



Task Force 4
Digital Transformation

Policy brief

LEVELLING THE DATA PLAYING FIELD – THE G20 EX ANTE REGULATORY APPROACH TO PLATFORMS WITH STRATEGIC MARKET STATUS

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Pencho Kuzev Konrad-Adenauer-Foundation

T20 NATIONAL COORDINATOR AND CHAIR

ISPI

T20 CO-CHAIR



T20 SUMMIT CO-CHAIR



**Università
Bocconi**
MILANO





ABSTRACT

This paper urges the G20 to implement a framework for defining online platforms that qualify as being of the utmost importance for the normal functioning of economies and have a great impact on societies. Such a framework would consist of a blacklist of practices declared undesirable, i.e. the prohibition of combining data from different sources, the prohibition of a dual role for platforms as a core service and a competitor, and the prohibition of self-preferencing. This analysis sees a clear case for accepting a common approach to gatekeeper regulation. The EU Digital Markets Act could serve as a model for data governance that could prevent the fragmentation of markets.



CHALLENGE

Several prominent market studies have explored the business model of online platforms and their effects on the economy and society. This policy paper observes identical findings in landmark studies regarding the **business model of major digital platforms that operate globally**, and most notably about the **role of consumer data** and the **role of transaction data** of the companies relying on those platforms. Therefore, this paper considers it possible for the G20 members to arrive at legislative solutions that would produce the same effect – a more transparent and fair platform economy.

The author notes general and durable platform competition problems irrespective of the situation of specific regional markets. The paper thus sees an urgent need to restore the competitiveness of digital markets, which has been drastically reduced by a lack of access to data, as a key input to the platform economy before further societal and economic implications arise. Otherwise, the breakup of the few global online platforms would be indispensable though certainly the solution of last resort. Consequently, this paper suggests that the G20 should implement **stricter regulation only for designated platforms of systematic relevance to other business and to society as a whole (Strategic Market Status)**. At the same time, it names three practices to be incorporated in a list of prohibitions that should substantially transform the digital market toward a fairer and transparent outcome.

Having in mind the experiences of regulatory authorities and the results of market studies, this policy paper claims that there is a clear case for accepting a common regulatory approach to designating platform operators with special status, without provoking retaliatory measures or risking the fragmentation of markets. Could the upcoming European Digital Market Act serve as a model and inspiration for data governance in the platform economy of the G20?



PROPOSAL

The platform economy with its characteristics of network effects and economies of scale, for example, has created monopolies in various market segments. As a result of the creation of conglomerate ecosystems around platform services (e.g. Google obtains data from Google's owned and operated sites: Google's search engine, YouTube, Google Shopping, Gmail, Google Maps, as well as from third party sites), a few large platforms acting on the global stage increasingly act as gateways for a large number of business to reach end users. Moreover, some of these gateways dominate the dissemination of information and, at the same time, the coordination of political mobilisation (Fukuyama, Richman, and Goel, 2021). These digital core platforms permanently leverage their power to new or previously non-dominated markets. Not only are economic markets affected, but societies and democratic processes as a whole. No nation and no economic system can efficiently address these market failures alone. Having in mind the size of the platform economy and its societal implications, addressing these problems at the G20 level is of utmost importance. This paper focuses on the digital platforms that tend to compete vertically, i.e. through intermediation.

Progressively stronger privacy regulations, inspired by the European General Data Protection Regulation, cannot alone remedy platform governance challenges and the problem of data barriers. The issues of privacy and competition are increasingly interrelated and an integrated approach would be welcome. This was best demonstrated in the Facebook case of the Federal Cartel Office in Germany (Bundeskartellamt 2019).

Several prominent market studies (e.g. the Furman Report 2019; ACCC 2020) have explored the business models of online platforms and their impact on economy and society. In this respect, the analysis highlights the following questions:

- Can we reach a consensus in identifying general platform competition problems irrespective of the situation of specific markets?
- What principles should govern gatekeeper regulations, especially when it comes to access to data of relevance to smaller business?
- Could the upcoming European Digital Market Act serve as a model and inspiration for data governance in the platform economy of the G20?

It is commonly known that fair access to data in the data economy may help bridge the digital divide and make digitalisation an opportunity for all. A few of the G20 governments are already trying to remedy this problem via different initiatives. Market investigations like those in Australia (ACCC 2019), Japan (JFTS 2019) and the UK (CMA 2020), the report of the three Special Advisers to Margrethe Vestager (Crémer, de Montjoye, and Schweitzer 2019), or the German Government (Commission Competition Law 4.0 2019) have provided a clear picture about the **business model of the major digital platforms** of our time, and



most notably, about the **role of consumer data** and the **role of transaction data** of the companies relying on these platforms.

The following essential findings of the recent ground-breaking analyses and inquiries mentioned above expose the most relevant features of major digital platforms:

- Most market studies refer to gateways in the digital economy that cannot be avoided by users or business, i.e. to a position that cannot be bypassed by consumers or other conventional businesses (see for instance ACCC 2019). Almost all reports identify companies that operate globally and that, in recent years, have increasingly been building large ecosystems of complementary products and services. The characteristics of many of them are such that they tend to a tipping point (CMA 2020). Once they reach that point, the situation becomes irreversible.
- The competitiveness of digital markets has been radically reduced by the absence of data as a key input to the platform economy.
- The identified root of many problems is the ability of major platforms to combine data from different sources.
- Contemporary competition law alone is not sufficient to remedy the novel challenges faced by the platform economy – a fact acknowledged by several regulatory authorities. The market power of the major platforms is durable and non-compliance is systematic. There is no doubt of the need to further develop competition law with new pro-active tools, which are more typical for the regulated network industries. Thus, firstly we must first restore the competition of digital markets, and secondly we need tools for regulatory action before harm occurs.
- More concrete market studies, like the one into digital advertising in the UK, observe the accumulation of abnormal profits by major platforms, or, in the words of the CMA, profits that are substantially higher than any reasonable estimate would expect in a competitive market (CMA 2020).
- Only a small number of large online platforms capture the greatest share in value.
- In recent years, we have observed negative societal and economic implications. One may dispute which form of harm is larger – that of a political or of an economic nature.

Having in mind the long procedures in abuse of dominant positions in all jurisdictions (on average seven years (e.g. Google Search 2017 (Shopping) or more), traditional ex post control obviously cannot guarantee fair and competitive markets in the digital economy. Therefore, a tailor-made ex ante regulatory approach in dealing with major digital platforms is a logical consequence to remedy a market failure that has the potential to destroy entire markets and threaten democracy. The current regulatory competition and data protection framework in G20 countries does not specifically address the economic power that large online platforms acting as gatekeepers hold. This market failure includes various aspects: (i) accumulation and combination of large quantities of data versus the rest of the economy, (ii) easy



expansion into new markets and leveraging of advantage from their services, (iii) taking over competitors (Killing acquisitions), (iv) traditional businesses becoming increasingly dependent on a limited number of large online platforms. (Inception Impact Assessment, European Commission Ref. Ares (2020)2877647 - 04/06/2020)

There is an emerging consensus that democratic societies can no longer silently observe this abuse of platform power and the continued leverage of that power into previously non-dominated areas. Whether and how to respond has been intensively discussed over the last two years. Germany was the first country to introduce a specific regulatory regime for businesses it considers to have a paramount significance for competition across markets (GWB 10 2021). The European Commission has drafted a proposal for a regulation, the Digital Markets Act, that probably targets the challenges posed by the platform economy in the most comprehensive way (COM(2020)842 final).

Antitrust enforcement inevitably intervenes after the restrictive or abusive conduct has occurred and involves time-consuming investigative procedures. The current proposal, inspired by the European Digital Markets Act, therefore minimises the detrimental structural effects of unfair practices ex ante (in advance), without limiting the ability to intervene ex post under national competition rules. The ex ante approach in dealing with gatekeeper platforms should complement existing competition rules, not replace them. It should address gatekeeper practices, bearing in mind the experiences of antitrust and data protection authorities over the last ten years. The experiences of the regulatory authorities in many G20 countries have shown that existing competition and data protection rules either cannot address unfair and abusive gatekeeper practices or cannot do so effectively.

ACTIONABLE POLICY RECOMMENDATIONS

The upcoming and currently discussed European Digital Markets Act (DMA) could serve as an inspiration and as a model of data governance in the platform economy. The G20 could adopt a coordinated and timely framework based on commonly accepted principles for the designation of digital gatekeepers or core platform providers. New rules could be based on three principles in particular: (i) freedom of competition, (ii) fairness of intermediation, and (iii) the sovereignty of economic actors to take their decisions autonomously (Marsden,- Podszun 2020).

The DMA defines the following categories of core services – a list would certainly be logical for the G20: (i) **online intermediation services** (for example marketplaces, app stores, and online intermediation services in other sectors like mobility, transport or energy), (ii) **online search engines**, (iii) **social networking**, (iv) **video sharing platform services**, (v) **number-independent interpersonal electronic communication services**, (vi) **operating systems**, (vii) **cloud services**, and (viii) **advertising services**. A commonly defined list of core services across the G20 could guarantee that appropriate obligations apply equally to the relevant providers of those services in all G20 member states. Provisions could include proactive measures and remedies that would apply to platform providers that meet the



conditions to be designated as gatekeepers. A common G20 regulatory approach to the most relevant digital stakeholders would be the first step towards a more level playing field in the digital economy.

While it would be the duty of national regulators to designate respective platforms as “gatekeepers”, or as platforms with special responsibility, some basic principles regarding **when a digital service qualifies as such can be defined at the G20 level**. How each country arrives at this point, e.g. by applying quantitative metrics, or by case-by-case qualitative assessment, is immaterial as long as it serves the purpose of identification of the essential economic players that raise serious economic and societal concerns. Moreover, irrespective of creativity in the employment of exclusionary and abusive practices, some basic practices inspired by Article 6 and 7 of the proposal for a European Digital Markets Act could be declared socially undesirable in a kind of “blacklist,” with little justification for exemption. Prohibitions should include:

- The prohibition of combining end user data from different sources or signing in users to different gatekeeper services, covering all possible sources of personal data, including the gatekeeper’s own services as well as those of third-party websites.
- The prohibition of a dual role for platforms as both a core service and competitor, or alternatively prohibition from using any aggregated or non-aggregated data, including anonymised and personal data that is not publicly available, to offer similar services to those of their business users. Global gatekeepers take advantage of this dual role: they use the data generated from transactions by their business clients for the purpose of improving their own services. In other words, a gatekeeper usually provides a marketplace or app store to businesses, and at the same time offers services as an online retailer or provider of application software in competition to those business users. To prevent gatekeepers from unfairly benefitting from this dual role, it should be ensured that they refrain from using any aggregated or non-aggregated transaction data from their business clients that is not publicly available to offer competing services.
- The prohibition of differentiated or preferential treatment in ranking the core platform’s services, whether through legal, commercial or technical means, in favour of products or services it offers itself or through a business user which it controls.

FINAL REMARKS - A COORDINATED APPROACH FOR GLOBAL CHALLENGES

Global challenges require global solutions and a coordinated approach. Similar considerations on the need to regulate large online platforms acting as gatekeepers are ongoing in all major jurisdictions. The current bill proposals introduced in the US House of Representatives on June 11, 2021 (“Ending Platform Monopolies Act” – HR 3825 and “Platform Competition and Opportunity Act” – HR 3826) are the latest regulatory proposals that go in this direction. The term “covered platforms” used in these proposals is equivalent to the notion of “gatekeeper” in this paper.



Regulatory fragmentation would further exacerbate problems because the digital economy adapts quickly to regulatory barriers. Unilateral regulatory action to redefine competition rules for the platform economy runs the risk of provoking retaliation in different areas. A common understanding of the challenges of the platform economy must be demonstrated, while at the same time avoiding the risk of false perceptions that certain steps in some jurisdictions are not objectively justified and are thus directed against other nations.

An approach at the G20 level does not mean global punishment for the success of major platforms. A common regulatory approach would create legal certainty and would acknowledge the existence of a market failure that is of systematic and durable character. Such an approach in the obligation of identification and designation of systemic platform undertakings would not permanently require the definition of markets and an assessment of their dominance. Rather, it would simply apply the management experiences of regulatory authorities over the past decade and be based on objective criteria.



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ABOUT THE AUTHOR



Pencho Kuzev Konrad-Adenauer-Foundation, Berlin (Germany)

Policy Advisor at the Konrad-Adenauer-Foundation in Berlin. He holds a PhD in Antitrust, Regulatory and European law. Prior to joining the Foundation, he worked for the Deutsche Telekom AG in Bonn in the field of Governmental Affairs and Competition Policy, as well as in attorneys' offices in Hamburg.