transactions from a competition perspective. However, more generally, the ACCC engages with other regulators –</p>

	including the Office of the Australian Information Commissioner, the Office of the eSafety Commissioner and the Australian Communications and Media Authority – on a range of digital platform issues.
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?
	<p>The ACCC has not expressly provided guidance on metrics specifically relevant for analysing market share or market position of digital platforms. According to its Merger Guidelines, the ACCC will calculate (and request for) market shares based on sales, volume, and capacity data. For transactions involving digital platforms, parties would typically provide (or the ACCC would typically request) information relating to active users, downloads or time spent.</p> <p>The ACCC has regard to measures such as the Herfindahl–Hirschman Index (HHI), but they do not form part of a formal threshold.</p> <p>Separately, in the context of other matters the ACCC has been engaged in – including the Digital Platforms Inquiry (DPI) and Digital Platform Services Inquiry (DPSI) – the ACCC has referred to a range of metrics to establish that certain digital platforms have market power. These metrics include daily and active user figures, and time spent on certain platforms.³</p>
5.	Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	<p>The ACCC has not publicly blocked any transactions in the digital economy. Likewise, it has not cleared any transactions subject to remedies in the digital economy.</p> <p>In late December 2020, the ACCC rejected a proposed behavioural undertaking offered by Google LLC in respect of its acquisition of Fitbit. In summary, this proposed undertaking would have required Google to:</p> <ul style="list-style-type: none"> • not use certain user data collected through Fitbit and Google wearables for Google’s advertising purposes for 10 years, with an option for the ACCC to extend this obligation by up to a further 10 years; • maintain access for third parties, such as health and fitness apps, to certain user data collected through Fitbit and Google wearable devices for 10 years; and

³ See, e.g. [DPSI Interim Report 6](#) (March 2023) (**DPSI 6**), pp. 37, 44, 47 and 66-67.

	<ul style="list-style-type: none"> maintain levels of interoperability between third party wearables and Android smartphones for 10 years. <p>In a public statement announcing that the ACCC had rejected the proposed undertaking, the ACCC noted that they were “<i>not satisfied that a long term behavioural undertaking of this type in such a complex and dynamic industry could be effectively monitored and enforced in Australia</i>”.⁴ At the same time, the ACCC announced that it would continue with its review of the transaction</p> <p>Google subsequently completed the transaction in early January 2021. The ACCC announced that the matter would no longer be reviewed as a merger clearance matter, but as an enforcement investigation of a completed merger.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>N/A – no transactions in digital sector cleared with conditions.</p> <p>More broadly, the ACCC has indicated a clear preference for structural remedies and has on a number of cases raised concerns about behavioural remedies. For instance, the ACCC’s Merger Guidelines state that “behavioural remedies are rarely appropriate on their own to address competition concerns”, and that “the ACCC has a strong preference for structural undertakings” given that they “provide an enduring remedy with relatively low monitoring and compliance costs”.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No.</p> <p>The ACCC has recently provided a recommendation to the Australian Government for economy-wide merger reform. The ACCC had initially considered recommending a digital-specific merger regime (with specific thresholds for digital platforms).⁵ However, when announcing its merger reform recommendations to Government in 2023, the ACCC did not reference a specific digital platform merger regime.⁶</p>

⁴ [ACCC rejects Google behavioural undertakings for Fibit acquisition](#) (22 December 2020).

⁵ ACCC Chair Rod Sims, [Protecting and Promoting Competition in Australia Keynote Speech](#) (27 August 2021).

⁶ ACCC Chair Gina Cass-Gottlieb, [The role of the ACCC and competition in a transitioning economy address to the National Press Club 2023](#) (12 April 2023)

8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	<p>Yes.</p> <p>In 2020, following Facebook's acquisition of Giphy, the ACCC announced that it was planning to investigate this acquisition as a post-completion enforcement investigation.⁷ In May 2023, Meta sold Giphy to Shutterstock for \$53m after it was blocked from completing the purchase by the UK CMA.</p>
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	<p>Yes, the ACCC does technically have the power to revise decisions that it reviews as part of the informal merger review process (which comprises the majority of decisions notified to the ACCC). However, as a matter of practice, this is limited only to circumstances where the ACCC receives new information on the transaction or if the parties have knowingly provided the ACCC with incorrect or misleading information.</p> <p>The ACCC does not have the power to revise merger decisions that it clears as part of the formal authorisation process, but it can revoke an authorisation in circumstances where:⁸</p> <ul style="list-style-type: none"> • the authorisation was granted on the basis of false or misleading information; • there has been non-compliance with a condition of authorisation; or • there has been a material change of circumstances since the authorisation was granted. <p>The ACCC can and does conduct ex-post review of merger decisions, and in February 2022 published a public report on its findings from in-depth ex post reviews of six merger decisions.⁹ However, none of these were transactions in the digital sector.</p>
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	<p>As a matter of practice, the ACCC relies on economic analysis when assessing the competition effects of transactions in all sectors, including the digital sector. The ACCC</p>

⁷ Natasha Gillezeau, [ACCC to investigate Facebook's acquisition of Giphy \(AFR, 8 June 2020\)](#).

⁸ See section 91B(3) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**). The ACCC also has the power to revoke if a revocation application is received pursuant to section 91B(1) of the CCA.

⁹ ACCC, [Ex post review of ACCC merger decisions](#) (February 2022).

	<p>mergers investigations team works closely with the ACCC's specialist economics unit on merger decisions, and often engages external economists to provide economic analysis and reports to assist in its decision making.</p>
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>No, there are no digital economy guidelines or legislative proposals which specifically apply to horizontal arrangements in Australia.</p> <p>Although, the ACCC has considered potential reforms to address challenges posed by digital platforms as part of DPSI,¹⁰ its competition recommendations were focused on exclusionary conduct such as self-preferencing and exclusive pre-installation/defaults rather than horizontal arrangements.¹¹</p>
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysis and provide a summary of the agency's approach.
	<p>No, the ACCC has not provided analysis on how it specifically intends to treat collaboration between competitors in the digital field.</p> <p>As a starting point, Australia's competition law prohibits parties from engaging in certain anti-competitive conduct which has the effect or likely effect of substantially lessening competition (for example, by engaging in a concerted practice or entering into a contract, arrangement or understanding with a provision which has this effect).¹² Parties to horizontal agreements can go through the ACCC's general authorisation process to manage the risks of potential anti-competitive collaboration. Guidance on this process is set out in the ACCC's guidelines for authorisation of non-merger conduct.¹³ Per se conduct (which includes cartel conduct) will only be authorised on net public benefit grounds, whereas non-per se conduct (such as anti-competitive agreements and concerted practices) can be authorised if the conduct satisfies either the net public benefits test or an effects test, where the conduct would not have or be likely to have the effect of substantially lessening competition.</p> <p>These principles apply to entities operating in all industries, including digital markets.</p>

¹⁰ See especially [DPSI Interim Report 5](#) (September 2022) (DPSI 5).

¹¹ Ibid, pp. 16-17.

¹² Section 45(1) of the CCA.

¹³ [Guidelines for Authorisation of Conduct \(non-merger\)](#) (December 2022).

	<p>In 2017, the ACCC denied two authorisation applications by credit/debit card issuers to engage in collective negotiations with Apple relating to access to Apple’s Near-Field Communication controller and its App Store, in order for them to provide and distribute their own digital wallets on Apple devices without relying on Apple Pay or facing unreasonable terms and approval delays from Apple.¹⁴ In denying authorisation, the ACCC observed that the conduct would distort competition in mobile operating systems by lessening the level of differentiation between Apple’s iOS (which integrates software with the device hardware) and Google’s Android operating system (where software is typically supplied separate to device hardware) and reduce competition in payment cards if issuers favoured their own wallets over multi-issuer digital wallets like Apple Wallet.¹⁵</p> <p>Separate to authorisation, a joint venture defence to cartel provisions can apply where the cartel provision is reasonably necessary for undertaking the joint venture and the joint venture is not carried on for the purpose of substantially lessening competition.¹⁶</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>No, data pooling between competitors has not been previously analysed in detail by the ACCC. However, the ACCC has repeatedly observed that limited access to data can be a significant barrier to entry and expansion in the supply of certain digital platform services (including for search and ad tech services), and in other sectors.¹⁷ The ACCC has also suggested that data portability and the sharing of data among competitors have the potential to promote competitive outcomes.¹⁸</p> <p>Australia’s Consumer Data Right (CDR) is an example of data portability in practice. The CDR, which first focused on the banking sector, allows consumers to share their data (for example, transaction history, interest rate and account balances) from an existing service</p>

¹⁴ See [Bendigo and Adelaide Bank & Ors - Authorisation - A91546 & A91547](#).

The scope of the Proposed Conduct included limited collective bargaining and limited collective boycott. Specifically, the Applicants sought authorisation to collectively bargain with Apple in respect of:

- a. access to Apple iPhone’s embedded NFC controller, in order for the Group Participants to provide their own digital wallets with embedded NFC on Apple devices without relying on Apple Pay for mobile payment processing (**NFC access**),
- b. to allow their digital wallets to be distributed from Apple’s App Store without any unreasonable prohibitions, unreasonable terms, or unreasonable approval delays from Apple (**App Store access**).

¹⁵ See [Bendigo and Adelaide Bank & Ors - Authorisation - A91546 & A91547, pp. 67-75](#).

¹⁶ See sections 45AO and 45AP of the CCA.

¹⁷ See [DPSI 5](#), p. 166; [DPSI Interim Report 3](#) (September 2021) (**DPSI 3**), p. 127; [Digital advertising services inquiry – final report](#) (August 2021) (**Ad Tech Inquiry Final Report**), pp. 12, 78.

¹⁸ [Ad Tech Inquiry Final Report](#), p. 79; [DPI final report](#) (26 July 2019) (**DPI Final Report**), pp. 115-116.

	<p>provider to another. In doing so, the CDR allows consumers to compare different offerings and encourages competition and innovation between providers.</p> <p>Some challenges around data portability also exist. In the DPI, the ACCC noted that unlike banking services, online search and social media services are provided at zero price and consumers may therefore be less incentivised to transfer their personal data.¹⁹ Concerns around privacy, security and likelihood of consumer consent must also be considered.²⁰ Despite these concerns, the ACCC considers that there may be scope for data access and portability requirements, and for data use limitations to be a feature of service-specific mandatory codes and imposed on Designated Digital Platforms.²¹</p> <p>The increased availability of data and data-driven innovation has also attracted commentary from the ACCC around the potential risks of algorithmic price setting and tacit collusion. In 2017, the ACCC Chair noted that while machine learning algorithms may help facilitate collusion among competitors, the continual development of deep-learning and AI may mean their companies do not know how or why they arrive at a certain conclusion.²²</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>There have not been any Australian cases on 'hub and spoke' arrangements specifically in the digital economy.</p> <p>In Australia, 'hub-and-spoke' arrangements may be considered as cartel conduct (where there is a purpose of restricting outputs, market sharing, bid rigging or purpose or effect of price fixing) or more broadly, a contract, arrangement or understanding where they have the purpose, effect or likely effect of substantially lessening competition (a 'catch-all' provision). Broadly, these types of arrangements can attract significant penalties and be dealt with as a civil or, for cartels, criminal offences under the CCA.²³</p> <p>Data-driven innovation has led to concerns around algorithmic collusion among digital players. In recent times, the Parliament has introduced a new concerted practices provision in the competition law, and the ACCC has established an analytics unit to help protect consumers against 'big data e-collusion'.²⁴</p>

¹⁹ [DPI Final Report](#), p. 116.

²⁰ [Ad Tech Inquiry Final Report](#), pp. 79-81. [DPSI 5](#), p. 165.

²¹ [DPSI 5](#), p. 168.

²² ACCC, (16 November 2017).

²³ See sections 45AF and 45(1) of the CCA.

²⁴ ACCC, [New competition laws a protection against big data e-collusion](#) (16 November 2017).

5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	<p>In Australia, there have not been any leniency applications in horizontal cases concerning digital players. Participants in potential cartel conduct can apply for immunity from civil or criminal proceedings provided that the party satisfies the eligibility criteria (including, that it is the first to report the cartel) and cooperates fully with the ACCC in future enforcement actions.</p> <p>The ACCC’s approach to applications for immunity are set out in its Immunity and Cooperation Policy for cartel conduct.²⁵</p>
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	<p>The digital economy will continue attracting scrutiny from the ACCC and its Digital Platforms unit. In DPSI 5, the ACCC recommended significant measures to address the ‘widespread, entrenched and systemic’ competition and consumer harms occurring across digital platform services.²⁶ These proposals include mandatory codes of conduct for designated digital platforms and targeted competition obligations such as requirements to address impediments to interoperability and exclusive and price parity clauses in contracts with business users.</p>
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	<p>There is no specific focus on a certain set of vertical agreements in digital markets in Australia – the ACCC assesses these in line with the general provisions applicable to vertical agreements under the <i>Competition and Consumer Act (CCA)</i>.</p> <p>The CCA specifically prohibits resale price maintenance as a <i>per se</i> offence, and prohibits exclusive dealing arrangements (including third-line forcing) where they have the purpose, effect, or likely effect of substantially lessening competition (SLC) in a market. It more generally prohibits anticompetitive contracts, arrangements or understandings and concerted practices where they have the purpose, effect, or likely effect of SLC in a market.</p>

²⁵ ACCC, [ACCC immunity and cooperation policy for cartel conduct](#) (6 September 2019).

²⁶ ACCC Chair Gina Cass-Gottlieb, [Opportunities and Challenges in the Digital Revolution](#) (Speech 17 March 2023).

	<p>There are no block exemptions or safe harbours for vertical restraints in Australia.</p> <p>The 'anti-overlap' provisions in the CCA provide that where an arrangement between competitors is a resale price maintenance arrangement or an exclusive dealing arrangement, those prohibitions instead of the cartel prohibitions will apply.</p>
2.	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>Under the CCA, exclusive dealing is prohibited when it has the purpose, effect or likely effect of substantially lessening competition. This is more likely to occur in cases where the product or service cannot be bought elsewhere, or the firm imposing the restraint has a strong market position.</p> <p>The ACCC has indicated that it is primarily concerned with exclusivity clauses when used by digital platform intermediaries with market power.²⁷</p> <p>We are not aware of any cases where the ACCC has investigated or sanctioned exclusive dealing by non-dominant platforms.</p>
3.	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat "wide" and "narrow" MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>The ACCC continues to closely watch the use of MFNs by online booking platforms. Although the CCA does not specifically prohibit MFN clauses, MFNs which have the purpose, effect or likely effect of substantially lessening competition in a market will be prohibited under the CCA's exclusive dealing or general provisions on anticompetitive terms.</p> <p>The ACCC has not expressly provided guidance on their treatment of 'wide' and 'narrow' MFNs. However, based on past investigations (see Q4 response below), the regulator's focus has been mainly on wide MFNs.</p>
4.	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>Yes.</p>

²⁷ [DPSI5](#), p. 186.

	<p>In 2016, the ACCC investigated online hotel booking platforms Booking.com and Expedia in relation to price and availability parity clauses in their contracts with Australian hotels and accommodation providers. In late 2016, the platforms agreed to amend their agreements to remove removing narrow room rate and inventory MFNs. The ACCC has since ceased its investigation.</p> <p>The ACCC conducted a range of targeted market inquiries, including an online questionnaire to Australian accommodation providers seeking specific information about their dealings with online travel sites. After reviewing over 500 responses and speaking with industry participants, the ACCC identified the key issues as the use of broad price parity and room availability clauses by online travel sites.</p> <p>Additionally, in late 2016, the High Court of Australia held that the travel agency Flight Centre was in competition with airlines in the market for the supply of airline tickets (notwithstanding Flight Centre was an agent for each of those airlines). Flight Centre had requested the airlines to not sell directly to customers at a price lower than the price the airlines offered to Flight Centre. The High Court found that to be an attempt to fix prices at which the airlines would sell to customers directly.²⁸</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>In 2016, the ACCC considered the use of price parity clauses in contracts between online booking platform services and Australian hotels and accommodation providers to be anti-competitive as they stopped consumers from getting different prices from competing online sites.</p> <p>The ACCC has also expressed concern that digital platforms could use exclusionary clauses in business user agreements to reduce rivals' ability to enter and expand by competing on pricing, or limiting the range of goods and services that rivals can offer. Specifically, exclusive agreements and price parity clauses could be particularly damaging for competition if applied by a digital platform with market power in respect of an intermediary service it supplies.</p>
<p>6.</p>	<p>Is there any safe harbor/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbor/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbors?</p>
	<p>No.</p> <p>In Australia, there are no complete safe harbour provisions akin to those in the EU and the UK.</p>

²⁸ [ACCC v Flight Centre Travel Group Ltd](#) [2016] HCA 29 (14 December 2016).

	However, exclusive dealing will only contravene the CCA where it has the purpose or likely effect of substantially lessening competition.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	The ACCC has repeatedly expressed its concerns about digital platforms being incentivised to restrict interoperability between their own services and those provided by third-parties. ²⁹ In DPSI 5, the ACCC contemplated that effective interoperability obligations (such as allowing third-party app stores on mobile operating systems) could be imposed on Designated Digital Platforms in the future reforms to promote competition in digital markets. ³⁰
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>There is currently no competition legislation that specifically governs the conduct of digital companies in Australia.</p> <p>However, the ACCC has previously observed in the DPI that leading digital platforms are likely incentivised to leverage their market power both within their relevant market as well as in related markets.³¹ The ACCC pointed to international evidence of digital platforms engaging in anti-competitive leveraging behaviour through practices like pre-installation of apps and sharing access to user data with third-parties to gain a corresponding benefit (i.e. increased ad spend).</p> <p>In DPSI 5, the regulator recommended the introduction of mandatory service-specific codes of conduct for ‘designated’ digital platforms. The ACCC recommended that the code should include targeted competition obligations for designated digital platforms to address the following issues:</p> <ul style="list-style-type: none"> • anti-competitive self-preferencing; • anti-competitive tying; • exclusive pre-installation and default agreements that hinder competition;

²⁹ See [DPSI 5](#), p. 156.

³⁰ *Ibid.*, p. 160.

³¹ [DPI Final Report](#), pp. 133-137.

	<ul style="list-style-type: none"> • impediments to consumer switching; • impediments to interoperability; • data-related barriers to entry and expansion; • lack of transparency; • unfair dealings with business users; and • exclusivity and price parity clauses. <p>The Australian Government is yet to provide a formal response or indication of potential legislative reform in light of these recommendations.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	No.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	<p>There is no competition legislation which specifically governs the conduct of digital platforms.</p> <p>Australia’s competition law prohibits firms with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. This could include conduct such as refusal to deal, restricting access to an essential input, predatory pricing, margin or price squeezing, and tying or bundling. This prohibition applies generally across all sectors, including digital platforms.</p> <p>However, in DPSI 5 the ACCC recommended the introduction of mandatory, service-specific codes of conduct for ‘designated’ digital platforms (see detail set out in Q1 above).</p>
i.	Please describe how “platform” is defined for these purposes.
	<p>As mentioned in Q3 above, Australian competition law does not specifically govern the conduct of platforms with significant market power.</p> <p>However, in DPSI 5 the ACCC recommended that competition measures be introduced only for ‘designated’ digital platforms, which are digital platforms ‘that pose the greatest risk of causing significant and widespread harm to competition for digital platform</p>

	services, and for related products and services'. ³² The ACCC considers that the primary threshold that should be used for designation would be quantitative criteria in the form of metrics such as numbers of monthly active Australian users and the platform's revenue.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	As above.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	See response to Q1 above.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	As above.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	In DPSI 5, the ACCC has only made recommendations at this stage, and the requirements have yet to be legislated. The recommendations remain at a high level, with different approaches being considered, and any details are yet to be settled.
vi.	Please summarise any penalties provided for non-compliance.
	N/A – as above. However, in DPSI 5, the ACCC made recommendations for significant financial penalties to apply for the proposed regime (see detail set out in Q1 above). At a minimum, the ACCC considers that a new regulatory regime should provide for penalties equivalent to the largest penalties already available in the CCA. ³³ It also noted that new enforcement tools should be considered, but did not provide any concrete recommendations. ³⁴
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that

³² [DPSI 5](#), p. 114 [5.4].

³³ [DPSI 5](#), pp. 191-2 [7.2.3]

³⁴ [DPSI 5](#), p. 193.

	overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	N/A – no specific rules have been introduced.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	There is no competition legislation which specifically governs the conduct of digital platforms. Australia's competition law prohibits firms (in all sectors) with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defenses or objective justifications accepted?
	N/A – no specific rules have been introduced.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defense be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	N/A – no specific rules have been introduced.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	N/A – no specific rules have been introduced. However, any specific rules would be based on the civil 'balance of probabilities' standard of proof.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?

	<p>The ACCC has identified that access to granular, high-quality data can be a source of competitive advantage for digital platforms that provide services where data is an important input. Conversely, a lack of access to such data can be a key barrier to entry and expansion in the supply of many digital platform services.</p> <p>The ACCC remains concerned that data-related barriers are limiting the ability of rivals to compete with digital platforms that have large data holdings in search and ad tech services. Given the importance of data to a range of digital platform services, the regulator is concerned that data-related barriers to entry and expansion are likely to arise in the supply of other digital platform services.³⁵</p> <p>The ACCC has recommended the introduction of additional competition measures relating to data to promote competition, including:</p> <ul style="list-style-type: none"> • data access requirements which require Designated Digital Platforms to provide access to specific data sources on an agreed basis to rivals (including in adjacent markets) • data portability requirements which would allow a consumer to request a Designated Digital Platform transfer their data to them or a third party in a structured, commonly-used, and machine-readable format, either on an ad-hoc or continuous basis; and • data use limitations which would place restrictions on how a Designated Digital Platform collects, stores, or uses certain data data access requirements.³⁶
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>Australia’s competition legislation includes a ‘regulated access regime’ which is conceptually similar to the essential facilities doctrine. It provides for certain facilities to be ‘declared’ on the basis of criteria including that access to the service provided by the facility would promote competition, that the facility is nationally significant (including its importance to the national economy) and that access would promote the public interest.</p> <p>The access regime has only been applied to services provided by physical infrastructure facilities.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>

³⁵ [DPSI 5](#), p. 166.

³⁶ [DPSI 5](#), p. 168.

	N/A
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Country: Brazil

Contributors: Paola Pugliese & Milena Mundim (Lefosse)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>Brazil does not use different notification thresholds for transactions in the traditional fields and in the digital economy.</p> <p>Law 12,529/2011, the Brazilian Competition Law (“BCL”) does not differentiate mandatory filing criteria according to economic sector. The BCL sets forth that parties to any given transaction that meets all elements of a three-prong test must hold off closing until the Administrative Council of Economic Defense – CADE issues its decision on the transaction’s merits.</p> <p>Such elements are:</p> <ul style="list-style-type: none">(i) <u>Territoriality</u> - actual or potential effects of the transaction in Brazil;(ii) <u>Revenues</u> – parties’ economic groups to the transaction must have had revenues surpassing BRL 750mm and BRL 75mm in opposite ends of the transaction (e.g. buyer group and target/seller group) in Brazil, in the year prior to the transaction; and(iii) <u>Concentration</u> – the transaction must amount to a merger case under the definitions set out in the BCL, namely, mergers, incorporations, stakeholding, securities and assets acquisitions, associative agreements, consortia and joint ventures (except those destined to participate in public bids).
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>There are no specific directives regulating merger control involving nascent competitors, mavericks, or any distinctive entities of the sort, but the Administrative Council of Economic Defense (“CADE”) has the prerogative to call in transactions, that are not subject to mandatory filing, up to a year past their closing. It is uncommon for CADE to exercise this prerogative.</p>
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in

	formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?
	<p>CADE has mutual cooperation agreements with the majority of regulatory agencies which also deal with competition-related matters and data protection, such as the Brazilian Telecommunications Agency (“ANATEL”), the Brazilian Data Protection Authority (“ANPD”) and the Brazilian Central Bank (“BACEN”), to name but a few.</p> <p>CADE does not routinely consult with other regulatory agencies within its merger control capabilities, but it may and does happen in specific situations involving more complex cases.</p>
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?
	<p>CADE has no preferred proxy for market shares in platforms, nor has it established a more robust framework upon which digital economy players would be reviewed by in order to ascertain the existence of market power, or lack thereof.</p> <p>In recent cases involving online retail, CADE used a straightforward revenues-based metric, whereas in a price comparison services merger case, CADE relied on market shares derived from total clicks in advertisements.</p>
5.	Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	<p>To date, no deal or acquisitions of a minority shareholding has been blocked or subject to remedies in Brazil due to concerns of a 'killer' acquisition in the digital economy.</p> <p>However, in 2020, CADE opened an enquiry into all acquisitions made by Big Tech, such as Google, Amazon, Apple, and Facebook, in the past 10 years. No specific proceedings or complaints have risen from this initiative, but the complaint is ongoing.</p>
6.	If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?
	<p>To date, CADE has not cleared a case conditioned to the performance of structural or behavioural remedies.</p>

	<p>However, the authority does mention SBF Group’s acquisition of Nike Brasil in its digital markets working paper, due to the relevance of e-commerce to the relevant market definition.</p> <p>CADE refers to the 2020 merger case of SBF Group’s acquisition of Nike Brasil’s local active contracts and assets. The deal would result in Centauro (“SBF Group”) being Nike’s exclusive distributor in Brazil, and gave rise to vertical concerns regarding discrimination of competing retailers and sensitive information exchange. As the SBF Group operates in Brazil both in retail and distribution of sporting goods, CADE undersigned a merger control agreement with the parties to ensure: (i) the structural separation between Nike and SBF’s business units in the retail link of the supply chain; (ii) enforcement of non-discriminatory conduct from SBF Group in supplying Nike products to competing retailers; and, (iii) provisions governing limitations on the exchange of commercially sensitive information vertically.</p> <p>Another relevant, and more recent case was the automotive sector information sharing JV which was recently blocked by CADE, referring to the Catena-X initiative. This case is further detailed in item II.3, below.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>There are no such provisions under the BCL or CADE’s decision-making practice.</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.</p>
	<p>There are three such examples of investigations. However, the nature of such violations is not related to the markets in which they occur (the digital economy). They are standard investigations and/or violations which happen to involve market players active in the digital economy.</p> <p><u>IBM/Red Hat</u></p> <p>The acquisition of Red Hat by International Business Machine Corporation (“IBM”) had already been filed on April 09th 2019, and was pending judgment by CADE, when the national and international press and the applicants notified the transaction. Thus, the merger was completed prior to the Tribunal’s decision, which amounts to gun-jumping. Therefore, considering that the transaction had already been filed and was close to being decided, there was no way to mitigate the intentionality of the defendants. CADE then took the view that the intentionality was absolute and, consequently, the maximum fine of 0.4% of the average turnover of the economic groups or conglomerates in the year prior to the consummation of the transaction was applied. CADE and the parties</p>

	<p>(IBM and Red Hat) then entered into a settlement agreement, whereby they were required to pay a monetary contribution of R\$ 57,000,000.00.</p> <p><u>Naspers/Delivery Hero</u></p> <p>Naspers Limited, a South African holding company which controls several companies in the technology industry, gradually increased its stake in Delivery Hero SE, a German company that controls delivery platforms operating in different countries. Several transactions took place between 2017-2018, but only the one that took place in March 2018 was previously notified to CADE. Although the transactions from June and December of 2017 were not mandatory filings, the transaction from May of that same year should have been filed.</p> <p>Therefore, CADE opened an investigation on the matter. In the transaction under analysis, Naspers made a primary investment through subscription of new shares issued by Delivery Hero, equivalent to 7.8% of the capital stock of said company, which was only filed after the Administrative Proceeding in question was opened.</p> <p>The Parties and CADE ultimately signed a settlement agreement that foresaw the payment of a BRL 718,554.00 fine.</p> <p><u>Microsoft/Facebook</u></p> <p>The Secretariat of Economic Law (“SDE”) became aware of the transaction between Microsoft and Facebook through a news report published on the website www.oglobo.globo.com, from which it sent Official Letters to the parties involved to provide clarifications on the transaction and, subsequently, opened the Administrative Proceeding for Merger Review. However, according to the officiated parties, the relationship between Microsoft and Facebook did not produce any effect in Brazil, i.e., could not affect the Brazilian competitive environment.</p> <p>In the analysis of the General Superintendence (“GS”), it was concluded that there would be no horizontal concentration or vertical integration since the transactions did not encompass any activity of the applicants in Brazil.</p> <p>More specifically, the purchase of Facebook shares by Microsoft occurred in 2006, a time when Facebook still had no activities in Brazil. Moreover, the agreements signed in 2010 also did not produce effects in the national territory, since the products and functionalities arising from the agreements were only available in the United States. In this regard, such transactions have no potential harm to Brazilian consumers, given the lack of effects in the national territory, which is why the GS decided to shelve the case.</p>
<p>9.</p>	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>
	<p>The authority does have the power to undertaking an ex-post analysis but there are no broad powers to revise closed transactions <i>ex officio</i>. To all effects, CADE may revise or reverse merger cases, but this must occur under one of the three following scenarios:</p> <p>(i) The review of a transaction not subject to mandatory filing, in up to a year past its closing, as indicated in response to item I.2 of this questionnaire. This could</p>

	<p>potentially result in the imposition of remedies or even blocking of the transaction.</p> <p>(ii) If a transaction was filed before CADE and subject to remedies and the parties fail to comply with their execution, the transaction is subject to revision, further remedies, or even blocking. This has occurred recently.</p> <p>(iii) If a market structure, with or without CADE's previous review, by any means produces at least one of the four effects defined by the BCL indicative of a competition infringement (I - to limit, restrain or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively), CADE may open a formal proceeding against the parties and impose structural sanctions, such as divestitures. Structural sanctions have been imposed only once in assessments of this nature, but in the context of a cartel proceeding.</p>
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	There is no specific criterion for reviewing economic analyses for digital sector merger control cases. CADE has its Economic Studies Department (“ DEE ”), to which it relies upon to produce tailored studies and/or its’ own review of reports submitted by applicants, but the relevance and extent to which the economic evidence will sway a decision on the merits varies greatly from case to case.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	There are no such directives in Brazil, only the Bill of Law No. 2.768/2022, as indicated in item IV.1 below, which more accurately resembles the EC’s DMA rather than specific directives for horizontal agreements between digital platforms.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.
	No, it has not.

<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>CADE has not reviewed any cases related to, nor detailed its stance on algorithmic price setting/algorithmic tacit collusion.</p> <p>It has reviewed several merger cases related to competitor collaborations related to data and information exchange, however, and has imposed the usual requirements of firewalls, compliance programs, ring-fencing, monitoring trustees, and so on.</p> <p>One case which is particularly worthy of mention is the recent merger control decision, which was ultimately blocked, of the Catena-X initiative.</p> <p>The Merger Case at hand was notified to CADE on June 24th 2022, and consisted of the establishment of a joint venture, headquartered in Germany, between the following companies: Volkswagen; BMW; Mercedes-Benz; BASF; Bosch; Henkel; SAP; Schaeffler; Siemens; T-Systems; and ZF.</p> <p>The JV has as its purpose the creation of a cloud-managed network, based on the principles established under Gaia-X and Catena-X, with broad access to all players in the automotive sector and their respective partners, so that each of the applicants will hold 9.1% of the shares representing the JV’s capital stock after the consummation of the transaction.</p> <p>The GS’ opinion determined the unconditional approval of the transaction, but this decision was subject to review by CADE’s Tribunal, since it was considered that a more in-depth analysis of the transaction was necessary in view of the mechanisms used to effectively prevent a possible illicit exchange of information between the companies involved in the project.</p> <p>The following aspects were analysed in greater depth: (i) the possibility of foreclosing the market with the artificial and abusive creation of barriers to entry; and, (ii) the investigation of whether the present project would not imply a re-edition of the extinct “Autolatina”, which was also a joint venture, equally composed by one of the companies now integrating the new initiative. Therefore, in the leading vote, it was considered that the concrete case fits the second hypothesis presented by the Organization for Cooperation and Development (“OCDE”) regarding the exchange of competitively sensitive information - a joint venture involving cooperation in research and development and standardisation of products and services.</p> <p>Hence, in CADE’s view, the scale of the project made it impossible to know what information would actually be exchanged by competitors. The Catena-X initiative is so broad, and its applications are at such an early stage that it was not considered possible to estimate what the concrete effects of this information exchange would be. Thus, in light of these uncertainties, it was decided that protective measures should be imposed to avoid harm to the market and consumers.</p>

	<p>In this regard, in order to address the tribunal’s concerns as well as to preserve the competitive conditions in the markets affected by the transaction, negotiations were held with the applicants, who agreed to adopt a set of compliance measures that could mitigate the competitive risks of the transaction. However, the remedies presented in the parties’ settlement proposal did not achieve the minimum measures considered necessary by CADE to ensure the enforcement and credibility of the agreement.</p> <p>For this reason, the tribunal, unanimously, following the reporting vote, decided not to homologate such agreement, thus unilaterally imposing remedies.</p> <p>The remedies imposed by the tribunal included behavioural measures, to be monitored for 5 years, and restrictions that had to be maintained on a permanent basis as long as the joint venture exists. The commitments required by CADE encompassed: a) the monitoring and storage of the information exchanged between the users of the JV’s IT Systems, with an obligation on the Commitments to cooperate and provide information to CADE; b) the appointment of a Chief Compliance Officer responsible for issuing safeguards rules, as well as for receiving and investigating reports of violations of antitrust rules; c) the development and adoption of a tracking software, designed to identify possible violations of antitrust rules within the scope of information exchanges through the JV’s IT Systems; d) the adoption of a Compliance by Design system, whereby the JV’s IT Systems should be conceived and designed to integrate antitrust compliance into the information exchange tasks and processes, preferably in an automated manner; and, e) the appointment and hiring of an independent audit firm (“Trustee”), which would be responsible for monitoring all such commitments and the implementation of the solutions indicated above.</p> <p>Ultimately, the parties to the transaction stated that the imposed remedies turned the transaction impossible to implement and forfeited its execution. This resulted in the parties abandoning the deal and in the blocking of the transaction, as initially submitted to CADE.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>As of yet, CADE has not provided any guidance on its view and/or enforcement structure for hub-and-spoke arrangements in the digital economy.</p>
<p>5.</p>	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>No, there haven’t been any cases of the sort.</p>

6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	Nothing further.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	There are no formally specified enforcement priorities in Brazil, let alone specifically for the digital economy, nor has CADE demonstrated a particular viewpoint with regards to non-price vertical restraints used by online multi-sided platforms. As of yet, it is only possible to ascertain that such practices would be reviewed just as any other vertical restraints, under the rule of reason.
2.	What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	There haven't been any such instances in Brazil. On 8 February 2023, CADE undertook a settlement agreement in an investigation against iFood, Latin America's largest food-tech company, for imposing exclusivity arrangements with restaurants registered in its delivery platform, a case which was being reviewed under the usual rule of reason approach (dominance – materiality of the conduct – balancing test), but there is no guidance specifically with regards to exclusive dealing by non-dominant platforms.
3.	What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?
	<p>There have only been two MFN cases brought by CADE, both subject to settlement agreements by defendants. These examples include the online travel agencies case, settled in 2018, and the more recent fitness services platform case, settled in 2022. Both cases regarded wide MFN clauses but, as there was no final decision on the merits of either case, there is no solid guidance as to CADE's view of this practice other than that it considers it to be a potential competition violation.</p> <p>However, the 2018 settlements in the online travel agencies case only sought to hinder wide MFN clauses, authorizing the maintenance of narrow MFN due to robust free-riding concerns brought by the parties.</p>

<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>Yes, there are examples of such cases in Brazil.</p> <p>In 2020, fitness services platform Totalpass filed a complaint before CADE containing market foreclosure concerns against its competitor, Gympass, which allegedly had exclusivity and/or MFN agreements with more than 80% of gyms in Brazil. The settlement agreement, undersigned with CADE, limited exclusivity to 20% of the gyms in Gympass’ database and forbid any and all forms of MFN clauses and/or effects.</p> <p>In 2016, the Brazilian Hotel Forums Operator, an industry association, filed a complaint against Expedia, Decolar, and Booking.com for the abusive imposition of MFN clauses. In 2018, all defendants undersigned settlement agreements with CADE that forbid the maintenance of wide MFN clauses but authorized the maintenance of narrow MFN due to robust free-riding concerns brought by the parties.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>Given that both cases referenced above were settled without the setting of a standard framework for review, the competition authority did not conclude on the extent of competitive harm or potential efficiencies of the MFNs in those cases. Notwithstanding, in the online travel agencies case, CADE did block wide MFN clauses while allowing the maintenance of the narrow variety.</p>
<p>6.</p>	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>There is no distinction in enforcement structure between traditional markets and digital platforms, nor is there a safe harbor in the same sense as that applicable by the EC.</p> <p>There is a rebuttable threshold for dominance based on market shares set out in the BCL’s article 36, para 2, which is placed at 20% market share, in addition to a provision within CADE’s merger control regulations in the sense that vertical links inferior to 30% do not, in and of itself, gives rise to competition concerns, and is able to be reviewed under the fast-track procedure.</p> <p>So, in general, unilateral conducts carried out by market players holding less than 20% market share, if occurring within a horizontal relationship (e.g. refusal to sell to competitors), or less than 30% for vertical practices (e.g. RPM) would not be rendered dominant and, as such, would not be made liable to antitrust sanctions.</p>

	<p>However, there have been instances in the past of enforcement and/or prohibitive measures against parties holding less than 20% market share, such as in SKF's and Michelin's RPM cases, which, even though holding less than 20% market share, were either sanctioned (SKF) or prohibited from engaging in the proposed commercial pricing policy (Michelin) based on coordinated effects concerns.</p>
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	Nothing further.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>Not currently in force, but Bill of Law no. 2.768/2022 has recently been proposed to the Brazilian Congress. The legislative procedure in Brazil is usually quite lengthy, with no foreseeability if, when, and on which terms this proposal would come into force (if at all). In its current form, the terms of the Bill regulate the organisation, functioning, and operation of digital platforms, with direct and confessed inspiration taken from the Digital Markets Act (“DMA”), conferring the Brazilian National Telecommunications Agency (“ANATEL”) the powers to discipline the use and abuse of market power in this specific segment, in tandem, with CADE’s usual enforcement abilities.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	<p>There is not currently any authorities as described in the question with regards to digital markets specifically, although the abovementioned Bill of Law No. 2.768/2022 does propose the creation of concurrent competence with the Brazilian National Telecommunications Agency (“ANATEL”) with regards to digital markets.</p> <p>In general competition enforcement matters, there is specific concurrent competence with a handful of regulatory bodies, chief among which are the (i) Brazilian Central Bank (“BACEN”); (ii) Brazilian National Telecommunications Agency (ANATEL); and (iii) Brazilian Oil, Natural Gas and Biofuel Agency (“ANP”). Antitrust enforcement is very much a coordinated effort between CADE and all such agencies, with CADE taking on an</p>

	incomparably more prominent role in enforcement, while agencies tend to handle sectorial and residual concerns.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	No, only the Bill of Law No. 2.768/2022, as indicated in item IV.1 above.
i.	Please describe how “platform” is defined for these purposes.
	Not applicable.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	Not applicable.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	Not applicable.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	Not applicable.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Not applicable.
vi.	Please summarise any penalties provided for non-compliance.
	Not applicable.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?

	Not applicable.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	No, only the Bill of Law No. 2.768/2022, as indicated in item IV.1 above.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	Not applicable – there are no rules specific to digital markets.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	Not applicable – there are no rules specific to digital markets.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.,
	Not applicable – there are no rules specific to digital markets.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	There hasn't been a case brought by CADE with considerations on data portability and interoperability robust enough as to indicate the authority's effective stance on these issues.
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide

	<p>a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>It does, based on the usual FRAND (Fair, Reasonable, and Non-Discriminatory) access to infrastructure which both (i) is essential to operate in a given market and (ii) is incapable of being replicated, due to either structural or economical impossibilities.</p> <p>However, this has never been robustly applied in any case involving the digital economy. It was alleged in the Brazilian Google Shopping case, which sought to investigate whether Google would have placed its Shopping service in a privileged position with regards to its search engine results, thus infringing the neutrality of its algorithm in self-preferencing, but the case was ultimately dismissed without an in-depth analysis nor a positive finding of essential facility.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>Nothing further.</p>

Country: Canada

Contributor: Subrata Bhattacharjee (Borden Ladner Gervais)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	Canada does not have different notification thresholds for sector-specific transactions under its Competition Act.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	There is no obligation to notify the Canadian Competition Bureau (“ Bureau ”) of a transaction that does not exceed the merger control thresholds contained in the Competition Act. However, the Commissioner of Competition (“ Commissioner ”) may challenge any merger (as the term is defined in law) within one year of completion, whether a transaction is notifiable or not.
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	The Commissioner may consult other federal departments or agencies in the course of a merger review, but is otherwise solely responsible for the discharge his duties under the Competition Act. As a result, and in our experience, consultation of this nature is informal. Some transactions may be subject to other federal regulatory or Ministerial review processes depending on the sector – notable examples include transportation, financial services, and telecommunications and broadcasting. In addition, the Canadian foreign investment review legislation contains a mechanism that refers certain reviewable transactions to the Commissioner for a competition assessment. For some of these types of “parallel” reviews, the Commissioner has entered into agreements or understandings with other agencies with respect to defining review roles.
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most

	<p>frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>The metrics used to calculate market share or market position are set out in the Bureau’s Merger Enforcement Guidelines.³⁷</p> <p>The Commissioner identifies participants in a market in order to determine market shares and concentration levels. Market shares can be measured in different ways, such as dollar sales, unit sales, capacity, or reserves, depending on the best indicators of sellers’ future competitive significance. The level of product differentiation in a market affects the calculation of market shares. The Commissioner includes the total output or capacity of current sellers in the calculation of market shares and the total size of the market, but only includes the output or capacity that would likely become available without incurring significant sunk investments.</p> <p>The Bureau has specified non-binding enforcement thresholds to distinguish mergers that are unlikely to have anti-competitive consequences from those that may require further analysis. Generally, the Commissioner will not challenge a merger if the post-merger market share of the merged firm is less than 35 percent or if the four-firm concentration ratio is less than 65 percent. In practice, mergers that have been challenged have featured post merger market shares well in excess of 50%. The Commissioner examines various factors to determine if mergers that exceed these thresholds would likely prevent or lessen competition substantially.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>We are unaware of any digital economy transactions that have been blocked.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>Merger reviews are typically conducted in private, and the Commissioner is not obligated to release formal decisions. However, in cases of particular significance, the Commissioner may choose to release a backgrounder or position statement. It appears that only a few digital sector transactions have been subject to remedies in Canada. One notable exception is Thoma Bravo’s acquisition of Aucerna, a software supplier to oil and</p>

³⁷ Competition Bureau Canada, [Merger Enforcement Guidelines](#) (6 October 2011).

	<p>gas companies.³⁸ Structural conditions were imposed to address competition concerns, as MOSAIC (owned by a Thoma Bravo subsidiary) and Val Nav (owned by Aucerna) were the two main competitors in developing, servicing, and supplying reserves software in Canada. The merger would have resulted in a monopoly, but Thoma Bravo was required to divest the MOSAIC business to an approved purchaser to address the Commissioner’s concerns.</p> <p>With respect to digital sector transactions, the Bureau has stated a preference for structural remedies as they are easier to enforce, with divestiture of assets being the preferred remedy.³⁹ However, when divestiture of assets is not sufficient, quasi-structural or behavioural remedies are used, or a combination of both. Remedies to anti-competitive practices involving big data may involve ceasing particular conduct, compulsory licensing of intellectual property, or making data available to competitors. The appropriate remedy for a case involving big data may also depend on whether the data is non-rivalrous or requires updates post-divestiture.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>In Canada, there are no specific merger control rules or obligations that apply exclusively to such entities.</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.</p>
	<p>We are not aware of any such investigations that have been made public.</p>
<p>9.</p>	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>
	<p>With respect to any merger review, the Commissioner may:</p> <p>(a) decide to challenge a merger before the Competition Tribunal (“Tribunal”), an entirely independent quasi-judicial tribunal before which the Bureau must prove that a merger is likely to lead to a substantial lessening or prevention of competition in order for the merger to be blocked or have remedies/conditions imposed;</p>

³⁸ Competition Bureau Canada, [Competition Bureau statement regarding Thoma Bravo’s acquisition of Aucerna](#) (30 August 2019).

³⁹ Competition Bureau Canada, [Big data and Innovation: Implications for competition policy in Canada](#) (20 January 2022).

	<p>(b) negotiate with the parties and gain the parties' consent to remedies/conditions in exchange for the Bureau's not challenging the merger before the Tribunal; or</p> <p>(c) decide not to challenge the merger, which it can do by letting the waiting period expire or waiving it (if mandatory pre-notification was required), or granting an advance ruling certificate ("ARC"), which confirms that the Bureau will not challenge the merger.</p> <p>In either (a) or (b), the Commissioner has no ability to undertake an <i>ex-post</i> analysis or effectively revise an original merger decision. However, in (c), if the Commissioner did not issue an ARC, he has one year following closing to initiate a challenge before the Tribunal. Additionally, if an ARC is issued on the basis of incorrect, incomplete or false information, the Commissioner may apply to the Tribunal for an order under section 92 of the Competition Act. If this is the case, the Commissioner will be able to challenge the merger up until one year after the merger has been substantially completed.</p>
<p>10.</p>	<p>To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?</p>
	<p>Bureau economists are involved in both qualitative and quantitative economic analysis in merger reviews, irrespective of the sector. They use qualitative analysis to assess the incentives of merging parties and their competitive strategies, and quantitative analysis such as statistical analyses, pricing regressions, upward pricing pressure tests, event studies, and merger simulation to quantify the price effects and deadweight losses of a potential merger. The selection of a technique depends on various factors such as timing, market characteristics, and data availability. Bureau economists also spend significant time understanding competitive dynamics to ensure accurate analysis. Data from merging parties and third parties are typically used in merger investigations instead of surveys.</p>
<p>II.</p>	<p>Horizontal agreements</p>
<p>1.</p>	<p>Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?</p>
	<p>The Bureau has published the Competitor Collaboration Guidelines, which apply to horizontal agreements irrespective of the sector.⁴⁰</p>

⁴⁰ Competition Bureau Canada, [Competitor Collaboration Guidelines](#) (6 May 2021).

<p>2.</p>	<p>Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.</p>
	<p>The Bureau has published a set of guidelines—the Competitor Collaboration Guidelines—on its approach to assessing horizontal agreements in general. Although there is no formal guidance, the Bureau has issued a call-out to market participants to provide information on potentially anti-competitive conduct in digital markets.⁴¹ The call-out specifically requests information on a range of issues, including the impact of data on competition, the role of platforms and ecosystems, the use of algorithms and artificial intelligence, and the potential for collusion or other anti-competitive conduct in the digital economy. It also invites stakeholders to share their views on potential policy and enforcement measures that could address these issues. While the Bureau has not yet provided specific guidance on how it will approach collaborations between potential competitors in the digital field, it is clear that the bureau is actively seeking to improve its understanding of competition issues in this area. In the most recent consultation on the future of Canadian competition policy, the use of artificial intelligence, including algorithms, automation, machine learning and language recognition, was identified as a basis for facilitating collusive outcomes.⁴² To this end, algorithmic collusion was specifically highlighted as a competition collaboration concern in the Bureau’s response to the government’s consultation.⁴³</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The Bureau has published a paper entitled “Big data and Innovation: Implications for competition policy in Canada” outlining its views on horizontal agreements with respect to data.⁴⁴</p> <p>The Bureau notes that big data does not change the core elements of a cartel case, which still require an agreement among co-conspirators. An example of an innovative way to manage a cartel involves specific pricing algorithms for the sale of certain</p>

⁴¹ Competition Bureau Canada, [Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy](#) (20 January 2022).

⁴² Innovation, Science and Economic Development Canada, [The Future of Competition Policy in Canada](#) (22 November 2022).

⁴³ Competition Bureau Canada, [The Future of Competition Policy: Submission by the Competition Bureau](#) (15 March 2023).

⁴⁴ Competition Bureau Canada, [Big data and Innovation: Implications for competition policy in Canada](#) (20 January 2022).

	<p>products, which became necessary after manual changes to pricing became too time-consuming.</p> <p>The Bureau has also stated that with the use of big data, companies can observe competitors' behaviour and adjust prices through automated pricing algorithms, and this may soften or sharpen competition. However, making the use of big data illegal in monitoring competitors would require a change in the framework of conscious parallelism, which is not feasible.</p> <p>When considering cases beyond unilateral data collection, cases with "facilitating practices" may raise concerns under the Competition Act. Facilitating practices can be interpreted as activities that have the potential to facilitate or may be indicators of the existence of an agreement between competitors. Some examples include price lists, advance announcement of price changes, similar pricing systems, most-favoured-nation clauses, and participation in regular meetings with competitors prior to a period of stability. Big data and algorithms may expand the array of activities that constitute facilitating practices. When firms engage in such practices, they run risks, particularly if the outcomes mirror those that would be achieved through collusion. Market players should remain vigilant to ensure that the use of new technology, including algorithms, does not result in anti-competitive conduct.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on "hub and spoke" arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority's analysis.</p>
	<p>According to the Bureau's white paper on "Big Data and Innovation: Implications for competition policy in Canada", "hub-and-spoke" agreements in the digital economy may take the form of agreements between competitors.⁴⁵ The white paper notes that cartels have long used data to facilitate and implement agreements and may use technological innovation to do so more effectively. While the use of big data and algorithms can have pro-competitive benefits, they can also be used to facilitate more sophisticated means of conspiring, such as the sharing of large data sets of inventory information to facilitate an output restriction agreement or a "hub-and-spoke" agreement between competitors to use the same algorithm to maintain prices for a large range of products. However, the Bureau has not yet released any decisions or guidance on horizontal coordination among suppliers through their individual agreements with a platform.</p>
<p>5.</p>	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency's analysis.</p>

⁴⁵ Competition Bureau Canada, [Big data and Innovation: Implications for competition policy in Canada](#) (20 January 2022).

	To date, the Bureau has not published any information regarding leniency applications in horizontal cases concerning digital players.
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	<p>On November 22, 2022, Innovation, Science, and Economic Development Canada initiated a consultation called “The Future of Competition Policy in Canada.”⁴⁶ In regards to competitor collaboration, the government is contemplating potential reforms with regard to several aspects. One of which is deeming or inferring agreements more readily for specific forms of civilly reviewable conduct, such as through algorithmic activity. This is particularly significant, given the challenges of applying concepts like “agreement” and “intent” in the era of AI.</p> <p>The government is also considering broadening and/or strengthening the Act’s civil competitor collaboration provisions to deter more intentional forms of anti-competitive conduct. This may include examining past conduct and introducing monetary penalties. Furthermore, they are considering making collaborations among indirect competitors civilly reviewable, even if they are not between direct competitors.</p> <p>Another consideration is the introduction of a mandatory notification or a voluntary clearance process for specific potentially problematic types of agreement. Finally, the government is contemplating reintroducing buy-side collusion, beyond only labour coordination, into the <i>Competition Act</i>’s criminal conspiracy provision, or considering a civil per se approach to it.</p> <p>On March 15, 2023, the Bureau published its submission in response to the Canadian government’s consultation.⁴⁷ Regarding competitor collaborations, the Bureau proposed several reforms, including criminalising certain buy-side agreements, introducing administrative monetary penalties for anti-competitive competitor collaborations challenged under the civil provisions of the Act, and expanding the scope of the civil competitor collaboration provision to capture historical agreements and harm.</p>
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?

⁴⁶ Innovation, Science and Economic Development Canada, [The Future of Competition Policy in Canada](#) (22 November 2022).

⁴⁷ Competition Bureau Canada, [The Future of Competition Policy: Submission by the Competition Bureau](#) (15 March 2023).

	<p>The Bureau has previously stated (in its Digital Market Call-out) that it is focusing on several types of vertical agreements in the digital economy when it comes to its enforcement priorities and public guidance.⁴⁸ These include refusal to deal, self-preferencing, margin squeezing, and most-favoured-nation requirements.</p> <p>The Bureau’s view on non-price vertical restraints used by online multi-sided platforms is that they can have both pro-competitive and anti-competitive effects, depending on the circumstances. The Bureau takes a case-by-case approach to analysing such restraints, taking into account the impact on competition and factors enumerated in the Competition Act, including the effect on barriers to entry, price or non-price competition, change and innovation, and any other factor relevant to competition in the affected market.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The Bureau recognizes that exclusive dealing may have pro-competitive benefits, such as promoting innovation and efficiency, and that it may be engaged in for reasons other than to exclude competitors.⁴⁹ However, it also recognises that the practice can harm competition by raising rivals’ costs, foreclosing competitors from important inputs or markets, and limiting consumer choice. Although there is no specific guidance with respect to <i>non-dominant</i> platforms, exclusive dealing is subject to a civil prohibition under section 77 of the Competition Act. Under this provision, exclusive dealing refers to a supplier requiring a customer to deal only or primarily in their designated products or refraining from dealing in a specified product class, and any inducement by a supplier to meet such conditions by offering more favourable terms.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>The Bureau has identified that anti-competitive strategies in the digital world may aim to protect a firm’s “core” market or capture adjacent markets, which could include the use of MFNs.⁵⁰ In the Bureau’s Digital Call-Out, it has stated that MFNs are a potential anti-competitive strategy because they can prevent suppliers from offering better prices or other trade terms to competitors, which can harm competition and ultimately harm</p>

⁴⁸ Competition Bureau Canada, [Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy](#) (20 January 2022).

⁴⁹ Competition Bureau Canada, [Abuse of Dominance Enforcement Guidelines](#) (7 March 2019) at paras. 65-67.

⁵⁰ Competition Bureau Canada, [Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy](#) (20 January 2022).

	consumers. However, the Bureau did not distinguish between “wide” or “narrow” MFN requirements imposed by online platforms.
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	<p>In 2014, the Commissioner investigated potentially anti-competitive obligations and restrictions imposed by Apple on Canadian wireless carriers in relation to the sale and marketing of iPhones.⁵¹ One of the focuses of this investigation was MFNs, or any other term that required preferential or parity treatment.</p> <p>The investigation examined whether the MFN clause in Apple’s agreements with Canadian wireless carriers restricted the ability of the carriers to offer lower prices to consumers for the iPhone on other platforms. The investigation looked at whether the MFN clause was limited to prohibiting suppliers from offering a lower price on their own website, or whether it extended to other platforms.</p> <p>After conducting analyses of the information gathered over the course of the investigation, the Commissioner concluded in 2017 that it did not have sufficient evidence to suggest that Apple was contravening the Competition Act in respect of the Apple Terms at that time.</p>
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
	<p>The Bureau has stated that MFNs may be anti-competitive when a firm explicitly or implicitly prohibits its suppliers from providing rivals with better prices or other trade terms.⁵² This could occur, for instance, where a hotel-booking website prohibits hotels from offering better rates to rival hotel-booking websites. Although MFNs may have a legitimate business purpose, they may nevertheless assist competitors in coordinating conduct more effectively and, ultimately, lead to anti-competitive outcomes.</p>
6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?

⁵¹ Competition Bureau Canada, [Investigation into alleged anti-competitive conduct by Apple](#) (6 January 2017).

⁵² Competition Bureau Canada, [Competition Bureau call-out to market participants for information on potentially anti-competitive conduct in the digital economy](#) (20 January 2022).

	<p>Generally, vertical agreements that do not have a substantial adverse effect on competition in the market are not subject to penalties under the Competition Act. However, the Bureau has outlined non-binding thresholds for assessing the potential anti-competitive effects of vertical agreements.⁵³ If a firm’s market share is below 50 percent, further examination will typically only occur if there is other evidence indicating that the firm possesses a substantial degree of market power or that it is likely to gain such power within a reasonable period of time through the alleged anti-competitive conduct.</p> <p>On the other hand, a market share of 50 percent or more will generally prompt further examination. In cases where a group of firms is alleged to be jointly dominant, a combined market share equal to or exceeding 65 percent will generally trigger further investigation.</p>
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	Not applicable.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>While there are no specific regulations that exclusively govern the conduct of digital companies in Canada, the existing competition laws and regulations are applicable to digital companies, and there have been efforts to update and modernise these laws to reflect the digital economy’s realities.</p> <p>The Competition Act is the primary federal law governing competition in Canada, and it prohibits various types of anticompetitive conduct, including abuse of dominance. In June 2022, the abuse of dominance regime was amended to contemplate factors that are applicable to the digital economy such as: network effects; consumer privacy; and the extent of change or innovation in a market.</p> <p>In addition, the Telecommunications Act gives the Canadian Radio-television and Telecommunications Commission (“CRTC”) the authority to regulate and oversee the telecommunications industry in Canada, which includes digital companies providing telecommunications services.</p>

⁵³ Competition Bureau Canada, [Abuse of Dominance Enforcement Guidelines](#) (7 March 2019) at para. 34.

	<p>Apart from antitrust laws, Canada has a range of other regulations that aim to ensure a level playing field in the digital sector. For instance, the Canadian government has implemented data protection laws such as the Personal Information Protection and Electronic Documents Act to regulate the collection, use, and disclosure of personal information by private sector organisations . Additionally, Canada has passed laws such as the Anti-Spam Legislation (“CASL”) to regulate electronic marketing.</p> <p>As for upcoming regulations, the Canadian government has indicated that it is considering further updating and modernising its competition laws to address challenges arising from the digital economy, such as those relating to data ownership and privacy, platform governance, and the use of algorithms. The Canadian government has launched a consultation process that is currently on-going.</p> <p>Additionally, the Online News Act, also known as Bill C-18, is currently being reviewed by the Senate of Canada. This proposed legislation aims to create a system for digital news intermediary operators and news businesses to come to agreements regarding news content that is made available via these intermediaries. The legislation has several features, including ensuring that revenue is shared fairly between digital platforms and news outlets, allowing news outlets to collectively bargain, and promoting commercial agreements between digital platforms and news outlets on a voluntary basis, with limited government involvement. If necessary, a mandatory arbitration framework is established as a last resort for cases where digital platforms and news outlets cannot reach commercial agreements.</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>The Bureau is the main competition law enforcement agency in Canada and the Commissioner has sole jurisdiction over matters subject to the <i>Competition Act</i>. Consultation between the Commissioner and sector specific regulators is often informal. Some actors may be subject to other federal regulatory processes depending on the sector – notable examples include:</p> <ul style="list-style-type: none"> • The CRTC, which is responsible for regulating Canada’s broadcasting and telecommunications sectors, including the provision of internet and mobile services. • The Office of the Superintendent of Financial Institutions, which is responsible for regulating and supervising federally regulated financial institutions, including banks, insurance companies, and pension plans; and • Transport Canada, which is responsible for developing regulations, policies and services of road, rail, marine and air transportation in Canada.
<p>3.</p>	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>

	<p>The Competition Act prohibits a variety of anti-competitive conduct, including abuse of dominance. Platforms with significant market power are subject to these provisions and may be found to have abused their dominant position if they engage in conduct that has or is likely to have the effect of preventing or lessening competition substantially in a market. However, there are no regulations specifically applicable to platforms.</p>
i.	Please describe how “platform” is defined for these purposes
	<p>In the context of competition legislation and regulations in Canada, there is no definition of the term “platform”. However, the Bureau has stated that digital platforms may control vast amounts of data; operate in two-sided or multi-sided markets characterised by network effects; and collect data as an input to the service and the selling of ads to monetise the service.⁵⁴</p>
ii.	What are the criteria used to determine whether a platform falls under the regime?
	<p>The criteria used to determine whether a platform, or any business, falls within the purview of the Competition Act depend on the specific context and the provisions being applied. However, in general, the following factors may be considered:</p> <ul style="list-style-type: none"> • Market power: If a platform has a significant share of a relevant market, it may be subject to provisions that prohibit anti-competitive conduct, such as abuse of dominance. • Product Market: The specific type of platform and the services it provides may also be relevant. • Geographic Market: The geographic location of the platform and its users may also be relevant. • Nature of the conduct: If the platform’s conduct is intended to have a predatory, exclusionary or disciplinary negative effect. • Impact on competition: If the conduct is likely to have the effect of preventing or lessening competition substantially in a market, the platform may be subject to provisions that prohibit such conduct.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	<p>As noted above, there are no specific rules applicable to platforms. The general requirements imposed on all businesses, including platforms, with market power in Canada will depend on the specific provisions being applied. However, in general, the</p>

⁵⁴ Competition Bureau Canada, [Highlights from the Competition Bureau’s Data Forum](#) (30 August 2019).

	<p>following are some of the main requirements that platforms with market power may be subject to:</p> <ul style="list-style-type: none"> • Prohibition on anti-competitive conduct including agreements among competitors to fix prices, allocate markets, or restrict output. • Prohibition on abuse of dominance and other reviewable practices such as predatory pricing, tying, or exclusive dealing.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	See above.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	<p>While the Bureau and Commissioner have released several guidelines and statements that may be applicable platforms, there is still a degree of uncertainty that exists. However, it should be noted that some level of uncertainty is to be expected, and it may actually be preferable to having rigid and clearly defined rules that do not align with the unique business models of these platforms.</p>
vi.	Please summarise any penalties provided for non-compliance.
	<p>The maximum administrative monetary penalty that can be imposed on corporations, including platforms, under the abuse of dominance provisions of the <i>Competition Act</i> will be the greater of:</p> <ul style="list-style-type: none"> (i) \$10 million (\$15 million for each subsequent violation); and (ii) three times the value of the benefit derived from the anti-competitive conduct, or if the Tribunal cannot reasonably determine the amount of the benefit, the maximum penalty will be 3 per cent of that corporation's annual worldwide gross revenues. <p>In addition to these penalties, the Competition Tribunal may issue a prohibition order ceasing the abuse from continuing.</p>
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	Although Canada has not introduced specific rules for platforms, the overarching goal of the Competition Act is to promote and maintain competition in the marketplace. These

	<p>rules are designed to prevent anti-competitive conduct and to ensure that markets remain open and contestable, so that consumers can benefit from lower prices, higher quality goods and services, and innovation.</p>
<p>5.</p>	<p>Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?</p>
	<p>There is no specific legislation or regulation that relates to platforms with market power. With that said, the <i>Competition Act</i> applies to all sectors of the economy, including digital markets and platforms. To date, the Bureau has recognised that digital platforms present unique challenges for competition law enforcement, due to the speed of technological change, the vast amounts of data collected by digital platforms, and the network effects that can lead to the dominance of a few key players in certain markets.</p>
<p>6.</p>	<p>If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?</p>
	<p>Canada does not have specific competition rules for digital markets. However, competition rules in Canada are generally effects-based, meaning that they focus on the actual or likely effects of conduct or transactions on competition in a particular market, rather than on the form or structure of the conduct or transactions.</p> <p>Under the <i>Competition Act</i>, the Bureau may challenge anti-competitive agreements, abuse of dominance, and mergers that are likely to result in a substantial lessening or prevention of competition in a market. In each case, the Bureau will assess the actual or likely effects of the conduct on competition in the relevant market.</p> <p>The <i>Competition Act</i> does not contain any civil <i>per se</i> rules, meaning that there are no specific types of conduct or transactions that are automatically considered to be anti-competitive without a showing of effects. Similarly, the <i>Competition Act</i> does not contain any rebuttable presumptions, although in some cases the Bureau may rely on inferences or presumptions (i.e., market share thresholds indicative of dominance) based on the facts of the case and the relevant market conditions.</p> <p>Efficiency defences or objective justifications may be raised in certain cases, but the burden is on the firm or parties to demonstrate that the conduct or transaction is pro-competitive and outweighs any anti-competitive effects. The Bureau will consider a range of factors, including the nature and extent of the efficiency gains, the degree of market power held by the firm or parties, and the availability of less restrictive alternatives.</p>
<p>7.</p>	<p>Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what</p>

	arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	Canada's competition rules applicable to companies in the digital sector are generally effects-based and do not contain any <i>civil per se</i> prohibitions (the only <i>per se</i> offence contained in the Competition Act is criminal conspiracy) or rebuttable presumptions.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	Not applicable.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	There are no public decisions by the Bureau showcasing how it evaluates the role of data portability and interoperable data formats. However, the Bureau is considering the role of data portability and interoperable data formats in promoting competition in the digital economy. ⁵⁵ Data portability is seen as a natural topic of discussion when contemplating structural changes that could foster innovation and competition. Open banking is a prime example of the benefits that portability can bring to competition in the financial sector. It allows for more transparency and consumer engagement, spurring innovation and providing more services to consumers.
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.
	The Competition Act and associated jurisprudence does not expressly permit for an essential facilities doctrine, though from time to time essential facilities issues have been raised in conduct cases. However, the abuse of dominance provisions do prohibit disciplinary conduct and specifically, a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market. Notably, this concept has not yet been applied in a case in the digital economy.

⁵⁵ Competition Bureau Canada, [Highlights from the Competition Bureau's Data Forum](#) (30 August 2019).

<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>In its submission to the Canadian government’s recent consultation on the future of competition policy, the Bureau has proposed further reforms regarding unilateral conduct.⁵⁶ Specifically, the Bureau proposes to simplify the test for establishing an abuse of dominance, including a more appropriate allocation of the burden of proof; require the dominant firm to prove that a business justification was objectively valid to be considered under the abuse of dominance provisions; and recalibrate the standards for evaluating a substantial lessening or prevention of competition to focus on harm to the competitive process.</p>

⁵⁶ Competition Bureau Canada, [The Future of Competition Policy: Submission by the Competition Bureau](#) (15 March 2023).

Country: Chile

Contributor: Benjamin Grebe and Andrea Von Chrismar (Prieto)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>There are no special notification thresholds for transactions in the digital economy. Chilean Competition Law (DL 211) requires some transactions with effect in Chile to be mandatory reviewed ex ante by the National Economic Prosecutors Office (“FNE”), in general “concentration operations”: (i) Mergers; (ii) Acquisitions of rights that allows to exercise “decisive influence” over a competitor; (iii) Joint Ventures; and (iv) Acquisitions of assets. There is no distinction based on the industry or market involved in the transaction for such purposes.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>A concentration operation in Chile shall be mandatorily notified if two thresholds are met, which are based on “sales in Chile” in the year prior to the filing of each agent and/or business group involved in the operation.</p> <p>The threshold refers to (i) individual sales of each agent and (ii) the combined sales of the agents that intend to concentrate. The current thresholds were established by the FNE in March 2019.</p> <p>In Chile no asset-based or market share thresholds are included, therefore no “asset value” or “market share” definitions are provided in this regard.</p> <p>Notwithstanding the aforementioned, Horizontal Merger Guidelines published by the FNE in May 2022, offer guidance for the analysis of dynamic competition and innovation, technological platforms, and digital markets. According to the document, such markets have their own distinctive characteristics, and they are especially driven by dynamic competition. These Guidelines represent an effort to publish the general criteria to be used by the FNE to evaluate horizontal concentrations involving digital markets, illustrating the specific elements that differ from the traditional analysis applied to transactions in other markets. English version available at: https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-ingles.pdf</p> <p>Regarding the question, the acquisition of a nascent competitor or maverick innovator in a transaction that does not meet the mandatory notification thresholds could be voluntarily notified before the FNE or part of a pre-notification, if it is considered a</p>

	<p>sensitive issue, since it allows the parties to have certainty that they are not engaging in gun jumping and that the FNE is aware of the transaction between competitors that might otherwise go unnoticed by the authority.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>In general, the FNE is allowed, during its investigations, to request the collaboration of any employee of the public bodies or services, municipalities or the companies, entities, or corporations in which the State or its companies, entities or corporations, or municipalities, have made contributions, are represented or hold shares, all of which shall be bound to provide such collaboration. Moreover, these employees are required to provide the information included in their files as required by the FNE and, when said files are classified as secret or confidential, they must provide the information in accordance with the current legislation, and in this latter case they shall require the Court's prior authorisation .</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>According to the FNE Guidelines published in May 2022:</p> <ul style="list-style-type: none"> • Regarding digital platforms, the FNE's definition of the relevant markets will consider the interaction between different groups of users, since the presence of indirect network effects implies that the value that one side of users obtains from using the platform may depend on the number of consumers of another side. Thus, the prices charged to each set of consumers take into account the effects on the other groups of platform users. However, the FNE recognises that the application of the hypothetical monopolist test generates certain difficulties when applied <i>mutatis mutandi</i> to digital platforms. • Regarding the last case analysed by the authority (FNE No. 320-2022), the metric for analysing market shares in the mobile, console and computer videogame publishing market, as well as in the market for the supply of licenses for videogame merchandising products and in the digital advertising market, was entirely according to revenues, based on the HHI index.
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your</p>

	<p>jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The Chilean merger control system does not require an ex-ante notification of a minority shareholdings acquisition if it does not grant control or decisive influence. FNE’s guidelines explains the meanings and kind of decisive influence and control, and expressly states that the FNE understands the concept of decisive influence and control included in DL 211 as synonymous. It also states that an acquisition of a minority share can also allow the exercise of decisive influence, when, for example, such participation grants a veto right regarding strategic decisions, or there is a shareholders’ agreement related to such strategic decisions.</p> <p>The authority has therefore not imposed remedies in respect of or blocked acquisitions of interest below the level of decisive influence.</p> <p>Chilean competition system requires the notification of cross-shareholdings in competitors (over 10% of shares), when the sales of both agents in Chile exceed particular sales thresholds (different to the merger review ones), in a special procedure, different than the merger review one. This special procedure consists of a simple notification before the FNE, after completion of the transaction, with the filling of a very simple form. It does not require any FNE approval, it is only a notification, but FNE could initiate an investigation. As will be further explained below:</p> <p>There hasn’t been any transaction in the digital economy that FNE has blocked, notwithstanding this, there have been three merger cases that have been approved subject to remedies: Cases FNE No. 81-2017; 116-2018; and 295-2021.</p> <p>Case FNE No. 116-2018, “Acquisition of Canal del Futbol Spa and Turner International Latin America Inc.” This concerned the concentration of two companies in the telecommunications industry, and the main effect on competition was the increase in the bargaining power of the concentrated entity affecting the wholesale licensing of pay television channels and the retail provision of television services. The authority examined the vertical risks of the operation such as ‘customer and input foreclosure’, the access to sensitive information, the integration between content providers, and other risks specific to Over The Top (OTT) platform services such as advertising. This, in addition to the study of the sufficiency of the measures, led the FNE to conclude that it was not an operation that could harm competition, approving it, subject to compliance with the remedies presented.</p> <p>Case FNE No. 295-2021 “Association between subsidiaries of Liberty Latin America Ltd. and América Móvil, S.A.B. of C.V.” The transaction involved a joint venture between two international holding companies dedicated to telecommunications services. The authority’s competitive analysis distinguished between landline Internet services, pay TV, landline telephony and bundles with landline Internet and pay telephony, analysing in each category the structural analysis, geographic deployment of networks, competitive proximity, the expansion of competitors’ networks, local competitive conditions, etc. Furthermore, it reviewed market entry and expansion conditions, conglomerate risks, market infrastructure, and finally mitigation measures. This led the FNE to conclude that the operation would not be apt to substantially reduce competition, as long as it strictly complies with all the measures offered.</p>

	<p>Case FNE No 81-2017 concerned the operation between two companies active in the global telecommunications industry: AT&T Inc. and Time Warner. The FNE analysed the vertical risks of the operation such as ‘customer and input foreclosure’ and access to sensitive information, and the dedicated a brief section to the efficiencies of the operation and the remedies proposed by the parties. Accordingly, it concluded that the operation would not be apt to substantially reduce competition, in attention to the fulfilment of the commitments presented.</p> <p>Finally , the acquisition of Cornershop Technologies LLC by Uber Technologies Inc. was approved without any mitigation measures in May 2020.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>As previously mentioned, there have been three transactions in OTT Platforms that have been approved with conditions: Cases FNE No. 81-2017; 116-2018; and 295-2021.</p> <p>No. 81-2017 included obligations to provide confidentiality clauses to address the risks of information transfer. Additionally, the parties assumed a commitment not to arbitrarily discriminate, and also they stated their commitment to offer an arbitration instance as a dispute resolution mechanism, among others.</p> <p>In No. 116-2018, the FNE considered six commitments of the parties that led to the approval of the operation: the safeguarding of information, the establishment of confidentiality clauses in their contracts. For input blocking, they offered a commitment to prohibit the refusal to sell, non-arbitrary discrimination and dispute resolution through arbitration. In addition, they indicated the absolute prohibition of tie-in sales.</p> <p>All this allowed the authority to mitigate the risks of the analysed operation.</p> <p>Finally, in No. 295-2021, given that the materialisation of the operation would result in a risk of radio spectrum hoarding, the parties proposed a series of structural measures in relation to the local regulator in order to prevent the concentration of the radio spectrum, such as the return of part of the spectrum, and the disinvestment in the AWS Band. They also offered a plan for the effective and efficient use of the spectrum, allowing the authority to approve the operation based on the quality of the measures.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No. The thresholds and procedure is the same for digital markets and for other type of industries. Notwithstanding the above, the FNE Guidelines published in May 2022 state that, regarding digital platforms, the FNE’s definition of the relevant markets will consider the interaction between different groups of users, among other considerations.</p>

8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	There is no public information related to investigations for failing to notify transactions in the digital economy, as far as we are aware.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	The reviewing authority in Chile does have the power to undertake an ex-post analysis or effectively revise an original merger decision, in general. Concentrations that do not reach or exceed the mandatory notification thresholds may be voluntarily notified by the economic agents that intend to merge. Voluntary notifications shall be subject to the same rules applicable to the mandatory notifications, provided that the transaction has not been consummated at the time of the notification. When such concentrations are not voluntarily notified to the National Economic Prosecutor, the latter will be authorised to initiate all such investigations he/she may deem fit within one year as from the consummation of the relevant concentration.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	<p>The FNE uses, for the purposes of analysing supply-side substitution, definition of relevant markets and the assessment of risks and measures both legal, technical, and economically feasibility, in all the investigations related to merger control, regardless the digital nature or not of the market.</p> <p>So far, concentration analyses in case law have been based on HHI calculations based on the revenues of market participants (FNE No. 320-2022 between Microsoft and Activision Blizzard). In cases involving OTT platforms, the HHI has been calculated based on the market shares in terms of the number of connections or subscriptions of each competitor (FNE No. F319-2022)</p>
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?

	No. Only the section related to digital markets already mentioned, published by the FNE in May 2022.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	In Chile, there is no legal provision nor guidelines related to collaboration among competitors. However, as mentioned above, the Horizontal Merger Guidelines published in May 2022 include a section related to digital markets.
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	<p>The competition authorities have not analysed data pooling.</p> <p>There is one case related to collaboration among competitors which concerned a horizontal agreement between six broadcast television channels and five media agencies to jointly contract audience measurement services. The agreements were analysed by the Competition Tribunal in a non-contentious procedure, where the FNE recommended the elimination of some clauses of the current agreement between the channels and the current provider due to their unilateral effects, both exclusive and exploitative. The FNE also proposed, as a mitigation measure, a joint contracting format under a Joint Industry Committee (JIC) model, which implies a collaboration agreement with the different types of industry player who require the essential facilities, such as media agencies or advertisers. The TDLC decided in December 2022 that the procedure was not anticompetitive, as long as it complied with some measures, such as applying general, objectives and non-discriminatory criteria for providing services, and an antitrust protocol including a compliance officer. This decision was appealed before the Chilean Supreme Court, whose decision is still pending today.</p>
4.	What is the view of the competition authority in your jurisdiction on "hub and spoke" arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority's analysis.
	Hub and spoke arrangements are considered as anticompetitive conducts according to DL 211, no matter the market involved.

	<p>Recently, the supermarkets chains were condemned by the TDLC and the Supreme Court for that type of conduct. The FNE accused the three main supermarket chains of agreeing on a common minimum resale price for fresh poultry meat between 2008 and 2011. Allegedly, though, there was an implicit mutual understanding between the supermarkets that each of them would comply with the price. According to the FNE claim, the case had two elements: (1) The existence of a “rule” or mode of behaviour among the supermarkets. This was the “vertical” component of the practice – i.e. a separate vertical restraint between each producer and each supermarket, which consisted of the prohibition of selling fresh poultry meat below the wholesale price and. (2) The voluntary observance of that rule by each chain, subject to the observance of the same rule by the other supermarket chains (the “horizontal” component of the practice).</p> <p>That case is, so far, the only precedent in Chile in which the TDLC has explicitly acknowledged a hub and spoke cartel. The TDLC established a standard regarding this kind of conduct and set up the criteria to condemn it. Given the evidence submitted in the trial –mainly, e-mails exchanged between each supermarket and each producer requesting other supermarkets not to deviate from the rule and threatening punishments– the three defendants were found guilty. It was proved the rule existed and that its enforcement was conditioned to mutual compliance. The judgment also states that there was no alternative explanation that could justify the pattern of behaviour displayed by the firms.</p>
5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	There is no public information related to leniency applications in the digital economy, as far as we are aware.
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	The FNE published in June 2014 Guidelines for the Analysis of Vertical Restraints, practice that, in the opinion of the FNE, brings in a list of risks or effects. The advocacy material gives some criteria of the analysis conducted by the FNE, however, it is not specific to the

	type of market or industry involved and does not include a section regarding the digital economy.
2.	What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	There is no public information related to exclusive dealing cases by non-dominant players in the digital economy, as far as we are aware.
3.	What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat "wide" and "narrow" MFNs in the same way? If so, on what is the rationale behind this approach?
	<p>In general terms, the review of this type of clauses by the Chilean competition authorities has been rather scant and has focused on traditional markets.</p> <p>According to the Guidelines for the Analysis of Vertical Restraints published in 2014, the FNE considers the MFN clauses as a preferential client clause, where the seller warrants the buyer that he is obtaining the more convenient terms and that any benefit granted to some other buyer will be replicated.</p> <p>In 2015 the FNE reached an extrajudicial agreement with two companies in the manufacture and sale of heavy weight conveyor belts, who agreed to waive MFN clauses included in their supply contracts.</p> <p>There is no public information related to MFN in the digital economy, as far as we are aware.</p>
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	According to public information, there is one ongoing investigation related to exclusivity clauses and MFN clauses regarding digital platforms (File No. 2653-21 at the FNE). This investigation was initiated due to the complaint filed by Providencia City Council on November 19, 2020, against certain platforms of intermediation of purchase and delivery of products (<i>Pedidos Ya, Rappi Chile and Uber Eats</i>), who are allegedly using business models such as dark kitchen and dark stores. The FNE, after reviewing the background, detected some contractual provisions such as exclusivity and MFN clauses that would have the potential to affect free competition, by virtue of which, to this day, the investigation continues.

	<p>Further information available at: https://www.df.cl/empresas/industria/la-fne-investiga-a-las-aplicaciones-de-reparto-y-pide-a-locatarios#:~:text=Desde%20hace%20dos%20a%C3%B1os%20que,por%20abuso%20de%20posici%C3%B3n%20dominante.</p> <p>https://www.biobiochile.cl/noticias/economia/negocios-y-empresas/2022/08/02/fne-investigara-apps-de-delivery-y-lanza-encuesta-para-entender-relacion-entre-locales-y-plataformas.shtml</p>
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
	There is no public information related to MFN in the digital economy, as far as we are aware.
6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	<p>There is no safe harbor rule included in the Chilean legislation. However, the FNE has provided some guidelines on vertical restraints.</p> <p>The Guidelines for the Analysis of Vertical Restraints published by the FNE in 2014 indicate, in relation to vertical restraints, that in those cases in which the undertaking has a market share of less than 35%, in general terms, the restriction will be lawful, and it is not necessary to carry out an analysis of effects and efficiencies. These Guidelines apply regardless of industry.</p> <p>However, the FNE exempts this presumption of legality when the share is equal or less than 35%, in cases where cumulative effects may be generated (due to the existence of parallel clauses with the same group of suppliers and / or distributors that are competing among them), or in other cases where the FNE will explain why the presumption of legality does not apply.</p> <p>This exemption is further explained in the Guide, as it follows: <i>“Notwithstanding the foregoing, and in order not to affect the speed with which such analysis must be carried out, when the Prosecutor’s Office lacks information regarding the buyer’s participation in the market of the product purchase, it may carry out the analysis considering an approximation the participation of the purchaser in the downstream market for the sale of the product.”</i></p>
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No

IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>On September 23, 2021, the Ministry of Economy, Development and Tourism published the Electronic Commerce Regulation (“ECR”) which became effective on March 24, 2022, according to its transitory article. The ECR, complying with the provisions of Article 30 and Article 62 of Law No. 19,496 on Consumer Rights Protection (“LPC”), aims to regulate the information and the quality, form, and opportunity in which it must be delivered to consumers by the different suppliers in the case of electronic commerce, in order to ensure informed decision making, strengthening the right to free choice of consumers. All this, through the establishment of new information duties and by regulating the minimum content that must be informed to consumers. Additionally, the ECR provides legal certainty regarding the situation of electronic platform operators, which will now be deemed as suppliers under the LPC.</p> <p>In addition to this regulation, the Personal Data Protection Bill is currently being processed (Consolidated Bulletins N° 11.092-07 and 11.144-07), which aims to incorporate a regulatory agency, basic principles, and obligations for data controllers and processors, which will undoubtedly influence digital markets, considering that the provisions established are closely related to the European standard of the GDPR.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	No.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	No. Please refer to DL 211 as referenced above.
i.	Please describe how “platform” is defined for these purposes.
	<p>The ECR does not provide any definition of ‘platform’.</p> <p>The FNE Guidelines state that:</p>

	<p>There are various types of ‘digital platforms’. The following is a non-exhaustive list based on the scope or segment in which they participate: i) digital information platforms; ii) digital communication platforms; iii) digital platforms for intermediation of goods and/or services; iv) digital platforms for supply chain and logistics; v) digital platforms that facilitate the recruitment of human capital (task platforms); and vi) digital platforms that facilitate payment systems and other financial services (fintech).</p> <p>There are different areas in which digital platforms are involved; a distinction can be made between those the purpose of which is to facilitate transactions (i.e., transactional platforms) - such as service intermediation or fintech platforms - and those which purpose is not the intermediation of transactions, but the facilitation of other types of interactions (i.e., non-transactional platforms), such as digital information platforms or digital communication platforms.</p> <p>Additionally, digital platforms are characterised by the presence and relevance of ‘network effects’. Network effects can be both positive and negative, and entail that the value of the platform for each user depends (positively or negatively) on the number of other users from the same group or side using it (direct network effect), or on the number of users from other groups or sides using it (indirect network effect).</p>
ii.	What are the criteria used to determine whether a platform falls under the regime?
	Not applicable because there is no special regime applicable to platforms.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	Not applicable because there is no special regime applicable to platforms.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	Not applicable because there is no special regime applicable to platforms.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Not applicable because there is no special regime applicable to platforms.
vi.	Please summarise any penalties provided for non-compliance.
	Not applicable because there is no special regime applicable to platforms.

4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	Not applicable because there is no special regime applicable to platforms.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	Not applicable because there is no special regime applicable to platforms.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	Not applicable because there is no special regime applicable to platforms.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	Not applicable because there is no special regime applicable to platforms.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	Not applicable because there is no special regime applicable to platforms.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	This provision is incorporated in the Data Protection Bill (Bulletins 11.092-07 and 11.144-07, recast) which is pending approval.

<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>Not applicable because there is no special regime applicable to platforms.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>Not applicable because there is no special regime applicable to platforms.</p>

Country: China

Contributors: Susan Ning et al. (King & Wood Mallesons)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>No. The currently effective Anti-Monopoly Law of the People’s Republic of China (“AML”) does not differentiate the notification thresholds for transactions in the traditional fields and in the digital economy.</p> <p>However, there are four notable issues involving notification thresholds in the digital economy.</p> <p>Firstly, Art.18 of the <i>Anti-monopoly Guidelines of the Anti-monopoly Commission of the State Council on Platform Economy</i> (“Platform Guidelines”) points out that in the field of platform economy, the turnover of undertakings includes the income derived from the sale of goods and provision of services. Based on industry practices, charging methods, business models, the role of the undertaking of a platform, etc., the calculation of turnover may be different. For the undertaking of a platform that only provides information matching and collects service fees such as commissions, etc., the turnover may be calculated based on the service fees charged by the platform and other income derived from the platform; if the undertaking of the platform participates in the market competition on any side of the platform or plays a leading role thereon, the transaction amount involved in the platform may also be calculated.</p> <p>Secondly, Art.4 of the draft Implementation Rules on Notification Threshold (“draft Threshold Rules”), which is expected to come into effect at some point before 2024, intends to introduce an additional threshold on top of the previous turnover threshold. Specifically, Art. 4 of the draft Threshold Rules provides that even if the basic turnover threshold is not met, the transaction must be notified to State Administration for Market Regulation (“SAMR”) if the following conditions are met:</p> <ol style="list-style-type: none">1. The turnover of one of the operators participating in the concentration in China in the previous fiscal year exceeded 100 billion yuan; and2. The market value (or valuation) of the target party to the concentration as specified shall not be less than 800 million yuan, and its turnover in China in the previous fiscal year shall account for more than one third of its worldwide turnover. <p>Art.4 of the Threshold Rules does not explicitly mention the digital economy but is commonly considered to aim at transactions involving a “<i>large</i>” undertaking and start-ups/nascent competitors, especially in digital economy field. It remains to be seen whether there will be further revisions in the official version of Threshold Rules to be published, and how the above two-prong test will be implemented in practice, as the determination standard of the market value or valuation of an undertaking to the concentration is not elaborated in the draft Threshold Rules and can be subject to reasonable disagreements.</p>

In addition, the AML specifies that where the notification threshold stipulated by the state council are not met, but there is evidence that the concentration of undertakings has or may have the effect of eliminating or restricting competition, the antitrust enforcement authority under the state council can require the relevant undertaking to notify, and where the relevant undertaking fails to notify upon request, the antitrust enforcement authority shall conduct an investigation in accordance with the law.

Notably, as early as 2008, the Rules of the State Council on Notification Thresholds for Concentration of Undertakings (the “**Notification Thresholds**”) already stipulated that, law enforcement agencies reserve the right to investigate transactions that do not meet the notification thresholds. The Platform Guidelines also emphasises that, if the concentration of undertakings does not meet the notification thresholds, but relevant facts and evidence show that the concentration has or may have the effect of eliminating or restricting market competition, law enforcement agencies should investigate in accordance with relevant provisions. Specifically, Art. 19 of the Platform Guidelines states that law enforcement agencies will pay close attention to the transactions of platform economy where an undertaking concerned is a start-up or emerging platform, where an undertaking concerned has small turnover due to adopting business model of free or low-price, where the relevant market is highly concentrated, or where there are small number of competitors.

Apart from the above-mentioned four issues, China has currently noticed the monopoly issues related to personal data protection and data security issues in the context of the digital economy.

For example, Article 70 of the “*Shenzhen Special Economic Zone Data Regulations*” stipulates that “*market entities shall not exclude or restrict competition by reaching monopoly agreements, abusing their dominant position in the data factor market, or illegally implementing concentration of undertakings.*”

Additionally, Article 8 of the *Provisions on the Review of Concentration of Undertakings* stipulates that the term “**concentration**” refers to the act of obtaining control over other undertakings or imposing decisive influence thereon, including but not limited to ...exchange of sensitive information with other undertakings...etc.

Although there are no detailed regulations on data security-related anti-monopoly notification thresholds at this stage, it is certain that with the promulgation of the Data Security Law and the Personal Information Protection Law, China will pay more attention to data security-related anti-monopoly compliance issues. Lastly, it should be noted that Art.18 of the Platform Guidelines also clarifies that the concentration of undertakings that involve a protocol control structure falls within the scope of anti-monopoly review of concentration of undertakings. The “protocol control structure” herein refers to variable interest entities (“**VIE**”) structure. Many Chinese technology companies use VIE structures to avoid foreign investment restrictions. A VIE Structure typically involves contractual arrangements pursuant to which an offshore holding company (the “**Offshore SPV**”) (usually through a wholly foreign-owned enterprise (“**WFOE**”) established in China) controls and receives the economic benefits of a VIE whose shareholders would normally be PRC nationals (the “**Nominees**”).

The VIE holds the assets and licenses that cannot be legally owned by foreign investors or foreign-invested entities. The VIE, the Nominees, and the WFOE enter into a suite of

	<p>contracts that enable the VIE’s operating results to be consolidated for financial accounting purposes into the financial statements of the Offshore SPV. The VIE Structure represents an attempt to grant to the Offshore SPV and its subsidiaries the rights and benefits normally associated with ownership of the VIE without holding actual equity ownership, thereby enabling foreign investors to invest in regulated sectors in China despite foreign equity ownership restrictions or prohibitions.</p> <p>In the past, whether VIEs are subject to the notification requirements under the AML was a grey area, and in fact, prior to the approval announcement of the first case involving VIE in July, 2020, most concentrations involving VIE Structure rarely filed with the authority, but the Platform Guidelines made it clear that VIE structure is not a reason for Internet companies to avoid the filing obligation if the obligation is triggered.</p> <p>In conclusion, we submit that the Platform Guidelines refine the notification thresholds within the scope of the AML.</p>
<p>2.</p>	<p>How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?</p>
	<p>The acquisition of nascent competitors by well-established industry leaders or killer acquisition has become an increasingly significant concern for antitrust authorities in mainland China in recent years.</p> <p>Art. 26 of the AML grants SAMR the jurisdiction to investigate transactions that do not meet the notification thresholds, which is helpful to prevent the so-called killer acquisition that have occurred frequently at home and abroad in recent years. Some internet giants, leveraging their huge capital advantages, carry out large-scale ‘killer acquisitions’, leading to a winner-takes-all situation. Pursuant to this provision, the antitrust enforcement authority may strengthen <i>ex ante</i> regulation to prevent distorting the competitive structure of the market through concentration and initiate the <i>ex officio</i> investigation <u>even where the concentration was already implemented to remedy the competition harms</u>. In addition, Art.4 of the draft Threshold Rules proposes to add a separate threshold based on the target party’s market value (or valuation), which is also designed to capture killer acquisition.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?</p>
	<p>Pursuant to Art.38 of the AML, where a foreign investor participates in the concentration of business operators by merging or acquiring a domestic enterprise or by any other means and the national security is involved, besides the antitrust review according to the</p>

	<p>AML, the national security review shall also be conducted according to the relevant provisions of the State.</p> <p>In addition, Art.30 of the <i>Provisions on the Review of Concentration of Undertakings</i> provides that SAMR may, where necessary, seek the views of relevant government departments, industry associations, business operators, consumers and other units or individuals during the review process. Practically, SAMR would share the necessary non-confidential filing information provided by filing parties with relevant stake holders (including other regulatory agencies), asking them to reply to specific questions and comment on arguments from filing parties. By considering the feedbacks from those stake holders to some extent, SAMR would make a decision in its own name. Nevertheless, there is no more detailed regulation on inter-agency consultation process. When it comes to platform issues, the inter-agency consultation process may take a relatively long time.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>When identifying the market power or market position of platforms, the following factors may be considered in light of the characteristics of platform economy pursuant to Art.11 of Platform Guidelines:</p> <p>(1) The undertakings’ market share and the status of competition in the relevant market. In determining the market share of undertakings in the field of platform economy, the transaction amount, transaction volume, sales amount, number of active users, number of clicks, duration of use or other indicators of the undertakings in the field of platform economy may be considered, and the duration of market share shall also be taken into account.</p> <p>In analysing the status of competition in the relevant market, the development status of the relevant platform market, the number of existing competitors and their market shares, characteristics of platform competition, degree of platform difference, scale economy, information on potential competitors, and innovation and technological changes may be considered.</p> <p>(2) The undertakings’ ability to control the market. The undertakings’ ability to control upstream and downstream markets or other associated markets, the ability to hinder or affect other undertakings’ entry into the relevant market, the operation mode of the relevant platform, network effects, and the ability to affect or determine prices, flow, or other transaction conditions, etc., may be considered.</p> <p>(3) The financial and technical conditions of the undertakings. The undertakings’ investor information, asset scale, source of capital, profitability, financing capability, technological innovation and application capability, intellectual property rights owned, the ability to master and process relevant data, and the extent to which the financial and technical conditions can promote the</p>

	<p>undertakings to expand or consolidate or maintain their market position, etc., may be considered.</p> <p>(4) The degree of dependence of other undertakings on the undertakings in respect of transactions. The trading relationship, trading volume, trading duration, lock-in effect, user stickiness between other undertakings and the undertakings, as well as the possibility for other undertakings to switch to other platforms and the switching costs, etc., may be considered.</p> <p>(5) The degree of difficulty for other undertakings to enter the relevant market. The market access, platform scale effect, scale of capital investment, technical barriers, users' multi-habitats, users' switching cost, difficulty for data access, user habits, etc., may be considered</p> <p>In practice, on July 10, 2021, SAMR issued an announcement, concluding that it had prohibited a merger between Huya and Douyu, which engage in live-streaming business, because it had the effect of eliminating or restricting competition on the live-streaming game market and online game operation service market in China. When assessing the market share of the parties in the game live-streaming market, SAMR analysed the market share from three perspectives, namely, turnover, the number of active users and live-streaming resources.</p> <p>On July 24, 2021, in SAMR's gun-jumping penalty against Tencent for its 2016 acquisition of China Music Group, market share was analysed based on monthly active users, monthly usage time of users, turnover, and music library resources.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>SAMR issued its decision prohibiting a merger between Huya and Douyu on 10 July 2021 and published its decision imposing remedies on Tencent's acquisition of a controlling stake in China Music Group on 24 July 2021.</p> <p>Both decisions are milestones as the Huya/Douyu decision was the first transaction blocked by SAMR in the digital platform industry, and Tencent/China Music Group is the first case in which SAMR has imposed remedies post-closing, in a failure-to-file investigation procedure.</p> <ul style="list-style-type: none"> • <i>Huya/Douyu case</i> <p>Both Huya Inc ("Huya") and DouYu International Holdings Limited ("Douyu") are publicly traded companies listed on US stock exchanges. Tencent is a shareholder in both companies. Tencent solely controls Huya and jointly controls Douyu with the founder of Douyu. Through the transaction, Huya planned to acquire 100 per cent shares of Douyu and, as a result, Tencent would acquire sole control of Douyu.</p> <p>SAMR identified a horizontal overlap in the live-streaming game market in China, in which Douyu and Huya had a combined market share of more than 70 percent in terms of turnovers. In addition, SAMR found a problematic vertical relationship between the upstream online game operation service market (in which Tencent was found to have a</p>

	<p>market share above 40 percent) and the downstream live-streaming game market. SAMR was concerned that Tencent who would solely control Douyu, and Huya post-transaction would likely engage in foreclosure tactics at both levels (input foreclosure and customer foreclosure).</p> <p>After SAMR found that the remedies proposed by Tencent were unsatisfactory, SAMR prohibited the transaction.</p> <ul style="list-style-type: none"> • <i>Tencent/China Music Group case</i> <p>In July 2016, Tencent signed an agreement to acquire 61.64 percent of shares in and, consequently, sole control over China Music Group. The transaction was closed in December 2017.</p> <p>This transaction was comprehensively assessed by SAMR through a failure-to-notify investigation procedure.</p> <p>SAMR found Tencent, post-transaction, to have a very high market share (70 percent in terms of revenues and higher on other metrics) in the internet music broadcast platform market. To ensure that the transaction would not foreclose other internet music platforms from obtaining music rights licenses and that other internet music platforms would have the ability to compete with Tencent, SAMR imposed multiple conditions on the conglomerate:</p> <ol style="list-style-type: none"> 1. Tencent is prohibited from entering into new exclusive music rights licensing agreements with record labels and other licensors (except for independent musicians and for new songs) and was ordered to rescind existing agreements of this kind. 2. Absent valid reasons, Tencent is not allowed to request conditions from music rights licensors that are more favourable than those granted to other internet music platforms. Existing agreements to the contrary need to be amended. 3. Tencent cannot offer excessive pre-payment to licensors so as to indirectly raise competitors' costs. <p>If Tencent has a 'concentration' (i.e., an acquisition of a controlling right in another company) that does not meet the filing thresholds but may have anticompetitive effects, it is obliged to submit a filing to SAMR and suspend closing until SAMR gives clearance.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>Tencent/China Music Group case</p> <p>In July 2016, Tencent signed an agreement to acquire 61.64 percent of shares in and, consequently, sole control over China Music Group. The transaction was closed in December 2017.</p> <p>Tencent filed the merger notification to SAMR through a failure-to-notify procedure.</p>

	<p>SAMR found Tencent post-transaction to have a very high market share (70 percent in terms of revenues and higher on other metrics) in the internet music broadcast platform market. To ensure that the transaction would not foreclose other internet music platforms from obtaining music rights licences and that other internet music platforms would have the ability to compete with Tencent, SAMR imposed multiple conditions on the conglomerate:</p> <ol style="list-style-type: none"> 1. Tencent is prohibited from entering into new exclusive music rights licensing agreements with record labels and other licensors (except for individual artists and for new songs) and was ordered to rescind existing agreements of this kind. 2. Absent valid reasons, Tencent is not allowed to request conditions from music rights licensors that are more favourable than those granted to other internet music platforms. Existing agreements to the contrary need to be amended. 3. Tencent cannot offer excessive pre-payment to licensors so as to indirectly raise competitors' costs. 4. If Tencent has a 'concentration' (i.e., an acquisition of a controlling right in another company) that does not meet the filing thresholds but may have anticompetitive effects, it is obliged to submit a filing to SAMR and suspend closing until SAMR gives clearance. <p>Although the effect of the above decision is similar to a “<i>conditional approval</i>”, it is worth noting that this case is under the failure to notify investigation and punishment procedures, which is different from the notification by the undertaking followed by a conditional clearance.</p> <p>In this case, the antitrust enforcement authority determined that the transaction had the effect of eliminating or restricting competition in the relevant market of online music playing platform market within the territory of China. Accordingly, in addition to imposing a maximum fine for failure to notify, the antitrust enforcement authority for the first-time applied article 58 of the AML in mandating the concerned parties to take necessary measures to restore the pre-concentration status.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No.</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.</p>
	<p>Failure to notify in the digital economy has been a top enforcement priority by the antitrust enforcement authorities in China in recent years (since the end of 2020). Cases in the digital economy accounted for up to 90% of the overall cases of failure to notify in</p>

	<p>2021. Most transactions involved VIE Structure. For a majority of failure to notify cases in the digital economy, all but one cases were found by SAMR to have no effects of eliminating or restricting competition and SAMR imposed maximum fines (as per the then-effective AML) of 500,000 yuan in those cases. The only exception is the case of equity acquisition of China Music Corporation by Tencent where besides imposing a fine of 500,000 yuan, SAMR also asked Tencent to take specific measures to restore competition in relevant market.</p> <p>It is important to note that under the current-effective AML, the fines for failure to notify cases are heightened to be up to 10% of the revenues of the relevant parties if it is found to have effects of eliminating or restricting competition and up to 5 million yuan if it is found to have no effects of eliminating or restricting competition.</p>
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	We have not seen a case where the antitrust enforcement authority re-examined a transaction that has been previously cleared.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	Overall, the antitrust enforcement authorities have incorporated some economic analysis into merger review decisions. For example, in the Huya/Douyu case, in concluding that the transaction would hinder market competition, the authority put a special emphasis on the fact that the platform is two-sided and there is significant cross-side networks for the platform. For another illustration, HHI index is often used by the authorities in assessing market concentration, as in the Tencent/China Music Group case. But the competition analysis in these two decisions are mostly of a descriptive nature rather than quantitative or model-based.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	Art. 16 of the AML specifies the definition of “ <i>monopoly agreements</i> ”, which stand for agreements, decisions or other concerted actions that eliminate or restrict competition. While the AML does not directly incorporate the characteristics of the digital economy into the definition of monopoly agreement, “ <i>other concerted actions</i> ” leave a lot of room for interpretation.

	<p>Considering the characteristics of the platform economy, Art. 5 of the Platform Guidelines states the form of monopoly agreements. Agreements or decisions may be in written or oral form. The term “other concerted conduct” refers to the conduct whereby undertakings do not explicitly enter into an agreement or decision, but are actually coordinated through data, algorithms, platform rules or other means, except for price following and other parallel conduct conducted by the relevant undertakings based on their independent expression of intent. Similarly, Art.5 of <i>the Provisions on Prohibition of Monopoly Agreements</i> (“Monopoly Agreement Provisions”) sets forth an agreement or decision may be made in written, oral, algorithmic or any other form. The stipulations and interpretation indicate that factors including data, algorithms, and platform rules are considered in identifying monopoly agreements concerning the digital economy, whether horizontal agreements or vertical agreements.</p> <p>In addition, Art. 4 of the Platform Guidelines points out that the platform economy industries involve complex business models and variable competition dynamics. The definition of relevant product market and relevant geographical market of platform economy industries shall follow the general principles determined by the AML and the <i>Guidelines of the Definition of the Relevant Market issued by the Anti-Monopoly Commission of the State Council</i> while taking into account the characteristics of the platform economy industries and conduct specific analysis in individual cases.</p>
<p>1.</p>	<p>Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.</p>
	<p>No. The Chinese competition authorities have not issued any document or public announcement indicating their attitude towards the collaboration of competitors in the field of digital economy.</p> <p>However, Chapter 2 of the Platform Guidelines clarifies the form of monopoly agreements and specifies other collaboration practices, as well as the identification approaches and law enforcement considerations of concerted acts in the platform economy industries.</p> <p>In terms of the approach to analysing monopoly agreements, the Platform Guidelines provide that the provisions of Chapter 2 of the AML and Monopoly Agreement Provisions are applicable to the determination of the monopoly agreements in the platform economy industries. When determining whether relevant conduct constitutes “<i>other monopoly agreement</i>” of the AML, the competition situation in the platform’s relevant markets, the market power of the platform undertakings and the undertakings using the platform, the degree of impediment for other undertakings to enter the relevant market and the influence on innovation can be considered.</p>
<p>2.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion?</p>

	<p>Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>No. As mentioned above, algorithmic pricing setting/algorithmic tacit collusion will be evaluated as to whether it constitutes a monopoly agreement through informal means or concerted conducts.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>No case concerning platform operators’ hub-and-spoke agreements has been investigated in China yet. However, Art. 19 of the AML, Art.8 of the Platform Guidelines, as well as the anti-monopoly guidelines issued by various provincial antitrust authorities can partly indicate the competition authorities’ attention towards hub-and-spoke agreements reached by operators in the field of digital economy.</p> <p>Before the enactment of the currently effective AML that came into effect on August 1, 2022, no provisions in AML specifically regulated hub-and-spoke agreements, pursuant to which spokes may be penalized for entering into monopoly agreement while a hub cannot be punished accordingly. Art. 19 of the AML stipulates that no undertaking may organise other undertakings to reach a monopoly agreement or provide them with substantive assistance for reaching a monopoly agreement. Although the provision does not explicitly refer to hub-and-spoke agreements, it clarifies the illegality of such type of agreements at the fundamental level, complementing the deficiencies of the old AML.</p> <p>In addition, Art.8 of the Platform Guidelines introduces the clear prohibition of hub-and-spoke agreements, stipulating that undertakings using the platform with competing relationships may leverage the vertical relationship with the platform operators, or the platform operator may organise and coordinate the competing undertakings to reach a hub-spoke agreement that has the effect of a horizontal monopoly agreement. When analysing whether such agreements constitute monopoly agreements prohibited by the AML, one may consider whether the undertakings using the platform with competing relationships have made use of technical means, platform rules, data and algorithms to conclude and implement monopoly agreements to eliminate or restrict competition of the relevant markets.</p> <p>Moreover, provisions concerning hub-and-spoke agreements can be found in several anti-monopoly guidelines issued by local anti-monopoly enforcement agencies such as <i>Tianjin Business Operators Anti-Monopoly Compliance Guidelines</i>, <i>Shanghai Business Operators Anti-Monopoly Compliance Guidelines</i>, etc. For example, Beijing anti-monopoly enforcement agency analysed in Chapter 2 “<i>highlights of anti-monopoly compliance</i>” in <i>Beijing Anti-Monopoly Compliance Guidelines of Platform Economy Industries (Edition 2021)</i>. The analysis is as follows: In the field of platform economy industries, hub-and-spoke agreements are mainly reflected in the platform operator’s</p>

	<p>use of its upstream and downstream trading relationship with operators in the platform to organise or assist operators in the platform with a competitive relationship to reach or implement agreements, decisions or other concerted practices that have the effect of eliminating or restricting competition through technical means, platform rules, data, algorithms, and so forth. Platform operators organise bilateral or multilateral groups to interact and match, set and intervene in price mechanisms, transaction mechanisms, competition rules, etc. It may seem that hub-and-spoke agreements are a set of independent vertical agreements that are usually manifested in the form of sales, agency, services, etc., but in essence, the spoke operators can reach horizontal coordination among themselves with the assistance of their vertical agreements with the hub operators. As the media of information exchange between spoke operators, the hub operators indirectly contribute to the convergence of intention between spokes operators. With the organisation and assistance of the hub operators, the spoke operators with competitive relationship can implement concerted actions.</p>
4.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency's analysis.
	<p>No horizontal monopoly cases and thus no leniency applications concerning the digital economy have been published in China.</p> <p>However, in order to prepare for possible monopoly agreement issues that may emerge in the digital economy, Art.10 of the Platform Guidelines sets forth that the leniency system is applicable to monopoly agreement cases in digital economy, stating that the anti-monopoly enforcement authorities encourage undertakings in the field of platform economy industries who involve in horizontal monopoly agreements to proactively report and provide significant evidence, while stopping suspected violations and cooperating with investigations. For undertakings satisfied with the conditions for leniency application, the anti-monopoly enforcement authorities may mitigate or waive penalties for them.</p> <p>The specific standards and procedure have been established in the <i>Guide of the Anti-Monopoly Commission of the State Council to the Application of the Leniency System to Horizontal Monopoly Agreement Cases</i>.</p>
5.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public

	<p>guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>Art.7 of the Platform Guidelines lists four typical forms vertical agreements by the undertakings in the field of platform economy and their transaction counterparties, including:</p> <ol style="list-style-type: none"> 1. automatically set prices by technical means; 2. harmonise prices by taking advantage of platform rules; 3. directly or indirectly restrict prices with data and algorithms; and 4. restrict other trading conditions by using technical means, platform rules, data, algorithms, etc., so as to eliminate or restrict market competition. <p>No vertical agreement cases conducted by online platforms have been investigated, so SAMR's ideas regarding how to prevent or solve this problem remain unclear. However, based on the Platform Guidelines, it is obvious that SAMR attaches importance to this issue and that the illegality of implementing vertical agreements through algorithms, data or platform rules has been proven.</p> <p>As to non-price vertical restraints specifically, it has always been outside the enforcement authorities' priority, as there has no stand-alone case in this regard to date.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>No vertical agreement cases concerning exclusive dealing reached by platforms have been investigated or reported in China.</p> <p>However, chances are that non-competition clauses may require exclusive dealing during mergers and acquisitions or establishment of joint ventures. Since the exclusive dealing requirement is usually set to safeguard the commercial value of the target assets or business after the transaction, or to maintain the effective operation of the joint venture after its formation, SAMR does not forbid this behaviour. However, considering the fact that non-compete clauses beyond a certain scope may have a negative impact on competition in the relevant market, the non-compete clause must generally be necessary to effect the transaction and is generally time limited.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat "wide" and "narrow" MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>Art.7 of the Platform Guidelines also set forth that the conduct of the undertaking of a platform requiring the undertakings using the platform to provide it with transaction conditions equal to or better than those of other competitive platforms in terms of price</p>

	<p>and quantity of commodities may constitute a monopoly agreement or abuse of market dominance.</p> <p>In September 2021, SAMR issued the Annual China Anti-Monopoly Enforcement Report (2020) (“Annual Enforcement Report”). In terms of the assessment of relevant conduct in the platform economy industry, the Annual Enforcement Report mentions that <i>“the implementation of the MFN clause by a platform operator that upstream suppliers promise or platform operators require upstream suppliers to give them trading conditions (especially prices) equal to or better than other competing platforms may constitute vertical agreements.”</i></p> <p>Based on the Platform Guidelines and the Annual Enforcement Report, we understand that the main focus of SAMR is currently on the wide MFN clauses.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>No vertical agreement cases concerning MFNs imposed by platforms have been investigated or reported in China.</p> <p>However, on July 24, 2021, SAMR announced a penalty on Tencent, which operated an online music platform called QQ Music, for its failure to notify its acquisition of China Music Corporation in July 2016. In the penalty decision, SAMR ordered Tencent and its affiliates to take a series of measures to restore competition in the relevant market, including <i>“without justifiable reasons, Tencent shall not require the upstream copyright owners to grant Tencent conditions more favorable to those offered to other competitors, including but not limited to the scope, amount and period of copyright license, etc., or any agreement or term related thereto. If already reached, it shall be dissolved within thirty days from the date of this decision.”</i></p> <p>The practice of exclusive agreement in the field of streaming music market had set off lots of criticism from the public, and the penalty decision did rectify the practice effectively. We submit that the terms concerning exclusive copyright for online music in this case may not constitute MFN clauses, but the transaction-specific remedy proposed by the penalty decision suggests that exclusive dealing may be carried out by means of MFN clauses, which is already under the attention of China’s antitrust enforcement authority.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>Since no MFNs conducted by platform operators have been investigated in China, we can only refer to Para (3), Art. 7 of the Platform Guidelines, which stipulates that in order to analyse whether the conduct constitutes vertical monopoly agreements, factors such as the market power of the undertaking of the platform, the status of competition in the</p>

	relevant market, the degree of hindrance to other undertakings from entering the relevant market, the impact on consumers' interests and innovation, etc., are relevant.
6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	<p>Art.18 of the amended AML sets forth that the vertical agreements between undertakings will not be prohibited if the undertakings can prove that their market share in the relevant market is lower than the standard prescribed by the Anti-monopoly Law Enforcement Agency of the State Council and meet other conditions prescribed by the Anti-monopoly Law Enforcement Agency of the State Council. The provisions of Art.18 are considered to introduce the “safe harbor” mechanism for vertical agreements in China.</p> <p>Art.15 of the Monopoly Agreement Provisions (Exposure Draft) specifies the criteria of the “safe harbor”, which could provide some reference:</p> <ul style="list-style-type: none"> • the market share of the undertaking and its trading counterparty in each of the relevant market is less than 15%; If the Anti-monopoly Law Enforcement Agency of the State Council stipulates otherwise, such provisions shall prevail; and • there is no evidence to the contrary to prove that the agreement eliminates or restricts competition. <p>However, the subsequently enacted Monopoly Agreement Provisions deliberately eliminated the specific criteria for safe harbor listed in the above exposure draft, while preserving an opening for further regulation in the future. Besides, no vertical agreement cases in the field of digital economy have been investigated yet. Therefore, how SAMR applies the “safe harbor” rule in the field of digital economy needs to be further examined.</p>
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.

	<p>Yes, see Platform Guidelines. In accordance with the AML, the Platform Guidelines prohibit platform operators from concluding and implementing monopoly agreements, abusing market dominance, and implementing concentration that has or is likely to have the effect of eliminating or restricting competition. Please refer to Question IV.3 for details.</p> <p>In addition to antitrust laws, there are other laws in China that either have a primary aim to ensure level competition and contain a digital sectors clause, or specifically target digital sectors and contain a competition clause:</p> <p><i>Anti-Unfair Competition Law of the PRC (“AUCL”)</i> prohibits business operators from competing in an unfair style, similar to the AML prohibiting business operators from abusing market dominance. But unlike the AML, the AUCL applies to all business operators regardless of market power. In regard to digital sectors, Article 12 of the AUCL prohibits business operators from misleading, deceiving, or compelling users into modifying, closing, or uninstalling network products or services legally provided by other business operators; or maliciously implementing incompatibility with network products or services lawfully provided by other business operators.</p> <p><i>E-Commerce Law of the PRC (“ECL”)</i> specifically targets digital sectors and includes competition clauses. Article 19 of the ECL prohibits e-commerce business operators from setting their tie-in sales as default to consumers. Article 35 of the ECL prohibits e-commerce platform operators from imposing unfair terms on business operators using the platform. Like the AUCL, the ECL applies to all e-commerce operators regardless of market power.</p> <p><i>Price Law of the PRC (“Price Law”)</i> mainly targets unfair pricing of business operators, including predatory pricing, price jacking, price cheating, price discrimination and other conducts. The Price Law applies to all business operators regardless of market power as well.</p> <p>Administrative enforcement under the above laws is not uncommon. Since the above laws do not require market dominance as a premise, certain abusive conducts, such as unfair pricing and unreasonable trading terms, have been penalised under the above laws even if the business operator does not have market dominance.</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p><i>Re administration:</i> SAMR has sole competence in competition-related administrative enforcement, including digital markets. However, SAMR may request assistance or opinion from other authorities to determine competition issues, especially in merger control cases. Within the State Anti-Monopoly Bureau seated in the SAMR, both Anti-Monopoly Enforcement Department No.1 and No.2 set up a specific division in charge of behavioural investigation and merger review of digital markets.</p> <p><i>Re legislation:</i> Both SAMR and the <i>Anti-Monopoly Commission of the State Council (“Commission”)</i> have the authority to issue competition rules. The Commission is more of</p>

	<p>a research and coordination institution. It has almost twenty members, including most of the government authorities. The Commission is known for issuing several competition guidelines, including the Platform Guidelines.</p>
3.	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>No, but Chapter 3 of the Platform Guidelines specifically govern the abusive conducts by platforms with market dominance.</p>
i.	<p>Please describe how “platform” is defined for these purposes.</p>
	<p>In the Platform Guidelines, “platform” is defined as a form of commercial organisation through which mutually dependent bilateral or multilateral entities interact under the rules provided by a specific carrier through network information technology so as to jointly create value.</p> <p>Furthermore, “Platform operator” is defined as business operators who provide Internet-based platform services such as business premises, transaction matching and information exchange to natural persons, legal persons and other market players.</p>
ii.	<p>What are the criteria used to determine whether a platform falls under the regime?</p>
	<p>Any platform that fits the “Platform operator” definition is subject to the Platform Guidelines. Since determining relevant markets is essential to competition analysis, the Platform Guidelines also provide a guideline to assess relevant markets in the field of platform economy. Specifically:</p> <p><u>Re relevant product market:</u> Demand-side substitution analysis may be conducted based on such factors as platform functions, business models, application scenarios, user groups, multilateral markets and offline transactions; when the competition constraint caused by supply-side substitution on the conduct of operators is similar to that caused by demand-side substitution, supply-side substitution analysis may be considered based on such factors as market entry, technical barriers, network effects, lock-in effects, transfer costs and cross-border competition.</p> <p>The relevant product market may be defined based on the products on the platform, or multiple relevant product markets may be defined separately based on the multilateral products involved in the platform. The mutual relationship and impact between relevant product markets shall be taken into account. When the cross-platform network effect existing in the platform is able to impose sufficient competition constraints on the platform operator, the relevant product market may be defined based on the platform as a whole.</p> <p><u>Re relevant geographic market:</u> The analysis of demand-side substitution and supply-side substitution shall also be adopted. Factors such as the actual regions where most users choose products, users’ language preferences and consumption habits, the</p>

	<p>provisions of relevant laws and regulations, the degree of competition constraints in different regions, and online and offline integration may be comprehensively assessed and considered. Due to the characteristics of platforms, the relevant geographic market is usually defined as a national or regional market. It can also be defined as a global market, as the case may be.</p> <p>In a recent administrative penalty case regarding a platform operator’s restricted dealing, SAMR analysed the platform’s network effect. Specifically, the increase in the number of users at one end of the platform will strengthen the attraction of the other end of the platform. Therefore, to compete in the market and attract consumers at one end, a platform needs a certain number of suppliers at the other end. Compared with larger platforms, the increase of additional suppliers on smaller platforms will lead to a greater increase in consumers on the other end. Conversely, suppliers decrease will also have a greater impact on consumers of smaller platforms.</p> <p>SAMR continued to analyse that suppliers are willing to work with multiple platforms to expand sales. This is a primary reason why new platforms are able to enter the market. However, if suppliers are forced to work with one platform only, in this case through the exclusive clause of the dominant platform, then the most rational choice would be to work with the one that brings the most benefit. Since the dominant platform has the most consumers and deal volume, competing platforms would have to significantly compensate suppliers or guarantee equal deal volume and consumers to compete. This way, the dominant platform would lock both the supplier and consumer end without lowering commissions or fees, thus eliminating and restricting competition.</p>
<p>iii.</p>	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>The Platform Guidelines do not impose more requirements on platform operators than the AML. Instead, Platform Guidelines explain the requirements in AML to better fit the platform scenario. Generally speaking, Chapter 3 of the Platform Guidelines regulates common abusive conducts, including unfair pricing, predatory pricing, refusal to deal, restricted dealing, tie-in sales, unreasonable trading terms and differential treatment.</p>
<p>iv.</p>	<p>Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?</p>
	<p>It’s a one-size-fits all system.</p> <p>Apart from the Platform Guidelines, the <i>Guidelines for Classification and Grading of Internet Platforms (Draft for public opinion)</i> (“Draft Classification Guidelines”) classify platforms into six categories according to their characteristics and main functions: online sales platforms, life service platforms, social and entertainment platforms, information and news platforms, financial service platforms, and computing application platforms. Each classification can be further divided into a total of 31 detailed categories. In addition, the Draft Classification Guidelines classify platforms into super, large, and medium/small platforms by comprehensively considering the size of users, types of services, and the ability to limit suppliers’ access to consumers. It is unclear</p>

	when the Draft classification Guidelines will come into effect or how it will apply in competition analysis.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Compared to the AML, the Platform Guidelines provide more certainty to platform operators since the Platform Guidelines are tailored for platform scenarios. Specifically, the Platform Guidelines provide methodological guidance for the definition of markets, factors for examining market dominance, and the legality or legitimacy of certain algorithm-based behaviours in platform scenarios. Although the Platform Guidelines do not go beyond the analytical framework of the AML, they do clarify some previously grey areas. In other words, the room to play innocent by exploiting the grey areas stipulated in previous laws has become smaller, and market participants now have more legitimate reasons to invoke directly in their defense.
vi.	Please summarise any penalties provided for non-compliance.
	<p>The Platform Guidelines do not include any penalties but refer to the AML. In the AML, a business operator that abuses its market dominance is subject to a fine of up to 10% of its previous year's turnover. If the violation is with serious circumstances, adverse effects and dire consequences, the above fine may inflate to 50% of its previous year's turnover.</p> <p>In 2021, SAMR imposed unprecedented fines against Alibaba and Meituan for abusing their dominant position over rivals and merchants on its e-commerce platforms, and the fines are equivalent to 4% and 3% of their turnovers in 2019 and 2020, respectively.</p> <p>Also, based on the principle of “<i>combining punishment and education</i>” in the <i>Administrative Punishment Law</i>, SAMR issued Administrative Guidance Letters in both cases, requesting the parties concerned to carry out comprehensive rectification in terms of strictly implementing the main responsibilities as digital platforms, strengthening internal control and compliance management, and protecting consumers' rights and interests, so as to operate in compliance with the law.</p> <p>It should be noted that in the Administrative Guidance Letter for Meituan, SAMR mentioned that Meituan shall strictly abide by the <i>Guidance On the Implementation of the Responsibility of the Network Food Delivery Platform to Effectively Safeguard the Rights and Interests of Food Delivery Workers</i>, to protect the labor income of food delivery workers, improve their social security, and fully protect their legitimate rights and interests. We submit that Meituan's misbehaviour only harmed the rights and interests of the operators (such as restaurants) on the platform, but the Administrative Guidance Letter addressed the protection of food delivery workers whose rights are not directly affected by Meituan's exclusive dealing. We submit that this may be SAMR's method to respond to the concerns of the public and solve the social problems.</p> <p>In addition, SAMR's Shanghai local branch released a penalty decision against an English language-based online food delivery platform also for exclusive dealing and imposed a fine amounting to 3% of its 2018 turnover.</p>

<p>4.</p>	<p>If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?</p>
	<p>Article 1 of the Platform Guidelines states its purpose as to prevent and prohibit monopolistic conduct in the platform economy, protect fair market competition, promote the standardised, orderly, innovative and healthy development of the platform economy, and safeguard the interests of consumers and the public.</p>
<p>5.</p>	<p>Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?</p>
	<p>Chapter 3 of the Platform Guidelines specifically governs the abusive conduct by platforms with market dominance. Please refer to Question IV.3 for details.</p> <p>According to an official media press conference, the Platform Guidelines is drafted against the background that there have been increasing reports of suspected monopoly issues in the field of platform economy, such as restricted dealing, differential treatment through data and algorithm, and failure-to-notify cases. These issues damaged both fair competition and the interests of consumers. These issues are also not conducive to stimulating the innovation and creativity of the society, promoting the innovative development of platform economy, and building new advantages and new momentum for economic and social development.</p>
<p>6.</p>	<p>If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted per se?</p>
	<p>The Platform Guidelines do not change the analysis framework of the AML. In the AML, a business operator may not abuse its market dominance to eliminate or restrict competition. Abusive conducts include unfair pricing, predatory pricing, refusal to deal, restricted dealing, tie-in sales or unreasonable trading terms, differential treatment, etc.</p> <p>In order to determine the illegality of any abusive conducts, a three-step analysis framework (“Three-Step Analysis”) could generally provide some guidance, including (1) Market dominance; (2) No due cause; and (3) The effect of eliminating or restricting competition. Specifically:</p> <p>First, market dominance is presumed if a business operator has more than 50% market share. Such presumption is rebuttable considering the business operator’s ability to control upstream & downstream markets, its financial and technical advantage, other operators’ degree of dependence, market entrance barriers, etc.</p>

	<p>Second, the <i>Provisions on Prohibiting Abuse of Dominant Market Positions</i> (“Abusive Conduct Provision”) provides an open list of possible due causes for each abusive conduct, including selling below cost for seasonal goods about to expire, restricting dealing necessary to protect IP, etc. In general, the “<i>due cause</i>” takes more of a rule-of-reason approach. Many justifications, including benefits to the consumer interest and efficiency, are permitted.</p> <p>Third, the effect of eliminating or restricting competition is also considered and analysed.</p>
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	No. The Platform Guidelines do not change the analysis framework of the AML, and do not introduce any special rules specifically targeting digital economy.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	No. All monopolistic conducts, regardless of business sectors, follow the same analysis framework under the AML.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p><u>Data portability</u>: SAMR has not yet explicitly evaluated data portability in promoting competition. Instead, data portability is mainly discussed in the personal information sector. According to the <i>Personal Information Protection Law of the PRC</i>, individuals have the right to consult and duplicate their personal information from personal information processors. Individuals may also request the transfer of personal information to designated personal information processors. However, it is understood that data portability will be considered by analysing the consumers’ switching costs and further the market power of a platform, considering whether the data generated in one platform is portable usually is important for consumers to make the decision to switch to competing platforms.</p> <p><u>Interoperable data formats</u>: In several merger control cases where remedies were imposed, SAMR has emphasised that reducing interoperability levels, either from a product or data perspective, is a way to eliminate or restrict competition. In both the Platform Guidelines and the <i>Provisions on the Review of Concentration of Undertakings</i>,</p>

	commitment to compatibility or not reducing the current interoperability level is listed as one of the possible behavioural remedies.
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.
	<p>Yes. According to the Abusive Conduct Provision, denying counterparties to use essential facilities under reasonable conditions is a type of refusal to deal. Apart from the Three-Step Analysis, it shall comprehensively consider factors such as (1) The feasibility of otherwise investing in or developing and constructing the facility with reasonable input; (2) The degree of dependence of the counterparty on the facility to carry out production and operation activities effectively; (3) The possibility of the business operator to provide such facility, and the impact on its own production and operation activities; etc.</p> <p>In a platform economy scenario, the Platform Guidelines suggest comprehensively considering the data held by the platform, the substitutability of other platforms, whether there is a potentially available platform, the feasibility of developing a competitive platform, the degree of dependence of counterparties on the platform, and the potential impact of an open platform on the platform operator.</p> <p>In an IP scenario, the <i>Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition</i> provides the following criteria: (1) Whether there is no reasonable substitute for such IP in the relevant market and it is necessary for other business operators to participate in competition in the relevant market; (2) Whether the refusal to license such IP will have a negative influence on competition or innovation in the relevant market, thus impairing consumer interests or public interests; and (3) Whether licensing such IP will cause unreasonable damage to the IP holder.</p> <p>The essential facilities doctrine has never been applied in administrative penalty cases before.</p>
11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	N/A

Country: European Union

Contributor: Stavroula Vryna, et al. (Clifford Chance)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No. In the EU, mergers in digital markets are reviewed under the standard merger control regime as set out in the EU Merger Regulation No 139/2004 (“ EUMR ”).
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>Such transactions can become reviewable by the European Commission (“EC”) under Article 22 EUMR.</p> <p>Article 22 EUMR enables one or more national competition authorities (“NCA”) of EU Member States to request the EC to review a transaction where the transaction affects trade between Member States and threatens significantly to affect competition within the territory of the Member State(s) making the request.</p> <p>The Article 22 mechanism was initially introduced in 1989, when a number of Member States had yet to establish national merger control regimes, to ensure that potentially problematic transactions would not escape antitrust scrutiny and could be reviewed by way of referral to the EC.</p> <p>In recent years, following the adoption of national merger control regimes by nearly all Member States, the EC’s informal policy had been to discourage NCAs from requesting referrals in relation to transactions that did not meet the national merger control thresholds. It was the case, however, that once a competent NCA had initiated a referral request, NCAs lacking jurisdiction under their national merger control laws could join that request, thus allowing the Commission to assess the impact of the transaction in the latter Member States as well.</p> <p>In guidance published on 26 March 2021, the EC reversed its previous position and, from then on, encourages and accept referrals initiated by NCAs even in respect of transactions for which both NCAs and the EC lack jurisdiction. This shift in policy is driven by a perceived “enforcement gap” which allowed potentially problematic transactions (especially “killer acquisitions” of nascent competitors or maverick innovators) that fell below EU and national merger control thresholds to complete without review. The Guidance cites the digital economy and the pharmaceutical sectors as examples where such transactions are most likely to occur.</p>

	<p>As referenced above, Article 22 EUMR states that, for a referral to be made by one or more Member State(s) to the EC, the concentration must comply with the following cumulative requirements:</p> <p>i) Affect trade between Member States: The Guidance establishes that the EC will in particular assess whether the transaction may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Specific factors which could be relevant may include the location of (potential) customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of R&D projects whose results, including intellectual property rights, if successful, may be commercialised in more than one Member State.</p> <p>ii) Threaten to significantly affect competition within the territory of the Member State(s) making the request: The Guidance establishes that relevant considerations may include the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.</p> <p>Additionally, the Guidance also provides for the following non-exhaustive and non-cumulative list of examples of undertakings which could be involved in transactions that despite not meeting the national turnover thresholds, have an actual or future competitive potential, and which are therefore appropriate for a referral under Article 22:</p> <ul style="list-style-type: none"> • Start-ups or recent entrants with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model). • An important innovator or conductor of potentially important research. • An actual or potential important competitive force. • An undertaking which has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights). • An undertaking which provides products or services that are key inputs/components for other industries.
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>The EC does not have an obligation to consult with other (non-competition related) agencies in the context of merger control, but may do so when necessary. For instance, in assessing the <i>Google/Fitbit</i> transaction the EC consulted the European Data Protection</p>

	Board on data privacy issues. The EC might also consult some National Data Protection Authorities provided the parties of the transaction give their consent.
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?
	The EC is not bound in the metrics it uses when assessing the market share or market position of digital companies. Depending on the type of enterprise, the EC might use standard metrics such as sales volumes and values, but also market-specific metrics such as number of users (see <i>inter alia</i> Amazon/MGM, Apple/Shazam). For software-related markets, the EC often relies on the segmentation and the competitive positioning analysis presented in industry reports such as <i>inter alia</i> Gartner or IDC.
5.	Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	<p>In the past ten years (2013-2023), the EC has not prohibited any digital transactions, but has cleared the following digital mergers with conditions. In all three cases, the EC cleared the transactions with behavioural remedies.</p> <p>Case M.10646 - Microsoft/Activision: On 15 May 2023, the EC cleared Microsoft’s proposed acquisition of game developer Activision Blizzard conditionally, with behavioural remedies. The EC’s preliminary investigation found that Microsoft could harm competition (i) in the distribution of console and PC video games, including multi-game subscription services and cloud game streaming services; and (ii) in the supply of PC operating systems. The EC’s in-depth market investigation indicated that Microsoft would not be able to harm rival consoles and rival multi-game subscription services. At the same time, it confirmed that Microsoft could harm competition in the distribution of games via cloud game streaming services and that its position in the market for PC operating systems would be strengthened.</p> <p>To address the competition concerns identified by the EC in the market for the distribution of PC and console games via cloud game streaming services, Microsoft offered the following comprehensive licensing commitments, with a 10-year duration:</p> <ul style="list-style-type: none"> • A free license to consumers in the EEA that would allow them to stream, via any cloud game streaming services of their choice, all current and future Activision Blizzard PC and console games for which they have a license. • A corresponding free license to cloud game streaming service providers to allow EEA-based gamers to stream any Activision Blizzard’s PC and console games. <p>At the time of the EC’s review, Activision Blizzard did not license its games to cloud game streaming services, nor did it stream the games itself. The EC noted that these licenses</p>

would ensure that gamers that have purchased one or more Activision games on a PC or console store, or that had subscribed to a multi-game subscription service that included Activision games, would have the right to stream those games with any cloud game streaming service of their choice and play them on any device using any operating system. The remedies would also ensure that Activision's games available for streaming would have the same quality and content as games available for traditional download.

On this basis, the EC found that Microsoft's commitments would fully address the competition concerns identified and represent a significant improvement for cloud game streaming compared to the current situation. In particular, the EC found that they would empower millions of EEA consumers to stream Activision's games using any cloud gaming services operating in the EEA, provided they are purchased in an online store or included in an active multi-game subscription in the EEA. In addition, the availability of Activision's popular games for streaming via all cloud game streaming services would boost the development of this dynamic technology in the EEA. Ultimately, the EC found that the commitments would unlock significant benefits for competition and consumers, by bringing Activision's games to new platforms, including smaller EU players, and to more devices than before.

To investigate the effectiveness of the remedies, the EC collected views from a large number of market participants and stakeholders. In particular, cloud game streaming service providers gave positive feedback and showed interest in the licenses. Some of these providers have already entered into bilateral agreements with Microsoft based on the proposed licenses to stream Activision's games, once the transaction is completed.

The EC's decision to clear the transaction came after the UK Competition and Markets Authority's decision to block it, despite Microsoft having offered the same remedy package, signaling divergence in the two authorities' treatment of behavioural remedies.

The EC is now re-examining Microsoft's commitments, following developments in the UK Competition and Market Authority's review.

Case M.10262 – Meta/Kustomer: On 27 January 2022, the EC cleared Meta's acquisition of Kustomer, a small innovative player in the customer service and support customer relationship management ('CRM') software market.

Following its market investigation, the EC had concerns that the transaction would have harmed competition in (i) the market for the supply of CRM software and (ii) the market for the supply of customer service and support CRM software. In particular, the Commission found that Meta would have the ability, as well as an economic incentive, to engage in foreclosure strategies in relation to Kustomer's close rivals and new entrants, such as denying or degrading access to the application programming interfaces ("APIs") for Meta's messaging channels. Similar to Kustomer, these players have a focus on small and medium business customers ("SMBs") and are particular drivers of innovation. Such foreclosure strategies could reduce competition in the market for the supply of CRM software and the market for the supply of customer service and support CRM software, leading to higher prices, lower quality and less innovation for business customers, SMBs in particular, which may in turn be passed on to consumers.

With respect to the market for the supply of online display advertising services, where the EC had raised preliminary concerns, the EC found that the merger was not likely to lead to a significant impediment of effective competition. In particular, the EC investigated what

data Meta would obtain from Kustomer’s customers. Kustomer offered a business-to-business product and did not own the data of its business customers. Access to data would be dependent on agreements with its business customers who need consent from their end customers. In any event, the EC found that because of Kustomer’s small size, even taking into account its potential growth, the amount of additional data would not be significant. Moreover, rival providers of online display advertising services have, and would continue to have, access to similar commercial data because of the strong commercial interest of businesses in sharing such data with both Meta and rival advertising platforms in order to measure and optimise the performance of their ad campaigns.

Therefore, the EC concluded that any additional data that Meta may gain access to for the purposes of improving its online display advertising service would not result in a significant negative impact on competition between providers of online display advertising services.

To address the EC’s competition concerns, Meta offered comprehensive access commitments with a 10-year duration:

- A public API access commitment: Meta committed to guarantee non-discriminatory access, without charge to its publicly available APIs for its messaging channels to competing customer service CRM software providers and new entrants.
- A core API access-parity commitment: To the extent any features or functionalities of Messenger, Instagram messaging or WhatsApp that were used by Kustomer’s customers at the time may be improved or updated, Meta committed to also make available equivalent improvements to Kustomer’s rivals and new entrants. This would also hold for any new features or functionalities of Meta messaging channels in the future if used by a sizeable proportion of Kustomer’s customers.

Case M.9660 - Google/Fitbit: On 17 December 2020, the EC cleared Google’s acquisition of wearable devices company, Fitbit with behavioural remedies.

The EC had concerns that the transaction, as initially notified, would have harmed competition in several markets. In particular:

Advertising: By acquiring Fitbit, Google would acquire (i) the database maintained by Fitbit about its users’ health and fitness; and (ii) the technology to develop a database similar to that of Fitbit. By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google’s services in the markets for online search advertising, online display advertising, and the entire “ad tech” ecosystem. In the EC’s view, the transaction would therefore raise barriers to entry and expansion for Google’s competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice.

Access to Web Application Programming Interface (“API”) in the market for digital healthcare: A number of players in this market currently access health and fitness data provided by Fitbit through a Web API, in order to provide services to Fitbit users and obtain their data in return. The EC found that following the transaction, Google might

restrict competitors' access to the Fitbit Web API. Such a strategy would come especially at the detriment of start-ups in the nascent European digital healthcare space.

Wrist-worn wearable devices: The EC is concerned that following the transaction, Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones. Some market participants who considered that Google has already a significant presence in the digital healthcare sector, raised concerns with the EC that Google may obtain a competitive advantage in this sector by combining Google's and Fitbit's databases to such a degree that competitors would no longer be able to compete. The EC's in-depth investigation did not confirm such concerns because the digital healthcare sector was seen as still nascent in Europe with many players active in this space. Moreover, Fitbit had a limited user community in the fast-growing smartwatch segment. Other market participants raised privacy concerns with the EC, indicating that it would be increasingly difficult for users to track what their health data would be used for. The EC's investigation found that Google would have to ensure compliance with the provisions and principles of the GDPR, which provides that the processing of personal data concerning health shall be prohibited, unless the person has given explicit consent. The EC considered that such concerns are not within the remit of merger control and relegated them to other regulatory tools better placed to address them.

To address the EC's competition concerns, Google offered the following commitments with a duration of ten years.

Ads Commitment: Google committed not to use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, including search advertising, display advertising, and advertising intermediation products. This refers also to data collected via sensors (including GPS) as well as manually inserted data.

Google committed to maintain a technical separation of the relevant Fitbit's user data. The data will be stored in a "data silo" which will be separate from any other Google data that is used for advertising.

Google will ensure that European Economic Area ("**EEA**") users will have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services (such as Google Search, Google Maps, Google Assistant, and YouTube).

Web API Access Commitment: Google committed to maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent.

Android APIs Commitment: Google committed to continue to license for free to Android original equipment manufacturers (OEMs) those public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone. Such core functionalities include but are not limited to, connecting via Bluetooth to an Android smartphone, accessing the smartphone's camera or its GPS. To ensure that this commitment is future-proof, Google's commitments also cover any improvements of those functionalities and relevant updates.

Under the commitments, it is not possible for Google to circumvent the Android API commitment by duplicating the core interoperability APIs outside the Android Open

Source Project (AOSP). This was because, according to the commitments, Google has to keep the functionalities afforded by the core interoperability APIs, including any improvements related to the functionalities, in open-source code in the future. Any improvements to the functionalities of these core interoperability APIs (including if ever they were made available to Fitbit via a private API) also need to be developed in AOSP and offered in open-source code to Fitbit's competitors.

To ensure that wearable device OEMs have also access to future functionalities, Google committed to grant these OEMs access to all Android APIs that it will make available to Android smartphone app developers including those APIs that are part of Google Mobile Services (GMS), a collection of proprietary Google apps that is not a part of the Android Open Source Project.

Google also committed not to circumvent the Android API commitment by degrading users experience with third party wrist-worn devices through the display of warnings, error messages or permission requests in a discriminatory way or by imposing on wrist-worn devices OEMs discriminatory conditions on the access of their companion app to the Google Play Store.

Case M.8306 - Qualcomm/NXP Semiconductors: On 18 January 2018, the EC cleared Qualcomm's acquisition of NXP with behavioural remedies.

The EC had the following competition concerns:

The merged entity would have had the ability and incentive to make it more difficult for other suppliers to access NXP's MIFARE technology, by raising the licensing royalties or by ceasing to license MIFARE altogether. MIFARE was a leading technology used as a ticketing/fare collection platform by several transport authorities in the EEA.

The merged entity would also have had the ability and incentive to degrade the interoperability of Qualcomm's baseband chipsets and NXP's Near Field Communication ("NFC") and Secure Element ("SE") chips with rivals' products. As a result, smartphone manufacturers would have preferred the merged entity's products over those of rival suppliers, who risked being marginalised.

The merged entity would have combined the two companies' significant intellectual property portfolios related to NFC technology. This would have increased the merged entity's bargaining power, allowing it to charge significantly higher royalties for its NFC patents than absent the transaction.

The EC initially also had concerns relating to competition in the markets for semiconductors used in the automotive sector. However, the EC's in-depth investigation did not confirm these concerns.

To address the competition concerns identified, Qualcomm offered the following commitments:

To address the concerns related to MIFARE, Qualcomm committed to offer licenses to NXP's MIFARE technology and trademarks, for an eight-year period, on terms at least as advantageous as those available at the time. This would enable competitors of the merged entity to have access to MIFARE technology and trademarks and compete effectively with the merged entity.

To address the competition concerns related to interoperability, Qualcomm committed to ensure that, for an eight-year period, it would provide the same level of interoperability between its own baseband chipset and the NFC and SE products it acquires from NXP with the corresponding products of other companies.

Finally, to address the Commission's competition concerns in relation to the licensing of NXP's NFC patents,

- Qualcomm offered to not acquire NXP's standard essential NFC patents. It also offered to not acquire certain of NXP's non-standard essential NFC patents. NXP will transfer these patents to a third party, which would be bound to grant worldwide royalty-free licenses to these patents for three years.
- Qualcomm would still acquire certain other NXP's non-standard essential NFC patents. However, Qualcomm committed, for as long as it owns these patents, i) not to enforce its rights against other companies; and ii) to grant worldwide royalty-free licenses to these patents.

Case M.8124 – Microsoft/LinkedIn: On 6 December 2016, the EC cleared Microsoft's acquisition of social network company, LinkedIn with behavioural remedies.

The EC's investigation focused in particular on three areas: (i) professional social network services, (ii) customer relationship management software solutions, and (iii) online advertising services.

Professional social network services

The EC looked at whether, after the merger, Microsoft could use its strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position among professional social networks. In particular the Commission was concerned that Microsoft would:

- pre-install LinkedIn on all Windows PCs; and
- integrate LinkedIn into Microsoft Office and combine, to the extent allowed by contract and applicable privacy laws, LinkedIn's and Microsoft's user databases. This could have been reinforced by shutting out LinkedIn's competitors from access to Microsoft's application programming interfaces, which they need to interoperate with Microsoft's products and to access user data stored in the Microsoft cloud.

The EC found that these measures could have significantly enhanced LinkedIn's visibility whilst competing professional social networks could potentially be denied such access. As a result, LinkedIn would have been able to expand its user base and activity in a way that it would not have been able to do absent the merger.

The EC was concerned that the increase in LinkedIn's user base would make it harder for new players to start providing professional social network services in the European Economic Area (EEA). Furthermore, it could have gradually and irreversibly tipped the market towards LinkedIn in Member States where a competitor of LinkedIn currently operates (such as Austria, Germany or Poland).

Customer relationship management software solutions

The Commission looked at whether after the merger Microsoft would be able to shut out its competitors by:

- obliging customer relationship management customers buying LinkedIn’s sales intelligence solutions to also purchase Microsoft’s customer relationship management software; and
- denying its competitors access to the full LinkedIn database, thus preventing them from developing advanced customer relationship management functionalities also through machine learning.

On the first concern, the EC found that while the customer base of the two products does overlap, LinkedIn’s product is one of several on the market and does not appear to be a “must have” solution.

On the second concern, the EC also found that access to the full LinkedIn database is not essential to compete on the market.

Moreover, Microsoft was a relatively small player in the customer relationship management market, where it faced strong competitors, such as Salesforce, Oracle and SAP. The EC therefore considered it unlikely that the transaction would enable Microsoft to foreclose these players and eliminate competition in this market.

Online advertising services

With respect to online advertising services, the parties’ activities only overlapped in relation to display advertising. However, given their very limited combined market share in the EEA, as well as the fragmented nature of the market, the EC excluded any competition concerns arising from the combination of the parties’ online non-search service activities.

Moreover, no competition concerns arose from the concentration of the parties’ user data that can be used for advertising purposes. This was because a large amount of such user data will continue to be available on the market after the transaction. In addition, the transaction would not reduce the amount of data available to third parties as neither Microsoft nor LinkedIn currently made available its data to third parties for advertising purposes.

The EC analysed potential data concentration as a result of the merger with regard to its potential impact on competition in the Single Market. Privacy related concerns as such do not fall within the scope of EU competition law but the EC can take them into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor. In this instance, the EC concluded that data privacy was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction.

The proposed commitments

To address the EC’s competition concerns in the professional social network services market, Microsoft offered a series of commitments for a period of five years. These commitments include:

	<ul style="list-style-type: none"> ensuring that PC manufacturers and distributors would be free not to install LinkedIn on Windows and allowing users to remove LinkedIn from Windows should PC manufacturers and distributors decide to preinstall it. allowing competing professional social network service providers to maintain current levels of interoperability with Microsoft’s Office suite of products through the so-called Office add-in program and Office application programming interfaces. granting competing professional social network service providers access to “Microsoft Graph”, a gateway for software developers. It is used to build applications and services that can, subject to user consent, access data stored in the Microsoft cloud, such as contact information, calendar information, emails, etc. Software developers can potentially use this data to drive subscribers and usage to their professional social networks.
6.	If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?
	Please see response to Question 5.
7.	In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?
	No. Please see the response to Questions 1 and 2.
8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.
	Not that we are aware of.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	No.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does

	the authority most often use to support its findings of risk to competition from a digital transaction?
	The EC often takes into account economic analyses in its merger control decisions. The types of economic analyses that the EC will take into account differ on a case-by-case basis, but would typically include concentration analyses, analysis of barriers to entry, analysis of win/loss data, analysis of incentives for input or customer foreclosure, surveys showing substitutability of products or services.
11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	In the EU, horizontal agreements in digital markets are reviewed under the standard competition framework governing horizontal agreements as set out in Article 101 of the Treaty on the Functioning of the EU. In 2023, the EU adopted revised Horizontal Block Exemption Regulations and revised Guidelines (soft-law) on the treatment of horizontal agreements. The new instruments came into effect on 1 July 2023.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysis and provide a summary of the agency's approach.
	The Horizontal Guidelines provide information on the Commission's approach to horizontal agreements in general; they are relevant across the board to all firms regardless of sector. The Guidelines, a revised version of which entered into force on 1 July 2023, provide guidance on the competitive assessment of information exchange and clarify that "information" for these purposes includes raw data and that information exchange refers to both physical information sharing and digital data sharing.
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis.

	<p>What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>On 30 June 2022, the Commission accepted commitments by Insurance Ireland regarding access to its data sharing platform. The Commission's Statement of Objections issued in June 2021 outlined that Insurance Ireland "arbitrarily delayed or in practice denied access of non-members to its Insurance Link information exchange system, thereby restricting competition in the Irish motor vehicle insurance market."⁵⁷ The Commission considered that those who were denied access were placed at a relative competitive disadvantage.</p> <p>The Commission has also provided guidance on data pooling in the recently approved Horizontal Guidelines. In particular, data pooling and data sharing agreements are identified as a particular information exchange between actual or potential competitors in the digital field. The term 'data sharing' is used to describe all possible forms and models of data access and transfer between undertakings. It includes data pools, where data holders group together to share data.</p>
4.	<p>What is the view of the competition authority in your jurisdiction on "hub and spoke" arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority's analysis.</p>
	<p>Hub and spoke arrangements in the digital economy are treated in the same way as hub and spoke arrangements in any other sector. We are not aware of any cases where the EC has taken a decision or provided guidance on this point in relation to the digital sector.</p>
5.	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency's analysis.</p>
	<p>We are not aware of leniency applications in horizontal cases in the digital economy in the EU.</p>
6.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>

⁵⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4242

III.	Vertical agreements
1.	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance?</p> <p>What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>The Vertical Block Exemption Regulation (the VBER), creates a safe harbour for vertical agreements that would otherwise be subject to the general prohibition on anticompetitive agreements where certain conditions (including a market share threshold) are met. The VBER was recently revised, with new rules coming into force on 1 June 2022. The revised VBER, and accompanying Vertical Guidelines, reflect changes in competition since the VBER was last updated in 2010, including revisions aimed at taking account of developments in the digital economy, including the growth of online sales.</p> <p>Online platforms hosting third party sales as well as selling on their own behalf cannot benefit from the dual distribution exception for agreements related to their supply of online intermediation services.</p> <p>"Wide" MFN clauses, which require sellers not to sell on more favourable terms on through competing platforms, are excluded from the new VBER and must be assessed separately. Narrow parity clauses, which apply to a specific sales channel, have remained block exempted.</p> <p>The revised Guidelines also set out the position on platform bans, having been updated to reflect the case law of EU Courts (in particular <i>Coty</i>), setting out that a ban on distributors using online platforms is acceptable under the VBER and explaining the circumstances in which such a ban will not be acceptable if the VBER is not applicable (e.g., if the market share threshold is exceeded).</p> <p>Further, the Guidelines explain that the Commission will not generally consider online platforms to meet the conditions for being "genuine agents" for products they resell on behalf of suppliers.</p> <p>Additionally, the revised Guidelines include a new section explaining when restrictions on the use of price comparison tools fall within the VBER and how the Commission will assess compliance of those that do not.</p>
2.	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>The VBER provides a safe harbour for agreements where neither party's market share exceeds 30% on the relevant sales and purchasing markets and where other conditions are met (including that the agreement does not contain any so-called "hardcore</p>

	restrictions" including, for example, resale price maintenance or certain territorial/customer restrictions).
3.	What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?
	<p>In 2022, the EU adopted a revised Vertical Block Exemption Regulation (“VBER”) that entered into force on 31 May 2022, as well as new Vertical Guidelines (soft law). The revised VBER set new rules regarding MFNs imposed by online platforms:</p> <ul style="list-style-type: none"> • “wide” across-platform parity clauses – requiring a party that sells through an online platform not to sell its products on better terms on any competing platform – are excluded from the scope of the new VBER and will therefore need to be assessed for compliance separately. • Narrow parity clauses – requiring a party not to sell on more favourable terms through a specific sales channel (such as its own website) than on an online platform - continue to be block exempted, and the revised Vertical Guidelines contain new guidance on how the EC will assess both wide and narrow parity clauses that fall outside the scope of the VBER.
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	In 2015 the Commission investigated Amazon in respect of conduct relating to sales of e-books. The Commission found that Amazon may have held and abused a dominant position through the use of MFN clauses which imposed a obligation on contracting publishers to inform and offer to Amazon favourable terms they offered to other retailers. Amazon did not agree with the Commission but offered commitments, accepted by the Commission in 2017. In the commitments, Amazon agreeing not to enforce the existing clauses and to not include them in any new contracts. In addition, publishers were able to terminate contracts that included the clause.
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
	Please see the response to Question 3 above.
6.	Is there any safe harbor/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbor/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbors?

	Please see the response to Question 1 above.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	Abuse of market dominance
1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations.</p> <p>In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>On 1 November 2022, the EU’s Digital Markets Act (“DMA”) came into force. The DMA represents the first attempt by the European Union to enact ex ante regulations to promote contestability and fairness in the digital economy, and is set to fundamentally change the way in which competition rules are applied in the digital sector.</p> <p>Only 16 months after the EC published its draft legislative proposal, EU legislators adopted the final text of the DMA – in record time by EU standards.</p> <p>Investigations into anticompetitive conduct typically take several years to complete, followed by several years of litigation before the EU courts. In the digital economy, which evolves incredibly rapidly, this has often resulted in prolonged uncertainty and irreversible harm to competition and consumers. The DMA enables the EC to act more quickly and without needing to establish an infringement of EU competition rules.</p> <p>At the heart of the DMA is a list of 22 prohibitions and obligations, regulating the conduct of digital companies designated as gatekeepers. Those ‘dos and don’ts’ are one-size-fits-all – for the most part, they apply to all gatekeepers irrespective of their business model. The EC has based the list of dos and don’ts on real examples of conduct by known large digital companies that the EC is formally investigating or about which it has previously expressed concerns.</p> <p>An earlier, far-reaching proposal to introduce a power to investigate markets and impose remedies where those markets were at risk of tipping into monopoly was dropped from the legislative package, although aspects of this proposal were subsumed into the DMA.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?

	Not at EU level. There are such authorities at the level of the EU Member States.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	Please see the response to Question 1 above.
i.	Please describe how ‘platform’ is defined for these purposes.
	There is no definition of “platform” in the DMA.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	<p>The DMA applies to companies that the EC will designate as gatekeepers. Gatekeepers are providers of one or more core platform services (“CPSs”) on the following exhaustive list:</p> <ul style="list-style-type: none"> • online intermediation services, including, among other things, app stores and online marketplaces; • online search engines, including all search through means such as voice; • online social networking services; • video-sharing platform services; • number-independent interpersonal communication services (eg, email and other messaging services); • operating systems; • web browsers; • voice assistants, such as Siri; • cloud computing services; and • online advertising services provided by a provider of any of the foregoing CPSs. <p>In the EC’s view, CPSs feature several characteristics that service providers can exploit, including extreme economies of scale, very strong network effects, multi-sidedness, lock-in effects and an absence of significant multi-homing.</p> <p>A provider of a CPS will be designated as a gatekeeper if all of the following three conditions are met:</p> <ul style="list-style-type: none"> • it has a significant impact on the internal market; • it operates a CPS that serves as an important gateway for business users to reach end-users; and • it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will do so in the near future.

	<p>To make it relatively straightforward to designate gatekeepers, the EC relies on rebuttable presumptions. A company is presumed to satisfy the gatekeeper conditions in respect of a specific CPS if three cumulative quantitative thresholds are met, relating to: (1) turnover, market capitalisation or fair market value; (2) the number of business users and end-users; and (3) the stability of market presence. Each of the three quantitative thresholds reflects one of the three gatekeeper conditions.</p> <p>Companies that meet the quantitative criteria can seek to avoid the gatekeeper designation by providing ‘sufficiently substantiated’ arguments that ‘manifestly put into question’ whether they satisfy the three gatekeeper conditions. If they do so, the EC will open a market investigation to determine whether designation is appropriate.</p> <p>Companies that do not meet the quantitative thresholds can still be designated as gatekeepers if the EC so determines following a market investigation. As part of the market investigation, the EC will make a qualitative (rather than quantitative) assessment of the (potential) gatekeeper’s market presence as well as structural characteristics of the market.</p> <p>Finally, the DMA gives the EC the power to designate not only existing gatekeepers but also emerging ones. A company designated as an emerging gatekeeper will only be subject to a subset of the 22 dos and don’ts deemed appropriate and necessary to prevent the emerging gatekeeper from achieving an entrenched and durable position through unfair means.</p> <p>The gatekeeper criteria are low enough to capture not just US-based big tech but also a few other players active in Europe.</p> <p>The first gatekeeper designations under the DMA are expected on 6 September 2023 and compliance will be required approximately by 6 March 2024.</p>
<p>iii.</p>	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>The dos and don’ts of the DMA are based on the EC’s real-world experience of enforcing antitrust rules in digital markets and primarily cover data-related practices, some forms of tying, interoperability with gatekeeping CPSs, transparency obligations when providing advertising services, and non-discrimination. Some key prohibitions and obligations that could have a significant impact are highlighted below.</p> <p>Article 5(2) prohibits various types of personal data combinations and cross-use. More specifically, gatekeepers are prohibited from:</p> <ul style="list-style-type: none"> • processing for the purposes of advertising personal data sourced from services of third parties that make use of the gatekeeping CPS unless the end-user has been presented with the specific choice and provided meaningful consent in the sense of the EU General Data Protection Regulation; • combining personal data from the gatekeeping CPS with personal data sourced from any other CPS or other service of the gatekeeper or a third party; • cross-using personal data from the gatekeeping CPS in any other service of the gatekeeper; and

- signing in end-users to other services of the gatekeeper to combine personal data.

This will primarily affect companies active in digital advertising, which combine data to gain an advantage in targeted advertising. Article 5(2) appears to still allow data combinations for advertising purposes if end-users consent to it.

Article 5(4), among other things, obliges gatekeepers to allow business users of their gatekeeping CPS to advertise offers to customers and transact with consumers freely and at no charge, without needing to use the gatekeepers' mechanisms (e.g., its payment mechanism) to carry out those transactions. This provision seems to be inspired by the EC's current investigations into Apple's App Store (the App Store) practices. In practice, it would oblige app store owners, such as Apple, to allow app developers to promote offers to consumers acquired via the App Store and conclude contracts with them without necessarily using Apple's in-app purchase mechanism.

Article 5(7) prohibits certain types of tying, by requiring gatekeepers to refrain from requiring users to offer or interoperate, inter alia, with the gatekeeper's identification services, web browsers, payment services or in-app purchase systems in the context of offering services through the gatekeeping CPS. As a result, the DMA appears to prohibit any obligation imposed by an app store on app developers exclusively to use its in-app purchase mechanism to carry out in-app sales of digital content.

Article 6(4) obliges gatekeepers (including notably mobile OSs) to allow and technically enable third-party app stores and direct downloads (sideloading) of third-party apps onto their systems in an effort to provide consumers and developers with more app distribution options.

Article 6(11) obliges search engine gatekeepers to provide rivals with access on fair, reasonable and non-discriminatory terms to user-generated search data. Search engine gatekeepers would be required to share virtually all data generated by users, including the data about users' long-tail searches (i.e., less common searches). This could have a dramatic impact on search engine competition.

Article 6(12) obliges gatekeepers to apply fair, reasonable and non-discriminatory general conditions for businesses' access to app stores, online search engines and social networks. The DMA requires gatekeepers to publish these general conditions of access, which should provide for an EU-based alternative dispute settlement mechanism with guarantees of independence and impartiality. The DMA's recitals make particular reference to app stores, highlighting pricing as one of the conditions of access on which the EC will focus its attention. To determine the fairness of an app store's conditions of access, the DMA proposes using as comparators the prices charged and conditions imposed by other app stores, or by the same app store for different services to different types of end-users for the same service in different geographic regions in respect of the same service the gatekeeper offers to itself.

Article 7, which was not part of the draft text of the DMA but was added relatively late in the legislative deliberations, creates an obligation on gatekeeper instant messaging services, such as iMessage and WhatsApp, to provide interoperability to rival messaging services free of charge to allow them to provide basic functionality such as text messaging, sharing of images and other attachments, voice calls and video calls. Contrary to initial predictions, the DMA did not include an equivalent interoperability

	<p>obligation to social networks, but the EC indicated that this might be considered in the future. Gatekeepers can take measures to protect the integrity, security and privacy of their messaging services to the extent that interoperability might endanger them.</p> <p>The EC has purposefully avoided using the DMA as a vehicle to make amendments to merger control rules. Nevertheless, merger control is not unaffected: article 15 obliges gatekeepers to report to the EC, pre-closing, any intended concentration involving another digital service provider, irrespective of whether the concentration is notifiable for merger control approval in the EU. Reporting the transaction discharges the gatekeeper's obligation, and there is no clearance process involved. This obligation is expected to put more transactions on the EC's radar, especially viewed in conjunction with the EC's recently amended interpretation of article 22 of the EU Merger Regulation (EUMR). In addition, gatekeepers systematically not complying with the DMA risk being sanctioned with a temporary freeze from entering into new concentrations.</p>
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	The DMA is closer to "one-size-fits-all", but in reality it is expected that through discussions with the EC, gatekeepers will attempt (and likely manage) to tailor aspects of compliance to their business models.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Unclear at this stage – the DMA's provisions are general and broadly defined. Legal certainty will depend on how the EC implements them in practice.
vi.	Please summarise any penalties provided for non-compliance.
	10% of global group turnover, which increases to 20% for recidivism.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	Ensure fairness and contestability of digital markets.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?

	Please see the response to Question 1 above.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	As noted in response to Question 5 above, the DMA designates gatekeepers based on a rebuttable presumption. The DMA obligations apply to all gatekeepers without the need for an effects analysis. No efficiency defenses are accepted. In exceptional circumstances, justified on the limited grounds of public health or public security laid down in EU law and interpreted by the Court of Justice, the EC can decide that a specific obligation does not apply to a specific CPS.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defense be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	Outside the DMA, there are no such rules in the EU to our knowledge.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	Not applicable. The DMA is not competition law and does not relate to the concept of dominance (the “gatekeeper” concept does not relate to the concept of dominance).
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	The EC considers both these tools as promoting more contestable digital markets. This is evidence, for instance, in the DMA which seeks to increase data portability by gatekeepers, to promote switching behaviour (Article 6(9) DMA).
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.

	<p>The essential facilities doctrine is used in EU competition law i.e., the owner of a facility may be virtue of its ownership, hold a dominant position within a market and the refusal to give access to it to its competitors on non-discriminatory terms may amount to an abuse. Nevertheless, we are not aware of the EC having applied this to a case in the digital economy in recent years.</p> <p>On 27 June 2017, the European Commission found that Google had abused its dominant position in the online general search services market by favouring its own comparison shopping service on its general results pages, while relegating the results from competing comparison services through ranking algorithms. The Commission fined Google EUR 2.42 billion.</p> <p>The Commission did not characterise the case as one to which the essential facilities doctrine applied. However, Google's appeal set out its view that the Commission had erred in imposing a duty to supply remedy without establishing that the <i>Bronner</i> conditions were fulfilled, arguing that the Commission should have had to follow the essential facilities framework to come to its decision. The Court's view was that Google's general search results page "has characteristics akin to those of an essential facility", but ultimately found that the circumstances were different from the <i>Bronner</i> case. The Court found that Google's conduct in any case did not constitute competition on the merits and dismissed almost the whole of Google's appeal.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>

Country: France

Contributor: Patrick Hubert (Orrick)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>No. However, the French competition authority (“FCA”) recently created a task force that will target below-the-thresholds acquisitions in order to refer some of them to the European Commission (“EC”) on the basis of the new approach of article 22 of EUMR. This task force is generally supposed to focus on tech and killer acquisitions, although its scope would be broader.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>The FCA does not have any general procedural mean to review or stop below-the-thresholds transactions.</p> <p>As explained in Question 1, the creation of the task force to assist the FCA in referring cases to the EC is a recent development. It is worth noting that the FCA was one of the national authorities that referred the Illumina Gray transaction to the EC. It is likely that the use of Article 22 EUMR will become frequent.</p> <p>In addition, the FCA’s case handlers are at the origin of the Towercast ruling by the European Court of Justice, according to which a below-the-threshold acquisition of a competitor by a dominant firm may be investigated and punished as an abuse of dominance. Even if the FCA’s panel did not accept this view, the fact that, after a preliminary ruling request by the Paris Court of Appeal, the position of the case-handlers was chosen by the Court of Justice over the position of the panel, probably implies that the FCA as a whole will now become active in investigating small acquisitions by a dominant company as abuses of dominance.</p>
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?

In France, the FCA must communicate with other administrative authorities whenever the sector relevant to a case is regulated by one of these authorities. The administrative authorities have a period of two months in which to submit any comments, which may be reduced by the *rapporteur general* if the urgency of the matter requires it. These observations are attached to the FCA file.⁵⁸

For instance, the CNIL (the French Regulator for data protection) formulated observations during the procedure against Direct Energie regarding its abuse of dominance practices, which consisted in relying on its historical file to convert its regulated gas customers to market gas and electricity offers. The CNIL has pronounced itself in favour of the right for the consumer to oppose to the canvassing by mail or phone, and its opinion was followed by the Authority.⁵⁹

To this day, the French Competition Authority has not provided any formal guidance regarding its cooperation with the data regulator, but both Presidents of the CNIL and the FCA have strongly supported increased cooperation.

- Firstly, the CNIL's president recently took part of speech in front of the NCA judges and agents, about the convergences between competition law regulation and data protection, encouraging for a strong consultation bond between both agencies⁶⁰. In particular, the President proposed to better use data protection concepts in competition law, and link them with the FCA approach asking the following questions: *"What role can dominant position play in the proportionality of data processing? data processing? Does the harm to competition have to include an invasion of privacy component, and if so, how can and if so, how can it best be assessed?"*.
- Secondly, Benoît Coeuré had already given a speech before the CNIL on the subject of "Competition and Personal Data Protection".⁶¹ Among his statements, the FCA President emphasised the need for a coordinated approach between the Authorities to ensure that the objectives of one field of regulation are not compromised by measures taken by the other regulator. As an example of their successful cooperation, the President spoke of its Apple iOS decision⁶², in which the Authority was thus able to benefit from an opinion issued by the CNIL on the various privacy enforcement issues raised by the case. This cooperation took place within a very short timeframe, illustrating the fact that cooperation

⁵⁸ Please see Article R. 463-9 of the French Commercial Code.

⁵⁹ Decision n° 14-MC-02, dated 9 September 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité.

⁶⁰ Marie-Laure Denis, CNIL's President, Intervention before the Competition Authority, dated 21 November 2022, please see: https://www.cnil.fr/sites/default/files/atoms/files/discours_presidente_cnil.pdf

⁶¹ Benoît Coeuré, President of the FCA, Intervention before the CNIL, dated 2 June 2022, please see: <https://www.autoritedelaconurrence.fr/sites/default/files/2022-06/20220608-CNIL-discours.pdf>

⁶² Decision 21-D-07, dated 17 March 2021, regarding a request for urgent interim measures presented by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, please see: <https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/targeted-advertising-apples-implementation-att-framework-autorite-does-not>

	<p>between authorities is possible not only in substantive cases but also in urgent proceedings. Benoit Coeuré also mentioned the issues at stake with respect to the articulation of the DSA and the DMA once they are implemented.</p> <p>In addition, the cooperation with sectoral regulators was announced as a priority for the FCA in 2023.⁶³</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>Although it hasn’t published any specific guidelines, the FCA has made several statements about the link between digital undertakings and market power, particularly in regard to e-commerce and data protection.</p> <p>In a report from 2020 about “Competition and online commerce”, the FCA made observations about the specificities of digital markets when it comes to evaluating market shares and market power⁶⁴. Digital markets have specific features that are already present in traditional markets, such as network externalities and the fact that certain services are free. There are also features that are specific to digital markets, such as the role of data or the absence of sales areas. Consequently, certain factors specific to online activities are likely to strengthen competition and thus reduce the market power of operators.</p> <ul style="list-style-type: none"> • Firstly, the mobility of customers between undertakings could intensify competition, insofar as customers would no longer be constrained by distance, and could easily change online providers since price comparison between products would be facilitated. However, other factors may limit this consumer mobility, notably the richness and quality of the proposed offer, which may depend on the number of users, reputation, or the experience effect. Moreover, in the case of free services, consumers may also show significant inertia, slowing them down to change providers. • Secondly, multi-homing allows customers to use several portals or platforms simultaneously. In the specific case of online real estate platforms, agencies frequently use the services of several services simultaneously. Thus, this multi-homing reduces the risk of price increases in the event of a merger between these players, as the Authority noted in Decision No. 18-DCC-18 of 1 February 2018 relating to the acquisition of sole control of the company Concept Multimedia by the Axel Springer Group - “<i>the advertisements published simultaneously on SeLoger and LogicImmo are not likely to be transferred to Logi-Immo since they</i>

⁶³ Please see the FCA roadmap for 2023: <https://www.autoritedelaconurrence.fr/en/article/autorite-publishes-its-roadmap-2023-2024>

⁶⁴ FCA, « Competition and e-commerce”, 2020, please see: <https://www.autoritedelaconurrence.fr/sites/default/files/concurrence-commerce-en-ligne-en.pdf>

are already published there”⁶⁵. Therefore multi-homing could reduce market power.

- Thirdly, regarding the dynamism of digital markets, the Authority, while indicating in its merger control guidelines that it refers to the most recent market shares available, specifies that it may take into account market shares over the previous two years, if they have changed significantly, and that these market shares may be corrected by estimates of market evolution, particularly when the market is developing fast. In addition, online operators may face the threat of entry and potential competition from GAFAM. Indeed, potential competition refers to the threat to incumbent operators in a market by the possible entry of new players. These entries would increase the effective level of competition and thus reduce individual profits on the market. The more credible this threat is, the more likely it is to have a disciplining effect on the operators present on the market, who anticipate that too large an increase in their prices could provoke the entry of new competitors. In dynamic markets such as certain online markets, it is difficult to take this potential competition into account given the uncertainties related to the entry costs and the speed of development of new players in these markets, which may depend on numerous parameters such as consumer inertia or mobility, the quality of the services offered by the new platforms, or the importance of direct or indirect network effects. Indeed, the authority has already considered that thanks to their reputation and audience, such potential entrants could quickly overcome the barriers to entry on a given market, to become major competitors of the incumbent players.

Access to data can also be a barrier to entry and thus strengthen the market power of incumbents. The role of data in the competitive process was assessed by the Authority in its examination of the SeLogger/Logic-Immo transaction mentioned above, during which the Authority examined whether the combination of data held by the parties from users and real estate agencies was likely to create anticompetitive effects. In particular, some competitors considered the acquisition of data held by Logic-Immo as “the greatest danger” and “the greatest interest” of the transaction. Finally, in its joint study with the Bundeskartellamt (i.e., the German competition authority) on “Competition law and Data”, the Authority stresses the importance of network effects in assessing the market share of companies⁶⁶.

- Network effects can be more important in online markets than in physical markets and thus contribute to increasing barriers to entry: “*in certain circumstances, these markets marked by important network effects can lead to the creation of strong positions linked to a phenomenon of concentration around dominant or even very dominant players, called the “snowball effect”*”. Indeed, in its Booking decision, the Authority stated that “*these network effects, if proven,*

⁶⁵ Decision N° 18-DCC-18, dated 1 February 2018 on the acquisition of exclusive control of Concept Multimédia by the Axel Springer group (SeLogger/Logic-Immo Decision), please see:

https://www.autoritedelaconurrence.fr/sites/default/files/decision_seloger_en_def.pdf

⁶⁶ FCA and Bundeskartellamt joint study, “Competition Law and Data”, 2016, please see:

<https://www.autoritedelaconurrence.fr/sites/default/files/Big%20Data%20Papier.pdf>

	<p><i>raise barriers to entry, since the size of an operator is in itself a fundamental parameter of its growth. Thus, smaller players and new entrants do not benefit from the same advantages as an already established and large player”⁶⁷.</i></p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>In the media sector, the French Authority imposed remedies in the merger decision n° 14-DCC-50 on the acquisition of exclusive control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Canal Plus Group⁶⁸.</p> <p>On 2 April 2014, the FCA again cleared, subject to several commitments, the acquisition by Vivendi and Groupe Canal Plus of the companies D8, D17, Direct Productions, Direct Digital and Bolloré Intermédia. For background:</p> <ul style="list-style-type: none"> • In its decision from 23 July 2023, the acquisition of the free-to-air channels D8 and D17, previously known as Direct 8 and Direct Star, by Groupe Canal Plus was authorised by the Autorité de la concurrence subject to a series of five commitments:⁶⁹ (1) limit on acquisitions of rights to American films, American series and French films; (2) limit on acquisitions of rights to French films; (3) separate negotiations for pay and free-to-air TV rights for films and series; (4) limits to acquisitions, by Direct 8 and Direct Star, of StudioCanal’s film catalogue; and (5) sale of the free-to-air broadcasting rights to sporting events of major importance. • However, in December 2023, the Conseil d’État (French Administrative Supreme Court) quashed the decision of the Autorité de la concurrence on procedural grounds. With regard to the substance, it also held that the commitment made with regard to French film rights (2nd commitment in the description above) should be strengthened to take into account the competitive risk linked to the purchase of the second and third free-to-air broadcast windows. It specified, however, that the decision would only take effect from 1 July 2014, to allow the Autorité de la concurrence to issue a new decision prior to this date. • On 15 January 2014, GCP and Vivendi gave renotification of the acquisition to the FCA, therefore the operation was re-examined in the light of the current competitive situation. While re-examining the operation, the FCA carried out a

⁶⁷ Decision 15-D-06 of April 21, 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, please see: <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-bookingcom-bv-bookingcom-france-sas-and-bookingcom>

⁶⁸ Please see: <https://www.autoritedelaconcurrence.fr/fr/decision-de-contrôle-des-concentrations/relative-la-prise-de-contrôle-exclusif-des-sociétés-10>

⁶⁹ 12-DCC-101 on the acquisition of exclusive control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi and Canal Plus Group, please see: <https://www.autoritedelaconcurrence.fr/fr/decision-de-contrôle-des-concentrations/relative-la-prise-de-contrôle-exclusif-des-sociétés-direct>

	<p>new competition analysis in the light of the situation prevailing today. It also submitted the commitments proposed by GCP to other players in the sector (TV channels, producers, etc.) and launched two market tests on the proposed commitments on 21 January and 3 March 2014. It also took into account comments made by the sectoral regulatory bodies that it consulted (CSA, Arcep).</p> <ul style="list-style-type: none"> • As a result, Groupe Canal Plus’s commitments with regard to French films have been strengthened and the rest of the remedies have been maintained. For unreleased French films, the parties have undertaken not to pre-acquire, in the same calendar year, the pay and free-to-air broadcast rights for the same film for more than 20 movies and to dedicate most of their investments to mid-budget films (“middle” films), without the ability to pre-empt the rights of a large number of big-budget films (a maximum of 2 films with a budget of more than 15 million euros, 3 with a budget between 10 and 15 million euros and 5 films with a budget between 7 and 10 million euros). • This commitment is substantially similar to the one previously agreed with the Autorité but its scope is extended to any pre-purchase, which makes it possible to cover all the broadcasting windows sold by the producers when they organise the film’s financing. This commitment also includes any purchases by Groupe Canal Plus, once the film is produced, of the free-to-air broadcast rights to the film up to 72 months after its cinema release, a period that corresponds to the three free-to-view broadcast windows. All the other commitments made in 2012 remain unchanged. <p>No prohibition decisions have been taken by the FCA in the digital sector.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>In the Decision n°12-DCC-100 on the acquisition of exclusive control of TPS and CanalSatellite by Vivendi and Canal Plus Group,⁷⁰ the FCA cleared the acquisition subject to compliance with injunctions ordered to restore sufficient competition in the pay TV markets.</p> <p>Subsequent to the withdrawal of a previous decision authorising the acquisition on 20 September 2011, Vivendi Universal and the Groupe Canal Plus (“GCP”) re-filed a merger notification with the FCA on 24 October 2011. Investigations began on 21 February 2012, at which date the companies satisfied the merger filing requirement.</p> <p>After an initial investigation, the FCA decided to open an in-depth investigation of the acquisition on 27 March 2012. The investigation involved a broad consultation of market</p>

⁷⁰ Please see: <https://www.autoritedelaconurrence.fr/fr/decision-de-controle-des-concentrations/relative-la-prise-de-controle-exclusif-de-tps-et>

players as well as opinions from the Audiovisual Regulator (Conseil Supérieur de l'Audiovisuel, or “**CSA**”) and the Telecommunications and Posts Regulator (Autorité de Régulation des Communications Électroniques et des Postes, or “**ARCEP**”).

The 2006 acquisition strengthened GCP’s position on all markets concerned and weakened competition. At the end of the investigation the Autorité found that, after the 2006 acquisition, whose effects were not prevented due to GCP’s failure to implement certain commitments which conditioned the merger’s clearance, competition was significantly weakened in several pay TV markets, particularly with respect to the acquisition of movie rights, channel publishing, pay-TV channels’ marketing and services distribution. In particular, the fact that the quality of unbundled channels was lessened, GCP’s failure to implement commitments relating to distribution conditions for independent channels and CanalSat’s exclusive distribution deals with independent channels, had the combined effect of preventing the emergence of competition in downstream markets.

GCP offered insufficient commitments in the context of the renewed merger review, leading the Autorité to order injunctions: the order was intended to guarantee competitive pay TV markets, while taking account of specific characteristics of the pay TV sector in France. GCP offered commitments to remedy competition issues. The commitments were found inadequate, and the Autorité therefore decided to require Vivendi and GCP, in accordance with Article L 430-7 III of the French Commercial Code, to adopt measures to restore adequate competition in the various pay TV markets, which will apply in both metropolitan France and overseas departments and regions. In defining the measures intended to restore competition to the affected markets, the Autorité took account of the specific characteristics of this sector in France and the changes expected from technological innovation and globalisation in affected markets.

As a consequence of the procedure, the following injunctions were ordered:

- **Movie rights:** The order sets rules governing GCP’s purchasing behaviour with respect to movie rights, in particular by limiting the duration of output deals to three years, requiring that GCP enter into separate agreements for different types of right (1st pay TV window, 2nd pay TV window, series, etc.), and prohibiting output deals for French films (for more details see orders 1(a) to 1(e)). In order to enable the Orange Cinema Series offer to exert actual competitive pressure, independently of GCP, GCP must divest its stake in Orange Cinema Series. Otherwise, GCP will have to adopt measures limiting its influence on Orange Cinema Series (see orders 2(a) to 2(c)).
- **Distribution of pay TV channels:** GCP will have to guarantee clear rules governing the access of independent channels to distribution services by CanalSat (distribution of a minimum number of independent channels, distribution of any channel holding premium rights and drafting of a model distribution deal) (see orders 3(a) to 3(d) and 4(a) to 4 (b)). GCP will have to allow alternative distributors, particularly the ISPs, to compete effectively with CanalSat for exclusive distribution deals (see orders 5(a) to 5(b)). GCP will have to make all its own movie channels distributed in its CanalSat offer (Cine+ channels) available for third-party distributors (unbundling) (see orders 6(a) to 6(c)).

	<ul style="list-style-type: none"> Video on demand (“VOD”) and subscription video on demand (“SVOD”) (see orders 7(a) to 7(c)). Separate contracts must be entered into for the purchase of VOD and SVOD rights on a non-exclusive basis and must not be combined with rights purchased for linear distribution on pay TV. StudioCanal’s VOD and SVOD rights must be offered to any interested operator. No exclusive distribution deals for the benefit of GCP’s VOD and SVOD offers on ISP platforms.
7.	In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?
	No.
8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.
	No decisions in that regard.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	Since the recent European Court of Justice Towercast decision (See <i>Question 1</i>), the FCA is now able to review a below the threshold merger after it was realised if the merger is abusive based on article 102 TFEU. However, it seems that a merger decision cannot be revised, only the commitments can be renegotiated as in case of SNCF concerning the sale of train tickets ⁷¹ .
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	Generally speaking, irrespective of the sector, the Authority takes economic analyses into account and involves its own chief economist when necessary. However, it is rare that economic analyses can change the prospects when combined market shares are very high and the transaction leads to a severe reduction of the number of players.

⁷¹ Please see: <https://www.autoritedelaconurrence.fr/en/article/sale-train-tickets-autorite-reviewing-two-commitments-made-sncf-2014>

11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	Digital mergers are often caught by the French foreign investment control regime. There are very few prohibitions, but the French government often authorises the transactions with conditions.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	No.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	The French NCA has not adopted a clear position on how it intends to treat the collaboration of competitors active in the digital field. However, usual anticompetitive practices can be, and have, been translated to the data sector. Indeed, in its study on Competition Law and Data, ⁷² the FCA underlines the risk of exclusive contracts. In the specific case of anticompetitive data-driven strategies, an actor on the market can prevent rivals from accessing data, through exclusivity provisions with third-party providers, or foreclose opportunities for rivals to procure similar data by making it harder for consumers to adopt their technologies or platforms. Therefore, a network of exclusive agreements might be problematic under Article 101 TFEU, because of the cumulative effects of a network of similar agreements. ⁷³
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.

⁷³ ECJ, "Delimitis", C-234/89, judgment of 28.02.1991, please see: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0234>

Data collection and sharing

In its recent Decision 23-D-04,⁷⁴ the FCA imposed a fine to several companies for the anticompetitive agreement they concluded in the sector for subscriptions to business intelligence products.

- Since 1989, BvD, as a software solutions provider, and Ellisphere, as an information provider, cooperated in the provision of several company data bases, such as Diane, Astrée, Orbis and Amadeus. Their agreements had, since the very beginning, price fixing and client sharing clauses.
- The practice was discovered thanks to the BvD application to a leniency program, which was therefore exonerated. Ellisphere received a €3 500 000 fine.
- However, the analysis of the FCA was not focused on the risks of data sharing between competitors, but rather on the object of the conduct, which was the client sharing agreement, and the price fixing agreements.

In its joint report with the Bundeskartellamt, the FCA recently analysed the potential role of data in the competition law analysis.

- First, the collection and exploitation of data may raise barriers to entry and be a source of market power when the data is collected by a third party, and then provided to a competitor of the owner of the data. There may be limits when the other entity is not willing to share with or sell these data to its competitors. In addition, if a company can acquire third-party data, and eventually catch up with the established companies' advantage in terms of data access, it could be impossible in practice because of the amount and the quality of the data collected by such established companies. For example, for online services such as search engines and social media platforms or any kind of free services offered to a wide base of users, they generate a large volume of data which may not be accessible to competitors. Moreover, such markets are often particularly concentrated, explaining the existence of strong scale and network effects in these cases, and therefore limiting the intensity of competition. The development of data collection and usage on those markets may thus reinforce the market power. Also, smaller competitors might be marginalised due to the differentiation between data access since access to a larger amount of data may support better services, attracting more customers in turn and therefore more data, the so-called "snowball effect".
- Second, it may reinforce market transparency, which may impact the functioning of the market. The increasing collection and use of digital data is often associated with greater online market transparency, but from an economic point of view, such transparency has ambiguous effects on the functioning of markets. On the one hand, price comparators allow consumers to make better informed choices, resulting in a higher intensity of competition both

⁷⁴ Décision n° 23-D-04 du 12 avril 2023 relative à des pratiques mises en œuvre dans le secteur de la vente d'abonnements à des produits d'intelligence économique (business intelligence) et d'information d'entreprise, please see: https://www.autoritedelaconurrence.fr/sites/default/files/integral_texts/2023-04/23d04.pdf

	<p>in terms of prices and quality. Marketplaces can host smaller shops and allow the comparison between prices and conditions offered by their hosted merchants, thereby contributing to market transparency. On the other hand, the greater information resulting from data collection, such as pricing, may be used by undertakings in order to restraint competition. To a certain extent, the increasing availability of data on prices on the Internet, and the fact that these data are displayed in real time, could give online markets an unprecedented level of transparency.</p> <p>All in all, the transparency of the information on digital services can benefit the consumers so they are better informed, but this same transparency also may allow competitors to coordinate their behaviours .</p> <p><u>Algorithms</u></p> <p>In November 2019, the FCA released a joint study with the Bundeskartellamt about “Algorithms and Competition”. With a particular focus on pricing algorithms, the study explores potential detrimental effects of such algorithms on competition and the different ways in which they may affect strategic interactions between companies, potentially leading to horizontal collusion.</p> <p>In particular, the study focused on the use of pricing algorithms in particular scenarios, considering the situations that they cover as well as their potential competition law implications. Indeed, the FCA stated that an algorithm could monitor competitors’ prices and/or punish a deviation from the price previously coordinated upon. Therefore, by allowing more transparency and adjustments, the algorithm might strengthen the cartel stability. A horizontal collusion could also be supported or facilitated by an exchange of algorithms (or of the principles implemented therein) between competitors. Such an exchange could raise concerns comparable to an agreement on or to exchange of pricing formulas, tariff schemes, etc.</p> <p>Similarly, an information exchange between competitors might be supported or facilitated by an algorithm. An algorithm could facilitate such an exchange by making it more simple, rapid, and direct.</p> <p>The FCA also considers that the scenario of different algorithms from different companies, which are in direct or indirect contact, i.e. some sort of “algorithmic communication” as opposed to mere unilateral behaviour, may fall within the scope of Article 101 TFEU. However, it is yet unknown whether “algorithmic communication” is a realistic scenario and, if it is, in what shape it might come up. It is thus too early to further develop which type of algorithmic interaction might constitute an “algorithmic communication”. In any case, there needs to be an element of interaction which goes beyond unilaterally exploring the competitor’s pricing behaviour and adapting to it.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>

	<p>The FCA has made statements about the specific situation in which a third party provides the same algorithm to competitors. The particularity of these situations is that there is no direct communication or contact between the competitors. A certain degree of alignment in the use of algorithms arises nevertheless due to the third party providing similar services to competitors. The third party could, for example, be an external consultant advising several companies in the same line of business on the design and use of algorithms, or a developer supplying competitors with implementations of similar software solutions. Once such a solution such as a pricing algorithm is set up, it is in the interest of the developer to sell it the most retailers possible.</p> <p>Competitors can knowingly use the same or somehow coordinated third party algorithms. In such a case, the alignment of algorithmic decision-making could arise at the level of coding the algorithm, and alignment at the lever of the input factors, <i>i.e.</i> data level.</p> <p>Companies could also use algorithms developed by a third party without being aware that their competitors are relying on the same third party (in the sense of not knowing and not being able to reasonably foresee it). However, the use of such algorithm is not neutral for competition, because its could equally lead to an alignment of competitors' behaviour, either at code level or data level. The FCA considers that in order to establish an infringement by the competitors themselves, they must be at least aware of the third party's anticompetitive acts or could have at least reasonably foreseen them. Where this is not the case, the conduct may be apprehended as a legal parallel behaviour on the part of the competitors.</p>
<p>5.</p>	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency's analysis.</p>
	<p>Not to our knowledge but the investigation duration relating to leniency applications take a long time, so we cannot exclude that pending applications exist.</p>
<p>6.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>N/A.</p>
<p>III.</p>	<p>Vertical agreements</p>
<p>1.</p>	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>

Following the example of the European Commission proceedings in the Google Ads case, the FCA has dealt with decisive cases in the online advertising sector in the past years.

In March 2018, the FCA issued a sector-specific investigation into online advertising, identifying two global operators were “dominating” the sector⁷⁵. Among the issues brought to the attention of the FCA, many stakeholders do not have proprietary sites where they can directly sell advertising space, explaining that their position is fragile on many levels. They cannot offer advertisers access to inventories that are as extensive as those offered by Google and they remain in an uncertain situation with regard to their ability to collect data on third-party sites and applications in order to offer customised advertising. Internet users are increasingly cautious about the use of their data and they increasingly use technological solutions offered by software publishers and device manufacturers (especially Apple) that limit data collection and ad display. This has an immediate effect on the revenue and profitability of publishers and certain intermediaries whose activities are based on data use.

The most recent case on these issues was published in May 2023, following the FCA having received a complaint in October 2022 from the company Adloox regarding practices implemented by Meta in the online ad verification sector. Ad verification refers to the processes in the online advertising sector which are intended to verify the quality of an ad inventory or an ad impression, such as viewability, fraud detection, and brand safety.

The FCA has issued interim measures against Meta, pending a decision on the merits of the case⁷⁶. It considered that the conditions for accessing Meta’s “viewability” and “brand safety” partnerships were likely to constitute an abuse of a dominant position and cause serious and immediate harm both to Adloox’s interests and to the independent ad verification sector. Consequently, the *Autorité* has ordered Meta to define and make public new criteria for accessing and maintaining “viewability” and “brand safety” partnerships which are objective, transparent, non-discriminatory, and proportionate. It has also issued an injunction to allow Adloox to be rapidly admitted to these partnerships, provided that the company meets the new access criteria.

In another case involving Meta, the company made commitments to the FCA to put an end to practices in the market for non-search related online advertising.⁷⁷ Following a complaint by Criteo in September 2019, the *Autorité*’s investigation raised competition concerns about several practices that could affect competition conditions, on the one hand between the various advertising intermediation service providers, and on the other hand between Criteo and Meta.

⁷⁵ 6 March 2018: Sector-specific investigation into online advertising, Please see: <https://www.autoritedelaconurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising>

⁷⁶ Online ad verification: The *Autorité de la concurrence* issues interim measures against Meta, Please see: <https://www.autoritedelaconurrence.fr/en/press-release/online-ad-verification-autorite-de-la-concurrence-issues-interim-measures-against>

⁷⁷ Meta makes commitments to the *Autorité de la concurrence*, Please see: <https://www.autoritedelaconurrence.fr/en/communiqués-de-presse/meta-makes-commitments-autorite-de-la-concurrence>

In the context of a negotiated procedure, Meta proposed commitments in June 2021, which were then subjected to a market test and then examined by the Board.

Since 2016, Meta has made specific application programming interfaces (“**APIs**”) available to certain intermediaries, including Criteo. Criteo used these interfaces to improve bidding and campaign performance tracking. In 2018, Meta withdrew the provision of these APIs, including from Criteo.

At the same time, Criteo was removed as a Facebook Marketing Partner (partnership now known as Meta Business Partner). This partnership allows beneficiary stakeholders to improve the quality of their services (in particular thanks to access to technical support and training enabling them to adapt to the evolution of the technologies and solutions offered by Meta), have easier access to APIs and improve their reputation with their customers, insofar as this status is perceived by advertisers as a guarantee of quality in terms of technical expertise and know-how in terms of Facebook Ads campaign management.

In their preliminary assessment, the FCA several practices implemented by Meta that could raise competition concerns in the French market for non-search related online advertising, where Meta, whose market share was 49% in 2018 and 50% in 2019, is likely to hold a dominant position.

Firstly, the conditions under which Criteo was deprived of access to Meta’s former partnership programmes lacked objectivity, transparency and stability in the criteria for the access to the programme, and by differences in the treatment when coming to their implementation.

Secondly, Meta’s sales teams engaged in conduct from late 2017 that could constitute disparaging practices against Criteo. These behaviours contributed to the company’s inability to re-enter the Facebook Marketing Partner programme.

Thirdly, in 2018 Meta removed Criteo’s access to an API, called “User Level Bidding,” which was made available to a limited number of companies on a trial basis. This API allowed Criteo to use its own bidding and product recommendation technologies to optimise its retargeting offer within the Meta advertising ecosystem. The conditions of this loss of access raised concerns about the transparency, objectivity, and non-discriminatory nature of the criteria for accessing Meta’s APIs.

Following this process and substantial improvements, the FCA accepted the proposed commitments that consisted in offering access to the partnership programme based on a quantitative criterion, committed to provide its sales teams with compliance trainings, to provide a new interface for advertising service providers, and to name a monitoring trustee responsible for their follow-up.

This is the first time that a competition authority accepts commitments from Meta in antitrust proceedings.

In addition to the proceedings against Meta, the FCA handed out a €220 million fine to Google for favoring its own services in the online advertising sector, having abused its

	<p>dominant position in the advertising server market for website and mobile application publishers.⁷⁸</p> <p>According to the FCA, Google granted preferential treatment to its proprietary technologies offered under the Google Ad Manager brand, both with regard to the operation of the DFP ad server (which allows publishers of sites and applications to sell their advertising space), and its SSP AdX sales platform (which organises the auction process allowing publishers to sell their “impressions” or advertising inventories to advertisers) to the detriment of its competitors and publishers.</p> <p>The practices are particularly serious because Google’s competitors and publishers of mobile sites and applications were harmed in the SSP market</p> <p>Without disputing the facts, Google used the settlement procedure and proposed commitments to improve the interoperability of Google Ad Manager services with third-party ad server and advertising space sales platform solutions and end provisions that favour Google. The commitments were accepted by the FCA.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>In its Big Data study, the FCA addresses the risk of exclusive contracts under Article 102 TFEU. The Authority explained that exclusive agreement can exclude rivals, especially when they are concluded by dominant firms. As an example, the European Commission proceeding against Google (Google Shopping) considered foreclosure of competitors.⁷⁹ The FCA also handled other cases in the advertising market as mentioned above.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>Inspired by the Trade law concept of “Most Favored Nation” (“MFN”) clause, the notion of MFN has been translated to Antitrust to describe a provision included in a contract for products or services that prevents the seller from selling its products or services to other actors for a lower price, or on better terms, than the sellers sell the products or services to the buyer.</p>

⁷⁸ The Autorité de la concurrence hands out a €220 millions fine to Google for favouring its own services in the online advertising sector, please see: <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/autorite-de-la-concurrence-hands-out-eu220-millions-fine-google-favouring-its>

⁷⁹ European Commission, “Google”, case 39740, [case page https://competition-cases.ec.europa.eu/cases/AT.39740](https://competition-cases.ec.europa.eu/cases/AT.39740)

With the introduction of article 133 of “Macron Law,” from 6 August 2015, all kinds of parity clauses were forbidden in France. If such a clause is introduced or maintained in the contracts, it is deemed to be unwritten, and therefore does not apply.

A well-known case in this respect occurred in the online hotel booking sector. In 2015, the FCA, in coordination with the European Commission and the Italian and Swedish authorities, obtained commitments from Booking.com aiming to boost competition between online booking platforms and give hotels more freedom in commercial and pricing matters.

The main French hotel unions and the Accord Group filed a complaint about the parity clause that forbid hotels contracting services with Booking.com from offering lower prices on other booking platforms, as well as on their direct sales channel.

As a consequence, Booking.com committed to change its commercial practices, amending the price parity clause and removing any clause imposing parity obligations in terms of the availability of rooms or commercial conditions. This obligation not only applies to their relations with competing platforms but also with hotels’ direct offline channels as well as some of their online channels.

As a result, hotels may consequently freely apply lower prices and better commercial conditions on competing platforms and also allocate larger quotas of rooms to these competing platforms. They may also offer lower prices than those displayed on Booking.com through their offline sales channels (on-site bookings, by telephone, fax, email, instant messaging, physical sales outlets of travel agencies, etc.) as long as these prices are not published on the hotel’s website. Hotels may also offer lower prices to customers who are members of loyalty programmes.

In addition, hotels may allocate more rooms, compared to the number of rooms allocated to Booking.com, to their direct sales channel (online or offline).

This set of measures were supposed to stimulate competition between Booking.com and competing online travel agents (“OTAs”), allowing the commissions levied on the hotels to fall, to give hotels some countervailing power by considerably improving their commercial and pricing freedom, to maintain at the same time the OTAs economic model which provides consumers with powerful research and comparison services.

Whereas the “wide” parity clauses forbid the hotels from fixing lower prices on any other sales channel, “narrow” parity clauses allow hoteliers to fix lower prices on the other sales channels apart from their own channels on which the prices are published online. Further, “narrow” parity clauses enable hotels to give different vacancies according to the sales channel, regardless of the channel.

Following the investigations carried out by several national competition authorities, some OTAs modified the wide parity clauses appearing in their contracts with hotels, that restricted the commercial and pricing freedom of the latter by forbidding them from offering lower overnight accommodation prices on competing platforms, as well as on their direct sales channel.

Under the initiative of the European Commission, the *Autorité de la concurrence*, along with nine of its counterparts, set up a workshop assessing the various solutions. In this framework, the participating authorities surveyed 16,000 hotels, among which there were more than 3,000 in France including: 19 large hotel chains, 20 online travel agents and 11

	<p>“metasearch websites”. They followed a uniform methodology which enabled them to compare the various solutions adopted. This survey was completed by an analysis of a database submitted by large metasearch websites enabling for the comparison of the hoteliers’ commercial strategies regarding the different OTAs before and after the remedies.</p> <p>The analyses conducted, which compared the situation before and after the remedies, suggest that the evolution from “wide” parity clauses to “narrow” parity clauses had led to an increased price differentiation between OTAs in most of the countries. In Germany, the suppression of Booking’s “wide” parity clauses in January 2016 had led to an increased price differentiation between online travel agents.</p> <p>Almost half of the surveyed hotels indicate that they were unaware of the changes in the sector. However, this number is distinctly inferior in France and in Germany (30%).</p>
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	Please refer to question 3 above.
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	The FCA does not have specific safe harbors for vertical agreements in the digital sector, but players in this sector are subject to the European exemption regulations.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	N/A
IV.	Abuse of market dominance

1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>There is no competition legislation that specifically governs the conduct of digital companies in France. General rules about abuse of dominance apply in the online advertising sector for Google and Meta as explained above.</p> <p>However, digital companies are subject to all the other applicable regulations regarding data protection, GDPR compliance, and will be subject to the Data Act when in force.</p>
2.	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>Several other independent administrations such as the CNIL and the ARCOM, have competences in regulating digital markets. Nevertheless, they remain outside of the competition law scope and can only provide advice to the NCA when it investigates in these fields (Medias, Energy, Transports etc.)</p>
3.	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>No, the only regulation is the DMA which is applied EU wide.</p>
i.	<p>Please describe how ‘platform’ is defined for these purposes.</p>
	<p>N/A.</p>
ii.	<p>What are the criteria used to determine whether a platform falls under the regime?</p>
	<p>N/A.</p>
iii.	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>N/A.</p>

iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	N/A.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	N/A.
vi.	Please summarise any penalties provided for non-compliance.
	N/A.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	No.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	N/A.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	N/A.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defense be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?

	N/A.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	N/A.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p>In its study on data, the FCA underlined the competitive advantage derived from data collection and exploitation, which is likely to depend critically on the volume and/or variety of data, which only an established company would be able to generate and manage. When this requirement is not verified, competitors could easily obtain the volume of data needed to compete on a level playing field, especially the availability of data in digital or connected market.</p> <p>However, the FCA did not make clear statements about data portability, and antitrust related issues.</p>
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.
	<p>Among the exclusionary conducts, the FCA underlined in its data study that refusal to access to data can be anticompetitive if the data are an “essential facility” to the activity of the undertaking asking for access. However, the ECJ has circumscribed compulsory access to essential facilities to only a limited number of cases. Indeed, even a dominant company cannot, in principle, be obliged to promote its competitor’s business. Indeed, according to the European Court of Justice rulings in Bronner, Microsoft and IMS Health, an undertaking can request access to a facility of networks: if the incumbent’s refusal to grant access concerns a product mandatory to have to conduct the activity in question; if the refusal prevents the emergence of a new product for which there is a potential consumer demand; if it is not justified by objective considerations and if it is likely to exclude all competition in the secondary market.</p> <p>These ECJ requirements would only be met, if it is demonstrated that the data owned by the incumbent is truly unique and that there is no other possibility for the competitor to obtain the data that it needs to perform its services. Improved data access may also lessen incentives for rivals to develop their own sources of data. Finally, access to a company’s data may raise privacy concerns as forced sharing of user data could violate privacy laws if companies exchange data without asking for consumers’ consent before</p>

	sharing their personal information with third companies with whom the consumer has no relationship.
11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.

Country: Germany

Contributors: Johannes Wiehe et al. (Deutsche Telekom)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No. Section 35 (1a) German Act Against Restraint of Competition (“ARC”) defines uniform thresholds.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	In addition to traditional revenue thresholds, a new threshold was introduced in response to pharma and digital sector takeovers (Section 35(1a) ARC). That transaction value threshold is designed specifically to catch such undertakings whose (low) revenues disguise their stronger (potential) competitive position (e.g., pharma undertaking with significant pre-market pipeline, and a pre-revenue or non-monetised digital start up with sizable user numbers). A pre-closing and suspensory filing is mandatory if the following conditions are cumulatively met: the combined worldwide turnover of all parties is more than EUR 500 million; in Germany the turnover of at least one undertaking concerned exceeds EUR 50 million and neither the turnover of the target nor the turnover of another undertaking concerned exceeds EUR 17.5 million; the value of the consideration received for the concentration is EUR 400 million or more; and, the target is active “to an appreciable extent” in Germany.
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	No. The ARC does not contain any requirements in this regard, nor is there any corresponding soft law. However, there is a general exchange between the authorities, which also includes the aforementioned questions. In addition, Germany has a rather broad Foreign Direct Investment regime, that also tackles many products of the digital sector.

4.	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>To determine market shares and market positions, the Federal Cartel Office (FCO) uses both traditional methods and methods that take into account the special features of digital markets. Thus, in addition to determining market shares on the basis of revenue or volume, other factors are also used. As an example, in the context of the merger of the Elitepartner and Parship dating platforms, user shares and opportunities for sustainable monetisation were taken into account. In the context of the merger of the digital marketplaces eBay-Kleinanzeigen and Adevinta, for example, the ad inventory in the form of new ads per month was also considered.</p>
5.	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>No.</p>
6.	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>No.</p>
7.	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No. However, Sec. 39a ARC does allow the FCO to oblige certain undertakings to notify all future transactions within a three-year timeframe, following a sectoral inquiry. It is important to note that only after a sectoral inquiry has been conducted can FCO impose such additional notification obligations. There have been sector inquiries, e.g., on messenger and video services and into non-search online advertising but no direct imperative measures resulted from these inquiries.</p>

8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.
	As far as we are aware there have been no such failure to notify investigations in the digital economy.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	The FCO has no power to undertake an ex-post analysis or revision of notified transactions. However, section 41(3) ARC gives the FCO the power to investigate transactions which have been closed but not notified.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	The FCO uses comprehensive economic analyses as a basis for decision-making. The SIEC test is predominantly used.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	No. There are no standards that are explicitly tailored to the digital economy.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.
	With the help of economic experts, the FCO is drawing up a concept for “ <i>digital policy work</i> ”. In this context, for example, a working paper on the market power of platforms and networks was published. However, this is a think tank report and not a concrete action plan. In addition, studies on the topics of “ <i>Competition and Data</i> ” and “ <i>Algorithms and Competition</i> ” were prepared jointly with the French competition authority. However, to date there has been no overarching, binding statement on the topic area queried.

	<p>Instead, the authority is developing its decision-making practice in the specific application of Section 19a of the ARC in the context of abuse control.</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The FCO has commented on data pooling in a scientific publication on the topic of “<i>Big Data and Competition</i>”. It states that antitrust law does not necessarily prohibit such cooperation. When assessing whether a data related cooperation is permissible under antitrust law, the general principles of antitrust law shall apply. The FCO signaled that it is aware of the special circumstances of data related cooperations.</p> <p>In another publication, the FCO dealt with the influence of algorithms on competition. In this context, the FCO recognises the risks of pricing algorithms and assumes that algorithms must be taken into account in antitrust investigations. The FCO assumes that algorithms can contribute to an undertaking’s market power. Access to an algorithm could constitute a barrier to market entry. In addition, it must be taken into account that the market power associated with algorithms may in turn be intrinsically linked to access to the data to be analysed and processed by the algorithm. The denial of access to algorithms or to information about algorithmic interfaces could also potentially constitute an abuse of market power. Abusive behaviour in connection with (pricing) algorithms could also be present with regard to an abuse of pricing power. There could also potentially be concerns about the use of personalisation algorithms that are used for price discrimination. Finally, ranking algorithms could also potentially become relevant in connection with an abuse of market power.</p> <p>In proceedings against Lufthansa, the FCO found that the use of an algorithm did not relieve an undertaking of its responsibility. The undertaking cannot defend itself by saying that the algorithm learns independently, and that any discrimination is not carried out by the undertaking. Rather, the company must ensure that the algorithm is developed and applied in such a way that it delivers fair results.</p> <p>In the context of the application of Section 19a GWB, price-setting algorithms are also examined. At present, however, the proceedings have not progressed to the point where an analysis of the authority’s actions would be possible.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>

	<p>A corresponding decision has not yet been issued. However, the FCO has commented that the prospect of a possible interplay between algorithms and hub and spoke collusion requires enforcers to deploy resources into solid conceptual groundwork in order to prepare themselves for future case work. As digital markets keep evolving, the FCO states that authorities should continue expanding their expertise on algorithms, in an exchange with each other as well as in interaction with businesses, academics and other regulatory bodies.</p>
5.	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>We are not aware of any such case.</p>
6.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
III.	<p>Vertical agreements</p>
1.	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>We are not aware of a focus on any particular type of vertical agreement. Nonetheless, there is a focus, discernable from Sec. 18 and 19 ARC, in an abuse of dominance context. These explicitly name direct and indirect network effects, switching costs, data access and innovation as factors establishing dominance, as well as label misconduct, among others, the unwarranted denial of access to data.</p>
2.	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The FCO and German jurisprudence largely follows EU precedent.</p>
3.	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>

	<p>The FCO takes a critical view of both narrow and broad best price clauses. In proceedings against the hotel portal HRS, the FCO classified a wide best price clause as abusive. In proceedings against the booking portal Booking, the FCO stated that, in order to fulfill the prohibition requirement, it is not a question of whether the narrow best price clauses are less restrictive of competition than the broad best price clauses, which were in force until July 2015, but solely of whether the narrow best price clauses constitute a noticeable and non-exempt restriction of competition compared to a situation entirely without such clauses. This was answered in the affirmative. The Federal Court of Justice confirmed the FCO's view in the proceedings concerning Booking. According to this, a narrow best price clause significantly restricts the platform-independent online sales of hotels.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>According to the MFN of HRS, the hotel partners were obliged to guarantee that for all online booking offers as well as those made via the hotel's own distribution channels, HRS's offering comprised the best room price, the highest room availability and most favourable booking and cancellation conditions (wide best price clause). The MFN of Booking granted Booking the same guarantees, but only with regards to bookings that were made on the hotel's own homepage. Other online booking platforms as well as the hotel's offline distribution channels (e.g. the hotel lobby, via telephone, via a travel agency) were explicitly excluded from Booking's MFN (narrow best price clause).</p> <p>In both cases, the parties claimed that such clauses only seemed to be to the benefit of consumers. According to the FCO they hindered competition since they prevented other competitors from entering and gaining ground in the market by offering better conditions or innovative services. Similar MFNs of other competitors would amplify these effects. Regarding the narrow best price clause, the FCO argued that even such a limited clause would lead to a noticeable restriction of the hotel's freedom to set prices independently. The FCO pointed out that even if a hotel lowered its room rates on an online platform other than Booking, it would still be forced to charge the higher price on its own homepage. Since such a discrepancy would reduce the attractiveness of the hotel's own distribution channel, the FCO claimed that hotels would be reluctant to actually make use of their formal right to set prices independently from Booking.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>See above.</p>
<p>6.</p>	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for</p>

	applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	Corresponding regulations result from the laws of the European Union, particularly the Vertical Block Exemption Regulation, which is taken into account in the application of national law.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>In addition to general regulations governing abuse of dominance cases, including relative dominance (i.e. undertakings with market power but which are not objectively dominant), Section 19a ARC applies to multi-sided markets and networks (i.e. digital companies or platforms). The code provides for a process that can be broadly divided into two stages. Paragraph 1 defines cases, in which the FCO may find in a separate decision that an undertaking has cross-market significance for competition. Not only is the dominant position in a market taken into account (No. 1), but also the undertaking's financial power and access to other resources (No. 2), vertical integration and activity on other related markets (No. 3), access to competition-relevant data (No. 4), and the importance of its activity for third-party access to procurement and sales markets as well as its associated influence on the business activities of third parties (No. 5). Pursuant to paragraph 2, the FCO has the authority to prohibit any conduct of the undertakings that received a decision pursuant to paragraph 1 which is attributable to the exploitation of a market power position across markets. In this context, the legislator provides for seven typical abuses. The burden of proof that market power is not being abused despite the existence of the facts lies with the undertaking.</p> <p>The DMA will soon be introduced at the Union level. In the FCO's view, however, the general clauses of Section 19 ARC and Section 19a ARC retain their scope of application and hence, the FCO will retain jurisdiction over what the DMA coins "gatekeepers". It remains to be seen how exactly the delimitation of the regulatory matters will take place.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or

	communications services)? How are these jurisdictions divided between the respective authorities?
	The general antitrust competencies lie with the FCO. Insofar as sector-specific issues from telecommunications or energy law are concerned, the special regulatory competence of the Federal Network Agency may be triggered.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	Section 19a of the ARC, described in IV. 1. above, explicitly covers the situation described. Moreover, Section 20 ARC addresses undertakings (not just digital ones or platforms) that have significant market power, without being outright dominant.
i.	Please describe how “platform” is defined for these purposes.
	The FCO generally defines platforms as follows: <i>“Platforms are undertakings which, as intermediaries, enable the direct interaction of two or more sides of markets or users between which indirect network effects exist.”</i> The definition is further developed in practice and adapted to the situation to be assessed in the individual case.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	See IV 1.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	<p>The FCO may prohibit undertakings after deciding they have cross-market significance from</p> <ul style="list-style-type: none"> • favoring its own offers over the offers of its competitors when mediating access to supply and sales markets, • taking measures that impede other undertakings in carrying out their business activities on supply or sales markets where the undertaking’s activities are of relevance for accessing such markets, • directly or indirectly impeding competitors on a market on which the undertaking can rapidly expand its position even without being dominant • creating or appreciably raising barriers to market entry or otherwise impeding other undertakings by processing data relevant for competition that have been collected by the undertaking, or demanding terms and conditions that permit such processing,

	<ul style="list-style-type: none"> • refusing the interoperability of products or services or data portability, or making it more difficult, and in this way impeding competition; • providing other undertakings with insufficient information about the scope, quality or success of the service rendered or commissioned, or otherwise making it more difficult for such undertakings to assess the value of this service; and • demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	One very flexible stipulation is applied to each individual case and a specific solution is sought for the specific problem. The legal requirements in contrast are as broad as they can be to enable the FCO to intervene in the individual cases wherever it sees the need for regulation.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	No. The scope of application as well as the substantive assessment are vague and depend much on the individual case, seeing as the same conduct can be perfectly legitimate if performed not by a platform, with or without market power, but in a traditional industry. However, since there are examples included in the provision, and in Germany it is illegal to create a law that covers only one individual case, it is acceptable to leave the required clarification to the authorities and courts.
vi.	Please summarise any penalties provided for non-compliance.
	The ARC essentially provides for the following sanctions for violations of antitrust law: Claims for damages, skimming of benefits, fines.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	The legislature's primary goal is to limit economic power, keep markets open, and protect the competitive process.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?

	Yes, the above described Section 19a ARC applies specifically to platforms with market power, albeit without a dominant market position.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	The FCO must prove and subsequently declare a digital undertaking's " <i>paramount significance to competition across markets</i> " (Section 19a(1) ARC). Certain criteria will be taken to be indicative of such a significance. Once that has been established, in a reversal of the burden of proof, the FCO may prohibit certain outlined behaviour (Section 19a(2) ARC), which the undertaking can rebut if it can prove its behaviour is/was objectively justified.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	See above – Section 19a(2) ARC.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	See above.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	In Section 19a (2) No. 5 of the ARC, the legislator has standardised a basic offence under which it can be prohibited to refuse or impede the interoperability of products or services or the portability of data and thus to impede competition.
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.

	<p>The essential-facilities-doctrine is standardised in Section 19 (2) No. 4 GWB. According to this doctrine, an abuse of a dominant position exists if an enterprise refuses to supply another enterprise with such a good or commercial service for an appropriate fee, in particular to grant it access to data, networks or other infrastructure facilities, and the supply or the granting of access is objectively necessary in order to operate on an upstream or downstream market and the refusal threatens to eliminate effective competition on this market, unless the refusal is objectively justified.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>

Country: India

Contributor: Hemangini Dadwal (AZB Partners)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>No.</p> <p>The Indian merger control regime does not have sector-specific thresholds, including in respect of digital markets.</p> <p>So far, a merger or acquisition (of shares, voting rights, control, or assets) would be notifiable to the Competition Commission of India (“CCI”) if (i) the parties, on a combined basis, breached sector-agnostic asset and turnover thresholds; and (ii) did not benefit from any exemptions (also, sector-agnostic). However, as part of the Competition (Amendment) Act, 2023 (“Amendment Act”), the legislature has introduced a ‘deal value’ test as an additional notification test. Under the ‘deal value’ test, any transaction which (i) has a ‘deal value’ of more than INR 20 billion (approx. USD 241 million); and (ii) involves a target with “substantial business operations in India” (to be defined per regulations), will need to be notified to the CCI, regardless of the size of the target.</p> <p>Although the ‘deal value’ test is also sector-agnostic, and is yet to be enforced, the primary rationale for introducing deal value thresholds was to ‘catch’ transactions in digital markets that were asset or/and turnover light businesses and were escaping notification to the CCI, on account of not meeting the overall jurisdictional threshold or benefitting from the ‘small target’ exemption.⁸⁰</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>As indicated in our response to Question I (1) above, to the extent a nascent or maverick innovator was likely to benefit from the small target exemption and escape merger control review, the Amendment Act introduced ‘deal value’ thresholds to override a case where the target generated turnover or had assets, in India, less than those prescribed by the ‘small target’ exemption.</p> <p>Once enforced, where the value of acquisition or merger is more than INR 20 billion (approx. USD 241 million) for the proposed acquisition or merger and the target has</p>

⁸⁰ The ‘small target’ exemption exempts from notification to the CCI, transactions involving an enterprise (whose shares, voting rights, assets or control are being acquired or are being merged or amalgamated) that has either assets of less than INR 3.5 billion (approx. USD 42.4 million in India) or turnover of less than INR 10 billion (approx. USD 121.2 million in India).

	<p>‘substantial business operations’ in India, such acquisition or merger would require notification to the CCI, regardless of the parties meeting the asset and turnover thresholds.</p> <p>The introduction of deal value thresholds underscores the following rationale: where a party is willing to pay a significant sum of money to acquire, part or full control, over an entity - regardless of its current revenue generation capacity or asset ownership, the target is likely to be of strategic value (for example, a key innovator) in the industry that it operates. These kinds of transactions would now be notifiable to the CCI.</p> <p>Notably, an earlier iteration of the Draft Competition Amendment Bill 2020, sought to introduce a provision by which the government could prescribe <i>any other</i> notification criteria (in addition to the existing asset and turnover thresholds) - but this <i>carte blanche</i> power to the government was not finally included in the Amendment Act.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?</p>
	<p>Yes.</p> <p>The CCI is empowered to refer any issue to another statutory authority, either on the request of a party or of its own accord, that may fall directly within the jurisdiction of such authority. The Indian merger control regulations specifically allow the CCI to seek the opinion of any other statutory agency or statutory authority while reviewing a merger filing, should it so require.</p> <p>In practice, the CCI has exercised this provision for antitrust enforcement for some regulators/sectoral agencies including the National Payments Corporation of India (PayU-Billdesk).</p> <p>Further, a new data protection law (i.e., the Digital Personal Data Protection Act) is proposed to be tabled in the monsoon session of the Indian parliament in July 2023. The Draft Digital Personal Data Protection Bill, 2022 (“DPDP Bill”) envisages a regulator i.e., the ‘Data Protection Board of India’ which shall be responsible for penalising entities for non-compliance with the proposed DPDP Bill. It is possible that the CCI may coordinate with this agency for issues related to data protection.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>As of date, the CCI has reviewed a handful of transactions that pertain to the digital economy. The market share metric for determining market shares for digital platforms vary depending on the dynamics of the market in which the digital platform operates.</p>

	<p>We set out a few examples below of metrics relied by the CCI, based on recent merger filings filed:</p> <ul style="list-style-type: none"> (i) 'Gross merchandise value' (Widzig, Aditya Birla Retail Ltd., Amazon & Samara); (ii) Total value transacted through digital payments operators (Softbank-Paytm); (iii) Number of transactions processed by online payment aggregation service providers (PayU-Billdesk); and (iv) Monthly Active User data (Facebook-Jio).
	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>No.</p> <p>As of date, the CCI has not blocked any transaction in the digital economy, or in any other sector for that matter. Moreover, the CCI has not escalated any merger review case into the 'Phase II investigation' stage (an in-depth investigation into the transaction) in the last few years (the last one was in 2019).</p> <p>It has however directed modifications for several transactions (all accessible here). Of these, none appear to pertain to an acquisition of a target that is a digital platform.</p>
<p>5.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>There have not been any such transactions in which the target company is a digital platform or player. However, for completeness, while obtaining the CCI's approval for Google's acquisition of 1.28% of the equity share capital of Bharti Airtel Limited (a telecommunication company), Google voluntarily undertook to have in place and maintain appropriate firewalls to prevent the flow of competitively sensitive information between Bharti Airtel Limited and Jio Platforms Limited (a competitor of Bharti Airtel Limited in the telecom services market) where Google also has a minority, non-controlling stake.</p>
<p>6.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No.</p> <p>The Indian merger control regime does not have sector specific thresholds, rules or filing requirements including in respect of digital markets.</p>
<p>7.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe</p>

	<p>the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.</p>
	<p>There is no way of knowing if there are any ongoing proceedings for non-notification of transactions in digital markets, given that these proceedings are confidential. However, of all the decisions published for non-notification/gun-jumping since July 2011, there are no decisions that involve non-notification/gun-jumping fines in the digital market.</p> <p>For completeness, the CCI fined Amazon for allegedly failing to adequately disclose the actual purpose of the transaction (i.e., to enter the Indian retail market) in its acquisition of 49% shareholding in Future Coupons Private Limited (“Amazon/Future case”). This transaction did not however relate to an acquisition in a digital platform/market.</p>
<p>8.</p>	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>
	<p>The Competition Act (or its underlying regulations) do not confer the CCI with the statutory power to undertake an <i>ex-post</i> analysis or indeed, revise a merger control decision.</p> <p>That said, the CCI, by way of practice, reserves the right to revoke any approval if the information provided by the notifying party is later determined as incorrect. It does this by adding a standard statement to this effect at the end of every merger control order.</p> <p>In the <i>Amazon/Future</i> case, the CCI, for the first time, exercised this reservation of its power. It suspended its approval of the notified transaction, and directed Amazon to refile its notification in the long Form II (distinct from the short Form I Amazon had originally filed) <i>two years</i> after it had unconditionally approved the transaction. The CCI also imposed an INR 2.02 billion (approx. USD 24.3 million) penalty on Amazon for (i) misrepresenting the true scope and purpose of the investment and (ii) gun jumping, i.e., implementing an ‘expanded’ scope of the transaction for which it has allegedly not sought approval.</p> <p>The CCI’s order is currently pending litigation before the Supreme Court of India.</p>
<p>9.</p>	<p>To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?</p>
	<p>In its merger control analysis, the CCI generally relies on market share analysis to determine the potential appreciable adverse effect on competition in India (“AAEC”) that a particular transaction will have. For transactions where parties have significant horizontal or vertical overlap, the CCI also analyses market concentration using the economic tools it requires to be included as part of the prescribed long Form II, namely the CR4 Index, and the Herfindahl - Hirschman Index.</p> <p>In a handful of traditional sector transactions, the CCI has also undertaken a separate market investigation, analysed consumer behaviour for determining portfolio effects (L&T/Schneider). In another case, it relied on the Elzinga-Hogarty test by analysing the consumption and production data of cement in different states beginning with those</p>

	<p>states where the combining parties are present and then extending to other neighbouring states (Emami/NVCL).</p> <p>As of date, there are only a handful of merger control decisions in the digital market. In the digital market, the CCI has typically limited its analysis to market share analysis and the economic tools it requires to be included as part of the prescribed long Form II, i.e., CR4 and HHI – in more recent cases.</p> <p>A summary of the economic analysis undertaken by the CCI in digital markets is set out below.</p> <p>(i) While approving acquisition of a minority stake in Jio Platforms by Facebook group, the CCI identified the potential incentive for the parties to pool their data banks and monetise the combined data set. Even though the parties undertook not to merge their data sets, the CCI stated that it would examine any anti-competitive conduct that may result from data sharing under its enforcement provisions (Facebook-Jio).</p> <p>(ii) While approving acquisition of a minority stake in Ola (Indian cab aggregator) by Hyundai and Kia, the CCI identified the possibility of Ola’s algorithm favouring cars manufactured by the acquirer manufacturers. Hyundai and Kia both undertook to ensure that Ola’s algorithm would not favour cars manufactured by them (Hyundai & Kia-Ola).</p> <p>(iii) While approving the aforementioned complete acquisition of Billdesk by PayU, the CCI identified the concern of technological barriers posed by Billdesk’s recurring payments solution being an enabling solution. The CCI’s concern was resolved by the parties clarifying that the recurring payments solution is open and interoperable (PayU-Billdesk).</p>
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>No.</p> <p>The Amendment Act however codifies the sanction against ‘hub and spoke’ cartel arrangements. ‘Hubs’ that participate or ‘intend to participate’ in a cartel <i>shall be presumed</i> to be part of the cartel agreement.</p> <p>The low burden of proof for hub and spoke cartel arrangements is particularly relevant for digital platforms that often act as intermediaries between customer groups.</p>
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.
	No.

	<p>There have been no published cases or official statements that relate to the conduct of competing entities present in digital markets. All enforcement cases in the digital market have primarily focused on abuse of dominance or vertical arrangements.</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>Data pooling/sharing: The CCI is yet to analyse data pooling/sharing arrangements among competitors. However, the CCI has in its decisional practice more generally held that the mere exchange of competitively sensitive information between competitors is sufficient for the CCI to conclude the existence of a cartel, even in the absence of such information being actually used/relied on by competitors (Beer Cartel). In our view, the same principle would squarely apply even in the context of sharing/pooling data involving competitively sensitive information.</p> <p>Algorithm collusion: The CCI has examined allegations of algorithmic collusion in two published cases. In neither, however, did the CCI find any evidence of algorithmic collusion.</p> <p>In the Airline Cartel case, the CCI examined allegations against five domestic air carriers for colluding on fare rates through deploying third-party software(s) that helped them determine, implement and dynamically change the fares offered to consumers, on a real-time basis. Each such software was based on a complex set of algorithms that considered factors such as demand conditions, actual booking, price of competitors, seasonality, etc., to determine airfares.</p> <p>The CCI’s analysis sought to discern whether the air carriers adopted the same third-party software(s) following a common understanding or if there was any other form of tacit collusion. The CCI found that despite third-party software using algorithms to set fares and airlines using the same/similar software, there was no evidence to suggest that the airlines entered into a price cartel because: (i) the ultimate decision on pricing was undertaken by the revenue management teams of the respective airlines; the software only offered suggestions based on their algorithms to optimise revenue; and (ii) the heavily fluctuating market shares of the respective airline during the period under investigation, was indicative of a competitive market.</p> <p>In Samir Agrawal (upheld by the Supreme Court of India), it was alleged that Ola and Uber (both cab-aggregators) facilitated collusion among their respective driver networks by setting the fare rides based on algorithmic pricing. The CCI dismissed the charges and held that for algorithmic collusion to be sustained, there needed to be an agreement <i>among</i> the drivers to either set prices through the platform or for the drivers <i>inter-se</i> to delegate this pricing power to the platform.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among</p>

	suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.
	<p>There is limited guidance on this, set out in response to Queries II (1) and (3) above.</p> <p>The Amendment Act codifies the liability of an entity (hub) “<i>if it participates or intends to participate</i>” in a cartel. Even an intention to participate, without actual participation, would attract presumptive liability for a cartel. This provision was notified on 18 May 2023 and we are yet to see how this provision would be invoked in cases.</p>
5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	<p>There are no published decisions involving leniency applications by digital platforms/players in India, to date. Regulations governing leniency in India require the CCI to maintain complete confidentiality over a leniency application (including over the identity of the leniency applicant) until the CCI passes a final order adjudicating on the leniency application and closing its inquiry.</p>
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	<p>For completeness, the Competition Act presumes the following kinds of agreements between competitors cause or are likely to cause an AAEC:</p> <ul style="list-style-type: none"> (i) Directly or indirectly determine purchase or sale prices of any product or service; (ii) Limit or control production, supply, markets, technical development, investment or provision of services; (iii) Share the market or source of production or provision of services by allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; and (iv) Directly or indirectly result in bid-rigging or collusive bidding. <p>The presumption is rebuttable but has not been successfully overturned thus far.</p> <p>There is a carve-out for efficiency-enhancing joint ventures between competing enterprises, that do not attract the AAEC presumption.</p> <p>Finally, export-related agreements and agreements and agreements that have ‘reasonable’ restrictions (including of the kind above) that are necessary for protecting an intellectual property right recognised under a separate statute are exempted from this charging provision.</p>
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?

	<p>The CCI's enforcement action for vertical restraints in digital platforms has primarily involved final orders in (i) parity/most favoured nation clauses (MMT); (ii) exclusivity arrangements (MMT); (iii) refusal to deal (MMT); and (iv) resale price maintenance (Kaff). The CCI has also initiated investigations against digital platforms from imposing (i) parity/most favoured nation clauses (Swiggy/Zomato); (ii) preferential treatment (Delhi Vyapar Mahasangh); and (iii) exclusivity arrangements (Delhi Vyapar Mahasangh, Swiggy/Zomato, BookMyShow).</p> <p>The Competition Act proscribes the following kinds of <i>inclusive</i> vertical restraints if they cause an AAEC (i.e., the 'rule of reason' test): (i) tie-in arrangements; (ii) exclusive dealing agreements; (iii) exclusive distribution agreements; (iv) refusal to deal; and (v) resale price maintenance. The CCI does not prioritise scrutinising one conduct over the other.</p> <p>In its market study on e-commerce in India ("E-commerce Report") published in January 2020 that focused on the online travel agency ("OTA"), shopping, and food aggregator markets, the CCI highlighted issues such as platform neutrality, exploitative platform to business ("P2B") contract terms, platform price parity clauses, exclusive agreements, and deep discounting as likely areas of concern for digital platforms. It also identified certain self-governing measures for increasing transparency in (i) search rankings; (ii) collection, use, and sharing of data; (iii) user review and rating mechanism; (iv) revision in contract terms; and (v) discount policies.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>Exclusive agreements imposed by entities with "market power" are sufficient for the CCI to sanction as being anti-competitive; dominance is not required. While there is no clear market share threshold that is considered sufficient, the CCI has previously considered market shares in excess of 30% as a (non-binding) proxy to infer 'sufficient market' power to assess vertical restraints (Kaff). We summarise a few decisions involving exclusive dealing in digital markets below.</p> <p>MMT: In a final decision, the CCI fined MakeMyTrip ("MMT"), an online travel agency ("OTA"), INR 2.2 billion (approx. USD 26.8 million) for <i>inter alia</i>, imposing exclusivity clauses that denied hotel partners an opportunity to list on other platforms/OTAs on competitor platforms during the busiest booking periods. The CCI also fined Oravel Stays Private Limited ("OYO"), INR 1.6 billion (approx. USD 20.2 million), for entering into agreements with MMT to delist two competitors of OYO (Treebo and FabHotels) from the MMT's platform. See a detailed summary of MMT in response to Query III (4) below.</p> <p>Delhi Vyapar Mahasangh: In January 2020, the CCI initiated an investigation into Flipkart Internet Private Limited ("Flipkart") and Amazon Seller Services Private Limited ("Amazon") after <i>inter alia</i> preliminarily finding that both Amazon and Flipkart had entered into various exclusive vertical anti-competitive agreements with certain 'preferred' sellers on their marketplaces for the sale of various products, across sectors, including the smartphone market, where they were the platform for the exclusive launch of several smartphone models. The CCI observed that the exclusive launch agreements caused an AAEC in the market as they were used as an exclusionary tactic to foreclose</p>

	<p>competition in violation of the provisions of the Competition Act. The CCI is yet to pass a final order in this case.</p> <p>BookMyShow: In June 2022, the CCI initiated an investigation against Big Tree Entertainment Pvt. Ltd. (“BookMyShow”) after, <i>inter alia</i>, preliminarily finding that BookMyShow enters into exclusive agreements with certain theatres/multiplexes in the city of Hyderabad, Telangana by offering huge monetary deposits to such cinema theatres. The CCI held that the exclusive agreements <i>prima facie</i> appear to have the potential of denying market access to competing platforms and potential entrants as cinema theatres as well as the cinegoers are restricted in their choice of alternate ticketing platforms.</p> <p>Swiggy/Zomato: In April 2022, the CCI initiated a detailed investigation against Zomato Ltd. (“Zomato”) and Bundl Technologies Private Limited (Swiggy) (the two prominent online food delivery platforms in India), <i>inter alia</i> preliminarily finding that Zomato and Swiggy compel the restaurant partners (“RPs”) to commit exclusively to be listed on their respective platform through incentives, lower commissions, etc. The CCI held that it has to investigate if exclusivity, in conjunction with minimum guarantee obligation, is further restricting platform neutrality.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>The CCI has condemned <i>wide</i> price (and non-price parity) obligations.</p> <p>First, in its E-commerce Report, the CCI identified the following concerns with MFNs:</p> <ul style="list-style-type: none"> (i) MFNS disincentivise existing platforms from competing on commission; (ii) MFNs act as an entry barrier for new low-cost platforms; and (iii) MFNs may help cement coordination or tacit understanding that may exist between platforms. <p>Subsequently, in its decisional practice, the CCI scrutinised <i>wide</i> MFN clauses as an anticompetitive vertical agreement in two published decisions, one of which is a final decision involving MMT (where MMT’s imposition of an MFN clause was also examined as an abuse of dominance) and the other involving an order directing an investigation into MFN obligations imposed by food delivery platforms, Swiggy and Zomato.</p> <p>In these decisions, the CCI differentiates between wide and narrow MFN clauses and finds, “<i>Platform MFNs are labelled “wide” if they constrain the price on all other platforms, including the provider’s own website (if any). In contrast, platform MFNs are considered “narrow” if they prevent the provider from setting a lower price on its own website, while leaving prices on other platforms unrestricted. Wide rate parity is the more restrictive form of parity agreement. ... [T]he difference between narrow and wide parity clauses is in the scope, i.e., the scope of coverage in wide parity clauses are broader than the scope of coverage in narrow parity clauses.</i>” As such, if a clause regulates prices on <u>all</u> platforms, it is a ‘wide’ parity clause; while restrictions limited to the service/product provider’s 1P platform or website are identified as a ‘narrow’ parity clause.</p>

	Of the only two published instances of the CCI having <i>reviewed</i> wide parity clauses in digital platforms, it has actioned both; it fined the imposing entity (MMT) and initiated an investigation into the other (Swiggy and Zomato).
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	<p>Yes.</p> <p>We have summarised the two published decisions (one final, and the other preliminary) below. In its decisions (preliminary and final), the CCI rejected arguments defending a wide parity clause, i.e., clauses that restrict a supplier from offering better terms on its own platform and third-party platforms) but may consider justifications for imposing a narrow parity obligation (i.e., obligations that restrict the supplier from offering better terms only on its own platform).</p> <p><u>MMT</u>: The CCI imposed a penalty on MMT (an online travel aggregator) for <i>inter alia</i>, abusing its dominant position by imposing a wide price parity obligation on its hotel partners in the ‘market for online intermediation services for booking of hotels in India.’ It was alleged that MMT imposed price and room parity obligations in their agreements with hotel partners, which prevented the latter to sell their hotel rooms at a more competitive price on any other platform, including the hotel’s own portal/website.</p> <p>Having found MMT to be dominant in the relevant market during the relevant period of inquiry (i.e., 2017-2020), it held:</p> <ul style="list-style-type: none"> (i) By imposing wide price parity obligations, MMT ensured their hotel partners were restrained from offering better prices to other travel aggregators (reducing the aggregators’ incentives to compete on lower commission rates). This made it difficult for an entrant or an existing player to establish a market presence, creating entry/expansion barriers for new/other platforms. (ii) The wide parity obligations also enabled MMT to: <ul style="list-style-type: none"> (a) Charge high commissions and offer deep discounts. This, along with exclusive listing requirements on hotels reinforced MMT’s dominance and foreclosed other OTAs; (b) Retain and further increase its network of users/travelers, who would increasingly use the platform for availing the best deals; and (c) Impede the competitive process between OTAs by limiting the competitive levers/instruments at the disposal of other portals who, for instance, cannot get better prices from hotels by offering lower commission rates. (iii) The consequent adverse effect on the sale of rooms through other platforms/channels and their user bases, further accentuates the dependence of hotels on MMT as well as the bargaining power imbalance that already exists between MMT and its hotel partners.

	<p>(iv) The increased sales through MMT may lead to unilaterally determined higher commissions charged by it, giving it the ability to also pass on discounts which are admittedly funded through these commissions, which may adversely impact the prices at which the hotel's rooms are being offered to end-consumers.</p> <p>Based on these observations, the CCI held MMT to have abused its dominance by (i) imposing unfair conditions on its hotel partners; and (ii) denying market access to competitors.</p> <p><u>Swiggy/Zomato</u>: In its investigation order, the CCI also, <i>inter alia</i>, preliminarily found that Zomato and Swiggy enforced price parity terms in the agreements/contracts with RPs which disallowed the latter to develop their own direct ordering channels or a competing platform by offering more competitive rates. This reduced inter-platform competition. The CCI also observed:</p> <p>(i) In the case of food delivery apps, widely defined price parity arrangements/restrictions may result in the removal of the incentive for platforms to compete on the commission they charge to RPs, may inflate the commissions and final prices paid by consumers and may also prevent entry of new low-cost platforms.</p> <p>(ii) This was likely to have an AAEC on the market by creating entry barriers for new platforms, without accruing any benefits to the consumers. The CCI is yet to pass a final order in this case.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>Competitive harms stemming from MFNs</p> <p>In the E-commerce Report, and in the cases summarised above in Question III (4), the following competitive harms were identified:</p> <p>(i) Existing platforms may not have sufficient incentive to compete on commission rates;</p> <p>(ii) It may serve as an entry barrier for low-cost platforms; and</p> <p>(iii) It may help cement coordination or tacit understanding that may exist between platforms, by discentivising deviation from a consensus rate of commission - potentially leading to higher commission rates and discouraging entry.</p> <p>Potential efficiencies stemming from MFNs.</p> <p>In the same report, the CCI also identified the potential efficiencies that could arise from a narrow parity obligation:</p> <p>(i) It protects investment incentives by preventing free-riding;</p> <p>(ii) Absent a price parity restriction, a service provider may take the advantage of the features of a superior quality platform to draw customer attention to its product and then sell the product through its website or another platform at a lower price;</p> <p>(iii) This would drive the traffic from that superior quality platform (that had made substantial investments to generate quality traffic on its platform) to the</p>

	<p>platform or website of the seller, at the cost of the superior quality platform's investor; and</p> <p>(iv) This would disincentivise investment.</p>
6.	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>There are no specific safe harbours for digital markets (just as there is no specific sanction for digital markets). Vertical restraints are examined under the rule of reason framework and have the following sector-agnostic assessment framework:</p> <p>(i) To determine if a vertical arrangement results in an AAEC, the CCI will consider the net impact of the pro-competitive effects (consumer benefits, improvement in production or distribution) and anti-competitive effects (hindering market access, driving existing competitors out of the market, higher prices, etc.).</p> <p>(ii) The CCI also considers the validity of objective business justifications when examining vertical agreements.</p> <p>(iii) A vertical restraint will be anti-competitive only if the entity imposing the restraint has 'market power' (approx. 30% market share - see the response to Query III (2) above). An entity without market power is unlikely to be sanctioned as imposing an anti-competitive vertical restraint.</p> <p>(iv) Agreements between an enterprise and an end-consumer are exempt from the application of the provisions of anti-competitive vertical restraint.</p> <p>(v) Restrictive agreements/practices, (a) if they are reasonable and necessary for the protection of the parties' intellectual property rights; or (b) entered into exclusively for the production, supply, distribution, or control of goods/provision of services for export, are also exempt from the application of the provisions of anti-competitive vertical restraint (as the effect of such export agreements is not felt in India).</p> <p>Separately, please note that the Competition Act also proscribes that any restraint (not just limited to vertical restraint) enforced by an entity on other entities (that may not even belong to the same supply chain) that has the potential to cause AAEC can be examined under the rule of reason framework. While this clarification has been inserted through the Amendment Act, it is likely that it was inserted to ensure that digital platforms do not escape scrutiny on technical grounds in relation to digital platform markets not being "vertically related" to the entity over which the restraint is enforced. This will also allow the CCI to scrutinise agreements between two enterprises having complementary linkages in case they have the potential to cause AAEC.</p>
7.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	N.A.
IV.	Abuse of market dominance

1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>At the time of submission of this document, there is no other competition legislation/other legislation in India that regulates the conduct of digital companies.</p> <p>Having said this, the Competition Act prohibits abuse of dominance by any dominant enterprise, which would include a digital platform/company. So far, the CCI has published four final decisions sanctioning abuse of dominance conduct for online digital companies/platforms, i.e., it has sanctioned Google in relation to some of its conduct (i) for search and search advertising services (Google Search); (ii) for its android platform on smartphones and tablets (Google Smartphones); and (iii) for its billing platform (Google Play). It has also sanctioned MMT for its conduct in the market of OTAs (details above) (MMT).</p> <p>Digital regulations in the pipeline: In December 2022, the Parliamentary Standing Committee of Finance, submitted its report on Anti-competitive Practices by Big Tech Companies (“Big Tech Report”). The Big Tech Report recommended measures to:</p> <ul style="list-style-type: none"> (i) Introduce a new <i>ex-ante</i> framework for certain designated big-tech platforms. As a framework for the proposed <i>ex-ante</i> legislation, the Big Tech Report suggested identifying certain leading market players with significant influence over competition in the digital ecosystem (based on their revenues, market capitalisation, and number of active business and end-users) to designate them as Systemically Important Digital Intermediaries (SIDI). Once designated, these platforms would be subject to a mandatory code of conduct, increased intervention, and detailed disclosures under the <i>ex-ante</i> framework. The designated SIDIs would be required to comply with the obligations and prohibitions set out under the regulation. (ii) Revamp the CCI by setting up a specialised digital markets unit within the CCI, staffed with skilled experts, academics, and attorneys, to: <ul style="list-style-type: none"> (a) Enable the CCI to closely monitor SIDIs and emerging SIDIs; (b) Provide recommendations to the Central Government on designating SIDIs; (c) Review SIDI compliance; (d) Adjudicate digital market cases and conduct, for efficient and effective monitoring of digital markets; and (e) Keep track of, monitor, and act upon similar unfair practices of other digital players, even though not specifically designated as SIDIs, in larger consumer interest. <p>Subsequently, on 6 February 2023, the Ministry of Corporate Affairs constituted the Committee on Digital Competition Law (“CDCL”), to (i) review the efficacy of the existing competition framework to deal with competition concerns in digital markets; (ii) examine</p>

	<p>the need for bringing an <i>ex-ante</i> framework through a separate legislation for digital markets; (iii) study the international best practices on regulation in the field of digital markets; (iv) study other regulatory regimes/institutional mechanisms/government policies regarding competition in digital markets; (v) study the practices of leading players/SIDIs which limit or have the potential to cause harm in digital markets; and (vi) any other matters related to competition in digital markets as may be considered relevant by the CDCL. While the CDCL is yet to submit its report, it may recommend that the government introduce a separate competition enforcement regime for digital platforms in India.</p> <p>It is difficult to predict at this stage likely timelines for the introduction of a digital competition law, if any.</p> <p>Other agencies that govern competition: In addition to antitrust laws, sectoral regulators (telecom, natural gas, electricity, etc.) are mandated with ensuring competitiveness in each of the sectors.</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>No.</p> <p>There are no specific authorities or agencies that regulate digital markets in any sector. However, there are certain sectoral regulators such as the Telecom Regulatory Authority of India (“TRAI”) and the Petroleum and Natural Gas Regulatory Board, which have a statutory mandate to facilitate competition and promote efficiency in their respective sectors (which may not be digital).</p> <p>While the CCI has sole and exclusive jurisdiction over all matters related to competition in India, irrespective of the sector, parties have challenged the CCI’s jurisdiction on grounds of jurisdictional conflict (e.g. the TRAI and the Controller of Patents). The Courts have however found in favour of the CCI’s jurisdiction on the following basis:</p> <ul style="list-style-type: none"> (i) The CCI has parallel/concurrent jurisdiction to proceed with the investigation while the issue is <i>sub-judice</i> before the sectoral regulator (see Ericsson, Monsanto); or (ii) In cases where an ongoing dispute exists, the preliminary issues of which cannot be answered by the CCI, the will have subsequent jurisdiction upon the completion of the investigation by the sectoral regulator (Bharti Airtel). <p>At present, there have been debates on the role of the CCI in regulating data privacy and other data-related issues, independently. In the absence of a data protection law in India, these issues have been more prevalent. The DPDP Bill has been tabled in the Indian Parliament and is expected to be enforced in the coming months. It is likely that with the passage of the DPDP Bill, similar jurisdictional issues may surface.</p>
<p>3.</p>	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>

	Please see our responses to Question IV (1) above. India does not have a regulation that specifically governs competition in digital markets.
i.	Please describe how “platform” is defined for these purposes.
	Please refer to our responses to Query IV (1) above. India does not have a regulation that specifically governs competition in digital markets. Since the Competition Act applies uniformly on all enterprises, the Competition Act does not specifically define a platform. The Big Tech Report and the E-commerce Report published by the Parliamentary Standing Committee of Finance and the CCI respectively, also do not define a platform - although they identify concerning conduct that may be undertaken by a digital platform.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	Please refer to our responses to Question IV (1) above. India does not have a regulation that specifically governs competition in digital markets. The Competition Act solely governs the competition regulatory framework in India and <i>all platforms</i> (irrespective of the size) are obligated to comply with the Competition Act, at all times.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	<p>Please refer to our responses to Question IV (1) above. The Big Tech Report suggested that SIDIs should (on an <i>ex-ante</i> basis) be restricted from the following (anti-competitive) conduct:</p> <ul style="list-style-type: none"> (i) Anti-steering; (ii) Self preferencing; (iii) Tying and bundling; (iv) Discriminatory pricing/deep discounting; (v) Exclusive tie-ups; (vi) Search and ranking preferencing; (vii) Restricting third-party applications; (viii) Leveraging position by putting consumer preference data to their own use; and (ix) Unfairness and opacity in the advertising policies. <p>The Big Tech Report also recommended that SIDI should inform the CCI of any intended concentration, prior to its implementation and following the conclusion of the agreement, or otherwise, where either party provides services in the digital sector or enables the collection of data.</p> <p>That said, the recommendations of the Big Tech Report are not binding on the government and have not been effected into law. Similarly, while the recommendations of the CDCL, when published, will also not be binding on the government, from certain news reports, we understand that the CDCL is in the final stages of preparing a draft</p>

	digital competition law and the final contours of the law could be ready soon and tabled in the Parliament by end of 2023.
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	Please refer to our responses to Question IV (1) above. India does not have a regulation that specifically governs competition in digital markets. The Competition Act that governs all markets is a one-size-fits all system.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Please refer to our responses to Question IV (1) above.
vi.	Please summarise any penalties provided for non-compliance.
	Please refer to our responses to Question IV (1) above. India does not have a regulation that specifically governs competition in digital markets. However, there is a statutory process enshrined under the Competition Act that empowers the CCI to initiate non-compliance proceedings for certain orders or directions. Step 1. Penalty for non-compliance. If an infringing enterprise/individual fails to comply with the CCI's directions issued <i>inter alia</i> under the penalty order/interim order/order seeking information, without reasonable cause, the CCI shall after conducting a show-cause proceeding, impose a fine of up to INR 0.1 million (approx. USD 1210) for each day of non-compliance up to a maximum of INR 0.1 billion (approx. USD 1.21 million). Step 2. Criminal prosecution for continued non-compliance. If the infringing enterprise fails to pay the penalty imposed under Step 1 above, the CCI may file a complaint with the Chief Metropolitan Magistrate, Delhi to ask for an imprisonment of up to three years or a fine up to INR 0.25 billion (approx. \$3.02 million).
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	Please refer to our responses to Question IV (1) above. India does not have a regulation that specifically governs competition in digital markets. Since the Competition Act applies uniformly to all enterprises, the Competition Act does not have separate provisions for platforms. The Big Tech Report notes the 'winner-takes-all' nature of digital markets and states that competitive behaviour needs to be evaluated ex-ante before 'markets end up monopolised'. The Big Tech Report also notes the 'emerging global consensus' that it is necessary to identify SIDs and thereafter subject them to 'specific ex-ante provisions in order to ensure fair competitive conduct in the digital market.' Further, as stated in response to Question IV (1), the Big Tech Report suggested a framework for the digital competition regulation where the CCI would identify certain leading market players

	<p>having significant influence over competition in the digital ecosystem and designate them as SIDI.</p> <p>Once designated, these platforms would be subject to a mandatory code of conduct, increased intervention, and detailed disclosures under the <i>ex-ante</i> framework. The designated SIDIs would be required to comply with the obligations and prohibitions set out by the CCI under the regulation.</p>
<p>5.</p>	<p>Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?</p>
	<p>No.</p> <p>As stated in response to Question IV (1), India does not have a regulation that specifically governs competition in digital markets. That said, the Big Tech Report notes the ‘emerging global consensus’ that it is necessary to identify SIDIs and thereafter subject them to ‘specific ex-ante provisions in order to ensure fair competitive conduct in the digital market.’ Further, as stated in response to Question IV (1), the Big Tech Report suggested a framework for the digital competition regulation where the CCI would identify certain leading market players having significant influence over competition in the digital ecosystem and designate them as SIDI.</p> <p>Additionally, as stated in response to Question IV (1), the Ministry of Corporate Affairs constituted the CDCL, to <i>inter alia</i> (i) examine the need for bringing an <i>ex-ante</i> framework through a separate legislation for digital markets and (ii) study the practices of leading players/SIDIs which limit or have the potential to cause harm in digital markets. While the CDCL is yet to submit its report to the government, the CDCL may recommend that the government introduce a separate competition enforcement regime for digital platforms in India.</p> <p>That said, the Competition Act prohibits abuse of dominance by a dominant enterprise, including digital platforms. A ‘dominant position’ is defined as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to — (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.</p> <p>While determining if an entity enjoys a ‘dominant position’, the CCI is required to (i) determine the relevant market the entity operates in; and (ii) consider factors listed in Section 19(4) of the Competition Act (such as market share, vertical integration of the entity, etc.).</p> <p>Specifically in relation to digital markets, the CCI has recently ruled that any digital platform in a dominant position acting as a gatekeeper has a “special responsibility” towards the market to not abuse its position in any manner or allow its conduct to impair undistorted competition (Google Play, Google Smartphones). Moreover, while directing the Director General (the CCI’s investigation arm) to investigate into allegations of abuse of dominance made against Google by its publisher partners, the CCI emphasised on the fact that Google was a ‘necessary trading partner’ for publishers (Google Publishers).</p> <p>Accordingly, while the framework proposed by the Big Tech Report will clarify how digital platforms with market power be regulated, the CCI has already placed emphasis</p>

	on a digital platform's position while adjudicating on abuse of dominance by such digital players.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	<p>As stated in response to Question IV (1), India does not have a regulation that specifically governs competition in digital markets. While the CDCL could have adopted any of the three options of imposition of an ex-ante regime identified in the European Commission's Impact Assessment Report ((i) a non-dynamic instrument of self-executing obligations; (ii) a semi-flexible instrument, combining a set of self-executing obligations and obligations with regulatory dialogue; or (iii) a fully flexible instrument providing for a dynamic updating mechanism), from news reports, we understand that the CDCL will recommend imposition of 10 obligations on gatekeepers (i.e., big tech companies (defined based on the number of active users and global turnover) including e-commerce, food delivery platforms, cab aggregators and search engines capable of distorting the competition in the market). The contours of these 10 ex-ante obligations are still unknown.</p> <p>Under the Competition Act, as far as the CCI adjudicating on allegations of abuse of dominance generally is considered, the CCI has so far been inconsistent in its approach, oscillating between a 'per se' and 'effects based' approach. The same was also noted in the Competition Law Review Committee's report.</p> <p>However, the appellate authority (National Company Law Appellate Tribunal (NCLAT)) has recently clarified that an 'effect analysis' is required before a finding of abuse of dominance (Google Smartphones⁸¹). Per the NCLAT's judgment, the CCI is required to conduct an effects-based analysis before finding that an entity (including in digital markets) has abused its dominance.</p>
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	<p>No.</p> <p>As stated in response to Question IV (1), India does not have a regulation that specifically governs competition in digital markets.</p>
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.

⁸¹ Google LLC & Anr. v. Competition Commission of India & Ors., Competition Appeal (AT) No.01 of 2023 (NCLAT)

	<p>No.</p> <p>As stated in response to Question IV (1), India does not have a regulation that specifically governs competition in digital markets.</p>
<p>9.</p>	<p>How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>
	<p>The Competition Act does not have any special dispensation for data related conduct. That said, in the context of certain cases, the CCI has observed:</p> <ul style="list-style-type: none"> (i) 'Full integration' of data banks could raise potential competition concerns, both under Section 3 (anti-competitive agreements) and Section 4 (abuse of dominance) (Google-Jio). (ii) Exclusivity <i>qua</i> data ownership and data access may increase a platform's bargaining power over time, and allow it to earn monopoly rents. The CCI also observed that data 'further strengthens and entrenches the network effects limiting inter platform competition' (BookMyShow). (iii) Google's ability to pool data from its various services and process the same to refine its services, results in superior monetisation through online ads and provides it with a 'significant and overwhelming competitive edge' over its competitors (Google Smartphones). (iv) While approving a merger between Bayer and Monsanto, the CCI identified competition issues arising from merging of the two companies' data sets including that the merged entity would have significant competitive advantage in big data technologies, its dependence on other players for diversifying its genetic data bank would reduce and would have an incentive to deny licensing data to other players. Resultantly, Bayer had to undertake that the merged entity would provide access to data on fair, reasonable and non-discriminatory terms to potential licensees (Bayer-Monsanto). (v) In a data-driven ecosystem, excessive data collection (alongside sharing of such data and the extent of its potential use) may have competition concerns including exploitative and exclusionary effects. It was also observed that Whatsapp sharing user data with Facebook may amount to degradation of non-price parameters of competition viz. quality which results in objective detriment to consumers, without any acceptable justification (Whatsapp). (vi) In the E-commerce Report, the CCI identified the following issues in relation to data: <ul style="list-style-type: none"> (a) Access to transaction data allows platforms to engage in self-preferencing; and (b) The issue of 'data masking': Food aggregator platforms refused to share critical customer information with restaurants wherein they only shared an aggregate picture of their periodic, but not customer-wise data.
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the</p>

	<p>criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>Yes.</p> <p>The CCI has applied the essential facilities doctrine in the following cases:</p> <ul style="list-style-type: none"> (i) In the HT Media case, the CCI held that music was an essential facility in the FM Radio Market and held that the entity which had imposed conditions on access to music had abused its dominant position. (ii) In the Air Works India case, the CCI laid down economic conditions for an asset to be considered an essential facility: <ul style="list-style-type: none"> (a) The dominant entity controls access to an essential facility; (b) The facility cannot reasonably be duplicated by the competitor; (c) The dominant entity denies access to the competitor; (d) There should be no alternative means of entering the relevant market at a reasonable cost without having access to the essential facility; and (e) There must be spare capacity on the facility in question. <p>While the CCI has not specifically applied the essential facilities doctrine in the digital ecosystem, the CCI has sought to introduce a novel ‘must have’ test when examining abuse of dominance cases in digital markets (Google Smartphones, Android TV). The CCI has not defined or set out the scope of the ‘must have’ test. Instead, it simply states that any product/service that is considered important from an end-consumer’s viewpoint and/or indispensable for the commercial success of the supplier’s ultimate product/service, is a ‘must have’ facility.</p> <p>The ‘must have’ test adopted by the CCI appears, at best, to be cursory and a significantly diluted version of an essential facilities doctrine, without the vigour of the critical elements of an essential facility doctrine.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>Law governing conduct of entities with market power/dominance.</p> <p>The Competition Act prohibits abuse of dominance by a dominant enterprise, including digital platforms. A ‘dominant position’ is defined as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to — (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.</p> <p>While determining if an entity enjoys a ‘dominant position’, the CCI is required to (i) determine the relevant market the entity operates in; and (ii) consider factors listed in Section 19(4) of the Competition Act (such as market share, vertical integration of the entity, etc.).</p> <p>Specifically in relation to digital markets, the CCI has recently ruled that any digital platform in a dominant position acting as a gatekeeper has a “special responsibility”</p>

	towards the market to not abuse its position in any manner or allow its conduct to impair undistorted competition (Google Play , Google Smartphones). Moreover, while directing the Director General to investigate into allegations of abuse of dominance made against Google by its publisher partners, the CCI emphasised on the fact that Google was a 'necessary trading partner' for publishers (Google Publishers).
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Country: Italy

Contributors: Antonio Mirabile, Luciano Di Via (Clifford Chance)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No. Law No. 287/1990 (the " Italian Competition law ") provides for uniform thresholds.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>Article 16 paragraph 1-bis of the Italian Competition Law – entered into force on 27 August 2022 – enables the Italian Competition Authority ("ICA") to review mergers below Italian merger control thresholds, if they raise competition concerns in the Italian market.</p> <p>In particular, the new rule provides that the ICA has the power to require merging undertakings to notify the ICA if a concentration meets at least one of the following thresholds:</p> <ul style="list-style-type: none">i. the combined aggregate worldwide turnover of all the undertakings concerned exceeding EUR 5 billion; ORii. the combined aggregate Italian turnover of all the undertakings concerned exceeding EUR 517 million; ORiii. the Italian turnover of at least two of the undertakings concerned exceeding EUR 31 million. <p>provided that both the conditions below are satisfied:</p> <ul style="list-style-type: none">(a) the concentration that raises competition concerns in the national market, or a substantial part of it, also considering potential detrimental effects on the development and spread of small enterprises with innovative strategies, AND(b) no more than 6 months have elapsed since the closing of the transaction. <p>When the ICA has prima facie indications that a below-threshold merger might raise competition concerns in the national market or in a substantial part of it, it can request the merging undertakings to notify the transaction within 30 days (or, in exceptional circumstances, within up to 60 days). Once the notification is submitted, the ICA has 30 days to assess whether it is necessary to open a phase 2 investigation. Furthermore, in</p>

	<p>the course of the proceedings, the ICA might submit some requests for further information to the notifying parties.</p> <p>Overall, the ordinary merger control procedural rules apply to the review of below-threshold mergers as well.</p> <p>Voluntary notification of below-threshold mergers</p> <p>Should the merging undertakings deem that a below-threshold merger might prima facie raise competition concerns in the national market or in a substantial part of it, they might submit a voluntary notification to the ICA even before the closing of the transaction in so far as they have already reached an agreement on the essential aspects of the concentration. The ICA's review term of a voluntary filing might last up to 60 days, within which the ICA might request the notifying parties to submit a formal notification of the transaction.</p>
3.	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>No. The Italian Competition law does not contain any requirements in this regard, nor is there any corresponding soft law. However, there is a general exchange between the ICA and other regulatory or independent authorities.</p>
4.	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>The ICA uses traditional metrics (e.g. companies' revenue or volume, number of competitors) in order to analyse and determine the market shares or market positions of market players, including those active in the digital sector. We are not aware of any specific decisional practice or ICA's assessment/opinion in this regard.</p>
5.	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>In 2021, the ICA opened an investigation to assess the acquisition by Nexi S.p.A. of SIA S.p.A. (see C12373 - <i>Nexi-Sia</i>). The merger concerned numerous areas of the digital payments sector, in particular the services of merchant banks acquiring, issuing payment cards, retail payment clearing, transmission of interbank data, as well as</p>

	<p>services for the supply and maintenance of ATMs. During the investigation, the ICA assessed that the (digital) payment services sector is characterised by the offering of services that are often vertically integrated and have a high technological component. In particular, the ICA found that the merger was likely to produce the establishment or strengthening of the post-merger entity's dominant position in the domestic markets of ATM Circuit card processing and non-SEPA product clearing services. It therefore, authorized the transaction with conditions (imposing both behavioural and structural measures on Nexi S.p.A. and SIA S.p.A.) in order to resolve any possible concerns raised during the investigation regarding the possible anticompetitive effects of the transaction in the above markets. More specifically, the ICA imposed the following conditions/remedies:</p> <ul style="list-style-type: none"> (i) Nexi S.p.A.'s waiver of the exclusivity contained in the contracts with the payment operator equensWorldline with specific reference to domestic processing and non-SEPA clearing services; (ii) the provision by Nexi S.p.A. and SIA S.p.A. of a non-discriminatory, clear and transparent offer relating to the acquiring processing and issuing processing activities of domestic cards; (iii) the preparation by Nexi S.p.A. and SIA S.p.A., for three years, of a clear and transparent offer relating to the clearing activity of non-SEPA products; (iv) the transfer of the non-SEPA clearing contracts currently signed by Nexi S.p.A. with client banks; (v) the compliance by Nexi S.p.A. of a set of independence and financial requirements. <p>In the ICA's view, the set of commitments/remedies are aimed at ensuring that any new entrant is able to operate effectively on a commercial level and at preventing discrimination.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>See reply to question 5 above. No further decisional practice in this regard.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No.</p>

8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	To the best of our knowledge, no.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	The ICA has no power to undertake an ex-post analysis or to revise an original merger decision.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? If so, what types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	No decisional practice in this regard.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	No.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	No specific analysis has been provided or published by the ICA on how it intends to treat the collaboration of (potential) competitors active in the digital field. However, during 2022, the ICA launched a comprehensive internal organisational reform (entered into force on 1 January 2023): in particular, in the new organisational chart, there are two departments responsible for antitrust matters, of which one will specifically deal with cartels and digital platforms.
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition

	<p>authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>As a general remark, on February 2020, the final report of the Big Data Sector Inquiry (IC53 - Big Data) conducted jointly by the ICA, the AGCOM and the Data Protection Authority, was published. The Inquiry examined how Big Data is driving change: from the users who provide the data, to the companies that use Big Data and, thus, the markets. The Inquiry looked at ways to exploit potential synergies between the three Authorities and to identify the most appropriate tools for any interventions.</p> <p>In particular, the ICA acknowledged that the value of data to profiling via algorithm is increasing as it becomes embedded into various commercial activities, and as it generates new concentrations of power - not only "market power" but more generally economic power. It highlighted that the spread of price algorithms, also facilitated by the availability of large amounts of data, can create and strengthen cartels and produce market environments open to collusive outcomes.</p> <p>In the ICA's view there are several elements that indicate that algorithms can potentially facilitate collusion, tacit or otherwise (and, therefore, more or less lawful) such as: (i) a greater degree of transparency in online markets, given the wide availability of price data from competitors and other relevant information; (ii) the frequency with which prices can be adjusted, given the ability of algorithms to monitor markets in real time, and given their ability to instantly and continuously change prices, and (iii) the development of optimal pricing strategies through machine learning.</p> <p>As regards decisional practice, we are not aware of any case concerning data pooling or any other collaboration among competitors related to data.</p> <p>As for algorithmic pricing setting/algorithmic tacit collusion, there is one case pending before the ICA. Notably, on 20 December 2022, the ICA opened an investigation alleging that four European airline companies (Ryanair DAC, Wizz Air Hungary Ltd., easyJet Airline Company Ltd., and Italia Trasporto Aereo S.p.A. had colluded to increase their ticket prices during the Christmas 2022 period and that such a collusion might be facilitated by the use of algorithms. The investigation is still pending, and the end of the proceedings is expected by 31 December 2023.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on "hub and spoke" arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority's analysis.</p>
	<p>No decisional practice in this regard.</p>

5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	No.
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	We are not aware of a particular focus of the ICA on a specific type of vertical agreement.
2.	What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	We are not aware of any decisional practice of the ICA in this regard.
3.	What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?
	<p>In Italy both ‘wide’ and ‘narrow’ MFN clauses are of interest to the ICA.</p> <p>In a case regarding the hotel sector and online reservation systems (<i>1779 - Mercato dei servizi turistici - Prenotazioni alberghiere online</i>) the ICA investigated the MFN clauses included in contractual relationships with partner hotels by Expedia Inc., Expedia Italy S.r.l., Booking.com B.V. and Booking.com (Italy). The contested clauses regarded, in particular:</p> <p>(i) MFN clauses aimed at preventing the partner hotels from offering their facilities at better prices and/or conditions through other On-line Travel Agencies (OTAs), and more generally through any other online and offline channel; and</p>

	<p>(ii) 'Best Price Guarantees' clauses, through which Booking, and Expedia guaranteed to the end-users that the offer available on their platforms was the most advantageous one, thus obligating the partner hotels to match any other better offer that could be found online.</p> <p>In the ICA's view such clauses incorporated vertical restraints likely to constitute violations of Article 101 TFEU and significantly restrict competition on price and supply conditions both between different platforms and different sales channels (OTAs, websites hotel websites, agencies). The above clauses were likely to dampen competition between platforms also in terms of the commissions charged by OTAs to hotels. Indeed, in this context, each platform would appear to be disincentivised from making its service more attractive through the aggressive use of the competitive variable represented by the commission charged to partner hotels, since - due to the presence of the MFN clauses - this could not lead to lower prices exclusively on that platform. Similarly, the presence of MFN clauses could discourage the entry of new platforms driven by strategic use of the level of commission charged to hotels. Therefore, the ICA found that the presence of MFN clauses in contracts with partner hotels was likely to significantly restrict competition on the fees charged to accommodations, impacting the prices of hotel services, ultimately to the detriment of the consumers.</p> <p>Following the investigation, the ICA by two separates decisions:</p> <p>(a) accepted and made binding the commitments offered by Booking, aimed at (i) amending the MFN clauses, transforming them from 'wide' to 'narrow', thus becoming applicable only to the prices and offers made by the partner hotels through their online and offline –channels, and not to the prices and offers made to other OTAs and through any other 'indirect' sales channel (such as traditional travel agencies, tour operator); and (ii) amending the 'Best Price Guarantees' clauses, which were made applicable only in case of breaches of the 'narrow' MFN clauses; and</p> <p>(b) closed the investigation relating to Expedia, stating that there was no need to proceed with the case, since Expedia had amended its MFN clauses, in line with Booking's commitments.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>See reply to question 3 above.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>See reply to question 3 above.</p>

6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	The Italian legislation and ICA's decisional practice on vertical agreements are based on, and consistent with, the EU legislation and precedents.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	ABUSE OF MARKET DOMINANCE
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	Yes, the Digital Markets Act (at EU level), entered into force on 1 November 2022. Additionally, there are specific rules for the abuse of economic dependence for digital platforms (see below).
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	The general antitrust competencies lie with the ICA. Insofar as sector-specific issues from telecommunications, energy, credit, data sectors are concerned. The ICA asks for the opinion of the Italian Telecommunication Authority (AGCom), Regulatory Authority for Energy Networks Environment (ARERA) and Commission for Companies and the Stock Exchange (Consob), Data Protection Authority (<i>Garante per la protezione dei dati personali</i>), respectively.
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	Not with regard to abuse of dominance.

	<p>However, there are specific rules with regard to the abuse of economic dependence. Article 9 of Italian Law No. 192 of 18 June 1998 (“Italian Economic Dependence Law”) prohibits the abuse of economic dependence. In that regard, the Italian Economic Dependence Law contains a non-exhaustive list of abusive conducts, namely the refusal to sell or purchase a good or a service, the imposition of discriminatory or excessively burdensome unilateral conditions, and the arbitrary interruption of the ongoing business relations.</p> <p>A recent amendment to the Italian Economic Dependence Law by Law No. 118 of 5 August 2022 introduced some specific provisions focused on digital platforms and their activities. In particular, there is now a rebuttable presumption of economic dependence whereby an undertaking uses the intermediation services supplied by a digital platform which has a determining role to reach final consumers or suppliers, even in terms of network effects or data availability. Furthermore, the amended Italian Economic Dependence Law lists some typical examples of abusive conducts exercised by digital platforms in a situation of economic strength, namely (i) the supply of insufficient information or data in relation to the type or the quality of the service provided, (ii) the request of undue unilateral performances not justified by the nature or the content of the activity carried out, (iii) and the conduct hindering an undertaking in a position of economic dependence from using different providers for the same service, including by means of the application of unilateral conditions or additional costs not provided for in the agreements already in place.</p>
<p>i.</p>	<p>Please describe how “platform” is defined for these purposes.</p>
	<p>There is no specific definition of "platform" in the relevant Italian Economic Dependence Law.</p>
<p>ii.</p>	<p>What are the criteria used to determine whether a platform falls under the regime?</p>
	<p>The platform must have a determining role to reach final consumers or suppliers, even in terms of network effects or data availability.</p>
<p>iii.</p>	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>Platforms must avoid abusive conducts towards customers or suppliers with respect to which they are in a position of economic dependence. Examples of abusive conducts include (i) the supply of insufficient information or data in relation to the type or the quality of the service provided, (ii) the request of undue unilateral performances not justified by the nature or the content of the activity carried out, (iii) and the conduct hindering an undertaking in a position of economic dependence from using different providers for the same service, including by means of the application of unilateral conditions or additional costs not provided for in the agreements already in place.</p>

iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	No, it is a one-size-fits all system.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	Yes. Of course, a fully reliable assessment on the legal certainty of such prescriptions could be made only once the decision-making practice of the ICA in this sector will consolidate.
vi.	Please summarise any penalties provided for non-compliance.
	<p>The situation of economic dependence is not anti-competitive unless the undertaking holding the position of relative strength puts in place an abusive conduct. If the ICA finds an abuse, it may (i) impose structural or behavioural remedies and (ii) inflict an administrative fine of up to 10% of the abusive undertaking's turnover generated in the previous financial year (public enforcement). In addition, from a civil law perspective, the legal consequences are the following:</p> <ul style="list-style-type: none"> • any agreement underlying the abuse is null and void (i.e., the abusive provisions through which the abuse is determined never produced legal effects); and • any entity damaged by the abuse may claim for damages before a court (private enforcement).
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	Prevent abuses ex ante.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	The Digital Markets Act applies in Italy. We assume that this has already been commented at EU level.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis?

	Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	The Digital Markets Act applies in Italy. We assume that this has already been commented at EU level.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	Yes, the new rule on the abuse of economic dependence is based on a rebuttable presumption (see above).
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.,
	The rules of the Digital Markets Act, as applicable.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p>According to the ICA data portability, to the extent that it facilitates data circulation and user mobility, offers alternative operators the possibility of exerting competitive pressure on operators with a dominant position, which base their dominance on the creation of ecosystems based on the management of almost unlimited amounts of data, functional only to their own business model.</p> <p>Moreover, in the ICA's view the right to portability, if accompanied by effective interoperability mechanisms, can offer users the opportunity to achieve the maximum economic potential from the use of personal data, including through alternative modes of exploitation to those currently practiced by the dominant operators.</p> <p>In 2022, the ICA launched an investigation against Google aimed at examining whether the platform's approach regarding data portability could constitute an abuse of a dominant position in violation of Article 102 of the TFEU (see A552 - GOOGLE-OSTACOLI ALLA PORTABILITÀ DEI DATI). Indeed, Google holds a dominant position in several markets that allow it to capture large amounts of data through the services it provides (Gmail, Google Maps, Android).</p> <p>In the ICA's view Google would have hindered interoperability in sharing data with other platforms, and in particular with the so-called Weople APP, managed by an operator</p>

	<p>active in Italy that has developed a data investment bank. During the proceedings (which is still pending) the ICA found that Google's conduct is likely to:</p> <ul style="list-style-type: none"> • compress the right to portability of personal data (pursuant to Article 20 of the GDPR), limiting the benefits that consumers might derive from the enhancement of their data; and • result in a restriction of competition by limiting the ability of alternative operators to Google to develop innovative ways of using personal data. <p>In order to, solve any possible antitrust concerns raised in this regard, Google submitted a set of commitments to the ICA consisting of the development and implementation of effective tools aimed at facilitating the selection and export, by users, of data, easing their portability from service to service. The end of the proceedings is expected by 31 July 2023.</p>
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.</p>
	<p>No.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>

Country: Japan

Contributor: Yusuke Nakano, Atsushi Yamada, Ryoma Kojima (Anderson Mori & Tomotsune)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>The Japan Fair Trade Commission (“JFTC”) has jurisdiction to review any mergers, irrespective of whether or not the notification threshold is met. If the JFTC becomes aware of a non-reportable transaction that it is interested in, the JFTC would try to reach out to the parties, Japanese subsidiaries of foreign parties, or lawyers who have represented the parties, and prompt the parties to submit information or to make a voluntary filing.</p> <p>In 2019, the JFTC amended the Policies Concerning Procedures of Review of Business Combinations (the “Policies for Merger Review”).⁸² This amendment was significant because the JFTC, in a manner clearer than ever before, indicated its willingness to review M&A transactions that have a large value that will likely affect Japanese consumers, but that do not meet the reporting threshold based on the aggregate domestic turnover of the target and its subsidiaries (non-reportable transactions). Furthermore, the amendment encourages voluntary filing for non-reportable transactions with an acquisition value exceeding JPY 40 billion, if one or more of the following factors are met:</p> <ul style="list-style-type: none">a. the business base or research and development base of the acquired company is located in Japan;b. the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; orc. the aggregate domestic turnover of the acquired company and its subsidiaries exceeds JPY 100 million.

⁸² English translation of the amended Policies for Merger Review is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf>.

	<p>Given that the JFTC opened a review of the acquisition by Google LLC of Fitbit, Inc, and the acquisition by M3 of Ultmarc, even though those cases did not meet the notification thresholds, and that both cases resulted in the parties making a commitment, companies engaging in non-reportable transactions for which any of the above three factors are applicable should pay close attention to the potential need to make a voluntary filing with the JFTC.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>We have no basis to believe that the JFTC consults other governmental agencies for related compliance issues in the digital economy merger cases. In the JFTC's press release announcing the result of merger review of acquisition by Google of Fitbit (see 5. below), where the JFTC focused on health-related data, there is no reference to the JFTC's communication with the competent governmental agency (Personal Information Protection Commission or "PPC"). That said, we cannot rule out the possibility that the JFTC unofficially reached out to the PPC.</p> <p>The JFTC has not provided an official view yet as to such need and agencies' roles.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>In December 2019, the JFTC amended the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the "Merger Guidelines"),⁸³ which state as follows:</p> <ul style="list-style-type: none"> • If a platform works to provide a third party with a "<i>place</i>" for their service where a multi-sided market with multiple, different user segments is created, the JFTC will basically define a market for each user segment and then determine how the relevant business combination will affect competition in light of the characteristics of the multi-sided market. • If a platform mediates business transactions between different user segments and causes strong indirect network effects, there are some cases where a market comprising each user segment will be separately defined in an overlapping manner.

⁸³ https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf

	<p>The JFTC appears to maintain the traditional methodology, namely, to define markets, calculate market shares and HHI, and (if the conditions for a safe harbor are not met) carefully look into pro-competitive and anti-competitive factors. However, the JFTC also appears to be adjusting the traditional method as a result of taking into consideration the difficulty in calculating market shares in the traditional way, particularly in platform cases. For example, in M3's share acquisition of Ultmarc (see 5. below), the JFTC used the percentage/number of doctors registered with platform services in order to gauge the market position of M3. In the business integration of ZHD and LINE (see 5. below), while the JFTC found that the parties' market shares for code-based payment services on a settlement amount basis is approximately 55 per cent for ZHD and 5 per cent for LINE, 5 per cent would likely be an underestimation of LINE's market position given that both the number of active users and settlements for LINE's service were consistently increasing and LINE's potential is bigger than its competitors, given that the number of registered users of LINE's service is larger than ZHD, and the number of active users of LINE's communication app is over 84 million (approximately two-thirds of Japan's population).</p> <p>We expect that the JFTC will continue to adjust its methodology on a case-by-case basis, particularly in platform cases.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>Yes, there are three remedy cases in the digital economy. There have been no cases that were blocked or where the acquisition of a minority shareholding resulted in a remedy.</p> <p><u>i. M3's share acquisition of Ultmarc</u></p> <p>In 2019, the JFTC initiated a review of M3's acquisition of all of the shares in Ultmarc, even though the acquisition did not meet the domestic turnover thresholds for mandatory filing.⁸⁴</p> <p>M3 is one of the major operators of online platforms providing doctors with free information and advertising relating to prescription drugs. Statistics showed that at least 85 per cent of doctors in Japan were registered with M3's platform. Pharmaceutical companies paid certain fees to M3 for the ability to provide doctors with drug information for marketing purposes on M3's platform. Ultmarc is the operator of medical information databases known as medical databases ("MDB(s)"), which are composed of information on medical institutions and the doctors working at those medical institutions. The MDB is recognised as the de facto standard database among pharmaceutical companies and drug information platform operators as the advertising of medical drugs to the general public is prohibited in Japan.</p>

⁸⁴ JFTC press release of 24 October 2019 is available in English at: <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html>

Focusing on (x) the medical information database market, and (y) the drug information platform market, for (a) pharmaceutical companies, and (b) doctors, the JFTC characterised the transaction in two ways:

- (a) a vertical business combination (upstream market: (x); downstream markets: (y), (a) and (b)); and
- (b) a conglomerate business combination ((x) on one hand and (y), (a) and (b) on the other hand).

It is noteworthy that the JFTC defined two sets of two-sided markets ((x) and (y), (a); and (x) and (y),(b)). From the perspective of a vertical business combination, the JFTC was concerned that the firm post-merger would have the ability and incentive to refuse to provide M3's competitors with the MDB, and might take advantage of competitively confidential information of M3's competitors obtained by Ultramar. Under a conglomerate business theory, the JFTC further expressed its concerns that the firm post-merger would have the ability and incentive to adopt a tying or bundling strategy for M3's online platform and the MDB, thereby excluding M3's competitors from the (y), (a) and (b) markets. Subsequently, to address the JFTC's concerns, the parties proposed the following remedies (all of which are intended for an infinite period of time, with the exception of (e)):

- (a) not to refuse to provide M3's competitors with the MDB or other databases;
- (b) not to treat M3's competitors discriminatorily with respect to, among other things, the prices for, and quality of, the MDB and other similar databases;
- (c) to take certain measures to prevent the parties from sharing confidential information of M3's competitors;
- (d) not to adopt a tying or bundling strategy for the MDB and M3's services; and
- (e) to report the parties' status of compliance with the proposed remedies once a year for a period of five years.

ii. Acquisition by Google of Fitbit

The Google group is active in a wide range of areas, including digital advertising, internet search engines, cloud computing, software and hardware. The Fitbit group mainly manufactures and distributes wrist-worn wearable devices. The acquisition by Google of Fitbit did not trigger mandatory filings in Japan because Fitbit's turnover in Japan was under the JPY 5 billion threshold. However, because the transaction fell within the category for which a voluntary filing is recommended, the JFTC initiated an investigation (see 2 above).

The JFTC indicated certain competitive concerns in terms of the following:

- (a) vertical business combination:
 - where the upstream market is the market for providing operating systems for smartphones (Google) and the downstream market is the market for manufacturing and selling wrist-worn wearable devices (Fitbit); and
 - where the upstream market is the market for providing health-related databases (Google/Fitbit) and the downstream market is the market for

	<p>providing health applications (for wrist-worn wearable devices and for smartphones) (Google/Fitbit); and</p> <p>(b) conglomerate business combination: where one market is the market for providing health-related databases (Google/Fitbit) and the other market is the market for digital advertising (Google).</p> <p>In particular, in regard to the first scenario in (a), the JFTC indicated its concerns that Google might foreclose its competitors in the downstream markets by, for instance, refusing access to the Android API and health-related data provided by Google. Regarding (b), the JFTC was concerned that Google's use of Fitbit users' health-related data for digital advertising might further strengthen its position in the digital advertising market. To address the JFTC's concerns, the parties proposed to provide competitors with access to the Android API and health-related data free of charge for 10 years. Furthermore, Google proposed that, for a period of 10 years, it: (1) would not use health-related data for its digital advertising; and (2) would maintain the health-related data separately from other datasets within the Google group. The JFTC cleared the transaction subject to these conditions.</p> <p><u>iii. Business integration of ZHD and LINE</u></p> <p>Both ZHD and LINE are engaged in digital platform businesses, including the operation of online shopping malls and distribution of content (such as electronic books). The parties notified the JFTC of their contemplated business integration.</p> <p>After closely examining the areas in which ZHD and LINE intensively overlap, including free news services, digital advertising and payment services, the JFTC indicated its concerns regarding the field of code-based payment services. Code-based payment services consist of a payment method that executes settlement of funds by electronically reading payment information in the form of a bar code or a QR code through a payment app on a smartphone. The parties' market shares for those payment services on a settlement amount basis is approximately 55 per cent for ZHD and 5 per cent for LINE.</p> <p>Following an in-depth review, including an economic analysis, the JFTC concluded that, although the transaction may not immediately result in substantial restraint of competition, the competitive concerns could not be completely dispelled, based on, among other things: (1) the parties' strong positions in the relevant markets; (2) the exclusive dealing conditions that the parties impose on member stores, which weaken their competitors' positions in the markets; (3) the difficulty of new entry into the markets; (4) the fact that competitive pressure from adjacent markets (e.g., credit cards and other cashless payment services) and users is not strong or limited; and (5) the parties' internal data,⁸⁵ which implied their intention to consider raising fees for member stores following the transaction. To address the JFTC's concerns, the parties proposed the following remedies:</p>
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⁸⁵ The parties' internal data was submitted in response to the JFTC's request, which included the minutes of board meetings and management meetings, as well as email communications of directors and employees.

	<p>(a) to report, on an annual basis for three years, the market size of code-based payment services, the market positions of the parties and their competitors, the parties' fees for member stores, and the parties' utilisation of data relating to code-based payment services;</p> <p>(b) to discuss the annual reports with the JFTC and consider countermeasures if the JFTC raises competitive concerns about these reports; and</p> <p>(c) to remove exclusive dealing conditions that the parties currently impose on member stores.</p> <p>The JFTC ultimately concluded that, if the parties implemented these remedies, the transaction would not substantially restrain competition in any of the relevant markets.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>Please see above. The three cases introduced in 5. above are the only cases that the JFTC has made public where clearance was conditional.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No.</p> <p>However, many practitioners in Japan understand that, in practice, the JFTC reviews mergers in the digital sector more stringently than those in other sectors.</p> <p>On June 16, 2022, the JFTC issued a position paper "<i>Towards Active Promotion of Competition Policy Corresponding to Changes in Social Economy such as Digitalization</i>" emphasising the alignment and reinforcement of advocacy and enforcement.⁸⁶ The JFTC states therein that, in terms of mergers in the digital sector, to grasp the intention and purpose of merger, the effect of the merger on various interested parties, including consumers and competitors, and what the parties expect the future markets will be, the JFTC will ask the parties to submit materials used by the parties' Boards of Directors and materials analysing competition and other internal documents.</p>

⁸⁶ Available in Japanese only at: https://www.jftc.go.jp/dk/advocacy/220616digital_statement.pdf

<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.</p>
	<p>With the notification threshold being relatively high and triggering requirements being fairly clear, it is rare for the JFTC to initiate investigations against parties for failing to notify. We understand that, during the last 10 years, the only case where a failure to notify was seriously discussed by the JFTC was Canon’s acquisition of shares in Toshiba Medical in 2016, which was not a digital economy case.⁸⁷</p> <p>In the Toshiba Medical case, the JFTC approved Canon’s acquisition of shares in Toshiba Medical, Toshiba Corporation’s (“Toshiba”) medical equipment unit. However, the JFTC also issued a statement warning that the structure of the deal could be deemed to circumvent the law, including the prior notification obligation under the Antimonopoly Act, because the parties had provided that Toshiba could receive the payment of the transaction price of JPY 665.5 billion before the JFTC’s clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In return for that equity warrant, Canon paid to Toshiba an amount virtually equivalent to the consideration for common shares. Furthermore, shares with voting rights in Toshiba Medical were acquired and held by an independent third-party owner up until the time Canon exercised the equity warrant. The JFTC found that the transaction structure formed part of a scheme that was aimed at Canon ultimately acquiring shares in Toshiba Medical. The JFTC held that since there is no public precedent of the JFTC’s position as to such a transaction structure, it would not impose any sanctions in this case, but warned that similar transaction schemes will be considered to be in violation of the Antimonopoly Act in the future.</p>
<p>9.</p>	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>
	<p>Once the JFTC issues a clearance for cases that are reportable, the JFTC will not be able to undertake an ex-post analysis or revise an original decision (to clear the transaction conditionally or unconditionally), except for extraordinary circumstances such as when the parties fail to honor commitments, or when there was false information in a material respect in the notification form. We are not aware of such exceptional cases.</p> <p>The same would apply to non-reportable cases that have been notified and for which the JFTC has issued clearances.</p> <p>On the other hand, for cases that do not meet the reporting threshold and have not been notified on a voluntary basis, since the JFTC retains jurisdiction and has not exercised it, the JFTC can initiate an ex-post review. The M3 case is a typical example of this.</p>

⁸⁷ English translation of the JFTC’s press release dated June 30, 2016 is available at: <https://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160630.html>

<p>10.</p>	<p>To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?</p>
	<p>The JFTC has been referring to economic analyses in its merger control decisions more frequently recently and has been employing an increasing number of JFTC officials who have strong economic backgrounds. However, in general, it has not heavily relied on economic analyses (regardless of whether the case under review is in the digital sector). It should be noted that the JFTC did not refer to economic analyses in some of the recent merger cases in the digital sector and that the significance of the role of economic analyses appears to be limited in Japan (at least in comparison with the competition authorities in other countries). The JFTC sometimes explains the reason why it does not accept parties' arguments based on the parties' economic analyses (without putting forward its own economic analysis) and characterises such explanation as the JFTC's own economic analysis.</p> <p>While the limited number of cases makes it difficult to describe "<i>types of economic analysis</i>" most often used by the JFTC, the following are some examples of economic analyses used in the recent cases in the digital sector.</p> <p>In the Google/Fitbit case, parties submitted an economic analysis based on vertical arithmetic. However, the JFTC held that the analysis should not be adopted as evidence to show that the post-merger parties have little incentive to reduce interoperability by pointing out room for improvement. As the parties offered remedies to address concerns regarding interoperability expressed by the JFTC, the JFTC did not ask the parties to improve the economic analysis.</p> <p>In the Z Holdings / LINE case, the parties submitted an economic analysis based on switching analysis in analysing the extent to which the services offered by the parties (payment method that executes settlement of funds by electronically reading payment information in the form of a bar code or a QR code through a payment app on a smartphone) compete with each other's services, and with neighboring services (other cashless settlement methods).</p> <p>In the Salesforce / Slack case, "<i>Win/Loss Data</i>" of Salesforce and Slack were submitted by the parties to show competitive pressure from neighboring markets, which the JFTC agreed supported its findings regarding competitive pressure from neighboring markets. The JFTC also noted that vertical arithmetic was considered, but due to limitations regarding data, it decided not to use vertical arithmetic.</p> <p>In the Microsoft / Activision case (in which no remedy was requested and as such was not discussed in 5 above), the parties submitted an economic analysis based on critical conversion analysis, an applied form of vertical arithmetic. While the parties used data in the United Kingdom and global data, the JFTC believed that, assuming that the relevant market data in Japan are used, the critical conversion rate would be higher, and as such, a conclusion that the incentive for input foreclosure would be created will unlikely be obtained.</p>

II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>There is no such legislation or legislative proposal. However, the following publications by the JFTC or the Competition Policy Research Center (“CPRC”) (a JFTC arm conducting research and studies focusing on competition policy from medium and long-term perspectives) are similar (but not identical) to soft law or guidelines.</p> <ul style="list-style-type: none"> • CPRC’s Report by Study Group on Data and Competition Policy (June 2017); • CPRC’s Report by Study Group on Business Alliances (July 2019); • JFTC’s Report by Study Group on Competition Policy in Digital Markets “<i>Algorithms/AI and Competition Policy</i>” (March 2021); and • CPRC’s Report by Study Group on Competition Policy for Data Markets (dated June 2021). <p>In addition, the JFTC published a position paper “<i>Towards Active Promotion of Competition Policy Corresponding to Changes in Social Economy such as Digitalization</i>” (see I.7. above) in which the JFTC made clear its intention to generally strengthen its enforcement against digital platformers (including using the commitment procedure introduced in December 2018), bearing in mind rapidly-changing digital markets. It is not highly likely that this press release is based on a strong motivation to strengthen enforcement against horizontal agreements in the digital sector, since (i) it does not use the terms “<i>horizontal</i>” or “<i>collaboration</i>” and (ii) the JFTC has no track record of horizontal cases in the digital sector.</p>
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.
	<p>Except for the position paper “<i>Towards Active Promotion of Competition Policy Corresponding to Changes in Social Economy such as Digitalization</i>” (see I.7 and 1. above), the documents listed above are not issued “<i>in an official capacity</i>”. The said the position paper does not specifically analyse types of collaboration in the digital field that the JFTC is particularly interested in.</p>
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If

	<p>affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>We are not aware of any investigation or enforcement actions by the JFTC in terms of data pooling or other horizontal cases in the digital sector.</p> <p>CPRC’s Report by Study Group on Data and Competition Policy (see 1. above) discusses certain competition issues related to data pooling in an unofficial capacity. For example:</p> <ul style="list-style-type: none"> • Data pooling could make it easier for participants to obtain information on the content, price and volume of other participants, which may promote parallelism between competitors. • Pooling of data which are an important “input” for product market where most of the market players competing with each other can singularly collect the same data could, depending on the number of participants, total market shares thereof, nature of data, necessity for pooling, scope and duration, be problematic. <p>For algorithm-related issues, please see 4. below.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>There has not been any such case. However, in March 2021, the JFTC’s study group published a report on “Algorithms/AI and Competition Policy”. The report referred to debates at OECD and in other jurisdictions, and discussed some issues involving algorithms and AI on one hand and competition policy on the other hand, and took the position that certain “hub and spoke” arrangements may be a problem, depending on various factors. The report continued to pick up the following examples as problematic:</p> <ul style="list-style-type: none"> • Algorithms are used for monitoring post-cartel implementation and pricing; and • The same “pricing information collection algorithms” or “pricing adjustment algorithms” is used by various market players competing in the same market, and those players share an understanding that prices will be synchronised if many players in the market use the same algorithm.
<p>5.</p>	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>After verifying all publicly available materials, we are not aware of any such cases since leniency was introduced back in January 2006.</p>

6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	Not applicable.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	<p>We are not aware of the JFTC’s focus on any particular type of vertical agreements. That said, however, in recent cases and market studies we are seeing an increased reference to private monopolisation (Article 3 of the Anti-Monopoly Act (“AMA”)), which is equivalent to abuse of dominance type of regulation, and certain types of unfair trade practices (Article 19 of the AMA), which overlap with private monopolisation in terms of the type of conduct that they address but do not require a finding of market power and has a lower threshold for the required negative effect on competition. More specifically, for unfair trade practices, we are seeing an increased reference to trading on exclusive terms (Item 11 of the Designation of Unfair Trade Practice (“General Designation”)), trading on restrictive terms (Item 12 of the General Designation) and interference with competitor’s businesses’ (Item 14 of the General Designation). In addition, while technically speaking, it is not a type of vertical agreement, we note that the JFTC seems to be more proactively enforcing the abuse of superior bargaining position (Article 2, Paragraph 9, Item 5 of the AMA), which is also a type of unfair trade practice but could be used to address exploitative abuse type of conduct without requiring market power but only requiring a relatively superior bargaining position in relation to the counterparty.</p> <p>For non-price vertical restraints used by online multi-sided platforms, the JFTC has been relying on trading on restrictive terms provision to address MFN type of conduct by online shopping malls and online travel agencies (e.g. cases concerning Amazon, Rakuten (the largest marketplace operator in Japan), Booking.com and Expedia) and trading on exclusive terms provision to address exclusionary conduct (e.g. cases concerning Airbnb, Minna no Pet Online and Uniqwest). As mentioned above, these types of conduct overlap with conduct that would be addressed by the private monopolisation provision, and therefore in cases where the party is found to have market power and the effect on competition is sufficiently significant to meet the substantial restraint on competition threshold, the JFTC could apply the private monopolisation provision.</p> <p>With respect to abuse of superior bargaining position, the JFTC published new guidelines in 2019 clarifying that the abuse of a superior bargaining position may be applied to address collection and use of an individual’s data by companies operating digital platforms. The guidelines provide that in circumstances in which consumers provide personal information and other information in exchange for services provided by companies operating digital platforms, an abuse of a superior bargaining position could</p>

	<p>be found, and list potentially problematic conduct concerning collection and use of personal information and other information. Another item to note in terms of abuse of superior bargaining position is that the JFTC seems keen to apply this in the context of change of terms and conditions/specifications by digital platform operators (e.g. various market study reports on digital platforms and the case concerning Rakuten (2021)).</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>Under the AMA, exclusive dealing by non-dominant platforms would be covered by trading on exclusive terms provision which is a type of an unfair trade practice. Although a dominant position is not required, according to the JFTC’s guidelines (Guidelines Concerning Distribution Systems and Business Practices under the Anti-Monopoly Act (“Distribution Guideline(s)”), the JFTC will focus on conduct by parties that are “<i>influential in the market</i>” which typically refers to parties having shares exceeding 20% in the market. See also response to 6. below.</p> <p>In the Airbnb case (2018), the JFTC investigated Airbnb Ireland UC and Airbnb Japan K.K. (collectively “Airbnb”) (which intermediates with its website users and providers of accommodation services using houses (private lodging service)) on the suspicion that Airbnb restricted providers from listing on websites other than that operated by Airbnb, and such restriction would fall in as trading on exclusive terms or trading on restrictive terms. However, as Airbnb proposed to promptly take measures to waive its rights to enforce the provisions regarding the abovementioned restriction in the contracts, the JFTC concluded that these measures would eliminate the abovementioned suspected violations and the case was closed without any formal orders.</p> <p>In the Minna no Pet Online case (2018), the JFTC investigated Minna no Pet Online Co., Ltd (“Minna no Pet”) which was conducting a business as an intermediary for the sale of pets between breeders and customers, and also operated websites where it acted as an intermediary for transactions of sale of pets (dogs and cats) to end customers. The JFTC found that Minna no Pet had restricted certain breeders from posting information about dogs and cats on other pet intermediary websites while providing discounts for commissions it collected from those breeders and also provided favorable listings for those breeders on its websites, and suspected that such conduct violated the AMA which is against trading on exclusive terms provision. However, as Minna no Pet proposed to promptly take voluntary measures including discontinuing such restrictions, the JFTC agreed that such counter measures would eliminate the suspected violation and the case was closed without any formal orders.</p> <p>In the Uniquet case (2021), the JFTC investigated Uniquet Inc. which is an online funeral service provider which operates its website where it receives funeral requests from families and friends of the deceased person. These requests are passed on to the funeral operators, under contracts with Uniquet, who actually conduct the funerals. The JFTC suspected that Uniquet had restricted those funeral operators to trade with other online funeral service providers, in violation of the trading on exclusive terms and trading on restrictive terms provisions. However during JFTC’s investigation, Uniquet proposed to</p>

	<p>take voluntary measures to cease the said practice. As a result of JFTC’s review of the proposal, the JFTC concluded that these measures would eliminate the abovementioned suspected violations and the case was closed without any formal orders.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>The JFTC’s current position towards MFNs is that it might fall under trading on restrictive terms which is a type of an unfair trade practice. The JFTC has indicated that MFNs may have a negative effect on competition in terms of: (i) restricting the sellers’ business activities; (ii) distorting competition among online platforms; and (iii) reducing the incentive of online platforms for innovation and hindering new entrants from entering the markets. See also response to 5. below.</p> <p>With respect to “wide” and “narrow” MFNs, while the JFTC acknowledges that such distinction could be made, it has not yet rendered any formal orders that would set out its position as to whether these would be treated the same in terms of whether they violate the unfair trade practices provision. As such we have yet to see whether these would be treated in the same way.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>The first case that the JFTC announced an investigation into MFNs was the Amazon Japan G.K. case (2017) concerning price parity clauses and selection parity clauses (MFN clauses) imposed by Amazon Japan G.K. on the sellers on its online marketplace (the MFN clauses here did not make any distinction between the sellers’ own website and other platforms). The JFTC suspected that these MFN clauses restricted business activities of sellers on the online marketplace platform operated by Amazon. However, after Amazon proposed to promptly take voluntary measures including deleting the MFN clauses, the JFTC was satisfied that such measures were sufficient to eliminate the suspected violations and terminated the investigations without issuing any orders against Amazon. The JFTC reiterated its position in the Amazon Services International, Inc. case (2017), when it announced that it had received a report from Amazon Services International, Inc. which operates an e-book distribution platform making a commitment that it would take voluntary measures concerning parity clauses it imposed on publishers and distributors distributing e-books on the Amazon.co.jp website, confirming that such measures would eliminate potential competition law concerns. In both instances, the JFTC only went so far as to make general references to potential competition law concerns it had with respect to parity clauses as described in 5. below.</p> <p>In the Rakuten MFN case (2019), Rakuten imposed conditions on accommodation operators that placed information on Rakuten’s travel website requiring the operators to</p>

	<p>make the prices and the numbers of rooms which they place on the website equal to or better than those they provide through other distribution channels with a minimum number of rooms requirement. The JFTC commenced an investigation on the suspicion that Rakuten’s conduct violated trading on restrictive terms provision. However, upon submission of a commitment plan which no longer imposed the said condition, the JFTC approved the plan and closed the investigation.</p> <p>Further in 2022, the JFTC accepted commitment plans from online travel agencies Booking.com B.V. and Expedia Lodging Partner Services Sàrl respectively. These cases concerned the JFTC’s investigation on suspicion that the abovementioned party’s terms and conditions required operators of accommodation facilities who placed information about their facilities located in Japan on their travel websites to provide the room rates and availability of the accommodation facilities on equivalent terms or more favorable terms than those offered through other sales channels, and that these practices were in violation of trading on restrictive terms provision.</p> <p>In both cases the JFTC noted that the approved commitment plan did not cover the requirements that the room rates should be equivalent to or more favorable than those offered through the sales channels such as the websites operated by the accommodation operators themselves, as the JFTC found that the accommodation operators did not necessarily abide by the clauses providing for the restriction. As such, it was not necessarily clear whether the JFTC would take the position that such narrow MFNs would be in violation of trading on restrictive terms position.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>The JFTC has indicated, in the Amazon case above, that MFNs may have a negative effect on competition based on the following three perspectives:</p> <ul style="list-style-type: none"> (i) Restriction of sellers’ business activities by limiting reduction of prices and expansion of lineups of goods that the sellers sell via other sales channels; (ii) Distortion of competition among online shopping mall operators by allowing an online shopping mall operator to impose those parity clauses to achieve the lowest price and the richest lineup of goods sold on its online shopping mall without making any competitive effort; and (iii) Reduction of online shopping mall operators’ incentive for innovation and hindering new entrants, as the reduction of fees charged by an online shopping mall operator for sellers did not result in these sellers’ reduction of prices and expansion of lineups. <p>However, the JFTC only indicated these as potential harms and did not specify which harm it actually found in the case, as the JFTC closed the investigation without rendering a formal opinion based on factual findings.</p>
<p>6.</p>	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for</p>

	<p>applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>While the JFTC does not set any safe harbor specifically for vertical agreements in the digital economy, it provides for a safe harbor for certain types of non-price vertical restraints in general in its Distribution Guidelines.</p> <p>The Distribution Guideline provides that conduct such as restriction on dealings with competitors, strict territorial restriction (i.e. restriction on sales outside of an assigned area but allowing for passive sales), and tie-in sales, may be illegal as unfair trade practices if such restraints are imposed by “<i>an influential party in a market.</i>” The Distribution Guidelines further provide that whether or not a party is “<i>influential in a market</i>” is in the first instance judged by whether or not it has a share exceeding 20% in the market. However, it should be noted that this threshold is not a definite threshold in the sense that the Distribution Guideline further notes that in cases where the party has “<i>a market share of 20% or less..., it does not usually tend to impede fair competition and therefore is not illegal.</i>”</p> <p>Further, in defining markets, the JFTC may define several relevant markets that overlap with each other, which could be more likely in cases where there are multisided markets with strong indirect network effects as often seen in the digital sector, and in such cases, as a practical matter, it could be more difficult to fall in the safe harbor requirement discussed above.</p>
7.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
IV.	<p>Abuse of market dominance</p>
1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>In addition to the general regulations under the AMA, such as unfair trade practice and private monopolisation, the Japanese government introduced in 2021 the Act on Improving Transparency and Fairness of Digital Platforms (Act No. 38 of 2020) (the “Transparency Act”). This Act is a new legal framework regulating digital platform businesses. The Transparency Act does not have general definitions of products or services subject to its regulations, but applies to specific products or services provided on digital platforms designated by the Japanese government. In order to adapt to the rapid changes in the digital markets, additional products and services may be added via</p>

	<p>future Cabinet Orders. As of March 1, 2023, the Japanese government designated three major e-commerce platform operators (Amazon, Rakuten and Yahoo!Japan), two major smart phone app store operators (Apple and Google) and three major digital ad platform providers (Google, Meta and Yahoo!Japan) as being subject to the regulations under the Transparency Act. The scope of the regulations may expand to other business sectors in the future.</p> <p>Unlike the AMA, rather than prohibiting certain types of conduct ex ante, the Transparency Act requires digital platform operators to take measures to improve transparency and fairness in transactions between digital platform operators and users. The requirements under the Transparency Act can be categorised based on disclosure of terms and conditions to users (Article 5, Paragraphs 1 and 2), provision of notification to users (Article 5, Paragraphs 3 and 4), taking measures necessary for improving mutual understanding with users pursuant to the guidelines provided by the government (Article 7) and submission of annual reports to the government (Article 9).</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>While the general antitrust competencies lie with the JFTC, the Ministry of Economy, Trade and Industry (the “METI”) supervises and enforces the Transparency Act. The METI monitors operations of the digital platforms specified as being subject to the Transparency Act and, if it finds that a digital platform provider may be involved in any violation of the AMA, the Transparency Act authorises the METI minister to request the JFTC to take appropriate measures under the AMA.</p> <p>In addition to the authority to enforce regulations, the Digital Market Competition Headquarters (the “DMCH”) plays a role in the digital market sector policymaking. In 2022, the DMCH proposed to subject the digital ad platform to the Transparency Act, and in 2022-2023, has been discussing the possibility of introducing a new regulatory framework with respect to the mobile ecosystem centred on mobile OS. On June 16, 2023, the DMCH published its final report on its competitive assessment of the mobile ecosystem and is currently soliciting comments from the general public. The final report finds that various layers of the mobile ecosystem are oligopolistic and insists that ex ante regulation is necessary in some areas in order to secure innovation by various players and options for consumers.</p>
<p>3.</p>	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>The Transparency Act, as described in IV. 1. above, is a legal framework that specifically governs the operation of digital platform businesses having a significant market position in a specific business sector.</p>

<p>i.</p>	<p>Please describe how “platform” is defined for these purposes.</p>
	<p>The outline of the definition of “Digital Platform” under Article 2, Paragraph 1 of the Transparency Act is a service to provide, via the telecommunications network, a digital forum (i) that is constructed with the intent of being used by a large number of persons, (ii) where information pertaining to goods, services or rights is continuously displayed, and (iii) that utilises network effect. However, as described in IV. 1. Above, please note that the Transparency Act does not apply to all Digital Platforms falling under this definition, but rather to specific products or services provided by Digital Platform operators designated by the Japanese government.</p>
<p>ii.</p>	<p>What are the criteria used to determine whether a platform falls under the regime?</p>
	<p>The criteria used are business categories and scale of business. The Japanese government, in its Cabinet Order, specifies business categories of Digital Platform to be subject of the Transparency Act and thresholds, for scale of business such as domestic sales amounts, for each business category. A Digital Platform operator who falls under the business category and meets the threshold must notify the METI to that effect, and the METI designates a specific product or service among such Digital Platforms as the subject of the Transparency Act.</p>
<p>iii.</p>	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>As described in IV. 1. Above, the main requirements under the Transparency Act are: (i) disclosure of terms and conditions to users (Article 5, Paragraphs 1 and 2), (ii) provision of notification to users (Article 5, Paragraphs 3 and 4), (iii) taking measures necessary to improve mutual understanding with users pursuant to the guidelines provided by the government (Article 7), and (iv) submission of annual reports to the government (Article 9). The METI monitors operations of the specified digital platforms and annually reviews annual reports submitted by the specified digital platform operators. The results of the annual reviews conducted by the METI are published.</p>
<p>iv.</p>	<p>Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?</p>
	<p>While the overall framework of the requirements under the Transparency Act is common to all business categories designated as subject to the Transparency Act, the Japanese government may tailor it to each of the business categories of the items that are to be disclosed or notified (requirements (i) and (ii) above) through an ordinance and indicate measures that are required to be taken (requirements (iii) above) through guidelines.</p>

v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	No. While the requirements under the Transparency Act are relatively clear as compared with the AMA, the Transparency Act takes an approach of minimising mandatory requirements and focusing on urging the specific digital platform operators to voluntarily rectify potential issues in a timely manner. Thus, the Transparency Act does not aim to be foreseeable in its nature. In practice, the METI, in its annual review process, would review not only compliance with the Transparency Act, but also issues they are interested in and publish their evaluation thereon. Even though such evaluation is not legally binding, the businesses subject to the review would bear the burden of responding to the METI's inquiries and could be subject to reputational risk due to the publication of the review.
vi.	Please summarise any penalties provided for non-compliance.
	If a specified digital platform operator does not comply with the disclosure requirements or fails to take measures pursuant to the guidelines under the Transparency Act, the METI may issue recommendations to rectify the non-compliance. If the non-compliance with respect to the disclosure requirements is not rectified even after the METI's recommendations, the METI may issue an order to the specified digital platform operator to do so. If the specified digital platform operator does not comply with the order or fails to submit notification or reports which must be submitted under the Transparency Act, it will be subject to a fine of up to JPY 1 million.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	The purpose of the Transparency Act stipulated therein is to improve the transparency and fairness of specified digital platforms and contribute to the enhancement of the lives of people and sound development of the national economy by promoting fair and free competition in relation to specified digital platforms. The Transparency Act takes into consideration the autonomy and independence of digital platform providers and the need to protect the interest of users who provide products or services through platforms.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	The above-described Transparency Act applies specifically to digital platforms which have a substantive market position. The Transparency Act provides that the intervention by the government should be limited to the minimum extent necessary and is focused on

	<p>urging the specific digital platform operators to voluntarily rectify issues which should be addressed. The idea is to address potential issues in a timely manner while not impeding innovation. As this is a novel approach, we have yet to see how things unfold.</p>
<p>6. If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?</p>	
	<p>Since the Transparency Act merely requires digital platform operators to take measures to improve transparency and fairness in transactions between them and users rather than prohibiting some types of conduct <i>ex ante</i>, there are no <i>per se</i> rules prohibiting certain conducts or rebutting presumptions in relation to the Act.</p>
<p>7. Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?</p>	
	<p>No.</p>
<p>8. If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.</p>	
	<p>No.</p>
<p>9. How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>	
	<p>In the CPRC's Report by Study Group on Competition Policy for Data Markets (dated June 2021), the JFTC mentioned the importance of ensuring data portability and interoperability from the perspective of the ease of service when switching or multi-homing. At the same time, the report also states that specific ways to ensure data portability and interoperability should be carefully considered taking into account cost and innovation so as not to impede competition.</p> <p>Further, in connection with merger review, the Merger Guidelines (see I. 4.) provide that high switching costs would be a factor to weakening competitive pressure. The JFTC officers mentioned in an article in a law journal that low data portability would elevate switching costs.</p>

<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>In Japan, the essential facility doctrine has never been applied nor has the JFTC indicate that such doctrine may be applicable in the future.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>In 2022, the Act on the Protection of Consumers Who Use Digital Platforms was enforced with the view to protect the interests of consumers using digital platforms. Rather than promoting competition in a market, the act focuses on protecting consumers from purchasing dangerous products and losing contact with sellers. It requires digital platform operators to make efforts to help consumers contact businesses selling products through digital platforms and disclose to consumers the contact information of such businesses which are in the digital platform operators’ possession.</p> <p>Further, from the same perspective, the JFTC published in 2019 Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information. The guidelines describe what kind of conduct related to the acquisition of personal information or use of acquired personal information on a digital platform by digital platform operators will be subject to issues concerning abuse of superior bargaining position in relation to consumers, which is prohibited under the AMA.</p>

Country: Mexico

Contributors: Vicente Grau, Ivan Szymanski, Mariana Alcalá (Santamarina y Steta)

I.A	Merger review
	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No. The applicable thresholds set forth in the Federal Law of Economic Competition (“ FLEC ”) are the same for transactions in the traditional fields and in the digital economy.
	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>If the regulatory thresholds are not met, the transaction will not require pre-merger control, nor mandatory notification, notwithstanding if the transaction involves a maverick innovator business.</p> <p>Investigation may be initiated by the Federal Economic Competition Commission in Mexico (“COFECE”) or the Federal Telecommunications Institute (“IFT”) (the “Mexican Competition Regulators”) into cases of monopolistic practices, irrespective of the market where they take place. The IFT is considered an authority in matters of economic competition in the broadcasting and telecommunications sectors, exclusively. Maverick businesses may be considered prone to some scenarios of monopolistic practices due to their sole or dominant position in a certain market, but until evidence or knowledge of the existence of potential antitrust activities in such market is obtained by the regulators, no investigation will be initiated.</p>
	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	<p>The Mexican Competition Regulators do not typically consult with other Mexican government agencies on for related compliance issues, such as data protection.</p> <p>The Mexican Competition Regulators in Mexico do, however, remain in close contact with many other antitrust regulators from other countries, but mainly for purposes of exchange of experience or specific assistance in the gathering of information. The compliance issues are relevant to the Mexican competition authority only as long as they</p>

	<p>have a competition impact on a market in Mexico. No official view or guidance has been issued by the Mexican regulator on this regard.</p>
	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>As per the FLEC, the same standards that apply to traditional markets apply to digital platforms and enterprises.</p> <p>The income and the outreach (possibility to access the services) may be considered by the Mexican Competition Regulators as the main metrics in analysing market share and market position for digital platforms.</p> <p>Nevertheless, this position has not been expressed officially as the Mexican Competition Regulators perform case-by-case analyses and take into consideration different factors, such as, among others, the type of business and the products / services subject matter therein.</p>
	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>No. The Mexican Competition Regulators has not formally objected or blocked a so called ‘killer acquisition’.</p> <p>However, COFECE objected to the acquisition of Cornershop (a food and grocery delivery platform) by Walmart.</p> <p>The main argument was that, by being controlled by Walmart, Cornershop would gradually cease to source its orders from other retailers different to Walmart. With the market position of Walmart and Cornershop in their respective segments in Mexico, the above scenario would have represented a detriment to the relevant markets and to the other participants therein. Ultimately, Cornershop was sold to Uber and the transaction was cleared unconditionally.</p>
	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>From the publicly available information, we found no evidence of the existence of conditioned transactions in the digital sector in the last 10 years.</p>

	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>There are no specific merger control rules or obligations which apply only to particular types of digital players and do not apply to other sectors. The pre-merger review by the Mexican Competition Regulators is based on different factors including regulatory thresholds, the type of transaction and the relevant market or markets where said transaction takes place.</p>
	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.</p>
	<p>From the publicly available information, we found no evidence of the existence non-notified transactions in the digital economy being investigated by the regulator in the last 10 years.</p> <p>However, there is currently a transaction under investigation by COFECE that entails, in part, digital markets. No further disclosures have been made by COFECE in this regard.</p>
	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>
	<p>No, there is no such power of the Mexican Competition Regulators set forth in the law to effectively revise an original merger decision. Once COFECE approves a transaction, and the transaction is closed in accordance with the resolution containing the clearance, COFECE is not entitled to recall or cancel the clearance. On the other hand, if the transaction ultimately leads to unforeseen anti-competitive effects on a market, COFECE is entitled to investigate such effects and the conduct of the involved economic agents, but this procedure will not be related to the earlier the pre-merger clearance and will not result in the revision of the original merger decision.</p>
	<p>To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?</p>
	<p>The economic analysis applied in respect of the digital sector has no particular distinction from the economy analysis used for other markets. The most often used analysis is based on the effects on the market, the substitution options, the elasticity of the supply and demand, and buyer / seller power, among others.</p>

	Horizontal agreements
	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>No. The same rules that apply to horizontal agreements in general, also apply to agreements in the digital economy.</p> <p>However, absolute monopolistic practices are considered illegal in Mexico. Whilst some horizontal agreements are permitted by the Mexican Competition Regulators, illegal horizontal agreements may consist of contracts, agreements, arrangements or combinations among competing economic agents, which have as their purpose or effect to (i) fix, raise, co-ordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets; (ii) establish an obligation not to produce, process, distribute, market or acquire but only a restricted or limited amount of goods, or the provision or transaction of a limited or restricted number, volume or frequency of services; (iii) divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, time spans or spaces; (iv) establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls, and (v) exchange information with any of the purposes or effects referred to in the previous subsections.</p>
	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	In 2018, COFECE issued non-binding guidelines regarding criteria in the digital economy, which states that the COFECE's objective is to maximise the benefits of digitalisation for Mexican consumers. However, these guidelines do not include a specific analysis on the collaboration of potential competitors active in the field.
	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	<p>The Mexican Competition Regulators have not yet analysed data pooling or any data collaborations among competitors related to data.</p> <p>The Mexican Competition Regulators have not yet solved any cases regarding algorithmic pricing setting or algorithmic tacit collusion nor issued binding criteria.</p>

	<p>However, in 2018, COFECE issued non-binding guidelines regarding criteria in the digital economy. In said guidelines, COFECE considers that there are four main forms of collusion in the digital environment: (i) the execution and monitoring of collusive agreements facilitated by the use of the growing capacity of computers and the Internet; (ii) the use of the same pricing algorithm by many users to determine the market price of a product; (iii) tacit collusion derived from the use of algorithms that, by means of adjusting prices according to market data, result in parallel price fixing; and (iv) collusion derived from the operation of Artificial Intelligence in a scenario of market transparency, leading to an anticompetitive outcome without the need for the for the existence of an explicit or tacit agreement, but as a best available response.</p> <p>Derived from the above, in recognising the use of digital media as tools for collusion, it also emphasises that these same tools facilitate the identification of these schemes, especially in the most dominant markets.</p>
	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>The Mexican Competition Regulators have not yet publicly shared a view on “hub and spoke” nor guidance on horizontal coordination.</p>
	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>No.</p>
	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
	<p>Vertical agreements</p>
	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>COFECE is currently focusing its investigations efforts on the market of digital goods and/or services in general, advertising services and related services. Its scope has been</p>

	<p>primarily directed to all those practices that have the purpose or effect of displacing other agents from the market, substantially impeding their access or establishing exclusive advantages (i.e. tied purchases or sales, exclusivity, price or treatment discrimination, among others).</p> <p>Currently COFECE is investigating the possible existence of vertical agreements in the development, marketing, and sale of digital goods and/or services, including electronic books, software, video games, photographs, music, and online movies, among others.</p> <p>COFECE has issued resolutions and recommendations in this matter as stated below:</p> <p>In 2019, COFECE blocked the concentration of Walmart and Cornershop, as mentioned above, because Walmart had incentives to favor its self-service stores and price clubs or give less favorable treatment to its competitors and it would have put Walmart in the position of owning an online platform that sells its own merchandise as well as competitors' products, giving it potential access to information about the orders shoppers placed with its rivals. This resolution had concerns of illegal vertical agreements (relative monopolistic practices).</p> <p>Likewise, on March 2022, COFECE issued a recommendation that ride-hailing companies such as Uber and DiDi be allowed to operate within the facilities of the Felipe Angeles International Airport ("AIFA"), as well as any interested party that complies with the applicable safety and quality requirements, without having to belong to a cab or site group. These recommendations also established that absolute monopolistic practices (collusion), and relative monopolistic practices (abuse of market power) proven by means of a COFECE resolution, would be grounds for termination of the contract.</p>
	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>The FLEC states that for vertical agreements to be illegal they shall consist of any act, contract, agreement, procedure or combination which (i) corresponds to any of the criteria referred to in article 56 of the FLEC;⁸⁸ (ii) are carried out by one or more</p>

⁸⁸ Article 56. The criteria referred to in subsection I of article 54 of this Law, consist of any of the following:

- i. When Economic agents that are not competitors incur in fixing, imposing or establishing the exclusive marketing or distribution of goods or services, defined by individuals or undertakings, geographic locations or specific time periods, including the division, distribution or allocation of clients or suppliers; as well as imposing the obligation not to manufacture or distribute goods or provide services for a determined or determinable period of time;
- ii. Imposing prices or other conditions that a distributor or supplier must observe in supplying, marketing or distributing goods and services;
- iii. Conditioning a sale or transaction to the purchase, acquisition, sale or provision of another good or service, normally different or distinguishable or under a reciprocity basis;

	<p>Economic agents that individually or jointly exert substantial market power in the same or related relevant market in which the practice is executed; and (iii) or may have as its purpose or effect, in the relevant market or a related market thereof, that of unduly displacing other Economic agents, substantially impeding their access or establishing exclusive advantages in favor of one or several Economic agents.</p> <p>Considering the above, if a platform is non- dominant, then it can be assumed that it does not have substantial market power, therefore, the vertical agreement would not be illegal pursuant to Mexican Law and it is unlikely that the Mexican Competition Regulators have grounds to investigate and sanction there agreements.</p>
	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>As mentioned before, for a vertical agreement to be illegal pursuant to Mexican law, said agreement shall comply with 3 requirements which include: substantial market power, the purpose or effect of unduly displacing other economic agents substantially impeding their access or establishing exclusive advantages in favor of one or several economic agents, and correspond to any of the criteria set forth in article 56 of the FLEC.</p>

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- IV. Conditioning a sale, purchase or transaction to not using, acquiring, selling, marketing or providing goods or services produced, processed, distributed or marketed by a third party;
 - V. Unilaterally refusing to sell, market or supply certain individuals or undertakings, available goods or services which are ordinarily offered to third parties;
 - VI. Concerting among several Economic agents or inviting them to exert pressure against a certain Economic agent or to refuse to sell, market or acquire goods or services from said Economic agent, with the purpose of dissuading it from a certain conduct, exert reprisals or compel its actions in a specific direction;
 - VII. Selling below the average variable cost or below the average total cost but over its average variable cost, if there are elements to presume that the Economic agent could recoup its losses through future price increases, in terms of the Regulatory Provisions;
 - VIII. Granting discounts, incentives, or benefits by producers or suppliers to purchasers under the condition not to use, acquire, sell, market or provide the goods or services produced, processed, distributed or marketed by a third party, or the acquisition or transaction subject to the condition of not selling, marketing or providing said goods or services to a third party;
 - IX. Using profits attained from the sale, marketing or provision of a good or service to finance the losses that result from the sale, marketing or provision of another good or service;
 - X. Establishing different prices or conditions for selling to or purchasing from different purchasers or sellers who are in like circumstances;
 - XI. The action of one or several Economic agents with the purpose or effect, either directly or indirectly, of increasing the costs or altering the production process or reducing the demand faced by other Economic agents;
 - XII. The refusal, restriction to access, or access under discriminatory terms and conditions, to an essential facility by one or several Economic agents, and
 - XIII. The margin squeeze, consisting in reducing the existing margin between the price of accessing an essential facility provided by one or several Economic agents and the price of the good or service offered to the final consumer by said Economic agents, which employs said input or facility for its production.

	<p>Among the criteria of article 56 of the FLEC there is the imposition of prices or other conditions that a distributor or supplier must observe in supplying, marketing, or distributing goods and services, which corresponds to MFNs. The FLEC does not make a distinction between wide and narrow MFNs.</p> <p>However, the FLEC provides that the aforementioned practices would not be considered illegal nor punished if the economic agent proves that these practices produce gains in efficiency and favorably impact upon the process of economic competition and free market access, thus overcoming their possible anticompetitive effects, and consequently result in an improvement of consumer welfare.</p> <p>Considering the above, MFNs would be considered illegal vertical agreements if the economic agent has substantial market power, and the clause has the purpose or effect to unduly displace other economic agents, and if the economic agent does not demonstrate that the clause does not have anticompetitive effects.</p>
	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>N.A.</p>
	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>N.A.</p>
	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>No.</p>
	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
	<p>Abuse of market dominance</p>

	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>No. As mentioned above, the FLEC and the current antitrust legislation do not differentiate between traditional markets and digital markets.</p> <p>However, it is important to mention that the IFT, as regulatory body and competition authority in the telecommunications sector, imposes asymmetric regulation on major suppliers (preponderant economic agents⁸⁹) to level the competitive conditions in the relevant market (fixed and mobile). The measures imposed include, among others, the obligation to provide regulated wholesale services on non-discriminatory terms with regulated prices, and the obligation to guarantee economic replicability.</p>
	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>Yes. As mentioned above, in Mexico there are two agencies that oversee competition. First, COFECE that oversees competition in all markets, including digital markets, except for those related to telecommunications and broadcasting, and the IFT, that oversees competition in the telecommunications and broadcasting markets, exclusively.</p> <p>In the last years, both agencies have engaged in judicial procedures to determine which of them has jurisdiction over digital markets. So far, the Judicial authorities, have ruled that even though digital markets use as their main input the telecommunications network, digital markets are markets by their own and are completely differentiated from the telecommunications and broadcasting markets, therefore, it has found that COFECE has jurisdiction over most of them.</p> <p>Notwithstanding, the Mexican Supreme Court of Justice has found that the IFT has jurisdiction over the mobile operations systems.</p>
	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>No.</p>

⁸⁹ Companies that directly or indirectly have a national market share above 50% in telecommunications services, measured by users, subscribers, traffic or capacity.

	Please describe how “platform” is defined for these purposes.
	N.A.
	What are the criteria used to determine whether a platform falls under the regime?
	N.A.
	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	The same market power requirements are used for traditional markets and for digital platforms.
	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	N.A.
	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	N.A.
	Please summarise any penalties provided for non-compliance.
	N.A.
	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	N.A.
	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	N.A.

	<p>If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?</p>
	<p>N.A.</p>
	<p>Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?</p>
	<p>N.A. The same rules that apply for traditional markets apply for digital platforms.</p>
	<p>If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.</p>
	<p>N.A.</p>
	<p>How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>
	<p>Portability and interoperability of data have been analysed under the barrier to entry doctrine (costs of entry, costs of changing from platform to platform, multi-homing, network effects, etc.).</p>
	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.</p>
	<p>Yes.</p> <p>As per the FLEC the following items shall be considered when determining the existence of essential facilities/inputs:</p> <p>(a) if the facility is controlled by one, or several economic agents with substantial market power or that have been found to be preponderant by the Federal Telecommunications Institute;</p>

	<ul style="list-style-type: none"> (b) if the facility cannot feasibly be replicated by another economic agent due to technical, legal or economic conditions; (c) if the facility is indispensable for the provision of goods or services in one or more markets, and has no close substitutes; (d) the circumstances under which the economic agent came to control the facility; and (e) if regulating access to the essential facility by third parties will bring any efficiency to the market. <p>So far, there are limited cases and resolutions dealing with essential facilities in Mexico, none of them related to the digital economy.</p>
	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>N.A.</p>

Country: South Africa

Contributor: John Oxenham (Primerio International)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>The South African Competition Commission (“SACC”) has not adopted different notification thresholds for notifiable transactions related to digital markets than those used for traditional fields. The SACC has, however, published a report titled ‘Competition in the Digital Economy’⁹⁰ (hereafter, “the Report”) that provides guidance into how the SACC may approach the digital market. In this regard, the Report remarks that the SACC should take a proactive and robust approach in its assessment of competition in digital markets. Further, it notes that the current legislative framework underlying South African merger control is sufficient to allow for transactions in the digital space to be scrutinised by the South African competition authorities.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>According to the South African Competition Act 89 of 1998 (as amended) (“the Act”), parties to small mergers are not obliged, unless required by the SACC, to notify the SACC of such merger and may implement such merger without approval. Small mergers are classified as those falling below the prescribed financial thresholds, namely if the value of the proposed merger is less than R560 million and the annual turnover or asset value of the target firm is less than R80 million. According to the Act, small mergers do not require mandatory approval from the South African competition authorities prior to implementation. The SACC may, however, require a small merger to be notified and approved within six months of the implementation of the transaction if the SACC believes that the small merger is likely to substantially prevent or lessen competition or cannot be justified on public interest grounds.</p> <p>The SACC has published “Guidelines on Small Merger Notification”⁹¹ which give effect to its ability to assess small mergers post-implementation. In this regard, the Guidelines on Small Merger Notification provide that “<i>a small merger of a firm operating in digital</i></p>

⁹⁰ Competition in the Digital Economy, Version 2, accessible at: <http://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf>. Last accessed 19 May 2023.

⁹¹ Final Guidelines on Small Merger Notification, September 2022, accessible at: <https://www.compcom.co.za/wp-content/uploads/2022/09/Guidelines-on-small-merger-notification.pdf>.

	<p><i>market</i> must notify when: the acquiring firms turnover or asset value alone exceeds the large merger combined asset/turnover threshold (currently R6.6 billion). For avoidance of doubt, only the acquiring firms turnover or asset value (without including the target firm) must exceed the large merger combined turnover/asset value threshold; and at least one of the following criteria must be met for the target firm: the consideration for the acquisition or investment exceeds the combined asset/turnover threshold for intermediate mergers (currently R190 million), the consideration for the acquisition of a part of the target firm is less than R190 million threshold but effectively values the target firm at R190 million or more.”</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?</p>
	<p>While <i>de facto</i> still a comparatively novel area of enforcement, the naturally intertwined subject areas of data protection, privacy, consumer protection, and competition appear as prime opportunities for the SACC to rely on its already-strong cooperation networks, both with other domestic South African agencies as well as relying on its Memoranda of Understanding and other bilateral or multilateral agreements with foreign jurisdictions’ enforcement agencies, such as other member states of SADC, the EU and United States, or COMESA.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>The SACC does not currently possess any specific metrics in assessment of market shares in digital markets. However, the SACC notes in the Report that it intends on developing a practice note in relation to assessment of mergers in digital markets.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The effective prohibition of “killer acquisitions” requires an assessment of “potential competition”. In this regard, the SACC assessed a proposed transaction of MIH eCommerce Holdings, at the time trading as OLX South Africa and WeBuyCars, using a traditional competition analysis available under the Act. The proposed transaction was prohibited on the grounds that the merger would provide WeBuyCars an unmatchable</p>

	<p>competitive advantage over rivals in the market for used cars. The SACC ultimately prohibited the proposed transaction on the basis of potential competition as the merger assessment revealed that the acquiring firm had separately considered entry in the market where the target was present. Despite the merging parties proffering conditions, the SACC found that no condition would cure the competition concerns arising from the proposed transaction.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>The Report describes the SACC’s statistics in relation to merger decisions in digital markets. In particular, it is noteworthy that the competition authorities have not imposed competition-related conditions (such as structural or behavioural conditions) on mergers in the digital market. However, the SACC has imposed various public interest conditions on mergers involving parties in the digital space.</p> <p>In terms of the Act, upon assessment of a merger, the SACC will consider whether the merger will raise any competition concerns, or whether the merger can or cannot be justified on substantial public interest grounds (which considers factors such as effects on (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small and medium business, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market; (iv) the ability of national industries to compete in international markets; and (v) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.)</p> <p>In the past 10 years, notable transactions in which the SACC has imposed conditions include:</p> <ol style="list-style-type: none"> 1. Takealot & Kalahari (2014), subject to conditions in relation to employment. 2. Google & Fitbit (2020), subject to conditions in relation to access to manufacturers, data separation between the merging parties and access for third parties.
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>The SACC does not currently have final or draft legislation in this regard.</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe</p>

	the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	We are not aware of any current investigations instituted by against parties for failure to notify mergers in the digital economy.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	The SACC does have the power to undertake an ex-post analysis of a merger. This is prevalent in its powers to assess small mergers. Please see question 2 above for more information in this regard.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	As no enforcement case has been brought to conclusion, there is currently no precedent that would demonstrate that the SACC would apply a different economic analysis from that employed in the traditional economy.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	There is currently no legislative proposals or soft law / guidelines in respect of regulating horizontal agreements within the digital economy.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	In the Report, the SACC indicated that the conventional means for identifying cartel conduct (i.e., dawn raids and corporate leniency programs) are less suitable for digital markets – which may be predominantly internet-based. In this respect, the SACC has expressed that it has (and likely will continue) to outsource the assessment of information to software developers to identify how software applications may be used to set prices.

	Evidently, the SACC intends on treating the fixing of prices through software applications as <i>per se</i> prohibited conduct.
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	While the SACC has expressed in its Report that algorithms may give rise to a new means of cartel conduct (such as algorithmic price fixing), there has not currently been a finding by the Competition Tribunal to assess how the competition authorities would assess such matters.
4.	What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.
	<p>The Act prohibits an agreement between or concerted practice by competitors to fix prices, divide markets or collude on tenders. The Act also prohibits minimum resale price maintenance between parties in a vertical relationship.</p> <p>The SACC has assessed several cases which directly involved ‘hub-and-spoke’ arrangements. From these cases, it is evident that the SACC’s approach to a hub-and-spoke arrangement would be to investigate hub-and-spoke arrangements under the restrictive vertical practices and/or abuse of dominance provisions as cartel conduct requires the SACC to show or prove “meeting of minds or consensus” between the parties, a particularly higher standard. In this respect, the SACC would rather investigate a case of minimum resale price maintenance as opposed to a cartel case, if the resale price maintenance is enforced by sanctions on the “spokes” for non-compliance with the instructions of the “hub.</p> <p>Notwithstanding the above, the SACC can still pursue the “spokes” through its cartel conduct provisions. In such instances, however, the SACC may allege that the spokes are involved in a concerted practice (instead of alleging an agreement between the spokes). Notably, such an investigation would not seek to prosecute or fine the “hubs” as they are not in a horizontal relationship with the spokes.</p>
5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.

	We are not currently aware of any leniency applications in respect of cartel conduct in the digital market.
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	South Africa’s existing regulatory framework is sufficient in capturing cartel conduct within digital markets. What is necessary, however, is the implementation of new tools to assist the SACC is assessing if and how software applications are being used to achieve horizontal <i>per se</i> contraventions.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	As is evident from the SACC’s Online Intermediation Platforms Market Inquiry Terms of Reference (“OIPMI ToR”), the SACC is focusing on: price parity clauses (“MFN”); exclusive contracting; loyalty incentives; and conglomerate leveraging to consider potential effects of these non-price vertical restraints.
2.	What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	While there are not currently any exclusive dealing cases specific to digital markets, South Africa’s Competition Tribunal and Competition Appeal Court have diluted the test for abuse of dominance. ⁹² Accordingly, the risk that firms are considered dominant,

⁹² Two recent decisions, the so-called “price gouging decisions” confirmed that even firm’s which possess low market shares can still be considered dominant. Although these two decisions were decided during the extreme market conditions brought about by the Covid-19 pandemic and the Tribunal was at pains to point out the context in which these decisions were decided, there are certain principles from those decisions which are relevant to all market power assessments. In Competition Commission of South Africa v Dis-Chem Pharmacies Limited the Tribunal found it unnecessary to conduct a market share analysis as Dis-Chem’s market power was directly inferred from its conduct. The Tribunal held that Dis-Chem’s ability to significantly increase the prices of face masks all the while increasing sales volumes was direct evidence of Dis-Chem having market power. In Babelegi Workwear and Industrial Supplies CC v Competition Commission of South Africa, the Tribunal held that a firm’s ability to increase prices within a short period of time is indicative of dominance and that market power or dominance must be determined with reference to context.

	<p>even if they do not satisfy the statutory thresholds for dominance, has significantly increased.</p> <p>In light of the above, even where a firm within a digital market performs an exclusionary and/or exploitative act, there is a risk that they may be considered to be dominant by virtue of their conduct alone.</p>
3.	What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?
	<p>As is evident from the OIPMI ToR, the SACC has adopted a strict stance against price parity clauses. Notably, the SACC states: <i>“it needs to be expressly removed from contracts to prevent self-enforcement and should not form part of leading platforms in the future.”</i>⁹³</p> <p>From what can be gleaned thus far, the SACC views wide price parity clauses as preventing businesses from offering lower prices on other platforms and narrow parity prevents businesses from offering lower prices on their own direct online channels.</p> <p>Evidently, the SACC has not expressed more of a concern towards either wide or narrow price parity clauses.</p>
4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	<p>We are not aware of any investigations and/or sanctions being imposed in respect of MFNs / price parity clauses within the digital marketplace.</p>
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
	<p>See question 3 above.</p>

In this regard, the Tribunal states that even small firms may have market power. In emphasis of the point that even small firms may be considered dominant, Babelegi had less than a 5% market share and was still deemed to have had market power as it had the ability to profitably increase prices and mark-ups without providing any cost justifications. (our emphasis)

⁹³ OIPMI, at paragraph 21. Available at: <https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-MPR-Chapter-9-Findings-and-Recommendations.pdf>

6.	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>There are no current exemption mechanisms specific to vertical agreements within the digital economy. Rather, exemption applications may only be made in respect of sectors designated by the Minister of Competition, Trade and Industry – of which E-commerce is not one.</p>
7.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>Not applicable.</p>
IV.	<p>Abuse of market dominance</p>
1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>The SACC has not published any formal or draft legislation or other guidelines pertaining to abuse of dominance in the digital economy. The SACC’s Report will, however, no doubt form the basis of the SACC’s regulatory approach in contemplating amendments in the future.</p> <p>The SACC has commenced with its proposed strategy in relation to the digital market as laid out in the Report. In this regard, the SACC envisioned ‘<i>mapping the digital landscape</i>’ as the first step to inform its future intervention in the market and to ascertain the focus of a Market Inquiry. Consequently, the SACC has commented its OIPMI, wherein it obtained an extension until 29 June 2023 for the finalisation thereof. Thereafter, the Report provides that the SACC will engage in:</p> <ol style="list-style-type: none"> 1. <i>“Proactive investigations against conduct, by dominant online firms, that may be excluding rivals and entrenching dominance;</i> 2. <i>Issue guidelines, where appropriate, in respect of conduct which the Commission deems likely to contravene the Competition Act;</i> 3. <i>Institute a market inquiry into digital markets; and</i> 4. <i>Global cooperation and coordination, with other competition agencies, in respect of addressing market conduct of firms such as Google, Facebook and</i>

	<i>Apple which also dominate domestically, and potentially also second-tier globally important digital firms such as Uber, Airbnb, Bookings.com.”</i>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	<p>There is a memorandum of understanding (“MoU”) between ICASA (Independent Communications Authority of South Africa) and the SACC that aims to foster cooperation in their respective areas of jurisdiction. This MoU establishes a shared commitment to promote fair competition, consumer protection, and the efficient functioning of the telecommunications sector in South Africa.</p> <p>Under this agreement, ICASA and the SACC agree to exchange information and expertise, to enable the agencies to identify and address anti-competitive practices within the telecommunications industry.</p> <p>The SACC, however, has primary jurisdiction over competition matters.</p>
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	There is no current legislation that governs certain platforms separately for purposes of establishing market power.
i.	Please describe how “platform” is defined for these purposes.
	Although the SACC does not have legislation providing for a separate test for market power for platforms, the Report defines a platform as ‘ <i>A digital service that facilitates interactions between two or more distinct but interdependent set of users (whether firms or individuals) who interact through the service via the internet</i> ’.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	The SACC does not currently have final or draft legislation in this regard.
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	The SACC does not currently have final or draft legislation in this regard.

iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	The SACC does not currently have final or draft legislation in this regard.
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	The SACC does not currently have final or draft legislation in this regard.
vi.	Please summarise any penalties provided for non-compliance.
	The SACC does not currently have final or draft legislation in this regard.
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	The SACC does not currently have final or draft legislation in this regard.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	The SACC does not currently have final or draft legislation in this regard.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	The SACC does not currently have final or draft legislation in this regard.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?

	The SACC does not currently have final or draft legislation in this regard.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	The SACC does not currently have final or draft legislation in this regard.
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p>The SACC does not currently have final or draft legislation in this regard. The Report, however, provides for the SACC’s view on this. The SACC has noted data portability in its Report as a “<i>key area for regulation that has been identified by stakeholders</i>”. The SACC noted that the government needs to ‘<i>introduce frameworks that aim to promote data openness, portability and interoperability. Such frameworks could be introduced in the manner of legislation requiring parties to share information or through some form of cooperative arrangement.</i>”</p> <p>The SACC has supported this view by providing in the Report that voluntarily sharing information will reduce barriers to entry for small to medium-size enterprises. The SACC has also acknowledged that in making such legislation regard would have to be given to ensure that innovation is not stunted as it may discentivise firms from investing in data gathering that would need to be shared in circumstances where there are no anti-competitive concerns.⁹⁴</p>
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.
	<p>Section 8(1)b) of the Act provides that it is prohibited for a dominant firm to “<i>refuse to give a competitor access to an essential facility when it is economically feasible to do so</i>”. An essential facility is defined in the Act as “<i>an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers.</i>”</p> <p>There is case law in relation to the refusal to supply of metropolitan backhaul infrastructure. In <i>Telkom</i>⁹⁵, the Tribunal found that Telkom was guilty of refusing</p>

⁹⁴ Report page 49.

⁹⁵ Competition Commission v Telkom South Africa Ltd 11/CR/Feb04

	<p>competitors access to an essential facility. More noteworthy, is that the Tribunal confirmed that: “a <i>dominant firm’s requirement that a downstream competitor accede to unreasonable conditions in order to obtain supply could nevertheless still amount to a refusal to supply. This is sometimes referred to as a constructive or effective refusal to supply, because the conditions of supply are so burdensome or were aimed to extract concessions which it would otherwise not be able, or so unreasonable as to render the purchase of the input uneconomical. For <u>sectors such as health, banks, stock markets, financial services and manufacturing, where the accuracy and currency of data are critical, even a slight delay or degradation in quality in the provision of telecommunications infrastructure could amount to a constructive or effective refusal.</u>”</i></p> <p>⁹⁶</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>Not applicable.</p>

⁹⁶ The Competition Commission v Telkom South Africa Ltd 11/CR/Feb04 par 90.

Country: South Korea

Contributor: Brian Ryoo, Gene-Oh Kim (Kim & Chang)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>There is no threshold specific to the digital economy.</p> <p>In Korea, a business combination of a certain size or larger is subject to the reporting obligation, and the thresholds are as follows: (i) the assets or sales of the Applicant are KRW 300 billion or more, and (ii) the assets or sales of the Target are KRW 30 billion or more. In this case, even if a company with assets and sales of KRW 30 billion or more merges with a company with assets and sales of KRW 300 billion or more, the reporting obligation arises and is calculated by aggregating the assets and sales of the company which maintains its status as an affiliate before and after the merger.</p> <p>On 21 October 2022, the Korean Fair Trade Commission (“KFTC”) issued a press release titled “Promotion of Competition in the Monopoly/Oligopolistic Online Platform Market,” and announced its plan to enact the “Guidelines for Reviewing Monopoly/Oligopolism of Online Platforms (Ruling)” to effectively regulate abuse of monopolistic power in the platform sector in response to concerns over monopoly/oligopolism of online platforms. In line with this, the KFTC plans to amend the “Guidelines for Reviewing Monopoly/Oligopoly of Online Platforms (Notification)” to effectively review mergers and acquisitions (“M&A”) for the expansion of large platforms. The KFTC is expected to strengthen market definition, market concentration, economic analysis, etc. by converting “conglomerate business combinations” of platform companies, which have been mostly processed as simplified review (based on fact-finding within 15 days and review completed), into the general review process. In addition, the KFTC will consider the possibility of transfer of control, foreclosure through loyalty to customers or data integration, etc. during the review process. The KFTC has announced plans to make further revisions to the Merger Review Guidelines after reviewing additional market research.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>In December 2021, the KFTC introduced a new merger filing standard based on the transaction size, in addition to the existing merger filing standard based on the size of parties. It is believed that this change was introduced in response to cases of non-filing in transactions involving smaller target companies, including the business combination between Facebook (now Meta) and WhatsApp in 2014. Under the revised threshold,</p>

	<p>even if a business combination with a value of less than KRW 30 billion is merged, such merger may be subject to reporting if (i) the transaction amount paid in return for the merger is KRW 600 billion or more, and (ii) the merged entity is active in the Korean market at a significant level.</p> <p>(i) means (1) in case of share acquisition/ownership, the amount equal to the value of the shares acquired/owned plus the assumption liabilities, (2) in case of a merger, the amount equal to the shares to be delivered as consideration for the merger plus the assumption liabilities and the merger grants, (3) in case of business transfer, the purchase price plus the assumption liabilities, or (4) in case of participation in the establishment of a company, the amount of contribution by the largest investor under the joint venture agreement.</p> <p>(ii) means (1) the Company has sold goods or services to more than 1 million persons per month in the domestic market during the immediately preceding 3 years (in case of content such as webtoons, games, etc. or Internet-based services such as SNS, etc., this refers to the case where the number of monthly net users or net visitors exceeds 1 million persons per month), or (2) the Company has continuously owned and utilised domestic research facilities or research personnel for the immediately preceding 3 years and has spent more than KRW 30 billion per year on research facilities, research personnel, research activities, etc. With respect to digital economy, the number of users may be considered.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>Depending on the industry, the KFTC may seek opinions from sectoral regulators (such as the Korean Communications Commission on issues involving the digital economy), but there is no standing requirement.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>The KFTC may use different metrics depending on the transaction, including revenues, the value of intermediated transactions, and the number of users.</p> <p>For example, with respect to SK Telecom's acquisition of 30% of the shares in the Content Alliance Platform ("CAP") and CAP's acquisition of "Oksusu" in the SK Broadband OTT video service business in 2019, the KFTC used the monthly active user ("MAU") figures as the basis for its market share and market position. In the Delivery</p>

	<p>Hero/Woowa Brothers transaction, the KFTC calculated market shares and positions based on the value of transactions.</p> <p>As discussed under Question 2 above, according to the KFTC’s Business Combination Reporting Guidelines, if the merged entity is active in the Korean market at a “significant” level, the merger may be subject to the KFTC’s reporting requirements.</p>
5.	Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	<p>There have been no such cases in the digital economy, but the KFTC’s scrutiny of transactions in the digital economy is expected to intensify. For example, as discussed under Question 1, transactions that are currently reviewed as conglomerate mergers, such as killer acquisitions of nascent competitors, may be held to higher scrutiny.</p>
6.	If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?
	<p>The following are recent cases in the digital sector in which conditions were imposed:</p> <p>On 20 August 2019, with respect to SK Telecom’s acquisition of 30% shares in the Content Alliance Platform (“CAP”) and CAP’s acquisition of “Oksusu” in the SK Broadband OTT video service business, the KFTC issued behavioural I corrective measures to prevent any anti-competitive concerns in the OTT market and promote innovative competition in new industries. In this case, the KFTC conducted an in-depth review into, not only the horizontal integration between major OTT service providers, but also the vertical integration between the three major terrestrial broadcasters, which are strong content providers, and OTT service providers.</p> <p>On 28 December 2020, the KFTC conditionally approved the business combination whereby Delivery Hero SE, a German global delivery app company with Delivery Hero Korea Co., Ltd. in Korea, will acquire about 88% of the shares in Woowa Brothers Co., Ltd. (“Baemin”), the No. 1 delivery app company in Korea. The KFTC found that there is a significant risk that the online brokerage service of delivery apps, such as restaurants, consumers, and deliverymen, may cause anti-competitive effects to various stakeholders in the market. Accordingly, the KFTC imposed both structural and behavioural corrective measures to require Delivery Hero SE to sell its entire stake in Delivery Hero Korea to a third party within six months from the date of receipt of the corrective order.</p>
7.	In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements

	applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?
	<p>No, not currently.</p> <p>However, if the KFTC amends the Merger Review Guidelines in accordance with the KFTC’s “Promotion of Monopoly/Oligopolistic Online Platform Market,” online platform M&As are expected to be excluded from the simplified review process, which will be conducted without a competitive assessment, and will be subject to stricter review in terms of market definition, market concentration, and economic analysis.</p>
8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.
	<p>The KFTC has investigated failure to file in two cases in 2015, three cases in 2016, one case in 2017, one case in 2018 and one case in 2019. The KFTC has noted that while most companies/transactions comply with the reporting obligations, a small number of transactions involving interlocking officers and an insignificant impact on the ownership or governance structure of the transacting parties go unfiled every year.</p> <p>Failure to file a report may be subject to an administrative fine of up to KRW 100 million (a business entity, a business entity’s organisation , or a public interest corporation which controls a company belonging to a business group subject to disclosure or is a specially related person of the same person) or up to KRW 10 million (an executive officer or employee of a company, a business entity’s organisation , or a public interest corporation, or any other interested person).</p>
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	<p>In general, the KFTC only reviews transactions that trigger filing obligations and are thus reported to the KFTC. However, it cannot be completely ruled out that the KFTC may decide to conduct a review on a discretionary basis due to concerns over anti-competitiveness.</p> <p>In theory, the KFTC may effectively revise an original merger decision due to anti-competitive concerns, but as far as we know, there has been no such case, and once a business combination is approved, it would be difficult to revise it unless there are special circumstances, such as another transaction occurring in the same market.</p>
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?

	<p>The KFTC’s review typically involves quantitative analyses of anti-competitive effects. Such analysis has also been conducted in recent cases of mergers in the digital sector.</p> <p>For example, in the Delivery Hero/Woowa Brothers transaction, the KFTC conducted (i) a critical sales reduction analysis (a method of defining the market by comparing the actual reduction rate of sales and the critical sales reduction rate that occur when the price of all delivery apps (consumers: coupon discounts, restaurants: commissions) is increased by 5-10%), and (ii) a total diversion rate analysis (a method of defining the market by comparing the actual diversion rate and the critical diversion rate that a customer switches to another delivery app when the price of a certain delivery app (Baemin or Yogiyo) is increased by 5-10%). To assess anti-competitiveness, the KFTC conducted a GUPPI analysis (a typical methodology that analyses incentives for post-merger price increase in differentiated markets) and a simulation analysis of departure (an analysis of benefits and costs arising from the use of delivery apps in case of increase of fees for BDMJ and YGY and predicted whether restaurants will continue to use delivery apps after the fee increase).</p> <p>In addition, in March 2023, with respect to the acquisition of 70% of shares in Interpark Co., Ltd., a Korean commercial transaction company, by Yanolja Co., Ltd., an online travel (“OTA”) platform company, the KFTC conducted an upward pricing pressure analysis (“UPP”: an economic analysis method mostly used for merger review, which quantitatively analyses the possibility of price increase after merger by taking into account diversion rate, margin rate, increased efficiency, etc.) to seek opinions from interested parties, conduct a consumer survey, and quantitatively analyse anti-competitive effects.</p>
<p>II.</p>	<p>Horizontal agreements</p>
<p>1.</p>	<p>Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?</p>
	<p>There are no legislative proposals, soft laws, or guidelines that target horizontal agreements in the digital sector, but the KFTC announced the “Guidelines for Reviewing Collaborative Acts” as a general principle for handling unfair collaborative acts. The notification stipulates that the speed of innovation by the collusive act, etc. shall be considered as a factor to determine whether the collusive act offsets the anti-competitive effect. In this regard, the dynamics of digital economy may be considered in the process of analysing and weighing the efficiency-enhancing effects.</p> <p>More specifically, according to the above notification, the illegality of a collusive act is reviewed in four stages: (i) analysis of the nature and market of the collusive act; (ii) analysis of anti-competitive effects; (iii) analysis of efficiency-enhancing effects; and (iv) weighing and balancing of anti-competitive effects and efficiency-enhancing effects. With respect to the efficiency-enhancing effects analysis, it is stated that “a collusive act may increase economic efficiencies by (i) economies of scale, (ii) economies of</p>

	<p><i>scope, (iii) risk allocation, (iv) increased speed of innovation through joint use of knowledge and experience, and (v) reduction of overlapping costs.”</i></p>
<p>2.</p>	<p>Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency’s approach.</p>
	<p>The KFTC has not issued any formal guidance on its analysis of collusion or countermeasures in the digital field. However, the KFTC has set forth criteria for determining collusion that interferes with the business activities of potential competitors in collusion cases among pharmaceutical companies, which may have implications for the digital sector.</p> <p>In the above case, the two pharmaceutical companies each produced a pharmaceutical with the same main ingredient, and a patent dispute arose. Pharmaceutical Company A agreed to discontinue the production, sale, and future development of the generic drug containing the same ingredients as the pharmaceutical drug in question, and the patent dispute was closed, instead of providing economic benefits such as exclusive sales rights and cash incentives for the pharmaceutical drugs it produced. In this regard, the KFTC ruled that pharmaceutical company B was in a potential competitive relationship even if it was not actually developing or selling the pharmaceuticals manufactured by pharmaceutical company A, and that such agreement restricted pharmaceutical company A from entering the relevant pharmaceutical market, resulting in anti-competitive effects and undermining consumer welfare. As such, this decision was affirmed by the court.</p> <p>If potential competitors reach an agreement in the digital field in the future, the KFTC may find such act as an unfair collusive act by analysing factors similar to the ones described above.</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>To date, there are no precedents or materials demonstrating the KFTC’s position on data-driven cartel or algorithm collusion.</p> <p>However, in 2018, a competition status survey and comparative study in the field of big data was conducted at the request of the KFTC, and the research service report explains that if (i) a competitor in the data trading market interferes with a new enterpriser’s participation in the market for products that use data as inputs, or (ii) if a</p>

	competitor refuses to allow a third party to use the data pool in order to exclude an existing enterpriser from the market, it may also constitute an unfair collusive act.
4.	What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.
	<p>There have not been any cases in which the KFTC specifically ruled on hub-and-spoke collusion in the digital sector.</p> <p>However, in a collusion case among the seven retail bearing vendors, the KFTC imposed an administrative fine by deeming it as a type of hub and spoke collusion and deeming it as an unfair collusive act in that one of the vendors communicated with other vendors regarding price increase and maintenance.</p> <p>In addition, in a case where four hypermarkets used suppliers to exchange and share information on the sales prices of Lunar New Year holiday gift sets via phone, interviews, and emails, the KFTC suspected that the four hypermarkets determined the prices of their Lunar New Year holiday gift sets based on the exchange of such information, and investigated whether this constituted a hub and spoke collusion. However, in this case, the KFTC closed the deliberation process on the grounds that there was insufficient evidence to prove the agreement between the hypermarkets.</p>
5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	<p>The KFTC does not publicly disclose information on leniency, and it is difficult to confirm whether there was any leniency application for collusion in the digital field, but the general legal principles are as follows:</p> <p>Under the Monopoly Regulation and Fair Trade Law (“FTL”), a leniency applicant of an unfair collusive act may be exempted from corrective measures or administrative fines or be exempted from criminal referral. Specifically, the first leniency applicant will be fully exempt from administrative fines and corrective measures, while the second leniency applicant will be subject to a 50% reduction in administrative fines and corrective measures. However, if the Company forces other business entities to participate in the unfair collusive act against their will or prohibits such act, or if the Company repeatedly engages in the unfair collusive act on two or more occasions within five years, the Company is not eligible for the leniency.</p>
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?

	No.
III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	<p>Vertical restraints in the digital sector that the KFTC has sanctioned in recent years are including the following:</p> <p><u>Exclusive dealing</u></p> <ul style="list-style-type: none"> In December 2007, the KFTC found that Interpark Gmarket Co., Ltd.’s exclusion of a seller from the “main exposure promotion,” which exposes the seller’s products on the initial screen of its web page, was an unfair trade practice to exclude competitors, in case a seller operating in its open market trades with a competitor, such as (i) lowering the sales price at its open market or raising the sales price at open markets of other companies, and (ii) mainly trading with Interpark Gmarket and suspending trades with other companies.⁹⁷ <p><u>Customer or territorial restraints, tying or transactions with condition</u></p> <ul style="list-style-type: none"> In August 2012, the KFTC notified distributors of small household appliances that PHILIPS would prohibit sales at open markets on the Internet and would impose sanctions such as suspension of release and increase in supply price in case of violation, and ruled that such act constitutes an unfair transaction with restrictive conditions.⁹⁸ On the other hand, the KFTC found that the act of suspending sales at hypermarkets, requesting product recalls, suspending the supply of GORE-TEX® fabrics, and terminating license agreements against customers that violated the Restriction on Distribution Channels, constituted an unfair transaction with restrictive conditions.⁹⁹ <p><u>Discrimination</u></p> <ul style="list-style-type: none"> In November 2018, the KFTC imposed sanctions on Golf Zone, which develops and manufactures golf simulators and provides golf content online, for unfairly

⁹⁷ For reference, in this case, the Respondent’s market dominant position was recognized and the Respondent was sanctioned for abuse of market dominance.

⁹⁸ The Supreme Court, however, found such restriction to be unlawful on the grounds that manuals on how to use PHILIPS’ M/S and small household appliances could be provided online and the actual intent behind imposing such restriction was to reduce the sales price of their products (Supreme Court Decision No. 2013Du17435 rendered on June 19, 2017)

⁹⁹ However, the Supreme Court ruled that Gore’s act could not be deemed to have “potential to harm fair trade,” by finding maintained premium brand value to be a justifiable cause. (Rendered on August 25, 2022, No. 2020Du35219).

discriminating against merchants and non-merchants by supplying new golf simulators only to merchants.

- In January 2021, the KFTC imposed sanctions on Naver for discriminating against its open market service providers' products and competing open market service providers' products by discriminating against Naver's search ranking based on whether Naver is an open market service provider.
- In 2023, the KFTC sanctioned Kakao Mobility's act of adjusting its allocation algorithm to preferentially allocate franchise drivers over non-franchise drivers; preferentially allocating franchise drivers based on the acceptance rate even though the acceptance rate of franchise drivers is inevitably higher than that of non-franchise drivers due to the structure; and, excluding or reducing the number of short-distance calls for franchise drivers in order to maximise the freight rate of franchise drivers, as unfair discrimination of trade terms.

Interference with management among abuse of superior bargaining position

- Delivery Hero Korea Co., Ltd unilaterally implemented the lowest price guarantee system for the delivery app Yogiyo, and the delivery restaurants subscribed to the app, prohibiting them from selling at a lower price in other sales channels, such as direct phone orders to restaurants and orders via other delivery apps. Delivery Hero Korea Co., Ltd managed whether the lowest price guarantee system was being complied with on its own, and terminated agreements in cases of non-compliance with the guarantee system after detecting and requesting correction of violating companies. Such acts were deemed to directly restrict the prices (transaction terms) of the delivery restaurants by sales channel, and were sanctioned as "management interference," a type of abuse of superior bargaining position.

Aside from the FTL, there are other special laws to protect business operators that are inferior in vertical relationships, such as the Fair Transactions in Subcontracting Act, the Fair Agency Transactions Act, and the Fair Transactions in Franchise Business Act.

Meanwhile, an additional regulation that may be applicable to digital companies, albeit not in the area of competition law, is the amendment to the Telecommunications Business Act that took effect on March 15, 2022, which prohibits "forcing in-app payment" by prohibiting app markets such as Google and Apple from forcing app developers to use certain payment methods.

Although there are no other special laws on vertical relationship in the digital platform sector, there are ongoing discussions to the effect that it is necessary to regulate the types of prohibition of abuse of superior bargaining position (coercion of purchase, coercion of provision of economic benefits, provision of disadvantages, interference with management, and transfer of unfair damages) that frequently occur in online platform transactions under the FTL according to the characteristics of the platform business model, and many relevant bills are pending in the National Assembly.

Although there are ongoing reports that the government is also pursuing a bill, there are disputes among government ministries over the jurisdiction over the regulation of online platforms, so it is necessary to keep an eye on the progress of the legislation.

<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The KFTC’s enforcement of exclusive dealings have mainly involved domestic platforms, and there has been no case where the KFTC sanctioned non-dominant platforms on the ground of exclusive dealing by platform operators.</p> <p>In both of the cases (A) and (B) below, abuse of market dominance (unfair exclusion of competitors) was applied, and in the case of (B), exclusive dealing was also applied to the same act.</p> <p>(a) The KFTC ruled that, if a seller in the eBay-Gmarket’s open market trades with a competitor, (i) the seller should lower the sales price at the eBay-Gmarket’s open market or raise the sales price at other companies’ open markets, and (ii) the seller should mainly trade with the eBay-Gmarket and stop trading with other companies, and if the seller refuses to comply with the request, the act of excluding the seller from the “main exposure promotion,” which exposes the seller’s products on the initial screen of the eBay-Gmarket’s web page, constitutes an unfair exclusion of competitors.</p> <p>(b) In January 2021, the KFTC imposed sanctions on Naver Co., Ltd. (“Naver”) on the ground that Naver’s act of prohibiting Naver’s provision of information on the sale of real estate to a third party, when entering into an agreement with a content provider (“CP”), constitutes an act of blocking multi-homing, and that Naver’s act constitutes an unfair trade practice, such as an act of dealing with restrictive conditions (exclusive dealing).</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>In 2021, the KFTC reviewed the MFN clauses in the agreements executed between the five domestic and foreign hotels’ Online Travel Agency operators, and required them to correct the MFN clauses. The KFTC distinguished between a broad range of MFNs and a narrow range of MFNs and required them to delete the MFN clauses from their terms and conditions or to amend the MFN clauses to a narrow range of MFNs.</p> <p>At the time, the KFTC mentioned in its press release the issue of free riding by lodging companies as the reason for recognising the narrow range of MFN clauses, and explained that even if there is a narrow range of MFN clauses, customers can make reservations at a lower price than OTAs by phone, in person, or via email.</p> <p>In January 2023, the KFTC issued the Review Guidelines on Abuse of Market Dominance by Online Platform Service Providers (the “Guidelines”). Under the Guidelines, MFNs by dominant platforms are classified as follows:</p> <p>(A) Narrow MFN refers to setting the price and other transaction terms applied to the relevant online platform to be equivalent to or better than the price and</p>

	<p>other transaction terms applied to the online platform business user’s own distribution channels (i.e., website, telephone order system, and others operated by the online platform business user).</p> <p>(B) Wide MFN refers to setting the price and other transaction terms applied to the relevant online platform to be equivalent to or better than the price and other transaction terms applied to all distribution channels, including the online platform business user’s own distribution channels and other online platforms.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>Delivery Hero Korea Co., Ltd’s management interference case mentioned above is a case where the application of the MFN clause was at issue. In this case, Yogiyo demanded that delivery restaurants within its delivery app be cheaper than other delivery apps.</p> <p>The KFTC acknowledged the Respondent’s superior bargaining position in the case at hand in light of the fact that delivery restaurants have no choice but to multi-homing in order to secure more customers due to the trend of single-homing by general consumers, and the nature of the delivery app market where the network effect is strong, and ruled that the minimum price guarantee directly limited the transaction terms, i.e., the sale price of delivery restaurants by sales channel.</p> <p>The Respondent argued that the minimum price guarantee system is an ordinary trade practice, but the KFTC rejected such argument on the grounds that <i>“it is difficult to acknowledge the Respondent’s argument that it is an ordinary trade practice, considering that (i) the minimum price guarantee system or the operation of fixed rate products is not an indispensable means or ordinary trade practice in the delivery app market; (ii) the minimum price guarantee system guarantees that a business operator directly sells its products at the lowest price, not that other persons’ selling prices become the lowest price like the Respondent; and (iii) most of the cases of open markets presented by the Respondent took place for a short period of time due to the nature of events, and a number of cases where the hotel reservation platform’s retail price has been subject to preferential treatment due to violation of laws abroad.”</i></p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>The Review Guidelines on Abuse of Market Dominance by Online Platform Service Providers (applicable to a dominant platform) explain the competitive harm and potential efficiency of MFN as follows:</p> <p><u>Anti-Competitive Concerns</u></p>

	<p>While a Narrow MFN only restricts competition between the relevant online platform and the distribution channels operated by the online platform business user, a Wide MFN poses the concern of restricting competition in all distribution channels including other online platforms, and thus can be found to have greater anti-competitiveness.</p> <p>(A) Wide MFN can restrict free price competition between online platforms. Moreover, there is a concern that a Wide MFN can enhance entry barriers into the online platform market by making it difficult for new platforms to secure users with lower prices in the early stages of market entry.</p> <p>(B) In a situation where competition in the relevant market has been restricted, such as absence of other distribution channels that can effectively compete with the relevant online platforms than the online platform business user's own distributional channels, a Narrow MFN can have heightened anticompetitive effects.</p> <p><u>Possibility of Efficiency Gains</u></p> <p>In the meantime, where the demand for MFN prevents free-riding by the online platform business user on the promotional efforts of the online platform service provider and promotes investments specialised to the transaction relationship, among others, there could be efficiency-enhancing effects.</p>
<p>6.</p>	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>Although it is not unique to the digital economy, the KFTC applies a safe harbor to the types of unfair trade practices that are reviewed mainly based on anti-competitiveness, and does not apply a separate safe harbor to the types of practices that are reviewed mainly based on unfairness (i.e., cases where an undesirable means of competition, other than the price or quality of goods or services, is used, or fair trade is undermined by hindering the counterparty's free decision-making or forcing disadvantages).</p> <p>While the assessment is ultimately based on the specific restraint under investigation, for certain types of unfair trade practices a safe harbor is available for enterprises with market shares not exceeding 10 percent (or if the annual sales of the relevant enterpriser is less than KRW 5 billion, if it is practically impossible or significantly difficult to calculate market share), including refusal to deal, discriminatory terms, price discrimination, exclusive dealing and territorial or restraint.</p>
<p>7.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
<p>IV.</p>	<p>Abuse of market dominance</p>

<p>1.</p>	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>The FTL prohibits abuse of market dominant position and unfair trade practices by business entities, including digital companies. The KFTC’s Guidelines for Reviewing Abuse of Market Dominant Position (the “Market Dominance Guidelines”) apply to digital companies as well.</p> <p>On 12 January 2019, the KFTC announced that it would enact and implement the Guidelines for Reviewing Abuse of Market Dominant Position by Online Platform Providers (the “Platform Dominance Guidelines”). These Guidelines apply when examining whether an online platform service provider’s business activity constitutes an abuse of market dominant position under the FTL (Article 5 of the FTL). While the Platform Dominance Guidelines are not legally binding on the KFTC or courts, it is highly likely that the KFTC will actively consider this when enforcing the FTL against online platform service providers.</p> <p>In addition, as the need to regulate online platforms has increased, various legislative discussions on the regulation of online platforms have continued. The ‘Act on Fairness of Online Platforms’, initiated by the KFTC, and the ‘Act on the Protection of Users of Online Platforms’, pursued by the Korea Communications Commission, have been discussed. However, as the new government pursues self-regulation through private organisation rather than influential regulation through legislation to establish a dynamic and innovative platform ecosystem, discussions on online platform-related bills have been fully reviewed.</p> <p>However, recent media reports (as of May 2023) suggest that the KFTC may be pursuing a bill on online platforms, which shifts its stance on self-regulating online platforms and highly regulates large platform companies. Therefore, it would be necessary to closely monitor the progress of legislation.</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>The KFTC is the agency that is primarily responsible for enforcing competition laws in the digital markets. Since November 2019, the KFTC has set up the Information and Communications Technology Task Force (“ICT Task Force”) to deal with major ICT cases and has focused on policing against abuse of power by online platforms. On 27 January, 2022, the KFTC reorganised the existing ICT Task Force team into a “Digital Market Response Task Force.” In order to strengthen its presence in the digital sector, the KFTC newly established a division dedicated to digital markets.</p>

	<p>Other agencies also have regulatory authority in the digital sector. The Korea Communications Commission (the “KCC”) regulates broadcasting and communications entities, including online platforms which use mobile networks, and the Personal Information Protection Commission (the “PIPC”) is responsible for data protection and privacy issues. According to the “Plan for Development of Digital Platforms”, announced by the administration on 29 December 2022, relevant agencies, including the KFTC, the KCC, and the PIPC, would form a “pan-government platform consultative body” to jointly promote fair competition and consumer protection in the digital sector.</p>
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	<p>The FTL (in particular, Article 5) governs the conduct of all business entities with market power, including digital platforms. In addition, the Online Platform Review Guidelines apply when assessing whether an online platform operator’s business practices violate abuse of market dominance. The Online Platform Review Guidelines also apply to cases where a foreign business operator affects the domestic market through an act performed overseas, irrespective of whether the foreign business operator has a business base in Korea, or the counterparty is a domestic business operator or a consumer (Section I. 2. of the Guidelines).</p>
i.	Please describe how “platform” is defined for these purposes.
	<p>According to the Online Platform Review Guidelines, “online platforms” refer to electronic systems established using information and communications facilities to interact with different groups of users, such as transactions and information exchanges (Section I.3.A.(1) of the Review Guidelines). The Guidelines define “online platform services” to include online platform brokerage services, online search engines, online social networking services, digital content services such as videos, operating systems (“OS”), and online advertising services (Section I.3.A.(2) of the Guidelines).</p>
ii.	What are the criteria used to determine whether a platform falls under the regime?
	<p>The FTL regulates platforms, suppliers, or customers in a particular market that can determine, maintain, or change the prices, quantity, quality, or other terms and conditions of trade individually or jointly with other enterprises.</p> <p>When determining if an enterprise has a dominant position in a relevant market, several factors must be considered, including:</p> <ul style="list-style-type: none"> • market share; • existence and extent of market barriers; • relative size of its competitors; • the likelihood of collusion among competitors;

	<ul style="list-style-type: none"> • the existence of adjacent markets; • the possibility of foreclosure; • the overall financial capacity of the relevant company; and • other relevant factors such as the ability of customers to switch to other sources of supply, and the relevant company’s research and development capacity and IP portfolio, etc. <p>A dominant market position will be presumed if:</p> <ul style="list-style-type: none"> • the relevant company has a market share of at least 50 per cent in the relevant market; or • the combined market share of the relevant company and up to two other players in the relevant market is at least 75 per cent (excluding players with 10 per cent or less market share). <p>In addition, according to the Online Platform Review Guidelines, when determining whether an online platform service provider is a market dominant service provider, it is possible to consider the market entry barrier depending on the effect of cross-networks, the online platform service provider’s influence as a gatekeeper, the ability to collect, retain and use data, and the possibility of the emergence of new products and services, taking into account the characteristics of online platforms (Section II.3.B of the Review Guidelines).</p> <p>In addition, the Guidelines provide that alternative variables, such as the number of users, frequency of use, etc., of online platform services, in addition to sales, can be used to calculate market share, which serves as the basis for estimating market dominance. For example, in order to calculate the market share of online search services, which are nominally provided free of charge, the number of users, number of visitors, number of searches, duration of stay, page view, etc. may be the standard (Section II.3.B.(6) of the Online Platform Review Guidelines).</p>
<p>iii.</p>	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>There are six types of specified abusive behaviours by dominant enterprises that are explicitly regulated by Article 5-1 of the FTL:</p> <ul style="list-style-type: none"> • Price abuse (conduct unreasonably determining, maintaining, or changing the price of commodities or services). • Output control (conduct unreasonably controlling the sale of commodities or provision of services). • Obstruction of business (conduct unreasonably interfering with the business activities of other enterprises). • Obstruction of new entry (conduct unreasonably obstructing the participation of new competitors).

	<ul style="list-style-type: none"> • Exclusion of competitors (conduct unreasonably excluding competitive enterprises). • Infringement of consumer interests (conduct that might considerably harm consumer interests). <p>Meanwhile, the Online Platform Review Guidelines provide examples of the criteria for reviewing illegality for the types of representative acts that may occur in the field of online platforms (but do not exclude the application of the law to acts of online platform operators that are not illustrated in the Guidelines). The types of representative acts are as follows:</p> <ul style="list-style-type: none"> • Multi-homing Restrictions; • Demand for Most Favored Nation (“MFN”); • Self-preference; and • Tying.
<p>iv.</p>	<p>Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?</p>
	<p>The legal requirements under the FTL and the Online Platform Review Guidelines apply equally regardless of the type of platform.</p>
<p>v.</p>	<p>Do you think these conduct requirements provide sufficient legal certainty to market participants?</p>
	<p>The enactment of the Online Platform Review Guidelines is expected to increase the reasonableness and predictability of law enforcement against online platform operators. The KFTC explained that the Online Platform Review Guidelines did not establish a new regulation but set forth factors to be considered when determining whether an act constitutes an abuse of market dominance under the current FTL. While the Online Platform Review Guidelines provide examples of each item of Article 5(1) of the FTL as statutory provisions applicable to each of the above types of acts, the Guidelines provide that the actually applicable statutory provisions may be determined on a case-by-case basis depending on the specific facts. It appears that the Guidelines will serve as an important basis for the KFTC’s determination of illegality.</p> <p>However, since the Online Platform Review Guidelines have not been applied since its enactment this year, it is necessary to monitor how the KFTC will directly or indirectly consider the various considerations set forth in the Online Platform Review Guidelines in cases of violation of the FTL by online platform service providers.</p>
<p>vi.</p>	<p>Please summarise any penalties provided for non-compliance.</p>
	<p>There are a number of potential consequences for non-compliance.</p>

	<p><u>Corrective measures</u></p> <p>The KFTC can order the market dominant company to:</p> <ul style="list-style-type: none"> • Reduce prices; • Discontinue the practice; • Publicly announce the fact that the company received a corrective order by the KFTC; or • Take other actions needed for remedies. <p><u>Fines</u></p> <p>Companies are subject to administrative fines not exceeding 6% of the turnover generated by the sale of the relevant goods or services during the period of the violation; provided, however, that if there are no sales or it is difficult to calculate the amount, the amount may be imposed within the limit of KRW 2 billion.</p> <p>Companies can also be subject to a criminal fine of up to KRW200 million.</p> <p><u>Personal liability</u></p> <p>Individuals who have violated the FTL can be subject to either:</p> <ul style="list-style-type: none"> • Imprisonment of up to three years. • A criminal fine of up to KRW200 million.
<p>4.</p>	<p>If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?</p>
	<p>The Online Platform Review Guidelines apply when determining whether an online platform service provider’s act constitutes an abuse of market dominance under the FTL. The legislative purpose of the Online Platform Review Guidelines is to “<i>enhance the reasonableness and predictability of law enforcement and present specific standards for the application of the FTL to online platform service providers.</i>” (Online Platform Review Guidelines, Section I.1.)</p> <p>The KFTC stated in its Online Platform Review Guidelines that it aims to increase the predictability of its enforcement activity. The KFTC intends to send a clear signal to the marketplace by issuing market definition and dominance standards that take into account the characteristics of relevant online platforms, while also articulating the types of acts that may raise anti-competitive concerns.</p>
<p>5.</p>	<p>Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?</p>

	<p>The KFTC’s Online Platform Review Guidelines apply when determining whether conduct by an online platform service provider constitutes an abuse of market dominance under the FTL.</p> <p>The Online Platform Review Guidelines specify (i) cross-network effects, (ii) economies of scale, and (iii) importance of data, among others, as key features of online platforms, explaining that this may result in a network effect where more users join platforms that win a critical mass of users at an early stage. Efficiency-enhancing effects such as increased user benefits, reduced costs, and improved service quality may arise, but the monopolistic/oligopolistic structure may become entrenched as entry of new platforms becomes difficult due to heightened entry barriers.</p> <p>Under the current FTL, the KFTC’s Guidelines for Review of Abuse of Market Dominant Position have potential limitations in fully accounting for the multi-faceted nature of online platforms, including network effects, tipping effects caused by data concentration, and innovation and dynamic effects of the market. The KFTC’s Online Platform Review Guidelines supplement the analysis based on the characteristics of online platforms.</p>
<p>6.</p>	<p>If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?</p>
	<p>There is no statute that specifically applies to competition in digital markets. The Online Platform Review Guidelines provide that if an online platform service provider’s act causes anti-competitive effects and efficiency-enhancing effects at the same time, the violation will be reviewed by balancing the two effects (Section II.3.C. of the Guidelines).</p> <p>The Online Platform Review Guidelines provide that online platforms could have anticompetitive effectives that do not necessarily increase prices or reduce output due to the existence of free services and other characteristics of digital products. In addition to price and output, the Guidelines specify reduced diversity of products and services, reduced quality, increased user costs, and undermined innovation as other factors to take into account.</p> <p>Online platform service providers can expand their dominance to adjacent products or services by leveraging their strength in the core platform services; that in turn can solidify their dominance in the core platform service market. Accordingly, the Online Platform Review Guidelines take into account not only competition in the market in which a platform is dominant but also competition in other related products or services.</p> <p>In addition, the Online Platform Review Guidelines provide that even if each side of a multi-sided online platform is defined as a separate market, the relationship between the sides may be considered in assessing the anti-competitive effect. But if it is unreasonable to justify anti-competitive effects on a certain group of users based on benefits on another group of users, the relevant market may be determined differently.</p> <p>Lastly, the Guidelines also consider a platform’s effect on promoting or reducing innovation and consumer welfare.</p>

7.	<p>Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?</p>
	<p>As noted above, the KFTC assesses whether an online platform service provider has acted anticompetitively by comparing any anticompetitive harm against any procompetitive/efficiency benefits. Accordingly, online platform service providers may argue that its efficiency-enhancing effects outweigh anti-competitive effects, and its conduct is thus not illegal.</p> <p>The following summarises at a high level the KFTC’s major cases involving abuse of market dominance in the online platform sector. The companies’ key arguments, as identified in the KFTC’s public decision and media reports, are briefly described (however, anti-competitiveness was recognised in all of the cases below).</p> <ul style="list-style-type: none"> • Corrective order and administrative fine (approximately KRW 42.1 billion) imposed (April 23) on Google’s act of supporting Google’s promotion and overseas expansion, etc. on the condition of Google’s exclusive release of games on Google Play (failure to release games on the ONE Store): The KFTC’s decision was not disclosed, and thus, the details of the defence cannot be confirmed. • Kakao Mobility manipulated the algorithm of the taxi dispatch service, and imposed a corrective order and a surcharge (approximately KRW 25.7 billion) on its franchisee’s taxi driver for prioritising regular calls (February 2023): Kakao Mobility argues that such method improved the efficiency of passengers and drivers, thereby increasing consumer welfare by reducing the waiting time for dispatch. • With respect to Google’s act of interfering with the emergence of a new operating system in the mobile operating system (“OS”) market and thereby undermining competition in the OS market and the app market, Google issued a corrective order and imposed an administrative fine (approximately KRW 224.9 billion) (September 2011): Google argued that such act did not cause any anti-competitive effect. • Corrective order and administrative fine (approximately KRW 1 billion) imposed on Naver’s act of preventing its real estate-related competitors from providing information on the sale (September 2020): Naver argued that Naver did not infringe on its counterparty’s freedom to choose customers and that the confirmed sale system was a legitimate exercise of intellectual property rights. • Corrective order and administrative fine (approximately KRW 26.6 billion) imposed on Naver’s act of first exposing its open market products by adjusting its shopping-related search algorithm (October 2020): The Petitioner argues that the corrective order and administrative fine were intended to provide satisfactory search results to consumers, without any intent or purpose to interfere with other business operators, and that anti-competitive effect cannot

	<p>be recognised as Naver’s open market service provider’s sales increased through Naver Shopping.</p>
<p>8.</p>	<p>If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.</p>
	<p>Although the Online Platform Review Guidelines apply specifically to online platforms, the same general legal standards for abuse of dominance apply to online platforms and non-platforms alike. The burden or standard of proof is also the same for platforms and non-platforms.</p>
<p>9.</p>	<p>How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>
	<p>According to the Online Platform Review Guidelines, the importance of data is one of the major characteristics of online platforms (Section II.2.C. of the Review Guidelines). On the one hand, the accumulation and use of data by online platform operators may have positive aspects, such as improvement of service quality and increased user convenience. On the other hand, the lack of data portability and interoperability may strengthen barriers to entry and restrict competition. The Guidelines explain that such anti-competitive concerns are alleviated when data portability and interoperability between platforms make it easier for new entrants to access existing user data.</p>
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>The FTL the legal principles of essential facilities and prohibits “unfairly interfering with the business activities of other business entities” as one of the abuses of market dominance. Specifically, the FTL prohibits “an act of refusing, suspending, or restricting the use of, or access to, any element essential to the production, supply, or sale of the goods or services of other business entities without any justifiable reason” (Article 5(1)3 of the FTL and Article 9(3)3 of the Enforcement Decree of the FTL).</p> <p>A claim under the above provision must satisfy the following requirements: (i) the production, supply, or sale of goods or services is practically impossible without the use of the relevant elements, making it impossible to participate in a particular business area, or the relevant business area remains unavoidable (essential); (ii) a certain business entity exclusively owns or controls the relevant elements (monopoly); and (iii) it is practically, legally, or economically impossible for a person who intends to use or access the relevant elements to reproduce the relevant elements or replace them with</p>

	<p>other elements (i.e. impossible to reproduce or reproduce) (Section IV.3.C. of the Guidelines for Review of Abuse of Market Dominant Position).</p> <p>In the digital economy, refusal to deal with essential elements was at issue in the following cases:</p> <ul style="list-style-type: none"> • Qualcomm’s Abuse of Mobile Communications SEPs (October 2016): The KFTC issued a corrective order and imposed an administrative fine of KRW 1.31 trillion on Qualcomm for violating Qualcomm’s declaration that it would provide a license for mobile communications standard technologies on fair, reasonable, and non-discriminatory terms (i.e., FRAND), such as (i) refusing to provide a patent license at the request of competitors such as Samsung Electronics, (ii) linking the supply of chipsets with patent license agreements, and (iii) receiving patents from mobile phone manufacturers free of charge or forcing unilaterally set license terms. Qualcomm objected to the KFTC’s decision and proceeded to revoke the administrative disposition, but the KFTC partially ruled in favor of Qualcomm that the KFTC’s disposition was lawful. With respect to (i) Qualcomm’s SEPs, the High Court revoked part of the KFTC’s disposition on the ground that Qualcomm’s acts cannot be deemed as an act of refusing, suspending, or restricting the use of or access to the SEPs, although the SEPs owned by Qualcomm are essential (Seoul High Court Decision No. 2017Nu48 rendered on December 4, 2019, finalised by the Supreme Court). • In the SEP infringement case filed by Samsung Electronics against Apple (April 2011): In the case where Samsung filed an injunction against infringement against Apple after the FRAND declaration, Apple argued that Samsung, the owner of essential facilities, refused to deal with essential elements and thus, it constitutes an abuse of market dominance. In this regard, the High Court ruled that although the SEP is an essential facility under the Monopoly Regulation and Fair Trade Act (the “FTL”), it does not constitute an abuse of market dominance because it is difficult to deem that there is anti-competitive effect simply based on the fact that the competitor suffered damage, and that there is no evidence to deem that the claim for injunction against SEP infringement is based on an act of offering unfair price or economically impossible conditions to the extent that it is deemed an act of interfering with access to essential facilities (Seoul Central District Court Decision No. 2011Gahap39552 rendered on August 24, 2012, which was withdrawn by the appellate court).
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>

Country: Spain

Contributor: Tomas Arranz (Uria)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>Article 8 of <i>Ley 15/2007, de 3 de julio, de Defensa de la Competencia</i> (Spanish Competition Law or “LDC”) does not establish different thresholds for a transaction in the digital markets to be notifiable to the <i>Comisión Nacional de los Mercados y la Competencia</i> (“CNMC”) in Spain. However, the fact that an alternative market share threshold is applicable (in addition to the turnover threshold) may capture specific transactions in digital markets that do not meet the turnover threshold.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>The current setting of the market share threshold (creating or acquiring a market share that equals or exceeds 30%) captures transactions that otherwise would have escaped mandatory notification due to the target’s size. When the target’s Spanish turnover is below EUR 10 million the transaction only needs to be notified if the parties have an individual or combined market share of 50% or more in any affected market. However, if the transaction does not meet either the turnover or the market share threshold, the CNMC will not be able to capture it under merger control rules.</p>
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	<p>According to Article 55(6) LDC, the CNMC may require any department within the CNMC, other than the Competition Directorate, or any other government agency to submit any report it deems necessary to assess the transaction or the remedies suggested by the notifying parties. This is the case irrespective of whether the transaction takes place in a traditional sector or in the digital economy. It must be noted that given the dual nature of the CNMC as regulatory body and competition authority, requests within directorates of the CNMC are not considered inter-agency consultations.</p>

	<p>The CNMC submits these requests as if these departments or agencies were third parties and requires them to provide a reply within a reasonable deadline. According to Article 37(1) LDC, these requests for information may stop the clock and extend the deadline for the CNMC to decide on the clearance of the merger. However, the CNMC must expressly justify the need for such a suspension.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>In the CNMC’s decisional practice regarding digital or online platforms, the most-used metrics to analyse the platform’s (or the undertaking operating the platform’s) market share are the following:</p> <ul style="list-style-type: none"> • Turnover generated through the platform (cases <i>Just Eat/La Nevera Roja</i> (C/0730/16), <i>Just Eat/Canary</i> (C/1046/19), <i>Easypark/Negocios sistemas aparcamiento IVIAL</i> (C/1076/19), and <i>Wedding Planner/Zankyou Ventures</i> (C/1318/22)); • Traffic on the platform (cases <i>Schibsted/Milanuncios</i> (C/0573/14), and <i>Wedding Planner/Zankyou Ventures</i> (C/1318/22)); • Number and amount (value in euros) of orders made through the platform (cases <i>Just Eat/La Nevera Roja</i> (C/0730/16), <i>Just Eat/Canary</i> (C/1046/19), and <i>MIH Food Delivery Holdings/Just Eat</i> (C/1072/19)); • Number of restaurants using the platform or associated with it (case <i>Just Eat/La Nevera Roja</i> (C/0730/16)); • Number of kilometers of parking areas covered by the platform (case <i>Easypark/Negocios sistemas aparcamiento IVIAL</i> (C/1076/19)); and • Number of advertisements published (case <i>Schibsted/Milanuncios</i> (C/0573/14)). <p>Turnover generated through the platform is the most frequently used metric. Regarding volume-based metrics, in the market for online food ordering, the number of orders are frequently used metrics too. To the best of our knowledge, the CNMC has not yet expressed whether such metrics objectively reflect a platform’s market position.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>In the last ten years, there have been four transactions in the digital economy for which the CNMC imposed remedies:</p> <ul style="list-style-type: none"> • <i>Schibsted/Milanuncios</i> (C/0573/14): Decision of 20 November 2014

The transaction concerned the acquisition of sole control of the classified online advertising business of Milanuncios, S.L.U., by Schibsted España, S.L.U., excluding the classified online advertising business for personal relationships.

The CNMC decided that the transaction could significantly restrict competition in the market for three reasons. Firstly, in light of the Spanish market structure for classified advertising platforms with open and free access, especially the motor sector segment. Secondly, the preeminent position of the resulting entity with economies of scale. Thirdly, the existing barriers to entry and expansion. Furthermore, the CNMC found no efficiencies stemming from the transaction.

The CNMC cleared the transaction with a remedy consisting of granting a licence to a third party to exclusively operate the classified online advertisements published by professional operators in the motor-industry section of Milanuncios.

- *Just Eat/La Nevera Roja (C/0730/16): Decision of 31 March 2016*

The transaction consisted of the acquisition of sole control of Grupo Yamm Eat PLC by Just Eat PLC, and affected the Spanish market for online platforms for food delivery services. The transaction involved the main competitors in the market and the resulting entity would have a significant market share.

According to the CNMC, the sector has relevant barriers to entry due to the high advertising and marketing costs to reach a profitable scale, and the notifying parties had significant economies of scale and network. The CNMC acknowledges that the parties did not apply any exclusivity strategy to their customers. The authority believes that the resulting entity will increase its economies of scale and network and will host many restaurant users of competing platforms. The CNMC considers that the resulting entity has the capacity and incentives to apply an exclusivity strategy to tie its customers into the service and prevent them from using competing platforms, consequently excluding those competitors from the Spanish market.

The CNMC cleared the transaction with remedies related to not imposing direct or indirect exclusivity clauses on Just Eat's professional customers (*i.e.* neither tying restaurants commission's with exclusivity clauses nor penalising those using third party platforms).

- *MIH Food Delivery Holdings/Just Eat (C/1072/19): Decision of 5 December 2019*

The transaction consisted of the acquisition of sole control of Just Eat PLC, an undertaking operating in the Spanish market for online food delivery services platforms, by MIH Food Delivery Holding, B.V. The acquiring undertaking is not directly active in the Spanish market but holds a minority shareholding in Glovo, a competitor and second operator in the market, through Delivery Hero (Glovo's main shareholder) allowing MIH/Just Eat to nominate a member of Glovo's governing body. Since there are no horizontal overlaps, the acquirer would occupy the position of Just Eat in the Spanish market.

Given the closeness between Just Eat and Glovo, the CNMC considers that it needs to assess the impact of MIH's minority shareholding in Just Eat's main competitor. Firstly, it would allow MIH/Just Eat to access Glovo's commercially sensitive information. Secondly, MIH/Just Eat could have incentives to limit

	<p>Glovo's expansion in the market. Thirdly, MIH/Just Eat would have incentives and capacity to coordinate their strategies in the market.</p> <p>The CNMC cleared the transaction with remedies to prevent (a) MIH/Just Eat from (i) accessing Delivery Hero's and Glovo's commercially sensitive information, and (ii) influencing Glovo's strategy in the Spanish market; and (b) Glovo and Delivery Hero from accessing MIH/Just Eat's commercially sensitive information.</p> <ul style="list-style-type: none"> • <i>Wedding Planner/Zankyou Ventures (C/1318/22)</i>: Decision of 14 December 2022. <p>The transaction consisted of the acquisition of Zankyou Ventures by Wedding Planner, the leading online platform providing wedding planning services. Following the transaction, Wedding Planner would significantly increase its market share in the Spanish market for the provision of wedding related services and the market of online platforms for the provision of wedding planning services.</p> <p>According to the CNMC, after the transaction, Wedding Planner would expand the relevance of its brand and increase its economies of scale and network, which would not amount to a barrier to entry due to low fixed costs and easy access to the relevant technology. However, the authority considered that the resulting entity would have the incentives and capacity to apply exclusivity-related strategies to limit its competitors' ability to grow or even to exclude them from the market.</p> <p>Thus, the CNMC cleared the transaction with remedies concerning the possibility of applying a strategy to force its professional customers to be supplied exclusively by Wedding Planner.</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>As seen in Question 5, the remedies and conditions imposed by the CNMC have been mainly behavioural:</p> <ul style="list-style-type: none"> • Remedies aiming at preventing the enforcement of exclusive supply strategies towards professional users of the platforms (cases <i>Just Eat/La Nevera Roja (C/0730/16)</i> and <i>Wedding Planner/Zankyou Ventures (C/1318/22)</i>); • Remedies with the purpose of preventing access to commercially sensitive information and influencing a competitor's business strategy (case <i>MIH Food Delivery Holdings/Just Eat (C/1072/19)</i>); and • Remedies consisting of granting an exclusive licence to operate to a business unit of the resulting entity (case <i>Schibsted/Milanuncios (C/0573/14)</i>).
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements</p>

	applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?
	There are no digital players under specific merger control rules or obligations not applicable to other sectors in Spain.
8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	According to publicly available information, there are no investigations against parties for failing to notify transactions in the digital economy in the last 10 years.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	No, the CNMC cannot undertake an <i>ex post</i> analysis or effectively revise an original merger decision. However, the CNMC can monitor the compliance with and effectiveness of remedies in merger control cases.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	In general, the CNMC is more likely to rely on market tests or the submission of information requests by third parties rather than economic analyses in its merger control decisions.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	Not at the national level. However, in its Strategic Plan 2021-2026 , the CNMC highlights the review of the Horizontal Guidelines and the need to adapt them to the digitalisation process.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in

	<p>the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.</p>
	<p>According to publicly available information, the CNMC has not provided any analysis in an official capacity on how it intends to treat the collaboration of potential competitors active in the digital field. However, the following must be noted. Firstly, in its Strategic Plan 2021-2026, the CNMC stresses that it will continue assessing potential (horizontal) anticompetitive conduct in digital markets. Secondly, on 1 July 2021, the CNMC opened infringement proceedings against several companies within the Amazon Group and within the Apple Group for potential anticompetitive practices in the Spanish markets of electronic product internet sales and the provision of marketing services to third-party retailers through online platforms (case S/0013/21 <i>Amazon/Apple Brandgating</i>).</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>To the best of our knowledge, there have only been two cases related to data pooling or collaboration among competitors, though the (alleged) anticompetitive conduct itself is not properly related to the digital sector:</p> <ul style="list-style-type: none"> • <i>Proptech</i> (S/0003/20): Decision of 25 November 2021 <p>The CNMC found that several undertakings operating in the real estate brokerage market and a couple of software providers infringed Articles 1 LDC and 101 Treaty on the Functioning of the European Union (“TFEU”). The undertakings developed a real estate database in the form of a multiple listing system. Once it was fully implemented, the system required real estate brokers, who used the database and wanted their properties to be listed and offered to third parties, to set a minimum fee of 4% to be shared between the real estate broker who listed the property and the one who completed the transaction. <i>In casu</i> the problem was not the implementation of the multiple listing system itself but the agreements to set the minimum fees for the provision of real estate brokerage services.</p> <ul style="list-style-type: none"> • <i>Enterprise database systems</i> (S/0002/21) <p>The CNMC initiated infringement proceedings against Informa D&B, S.A.U, its parent company, Compañía Española de Seguros de Crédito a la Exportación, S.ME., and Bureau Van Dijk Publicaciones Electrónicas, S.A., and its parent company Moody's Corporation in its Moody's Analytics business. As in the Proptech case, the alleged infringements are rather traditional: market sharing and fixing sale prices or rebates for the supply of information concerning companies and businesses. The case is still ongoing and, other than the inspections carried out by the CNMC and the Portuguese <i>Autoridade da</i></p>

	<p><i>Concorrência</i> in June 2021, there have not been any developments since proceedings opened on 16 December 2021.</p> <p>According to the CNMC's 2023 Action Plan (Plan de actuaciones), the Competition Directorate aims to design or procure a software tool to detect algorithmic collusion. However, to the best of our knowledge, there have been no cases either investigated nor sanctioned regarding algorithmic pricing setting or algorithmic tacit collusion.</p>
4.	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>According to publicly available information, the CNMC has not yet initiated any proceedings concerning, or provided any guidance on, hub and spoke arrangements in the digital economy.</p>
5.	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>According to publicly available information, there have not been any leniency applications in horizontal cases concerning digital players in Spain.</p>
6.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>To the best of our knowledge, there are no other relevant legal or regulatory factors regarding the above analysis.</p>
III.	<p>Vertical agreements</p>
1.	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>The number of decisions that have been handed down by the CNMC in the field of vertical restraints is strikingly low, when compared with the number of proceedings regarding horizontal practices. To the best of our knowledge, there have been the following cases before the CNMC of vertical restraints in the digital economy, both regarding price and non-price restrictions:</p>

	<ul style="list-style-type: none"> • <i>Adidas España</i> (case S/0631/18) Inclusion of clauses in contracts with franchisees that could limit online sales and cross-selling of products. Finally, the case was closed subject to the following commitments: (i) removal of post-contractual non-compete clauses; (ii) clarification of the requirement to approve internet addresses used by distributors in advance; and (iii) removal of the prohibition on cross-selling between franchisees, suppliers or distributors. • <i>ISDIN</i> (case S/0049/19) Inclusion of online RPM clauses for retail distributors and the obtention of discounts –and even the supply of the products itself– being linked to the monitoring of these prices. Finally, the case was closed subject, among others, to the commitment to implement an objective, transparent and non-discriminatory system of discounts, to avoid the discounts possibly being linked to retail distributors monitoring a specific pricing policy. <p>In its Strategic Plan 2021-2026, the CNMC highlights the review of the Vertical Block Exemption Regulation and Vertical Guidelines and the need to adapt these to the digitalisation process and the emergence of so-called gatekeepers. In relation to this, the CNMC will continue to focus on identifying competition risks regarding potentially anticompetitive conduct in the digital markets that may limit the benefits to society of the economy’s digitalisation process.</p> <p>Moreover, the CNMC has showed interest in digital platforms that have disruptively entered the financial sector and has carried out a market study in FinTech. Against this background, the CNMC states that well-known digital platforms could extend their market power to the financial sector, as they would have a competitive advantage in exploiting information, <i>i.e.</i> key input of the financial industry. In this new landscape, Competition Authorities should be attentive to deter and fight anticompetitive and exclusionary practices and the cooperation between competition authorities and sectoral regulators, such as financial and telecommunications regulators, should be improved.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>To the best of our knowledge, there have been no cases before the CNMC of exclusive dealing by non-dominant platforms.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>

	<p>To the best of our knowledge, the current investigation into Booking.com mentioned in Question 4 is the first carried out by the CNMC into MFNs imposed by online platforms. Given that it is still pending, we cannot provide a straight answer to the question posed.</p> <p>However, it may be presumed that, in cases regarding MFNs imposed by online intermediation services, the CNMC will take into account the revised Vertical Block Exemption Regulation (“VBER”) and Guidelines on vertical restraints (“Vertical Guidelines”), under which narrow MFNs still benefit from the safe harbour.</p> <p>However, as noted by the European Commission in the Vertical Guidelines: <i>“if the provider of online intermediation services or its competitors operate in other comparable markets without using retail parity obligations or using less restrictive obligations, this may indicate that the obligations are not indispensable”</i> (para. 373 Vertical Guidelines) and <i>“in the absence of efficiencies, withdrawal [of the VBER exemption] is particularly likely where narrow retail parity obligations are applied by the three largest providers of online intermediation services in the relevant market and those providers hold a combined market share exceeding 50%”</i> (para. 374 Vertical Guidelines).</p> <p>Wide MFN are, on the contrary, excluded from the application of the VBER.</p> <p>Please note that, due to the direct applicability of Regulation 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act, “DMA”), prohibition of MFN –be they wide or narrow– by the DMA may be also taken into account.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>On 17 October 2022, the CNMC initiated proceedings against Booking.com (case S/0005/21) for possible anti-competitive practices affecting hotels and online travel agencies (“OTA”), including (i) the possible imposition of unfair conditions on hotels located in Spain, and (ii) the implementation of commercial policies that could have had exclusionary effects on other OTA, as well as on other online sales channels.</p> <p>Additionally, the conduct under investigation would include practices that potentially exploit the economic dependence of hotels located in Spain on Booking.com –this would constitute an act of unfair competition that could distort free competition and affect the public interest.</p> <p>The case, still ongoing, stems from two complaints received by the CNMC –from the Spanish Association of Hotel Managers and the Madrid Hotel Business Association– which accuse Booking.com of applying narrow MFN clauses regarding price and room availability in their contracts with accommodation partners.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>

	<p>To the best of our knowledge, the current investigation into Booking.com mentioned in Question 4 is the first carried out by the CNMC into MFNs imposed by online platforms. Given that it is still pending, we cannot provide a straight answer to the question posed and, therefore, we refer to the answer to Question 3.</p>
6.	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>Please see answer to Question 3.</p>
7.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>To the best of our knowledge, there are no other relevant legal or regulatory factors regarding the above analysis.</p>
IV.	<p>Abuse of market dominance</p>
1.	<p>Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.</p>
	<p>There is no national competition regulation specifically targeting the conduct of digital companies in Spain.</p> <p>Notwithstanding this, digital companies are subject to compliance with national competition law embedded in the LDC and its regulations, approved by Royal Decree 261/2008 of 22 February, which implement the Spanish Competition Law. Further relevant provisions can be found in Law 3/1991 of 10 January on Unfair Competition (“Unfair Competition Law”).</p> <ul style="list-style-type: none"> • General prohibition of abuse of a dominant position is envisaged in Article 2 LDC, which mirrors Article 102 TFEU. <p>Although no express definition is provided in Article 2, dominance is understood as the ability of a company to act independently from its customers, suppliers and, ultimately, consumers. To assess whether a company is dominant, market shares, stability and volatility of market shares, entry barriers, market position of competitors, competitive advantages and the degree of vertical integration and dominance in related markets, among other variables, are taken into account.</p>

	<p>Regarding market share, in <i>Oracle</i> (case S/0354/11), the CNMC found that a market share of [45-50]% did not itself amount to dominance, but evidence should be provided of the existence of entry barriers. Market shares not exceeding 25% do not normally amount to dominance (<i>IBM</i>, case 75/94). On the contrary, market shares between 70% and 85% may by themselves amount to a dominant position (<i>Productos Lácteos</i>, case R/657/05).</p> <p>The following types of behaviour can constitute abuse of a dominant position: (i) directly or indirectly imposing prices, or other unfair trading or service conditions; (ii) limiting production, distribution or technical development based on unjustified prejudice towards undertakings or consumers; (iii) unjustifiably refusing to satisfy requests to purchase products or services; (iv) applying in trading or service relationships dissimilar conditions to equivalent transactions that place competitors at a disadvantage; and (v) making the concluding of contracts conditional on accepting supplementary obligations that are unrelated to the main contracts.</p> <ul style="list-style-type: none"> • Even when no dominant position is held, exploitation by an undertaking of its market power is unfair (Article 16 Unfair Competition Law). If a commercial act contrary to the Unfair Competition Law affects the public interest, there may be an infringement of Article 3 LDC. • Recently, the CNMC has opened proceedings for alleged abuse of a dominant position and unfair practices against <i>Booking.com</i> (case S/0005/21) and <i>Google</i> (case S/0013/22) –both proceedings are still ongoing. <p>However, as Spain is a Member State of the European Union, regulations approved at the EU level are directly applicable to digital companies under the Spanish jurisdiction. Therefore, they are subject to compliance with the recently approved Digital Services Act package comprising: (i) DMA and (ii) Regulation 2022/2065, of 19 October 2022, on a Single Market for Digital Services (Digital Services Act, “DSA”). Please note that, for the purposes of this questionnaire, only the DMA will be covered in subsequent answers.</p> <p>The DMA aims to ensure that “<i>markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper on competition on a given market</i>” (Recital 11 DMA). This is not a competition regulation, but an <i>ex ante</i> regulation which complements European competition law, and should be applied without prejudice to Articles 101 and 102 TFEU, corresponding national competition rules –i.e. Articles 1 and 2 LDC–, and other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour (including its actual or potential effects and the precise scope of the prohibited behaviour), which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question, and to national rules concerning merger control (Recital 10 DMA).</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>

	<p>No. After the modifications introduced by Law 3/2013 of 4 June on the Creation of the Spanish Competition Authority, competition rules in Spain are enforced by the CNMC. The CNMC comprises a decision-making body, the Council, and four directorates responsible for investigating the following sectors: (i) competition, (ii) energy, (iii) telecommunications and audiovisual, and (iv) transport and postal. Please note that there are 12 regional competition authorities with jurisdiction over restrictive agreements and practices where the effects are confined to their particular region.</p> <p>Additionally, it should be noted that, in the supranational sphere, cooperation of National Competition Authorities (“NCA”) with the European Commission in the application of the DMA is established in Article 38(7) DMA. This Article empowers NCA to initiate their own investigations over infringements of the obligations and prohibitions set out in the DMA, if so mandated by their national parliaments by means of national law. The European Commission, however, remains the sole enforcer of compliance with the DMA.</p>
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	No. Please see answer to Question 1.
i.	Please describe how “platform” is defined for these purposes.
	<p>The European Commission has defined online platform as “an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups”, also pointing out that “certain platforms also qualify as intermediary service providers”. Please see the European Commission’s Consultation document on the Digital Single Market Strategy (2015).</p> <p>Top officials of the CNMC provided a definition of two elements of the activities performed by platforms: (i) the role of these companies as intermediaries facilitating interactions between users belonging to one or more groups (also called sides or bands); and (ii) the existence of externalities between the intermediated users and the active management of these externalities. The state-of-the-art theoretical analysis has helped to refine the identification of different types of multi-sided markets, distinguishing between transaction and non-transaction markets, and between matching or serviced-based vs audience-providing or subsidy-based markets. In this respect, digital platforms are simultaneously transaction matching platforms (digital contents) and non-transaction, non-matching markets (advertising).</p>
ii.	What are the criteria used to determine whether a platform falls under the regime?
	An online platform will be subject to the specific regime established by the DMA if it meets the requirements to be designated as a “gatekeeper” set out in Article 3(1) –qualitative criteria– and 3(2) –quantitative thresholds.

iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	<p>The DMA imposes a set of obligations and prohibitions upon gatekeepers, most of which are established in Articles 5 and 6: (i) prohibition on processing, combining and cross-using personal data of end users without their consent; (ii) prohibition of MFN clauses; (iii) anti-steering prohibition; (iv) prohibition of restrictions on use; (v) prohibition on forcing business users to use specific ancillary services (identification and payment services); (vi) prohibition on bundling/tying; (vii) prohibition on use of business users' data to compete with them; (viii) prohibition on self-preferencing; (ix) obligation to enable interoperability, etc.</p>
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	<p>The obligations and prohibitions established in the DMA are inspired by previous cases of enforcement of competition law in the digital economy.</p> <p>Within the long list of obligations and prohibitions envisaged in the DMA, those established in Article 5 will be directly applicable without further specifications; on the contrary, those set out in Article 6 will be subject to further specification in the framework of the regulatory dialogue between the European Commission and the concerned gatekeeper.</p> <p>The CNMC has highlighted that Competition Authorities' approach to digital platforms must necessarily vary with the type of activity.</p>
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	<p>The DMA is currently in the initial stages of application –pre-notification contact is already ongoing and notifications must be submitted before 2 July 2023. The European Commission will not issue guidelines on substantive matters before it has gained experience on how gatekeepers implement and comply with obligations and prohibitions imposed upon them in the designation decision. Therefore, it could be said that there is a substantial lack of certainty for market participants and other interested third parties.</p>
vi.	Please summarise any penalties provided for non-compliance.
	<p>Under the general prohibition of abuse of a dominant position, the breach of Article 2 LDC (and the corresponding Article 102 TFEU) constitutes a very serious infringement and may be sanctioned with fines of up to 10% of the worldwide turnover. Additionally, fines could be imposed on legal representatives and directors of the infringing company</p>

	<p>up to a maximum of EUR 60,000 per individual (which is likely to be increased to EUR 400,000).</p> <p>Unfair commercial practices prohibited by Article 3 LDC constitute a serious infringement and can be sanctioned with a fine up to 5% of the worldwide turnover.</p> <p>Under the specific regime established by the DMA, in the event of intentional or non-diligent non-compliance with the designation decision, the European Commission may impose fines up to 10% of its total worldwide turnover. In cases of systematic non-compliance, fines can be imposed up to 20% of the worldwide turnover.</p>
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	No. Please see answer to Question 1.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	No. Please see answer to Question 1.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	No. Please see answer to Question 1.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	<p>The general prohibition under Article 2 LDC embodies an objective notion of abuse, which does not depend on the intentions of the undertaking or on the market effects, although the culpability of the undertaking in question must necessarily be taken into account when imposing a sanction.</p> <p>However, there will be no abuse if the conduct is objectively justified, <i>i.e.</i> if it responds to an economic rationale other than the mere restriction of competition in the market. This requirement has sometimes been interpreted to mean that there is no abuse if the</p>

	<p>conduct would have occurred equally in a competitive market (i.e. in a scenario where the concerned undertaking would not be in a dominant position).</p> <ul style="list-style-type: none"> • In the judgment of 11 October 2013 in the case <i>Gas Natural Distribución SDG, S.A.</i> (appeal n. 3053/2010)), the Supreme Court established that “<i>in no case is it required that quantifiable damage actually be caused to third party competitors, but it is sufficient that the abusive conduct described occurs, which in itself is deemed to be harmful to competition</i>”. • However, in the judgment, of 5 February 2018, in the case <i>Sociedad Estatal Correos y Telégrafos</i> (appeal n. 2808/2015), the Supreme Court upheld a prior judgment of the National Court, of 1 July 2015, in the case <i>Correos 2</i>, which explicitly rejected the existence of margin squeeze abuse because the dominant undertaking’s pricing policy had not excluded a competitor which was as efficient as the dominant company in the market. • In the case <i>Correos 3</i> (S/0041/19), the CNMC, based on the judgment of the EU General Court, of 26 January 2022, in the <i>Intel case</i> (T-286/09 RENV), stated that the Competition Authority must carry out an economic analysis of the justifications offered by the parties when the party concerned “<i>maintains during the administrative procedure, by adducing evidence to that effect, that its conduct did not [have] the ability to restrict competition and, in particular, to produce the alleged foreclosure effects</i>”. Therefore, the Competition Authority may not automatically declare such conduct as abusive. However, in this case, the CNMC considered that Correos had not provided such evidence and had not provided an objective economic justification. <p>Beyond a defence based on objective and reasonable economic justification –which has been expressly accepted, by the Supreme Court, as stated <i>supra</i>, other justifications alleged before the CNMC are the following: (i) recognised illegality of the company that is the victim of the abuse (case <i>Funerarias Baleares</i> (650/08)); (ii) sporadic nature of the conduct (case <i>Telecomunicaciones Castilla y León 2</i> (R/606/04)); (iii) consent or request by the customer (case <i>Uni2/Telefónica Móviles</i> (571/03)); (iv) indispensability and proportionality of the conduct (Judgment of the Supreme Court, of 20 June 2006, in the case <i>Telefónica de España, S.A.</i> (appeal n. 9174/2003)).</p>
<p>8.</p>	<p>If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.</p>
	<p>No. Please see answer to Question 1.</p>
<p>9.</p>	<p>How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>
	<p>The CNMC encourages portability of data from digital platforms, as activity in digital markets is moving much faster than procedures. Portability of data held by digital</p>

	<p>platforms may be applied as a possible remedy to the distortions in competition caused by the power wielded by large digital platforms. Along the same lines, the CNMC deems that interoperability concerns will play an increasing role in order to reduce the risk of abusive conduct and to keep the digital ecosystem vibrant.</p>
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.</p>
	<p>Unjustified refusal to meet demands for the purchase of products or the provision of services has been frequently analysed by the CNMC. Although the decisional practice of the CNMC on the matter is very diverse, in general, it can be noted that the CNMC has been more inclined to declare the existence of abusive conduct when the entity requesting to be supplied is already a customer of the dominant company or when it competes –or intends to compete– with the latter or with entities of its business group in a neighbouring market. The reasoning is also influenced by how indispensable the supplies are for the entity in question to be able to effectively carry out a specific economic activity –i.e. essential asset.</p> <p>Regarding digital economy, the CNMC considers crucial, in order to keep digital innovation alive, that significant players do not foreclose access to their data when firms in other related markets need them in order to develop new products (or improve the quality of existing ones). Given that business models evolve quite rapidly in the digital world and embrace new related activities, firms with significant market power may be tempted to carve out new activities for themselves through the denial to provide data that may be necessary in order to develop these new products. As a result, the appraisal of an abusive denial to supply may need an update in order to provide flexible solutions to data access problems that may arise in the digital sphere.</p> <p>The CNMC has defined “essential facility” as a product, service or infrastructure, access to which is essential to compete in a related market and which is impossible or excessively difficult to replicate (cases <i>Interflora/Tanatorio Sevilla 3</i> (622/06), <i>Tanatorios Castellón</i> (616/06) and <i>Tanatorios Valencia</i> (619/06).</p> <p>The decisional practice of the CNMC has been progressively adjusted to the 2008 Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings, which adopted a more tolerant perspective on refusal to supply by dominant companies and was clearly focused on effects.</p> <p>Criteria established therein are clearly reflected in <i>Correos</i> (case S/0341/11): “Refusal to continue to provide such wholesale services to its competitors constitutes an abusive practice prohibited by Articles 2.2. (c) of the Spanish Competition Law and 102 of the TFEU if the following conditions are met: (i) <i>CORREOS</i> controls an essential or indispensable asset for third parties to develop or remain in the downstream related markets; (ii) there is a practical impossibility for the third party to duplicate the postal</p>

	<p><i>network of CORREOS; (iii) competition in the related markets is thereby excluded or severely restricted to the detriment of consumers; and (iv) there is no legitimate commercial reason for CORREOS' refusal".</i></p> <p>Regarding refusal to supply to an entity that is not a customer of, or a competitor of, the dominant undertaking or entities in its group, precedents of the CNMC and case law limit abuse to cases where the refusal to supply concerns access to an essential facility, even though the applicant for access is neither a competitor nor a previous customer of the dominant undertaking (see Judgment of the Spanish National Court, of 28 May 2018, in case <i>Binter La Graciosa</i> (appeal n. 690/2015)).</p> <p>In the digital economy field, in <i>Google</i> (case S/0346/11), the CNMC decided to drop proceedings regarding the complaint submitted by COMPRA AMIGA on grounds of unjustified refusal to provide online advertising services that would constitute an abuse of a dominant position by Google. The CNMC decided that there was no evidence that Google AdWords could be considered an essential tool which would justify forcing Google to be open to advertising COMPRA AMIGA's products.</p> <p>However, please note that, on 27 March 2023, the European Commission launched a review of the 2008 Guidance on enforcement priorities concerning exclusionary abuses and, to that end, published an amended Communication and Annex –subject to public consultation until 24 April 2023– which establishes significant changes to its policy regarding abuse of market dominance.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>To the best of our knowledge, there are no other relevant legal or regulatory factors regarding the above analysis.</p>

Country: Sweden

Contributor: Per Karlsson (Advokatfirman Per Karlsson & Co AB)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No. The Swedish Competition Authority has suggested that the Swedish Government takes initiative to review the thresholds regarding digital economy mergers. No such analysis has been done so far.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	The Swedish Competition Authority has the possibility to request a notification when the main threshold of 1 billion SEK is met, while the second threshold is not met that at least two of the undertakings concerned have each a turnover exceeding 200 million SEK. For example, if a large company tries to take over a maverick with a low turnover, the Swedish Competition Authority has the possibility to request a merger notification and has also jurisdiction to prohibit the merger. The Swedish Competition Authority uses that power to request a notification in a couple of cases per year.
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?
	No, the Swedish Competition Authority has not provided an official view or guidance on the need for inter-agency consultation or the respective roles of different agencies in this regard.
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?

	<p>HHI - Herfindahl-Hirschmanns index</p> <p>UPP - Upward Pricing Pressure</p> <p>GUPPI - Gross upward pricing pressure index</p> <p>CMCR - Compensating marginal cost reduction</p> <p>IPR - Indicative price rise</p> <p>Efficiency gains, profit margins and diversion quotes are important factors</p>
5.	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The case Blocket/Hemnet was in practice blocked since the parties abandoned the merger once it was clear that the authority had communicated it would file a prohibition claim against the merger in court.¹⁰⁰ The merger regarded the acquisition of a competing platform for digital property advertising.</p> <p>Blocket Bostad, owned by Schibsted, decided not to acquire its competitor Hemnet in Sweden. The merger notification submitted to the Swedish Competition Authority was withdrawn by the parties. The Swedish Competition Authority investigated the proposed deal and raised preliminary objections, prompting the parties to propose commitments to address anticompetitive effects. However, these commitments were deemed insufficient, leading to the decision to abandon the merger and withdraw the notification. The Swedish Competition Authority intended to bring a case to the Stockholm District Court to block the merger. The cancellation of the merger was considered beneficial for property sellers in Sweden, as it prevents the formation of a monopoly in the digital property listings market and potential increases in listing prices. The withdrawal by the parties eliminated the need for a lengthy and costly court process.</p>
6.	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>The case Blocket/Hemnet was in practice blocked since the parties abandoned the merger once it was clear that the authority had communicated it would file a prohibition claim against the merger in court.</p> <p>The Swedish Competition Authority normally prefers structural remedies but has in some cases accepted behavioural remedies. In other cases the behavioural remedies</p>

¹⁰⁰ The Swedish Competition Authority, dnr 84/2016.

	<p>has not been sufficient to solve the competition concerns. In some of these latter cases the authority has not even market tested the remedies.¹⁰¹</p> <p>On December 5, 2022, Tidnings AB Marieberg (TABM), controlled by Albert Bonnier AB (Bonnier), reported the acquisition of Readly International AB (Readly) to the Swedish Competition Authority. Concerns were raised about Bonnier's potential unfair treatment of publishers and access restrictions on Readly's platform. To address these concerns, Bonnier and TABM voluntarily committed to behavioural remedies.</p> <p>The behavioural remedies included:</p> <ol style="list-style-type: none"> 1. Continuation of competition-neutral treatment: Bonnier and TABM guarantee equal treatment of publishers on the platform for seven years after the acquisition. This means that they will not favour their own titles or discriminate against other publishers. 2. Data access for publishers: Publishers will have the same access to reader behavioural data related to their own titles as they currently have. Bonnier and TABM will not withhold or misuse data from other publishers. 3. Independent monitoring trustee: Bonnier and TABM will appoint an independent trustee who will oversee and ensure compliance with the commitments. The trustee will report to the Swedish Competition Authority regarding compliance. <p>Failure to comply with these commitments may result in a penalty of SEK 150 million imposed on Bonnier and TABM.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.</p>
	<p>No</p>
<p>9.</p>	<p>Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?</p>

¹⁰¹ See further Svensk kontroll av företagsförvärv, Per Karlsson, Norstedts juridik, 2018.

	No
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	<p>HHI Herfindahl-Hirschmanns index</p> <p>UPP Upward Pricing Pressure</p> <p>GUPPI..... Gross upward pricing pressure index</p> <p>CMCR Compensating marginal cost reduction</p> <p>IPR..... Indicative price rise</p> <p>Efficiency gains, profit margins and diversion quotes are important factors. There are, so far, no specific market share measures that are being applied with regard to digital firms.</p>
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	In principle no although there are no guidelines on horizontal agreements that focuses particularly on digital aspects. The Swedish Competition Authority has previously published guidelines (e.g. KKVFS 2017:3) that clarifies the scope of the horizontal block exemptions published by the EC.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	<p>The Swedish Competition Authority has dealt with the question of horizontal agreements in two investigations regarding online travel agents: booking.com as well as expedia.com. The case relating to booking.com was closed through a decision to accept a voluntary commitment from booking.com. The expedia.com investigation was closed as the company changed its contractual terms and conditions.</p> <p>Both investigations concerned price-parity clauses on booking agency sites (wide MFN clauses) as well hotel sites (narrow MFN clauses, this distinction is developed under section III). The commitments by booking.com ensured that horizontal competition</p>

	<p>between booking.com platforms was upheld. In the decision the authority specially emphasized the risks of horizontal agreements distorting competition in digital markets.</p> <p>In the booking decision the Authority said that: <i>“Restrictions on competition between companies that are competitors, known as horizontal restrictions, are in general more problematic for competition than vertical restrictions.”</i> (para 20).</p> <p>The authority also explained the rationale to why horizontal clauses are potentially harmful to competition: <i>“the fact that the competitors of booking.com also apply horizontal price parity aggravates the situation and means that competition on prices and commissions between the online travel agencies is severely restricted”</i> (para 22).</p> <p>How the authority differentiates MFNs in vertical respectively horizontal relationships is developed in section 3 question 3.</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>No, not to our knowledge.</p>
<p>4.</p>	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>No, not to our knowledge.</p>
<p>5.</p>	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>No, not to our knowledge.</p>
<p>6.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No, not to our knowledge.</p>

III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	<p>In a report from 2021¹⁰² the Swedish Competition Authority highlighted that there is a need to provide guidance to how the competition law framework shall be applied to digital markets. This includes guidance to undertakings as to what extent vertical agreements are allowed under the new vertical block exemptions (“VBER”) adopted by the European Commission this summer. In the report, the authority also highlighted that already existing guidelines on the vertical block exemption will be reviewed to see whether any improvements can be made.</p> <p>The Swedish Competition Authority has previously prioritised examining exclusivity agreements (such as Bruce) and most-favored-nation (MFN) clauses (like Booking) in vertical relationships within the digital economy.</p>
2.	What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	<p>The Swedish Competition Authority has evaluated exclusivity dealing with regards to a platform offering aggregated gym services in the BRUCE-investigation. The authority made an interim decision that was appealed. The patent and market court upheld the decision.¹⁰³ The Swedish Competition Authority closed the case through accepting voluntary commitments by BRUCE that to a large extent reduced the number of exclusivity agreements with training facilities such as gyms.¹⁰⁴</p> <p>The Swedish Competition Authority argued that the exclusive agreement prevents fitness facilities from offering their services to Bruce’s competitors, allowing Bruce to control a large share of the input that other fitness aggregators depend on. This limits competitors’ ability to provide an attractive and competitive service to consumers compared to Bruce in the next stage of the supply chain. If Bruce’s actions lead to the exclusion of input on upstream markets, it could potentially exclude or marginalise competing fitness aggregators even on downstream markets, where aggregators compete for consumers through their services. This, in turn, is expected to harm consumers because the offerings of fitness aggregators are not completely</p>

¹⁰² The Swedish Competition Authority, Report 2021:3.

¹⁰³ Patent and market court, PMÅ 17901-19.

¹⁰⁴ The Swedish Competition Authority, dnr 572/2019.

	interchangeable with individual fitness facilities or gym chains (see p.39-42 in the decision).
3.	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>In the booking.com investigation (described under section 2 question 2), the undertaking (Booking) committed to replace wide MFN with narrow MFN which the authority accepted. In other words, the commitments mean that Booking.com cannot prevent hotels from offering lower prices via other competing online travel agencies.¹⁰⁵</p> <p>In the Expedia-investigation the authority found that Expedia’s parity clauses had affected competition “<i>in a similar manner</i>” to Booking.com’s parity clauses. A change of contractual terms and conditions from Expedia, similar to the commitments of Booking.com, were enough for the authority to close the case.¹⁰⁶</p> <p>In light of the outcome of these investigations, the Swedish Competition Authority seems to separate the treatment of wide and narrow MFNs; the authority that narrow MFN clauses are not as harmful to competition at all as wide MFN clauses. In both investigations, the authority did not find any theories of harm with regard to narrow MFN-clauses.</p> <p>Regarding narrow MFN clauses the authority said that, since there is a vertical relationship between hotels and booking.com, they are not active in the same relevant market. The authority did not therefore consider the clauses requiring hotels to have the same prices on their own website as harmful.</p> <p>The potential harm for a narrow MFN-clause can, however, vary from case-to-case. From these two investigations, it is therefore not justified to conclude that the Swedish Competition Authority would always find a narrow MFN to be permissible.</p> <p>Another interesting aspect is that Visita, a trade association representing the Swedish hotels, brought a court action against booking.com regarding the continued use of narrow MFN clauses after the Swedish Competition Authority had accepted Bookings commitments. The Patent and Market Court issued an injunctive order against booking.com.¹⁰⁷ The court accepted the argument that narrow clauses reduce the price competition between online travel agencies and hotels, and leads to at least potentially anticompetitive effects compared to the situation likely to prevail without parity conditions. However, this judgement was appealed and overturned in the second instance. The Patent and Market Court of Appeal concluded that Visita had not shown that the narrow MFN-clauses had a restrictive effect on competition, neither in the market for online travel agencies nor in the market for hotel stays.¹⁰⁸</p>

¹⁰⁵ The Swedish Competition Authority, dnr 596/2013.

¹⁰⁶ The Swedish Competition Authority, dnr 595/2013.

¹⁰⁷ Patent and Market court, PMT 13013-16.

¹⁰⁸ Patent and Market court of Appeal, PMT 7779-18.

4.	Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency's analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)
	See answers to questions above. No sanctions were decided.
5.	How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?
	<p>In the booking.com investigation the authority found the wide MFN clauses to cause two major problems with regard to competition:</p> <ol style="list-style-type: none"> 1. higher commission rates without risk of losing customers and therefore higher hotel prices (para 21) 2. entry barriers (para 23).
6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	There are no explicit additional national rules regarding the digital economy in this respect. However, the new VBER and vertical guidelines from the European commission is applicable.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No, not to our knowledge.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	Sweden has neither a specific national competition tool or a sector specific regulation governing the conduct of digital companies. Initiative for sector specific regulation was

	<p>brought to the table by the Swedish Competition Authority in a sector inquiry from 2021 (2021:1). In this inquiry it was concluded that, although many of the competition issues that prevail on digital markets fall within the scope of traditional competition law, the further need for complementary national regulation could be investigated. The authority found that such an initiative lies within the interest of promoting competition and consumer welfare in Sweden.</p> <p>As the DMA now soon enters into force (most likely during spring 2023) it will be interesting to see whether the authority finds this new piece of regulation on a European level effective to deal with digital competition issues also on a national level.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?
	<p>The Swedish Post and Telecom Authority shares competence with the Swedish Competition Authority to matters that fall within sector specific rules of telecom and postal markets. There are no rules governing how this overlapping competence is divided. There have been examples of investigations where both authorities have investigated the same matter but under different frameworks (i.e. through both sector regulation and competition law). To our knowledge this has not caused any problems with regard to principles such as <i>ne bis in idem</i> and proportionality. Having two authorities sharing competence over issues covered by both sector specific regulation and competition law is also aligned with case law of The Court of Justice of the European Union (see for example <i>Deutsche Telekom AG v. Commission</i>, ECLI:EU:C:2010:603)</p>
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	N/A
i.	Please describe how “platform” is defined for these purposes.
	N/A
ii.	What are the criteria used to determine whether a platform falls under the regime?
	N/A
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?

	N/A
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	N/A
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	N/A
vi.	Please summarise any penalties provided for non-compliance.
	N/A
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	N/A
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	N/A
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	N/A
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an

	efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	N/A
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	N/A
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	N/A
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.
	<p>The Swedish Competition Authority has applied the doctrine of essential facility in at least two investigations to our knowledge. One example is FTI, where the authority issued an injunctive order against FTI not to terminate a supply agreement with a competing waste material producer.¹⁰⁹ The patent and market court upheld the decision,¹¹⁰ while the patent and market court of appeal annulled the decision.¹¹¹ The Bronner criterion were applied in the case.</p> <p>In another closed investigation by the Swedish Competition Authority regarding Svensk Mäklarstatistik AB and a potential abuse, the authority has – at an interim stage - evaluated the three criteria established in the Bronner-case.¹¹² The Swedish Competition Authority decided to close the case regarding Svensk Mäklarstatistik's decision to stop providing publishing rights to Valueguard Index Sweden AB. The Authority found that while the data collected by Svensk Mäklarstatistik is valuable to many market participants, there is no clear evidence that making Valueguard's index public is crucial to its customers. Svensk Mäklarstatistik will continue delivering data on</p>

¹⁰⁹ The Swedish Competition Authority, dnr 583/2016.

¹¹⁰ Patent and market court, PMÅ 2741-18.

¹¹¹ Patent and market court of appeal, PMÖÅ 1519-19.

¹¹² The Swedish Competition Authority, dnr 348/2021.

	property transactions to Valueguard, ensuring that its customers still have access to the statistics. To our knowledge the Bronner-test has not been applied in a digital economy case.
11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	N/A

Country: Turkey

Contributor: Gönenç Gökaynak (Elig Law Firm)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>Yes, it does.</p> <p>The Turkish Competition Authority has recently introduced a new merger control regime for undertakings active in certain markets/sectors with Communiqué No. 2022/2 Amending Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (“Amendment Communiqué”) which entered into force on May 4, 2022. According to the Amendment Communiqué, the turnover thresholds set forth in Article 7 of the Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (“Communiqué No. 2010/4”) will not be sought for the acquired undertakings active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.</p>
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	<p>Where the transaction does not meet the relevant thresholds, the transaction is not deemed notifiable, irrespective of the target being a nascent competitor or maverick innovator.</p> <p>That said, Article 7 of Law No. 4054 prohibits mergers and acquisitions that would result in a significant lessening of effective competition, particularly in the form of creating or strengthening a dominant position in any given market in Turkey. Accordingly, if a merger or an acquisition, while the thresholds are not met, would result in a significant lessening of effective competition, the Turkish Competition Board technically has the authority to launch an investigation into the matter.</p>
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in

	<p>formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>The Turkish Competition Authority often engages with other governmental agencies, especially with regards to transactions taking place in regulated areas, to the extent that it requires sector-specific expertise for the review of the given transaction. That said, this consultation does not typically go beyond a general information request on the legislative pieces surrounding the sector, for the purposes of identifying the competitive landscape of the relevant market. For instance, in its Türk Telekomünikasyon decision (10-59/1195-451; 16.09.2010), the Board requested the opinion of the Information and Communication Technologies Authority for guidance on the electronic communication sector.</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>In practice, the Turkish Competition Authority usually considers the market shares, based on sales revenues or sales volumes, in the market in question as the primary metric in evaluating an undertaking's position. In addition to market shares, the Board also takes into account new entries, economies of scale, network effects, entry barriers, innovation, brand loyalty, as well as multihoming, in order to identify the market positions.</p> <p>The Horizontal Guidelines underlines that the market shares calculated using sales revenue, or the sales volume, may lead to misleading analyses, and instead, parameters such as the number of users and visitors, network effects, and the coverage of the data possessed by the undertaking should be considered.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called 'killer' acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p>There is no case law in the digital economy where the Turkish Competition Authority has imposed remedies or blocked the transaction altogether.</p> <p>With the Law No. 7246 on the Amendment to Law No. 4054 ("the Amendment Law"), Article 9 now introduces the 'first behavioural, then structural remedy' rule for Article 7 violations. The Amendment Law also aims to grant the Competition Board the power to order structural remedies for anticompetitive conduct infringing Article 7 of Law No. 4054 on Protection of Competition ("Law No. 4054"), provided that behavioural remedies are first applied and have failed. Further, if the Board determines with a final decision that behavioural remedies have failed, undertakings or associations of undertakings will</p>

	<p>be granted at least six months to comply with structural remedies. How the Competition Board will reconcile these two provisions in practice remains to be seen.</p> <p>Before the Amendment Law, the general approach was that structural remedies take precedence over behavioural remedies, and behavioural remedies can be considered in isolation only if structural remedies are impossible to implement, and it is beyond doubt that behavioural remedies are as effective as structural remedies. For behavioural remedies to be accepted alone, such remedies must produce results as efficient as divestiture. The behavioural commitments will be re-evaluated by the Competition Board at the end of the three-year period.</p>
1.	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>In its <i>Obilet</i> decision (21-33/449-224; 01.07.2021), the Competition Board cleared the contemplated transaction concerning the acquisition of sole control over Biletal İç ve Dış Ticaret A.Ş. ("Biletal") by Obilet Bilişim Sistemleri A.Ş. ("Obilet"), two marketplaces active in online sales of tickets for buses and airplanes, based on the commitments offered by the parties.</p> <p>The Competition Board concluded that the transaction would lead to significant impediment of effective competition due to the aggregate market shares of and the horizontal overlap between the parties, yet found the commitments offered by the parties sufficient for eliminating competitive concerns. The commitments offered by the parties included (i) continuing to offer infrastructure services for price comparison provided by Biletal for 3 years following the closing of the transaction and (ii) eliminating the exclusivity obligations preventing the use of competing online platforms, post-transaction.</p> <p>The Obilet decision indicates that the Competition Board primarily resorts to behavioural conditions in digital market, as it has not imposed any structural conditions to date.</p>
6.	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>There are no sector specific merger control rules applicable to digital players, except the special merger control regime elaborated under Question 1 above.</p>
7.	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.</p>

	No, there are no investigations against parties for failing to notify transactions in the digital economy in Turkey over the last 10 years.
8.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	<p>The Authority has not conducted any ex-post analysis after an original merger decision so far. That said, theoretically, it is entitled conduct an ex-post analysis pursuant to Article 7 and Article 9 of Law No. 4054.</p> <p>As explained above, Article 7 of Law No. 4054 prohibits the mergers and acquisitions that would result in a significant lessening of effective competition, particularly in the form of creating or strengthening a dominant position in any given market in Turkey. As such, Article 9 introduced ‘first behavioural, then structural remedy’ rule also for transactions falling into the scope of Article 7. In this respect, if the Board deems that a transaction resulted in a significant lessening of effective competition, it may theoretically launch an ex-post analysis based on Article 7 and Article 9 of Law No. 4054.</p> <p>For completeness, in accordance with Article 16 of the Communiqué No. 2010/4, the Board is authorised to “re-examine” a transaction if one of the following conditions is present:</p> <p>a) If the decision was taken as a result of false or misleading information supplied by the transaction parties, or</p> <p>b) If the conditions or obligations tied to the decision were not fulfilled.</p>
9.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	<p>Before the Amendment Law, the dominance test was applicable to mergers when conducting substantive assessment. The Amendment Law replaced the previous dominance test with the significant impediment of the effective competition (“SIEC”) test.</p> <p>In terms of the economic analysis, the Board generally takes the following path in assessing whether a notified transaction significantly impedes effective competition in a market, for both traditional transactions and digital transactions:</p> <ul style="list-style-type: none"> - Market power: The Board first looks into whether the notified transaction may lead to the creation or strengthening of an existing dominant position in any of the affected markets. In doing so, the Board takes into consideration, among other things, the market shares and concentration levels. - Anti-competitive effects: Following the assessment of dominance, the Board generally goes into the evaluation of possible anti-competitive effects of the notified transaction.

	<p>- Efficiencies: Lastly, the Board takes into consideration the efficiencies stemming from the notified transaction, which may include, among others, consumer welfare and decrease in costs of production.</p>
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>There are no legislative proposals or soft law/guidelines in Turkish Competition Law that applies to horizontal agreements whilst specifically taking into account the dynamics of the digital economy. However, the Guidelines on Horizontal Cooperation applies to any horizontal agreement in the digital sector.</p>
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	<p>The Guidelines on Horizontal Cooperation delineate several types of collaboration of competitors, however, does not directly provide digital markets-specific guidance.</p>
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.
	<p>Although not having a decisional practice related to data, the Authority updated its Horizontal Guidelines on April 4, 2022, incorporating guidance on, among others, digital markets. In this regard, data is underlined to be a significant input in digital markets which could lead to enhancing market power for the undertaking conducting, for example, data pooling and creating entry barriers to the market.</p> <p>As for the use of algorithms and algorithmic pricing setting/algorithmic tacit collusion, the Authority's decisional practice does not yet include a detailed assessment over the use of algorithms within the sphere of horizontal anticompetitive agreements. Therefore, it is not possible to say that the Authority expressly addressed the question of whether there can be an agreement where algorithms coordinate pricing with no human input. However, a few cases reflecting the Authority's view on the algorithms are as follows:</p> <p>The use of algorithms and, in particular, algorithm updates, has so far been tested from the perspective of abuse of dominance theories. Although investigated in Google Search</p>

	<p>and AdWords (20-49/675-295; 12.11.2020), the Board found no violation on Google’s part concerning algorithm updates.</p> <p>On September 30, 2021, the Authority announced its decision to issue interim measures against DSM Grup Danismanlik Iletisim ve Satis Ticaret A.S. (“Trendyol”) for its practices in the multi-category online marketplaces market. This was the first instance in which the Board decided to impose interim measures in an investigation conducted on algorithm-based competition law violations. Before the Trendyol investigation, the Authority had not inspected algorithmic commercial behaviours. Therefore, such examination constitutes a milestone for on-site investigations, as the Authority has analysed the algorithms of an undertaking in detail for the first time.</p>
4.	<p>What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.</p>
	<p>While there are no precedents specific to the digital economy as yet, the Turkish Competition Law regime recognises and condemns ‘hub and spoke’ information exchange arrangements. For completeness, the Authority examines the marketplace and sellers’ tendency to hub and spoke cartels in digital markets in its E-Marketplace Report, a sector report focusing on e-marketplaces drawn up by the Authority.</p> <p>As of February 2023, there are no cases yet where the Authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform.</p>
5.	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>There have been no leniency applications in horizontal cases concerning digital players in Turkey.</p> <p>For completeness, leniency applications are regulated by the secondary legislation under Turkish Competition Law. These are the Regulation on Leniency and Guidelines on Active Cooperation, which derive from Article 16(6) of Law No. 4054. Leniency applications are specific to cartel cases, and they do not cover other types of violations.</p>
6.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	N/A
III.	Vertical agreements

<p>1.</p>	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>The Authority considers the MFN clauses, exclusivity and non-compete obligations, and multi-homing to be competition concerns for inter-platform competition in digital economy as set out in its E-Marketplace Report.</p> <p>In its Guidelines for Vertical Agreements, the Authority lists non-price vertical restraints as single branding, limited distribution, and market allocation. However, there is no specific explanation as to the non-price vertical restraints used by online multi-sided platforms within the documentation or precedents of the Board.</p>
<p>2.</p>	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>Under the Block Exemption Communiqué on Vertical Agreements No. 2002/2 (“Communiqué No. 2002/2”), vertical agreements (including exclusive dealing) which meet the conditions set out in the Communiqué No. 2002/2 are subjected to a block exemption mechanism. According to Article 2 of the Communiqué No. 2002/2, vertical agreements may qualify for the block exemption if (i) the supplier’s market share does not exceed 30% in the relevant market and (ii) there are no hardcore restrictions enumerated under the Communiqué No. 2002/2.</p> <p>In its <i>Trendyol</i> decision (22-23/364-154; 18.05.2022), the Board concluded that, since Trendyol’s market share for the financial year of 2020 was below 30% and there are only negligible restrictions of competition, the exclusive dealing between the parties fell within the block exemption under Communiqué No. 2002/2.</p> <p>For completeness, in Turkey, there are no cases in which the Board imposed an administrative monetary fine to a non-dominant platform for its exclusive dealings.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>The Authority explains in its Guidelines for Vertical Agreements that MFN clauses may be assessed differently in conventional markets and in markets with online platforms. For instance, in conventional markets, the party in favor of which the MFN clause is implemented is the buyer, while in markets with online platforms, the party in favor of which this clause is implemented may be the supplier, buyer, or mediator, depending on the relevant product market.</p>

	<p>The Guidelines for Vertical Agreements does not make a distinction between wide and narrow MFNs. However, in its recent decisions such as <i>Trendyol</i> (22-23/364-154; 18.05.2022) and <i>Yemek Sepeti</i> (22-23/366-155; 18.05.2022), the Board recognises wide and narrow MFNs, identifying their differing nature. That said, it does not categorically oppose either wide or narrow MFNs, rather conducts a case-by-case analysis.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>The first case in which the Board examined online platforms’ MFN clauses in detail was <i>Yemek Sepeti</i>. This case concerned an alleged violation of article 6 of Law No. 4054, which prohibits abuse of dominant position. <i>Yemek Sepeti</i> (which is now owned by Delivery Hero SE, one of the leading online food ordering and delivery marketplaces), was the incumbent online food delivery platform in Turkey, with a significant market share and unparalleled geographical coverage. Certain competitors of <i>Yemek Sepeti</i> argued (mostly encouraged by recent investigations initiated in certain European countries against the MFN clauses used by <i>Booking.com</i>) that <i>Yemek Sepeti</i> held a dominant position in the market for online food delivery platform services and was abusing this dominant position by hindering the entry of competitors via the MFN clauses. After confirming that <i>Yemek Sepeti</i> held a dominant position with a market share of more than 90 per cent, the Board undertook an assessment of the MFN clauses that were in place between <i>Yemek Sepeti</i> and the restaurants that used its online platform. The relevant clauses were divided into two subcategories: MFN clauses that required restaurants not to offer better terms in their own food delivery channels (narrow MFN clauses) and MFN clauses that required restaurants not to offer better terms in any other channel, including competing platforms (wide MFN clauses). The Board analysed the effects of the wide MFN clauses in detail and concluded that their anticompetitive effects outweighed the efficiency gains that they created under the specific circumstances of the case at hand, especially considering <i>Yemek Sepeti</i>’s significant market power. The Board decided that the narrow MFN clauses did not constitute a violation but refrained from conducting a detailed effects-based assessment in this particular case. As a matter of fact, the Board specifically noted that it would not further evaluate the pro-efficiency (especially to tackle the free-riding problem) and anticompetitive aspects of the narrow MFN clauses as these were not a subject of the investigation.</p> <p>Additionally, the <i>Booking.com</i> decision (17-01/12-4; 05.01.2017) sets a landmark precedent that concerns the application of MFN clauses in investigating online markets under the Turkish Competition Law regime. <i>Booking.com</i>, as the investigated platform, is a digital travel company that provides an online accommodation reservation service. The case handlers claimed that the provisions related to the price and availability parity clause as well as the best price guarantee (broad MFN clauses) contained within the agreements executed between <i>Booking.com</i> and the accommodation providers, having the effect of restricting competition within the meaning of Article 4 of Law No. 4054. The Board decided that such clauses foreclose the market to competitors and reduce the</p>

	<p>competition in the market for accommodation reservation services platforms. It found that the clauses reduce Booking.com's competitors' incentive to offer lower commission rates to the accommodations that execute broad MFN clauses with Booking.com, prevent the application of competitive pressure to the commission rates applied by Booking.com, and protect Booking.com from new entrants to the market. The Board concluded that Booking.com's wide MFN clauses were in violation of Article 4 of Law No. 4054.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>Both the pro-competitive and anti-competitive effects of MFNs are recognised in the Guidelines for Vertical Agreements. The Board concludes in its <i>D-Market and Anka Mobil</i> decision (21-22/266-116; 15.04.2021) that the effects of MFN clauses may differ on a case-by-case basis according to the market positions of the party benefiting from the clause as well as its competitors, the goal of including the clause in the agreement, the characteristics of the market, and the clause itself, therefore, it they are not considered illegal <i>per se</i>.</p> <p>Accordingly, the competitive harm and potential efficiencies imposed by online platforms are generally described in the precedents of the Board as specific to each case. For example, in its <i>D-Market and Anka Mobil</i> decision (21-22/266-116; 15.04.2021), the Board considered the competitive harms posed by the MFN clause used by an online platform including the foreclosure of the market to other online platforms, the creation of entry barriers into the market, and causing price rigidity. In addition, as explained in the same decision, a potential efficiency produced by the MFN clause used by an online platform can be generating traffic through the platform sales.</p>
<p>6.</p>	<p>Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?</p>
	<p>Under the Communiqué No. 2002/2, vertical agreements, not only in the digital economy but in all sectors, which meet the conditions set out in the Communiqué No. 2002/2 can be subjected to an exemption mechanism.</p> <p>Article 4 of Law No. 4054 provides a general principle that agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion, or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. That said, Communiqué No. 2002/2 provides a block exemption for certain vertical agreements which meet the conditions set forth under the said communiqué. According to Article 2 of the Communiqué No. 2002/2, vertical agreements may qualify for the block exemption if (i) the supplier's market share does not exceed 30% in the relevant market and (ii) there are no hardcore restrictions enumerated under the Communiqué No. 2002/2.</p>

7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	N/A
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>There is no primary legislation that specifically governs the conduct of digital companies in Turkey. The primary competition legislation in Turkey is Law No. 4054 and this law applies to competition in each and every market, including digital markets. There are no special rules or exemptions with respect to competition in digital markets in Turkey.</p> <p>The Authority has not yet issued dedicated secondary legislation (i.e., regulation, communiqué, or guidelines) on the application of competition law rules in digital sectors. However, the Authority is now working on legislative pieces concerning digital markets. The Authority started working on its sector inquiries that focus on online marketplaces in June 2020, and on online advertising in March 2021. The Authority aims to determine behavioral and structural issues surrounding these sectors and to offer solutions accordingly. Each of these sector inquiries served as preparatory components facilitating the Authority’s legislative actions.</p> <p>The Authority’s E-Marketplace Report of April 14, 2022 stated that <i>“E-marketplaces represent only a fraction of the targeted digital actors. The Authority currently has an on-going legislative study that aims to ex ante determine the (i) digital platforms with significant market power and (ii) regulations on obligations they have to abide by and practices they have to avoid. The Authority is planning to conclude the relevant study in a short period. It is important to underline that although this very sector inquiry was one of the main inputs for the legislative study, relevant legislative study is aimed to execute on a broader scale with a more extensive motive.”</i></p> <p>Accordingly, the lawmakers recently initiated a public consultation process for a new set of draft amendments to the Law No. 4054 (“Draft Amendments”). The Draft Amendments follows the Digital Markets Act (“DMA”) of the European Union in terms of its scope and details as it aims to regulate the conducts of players active in digital markets. However, the Draft Amendments may be subject to changes further down in the public consultation, and thus have not entered into effect.</p>
2.	Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or

	<p>communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>The Authority alone enforces antitrust rules in Turkey’s digital markets. The Authority operates with several different supervision and enforcement departments, all of which are dedicated to specific sectors. Although none are dedicated specifically to digital markets, the Supervision and Enforcement Department I oversees information and communications technology and services, and media and advertising services, which broadly relate to digital markets.</p> <p>While Law No. 4054 does not recognise any industry-specific abuses or defences, independent regulatory authorities have the jurisdiction to regulate the activities of dominant players in the specific regulated sectors. For instance, according to the secondary legislation issued by the Turkish Information and Communication Technologies Authority, firms with significant market power are prohibited from engaging in discriminatory behaviour among companies seeking access to their network and (unless justified) rejecting requests for access or interconnection. Similar restrictions and requirements are also applicable in the energy sector. Also, the secondary legislation issued by the Energy Market Regulatory Authority brings certain requirements for the retail electricity sales companies and distribution companies. The sector-specific rules and regulations provide structural market remedies for the effective functioning of the free market; however, these do not entail any dominance-control mechanisms.</p> <p>Additionally, the Banking Regulation and Supervision Agency regulates and supervises the banking sector. Accordingly, mergers between banks are subject to the approval of the Banking Regulation and Supervision Board. Further, changes to the control structure of energy companies resulting in a change in more than 10% - or for public companies, more than 5% - of their capital, or a merger concerning these companies are subject to the approval of the Energy Market Regulatory Board. As regards companies in the information and communication sector, a merger notification to the Information and Communication Technologies Authority is not required. That said, the Turkish Competition Board should take into account the Information and Communication Technologies Board’s opinion on mergers in this sector. Mergers in the broadcasting sector are subject to the approval of the Radio and Television Supreme Council.</p> <p>The Authority is the only regulatory body that investigates and condemns abuses of dominance. However, the Board takes into account the regulatory context to assess the nature of the market and whether the investigated undertaking’s conduct is justified based on these regulations.</p>
<p>3.</p>	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>As explained above, the primary competition legislation in Turkey is Law No. 4054 and this law applies to competition in each and every market, including digital markets. There are no special rules or exemptions with respect to competition in digital markets in Turkey. Additionally, as per our explanations above, while Law No. 4054 does not</p>

	recognise any industry-specific abuses or defences, independent regulatory authorities have the jurisdiction to regulate the activities of dominant players in the specific regulated sectors.
i.	Please describe how “platform” is defined for these purposes.
	<p>The Draft Amendments are presented to public opinion in late 2022 and have not entered into effect and are subject to changes.</p> <p>As such, while there is no final definition for ‘platform’ in Turkish competition legislations, the Final Report of the Authority’s Sector Inquiry for E-Marketplace Platforms sheds light on the Authority’s approach. Accordingly, the Authority remarks that <i>“Although there is not a generally accepted term for platform, all definitions mention three common features of platform business models: (i) platforms offer services to more than one customer group (demand source), (ii) there are indirect network effects/externalities between these customer groups’ demands, and (iii) these network effects can only be internalised by the platform.”</i></p> <p>As mentioned above, while there is no final definition for ‘platform’, the draft amendments to the Law No. 4054 introduce a definition for ‘core platform services’ as <i>“online intermediation services, online search engines, online social networking services, video/audio sharing and broadcasting services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services offered by the provider of any of these services”</i> which is akin to the definitions set under Article 2 of DMA.</p>
ii.	What are the criteria used to determine whether a platform falls under the regime?
	<p>As explained above, it should be noted that the Draft Amendments are presented to public opinion during late 2022 and have not entered into effect and are subject to changes.</p> <p>For the time being Draft Amendments remark that thresholds which will be appropriate to the definition of significant market power will be determined via a communiqué. Accordingly, the Draft Amendments provide that quantitative criterion such as annual gross revenues, number of end users and the number of commercial users, and qualitative criterion such as network effects, data ownership, vertically integrated and conglomerate structure, economies of scale and scope, lock-in and tipping effects, switching costs, multiple access, user tendencies and undertakings’ mergers and acquisitions will be considered for the determination of the thresholds.</p>
iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?

	<p>As explained above, it should be noted that the Draft Amendments are presented to public opinion during late 2022 and have not entered into effect and are subject to changes.</p> <p>Accordingly, for the time being, the Draft Amendments are expected to require that an undertaking with significant market power;</p> <ul style="list-style-type: none"> - will equally offer its own goods and services and the goods it mediates for sale, - will not use non-public data for commercial competition, - will not bundle the product and services they offer with another product or services, - will not restrain access to their own platform, - the installation and removal of the apps will be easy, - will not restrain the transitions, - will not forbid the commercial users (the ones who make sales) from also operating on other platforms, - will not restrain from making sales at different prices and conditions, - will not prevent its competitors from entering to the market, and - will not be able to match personal data with data obtained from third parties. <p>In addition to the foregoing, the Draft Amendments also impose obligations on the online advertisement service providers, pursuant to which online advertisement service provider must provide access to advertisers, publishers, advertising agents or third parties authorised by customers to whom it provides online advertising services, the necessary data for ad validation and performance measurement tools and use of free, continuous and real-time information about the visibility and usability of the ad portfolio, including the pricing terms of the bids submitted, the auction process and pricing principles, the fee paid to the publisher for the respective ad services.</p>
<p>iv.</p>	<p>Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?</p>
	<p>For the time being, the Draft Amendments do not establish a separate standard in which a platform will be subject to an obligation based on its business model.</p>
<p>v.</p>	<p>Do you think these conduct requirements provide sufficient legal certainty to market participants?</p>
	<p>The Draft Amendments follow the steps of the DMA in terms of its scope and details as it aims to regulate the conducts of players active in digital markets. However, during the legislation preparations, the Authority sent extensive information requests to undertakings active in the same core platform services markets covered by the DMA. It is fair to say that the information requests were quite comprehensive in nature and were</p>

	<p>mostly specific to the Turkish market. Since the Draft Amendments have not entered into effect, the sufficiency of the obligations and conduct requirements remain to be seen.</p>
vi.	<p>Please summarise any penalties provided for non-compliance.</p>
	<p>As explained above, the Draft Amendments are presented to public opinion during late 2022 and have not entered into effect. Accordingly, there are no penalties resulting from non-compliance with the Draft Amendments.</p>
4.	<p>If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?</p>
	<p>N/A</p>
5.	<p>Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?</p>
	<p>Turkish competition law does not provide a dedicated criterion for establishing market power in digital markets.</p>
6.	<p>If your jurisdiction contains specific competition rules for digital markets, are these rules <i>per se</i>; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?</p>
	<p>Turkish competition law does not provide specific competition rules for digital markets.</p>
7.	<p>Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?</p>
	<p>Turkish competition law does not specifically impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful <i>per se</i> or subject to a rebuttable presumption.</p>

8.	<p>If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.</p>
	<p>Turkish competition law does not currently impose specific competition rules on digital companies with market power.</p>
9.	<p>How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?</p>
	<p>The Turkish competition law regime does not separately address concerns surrounding access to data held by companies with market power in digital markets.</p> <p>That said, there are several decisions where the Authority considered data portability and interoperability in the digital economy.</p> <p>In the Turkish Insurance Association decision (17-30/500-219; 27.09.2017), the Board stated that small insurance companies will have similar advantages by accessing the data of big companies and that this will increase economic efficiency. As a result, the Board granted individual exemption.</p> <p>In Nadirkitap (22-15/373-122; 07.04.2022), the Board decided that the online book sales platform Nadirkitap holds a dominant position in the market for platform services for second-hand book sales. As such, the Board assessed that Nadirkitap abused its dominance by unjustifiably preventing access to and the portability of book data uploaded to its website by third-party sellers. As a result, the Board decided to fine Nadirkitap. In addition, to ensure effective competition the Board also ordered Nadirkitap to cease blocking access to data and to provide sellers with their data in an accurate, understandable, secure, complete, free-of-charge and appropriate format, should the sellers request so. Thus, sellers are now able to transfer data to other platforms.</p> <p>The Board also assessed interoperability in its Sahibinden decision (21-46/655-325; 30.09.2021) where the complainant alleged that, among others, Sahibinden abused its dominant position by not allowing its integration to Sahibinden's online platform. The complainant's allegations mainly consist of request for interoperability with Sahibinden's online platform, as the integration into Sahibinden's platform is allegedly essential to carry out the complainant's activities. The Board noted that (i) interoperability means the ability of different digital services to work and communicate together and can be categorised as horizontal or vertical interoperability, (ii) obstruction of interoperability is not in and of itself a type of violation and the benefits and harms of interoperability may vary depending on the economic and technological conditions in the relevant markets, (iii) in order to identify the competition problems, it is necessary to look at the whole picture, to question the market in which integration is requested and the integration process that is claimed to be necessary to operate in this market. In light of this, the Board assessed the requested integration's long and short term benefits and harms to the competition, and concluded that the complainant's integration request relates to a technology request to perform Sahibinden's basic services through its own interface,</p>

	<p>rather than a request for access to the technology required for the provision of a service, such as interoperability examples in practice. All in all, the Board evaluated that Sahibinden's refusal to provide integration cannot be considered as (i) preventing the customer groups from being fed from multiple sources or (ii) making the activities of other undertakings difficult/excluding them from the market by preventing interoperability, thus does not lead to a violation.</p> <p>It is also worth noting that the Authority's recent Study on the Reflections of Digital Transformation on Competition Law published on April 18, 2023 indicates that the prevention of access to data or interoperability is one of the methods the competition can be distorted by an undertaking, and finds it appropriate to regulate data access practices of platforms with significant market power, as a potential solutions to address competition concerns in digital markets.</p>
<p>10.</p>	<p>Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.</p>
	<p>Refusals to supply and access to essential facilities are common forms of abuse with which the Authority is very familiar. According to the Guidelines on Abuse of Dominance, an undertaking's (i) refusal to supply the goods or services it produces as well as the tangible or intangible business inputs in its possession, and (ii) direct (outright) or indirect (constructive) refusal are considered instances of refusal to deal. Raw physical materials, infrastructure that is necessary for the provision of certain services, product distribution systems, and intangible business inputs or information (whether or not protected by intellectual property rights), as well as other assets demanded by undertakings, can be considered among the goods, services, or inputs mentioned above.</p> <p>The essential facilities doctrine applies based on the indispensability condition, which is referred to as the "indispensability" of the product or service the dominant undertaking is alleged to deny access to. This was exemplified by the Board in Daichii Sankyo (18-15/280-139; 22.05.2018.):</p> <p><i>"The essential facilities doctrine is immensely parallel with the aforementioned indispensability condition. That is because the essential facilities doctrine provides a useful framework for identifying the circumstances where a dominant undertaking can be imposed an obligation to contract, under the EU law. The essential facilities doctrine mainly bases the indispensability criterion on an exclusionary theory of harm."</i></p> <p>In Maysan (19-22/353-159; 20.06.2019), the Board concluded that Maysan did not abuse its dominant position by refusing to supply, as its products were not essential for reselling automotive spare parts. Therefore, the Board treats the indispensability criterion as the reflection of the essential facilities doctrine.</p> <p>In its Sahibinden decision (21-46/655-325; 30.09.2021), the Board examined whether Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret AŞ ("Sahibinden"), an online platform which acts as an intermediary for online advertising in various categories such as real estate, automotive, spare part and accessories and construction machines, abused its</p>

	<p>dominant position via exclusionary practices. After determining that restricting interoperability is not an infringement in and of itself, the Board remarked that the market in which the integration is requested and whether it is necessary to operate in that market must be evaluated. Under the current market conditions, the Board considered that it would be disproportionate to impose an interoperability obligation through an integration as specified in the complainant's request to Sahibinden. Additionally, the Board made evaluations under refusal to supply and looked into whether the integration process is indispensable. Accordingly, the Board established that (i) the integration is not indispensable to compete in the downstream market and (ii) even if that is not the case, the request for integration is rejected with just cause. Finally, the Board concluded that Sahibinden did not abuse its dominant position. From the Board's decision it is seen that, to determine whether the investigated party abused its dominant position, the market conditions are thoroughly scrutinised .</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>N/A</p>

Country: United Kingdom

Contributors: Alex Nourry, Stavroula Vryna, Sophie Halls, Connie Maskell (Clifford Chance)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	<p>In the UK, mergers in digital markets are reviewed under the standard UK merger control regime as set out in EA02.¹¹³</p> <p>The DMCC Bill includes proposals to amend the UK merger control regime to capture specific types of transactions within the digital sector, including:</p> <ul style="list-style-type: none">• the addition of a new threshold to the standard UK merger control regime, to capture specific vertical and conglomerate mergers, with a focus on “killer” acquisitions of nascent innovators within this space. This new threshold would allow the CMA to review deals where the acquirer possesses an existing share of supply of goods or services of 33% in the UK (or a substantial part of it), and a UK turnover of £350 million, provided another party (usually the target) carries on activities or has has some sales in the UK, no matter how small; and• the addition of a mandatory pre-closing notification requirement to the CMA, prior to completion, for “significant transactions” by SMS firms, where:¹¹⁴<ul style="list-style-type: none">• The SMS firm acquires over a 15% equity or voting share following the transaction;• The value of the SMS firm’s holding exceeds £25 million; and• The transaction meets a UK nexus test. <p>The Bill will also introduce certain changes with a view to making merger reviews more efficient, such as:</p> <ul style="list-style-type: none">• enabling parties to make a fast-track reference to Phase 2 review without the requirement for the CMA to assess whether the merger could result in a substantial lessening of competition.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g.,

¹¹³ Please see: <https://www.legislation.gov.uk/ukpga/2002/40/contents>.

¹¹⁴ Please see: <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>

	<p>would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?</p>
	<p>In practice, the UK Competition Authorities have applied a wide interpretation of existing merger control thresholds (including the “share of supply” jurisdictional test) to obtain jurisdiction over these acquisitions.</p> <p>The existing UK merger control regime (set out in EA02) provides two alternative tests to establish jurisdiction. The first test being the “<i>turnover test</i>” outlined in Question 1 above. Where the turnover test is not met, CMA is able to establish jurisdiction where “<i>the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it,</i>” (the “share of supply” test).¹¹⁵</p> <p>The flexibility of the share of supply test has meant that in practice the CMA has been able to consistently exert jurisdiction over digital market transactions in cases where target turnover was limited, but the value of the deal was deemed high. For example, on 11 June 2020, the CMA launched an investigation into the completed acquisition by Facebook, Inc and Giphy, Inc. In this case, the CMA established jurisdiction over the merger through its wide interpretation of the ‘share of supply test’ as the parties did not meet the relevant turnover tests (Giphy does not charge for access to its online database and therefore did not generate revenue in the UK). In the CMA’s view a relevant merger situation had been established as (i) Facebook and Giphy were both enterprises that have ceased to be distinct within the statutory period; (ii) the share of supply test was met on the basis that the acquisition had resulted in an increment to the share of supply and the Parties supply, in the UK, at least 25% of apps and/or websites that allow UK users to search for and share GIFs. On 30 November 2021, the CMA found that the completed acquisition may give rise to competition concerns and a substantial lessening of competition in both the supply of display advertising in the UK, and in the supply of social media services worldwide (including the UK) and required that Facebook sell Giphy to an independent purchaser with the capability and commitment to develop and supply GIF-based advertising in the UK and GIFs to social media platforms.</p> <p>Please also see above (response to Question 1), the DMCC’s proposed amends to the UK merger control rules enabling the CMA to exert more oversight over deals in the digital sector.</p>
<p>3.</p>	<p>For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official</p>

¹¹⁵ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf

	<p>view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies' respective roles should be?</p>
	<p>The CMA reserves the right to speak with other governmental bodies, regulators (including the sectoral regulators), industry associations and consumer bodies regarding their view of merger cases where appropriate, including those within the digital sector. Sectoral regulators may also carry out their own public consultation before providing comments to the CMA. The CMA will take any views it receives into account, although it is ultimately for the CMA to decide whether there is a realistic prospect that the merger will give rise to substantial lessening of competition.¹¹⁶</p> <p>In cases where a merger is being investigated by other competition authorities, or the CMA wishes to discuss with other bodies as outlined above, the CMA will typically seek a confidentiality waiver from the merger parties. This waiver is intended to enable the CMA and the relevant party to discuss any competition concerns arising from the merger, exchange confidential information and evidence related to the merger, discuss potential/actual remedies and, where appropriate, gather information to facilitate the coordination of investigation timetables. In cases where a waiver is not obtained by the CMA, they are still able to talk to other authorities but cannot share documents or other confidential information.¹¹⁷</p> <p>In addition, the CMA engages in more generalised collaborations with other government/regulatory bodies. For example, on 19 May 2021, the ICO and CMA released a joint statement, setting out their views on the relationship between competition and data protection in the digital economy.¹¹⁸ Moreover, it expressed the ICO and CMA's commitment to continuing to work together on projects that will implement this joint statement into practice. This can already be seen in the CMA's investigation into Google's Privacy Sandbox and the ICO's investigation into real-time bidding in the AdTech-industry.¹¹⁹</p> <p>This commitment has been reinforced through an updated Memorandum of Understanding ("MOU") signed by the ICO and CMA, which sets out how the two regulators will continue to collaborate in the future e.g., through information sharing and joint projects.¹²⁰ The MOU and the statement fit within the broader programme of work of the Digital Regulatory Cooperation Forum, involving the CMA, the ICO, Ofcom</p>

¹¹⁶ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf

¹¹⁷ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf

¹¹⁸ Please see: <https://ico.org.uk/media/about-the-ico/documents/2619797/cma-ico-public-statement-20210518.pdf>.

¹¹⁹ Please see: <https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-agreement-between-google-and-meta-and-behaviour-by-google-in-relation-to-header-bidding>

¹²⁰ Please see: <https://ico.org.uk/about-the-ico/what-we-do/digital-regulation-cooperation-forum/>.

	<p>and the FCA, to support a coordinated regulatory approach across digital and online services.¹²¹</p> <p>The CMA has also always worked closely with other competition authorities around the world, including the FTC, DOJ, and the EC. There are key examples of collaboration in cases such as <i>Illumina/PacBio</i>,¹²² <i>ThermoFisher/Gatan</i>,¹²³ and <i>Sabre/Farelogix</i>,¹²⁴ <i>Nvidia/Arm</i>,¹²⁵ and <i>Cargotec/Konecranes</i>.¹²⁶ In addition, a good example of collaboration in relation to remedies can be seen in <i>Stryker/Wright</i>,¹²⁷ in which the parties were offered a divestment package to address competition concerns across both the UK and the US - during this the CMA extended its timetable for considering remedies in order to align with the FTC's timetable and ensure that any remedy accepted by the CMA was also acceptable in the US.¹²⁸</p> <p>In addition, on 2 September 2020, the CMA signed a new framework with five international counterpart competition authorities (i.e., the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, Competition Bureau Canada, the United States Department of Justice, and the United States Federal Trade Commission) to improve cooperation on investigations (The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities).¹²⁹</p>
<p>4.</p>	<p>What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed whether such metrics objectively reflect a platform or digital enterprise's market position?</p>
	<p>The CMA has used a variety of metrics to analyse the market share of digital enterprises. In addition to revenue, the CMA has used <i>inter alia</i> the number of conversations by UK users on B2C messaging channels (<i>Facebook/Kustomer</i> merger), the average monthly searches on the apps and/or websites that allow UK users to search for and share GIFs (<i>Facebook/Giphy</i> merger), the supply of virtual social networking services as measured by Experian Hitwise data (<i>Facebook/Instagram</i> merger), and the number of UK users (<i>Google/Looker</i> merger).</p> <p><i>Dynamic competition</i></p>

¹²¹ Please see: <https://ico.org.uk/about-the-ico/what-we-do/digital-regulation-cooperation-forum/>.

¹²² Please see: <https://www.gov.uk/government/news/illumina-pacbio-abandon-merger#:~:text=Illumina%2C%20Inc.,universities%2C%20laboratories%20and%20research%20institutes>.

¹²³ Please see: <https://www.gov.uk/cma-cases/thermo-fisher-scientific-roper-technologies-merger-inquiry>

¹²⁴ Please see: <https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry>.

¹²⁵ Please see: <https://www.gov.uk/cma-cases/nvidia-slash-arm-merger-inquiry>

¹²⁶ Please see: <https://www.gov.uk/cma-cases/cargotec-corporation-slash-konecranes-plc-merger-inquiry>

¹²⁷ Please see: <https://www.gov.uk/cma-cases/stryker-wright-medical-merger-inquiry>.

¹²⁸ Please see: <https://www.gov.uk/government/speeches/berkeley-spring-forum-mergers-policy-and-practice>

¹²⁹ Please see: <https://www.gov.uk/government/news/cma-to-increase-competition-cooperation-with-international-partners>

On 18 March 2021, the CMA released new Merger Assessment guidance.¹³⁰ This updated guidance sought to consider the significant economic changes that had occurred since the publishing of its previous guidance in 2010.

These changes included the adaptation of the CMA’s theories of harm for mergers in digital markets. These changes sought to address and reflect developments in the digital market sphere and the recommendations made by the Furman and Lear Reports.¹³¹ These changes included the CMA taking a greater consideration of dynamic counterfactuals and the impact of a merger on innovation, when conducting its merger assessments.

These revised guidelines were important in providing additional and detailed guidance on how the CMA would consider future and dynamic competition issues within its merger decisions. Regarding ‘future competition’, the updated CMA guidance sets out that in assessing mergers the CMA will consider (i) whether either merger firm would have entered or expanded into the market absent of the merger; and (ii) whether the loss of future competition brought about by the merger would give rise to the substantial lessening of competition. This highlights that the CMA in its assessment of mergers will consider the fact that whilst firms may not presently compete “*head-to-head*”, they could do so in the future. This means that any merger decisions taken by the CMA must be ‘future-proofed’ by considering the factors outlined in (i) and (ii) above.¹³²

Regarding ‘dynamic competition’ issues, the CMA’s guidance considers how the threat of future competition may affect the merging firms’ incentives to compete e.g., their investments to protect or expand future profits. The CMA’s guidance notes that this consideration is particularly important for mergers within “*dynamic markets*” like digital markets, stating: “*in dynamic markets, firms that may not compete head-to-head today might do so in the future. The threat of future disruption may inspire incumbent suppliers to improve their offer in the present, for the benefit of consumers. Fast-changing and evolving markets make predicting the future uncertain. The CMA needs to be prepared for these challenges and to be able to take effective decisions for the benefit of consumers*”. Moreover, the CMA’s revised guidelines also place a particular emphasis on non-price factors in response to the increased number of “*free-to-consumer*” markets.

A clear example of this was the CMA’s approach in the merger assessment of *Experian Limited/Credit Laser Holdings* (Clearscore).¹³³ In this case, the CMA’s decision to

¹³⁰ Please see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_-_pdf

¹³¹ Please see: <https://www.gov.uk/government/publications/assessment-of-merger-control-decisions-in-digital-markets> and <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>.

¹³² Please see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051823/MAGs_for_publication_2021_-_pdf

¹³³ Please see: <https://www.gov.uk/cma-cases/experian-limited-credit-laser-holdings-clearscore>.

	<p>provisionally prohibit the merger was heavily driven by the dynamic nature of the market, and whether the merger was likely to “<i>substantially reduce the parties’ incentives to invest in improvements and product developments, thereby reducing the rate of innovation</i>” in the market. In addition, the CMA was concerned that the merger would lead to a substantial reduction in the parties’ incentives to reduce prices or improve the quality of Experian’s paid for products, in absence of their rivalry. The CMA concluded that this would cause harm to consumers and so provisionally blocked the merger.¹³⁴ Shortly thereafter, both parties abandoned the transaction.¹³⁵ In addition, the CMA’s approach towards the assessment of dynamic markets and future competition under these revised merger guidelines were later upheld by the CAT in the Meta / Giphy appeal.¹³⁶</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p><i>Prohibited mergers in the UK</i></p> <p>In recent years, the CMA has adopted a progressively tougher approach towards merger control within the digital market sector. For example:</p> <ul style="list-style-type: none"> <p>Sabre/Farelogix CMA merger inquiry: On 11 June 2019, the CMA launched an investigation into the anticipated acquisition by Sabre Holdings Corporation of Farelogix Inc. These companies both supplied software solutions to aid airline travel bookings. In this case, the CMA used a wide interpretation of the share of supply test to obtain jurisdiction over the merger despite it lacking an obvious jurisdictional link with the UK (as both parties are US-based with no UK turnover). The CMA found the share of supply test to be satisfied due to Farelogix’s sales to a single UK customer (British Airways). On 9 April 2020, following a detailed Phase II investigation, the CMA published its final report which prohibited the acquisition, on the basis that it was “<i>the only effective remedy to the substantial lessening of competition issues found</i>”. These issues included that in the CMA’s opinion, the acquisition would result in (i) reduced innovation; (ii) higher fees for airlines and travel agents; and (iii) a more limited choice of suppliers for</p>

¹³⁴ Please see: https://assets.publishing.service.gov.uk/media/5c065b8140f0b6705f11cf17/experian_clearscore_provisional_findings.pdf

¹³⁵ Please see: <https://www.gov.uk/government/news/abandonment-of-credit-score-checking-merger> and https://assets.publishing.service.gov.uk/media/5c765c8fe5274a0ec6ed960a/190226_Notice_of_Cancellation_of_Reference.pdf

¹³⁶ Please see: <https://www.catribunal.org.uk/judgments/142941221-meta-platforms-inc-v-competition-and-markets-authority-judgment-14-jun-2022>

airlines.¹³⁷ In May 2021, the CMA's decision was upheld on appeal before the CAT.¹³⁸

- **Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc CMA merger inquiry:** On 11 June 2020, the CMA launched an investigation into the completed acquisition by Facebook, Inc of Giphy, Inc. In this case, the CMA established jurisdiction over the merger through its wide interpretation of the 'share of supply test' as the parties did not meet the relevant turnover tests (as Giphy does not charge for access to its online database and therefore did not generate revenue in the UK). In the CMA's view a relevant merger situation had been established as (i) Facebook and Giphy were both enterprises that have ceased to be distinct within the statutory period; (ii) the share of supply test is met on the basis that the acquisition had resulted in an increment to the share of supply and the Parties supply, in the UK, at least 25% of apps and/or websites that allow UK users to search for and share GIFs.¹³⁹

On 30 November 2021, the CMA found that the completed acquisition may give rise to competition concerns and a substantial lessening of competition in both the supply of display advertising in the UK, and in the supply of social media services worldwide (including the UK) and required that Facebook sell Giphy to an independent purchaser with the capability and commitment to develop and supply GIF-based advertising in the UK and GIFs to social media platforms.¹⁴⁰

The CMA's decision was upheld by the CAT on 14 June 2022. The CAT rejected Facebook's substantive appeal grounds. It concluded that the CMA's finding that the merger would substantially lessen dynamic competition was both a correct and lawful reasoning to prohibit the acquisition.¹⁴¹

- **Microsoft Corporation / Activision Blizzard, Inc:** On 6 July 2022, the CMA launched an investigation into the \$68.7 billion anticipated acquisition by Microsoft Corporation of Activision Blizzard. Microsoft produces Xbox, a gaming console, Azure, a cloud platform, and Windows OS, a PC operating system. Activision Blizzard has gaming franchises including Call of Duty and World of Warcraft. The CMA decided to prevent the deal going ahead, after having considered and rejected remedies offered by Microsoft, on the basis that it would reinforce Microsoft's position in the cloud gaming market, of which the CMA estimated it already held 60-70% globally. The CMA considered that evidence indicated that absent the merger, Activision Blizzard would start providing games via cloud platforms in the foreseeable future.

¹³⁷ Please see: https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf

¹³⁸ Please see: <https://www.catribunal.org.uk/judgments/134541220-sabre-corporation-v-competition-and-markets-authority-judgment-2021-cat-11-25>

¹³⁹ Please see: <https://www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry#reference-decision>

¹⁴⁰ Please see: <https://www.gov.uk/cma-cases/facebook-inc-giphy-inc-merger-inquiry#reference-decision>

¹⁴¹ Please see: <https://www.catribunal.org.uk/judgments/142941221-meta-platforms-inc-v-competition-and-markets-authority-judgment-14-jun-2022>

	<p>Following the deal having been prohibited by the CMA, Microsoft has submitted a newly restructured deal to the CMA for its fresh consideration. Microsoft had already initiated an appeal of the CMA's prohibition decision, which was stayed by the Competition Appeals Tribunal.</p> <p><i>Transactions abandoned following adverse provisional findings adopted by the CMA</i></p> <ul style="list-style-type: none"> <p>Experian Limited/Credit Laser Holdings (Clearscore): Clearscore and Experian are both businesses which provide users with free credit scores and match them to appropriate credit products via its digital platform. Following the announcement of their proposed merger, on 25 May 2018, the CMA launched a merger enquiry. In April 2019, the CMA announced its provisional findings and provisionally prohibited the merger. These findings were formed on the basis that the merger was likely to “<i>substantially reduce the parties’ incentives to invest in improvements and product developments, thereby reducing the rate of innovation</i>” in the market. In addition, the CMA was concerned that the merger would lead to a substantial reduction in the parties’ incentives to reduce prices or improve the quality of Experian’s paid for products, in absence of their rivalry. The CMA concluded that this would cause harm to consumers and so provisionally blocked the merger.¹⁴² Shortly thereafter, both parties abandoned the transaction.¹⁴³</p> <p>Taboola/Outbrain merger inquiry: Taboola.com proposed an acquisition of Outbrain, with both companies being active in the digital advertising market. On 9 July 2020, the CMA referred the proposed acquisition by Taboola.com of Outbrain Inc. for an in-depth investigation, on the basis that the CMA believed it consisted of arrangements that are in progress or in contemplation, which if accrued into effect, would result in the creation of a relevant merger situation, and that this may result in a substantial lessening of competition within the relevant markets.¹⁴⁴ On 14 September 2020, Taboola announced that it would be abandoning its proposed purchase of Outbrain following the adverse findings by the CMA.¹⁴⁵</p>
<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the</p>

¹⁴² Please see: https://assets.publishing.service.gov.uk/media/5c065b8140f0b6705f11cf17/experian_clearscore_provisional_findings.pdf

¹⁴³ Please see: <https://www.gov.uk/government/news/abandonment-of-credit-score-checking-merger> and https://assets.publishing.service.gov.uk/media/5c765c8fe5274a0ec6ed960a/190226_Notice_of_Cancellation_of_Reference.pdf

¹⁴⁴ Please see: <https://www.gov.uk/cma-cases/taboola-outbrain-merger-inquiry>

¹⁴⁵ Please see: <https://www.gov.uk/government/news/digital-advertising-merger-to-be-abandoned-during-cma-investigation> and https://assets.publishing.service.gov.uk/media/5f6b14a88fa8f55f300ef625/Notice_of_cancellation_of_merger_reference.pdf.

	<p>conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p><i>Remedies</i></p> <p>In recent merger investigations, the CMA has generally adopted the approach of applying structural rather than behavioural remedies in relation to digital markets. The CMA has conducted a significant amount of analysis on the success of merger remedies,¹⁴⁶ conducting a detailed evaluation of over 18 case studies on an ongoing basis over the last 15 years, spanning structural remedies such as divestiture, behavioural remedies such as price controls and vertical separation, as well as intellectual property and licensing remedies.</p> <p>In relation to behavioural remedies, the CMA has stated, together with the ACCC and Bundeskartellamt in a joint statement,¹⁴⁷ that for dynamic markets such as the tech or life sciences space, it prefers to adopt structural remedies rather than behavioural remedies. This reflects the view articulated in the CMA's Remedies Guidance,¹⁴⁸ that behavioural remedies are less likely to effectively address competition concerns, especially when used within dynamic markets.¹⁴⁹</p> <p><i>The CMA's case against behavioural remedies is that its experience "shows that the complexity of some markets and transactions renders behavioural remedies less suitable in a number of ways. Behavioural remedies create continuing economic links and are unlikely to create the same level of pre-merger competitive intensity between the merging firms. Behavioural remedies can become quickly outdated or unsuited to remedying issues as markets, products and customer desires change. Structural remedies are more likely to avoid these pitfalls and preserve competition." In addition, in the CMA's view: "where no divestment is available, agencies should not be afraid of prohibiting a merger. Preserving competition is in the best interests of consumers."¹⁵⁰</i></p> <p>For example, in the Meta/Giphy merger, the CMA rejected the behavioural remedies proposed by Meta, which essentially involved a time-limited commitment to provide continued access to GIPHY. The CMA rejected this on the basis that: <i>"In light of the dynamic and fast-changing nature of the relevant markets, a static behavioural remedy would not have been effective in addressing the competition concerns."¹⁵¹</i></p> <p>In the following two cases, the CMA required structural remedies:</p>

¹⁴⁶ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf

¹⁴⁷ Please see: <https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement>

¹⁴⁸ Please see: <https://www.gov.uk/government/publications/merger-remedies>

¹⁴⁹ Please see: <https://www.gov.uk/government/speeches/berkeley-spring-forum-mergers-policy-and-practice>

¹⁵⁰ Please see: <https://www.gov.uk/government/speeches/berkeley-spring-forum-mergers-policy-and-practice>

¹⁵¹ Please see: <https://www.gov.uk/government/speeches/berkeley-spring-forum-mergers-policy-and-practice>

	<ul style="list-style-type: none"> • StubHub / viagogo: The CMA, having found that the completed acquisition by viagogo of Stubhub resulted or could be expected to result in a substantial lessening of competition within the supply of uncapped secondary ticketing platform services for the resale of tickets to UK events, accepted remedies. The remedy was a partial divestiture, requiring sale of the StubHub International business. • eBay / Adevinta: following the CMA's finding that the anticipated acquisition would be expected to result in a substantial lessening of competition in the supply of generalist online classified advertising services and consumer-to-consumer online marketplaces in the UK, the CMA accepted a structural remedy at phase 1. The transaction was cleared on the basis that the parties would divest Gumtree's UK business and Shpock.
7.	In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?
	Please see the response to Question 1 and the introductory paragraph to this questionnaire response.
8.	Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority's analysis.
	Not applicable, as the UK operates a voluntary filing regime. Mandatory notification requirements for SMS firms per the DMCC Bill are not yet enforce.
9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	The CMA does not have the power to undertake an ex-post analysis that results in the CMA revising an earlier merger decision. However, the CMA does conduct ex-post evaluations of mergers in which, it commissions experts to review the CMA's assessments and decisions. For example, on 14 April 2022, they published: 'Ex-post assessment of merger control decisions involving vertically-related firms'. ¹⁵²

¹⁵² Please see: <https://www.gov.uk/government/publications/ex-post-assessment-of-merger-control-sions-involving-vertically-related-firms>.

	<p>In addition, in cases where the CMA has had doubts about its decision to clear a merger, it has been known to try and address these issues by launching a market investigation into that sector. For example, when the CMA cleared the merger of Motorola and Airwave, it was criticised for not fully considering the risk that the merger would reduce Airwave’s incentive to implement its new service that had been contracted to replace Motorola’s legacy service. Shortly after, the CMA launched the Mobile Network Services Market Investigation,¹⁵³ which investigated the supply of land mobile radio network services for public safety in Great Britain. It appears that this investigation was an action taken by the CMA to retroactively address competition issues caused by their original merger decision, although this was never confirmed.</p>
<p>10.</p>	<p>To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?</p>
	<p>Please see our response to Question 4 above for information on how the CMA analyses merger control decisions.</p>
<p>11.</p>	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p><i>Advance compliance guidance in the UK</i></p> <p>Current UK merger control framework does not contain any specific provisions which allow companies within digital markets to obtain advanced guidance from the CMA on the merger’s competition law compliance, in advance of them entering into an agreement. Prior to June 2021, the CMA operated a system under which it was able to provide short-form opinions that provided non-binding guidance to companies concerning the application of competition law to their proposed agreements which raised novel or unanswered questions under the CA98. However, from 15 June 2021, the CMA withdrew its CMA27 Guidance on the CMA’s Approach to Short-form Opinions and discontinued providing short-form opinions. It should be noted, however, that at this time the CMA stated that this discontinuation “does not mean however that the CMA will not consider giving, through opinions or other means, its non-binding views on the application of competition law to novel questions.”¹⁵⁴</p> <p><i>Merger control following Brexit</i></p> <p>After the end of the Transition Period, on 31 December 2020, UK mergers were no longer subject to the “one-stop-shop” system established for mergers under the EU Merger</p>

¹⁵³ Please see: <https://www.gov.uk/cma-cases/mobile-radio-network-services>

¹⁵⁴ Please see: <https://www.gov.uk/government/publications/guidance-on-the-cmas-approach-to-short-form-opinions>

	Control Regulations. This means that the CMA is now able to investigate transactions in parallel with the EC ¹⁵⁵
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>In the UK, horizontal agreements in digital markets are reviewed under the standard competition framework governing horizontal agreements as set out in CA98 (Chapter 1) and EA02.</p> <p>On 25 January 2023, the CMA published new draft guidance on horizontal agreements, which is currently undergoing the consultation process (from 25 January 2023 to 8 March 2023) This draft guidance published by the CMA is significant in offering some insight into how the CMA views competition affecting digital markets. ¹⁵⁶ For example, the guidance makes specific reference to the importance of considering dynamic competition when in the digital market sphere, on the basis that dynamic competition is a key driver for the wider evolution of competition of many markets and in particular, digital platforms which involve years of investment without the guarantee of future success. ¹⁵⁷ The draft guidance also offers insight into how the CMA views competition law applying to businesses that operate within digital markets. For example, it offers examples of how the CMA's assessment under the Section 9 exemption ¹⁵⁸ may be applied to joint online platforms. ¹⁵⁹</p>
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysed and provide a summary of the agency's approach.
	On 25 January 2023, the CMA published new draft guidance on horizontal agreements, which is currently undergoing the consultation process (from 25 January 2023 to 8

¹⁵⁵ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf

¹⁵⁶ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1131039/HBER_Draft_guidance.pdf

¹⁵⁷ Please see: <https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreement>.

¹⁵⁸ Please see: The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions. Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.

¹⁵⁹ Please see: <https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreement>.

	<p>March 2023). The draft guidance covers various types of collaboration, including (i) purchasing agreements; (ii) commercialisation agreements; (iii) bidding consortia; (iv) production agreements; (v) R&D agreements; and (vi) Agreements covered by the Specialisation Agreements Block Exemption Order 2022. Whilst this guidance does not appear to offer specific rules or guidance as to how it intends to treat collaboration within the digital field, it does offer generalised information on how the CMA intends to deal with the collaboration of (potential) competitors.¹⁶⁰</p> <p>That being said, the draft guidance published by the CMA is significant in offering some insight into how the CMA views competition affecting digital markets.¹⁶¹ For example, the guidance makes specific reference to the importance of considering dynamic competition when in the digital market sphere, on the basis that dynamic competition is a key driver for the wider evolution of competition of many markets and in particular, digital platforms which involve years of investment without the guarantee of future success.¹⁶²</p> <p>In addition, the draft guidance offers insight into how the CMA views competition law applying to businesses that operate within digital markets. For example, it offers examples of how the CMA's assessment under the Section 9 exemption¹⁶³ may be applied to joint online platforms.¹⁶⁴</p>
<p>3.</p>	<p>Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority's approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority's analysis.</p>
	<p><i>Data collection and sharing</i>¹⁶⁵</p> <p>On 13 January 2010, the Office of Fair Trading (“OFT”) (now the CMA), launched an investigation into indirect information exchanges between six private motor vehicle insurers using a specialist market analysis software tool called ‘WhatIf’. The OFT</p>

¹⁶⁰ For more information on the CMA's proposed draft guidance for the collaboration of (potential) competitors, please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1131039/HBER_Draft_guidance.pdf#page=13&zoom=100,93,424

¹⁶¹ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1131039/HBER_Draft_guidance.pdf

¹⁶² Please see: <https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreement>.

¹⁶³ The CA98 provides that some agreements that restrict competition are exempt from the Chapter I prohibition where they satisfy certain conditions. Section 9(1) CA98 sets out the conditions that must all be met for an agreement to benefit from individual exemption from the Chapter I prohibition.

¹⁶⁴ Please see: <https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreement>.

¹⁶⁵ Please see: <https://www.gov.uk/cma-cases/private-motor-insurance-exchange-of-data>

expressed concerns that the insurers were able to access highly individualised , commercially sensitive, nonpublic, pricing information through WhatIf, which could be used to coordinate pricing. The OFT considered that this information exchange might constitute, for this reason, an infringement of the Chapter 1 prohibition under the CA98.

On 2 December 2011, the OFT closed the investigation following commitments being made by the insurers and the IT software service providers which addressed the above concerns, by ensuring that any pricing information exchanged through the analysis tool complied with the principles set out by the OFT e.g., information less than six months old was required to be anonymised and aggregated across at least five insurers.

Algorithms

On 1 December 2012, the CMA launched its most notable case involving computer-powered algorithms and automated pricing software, also known as the ‘online sales of posters and frames’ case. In this case, the CMA launched an investigation into a cartel that related to the sale of posters and frames by two competing sellers on the Amazon UK website. On 12 August 2016, the CMA issued a decision which found that the sellers infringed competition law by agreeing, from 24 March 2011 (at the latest) to 1 July 2015 (at the earliest) that they would not, in certain specified circumstances, undercut each other’s prices for posters and frames sold on Amazon’s UK website. This agreement was executed using automated repricing software that had been developed by the parties to monitor and enforce the agreement.

Following the case, the CMA launched a series of follow-up compliance work, including a campaign to ensure online sellers knew how to not break UK competition law, and information campaign that includes an at-a-glance summary for online sellers that explains what constitutes ‘price-fixing’ and what they can do to avoid it.¹⁶⁶

In October 2018, the CMA announced its new Data, Technology and Analytics unit (the “**DaTA Unit**”). The purpose of which was to help the CMA “stay ahead using the latest in data engineering, machine learning and artificial intelligence techniques”. The CMA noted that this unit will pioneer the use of these techniques internally to make the CMA more effective and enable it “using its legal data gathering powers – to understand how firms are using data, what their machine learning and AI algorithms are doing, the consequences of these algorithms and, ultimately, what actions authorities need to take.”¹⁶⁷

In addition, on 19 January 2021, the CMA published a report entitled “*Algorithms: How they can reduce competition and harm consumers*”.¹⁶⁸ This report, and the accompanying call for information released with it, marked the launch of the new CMA programme of work on analysing algorithms, which aimed to improve the CMAs knowledge of this area and better identify and address harms within this sphere. Within the report, the CMA explores the direct harms algorithms can cause consumers, how

¹⁶⁶ Please see: <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>

¹⁶⁷ Please see: <https://competitionandmarkets.blog.gov.uk/2018/10/24/cmas-new-data-unit-exciting-opportunities-for-data-scientists/>

¹⁶⁸ Please see: <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>.

	the use of algorithms can exclude competitors and so reduce competition (outlining the most recent developments in the algorithmic collusion literature) and summarises the techniques which could be used to analysis algorithmic systems in the future. ¹⁶⁹
4.	What is the view of the competition authority in your jurisdiction on “hub and spoke” arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.
	<p>In its report on ‘Algorithms: How they can reduce competition and harm consumers’ published on 19 January 2021, the CMA set out the following thoughts on ‘hub and spoke’ arrangements:¹⁷⁰</p> <p><i>“Another potential concern is the extent to which pricing recommendations or price setting by common intermediaries could result in supra-competitive prices. Many platforms offer tools and algorithms to their supply-side users (such as third-party sellers on Amazon Marketplace and eBay, and hosts on Airbnb), in order to help them to set and manage their prices. (For example, Amazon provides Automate Pricing for its third-party sellers.) Some sharing economy platforms go further and recommend prices, allow supply-side users to delegate pricing to the platform, or even to require them to do so. It is an open question whether these platforms’ algorithms optimise prices and recommendations for each user independently...It is as yet unclear that competition authorities can object to hub and spoke and autonomous tacit collusion situations where, for example, there may not have been direct contact between two undertakings or a meeting of minds between them to restrict competition.”</i></p>
5.	Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.
	We are not aware of leniency applications in horizontal cases in the digital economy in the UK.
6.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.

¹⁶⁹ Please see: <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>

¹⁷⁰ Please see: <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>

III.	Vertical agreements
1.	On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?
	<p>In the UK, vertical agreements are governed by Chapter 1 of the CA98.</p> <p><i>UK Vertical Block Exemption Order</i></p> <p>On 1 June 2022, both the revised EU Vertical Block Exemption Regulation 2022/720 (“EU VBER”)¹⁷¹ and the UK Vertical Block Exemption Order (“UK VABEO”) came into force.¹⁷² With the UK VABEO being primarily drafted based on earlier drafts of the EU VBER and its guidance.</p> <p>These block exemptions are in place to provide a safe harbour for vertical agreements from EU/UK prohibitions on anticompetitive agreements, in cases where (i) the parties market shares are less than 30% in their respective markets; and (ii) the agreement does not include “<i>hardcore</i>” competition restrictions.</p> <p>Whilst both block exemptions are in place to serve the same purpose, they are separate regimes governing vertical agreements, and diverge in their approach in several areas (including digital markets).</p> <p>For example, the EU VBER regime appears to recognise the growth of sales through online platforms (or “online intermediation services”) and has included provisions within its guidelines which are expressly aimed at such platforms, for example: “<i>online platforms that sell on their own behalf, as well as hosting the sales of third-party sellers, cannot benefit from the dual distribution exception described above in respect of agreements that relate to their supply of online intermediation services</i>”.¹⁷³ By contrast, the UK VABEO does not include additional provisions, rules or exemptions which apply in the CMA’s assessment of undertakings at different levels of the supply chain in digital markets (e.g., online platforms or MFNs). Instead, the CMA assesses vertical agreements in the digital sector in line with the general rules applicable to vertical agreements. For example, wide retail MFNs have become a hardcore restriction under the UK VABEO regardless of whether they apply to digital platforms or offline sales.</p>

¹⁷¹ Please see: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0720&from=EN>

¹⁷² Please see: <https://www.legislation.gov.uk/ukxi/2022/516/contents/made>

¹⁷³ Please see: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/05/vber_and_vertical_guidelines_may2022_client_briefing.pdf

Please see the UK VABEO Guidance, which helpfully discusses vertical agreements within platform economies and provides important guidance on the application of VABEO to online platforms.¹⁷⁴

Platform bans and UK VABEO guidance

UK VABEO Guidance states that the restriction on the use of online marketplaces in vertical agreement will be exempted by VABEO provided that: (i) the agreement does not, directly or indirectly, have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular geographical areas or customers; (ii) the market shares of each of the supplier and the buyer do not exceed 30%; and (iii) the vertical agreement does not include any hardcore restrictions under the VABEO or any excluded restriction under the VABEO that cannot be severed from the rest of the vertical agreement.¹⁷⁵

Section 8 of this guidance outlines that the restriction or ban of sales on the online marketplace concerns “*the manner in which the buyer may sell and does not limit sales into a specific geographical area or to a specific customer group. While such a restriction or ban restricts the use of a specific online channel, other online channels remain available to the buyer. Despite a restriction or a ban of sales on online marketplaces, the buyer may still sell the contract products via its own online store and other online channels, and it may use search engine optimisation techniques or advertise online, including on third-party platforms to increase the visibility of its online store or other sales channels.*” This means, therefore, that such a restriction on the use of online marketplaces may in principle benefit from the UK VABEO block exemption.¹⁷⁶

Nevertheless, it should be noted that there are very few UK cases which have dealt with restrictions on distributors for specific platforms / marketplaces. One example is *Ping Europe Limited v Competition and Markets Authority*,¹⁷⁷ in which, the CAT and later the Court of Appeal, confirmed that whilst Ping was permitted to place conditions on the sale of its products over the internet, it could not ban online sales outright. As this constituted a “*restriction by object*” and as such, could not benefit from the block exemption regulation adopted by the EC in 2010, Regulation 330/2010.¹⁷⁸ For more information on this case and online sale bans, please see the paragraph “*Online Sale Bans and UK VABEO guidance*” set out below.

Online sales bans and VABEO guidance

As outlined above, under UK competition law, suppliers are not able to impose absolute bans on retailers selling their products online. On the basis that this constitutes a “*restriction by object*” under the UK VABEO, and therefore, does not benefit from its safe harbour.

¹⁷⁴ Please see:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Please see: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/13.html>

¹⁷⁸ Please see: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/13.html>

This concept was clearly identified in the case *Ping Europe Limited v Competition and Markets Authority*.¹⁷⁹ In this case, the company Ping was fined £1.45 million by the CMA, due to it imposing an absolute ban on UK retailers from selling its products online. Ping argued that this ban had a legitimate commercial purpose, in that they had done it to promote their in-store custom fitting for golf clubs. Nevertheless, whilst the CMA acknowledged that this was a legitimate commercial strategy, they argued that Ping could have employed alternative and less restrictive measures to achieve its desired outcome and imposed the fine on the basis that they had infringed competition laws through the absolute ban of online sales. On 21 January 2020, the Court of Appeal upheld the MA's decision, and ruled that the absolute ban imposed by Ping constituted a restriction by "object", which was classified as a "hardcore restriction" and as such, did not benefit from the block exemption regulation adopted by the EC in 2010, Regulation 330/2010.¹⁸⁰

It should be noted that there was a relaxation of rules regarding the dual pricing of products for online and offline sales under the UK VABEO. These relaxations included dual pricing being removed as a "hardcore restriction", provided that its objective was not to prevent the effective use of the internet or the restriction of sales to specific customers or territories.

Most-Favoured Nation clauses and UK VABEO guidance

The new UK VABEO regime classifies wide retail parity obligations (also known as wide Most Favoured Nation "MFN" clauses),¹⁸¹ or arrangements of the same effect, as "hardcore restrictions" in relation to agreements for the offer, sale, or resale to end-users. This means that it will not be subject to the safe harbour exemptions set out in the UK VABEO. It should be noted, however, that this emphasis on wide "retail" parity obligations, means that wide parity obligations in upstream business-to-business markets will not be considered hardcore restrictions. In these cases, the CMA has made it clear that it will assess these cases on a case-by-case basis, and the onus will be on the businesses to justify their use of such clauses.

Resale price maintenance and VABEO guidance

In recent years, the CMA appears to have taken a keen interest in the investigation of online resale price maintenance, which is a hardcore restriction under Article 8 (2) (a) of

¹⁷⁹ Please see: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/13.html>

¹⁸⁰ Please see: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/13.html>

¹⁸¹ MFNs are restrictions that require one party to an agreement to offer the other party goods or services on terms that are no worse than those offered to its own customers or to third parties. The term retail parity obligation is used to describe restrictions that apply in the retail context and involve an undertaking offering, selling or reselling goods or services to end users. Retail parity obligations may typically be categorised as either 'wide' or 'narrow' in scope. As set out in Article 8(7) VABEO, a 'wide retail parity obligation means a restriction by reference to any of the supplier's indirect sales channels (whether online or offline, for example online platforms or other intermediaries), which ensures that the prices or other terms and conditions at which a supplier's products are offered to end users on a sales channel are no worse than those offered by the supplier on another sales channel'. The relevant terms and conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale.

the UK VABEO.¹⁸² This increased interest has resulted in the CMA issuing investigations and fines across a range of sectors. For example, in June 2020 the CMA imposed total fines of £5.8 million for resale price maintenance within the musical instrument and equipment market. In addition, in March 2022, the CMA fined Dar Lighting, a supplier of domestic light fittings, £1.5 million for restricting the level of discounts retailers could offer to customers online.¹⁸³

The recent UK VABEO Guidance recognises that price monitoring is becoming “increasingly used in e-commerce where manufacturers and retailers often use specific price monitoring software”,¹⁸⁴ which increases price transparency within the market and allows manufacturers to track the prices of their competitors and report price decreases to the manufacturer. Nevertheless, the CMA notes that whilst e-price monitoring and price reporting may allow manufacturers to intervene swiftly in case of price decreases and allow retailers to request such intervention by manufactures, it does not, on its own, constitute resale price maintenance. However, such price monitoring and reporting is commonly a feature of arrangements that do amount to resale price maintenance and have been found to infringe the Chapter I prohibition.¹⁸⁵

In addition, it is also interesting to note, that the infringing conduct in the musical instrument and equipment sector was picked up using the CMA’s new in-house price monitoring tool, that was developed by its DaTA unit. Following this, the CMA advised musical instrument retailers in its open letter entitled: “consequences of restricting resale prices: an open letter to suppliers and retailers in the musical instruments sector”, that if they agree with suppliers to sell at fixed or minimum prices, they may be found to be infringing competition law. Whilst only addressed to the musical sector, this still sets out practical guidance relevant to suppliers in all sectors regarding resale price maintenance.¹⁸⁶

Geo-blocking, territorial restrictions and VABEO guidance

The Geo-Blocking (Enforcement) Regulations 2018 came into force in the UK on 3 December 2018, and implemented EU-Regulation 2018/302, which prevents traders from blocking or limiting access to their online interfaces based on nationality, place of residence or place of establishment. Following Brexit, EU businesses were no longer required to follow EU Regulation 2018/302 when selling to the UK, but UK businesses selling into the EU were still required to comply.

¹⁸² Resale price maintenance (RPM) is where a supplier requires a retailer not to resell the supplier’s products below a specified price. RPM can be imposed directly or indirectly, for example through restricting the prices retailers can advertise products at.

¹⁸³ Please see: <https://www.gov.uk/government/case-studies/dar-lighting-fined-1-5-million-for-illegally-preventing-online-price-discounts>

¹⁸⁴ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1091830/VABEO_Guidance.pdf

¹⁸⁵ Ibid.

¹⁸⁶ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896119/Musical_instruments_open_letter_290620.pdf

	<p><i>Multisided digital markets and non-price vertical restraints</i></p> <p>On 26 September 2017, the CMA published its final market study report on “<i>digital comparison tools</i>”.¹⁸⁷ This report primarily focused upon the impact of non-price vertical restraints within this market, such as: non-brand bidding, non-re-solicitation clauses, and the impact of MFN clauses. For more information on the CMA’s approach towards MFNs, please see our response to Question 3 below.</p>
2.	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>The CMA tends to bring exclusivity cases against dominant (rather than non-dominant) companies.</p>
3.	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>In recent years, the CMA has taken an active interest in the use of MFN clauses used by online platforms. The CMA’s general approach in this sphere has been to say that ‘wide’ MFN clauses are likely to infringe upon UK competition law, whilst ‘narrow’ MFN clauses are unlikely to do so.</p> <p>One application of this approach is in the CompareTheMarket case.¹⁸⁸ In November 2020, the CMA issued a Decision¹⁸⁹ against CompareTheMarket and imposed a fine of £17.9 million. The Decision took issue with CompareTheMarket’s use of wide MFN clauses, which were imposed by CompareTheMarket in its agreements with certain home insurers. These clauses required home insurers to provide to the price comparison website the lowest (or equal lowest) prices on offer anywhere for that product, whether on other price comparison website or via their own direct channels. This meant that rival sites were prevented from offering cheaper prices than CompareTheMarket.</p> <p>This case was subsequently appealed by CompareTheMarket to the CAT. On 8 August 2022, the CAT overturned the Decision’s findings of anticompetitive effects, citing both general and specific observations. First, the CAT noted that the Decision’s analysis of the effects of the wide MFNs was limited to qualitative evidence (e.g., contemporaneous documents and responses to the CMA). The CAT accepted that a case can be brought on such a basis, but noted that, in the present case, that evidence simply showed that the wide MFNs were effective and constrained the home insurers from being able to</p>

¹⁸⁷ Please see: <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf>.

¹⁸⁸ Please see: <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>

¹⁸⁹ Ibid.

	<p>quote lower premiums on rival PCWs – however, that this does not prove that those effects were anticompetitive. Rather, the Decision needed to prove that, in the counterfactual, there would have been greater incentives for home insurers to reduce their premiums. The CAT found that the Decision did not prove this, and instead operated “<i>at the level of theory or (less helpfully) bare assertion</i>”.</p> <p>Second, the CAT held that there were also several general features of the market that militated against the existence of anticompetitive effects. For example, inter-brand competition between the home insurers was not constrained by the wide MFNs, and the CMA had not considered the impact of inter-competition. Moreover, there were limits to which wide MFNs could constrain intra-brand competition. For example, the wide MFNs only applied to differential pricing in respect of the same product with the same risk profile. However, home insurers assess consumers’ risk profiles based on the answers to the set questions posed by the PCW. As PCWs often asked different questions, the same consumer can end up being offered different premiums on different PCWs without any PCW having breached its wide MFN obligation</p> <p>Third, the CAT accepted that the quantitative evidence – advanced by CTM – suggested that the wide MFNs did not have anticompetitive effects. The CAT found it “<i>prima facie odd</i>” that the CMA did not rely on quantitative evidence, particularly given that the CMA itself had relied on quantitative evidence to examine wide MFNs in another case. With this in mind, this judgment is significant in casting some doubt on whether the CAT would accept the CMA’s position that that MFNs which are “<i>hardcore</i>” restrictions under the VABEO should also be considered as object restrictions.¹⁹⁰</p> <p>Please see also our response to Question 1 above, for additional information on how MFN clauses have been considered within the UK VABEO regime.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>Please see the response to Question 3 above.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>Please see the response to Question 3 above.</p>

¹⁹⁰ For more information and analysis on this case, please see: <https://www.cliffordchance.com/insights/resources/blogs/antitrust-fdi-insights/2022/09/cmawide-most-favoured-nation-decision-overturned-in-the-compare-the-market-case.html>.

6.	Is there any safe harbour/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbour/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbours?
	Please see the response to Question 1 above.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>Competition in the digital economy is covered under the general competition law framework, including primarily the Competition Act 1998 (the “CA98”),¹⁹¹ covering anticompetitive agreements and concerted practices as well abuse of dominance, and the Enterprise Act 2002 (the “EA02”), which regulates merger control, market studies, and market investigations.¹⁹²</p> <p>The UK Government has recently introduced the Digital Markets, Competition, and Consumer’s Bill (“DMCC Bill” or “the Bill”), which is currently moving through the Parliamentary process.</p> <p>The DMCC Bill: a new ex ante “pro-competition regime for digital market”¹⁹³</p> <p>On 1 July 2020, the UK Competition and Markets Authority (“CMA”) issued a market study into online platforms and digital advertising. This market study concluded that these markets had been long concentrated among a small number of companies, resulting in, among other issues, “restricted innovation and harm to businesses and consumers”.¹⁹⁴</p>

¹⁹¹ Please see: <https://www.legislation.gov.uk/ukpga/1998/41/contents>.

¹⁹² Please see: <https://www.legislation.gov.uk/ukpga/2002/40/contents>.

¹⁹³ Please see: <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2020/12/the-uk-s-new-competition-regime-for-digital-platforms-with-strat.html>.

¹⁹⁴ Please see: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

The CMA set out recommendations, including (i) the adoption of a mandatory and enforceable code of conduct for platforms funded by digital advertising that have Strategic Market Status (“**SMS**”);¹⁹⁵ and (ii) the creation of a new Digital Markets Unit (“**DMU**”) within the CMA, to implement the code of conduct.

On 27 November, the UK Government endorsed the CMA findings and announced its intention to pursue its recommendations. In May 2022, the UK government made a legislative proposal for a new ex ante regime for digital markets aimed at regulating the conduct of digital companies with significant market power across markets as well as revisions to the consumer protection regime.¹⁹⁶ This proposal informed the DMCC Bill, which was published by the UK Government and introduced to Parliament in May 2023.¹⁹⁷

This Bill envisages implementation of three broad categories of reform:

introducing an ex-ante regulatory regime, to be enforced by the DMU, for businesses that are active in digital markets and have SMS;

effecting various changes to UK competition laws regarding the behavioural antitrust prohibitions on anticompetitive agreements and abuse of dominance, merger control and market investigations; and

reform to consumer protection laws by giving the CMA powers to impose civil penalties for their breach without having to seek a court order first and by creating certain new prohibitions to regulate subscription traps, consumer saving schemes and fake reviews.

Previous reports and forum discussions on perceived digital market competition issues

Prior to the introduction of the DMCC Bill, as outlined above, there have been several other reports and forum discussions highlighting what are perceived as current competition issues in digital markets, including:

The Digital Regulation Cooperation Form (“DRCF”): In July 2020, the CMA, the Information Commission’s Office (“**ICO**”), and the Office of Communications (“**Ofcom**”), formed the DRCF. The Financial Conduct Authority (“**FCA**”) later became a full member of the DRCF in April 2021 (having previously been an “observer member”). The DRCF was formed to “establish and ensure greater cooperation on online regulatory matters”.¹⁹⁸

The CMA’s assessment of merger control decisions in digital markets: In June 2019, the CMA published the Lear report, a report prepared by economic consultancy Lear on behalf of the CMA reviewing past merger decisions in digital markets.¹⁹⁹

¹⁹⁵ The CMA have defined those with ‘Strategic Market Status’ as a small number of firms with substantial and entrenched market power, which gives them a strategic position. For more information, please see:

<https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>.

¹⁹⁶ Please see: <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>

¹⁹⁷ Please see: <https://bills.parliament.uk/bills/3453>

¹⁹⁸ Please see: <https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum>.

¹⁹⁹ Please see: <https://www.gov.uk/government/publications/assessment-of-merger-control-decisions-in-digital-markets>.

The Furman Report: In March 2019, Prof. Jonathan Furman, issued an independent report on the state of competition in digital markets in the UK.²⁰⁰ The report formed the basis for the UK government’s May 2022 proposal for a new ex ante regulatory regime for digital markets in the UK. It made recommendations for revisions to UK competition law governing merger control and antitrust enforcement, as well as additional regulatory measures aimed at opening digital markets.

CMA Mobile Ecosystems Market Study: On 15 June 2021, the CMA launched a market study into the supply of “mobile ecosystems” in the UK. On 10 June 2022, the CMA issued its “Market Study final report”,²⁰¹ which concluded that Apple and Google’s duopoly gave them a “stranglehold” over key gateways in mobile ecosystems and expressed the CMA’s expectation that both firms would be likely to be designated under the digital markets regime per the then anticipated DMCC Bill.²⁰² The CMA identified that it would be taking targeted action to tackle the issues it identified, and that the new “pro-competition” digital regime would be useful in providing additional powers to oversee key digital markets such as these. Within its final report, the CMA stated that it had identified a “wide range of changes to open up competition in browser and app distribution, remove or revise unnecessary restrictions, and introduce new safeguards aimed at ensuring fair and reasonable treatment of app developers.” Following this, the CMA announced that it would be consulting on a market study into mobile browsers and cloud gaming (launched in November 2022) and would be taking further “enforcement action including a new investigation into Google’s app store payment practices” alongside its similar investigation into Apple and would be launching additional digital cases beyond this study.²⁰³

Impact of Brexit on UK Competition Law and the Digital Economy

Following the UK’s exit from the EU, the CMA faced the new challenge of exploring and understanding how it could enforce UK competition law, independently from the European Commission (“**EC**”). In particular, the CMA was required to navigate how it could proceed in investigating competition law cases and issues that were already the subject of EC investigations. In recent years, the CMA appears to have adopted a proactive and confident approach in this regard and sought to enforce UK Competition Law under CA98 on issues that were also being investigated by the EC in parallel.

In addition, the CMA notes that following the Brexit, the scope, scale and intensity of cooperation between the CMA and the EC (and other leading authorities such as the Federal Trade Commission (“**FTC**”) and Department of Justice (“**DOJ**”)) has significantly

²⁰⁰ Please see: <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>

²⁰¹ Please see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1096277/Mobile_ecosystems_final_report_-_full_draft_-_FINAL_.pdf

²⁰² Please see: https://assets.publishing.service.gov.uk/media/62a228228fa8f50395c0a104/Final_report_summary_doc.pdf

²⁰³ Please see: https://assets.publishing.service.gov.uk/media/62a228228fa8f50395c0a104/Final_report_summary_doc.pdf

increased. For more information on the CMA's collaboration with the EC and other authorities please see our response to Question 3 of the Mergers Section below.

Ongoing investigations under CA98 and EA02

Ongoing investigations launched under CA98 and EA02, include:

Investigation into Apple AppStore: The CMA is investigating Apple's conduct in relation to the distribution of apps on iOS and iPadOS devices in the UK, in particular, the terms and conditions governing app developers' access to Apple's App Store.²⁰⁴

Investigation into Meta's use of data: The CMA is investigating whether Meta might be abusing a dominant position in the social media or digital advertising markets through its collection and use of advertising and single sign-on data.²⁰⁵

Investigation into suspected anti-competitive agreement between Google and Meta and behaviour by Google in relation to header bidding: The CMA is investigating whether Google and Meta entered into an anti-competitive agreement, and whether Google might have abused a dominant position through its conduct in relation to header bidding services (services which allow sellers to simultaneously offer their online advertising space to multiple potential buyers).²⁰⁶

Investigation into Google's 'Privacy Sandbox' browser changes: In February 2022, the CMA accepted commitments from Google to address its competition concerns resulting from its CA98 investigation into Google's proposal to remove third-party cookies and other functionalities from its Chrome browser.²⁰⁷ These commitments involved the CMA working with Google to design and assess Privacy Sandbox proposals before any final decision is taken to remove third-party cookies from Chrome.²⁰⁸

CMA investigates Amazon over suspected anti-competitive practices: The CMA is investigating Amazon over concerns that practices affecting sellers on its UK Marketplace may be anti-competitive and could result in a worse deal for customers. The EC has previously opened two investigations into Amazon in this same area. The CMA noted that it will be seeking to liaise with the EC as its own UK investigation progresses. Alongside this case, the CMA also has an open investigation into Amazon and Google, under consumer protection laws, over concerns that they have not been doing enough to combat fake reviews on their sites.²⁰⁹

The digital markets regime to be introduced by the DMCC Bill

²⁰⁴ Please see: <https://www.gov.uk/cma-cases/investigation-into-apple-appstore>

²⁰⁵ Please see: <https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data>

²⁰⁶ Please see: <https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-agreement-between-google-and-meta-and-behaviour-by-google-in-relation-to-header-bidding>

²⁰⁷ Please see: https://assets.publishing.service.gov.uk/media/62052c6a8fa8f510a204374a/100222_Appendix_1A_Google_s_final_commitments.pdf

²⁰⁸ "Privacy Sandbox" relates to Google's proposals on the Removal of Third-Party Cookies, the design, development and implementation of the Alternative Technologies, and changes to Chrome.

²⁰⁹ Please see: <https://www.gov.uk/government/news/cma-investigates-amazon-over-suspected-anti-competitive-practices>

	<p>The DMCC Bill sets out a digital markets regime that will apply to firms designated as having SMS. Under the DMCC Bill, firms may be designated as having SMS where they provide 'digital activities', being services provided by means of the internet, electronic communications services or digital content (in each case including those services that are provided free of charge) related to the UK, where they meet the turnover condition of worldwide turnover of at least £25 billion or UK turnover of at least £1 billion, and where the DMU finds that the firm has substantial and entrenched market power (based on a forward-looking assessment of a period of at least five years), and a position of strategic significance in respect of the digital activity. Importantly, the CMA may only designate an undertaking as having SMS after an investigation and public consultation. SMS designation will be made in respect of a digital activity linked to the UK and will apply to the whole corporate group, not just the part of the group that carries out the relevant activities.</p> <p>The DMCC Bill envisages the introduction of powers for the DMU to enforce a code of conduct, consisting of high-level objectives and principles that specify the behaviour expected of businesses with respect to their SMS-designated activity. The objectives include meeting standards of fair-dealing, open choices and trust and transparency. Connected to these objectives, the DMU will have powers to impose on firms conduct requirements to treat users fairly and interact with them on reasonable terms, allow them to choose freely and easily between services and digital content, and provide information needed to make informed choices. Such conduct requirements could also include obligations not to discriminate, self-preference, bundle, leverage, impose use restrictions, use data unfairly, restrict the use of third-party products, or restrict interoperability with third-party offerings. The DMCC will also give the DMU the power to impose a wide range of so-called pro-competitive interventions ("PCIs") on SMS businesses to tackle the underlying sources of market power and promote competition. a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition, and where the PCI would be likely to mitigate or prevent that adverse effect. These PCIs will be similar to the remedies available to the CMA under the market investigation regime. The DMU will be able to trial, review, modify and terminate remedies (including voluntary, enforceable undertakings) and to direct firms with SMS to take specific actions to comply with a PCI order. It will be able to implement PCIs anywhere within an SMS firm, including outside the designated activity, provided the concern relates to the designated activity. PCIs can be imposed following PCI investigations, which also have a period of 9-12 months (with a further four months within which any PCI order must be issued) and are subject to consultation and transparency requirements.</p>
<p>2.</p>	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>There are authorities and agencies which have concurrent competition competences in regulating digital markets. Primarily, the CMA is responsible for the enforcement of CA98 and the EA02 across UK markets (including digital markets). Under the DMCC Bill, following an investigation, the DMU will also have the power to issue code orders and</p>

	<p>interim code orders to address breaches of conduct requirements by SMS firms in the digital markets.</p> <p>There are also several sectoral regulators with concurrent competition competences alongside the CMA in relation to their respective industries which may include digital markets, these include: (i) Ofcom; (ii) the FCA; and the Payment Services Regulator (“PSR”).</p> <p>In addition, the UK also operates the United Kingdom Competition Appeal Tribunal (the “CAT”). This is a specialist judicial body with a cross-disciplinary expertise in law, economics, business, and accountancy, whose function is to hear and decide cases involving competition or economic regulatory issues, which may include digital markets.²¹⁰</p>
3.	Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?
	Please see the response to Question 1 above and the introduction to this questionnaire response.
i.	Please describe how “platform” is defined for these purposes.
	<p>Under Section 2 of the DMCC Bill, the CMA may designate an undertaking as having SMS in respect of a digital activity carried out by the undertaking, where the CMA considers that the digital activity is linked to the UK and the undertaking meets the SMS conditions in respect of the digital activity.</p> <p>The SMS conditions are that the undertaking has a substantial and entrenched market power, a position of strategic significance in respect of the digital activity, and meet the turnover condition of worldwide turnover of at least £25 billion or UK turnover of at least £1 billion.</p> <p>The following are "digital activities" for the purpose of the Bill:</p> <ul style="list-style-type: none"> • the provision of a service by means of the internet, whether for consideration or otherwise; and • the provision of one or more pieces of digital content, whether for consideration or otherwise.
ii.	What are the criteria used to determine whether a platform falls under the regime?
	See the concept of SMS defined under Question 3 i. above.

²¹⁰ <https://www.catribunal.org.uk/>

iii.	What are the main requirements that the relevant legislation or regulation impose on platforms with market power?
	<p>The DMCC Bill will introduce an ex-ante regulatory regime for businesses that are active in digital markets and have SMS.</p> <p>The CMA will be able to impose conduct requirements on designated undertakings. These are requirements as to how the designated undertaking must conduct itself in relation to a relevant digital activity.</p>
iv.	Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?
	<p>In contrast to the EU DMA, the conduct requirements envisaged by the DMCC are bespoke, to be specifically tailored to apply to each SMS firm's business model and conduct, rather than applied across all designated firms in a blanket fashion.</p>
v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	<p>We don't yet know how the regime will work in practice with regards to legal certainty, because it is not yet in force.</p>
vi.	Please summarise any penalties provided for non-compliance.
	<p>Under the DMCC Bill, as is the case for antitrust infringements, breaches of the code and failures to comply with PCI orders can result in fines of up to 10% of group worldwide turnover, third party "follow on" claims for damages and the disqualification of directors that have been involved in a breach, and the CMA will be able to accept commitments from SMS undertakings to address its concerns. The Bill also contains a novel "final order mechanism" that may be used by the CMA to set the terms of trade between a SMS and one or more third parties, where it considers that an SMS' existing terms are not fair and reasonable.</p> <p>Additionally, The Bill will significantly increase the civil fines that can be imposed on businesses for failures to comply with its information gathering powers in merger, markets and antitrust investigations. The maximum fixed fine will increase from £30,000 to 1% of annual worldwide group turnover, and daily fines for ongoing non-compliance will increase from £15,000 to 5% of daily group worldwide turnover. The CMA will also have new powers to impose fines of up to 5% of annual worldwide turnover for breaches of commitments given in antitrust cases, or breaches of remedies imposed in market investigations. At present it must go to court to enforce such obligations.</p>
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that

	the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	<p>The CMA's website states that the DMCC Bill "will use a proportionate approach to hold digital firms accountable for their actions – enabling all innovating businesses to compete fairly. It will set rules that will prevent firms with Strategic Market Status from using their size and power to limit digital innovation or market access – ensuring the UK remains a highly attractive place to invest and do business for all."²¹¹</p> <p>Under the Bill, the CMA may only impose a conduct requirement on a designated undertaking if it considers that it would be appropriate to do so for the purposes of one or more of the following objectives:</p> <ul style="list-style-type: none"> • fair dealing; • open choice; and • trust and transparency.
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	Please see the response to Question 1 above and the introduction to this questionnaire response.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	The CMA may begin a conduct investigation where it has reasonable grounds to suspect that a designated undertaking has breached a conduct requirement. During such investigations, firms will be able to assert that a countervailing benefits exemption applies to their conduct, if they can demonstrate that it gives rise to benefits to users of the digital activity which outweigh any competitive harms, the conduct is indispensable and proportionate to the realisation of those benefits, and the conduct does not eliminate or prevent effective competition. The CMA must close a conduct investigation where representations made by the undertaking to which the investigation relates lead the CMA to consider that the countervailing benefits exemption applies.
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a

²¹¹ <https://www.gov.uk/government/news/new-bill-to-stamp-out-unfair-practices-and-promote-competition-in-digital-markets>

	rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defence be acceptable?) In cases of <i>per se</i> prohibitions, what justifications is the company allowed to present, if any?
	See response to Question 6. above.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.
	<p>Appeals against decisions under the new regime will be to the Competition Appeal Tribunal and the Bill provides for a judicial review standard of appeal, aimed at ensuring that "appropriate deference is given to the DMU's position as an expert regulator". This is the case even for decisions imposing substantial penalties, which under other regimes (including the competition and consumer law regimes) are subject to the more stringent "on the merits" standard of review, in order to satisfy the requirements of the European Convention on Human Rights ("ECHR"), in particular the right to a fair trial. For appeals against penalties under the digital markets regime, the Government is instead relying on the courts to apply the judicial review standard flexibly, with a view to ensuring that the ECHR requirements are met. It remains to be seen whether the resulting degree of scrutiny of penalty decisions will broadly equate to that of a "merits" review. Even if it is, the courts will not have the same options to substitute their judgment for that of the DMU in the event of an adverse ruling, or to vary the amount of any penalty, and will instead be limited to remitting the matter back to the DMU for reconsideration.</p>
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p>Under the DMCC Bill, the CMA may impose conduct requirements on SMS firms to prevent the designated undertaking from, among other things,:</p> <ul style="list-style-type: none"> • restricting interoperability between relevant service or digital content and products offered by other undertakings; and • using its position in relation to the relevant digital activity, including its access to data relating to that activity, to treat its own products more favourably than those of other undertakings.
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority's analysis around essential facilities or related concepts.

	<p>The concept of the essential facilities doctrine is adopted by the UK under Section 4 of the CA98. Under which, the owner of a facility may be virtue of its ownership, hold a dominant position within a market and the refusal to give access to it to its competitors on non-discriminatory terms may amount to an abuse.²¹² Nevertheless, we are not aware of the CMA having applied this to a case within the digital economy.</p>
11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.

²¹² Please see: [https://uk.practicallaw.thomsonreuters.com/2-107-6234?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-107-6234?transitionType=Default&contextData=(sc.Default)&firstPage=true)

Country: United States of America

Contributor: Tim Cornell (Clifford Chance)

I.	Merger review
1.	Does your jurisdiction use different notification thresholds for transactions in the traditional fields and in the digital economy? If affirmative, explain what the difference is and why.
	No.
2.	How does your jurisdiction deal with the situation where the target company is considered a nascent competitor or maverick innovator who does not meet the merger control thresholds (e.g., revenue, market share)? Please describe the approach (e.g., would your jurisdiction require mandatory notification or initiate a proactive investigation in the aforementioned case)?
	Merger control thresholds only determine whether a given acquisition, merger, or joint venture is subject to the Hart-Scott-Rodino (“ HSR ”) Act notification and waiting periods to allow time for US antitrust agencies (DOJ, FTC) to review the transaction. US antitrust law also allows the agencies to investigate any corporate transaction, at any point in time, pre- or post-closing, without regard to its subjection to HSR reporting obligations under Clayton Act Section 7. Thus, the agencies, can and do review ex-ante transactions of nascent competitors where the competitor has yet to start earning revenue and ex-post transactions where a nascent competitor was removed from the marketplace, adding to the dominant position of an incumbent.
3.	For transactions in the digital economy, would the reviewing authority in your jurisdiction consult other government agencies for related compliance issues, such as data protection? If affirmative, please provide the details on the inter-agency consultation process. If negative, has the competition authority provided an official view (e.g., in formal guidance or soft law) as to why there may be such need and what agencies’ respective roles should be?
	We are not aware of any official coordination requirement, but can attest that in various transactions, where a merger may affect another US governmental agency or branch, it is common for the DOJ to seek the input of those agencies. Moreover, the US antitrust agencies routinely coordinate with their counterparts around the globe on antitrust review of transactions.
4.	What metrics does the reviewing authority in your jurisdiction use in analysing the market share or market position of platforms or other digital enterprises? What are the most frequently used or accepted metrics? Has the competition authority expressed

	<p>whether such metrics objectively reflect a platform or digital enterprise’s market position?</p>
	<p>The US antitrust agencies consider all potentially relevant and applicable market definitions and metrics – including traditional geographic and product definitions and metrics, network volumes, platform impacts, and two-sided markets. Structural metrics, such as market shares and Herfindahl-Hirschman Index (“HHI”) numbers, are routinely employed. Margins and pricing trends may also be relevant.</p>
<p>5.</p>	<p>Are there any transactions (including acquisitions of a minority shareholding and so called ‘killer’ acquisitions) in the digital economy that the reviewing authority in your jurisdiction has imposed remedies to or blocked? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>Yes. The US Federal Trade Commission (“FTC”) is currently seeking to block the acquisition of Activision by Microsoft. Other recent matters include:</p> <p>Meta-Instagram-WhatsApp: In December 2020, the FTC filed a lawsuit against Meta, seeking to unwind its 2012 acquisition of Instagram and 2014 acquisition of WhatsApp. Trial is expected to begin late 2023 or early 2024.</p> <p>Meta-Within: The FTC filed an administrative complaint, along with a preliminary injunction in the Northern District of California, in an attempt to block Meta’s acquisition of virtual reality startup, Within Unlimited. The Northern District of California denied the preliminary injunction, finding against the FTC’s argument that the proposed acquisition would reduce future competition and dampen innovation in the nascent fitness virtual reality market. Shortly after the preliminary injunction was denied, the parties closed the transaction. Several weeks later, the FTC dropped its administrative case.</p> <p>United Health-Change Healthcare: In September 2022, the Department of Justice (“DOJ”) lost its challenge to the proposed merger of UnitedHealth Group and Change Healthcare in the United States District Court for the District of Columbia. One of the main areas of concern was the combination of two first-pass editing software providers and an electronic data interchange clearinghouse, which gave the combined companies access to large amounts of claims data. Post-acquisition, the DOJ was concerned that UnitedHealth would be incentivised to use claims data to lessen competition. The Court rejected the government’s theories of harm based on its failure to show sufficient evidence that the additional data accessible to UnitedHealth post-merger would reduce innovation and substantially lessen competition. The parties closed the transaction shortly after the court’s decision.</p> <p>Visa-Plaid: In November 2020, the DOJ sued to block Visa’s proposed \$5.3 billion acquisition of Plaid, a fintech company. The DOJ claimed that Visa was a monopolist in the market for online debit transactions and, citing documents from Visa executives, that its acquisition of Plaid, who was developing a lower-cost online debit payment system, was an attempt to eliminate the threat of a nascent competitor that was “uniquely positioned” to threaten Visa’s power in the market. The parties announced that they were terminating the merger in January 2021.</p>

<p>6.</p>	<p>If there have been transactions in the digital sector in the last 10 years that the reviewing authority in your jurisdiction has cleared with conditions, please describe the conditions imposed. Has the authority sought to apply primarily structural or behavioural conditions in digital sector transactions?</p>
	<p>Remedies are currently disfavored by the US antitrust agencies, although accepted episodically. Behavioural remedies are very rare.</p> <p>We are not aware of any transactions in the digital sector in the past 10 years that have been cleared with conditions at the federal level.</p> <p>At the state level, remedies were required to clear the T-Mobile/Sprint merger. For example, Texas required the “new” T-Mobile to: (1) give all Texas customers access to the same or better unlimited talk, text, and data rate plans as those offered by T-Mobile as of the date of the agreement, for five years; (2) give all Texas customers access to T-Mobile limited data rate plans at a cost far below what was being offered in the industry; and (3) commit to provide 5G wireless broadband coverage to areas where most Texans lived, including for Texans who lived in rural portions of the state, for three years, and to expand that 5G coverage dramatically within six years. California also required the merged company to: (1) make low-cost plans available in California for at least 5 years, including a plan offering 2 GB of high-speed data at \$15 per month and 5 GB of high speed data at \$25 per month; (2) offer 100 GB of no-cost broadband internet service per year for five years and a free mobile Wi-Fi hotspot device to 10 million qualifying low-income households not currently connected to broadband nationwide, as well as the option to purchase select Wi-Fi enabled tablets at the company’s cost for each qualifying household; and (3) reimburse California and other coalition states up to \$15 million for the costs of the investigation and litigation challenging the merger.</p>
<p>7.</p>	<p>In your jurisdiction, are particular types of digital players under specific merger control rules or obligations not applicable to other sectors (e.g., are different filing requirements applied, legal standard for finding substantive competition issues, burden of proof imposed)? If so, what are these and what is the official rationale for such rules?</p>
	<p>No. However, certain large digital players (e.g., Meta [Facebook] and Alphabet [Google]) are under intense scrutiny by state and federal antitrust authorities as well as state and federal legislators. Legislation has been introduced specifically targeting certain large digital players.</p>
<p>8.</p>	<p>Are there any investigations against parties for failing to notify transactions in the digital economy in your jurisdiction in the last 10 years? If affirmative, please describe the cases, provide details of any fines imposed, and provide a summary of the authority’s analysis.</p>
	<p>There does not appear to be any investigations against parties for failing to notify transactions in the digital economy in our jurisdiction in the last 10 years. Under the Hart-Scott-Rodino Act, certain monetary thresholds need to be met for a transaction to be notifiable.</p>

9.	Does the reviewing authority in your jurisdiction have the power to undertake an ex-post analysis or effectively revise an original merger decision?
	Yes. Under Clayton Act Section 7, the government can review transactions that substantially lessen competition or tend to create a monopoly. This can occur post-closing and post-HSR notification.
10.	To what extent does the reviewing authority in your jurisdiction rely on economic analyses in its merger control decisions in the digital sector? What types of economic analysis does the authority most often use to support its findings of risk to competition from a digital transaction?
	Economic analysis and theory have previously been at the core of antitrust examination. The current US antitrust authorities appear to give less importance to economics.
II.	Horizontal agreements
1.	Are there any legislative proposals or soft law / guidelines in your jurisdiction that seek to take into account the dynamics of the digital economy when applying competition rules related to horizontal agreements?
	<p>Yes. Federal and state legislatures have considered a wide range of proposals to modify current antitrust laws. Generally, the top recommendations are: (1) restoring competition in the digital economy; (2) strengthening the antitrust laws overall; and (3) reviving antitrust enforcement. Most of the recently proposed legislation in this area is unlikely to become law, although legislators appear eager to make changes to the antitrust laws to rein in Big Tech. Below are two bills that got major traction last Congress, although they were ultimately not signed into law.</p> <p>The American Innovation and Choice Online Act would make it unlawful for a person operating a covered platform to engage in any conduct in connection with the operation of the covered platform that—(1) advantages the covered platform operator’s own products, services, or lines of business over those of another business user; (2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business; or (3) discriminates among similarly situated business users. A covered platform is determined based on (1) U.S. based monthly active users or active business users; (2) market capitalisation or net revenues; and (3) being deemed a critical trading partner.</p> <p>Another legislative proposal is the Open App Markets Act. This bill would: (1) allow developers to collect user fees/payments outside the app stores’ mandatory payment mechanisms; (2) let developers tell users they can set up payment for services outside the app stores (i.e., on developers’ websites); (3) let users sideload competing apps and app stores; (4) preclude app store searches from favoring Apple and Google’s own apps; and</p>

	(5) prevent Apple and Google from using non-public data of app stores to benefit their own apps.
2.	Has the competition authority in your jurisdiction provided any analysis (in an official capacity) on how it intends to treat the collaboration of (potential) competitors active in the digital field? If affirmative, please refer to the types of collaboration the authority has analysis and provide a summary of the agency’s approach.
	There is no US guidance specific to collaboration between digital competitors. The general guidelines on competitor collaborations would apply.
3.	Has the competition authority in your jurisdiction analysed data pooling or any other collaboration among competitors related to data? If affirmative, please provide a summary of the authority’s approach and analysis. What is the view of the competition authority in your jurisdiction on algorithmic pricing setting/algorithmic tacit collusion? Are there any cases where these issues have been investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.
	Not that we are aware.
4.	What is the view of the competition authority in your jurisdiction on ‘hub and spoke’ arrangements in the digital economy? Are there cases in your jurisdiction where the authority has taken a decision or provided guidance on horizontal coordination among suppliers through their individual agreements with the platform? If affirmative, please provide a summary of the authority’s analysis.
	<p>‘Hub and spoke’ arrangements in the digital economy are viewed the same as in other sectors.</p> <p>In <i>U.S. v. Apple</i>, the DOJ brought a civil suit alleging that Apple and five book publishing companies conspired to raise and fix the price for e-books, in violation of Section 1 of the Sherman Antitrust Act in 2012. Only Apple went to trial, while the publisher defendants settled the claims against them. After trial, the Court held that DOJ had proven a <i>per se</i> violation, finding that there was ample evidence that the publishers defendants participated in a horizontal price-fixing conspiracy (the hub) and that Apple (the spoke) conspired with them to raise e-book prices.</p> <p>The key facts included parallel vertical agreements between Apple and the publishers using an “agency” sales model, where the seller/publisher set the retail price and the agent/Apple received a commission, rather than the theretofore standard “wholesale” model, where the seller/publisher sold e-books at a wholesale price to a retailer, who could then set its own retail price at the suggested retail price or at a discount as it saw fit. Another key fact was that Apple introduced an MFN clause into the vertical agreements so that the publishers’ books would be sold on the Apple platform for the lowest retail price available in the marketplace. The Court found that the switch to an agency model and the MFN provisions created economic incentives that would only work</p>

	<p>if all of the publishers signed on and if all retailers switched to the agency model. Through a coordinated effort, the publishers then forced Amazon, the largest e-book retailer, to switch to the agency model. Amazon had been steeply discounting the price of e-books and switching to the agency model allowed the publishers to regain control over retail pricing. After the agency agreements went into effect, e-book prices increased.</p>
5.	<p>Have there been any leniency applications in horizontal cases concerning digital players in your jurisdiction? If affirmative, please describe the cases and provide a summary of the agency’s analysis.</p>
	<p>Not that we are aware.</p>
6.	<p>Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?</p>
	<p>No.</p>
III.	<p>Vertical agreements</p>
1.	<p>On what types of vertical agreements in the digital economy does the competition authority in your jurisdiction focus on in terms of its enforcement priorities and public guidance? What is the view of the competition authority in your jurisdiction on non-price vertical restraints used by online multi-sided platforms?</p>
	<p>There are not specific agreements in the digital sector that are a focus of the US antitrust authorities as far as we are aware (with the caveat that we are in a period of guidance withdrawal and increased opacity). In September 2021, the FTC withdrew its approval of the 2020 Vertical Merger Guidelines. Both the DOJ and FTC are currently drafting a new set of merger guidelines, which will cover both horizontal and vertical agreements.</p>
2.	<p>What is the view of the competition authority in your jurisdiction on exclusive dealing by non-dominant platforms? Are there cases in your jurisdiction where such instances were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the authority’s analysis.</p>
	<p>With the exception of claims brought under Section 2 of the Sherman Act, challenges of exclusive dealing arrangements are generally assessed by courts under a rule of reason analysis. Under this approach, courts will consider the anticompetitive effects of the conduct before the burden is then shifted to the defendant to demonstrate the legitimate precompetitive justifications for the conduct. In addition to proving injury, the plaintiff must demonstrate that competition in the relevant market was harmed generally.</p> <p>Once a plaintiff has defined the relevant market, courts often require that the seller have market power in that market before finding that an agreement substantially forecloses</p>

	<p>competition, as a supplier without market power is unlikely to harm competition. Courts have found that a market share under 30 percent generally means a defendant does not have market power. See <i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i>. Prior to that decision, the Supreme court in <i>Tampa Electric Co. v. Nashville Coal Co.</i> upheld a 20-year contract where it found that the seller did not have a dominant position in the market and that pre-empting less than 1 percent of total relevant coal market did not substantially foreclose competition in relevant coal market.</p> <p>Beyond shares, courts also look at whether there are high barriers to entry or whether other competitors can increase output in assessing market power.</p>
<p>3.</p>	<p>What is the view of the competition authority in your jurisdiction on MFNs imposed by online platforms? Does the authority treat “wide” and “narrow” MFNs in the same way? If so, on what is the rationale behind this approach?</p>
	<p>Antitrust enforcement in the US against MFN provisions in online markets has been minimal. MFNs are contractual agreements where a supplier agrees to treat an individual customer no worse than all its other customers. In most cases, MFNs are seen as benign; in fact, no court has found them, independently, to be a violation of the antitrust laws. The FTC and the DOJ, however, have theorised through consent decrees that MFNs, depending on the facts of the case, can result in anticompetitive harm. In the Apple e-books litigation, the court held that MFNs played a role in allowing Apple to fix retail prices and eliminate competition. The United States does not distinguish between narrow and wide MFNs.</p>
<p>4.</p>	<p>Are there cases in your jurisdiction where platform MFNs are being or were investigated or sanctioned? If affirmative, please describe the cases and provide a summary of the agency’s analysis. Please specify the scope of the investigated platform MFNs. (Did it only prohibit a supplier from posing a lower price on its own website, or does it include other platforms?)</p>
	<p>Not that we are aware.</p>
<p>5.</p>	<p>How has the competition authority in your jurisdiction characterised the competitive harm and potential efficiencies of MFNs imposed by online platforms?</p>
	<p>As discussed above, MFNs played a role in the Apple e-books case. Additionally, private plaintiffs have filed class action lawsuits against Amazon and the five largest book publishers in the US, alleging MFN clauses in e-book agency contracts amounted to price fixing, and against Valve, Inc. accusing it of using MFN clauses with game developers to maintain its monopoly in personal computer game sales through its online marketplace, Steam.</p> <p>Both federal enforcers and state attorneys general (such as DC and California) have acknowledged both the procompetitive benefits and anticompetitive harms that can arise from MFNs. On the procompetitive side, MFNs can minimise transactional costs,</p>

	encourage buyers not to delay purchases in hope of future discounts, and protect sellers from exploitation. On the anticompetitive side, MFNs can increase the likelihood that price information is exchanged between competing firms and may foster collusion.
6.	Is there any safe harbor/presumed exemption mechanism for vertical agreements in the digital economy in your jurisdiction? If affirmative, please explain the thresholds for applying such safe harbor/presumed exemption. Are parties active in the digital sector treated differently in the context of applying these safe harbors?
	No. At one time, 20% was a presumed safe harbor, but that number has effectively been withdrawn.
7.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	No.
IV.	Abuse of market dominance
1.	Is there competition legislation or other regulations that specifically govern the conduct of digital companies in your jurisdiction? Please describe the main requirements of the relevant legislation or regulations. In addition to antitrust laws, are platforms subject to any other regulations which have as their primary aim to ensure a level competitive playing field in the digital sector? If such legislation is pending, please provide an estimate of when it is expected to come into effect.
	<p>There is no current legislation that specifically governs the conduct of digital companies in the US.</p> <p>There was legislation introduced last Congress that would have governed the conduct of digital companies. The American Innovation and Choice Online Act, introduced in both the House of Representative and Senate, sought to prohibit covered online platforms from abusing their gatekeeper power through favoring their products or services by:</p> <ul style="list-style-type: none"> • Biasing search results in favor of the dominant firm; • Misusing a business’s non-public data to compete against it; • Preventing another business’s product or service from interoperating with the dominant platform or another business; or • Requiring a business to buy a dominant platform’s goods or services for preferred placement on its platform. <p>The legislation was approved by the House and Senate Judiciary Committees but did not receive votes in the full House of Representatives or Senate.</p> <p>In addition, there are a significant number of state laws being proposed that directly target dominant players in the digital sector, specifically in New York. The NY Twenty-First</p>

	<p>Century Anti-Trust Act would make abuse of a dominant position illegal. A firm’s dominant position can be shown by direct or indirect evidence. Abuse of a dominant position can be shown by “conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors.”</p>
2.	<p>Are there authorities or agencies that have concurrent competition competences in regulating digital markets (e.g., competence over competition for financial, energy or communications services)? How are these jurisdictions divided between the respective authorities?</p>
	<p>Yes. As between the FTC and DOJ, there is an allocation of HSR evaluations by industry-grouping that includes a process for determining assignment of borderline matters. Additionally, there are overlapping agency responsibilities that include consideration of competition factors by agencies such as the FCC, FERC, CFIUS, GSA, and DOD. Further, many of the states have antitrust capabilities, includes attorneys that focus solely on prosecuting companies under their respective state’s antitrust laws.</p>
3.	<p>Is there competition legislation or other regulations that specifically govern the conduct of platforms with significant market power in your jurisdiction?</p>
	<p>Not currently.</p>
i.	<p>Please describe how ‘platform’ is defined for these purposes.</p>
	<p>N/A</p>
ii.	<p>What are the criteria used to determine whether a platform falls under the regime?</p>
	<p>N/A</p>
iii.	<p>What are the main requirements that the relevant legislation or regulation impose on platforms with market power?</p>
	<p>N/A</p>
iv.	<p>Are these requirements tailored to each platform according to its business model or is it a one-size-fits all system?</p>
	<p>N/A</p>

v.	Do you think these conduct requirements provide sufficient legal certainty to market participants?
	N/A
vi.	Please summarise any penalties provided for non-compliance.
	N/A
4.	If your jurisdiction has introduced specific rules applicable to certain categories of platforms (e.g., platforms with significant market power), what does the law state that the overarching goal of these rules is (e.g., prevent abuses ex ante, ensure contestability, ensure technological autonomy)?
	N/A
5.	Is there competition legislation or regulation related to platforms with market power in your jurisdiction? If affirmative, please describe how the legislature or authority assessed why the particular characteristics of the sector warranted specific rules?
	No.
6.	If your jurisdiction contains specific competition rules for digital markets, are these rules per se; do they include rebuttable presumptions; or require an effects-based analysis? Where there are prohibitions or presumptions, are efficiency defences or objective justifications accepted?
	N/A
7.	Does your jurisdiction impose any competition rules on companies active in the digital sector that make certain behaviour by these companies unlawful per se or subject to a rebuttable presumption? In cases where a rebuttable presumption applies, what arguments are companies allowed to use to rebut the presumption (e.g., would an efficiencies-based defense be acceptable?) In cases of per se prohibitions, what justifications is the company allowed to present, if any?
	Nothing specific to platforms.
8.	If your jurisdiction imposes specific competition rules to digital companies with market power, are the legal standards applied (e.g., burden of proof and/or standard of proof) different to general abuse of dominance legislation? If so, please explain how.

	N/A
9.	How does the competition authority in your jurisdiction evaluate the role of data portability and interoperable data formats in promoting competition in the digital economy?
	<p>Currently, there are no laws that directly address the role that data portability and interoperable data formats play in the competitive landscape within the digital economy. Pending legislative efforts in this area include the Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act (previously introduced last Congress as the Competition and Transparency in Digital Advertising Act). That bill addresses data portability and interoperability below:</p> <ul style="list-style-type: none"> • A digital advertising exchange shall provide every buyer and seller in the exchange fair access, including with respect to operations of the exchange, colocation, any technology systems or data, information related to transactions, service, or products offered, exchange processes, and functionality.” See Section 5 (Fair Access Duty). • All records pertaining to an order solicited or submitted by a brokerage customer, and the subsequent result of the order, shall remain the property of the customer, including any bids solicited from or submitted to any digital advertising exchange, unless the information is otherwise publicly available.” See Section 7 (Data Ownership). <p>In addition, the American Innovation and Choice Online Act would make it unlawful for a person operating a covered platform to “(7) materially restrict or impede a business user from accessing data generated on the covered platform by the activities of the business user, or through an interaction of a covered platform user with the products or services of the business user, such as by establishing contractual or technical restrictions that prevent the portability by the business user to other systems or applications of the data of the business user.” See Section 7. It would also make it unlawful for covered platforms to “use nonpublic data that are obtained from or generated on the covered platform by the activities of a business user or by the interaction of a covered platform user with the products or services of a business user to offer, or support the offering of, the products or services of the covered platform operator that compete or would compete with products or services offered by business users on the covered platform.” See Section 6.</p>
10.	Does antitrust legislation or the competition authority in your jurisdiction apply an essential facilities doctrine or some similar instrument? If affirmative, what are the criteria? Has this ever been applied in a case in the digital economy? If so, please provide a description of the case and the authority’s analysis around essential facilities or related concepts.
	Seldom. We are not aware of any digital economy applications of the doctrine that resulted in a finding of violation of law.

11.	Are there any additional legal or regulatory factors in your jurisdiction that are relevant to the completeness of this survey?
	N/A

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