PERSONAL DATA AND COMPETITION: Mapping perspectives, identifying challenges and enhancing engagement for competition regulators and civil society

April 2022

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EXECUTIVE SUMMARY

This report seeks to map the attitudes and perspectives of competition regulators and civil society across the world with regard to personal data and competition. Specifically, it explores the approach certain regulators have adopted by incorporating 'personal data' parameters in their competitive assessments, as well as the challenges faced by them in doing so. Furthermore, the report seeks to identify effective advocacy opportunities for civil society organisations (CSOs), by discussing the various tools they can use to support the regulators' programmatic work while defending consumers' well-being in the digital environment.

The report builds on both desk and empirical (qualitative and quantitative) research that was carried out by Privacy International (PI) in 2021. Specifically, PI sent out a survey to several antitrust regulators and CSOs based and/or operating in various parts of the world. The questions posed to regulators and civil society revolved around their work in the digital economy. Regulators and CSOs were asked to comment on whether and how personal data considerations were incorporated into their analyses or assessments, the difficulties faced in the context of their programmatic work, the interactions with civil society and competition regulators, and their views on how further collaboration between these stakeholders is envisaged in the future. In total, 28 organisations (8 anti-trust regulators and 20 CSOs) responded to PI's survey. The respondents' programmatic activities cover the following regions of the world: Africa (CSOs), Central and South Americas (Regulators and CSOs), Asia (CSOs), and Europe (Regulators and CSOs).

Following a comparative assessment of the responses received as well as specific material suggested by respondents, such as programmatic work outputs by civil society and regulators, court judgements, regulatory decisions, reports and academic literature, the report reaches a series of key findings and recommendations. As further discussed in the sections below, most of the responses received to PI's survey suggest that personal data and competition considerations are an important part of the respondents' programmatic

activities, and that these issues seem to not just be limited to a specific jurisdiction or continent. Being conscious of this global relevance of the topic, PI sought to involve organisations from diverse jurisdictions across the world. However, not all the regulators and CSOs that were originally contacted responded to the survey. As a result of this lack of input from certain jurisdictions or regions, the report does not have an equally diverse representation of all parts of the world and its findings are by no means comprehensive.

We would like to express our sincere gratitude to all regulators and CSOs that responded to PI's survey. We would also like to thank Maria Luisa Stasi, Head of law and policy for digital markets, ARTICLE 19, Vanessa Turner, Senior Advisor – Competition, BEUC, and Elettra Bietti, Postoctoral Fellow at NYU Law and Cornell Tech who acted as external reviewers for the report and its findings.

We hope that the present report will contribute to the global and rather topical debates about the role of personal data in competitive assessments and ultimately further advance the protection of consumers' well-being across the globe, through a robust and fruitful collaboration between regulators and CSOs.

PI will continue updating the findings stemming from this research. To that aim we would welcome any further input from regulators and CSOs that did not have the opportunity to respond to our surveys, a copy of which can be found in the annexes accompanying this report.

London, April 2022

Privacy International

INTRODUCTION

THE VALUE OF PERSONAL DATA IN ASSERTING MARKET POWER IN THE DIGITAL ERA

In the digital economy there is a trend towards corporate concentration of personal data.[1] This is particularly true for digital platforms, such as social media platforms, search engines, digital entertainment, or online retailers. The way in which market dominance is traditionally measured does not always capture the extent of these companies' market power,[2] as their products and services are often 'free' to consumers.[3]

This trend is fuelled by the increasing reliance of many sectors of the economy on data, particularly personal data. Access to personal data is perceived as an increasingly valuable capability in the digital economy[4] and its acquisition of vast scales is what allows big tech companies to make billions of dollars each year via targeted advertising.[5] In 2020, for example, Google's parent company, Alphabet, generated over 80% of its $182.5 billion in revenue from delivering advertisements to the users of their many user-facing services, which, among others, include the Android operating system, Google Search, YouTube and Gmail.[6] Similarly, Facebook's revenue in 2020 was $85.97 billion with advertising revenue accounting for almost 98% of it ($84.17 billion).[7]

The value of access to personal data increases as more and more data become exploitable through acquisition, combination and additional processing, and this incentivises companies to pursue business strategies aimed at collecting as much data as possible.[8] With the development and integration of artificial intelligence (AI) technologies, users' data have become even more important for these companies, since they form an essential input to train AI models, particularly ones that categorise humans based on their characteristics and profiles. And given the growing importance of personal data across all sectors of the economy, data concentrations are likely to continue and expand to other markets.[9]

A 2019 study by PI revealed how popular mental health websites in France, Germany and the UK share users' data with advertisers, data brokers and large tech companies, including Google, while some 'depression tests' on these websites leak answers and test results to third parties. This research also shows the dominance of Google in this tracking ecosystem. On the webpages PI analysed Google was the most prevalent third-party tracker and Google's advertising services DoubleClick and AdSense were used by most of these webpages. 70.39% of the webpages used DoubleClick. Other Google products such as Google Analytics, Google Tag Manager and Google Fonts are also widely used. 87.8% of webpages in France had a Google tracker, 84.09% in Germany and 92.16% in the UK.[10]

In December 2018, PI revealed how Facebook routinely tracks users, non-users and logged-out users outside its platform through Facebook Business Tools. PI's investigation found that at least 61% of the Android apps tested automatically transfer data to Facebook the moment a user opens the app. This was found to have occurred regardless of whether people have a Facebook account or not, or whether they are logged into Facebook or not. Furthermore, PI's investigation found that some apps routinely send Facebook data that is incredibly detailed and sometimes sensitive. Again, this concerns personal data of people who are either logged out of Facebook or who do not have a Facebook account.[11]

WHAT ARE THE CONSEQUENCES OR HARMS FOR MARKETS AND CONSUMERS?

The effects of this concentration of power are significant, and they are not limited to online and offline privacy. Digital platforms nowadays act as gatekeepers, for example by regulating how we access information on the web as well as which applications we can install on our devices. These companies increasingly rely on the availability of users' data and can impose excessive collection of personal data on people who have become 'captive users' to their providers, given their lack of genuine choice.[12]

A vicious cycle is at play: because of their dominance, these companies collect and analyse vast amounts of personal data. The more data they collect, the better they potentially become at profiling individuals and offering these profiles to advertisers, political parties, and others, as well as using those profiles to improve the attractiveness of their own services. And the more people are drawn into these services, the less any individual user has the power to opt out of the corporate data exploitation model because no equivalent (privacy preserving) service exists.[13]

In its 2019 Final Report of its Digital Platforms Inquiry, the Australian Competition and Consumer Commission (ACCC) notes:

> "*There are high barriers to entry and expansion in the markets for the supply of general search and search advertising services and data plays a key role in these barriers. For example, there are network effects from Google's ability to accumulate large quantities of user data that it can then use to improve its online search and search advertising services… [W]hile the data collected by Google increases its market power, the market power held by Google and its presence across related markets can also enable it to collect greater quantities and qualities of data.*" [14]

At the same time, data-dominant companies can hinder innovation and impose several barriers for competitors that are active in or wish to enter the markets the former are dominant in. This reduction in competition undoubtedly has negative consequences for consumer well-being.

In a competitive market, it should be expected that the level of privacy and data protection offered to individuals would be subject to genuine competition, i.e., companies would compete to offer privacy friendlier alternatives. Instead, in digital markets that are characterised by increased corporate concentration, companies in a dominant position have no incentive to adopt businesses models and practices that enhance people's privacy. Instead, companies that exploit personal data often view privacy and data protection legislation as a threat to their business models,[15] and may seek to exclude any privacy enhancing players from any of the markets where they can exert market power.

Facebook's 2020 Annual Report seems to consider compliance with data privacy laws as a threat to its business model:

> *"Our advertising revenue is dependent on targeting and measurement tools that incorporate [data] signals, and any changes in our ability to use such signals will adversely affect our business. For example, legislative and regulatory developments… have limited our ability to target and measure the effectiveness of ads on our platform, and negatively impacted our advertising revenue, and if we are unable to mitigate these developments as they take further effect in the future, our targeting and measurement capabilities will be materially and adversely affected, which would in turn significantly impact our future advertising revenue growth."* [16]

Apple's 2021 Annual Report states:

> *"Complying with emerging and changing [data protection law] requirements causes the Company to incur substantial costs and has required and may in the future require the Company to change its business practices. Noncompliance could result in significant penalties or legal liability."* [17]

Under a section titled "Government Regulation Is Evolving And Unfavorable Changes Could Harm Our Business", Amazon's 2020 Annual Report equally raises concerns regarding the impact of, among others, privacy and data protection regulations on its business:

> *"Unfavorable regulations, laws, decisions, or interpretations by government or regulatory authorities applying those laws and regulations, or inquiries, investigations, or enforcement actions threatened or initiated by them, could… require us to change our business practices in a manner materially adverse to our business, damage our reputation, impede our growth, or otherwise have a material effect on our operations."* [18]

PERSONAL DATA AS PART OF COMPETITIVE ASSESSMENTS IN THE DIGITAL ECONOMY

As huge concentrations of power arising from the value of personal data in the digital economy already exist, it is of utmost importance that companies' data holdings are central to anti-trust regulators' competitive reviews. Indeed, the importance of data holdings is very well- recognised by digital platforms who consistently regard consumers' data as a business asset.[19] Personal data is also integral to these companies' business models and therefore their market value.[20]

When assessing market power, competition authorities have, in the past, tended to focus on price and outputs, giving little to no consideration to the role of personal data in the different relevant markets (e.g. advertising, social media, search engines, online entertainment, etc.). This narrow approach missed the increasingly important competition implications of the processing of personal data, particularly when done at scale. In turn it failed to take into consideration the multiple effects that gaining personal data has on certain types of digital services as described above. The network effects in online markets can raise the importance of gaining or losing a user because of the importance of personal data (at scale) for the functioning of certain algorithms, such as those that underpin the effectiveness of targeted advertising.

The last few years have witnessed competition regulators recognising the need to consider the role of personal data in competition assessments, particularly in digital markets.[26] Some competition authorities have gone a step further to address privacy and data protection implications. For example, in February 2019 the German competition authority noted that "[m]onitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers".[27] In a similar vein, data regulators have warned of the privacy threats posed by increased market concentration and they have argued for the need to integrate data protection in the assessment of potential abuses of dominant position and of mergers of companies operating in the digital market.[28]

Back in April 2007, when Google acquired DoubleClick for $3.1 billion, Google founder Sergey Brin said privacy would be the company's "number one priority" when considering new advertising products.[21] That merger was approved by both the European Commission and the United States Federal Trade Commission (FTC) on the basis that it was unlikely to lessen competition, even though by then Google had become dominant in pay-per-click internet advertising. The FTC held that privacy issues were not relevant to an antitrust review.[22] However, in the summer of 2016 it was reported that Google had erased the line in its privacy policy that promised to keep DoubleClick's database of web browsing records separate from the names and personally identifiable information Google collects from Gmail and other login accounts.[23]

In its review of the Facebook/WhatsApp merger in 2014, the European Commission noted that Facebook and WhatsApp had different business models, including notably different privacy policies, with WhatsApp's strong commitment to user privacy opposed to Facebook's ubiquitous tracking and profiling practices.[24] However, the Commission wrongly assumed that consumers would easily detect degradation of any privacy protections after the merger, and it failed to consider how the merger increased entry barriers for new competitors given the several, strong data-driven network effects, that were indeed leveraged in several manners by Facebook to drive its growth. Two years after the merger, Facebook was fined for misleading the EU during the merger probe: it had told the regulators it could not combine WhatsApp data with its other services but moved to do so shortly after the deal was finalised.[25]

The ability to deal appropriately with concentrations of personal data is therefore key to evolving competition rules to deal with the challenges and realities of the digital economy: it is not solely a matter for data protection regulators. It must, therefore, be considered by competition regulators in every aspect of their work.

SCOPE AND PURPOSE OF THE REPORT

The present report constitutes an effort to map the perspectives of anti-trust regulators and CSOs on the role of personal data in competitive assessments. It seeks to contribute to effective advocacy before competition authorities, by exploring the interactions between regulators and civil society, and identifying meaningful interventions to ensure that consumers' fundamental rights are properly upheld in the digital economy.

Over the past years, PI has been engaging with competition regulators and CSOs around the world on issues at the intersection of personal data and competition laws.29 PI has submitted evidence to the European Commission, [30] the United Kingdom's CMA,[31] and the U.S. FTC regarding personal data and competition issues.[32] In 2020 PI was recognised as an interested third party and provided comments at several stages of the European Commission's review of the Google/Fitbit merger.[33] Similar submissions on that transaction were also made before the Australian Competition and Consumer Commission (ACCC).[34] Additionally, in 2021 PI submitted comments with regard to Facebook's acquisition of Giphy before both the UK Competition and Markets Authority (CMA) as well as before the Australian Competition and Consumer Commission (ACCC).[35]

PI's research reveals that data exploitation tends to be perpetrated by companies which occupy dominant positions in the various online markets, and we believe that competition rules have a vital role to play in holding the digital giants to account. More importantly, what several investigations by PI's international network of partners[36] have underscored is that these issues are not limited to a specific jurisdiction or region but are global in nature. This is because, first, big tech giants like Facebook, Google, Apple, Amazon and Microsoft (colloquially known under the acronym 'GAFAM') appear to often emerge as the "usual suspects" behind data exploitation practises in various countries across the world. These companies could act globally as gatekeepers, for example by regulating how we can access information on the web, including in some cases

which applications can we install on our devices. This is no longer 'just' affecting the realm of digital advertising. Increasingly corporate powers encroach on the functioning of democracy and have profound societal impacts.[37]

Second, competition law frameworks might provide an excellent opportunity to advance the fundamental rights of users, in regions where protection of individuals' personal data is either lacking or is not sufficiently enforced. As PI's research findings reveal, privacy issues have arisen in the context of anti-trust legislative proposals seeking to regulate digital markets.[38] This does not only underscore the close relationship of personal data and competition have come to play in the digital economy but also begs the question of whether competition authorities could also address wider systemic issues of data exploitation and advance consumers' digital rights under the prism of competition law, by, for example, ensuring that effective competition exists also when it comes to privacy standards offered by companies.[39]

Following a 2019 investigation into the practices of SafeBoda, one of the most popular ride-hailing apps in Kenya, Uganda, and Nigeria, the digital rights organisation Unwanted Witness revealed that the company was sharing clients' personal data with third parties without their knowledge or permission. Specifically, according to Unwanted Witness's report, the app used a Facebook business tool, namely Software Development Kit (SDK), to routinely collect information on Safeboda users and share data with Facebook.[40]

In 2020, the Brazilian Institute of Consumer Defense (Idec) filed a complaint to the Brazilian Antitrust Authority (CADE) asking it to analyse the Google-FitBit merger. This action forms part of a joint movement of global CSOs raising concerns on this merger.[41]

In India, the Centre for Internet and Society (CIS) submitted comments on the proposed amendments to the Consumer Protection (E-commerce) Rules, 2020, which were first introduced in an attempt to ensure that consumers were granted adequate protections and to prevent the adoption of unfair trade practices by E-commerce entities.

In its submission CIS emphasised the need for the provisions relating to the protection of personal data to be more robust, in absence of data protection legislation in India.[42]

In 2021, the Indonesia-based Institute for Policy Research and Advocacy (ELSAM) formulated a brief focusing on the protection of personal data in the context of corporation actions, such as mergers and acquisitions, in response to two technology companies in Indonesia, namely Gojek (taxis, fintech, and daily life services) and Tokopedia (e-commerce).[43]

Against this backdrop and in light of constant policy and regulatory developments across the world, in 2021 PI carried out empirical and desk-research with the aim of understanding how competition regulators across the globe are reacting to issues around personal data and competition and how they reflected on their interactions or relationship with civil society in the context of their work in the digital economy. Likewise, PI sought to also consult CSOs based or active in several parts of the world to obtain further insights into the underlying reasons behind various regulatory approaches and better inform our findings.

The purpose of this report is therefore to illustrate some preliminary findings around how competition regulators and CSOs are responding to privacy issues arising in the context of the digital economy, and to provide a preliminary assessment of the effectiveness of the interactions between these two stakeholders through specific advocacy means available to them. Consequently, the findings contained in this report are envisaged to contribute to the global advocacy and regulatory efforts to tackle the harmful effects of data concentrations in the digital era and to promote the well-being of consumers around the world.

METHODOLOGY

In carrying out the research for this report, PI prepared two similar surveys, one for competition regulators and one for CSOs. The surveys, which can be found in the Annexes accompanying this report, contained questions about whether and how privacy considerations were incorporated into their analyses or assessments, the difficulties faced by them in the context of their programmatic work on personal data and competition, their interactions with civil society and competition regulators, respectively, and their views on how further collaboration between these stakeholders is envisaged in the future.

The survey for regulators was sent to a total of 23 bodies based in Europe, Africa, Asia, Australia and Americas, which were selected based on a current or past interaction with PI or its international network of partners, as well as whether they had recently been active on issues pertaining to privacy and competition in their jurisdiction. Out of the 23 regulators that received PI's survey, 10 responded and their responses can be found in the Annexes accompanying this report. Out of the 10 regulators that responded to PI's survey, two (the Australian Competition and Consumer Commission (ACCC) and the United States Department of Justice) declined to take part in the survey, while eight (the Bundeskartellamt (Germany), the Hellenic Competition Commission (Greece), the Hungarian Competition Authority (Hungary), the Competition and Markets Authority (United Kingdom), the European Commission (EU), the Federal Economic Competition Commission (Mexico), the Instituto National Institute for the Defense of Competition and Protection of Intellectual Property Rights (Peru) and the Superintendence of Industry and Commerce (Colombia)) provided partial or complete responses to the questions. It should be noted that the terms 'anti-trust regulators' and 'competition regulators' or 'competition authorities' are used interchangeably throughout the report.

The survey for CSOs was circulated among more than 50 organisations which ranged from human rights or digital rights organisations to consumer organisations based in Europe, Africa, Asia, Australia and Americas. This included organisations that were part of PI's international network of partners, organisations that were part of other consumer or digital rights networks PI is

part of, such as the European Digital Rights (EDRi) or Trans-Atlantic Consumer Dialogue (TACD) networks, or organisations that had recently been active on privacy and competition issues or that had worked on these issues with PI in the past years. A total of 20 CSOs responded to PI's survey, partially or wholly. Respondents were offered the option to respond to PI's survey anonymously. As a result, their responses are not published, and any quotes or statements from the respondents that chose to remain anonymous are attributed to a generalised reference ("a CSO").

The analysis of the responses was complemented by desk research, which, due to bandwidth and resources constraints, was limited to material suggested and/or referred to in the survey responses, notably academic literature, reports, decisions or judgements, investigations or blogs. In addition, notwithstanding procedural issues that might be jurisdiction specific, the report's findings remain high-level. In addition, the draft report was reviewed by Maria Luisa Stasi, Head of law and policy for digital markets, ARTICLE 19, Vanessa Turner, Senior Advisor – Competition, BEUC, and Elettra Bietti, Postoctoral Fellow at NYU Law and Cornell Tech.

Finally, while PI sought to involve organisations from diverse jurisdictions across the world, not all of the regulators and CSOs that were originally contacted responded to the survey. Therefore, while the findings contained in this report might represent a good proportion of competition regulators and CSOs across the globe, any further generalisation for regions not discussed in this report should be treated with caution.

REPORT STRUCTURE

This report is structured in two parts:

- **PART I** discusses respondents' approaches to personal data in competitive assessments. It offers insights into whether and why privacy has been a parameter in the regulators' competitive reviews and in the programmatic work of various CSOs, and briefly demonstrates the most important challenges faced by them in each of the examined regions as well as ways to overcome those.
- **PART II** provides an overview of the interactions participating regulators and CSOs had with each other in the context of reviewing data concentrations. It discusses regulators' views of their engagement of civil society, followed by CSOs' assessment of their activities before regulators. Finally, it summarises CSOs' views of the challenges they face in this engagement and provides avenues and recommendations for more meaningful interactions in the future.

The report's Annexes contain the responses received by competition and anti-trust regulators, as well as the original template questionnaires used for each category of respondents.

PART I: PERSONAL DATA AS A PARAMETER FOR COMPETITIVE ASSESSMENTS: APPROACHES AND CHALLENGES

- Regulators responded that their approach to digital economy issues takes adequate stock of the interplay between personal data and competition. Several regulators have already dealt with issues pertaining to personal data and competition, while others were keen to identify situations where privacy considerations would come into play in the context of their competitive assessments.
- According to regulators, privacy considerations do not only arise when assessing market dominance or articulating theories of harm but might also have an equally important role to play at the stage of designing and implementing regulatory interventions or behavioural remedies.
- When asked about what fundamental rights they see as being most impacted by privacy concentrations in the context of digital economy, privacy and data protection came in the first place identified by 95% of CSOs. Consumer rights are ranked second and freedom of expression/access to information third, being identified by 90% and 60% of CSOs, respectively. PI's findings suggest that there is a growing tendency among digital rights or human rights CSOs to work more on competition issues and the interplay privacy might have with the former.
- Regulators seemed to agree that the digital economy posed certain challenges for competition laws, which might have

traditionally not foreseen the relevance of personal data for assessing potential market abuses, and that existing competition law frameworks were still able to incorporate competitive assessments in the context of data concentrations.

- When asked to what extent, in their view, their country or region was addressing issues pertaining to personal data and competition CSOs expressed mixed views, stating that certain regions were more active than others and that discrepancies might still be observed within the same region, with some countries being more or less responsive.
- Regulators identified both organisational and substantive challenges that they are confronted with in the context of competition and privacy. The organisational challenges related mainly to the lack of staff with specialised privacy expertise within competition authorities and the need to investigate whether the current institutional design is sufficient to meet the challenges of inter-institutional coordination required by digital markets. The substantial challenges evolved around the need to better understand how data concentrations work in the digital economy.
- Regulators have sought to tackle these challenges through organisational reforms or proactive responses at international level, as well as by carrying out market studies, publishing policy papers or proposals, adopting digital strategies, boosting cooperation with their international counterparts, or receiving relevant training on competition enforcement in the digital economy.
- The vast majority of competition regulators underscored the importance of cross-institutional cooperation with their data protection counterparts, with several of them indicating that they have already worked together with data protection regulators in the context of anti-trust investigations or merger reviews.

PERSONAL DATA CONSIDERATIONS IN THE DIGITAL ECONOMY

The responses received to PI's survey suggest that both regulators and CSOs understand that data considerations have a vital role to play in the context of competition assessments in the digital economy. While a distinction should be made between personal data as an asset, which might be relevant in the context of a merger review, for instance, and data protection or privacy considerations, which could arise in the context of investigating anti-competitive behaviour or even designing remedies, there are cases that could raise both of these two angles. Many of the responses we received from anti-trust regulators suggest that both aspects have surfaced as part of their programmatic work.

As far as regulators are concerned, they all stated that their approach to digital economy issues takes adequate stock of the interplay between privacy and competition. Several regulators have already dealt with issues pertaining to personal data and competition, while others were keen to identify situations where data considerations would come into play in the context of their reviews.

> *"The Bundeskartellamt shares your believe [sic] that considering the intersection of data privacy and competition law has become more and more important. Our agency has been confronted with assessing the role of data in general and personal data in particular, due to the pivotal role data has in the digital economy."*
>
> **Bundeskartellamt (Germany)**

> *"[I]n recent years, the Federal Economic Competition Commission (COFECE or Commission) has included in its analysis, in the cases that warrant it, the use or exploitation of consumers' private data as an additional variable to understand how these [digital economy] markets operate."*
>
> **COFECE (Mexico)**

> *"The interplay between data privacy and competition has always been part of the Commission's approach to the digital economy."*
>
> **European Commission (EU)**

> *"In the context of the digital economy, many products and services are data-driven, which means their consumer model is founded on consumer data. In this sense, data use and exploitation has gained relevance to analyze competition cases and issue opinions and reports by various authorities at the international level, in particular regarding the analysis of data as a competition parameter."*
>
> **INDECOPI (Peru)**

Moreover, in their responses, several regulators went on to describe specific situations or examples where they see privacy considerations coming into play in the context of their reviews.

First, several regulators stated they have already addressed the accumulation of personal data in their competitive assessments.

> *"[P]rivacy considerations can potentially be a factor within the assessment of an abuse of a dominant position. The German Facebook case [ref] is a prominent example in which privacy considerations were relevant for the Bundeskartellamt's finding of an abusive practice. Our agency found that Facebook's terms of service and the manner and extent to which it collects and uses data amount to an abuse of dominance. In assessing the appropriateness of Facebook's behaviour under competition law, the Bundeskartellamt had regard to the violation of the European data protection rules to the detriment of users."*
>
> **Bundeskartellamt (Germany)**

In December 2019, the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) fined Facebook a total of EUR 3.6 million for deceiving

consumers by stating that its services are "free and anyone can join" and "Free and always will be". According to the GVH, those statements were deceptive because they distract users' attention from the fact that they are indirectly paying for the use of its services in the form of the transmission of their data, the extent of the data collected, and all of the resulting consequences.[44]

> *"Thessencee of the (so-called zero price) model of Facebook is that it attracts users with its online platform's content and it collects detailed information about its users' interests, behaviour and purchasing habits. The undertaking then uses this information to sell targeted advertising to its clients, with these paid for advertisements then appearing among the posts of targeted users."*
>
> **GVH (Hungary)**

In addition, regulators such as COFECE and the European Commission noted how personal data considerations might be important, for example, in the context of merger investigations. In the Microsoft/LinkedIn case, which concerned the acquisition of the professional networking website LinkedIn by the global tech giant Microsoft, the European Commission identified a handful of privacy related concerns, which would have resulted in the merged entity's increased market power or in increased barriers for competitors that wished to enter the market of professional social networks.[45]

Similarly, when examining the merger between Apple and Shazam, the European Commission "compared the data collected by the parties against other comparable datasets available on the market, using four relevant metrics: (1) variety of data; (2) velocity of data accumulation; (3) volume of the dataset; and (4) data value".[46]

At the end of 2018, the supermarket chain Walmart announced that it had reached an agreement to acquire Cornershop, a startup that operated as the leading digital home delivery platform for purchases in, among others, supermarkets, price clubs etc, for USD 225 million. Based on the analysis of the merger, COFECE decided not to authorise the transaction as it identified several risks, the most relevant of which were related to users' personal data:

- The resulting entity could induce Walmart's competitors to abandon the Cornershop platform due to the lack of certainty about the strategic use of the data produced and provided by such competitors when selling their products;
- Walmart could use the data of Cornershop users for anti-competitive purposes such as: (i) offering personalised offers to users who normally buy products from other supermarkets; and, (ii) favouring Walmart's products over those of its competitors within the Cornershop platform.[47]

"Therefore, and in relation to data privacy, the Commission's main concern was the possibility that Walmart could strategically use for its own benefit data from competing stores and end consumers that supply and produce on the Cornershop platform, including consumption habits, offers, among others. As a result of these potential risks identified during the analysis, in mid-2019 the COFECE Plenary decided not to approve this transaction."

COFECE (Mexico)

As explained in the response provided by SIC (Colombia), in 2019, Colombia's three largest banks requested the pre-assessment of a possible merger before the Colombian financial markets authority (SFC). The merged entity, NewCo, would be a joint venture based on a technological innovation that would use a digital platform to connect public and private institutions with citizens, and exchange personal data necessary to certify their personal identity. NewCo is the first company that would provide the digital identity service in Colombia. NewCo would be in charge of consolidating user information contained in the different institutions that hold it and then make it available to public and private institutions interested in having access to the information, subject to the user's authorisation.

The SFC requested the Colombian competition authority's opinion to be included in the analysis of the impact of NewCo's operation on the market. In order to issue the opinion, the SIC studied the markets where the operation would have an effect. On the one hand, the financial services market, since it is the market in which banks operate, and on the other hand, the market for digital identification applications.

> *"The SIC found that the financial market would not be altered structurally because the new company would not operate in this market alongside the banks. However, NewCo provides a distinguishing asset to the three largest banks in Colombia, as it is the only platform for digital identity applications in the market. It is important to note that in aggregate these banks have more than thirty million active users (approximately 78% of the national economically active population for 2018), a circumstance that could be relevant in analyzing the network effects of the operation and the structure of both NewCo's and the banks' market power. As network effects are positive, the more users (citizens and institutions) there are on the platform, the greater the benefits and the greater the power of NewCo."*
>
> **SIC (Colombia)**

In December 2020, the European Commission concluded its in-depth review of Google's acquisition of the health and fitness tracker Fitbit:

> *"In that case, the Commission has examined whether the combination of the merging parties' data and data collection capabilities would raise competition concerns. The conclusion has been affirmative in relation to the market for online advertising, where it has been found that the addition of Fitbit's user data would strengthen Google's entrenched market position in online advertising."*
>
> **European Commission (EU)**

Second, personal data considerations have not only arisen when assessing market dominance or articulating theories of harm. The responses received suggest that data protection might have an equally important role to play at the stage of designing and implementing regulatory interventions or behavioural remedies.

> *"In effect, there are synergies between these two regimes that materialize, firstly, when the facts of the case are examined, because an analysis that includes a personal data approach highlights its role in markets with digital platforms, especially given the volume of users and the correlative amount*

of personal data involved. And, secondly, in the design of optimal solutions that actually take into account the logic underlying the transaction or business and that depend mainly on personal data, for instance in the case of conditions imposed during the ex ante control of business integrations."

SIC (Colombia)

In the Google Allo investigation mentioned above, Google was forced to undertake a series of data protection commitments such as setting up an accessible page explaining the data processing activities carried out by Allo "in plain language and in a balanced manner".[48] The commitments undertaken by Google strongly reflect data protection obligations companies have under European data protection laws, such as the General Data Protection (GDPR).

"[I]t is important to consider what kind of rules and/or public policy measures related to data privacy can have positive effects on the competition process. For example, the imposition of obligations limiting the purpose of the use of users' data and information may help to prevent companies with some market power from using the information they collect when offering a service in an adjacent market. Such a measure not only avoids infringements of consumers' privacy rights, but also reduces the ability of a dominant firm to leverage its power in one market in an adjacent market by using the data it has from operating in the first market."

COFECE (Mexico)

In the NewCo merger discussed above, SIC suggested to the SFC to include some conditions to the transaction in order to mitigate any horizontal and vertical restrictive effects on competition. With regard to NewCo's market power, the SIC highlighted the need to maintain independence between the new company and its future shareholders (the banks), as well as its obligation to include equal and non-discriminatory treatment between the different clients and users of the new company. It is worth noting that the SIC also recommended the adequate treatment and protection of the personal data of customers or users of the new company. In particular, it drew attention to

the fact that the automatic and non-consensual migration of personal data and confidential information of bank users or customers to the new company should not be managed. Such migration will require prior, express and informed authorisation from customers. This last condition and the obligation to maintain the interoperability of the new developments for the migration of users to other platforms without additional costs, resulted from the active participation of the personal data protection authority and the competition authority (SIC is responsible for overseeing the compliance with both competition as well as data protection and consumer laws), given the role that personal data play in markets with digital platforms, especially due to the volume of users and the correlative amount of personal data involved in this specific case.

> *"[T]he SIC's recommendations sought to prevent anti-competitive practices potentially resulting from NewCo's operations in relation to (i) restricting the entry of new rivals in the market for digital identity applications and (ii) the potential exploitation of market power in the financial sector to consolidate NewCo's market power through the data of its users."*
>
> **SIC (Colombia)**

Similar remedies were adopted in the context of the European Commission's review of Google's acquisition of Fitbit:

> *"[A] remedy was adopted to segregate and hold separate Fitbit's data in a data silo and prevent their use by Google's advertising functions. In addition, in the context of the commitments offered to secure clearance to the transaction, Google committed to offer all Fitbit users a specific and separate choice of whether to consent to the use of their data by Google's non-advertising functions, a commitment that reinforces existing data protection safeguards on data processing."*
>
> **European Commission (EU)**

Third, regulators underlined how personal data considerations have also been part of consultations, reports, market studies, sector inquiries or legislative opinions produced as part of their work in the digital economy. For example,

INDECOPI has published a preliminary report of the market study on payment card systems where it analyses the existing competitive conditions in the market and makes recommendations to improve competition in the markets. This document is evidence of the growing interest in gaining a better understanding of the functioning of competition in digital markets.[49]

In October 2017, COFECE issued a non-binding opinion addressed to the Mexican Senate on the Draft Decree to reform several financial sector laws and issue the first Mexican law to regulate Financial Technology Institutions (Ley Fintech). The Draft Decree aimed to regulate some of the financial services provided by these types of companies, known as Fintech, as well as their organisation, operation and functioning. The COFECE's recommendations to the Senate were mainly aimed at obliging traditional financial institutions to provide such information to other market participants, with the consent of users.

> *"In early 2018, the Fintech Law was enacted, taking into consideration different recommendations made by COFECE, including: (i) explicitly recognizing that financial information belongs to customers and not financial institutions; (ii) facilitating Fintech companies' access to customer information controlled by traditional financial institutions, as well as determining that regulators will establish non-discriminatory fees for the transmission of information and the conditions under which transmission interruptions will be allowed."*
>
> **COFECE (Mexico)**

Similarly, the Hellenic Competition Commission has carried out a number of inquiries in sectors where privacy may be a concern, namely fintech, healthcare and e-commerce. With regard to the latter, the HCC published its interim report in August 2021:

> *"The Interim Report notes that the uniform application of personal data protection rules at Member State level in the European Union can boost cross-border sales and encourage the completion of the digital single market. From a business perspective and in light of the various applicable legal rules under both EU and national law (personal data and privacy*

legislation, as well as e-commerce and consumer protection legislation), the publication of guidelines will improve legal certainty." [50]

Hellenic Competition Commission (Greece)

As the findings discussed above reveal, the responses received by regulators do not only suggest that personal data considerations are being an integral part of their work, but also highlight how those emerge across most of their activities, from merger reviews to market investigations to policy consultations or reports.

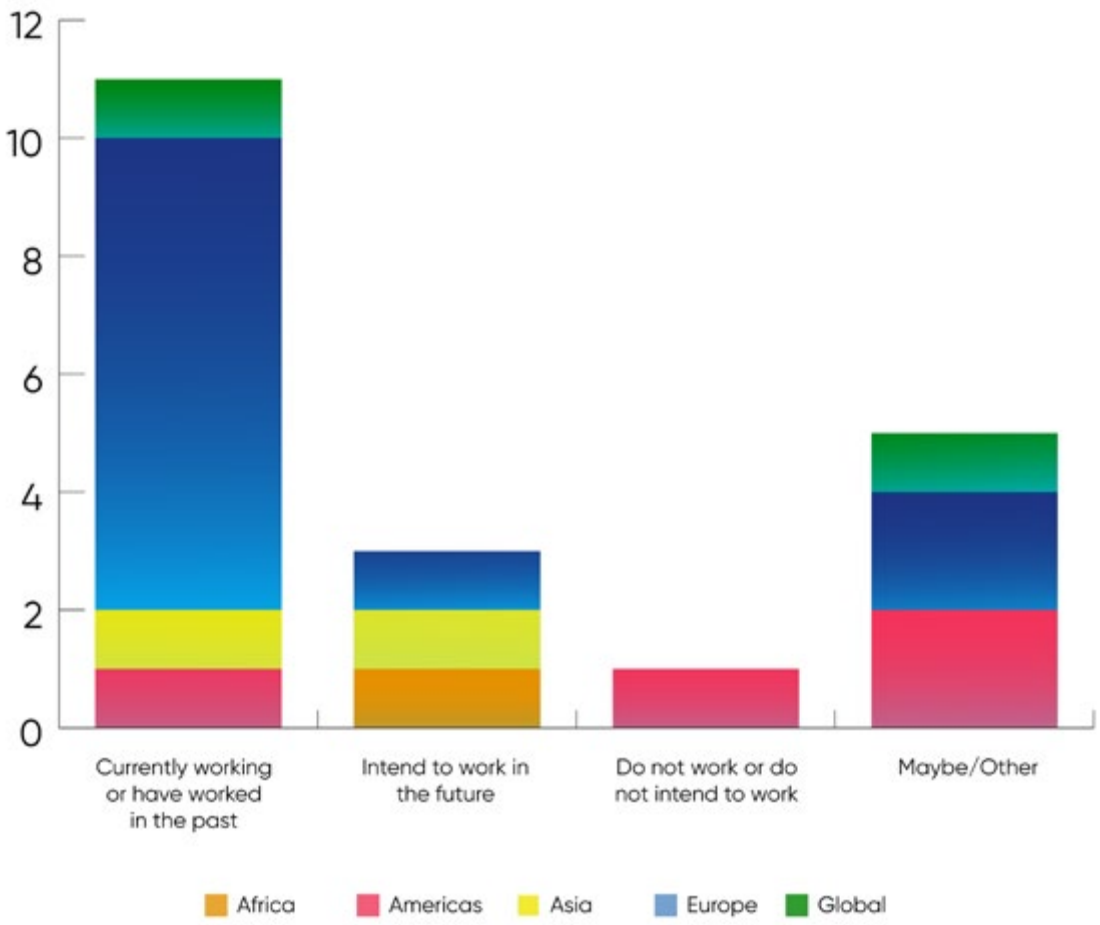
"There appears to be growing willingness to take privacy issues into account in some circumstances."

A CSO

When asked about what fundamental rights they see as being most impacted by data concentrations in the context of digital economy, privacy and data protection came in the first place identified by 95% of the respondents. Consumer choice and rights are ranked second and freedom of expression/ access to information third, being identified by 90% and 60% of the respondents, respectively.

As the graph below illustrates, the vast majority of CSO respondents indicated that they have worked, are currently working or plan to work on issues around privacy and competition. Specifically, 55% of CSOs (11 out of 20) responded that they are currently working or have worked in the past on issues around privacy and competition; 15% (3 out of 20) stated that they intend to make privacy and competition part of their programmatic activities, and 25% (5 out of 20) said that they might work on these issues in the future. Only one organisation (5% of respondents) indicated that they have no intention to work on privacy and competition.

Civil society and data privacy and competition



What merits further attention is that, first, this approach is endorsed by both consumer organisations as well as human rights or digital rights organisations, signalling an adaptation of the programmatic work and strategic priorities of CSOs to properly address the human rights challenges arising in the digital economy. Second, the organisations that currently work or intend to work on issues around personal data are not limited to a single region but represent various parts of the world. This confirms the view that issues arising from data concentrations in the digital economy can have global implications for individuals' rights. Accordingly, the survey findings suggest that there is a growing tendency among digital rights or human rights CSOs to work more on competition issues and the interplay privacy might have with the former.

ASSESSMENT OF EXISTING FRAMEWORKS AND THE ROLE OF DATA PROTECTION LEGISLATION IN DIGITAL COMPETITION

The Hellenic Competition Commission (HCC) acknowledged that "data concentrations challenge the application of existing competition law tools" and welcomed recent legislative initiatives at both domestic and EU level, namely the recently proposed Digital Market Act by the European Commission.

> *"As illustrated by recent cases in the digital economy, the current competition framework enables the Commission to address competition concerns stemming from data processing and concentration. In addition, on 15 December 2020, the Commission has launched a proposal for a Digital Market Act (DMA) that comprehensively address the competition risks associated to the raise of gatekeepers in digital markets and data-related markets. The Digital Markets Act (DMA) proposes regulation covering obligations on designated as gatekeepers, some of which relate to the handling and uses of data."*
>
> **European Commission (EU)**

Regulators seemed to agree that the digital economy posed certain challenges for competition laws, which might have traditionally not foreseen the relevance of personal data for assessing potential market abuses, and that existing competition law frameworks were still able to incorporate personal data considerations in the context of competitive assessments.

> *"The general purpose of [the existing regulatory framework] is to protect the right to free competition, referring to the need to update it "to the current conditions of the markets". Thus, [it] allows this Superintendency to address the competition problems arising from the violation of the personal data protection regime."*
>
> **SIC (Colombia)**

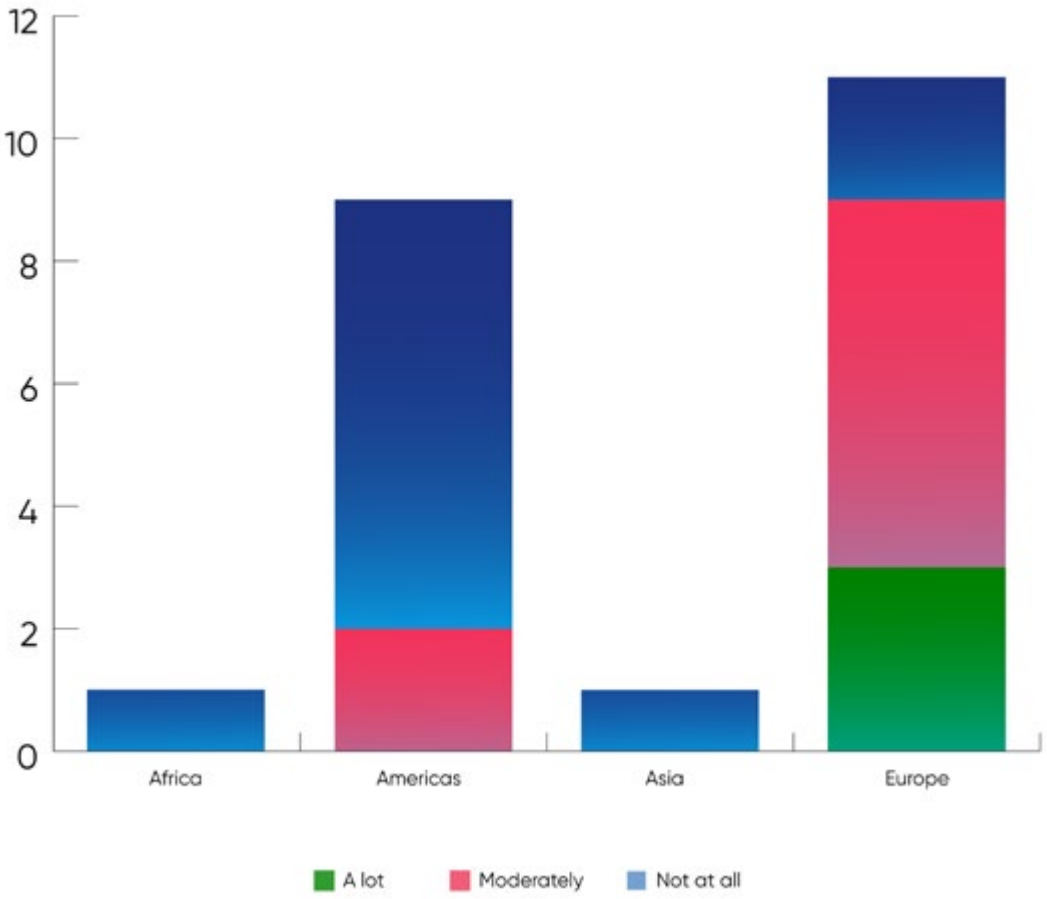
However, albeit agreeing that the current competition tools at its disposal allow it to "address many of the competition problems arising from" data concentrations, there were areas that would require or benefit from certain reform.

> *"For example, the current regulatory framework does not allow the Commission to investigate and sanction exploitative practices, which in the digital environment translate into the imposition of abusive terms and conditions in order to obtain more private data from users and consumers and which have been sanctioned in other jurisdictions, as the German competition authority did recently."*
>
> **COFECE (Mexico)**

When asked to what extent, in their view, their country or region was addressing issues pertaining to personal data and competition CSOs expressed mixed views.

> *"As we work in different areas of the world, the answer might vary substantially depending on the specific country. The most 'active' places in that regards appear to be United Kingdom, Germany, the European Union, United States. We're also seeing some LATAM countries entering in the discussion, such as Mexico and Brazil, among others."*
>
> **ARTICLE 19 (Global)**

To what extent are data and competition issues addressed in your country or region?



As the graph above indicates, the responses received varied by region and country. CSOs believe that certain regions are addressing issues around personal data and competition more actively than others and that discrepancies might still be observed within the same region, with some countries being more or less responsive.

> *"Privacy parameters should be considered further in EU competition law."*
>
> **A CSO**

The responses received by two CSOs which indicated that privacy and competition issues are not addressed in their regions at all, DRF and ELSAM, based in Pakistan and Indonesia, respectively, might to a certain extent explain why personal data and competition might have not been discussed so much in their jurisdictions.

> *"Notice will be taken, we are hoping, in terms of the intersection between data privacy and competition regulation. This for Pakistan will not come before the Data Protection Bill becomes law. However since the tentative hope is that since we've gone through our third draft of the Bill and interest seems to remain focused on introducing regulation, that the legal basis for engaging with the Competition Commission of Pakistan will emerge over the next 1-2 years and we can strategize on how to engage with them in order to best convey a rights-based approach to their work that'll impact the situation positively."*
>
> **DRF (Pakistan)**

> *"In the context of data protection and business competition, regulators and practitioners in Indonesia often refer to the standards and practices that apply in ASEAN countries. However, in ASEAN until now there is no standard regarding the protection of personal data in business competition. Therefore, looking at comparisons with other ASEAN countries in this regard is also important."*
>
> **ELSAM (Indonesia)**

What the responses above suggest is that an effective competitive assessment of personal data or privacy concerns would also require an existing data protection framework. In other words, data protection is closely linked to competition law in the context of the digital economy. Data protection law is seen not only as providing the right tools to assess anti-competitive behaviour, but also as the source of remedies or interventions to address the harmful effects of data concentrations.

"[F]rom our perspective, the current regulatory framework on data protection presents areas of opportunity that, if addressed, could have a positive impact on the competition process. Among the issues that we have detected in the Commission is, for example, the establishment of a data portability mechanism in favour of users, which would empower them as data owners to decide on which platform, application or service to share this information, as well as fostering greater competition by allowing companies that want to participate in digital markets to access such data, which are generally concentrated in large established companies. With similar effects is also data interoperability, which from a competition perspective could reduce barriers to entry for new competitors and the "single-homing" effect related to a single provider of products or services in the digital environment.

Another data protection issue that may have an impact on economic competition is data minimisation, a regulatory principle that obliges companies to collect only the data that are necessary for a specific purpose, and that cannot be used for other purposes. This may limit the use of user data by companies with a dominant position in adjacent or related markets (a practice known as "leveraging").

This minimisation principle could also be accompanied by the obligation to inform users and consumers in a clear and precise manner about the use and purpose of the data that are collected on a given platform or service. The user's right to be informed has a positive impact on markets in the sense that better informed consumers reduce the asymmetry of information between consumers and businesses. At the same time, it makes it easier for consumers to identify those companies that offer them better conditions in the processing of their data, which translates into incentives for companies to compete among themselves in terms of quality in their personal data collection and analysis processes."

COFECE (Mexico)

At the same time, the response from the European Commission below sets out the limits to which data protection law can advance competitive assessments:

> *"[C]ompetition rules are not deemed to intervene in the absence of competition concerns, even when market behaviour involves the processing of personal data and/or leads to an infringement of data protection rules. In other words, data protection issues "as such" are not a matter for competition policy, but they are certainly relevant and considered when the accumulation of personal data is at the centre of a competition concern. The Court of Justice indicated in the Asnef judgment that "issues relating to the sensitivity of personal data are not, as such, a matter for competition law [and] may be resolved on the basis of the relevant provisions governing data protection"."*
>
> **European Commission (EU)**

CHALLENGES AND OPPORTUNITIES IN TERMS OF TECHNICAL AND DATA PROTECTION EXPERTISE

The competition regulators that responded to PI's survey identified both organisational and substantive challenges that they are confronted with in the context of competition and personal data.

The organisational challenges identified by regulators related mainly to the lack of staff with specialised data protection expertise within competition authorities and the need to investigate whether the current institutional design is sufficient to meet the challenges of inter-institutional coordination required by digital markets.

> *"It is crucial for competition agencies to understand the scope and type of data collected by the investigated companies, how data are processed within complex technology environments, which are the entities and corporate functions that are actually processing the data and whether similar databases are available to other players in the market."*
>
> **European Commission (EU)**

The substantial challenges regulators said they were confronted with evolved around the need to better understand how data concentrations work in the digital economy. For example, several regulators referred to the importance of understanding the extent of personal data collection and processing carried out by key players in digital markets, which will accordingly help inform their findings, develop theories of harm and identify anti-competitive behaviour in the context of competition problems. COFECE additionally referred to understanding "the relevance and scope of existing competition and personal data protection tools and recognise whether any amendments to the existing legal framework will be necessary to better address the challenges posed by the digital economy".

> *"As a competition agency, we believe that the most important challenge is to properly understand the dynamics that characterise digital markets, as well as their specific context."*
>
> **INDECOPI (Peru)**

Moreover, the Colombian SIC emphasised, among others, the global nature of the digital market and the platforms usually populating it which as a result requires access to all available information in order to be able to carry out effective competitive assessments:

> *"The problem is that in many cases the companies in charge of storing, using and exploiting the platform's information are not located in the geographical area where the economic interactions take effect. This severely limits the ability of competition authorities to take effective action to ensure the proper functioning of the market. The reason for this problem is related to the global nature of the markets analysed and of the technologies on which they are based. In the face of this global character, the competition authorities, individually considered, have hardly any local influence and power to act."*
>
> **SIC (Colombia)**

In order to adapt to the organisational challenges posed by the digital economy, a few regulators stated that they have developed organisational reforms or proactive responses at international level.

> *"The HCC, aware of the challenges posed by the digital economy and in order to boost the respective expertise within the HCC has established a dedicated Directorate on media, online services and e-infrastructure. It has also established a Forensic Investigation/ Detection Unit and will hire a Chief Technology Officer with a team of data scientists as well as a Chief Economist supported by a dedicated team. In addition, it has established the HCC Data Analytics and Intelligence Platform, which allows better market monitoring in real time. The HCC has also invested in the use of computational law and economics tools."*
>
> **HCC (Greece)**

The Hellenic Competition Commission stated that, among others, "it has recently revamped its internal organisation" and "has established a dedicated Directorate on media, online services and e-infrastructure".[51] The Hungarian Competition Authority (GVH) noted that is also involved in the International Competitional Network's (ICN) Steering Group project on Competition law enforcement at the intersection between competition, consumer protection, and privacy.[52]

With regard to substantive challenges posed in the context of personal data and competition, the responses to PI's survey underline that anti-trust regulators have already started tackling those through a variety of ways. These include conducting market studies, publishing policy papers or proposals, adopting digital strategies, boosting cooperation with their international counterparts, or receiving relevant training on competition enforcement in the digital economy.

> *"In this regard, we believe that market studies are very important because they allow us to convene the different public and private actors that make up the digital ecosystem and, in this way, to draw on their knowledge and experience to better understand the digital rights, technical functioning and dynamics that characterise digital markets. In this framework, we have issued a preliminary market study report analysing the conditions of competition in payment card systems, which also explores the use of digital means of payment, which are key to achieving digital and financial inclusion for more and more Peruvians."*
>
> **INDECOPI (Peru)**

In March 2020, the Mexican Competition Commission published its Digital Strategy, outlining the actions it would take in the context of digital markets. The Digital Strategy considered the following actions: (i) developing policy recommendations on how digital markets can benefit more Mexican consumers; (ii) working with international experts to update and strengthen its staff's expertise in understanding how digital platforms work; (iii) strengthening the technical capacities and technological infrastructure of the Commission so that it can, inter alia, collect and analyse large amounts of data and understand the scope of artificial intelligence; (iv) boosting international cooperation; and, (v) establishing a Digital Markets Competence Unit.

> *"The actions considered in the COFECE Digital Strategy have undoubtedly allowed the Commission to advance in the understanding of the implications of the collection, storage and use of personal data for business models operating in the digital world, as well as their impact on the competition process in certain markets. As mentioned above, we have already analysed Mexican personal data protection regulations, noting some areas of opportunity in terms of the data handling that companies can do with their users' personal data and the impact of this conduct on the markets."*
>
> **COFECE (Mexico)**

Finally, as far as the challenge stemming from limited access to information that was highlighted by SIC is concerned, the latter stated that it has used its powers under the domestic competition law framework to fine a digital platform operating in Colombia as a result of the company's policy which limited the regulator's access to relevant information and consequently hindered SIC's investigation.

> *"The central point of this type of action is that, beyond the methodological difficulties implied by the strategy used by competition authorities to address markets with digital platforms, access to information related to interactions within these markets is also limited. The situation worsens if there is insufficient collaboration from companies or coordination dynamics among competition authorities to put in place all the necessary steps to obtain the necessary information for the exercise of their functions."*
>
> **SIC (Colombia)**

BUILDING DATA PROTECTION EXPERTISE THROUGH CROSS-INSTITUTIONAL COLLABORATIONS

Focusing on the issue of cooperation between competition and data protection regulators, the vast majority of the anti-trust regulators that responded to PI's survey underscored several times how important it is to be able to receive support in their activities. Several respondents indicated that they have already worked together with data protection regulators in the context of anti-trust investigations or merger reviews. For example, the German Bundeskartellamt mentioned that, during its Facebook investigation mentioned above, it "closely cooperated with data protection authorities in clarifying the data protection issues involved". Furthermore, the HCC's interim report on e-commerce also stresses the importance of cooperation between the competent authorities.[53]

> *"Support from data protection authorities in competition investigations is helpful in this respect. For example, in its recent Google/Fitbit merger investigation the Commission has worked in close cooperation with the European Data Protection Board."*
>
> **European Commission (EC)**

According to competition authorities, data protection regulators can provide valuable input both at the level of competitive assessments of data concentrations, as well as at the level of designing and implementing regulatory interventions and remedies.

> *"As regards the protection of personal data, the National Institute for Access to Public Information (INAI) is the autonomous constitutional body with exclusive powers to ensure its protection, for which it has tools within the national regulatory framework, among which the Federal Law for the Protection of Personal Data in the possession of individuals stands*

out. Although this law incorporates some principles such as the rights of Access, Rectification, Cancellation and Opposition to the information handled by individuals, which are fundamental to guarantee the protection of the information of users of digital services, it does not expressly establish collaboration with other authorities on issues that intersect with other matters, such as economic competition. COFECE recognises that, in order to guarantee comprehensive consumer protection within the digital environment, […] greater cooperation schemes between the authorities responsible for ensuring the protection of personal data and the competition authorities are increasingly required."

COFECE (Mexico)

As a result of the "strong synergies between the interests of data protection and competition", in May 2021, the UK Competition and Markets Authority and UK's data protection regulator, the Information Commissioner's Office, issued a joint statement on how the two interact in digital markets. The 31-page document outlines the views of both regulators on the relationship between personal data and competition and underlines the importance of working together on these matters. Among other regulatory exercises, it mentions that the two institutions are collaborating closely with regard to two on-going investigations, namely the CMA's investigation into Google's Privacy Sandbox proposals and the ICO's investigation into real time bidding and the adtech industry.[54]

PART II: INTERACTIONS BETWEEN REGULATORS AND CIVIL SOCIETY AND MAXIMISING FUTURE ENGAGEMENT

- Competition regulators indicated split views on their engagement with civil society. European regulators like the European Commission and the Hellenic Competition Commission (HCC) had substantial and positive experience of engaging with civil society, while regulators in Latin America reported limited or no experience of such engagement.
- More than half of the CSOs that responded to PI's survey indicated that they had previously interacted with competition regulators (55%). Of those who had not (9), 3 indicated that this was due to the fact that issues of personal data had not yet come up in competition regulators' activities in their jurisdiction, 3 that they did not have the expertise, and 3 that they did not have the resources.
- CSOs interactions with competition regulators seemed to take various forms, though they mostly involved formal or informal meetings with competition regulators to discuss privacy issues or concerns.
- While a substantial proportion of CSOs were disappointed by the results of their engagement with regulators, the majority of those that had interacted with them found that their interactions were somewhat impactful on regulators' decisions.
- The most reported challenge that CSOs faced when interacting with competition regulators was difficulties surrounding the gathering of evidence, while some CSOs also felt that issues around legal standing and adverse legal costs could have a negative impact on the efficacy of their advocacy activities

- Competition regulators were generally enthusiastic about their future engagement with CSOs, some of them highlighting how they believed CSOs could be of particular help, such as alerting regulators to possible competition law violations, proactive participation in merger or antitrust investigations, providing evidence of consumers' approaches to privacy, assisting the regulator at the stage of designing remedies.
- According to competition regulators, the most useful ways for civil society to engage with their work on privacy and competition were submissions in ongoing investigations, formal complaints, expert opinions/submitting information, replies to questionnaires, consultations or market studies, evidence of consumer behaviour/approach to privacy, meetings and calls, raising public awareness.
- CSO respondents appeared less optimistic about their future interactions with competition regulators. In particular, a few CSOs questioned how receptive regulators were to arguments about impact on human rights or social impact beyond market impact. On the other hand, some CSOs were optimistic about their ability to build competition regulators' awareness and capacity, for example through providing policy recommendations, involving regulators in studies, and inviting them to workshops or presentations.
- When asked what type of skills, knowledge or expertise they would need to develop in order to achieve their desired level of engagement, a great majority of CSOs indicated a need to develop legal expertise and coordination with other CSOs, and a small majority said they would need better technological expertise. Quite a few CSOs highlighted the need for more capacity and funding to work on these issues – reflecting the fact that funding priorities have not yet turned to supporting civil society in this type of work.

REGULATORS' ENGAGEMENT WITH CIVIL SOCIETY

The state of competition regulators' integration of personal data in their assessments seems to be reflected in their level of engagement with civil society. Regulators who responded to PI's survey indicated split views on this engagement. European regulators like the European Commission and the Hellenic Competition Commission (HCC) had substantial and positive experience of engaging with civil society, while regulators in Latin America reported limited or no experience of such engagement.

The Hellenic Competition Commission indicated that, in the course of its e-commerce sector inquiry,[55] it engaged extensively with civil society organisations:

> *"Homo Digitalis in particular has contributed actively at the initial stages of the HCC's E-commerce Sector Inquiry through its participation in the public consultation, both by submitting written comments and by delivering a presentation on the issue of data protection in the digital environment during the relevant teleconference organised by the HCC (see para 1091 of the Interim Report)."*
>
> **HCC (Greece)**

Similarly, the European Commission's investigation of the Google/Fitbit merger engaged with a number of digital rights organisations:

> *"The Commission found the cooperation with Privacy International, which was active in both phases of the Google/Fitbit investigation (e.g., with submissions, expert opinions, replies to the questionnaire and to market test of the remedies), and other digital rights organisations useful… The contribution of such organisations in pointing to the privacy implications of the Google/Fitbit case were useful. They provided useful insights on how data could be exploited in a given business model. As is the case for all investigations, the input provided by such organisations would typically be complemented with other evidence, such as internal documents of the merging parties and replies to market investigation questionnaires by customers and competitors of the merging parties."*
>
> **European Commission (EU)**

CSO's input is therefore a growing part of competition investigations, considered not as an afterthought but as providing evidence of similar value to that of merging parties or industry experts.

Of regulators that had not yet interacted with civil society, most of them did not rule out, or were open to, future collaboration - Colombia's SIC noting that competition law in the country provided the proper framework for third parties to participate in investigations:

> *"[A]rticle 1956 of Law 1340 of 2009 provides that interested third parties may be accredited and participate as such in investigations into business practices restrictive of competition (administrative action), submitting the considerations and evidence they believe is relevant."*
>
> **SIC (Colombia)**

Similarly in Mexico, COFECE considered that:

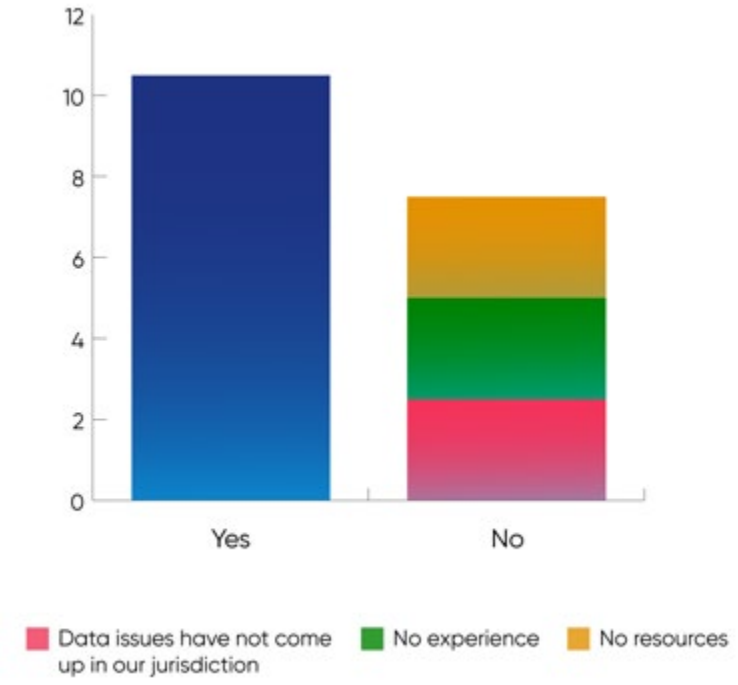
> *"[S]o far COFECE has not interacted with digital rights organizations for any of the processes under its responsibility. However, the Commission recognizes that in the face of the challenges of the digital economy, the emergence of collaborative spaces with other agencies involved in ensuring the proper functioning of digital markets and also with private sector and civil society organizations, to ensure these markets work for the benefit of citizens, is becoming increasingly relevant. In this sense, COFECE does not rule out the possibility of future cooperation efforts with digital rights organizations."*
>
> **COFECE (Mexico)**

Competition regulators are therefore alive to the need for obtaining views and evidence on the impact of mergers and acquisitions on privacy – and are aware that civil society can play a vital role in helping them assess this impact. Some regulators have already officially engaged with civil society as part of investigations, with their final decisions reflecting their assessments of those issues, as informed by civil society's contributions.

CSOS ENGAGEMENT WITH REGULATORS

Regulators' assessment of their engagement with civil society was reflected in the responses that CSOs provided to PI's survey. Of the civil society organisations that responded to our survey, more than half indicated that they had previously interacted with competition regulators (55%). Of those who had not (9), 3 indicated that this was due to the fact that issues around privacy had not yet come up in competition regulators' activities in their jurisdiction, 3 that they did not have the expertise, and 3 that they did not have the resources.

CSOs's past interactions with competition regulators



Where CSOs indicated that competition and privacy issues had not come up in their jurisdiction, this was in line with regulators' responses, which indicated that they had not yet performed competitive assessments involving analysis of the interaction between personal data and competition.

Where CSOs had interacted with regulators, these interactions took many forms, but most involved formal or informal meetings with competition regulators to discuss privacy issues or concerns.

These formal or informal meetings involved presenting to regulators the CSOs' concerns about certain legislative proposals, such as the Digital Services Act and Digital Markets Act in the EU, or getting regulators' views as part of focus groups (e.g., ELSAM involved the Indonesian competition authority, KPPU, in a focus group on data protection and corporate behaviour).

> *"In general, we enjoy good relations with the Hellenic Competition Authority, and we have arranged meetings with them… in the past."*
>
> **Homo Digitalis (Greece)**

> *"[Our CSO] interacts with DG Competition, UK Competition & Markets Authority, Bundeskartelamt [sic], and others, from time to time."*
>
> **Irish Council for Civil Liberties (Ireland)**

> *"We have had meetings with the national competition authority to discuss issues related to privacy and competition."*
>
> **A CSO**

CSOs working at a global or EU level were also active with regard to the European Commission's review of the Google/Fitbit merger, by obtaining third party intervenor status[57], as well as submitting or signing on to statements to the European Commission that highlighted the concerns the merger raised.[58]

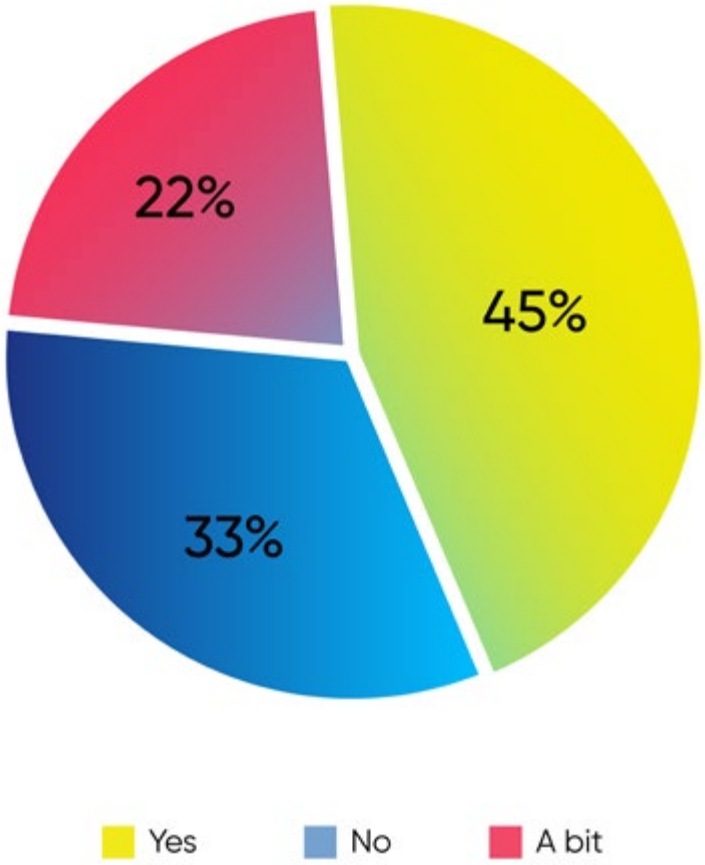
As mentioned above, due to its implications for consumer wellbeing globally, the acquisition of fitness tracker Fitbit by Google provided opportunities for CSOs in other parts of the world to interact with regulators, supporting their reviews or asking them to consider the transaction. The Brazilian Institute for Consumer Defense (IDEC), for example, denounced the merger and asked the Brazilian regulator (CADE) to investigate.[59]

IDEC was also successful in convincing Brazilian data protection, consumer and competition authorities to assess WhatsApp's privacy policy updates, which led authorities to recommend that WhatsApp cease restricting access to users who hadn't accepted the updates while the authorities' assessment was pending.

> *"Also, Idec took an active part in denouncing WhatsApp's privacy policy update for several Brazilian authorities – data protection, consumer and competition ones.*[60] *After this, these authorities and the Federal Prosecution Office released a joint recommendation for WhatsApp to cease restricting access to users that didn't accept the changes while the authorities' assessment is still pending. Idec worked in national and regional level, with statements from CDR (Brazilian Coalition of Rights Network)*[61] *and Al Sur (Latin American Coalition).*[62] *We also took part in a global campaign the "Stop Facebook, Save WhatsApp",*[63] *raising competition, consumer and privacy issues. Idec has participated in two meetings with the Federal Prosecution before CADE, the authority that has a pre-procedure for assessing the possibility to present a formal complaint directly to CADE. Lastly, we took part in an internal workshop to the Paraguayan Competition Authority on the same matter."*
>
> **IDEC (Brazil)**

As to the impact and usefulness of these regulators/civil society interactions, a majority of CSOs found that their interactions with regulators were somewhat impactful on regulators' decisions.

Impact of CSO interventions on regulators' decisions



One CSO that replied "No" when asked whether it thought its interactions had an impact, considered that "direct impact is hard to measure", and that the regulator it was interacting with "was forced to eventually drop the most innovative parts" of the competition tool they were consulting about, indicating that the CSO's intervention could have had an impact if other external factors had not prevented the regulator from going ahead with its initiative.

> *"The regulator has entered into closer dialogue with the data protection authority, and become more active on digital issues."*
>
> **A CSO**

> *"It is hard to exactly pinpoint the impact of conversations, but I guess the [competition regulator] is take a better informed approach because of our interventions."*
>
> **A CSO**

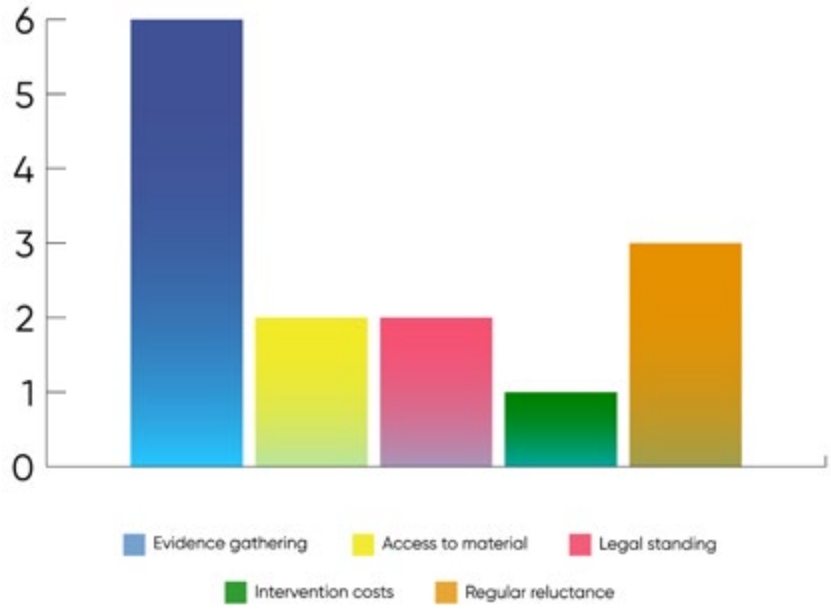
However, there still remains a substantial proportion of CSOs that were disappointed by the results of their engagement with regulators. While this is unsurprising considering that competition regulators are only starting to take proper account of privacy issues, the next section will assess whether CSOs are facing any particular challenges to effective advocacy.

ADVOCACY CHALLENGES FOR CIVIL SOCIETY

When asked about the challenges they faced while interacting with anti-trust regulators, the most commonly reported challenge by CSO respondents was difficulty with evidence gathering. This seems to come as no surprise to digital rights organisations, who by virtue of the opaque industry they seek to challenge often face issues with collecting evidence of their claims.

A common feature of data processing by big tech companies is a lack of transparency - despite the known harms of data concentrations, this can make CSOs' evidence gathering difficult particularly when faced with mergers, as organisations do not have access to the information merging parties give to regulators about their processing of personal data. While organisations can encourage regulators to seek certain types of information about merging parties' data processing practices, CSOs are usually not granted a right to see this information, even under obligations of confidence. This was indicated by CSO respondents as a major obstacle to effective engagement.

In your interventions, which challenges did you come across?



Some CSO respondents also felt that issues around legal standing and adverse legal costs could have a negative impact on the efficacy of their advocacy activities.

> *"Civil society needs the budget and balls to take DG Comp to the ECJ when next it fails to act. We also need to invest in legal analysis concerning standing."*
>
> **Irish Council for Civil Liberties**

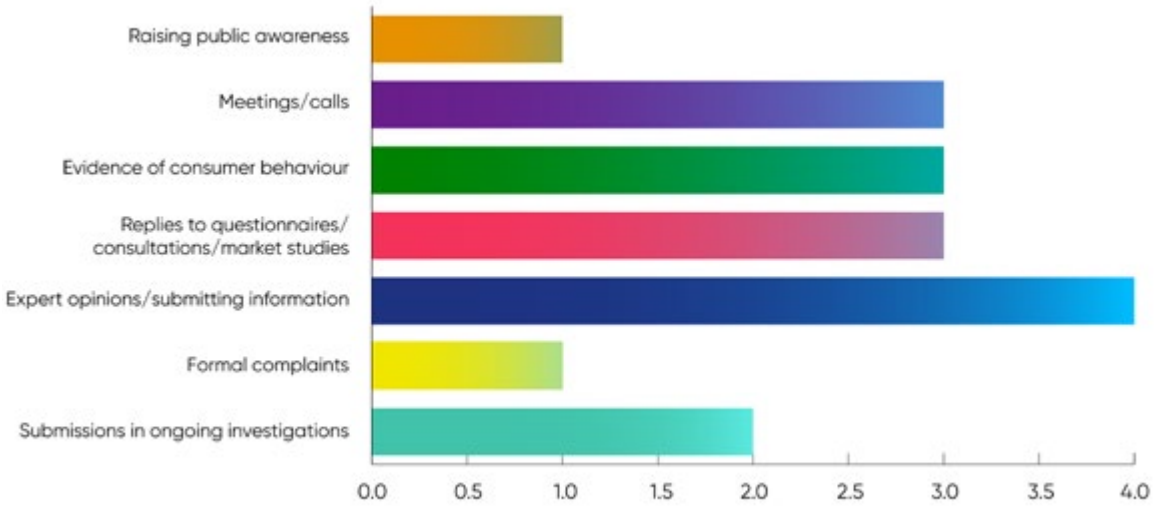
This was a recurring concern, whereby CSOs are stuck between a rock and a hard place: on the one hand, they often lack the legal standing to make formal interventions or complaints to regulators, or to challenge regulators' decisions before courts; and on the other, even if they did, they would lack the resources to be able to defend their cases - as the costs consequences can be dire.
This is not an issue unique to the field of competition and personal data, but one that deserves particular attention and remedy through reform of competition legislation.

Overall, the survey highlighted that the interactions of CSOs with regulators are bridging an important gap in competition regulators' expertise and merger/acquisition assessments arsenal. Regulators recognise the value of integrating expertise on the impact of data concentrations on individual rights, and all those who had engaged with such expertise found it useful for their assessments. While many CSO/regulator interactions have for now been limited to informal or formal meetings and presentations, a growing number of CSOs are submitting formal interventions that seem to influence regulators' decisions or opinions. We see that a major challenge to the efficacy of CSOs' interventions is a difficulty to obtain evidence and materials to support their claims – something regulators should consider remedying by granting confidential access to certain information if civil society involvement is useful to support their investigations.

A MEANINGFUL RELATIONSHIP FOR THE FUTURE

In the survey PI asked regulators and CSOs how they perceived future interactions. Regulators were generally enthusiastic about future engagement with CSOs, some of them highlighting how they believed CSOs could be of particular help, such as alerting regulators to possible competition law violations, proactive participation in merger or antitrust investigations, providing evidence of consumers' approaches to privacy, assisting the regulator at the stage of designing remedies.

What do regulators consider as most useful ways for civil society to engage?



According to competition regulators, the most useful ways for civil society to engage with their work on personal data and competition were:

- Submissions in ongoing investigations (European Commission, Peru)
- Formal complaints (Mexico)
- Expert opinions/submitting information (European Commission, Peru, Mexico, Colombia)
- Replies to questionnaires/consultations/market studies (European Commission, Peru, Colombia)
- Evidence of consumer behaviour/approach to privacy (Greece, Mexico, Peru)
- Meetings/calls (European Commission, Peru, Mexico)
- Raising public awareness (European Commission)

In the responses provided by both regulators and CSOs, a potential obstacle emerged to formal interventions by civil society in merger/acquisition assessments in certain jurisdictions: the fact that governing laws in these jurisdictions do not allow third parties to be formal intervenors in the procedure. One way to alleviate this obstacle, highlighted by certain regulators, is to submit relevant information to the authority in the form of evidence.

The European Commission also highlighted an indirect way for CSOs to engage with competition and privacy issues:

> *"More generally, digital rights organisations would support competition policy by fostering people's awareness that their control over personal data is important also in the context of their market interactions with digital services providers (for example when data is shared in exchange of digital services) and that privacy could be a quality aspect of such services."*
>
> **European Commission (EU)**

CSO respondents seemed less optimistic about their future interactions with competition regulators. In particular, a few CSOs questioned how receptive regulators were to arguments about impact on human rights or social impact beyond market impact.

> *"The attitude of the competition authorities should be changed: to be more receptive to human rights/fundamental rights arguments."*
>
> **A CSO**

On the other hand, some CSOs were optimistic about their ability to build competition regulators' awareness and capacity, for example through providing policy recommendations, involving regulators in studies, and inviting them to workshops or presentations.

> *"We see our organisation engaging more with competition regulators, have a dialogue with them and be heard on issues related to competition and privacy, influence them in their decision-making and see competition regulators take privacy concerns into account."*
>
> **A CSO**

> *"The main contribution would be to work with the regulators to help including data privacy matters in competition policy and enforcement. This could be done at least at two layers: by building a new narrative about the relevance of data privacy matters in the competition framework, and by providing evidence, especially with regards to the consumers' side."*
>
> **ARTICLE 19 (Global)**

The value of this type of engagement was echoed by regulators, who would welcome CSOs' involvement to help them better understand digital rights issues:

> *"By providing relevant information related to studies that enhance the Commission's understanding of the development of digital markets in Mexico and the status of the defense of digital rights in our country, especially in those aspects that are beyond the Commission's competence*

but need to be understood to improve COFECE's work. For example, information on consumer behavior in the digital environment. […] Lastly, in relation to market studies prepared by the Commission, digital rights organizations could cooperate with COFECE by contributing relevant information pertaining to the operation of digital economy markets, as well as information on the behaviors, perceptions and problems identified by consumers of digital products and/or services."

COFECE (Mexico)

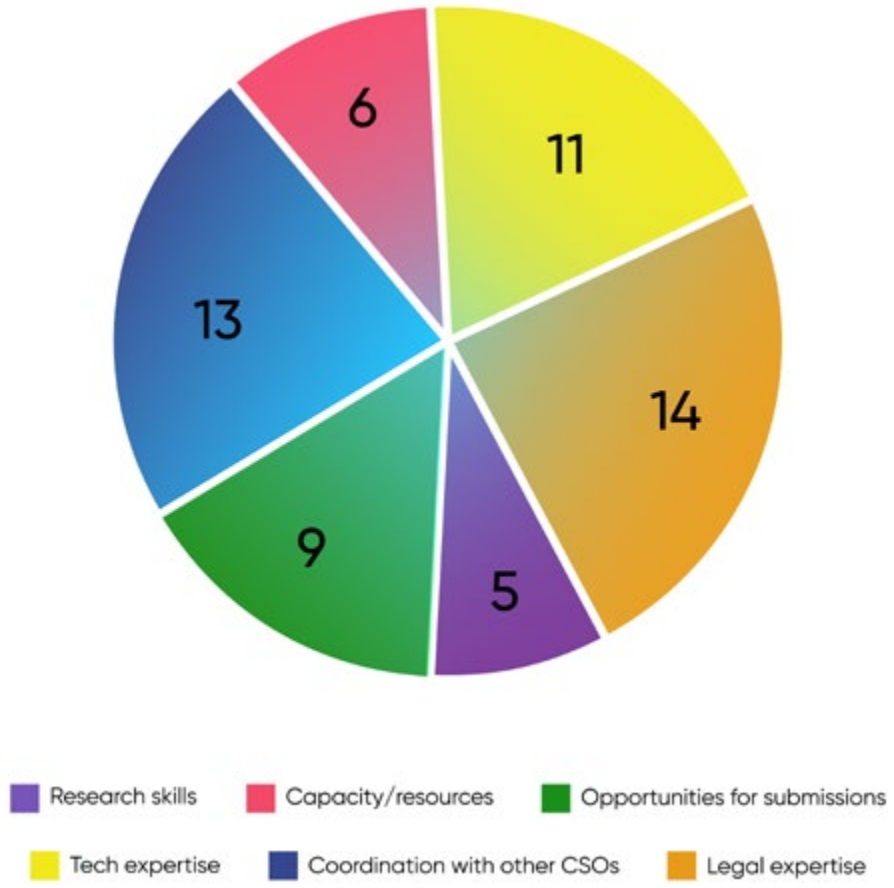
The possibility of more intense or adversarial approach also emerged - with one CSO saying they would ideally be able to "force the regulator" to "consider the societal impact of the dominance of a few companies" and to "force the regulator to take up more investigations and enforcement interventions, for example by starting cases at the regulator, or by taking the regulator to court." Another considered that impact would be better achieved by taking the European Commission to the European Court of Justice "when it next fails to act". They noted that without threat of legal action by civil society, "the Commission only fears challenges from other market participants".

"We would force the regulator to consider not just the market impact, but also the societal impact of the dominance of a few companies. We would be able to force the regulator to take up more investigations and enforcement interventions, for example by starting cases at the regulator, or by taking the regulator to court."

A CSO

Finally, when asked what type of skills, knowledge or expertise they would need to develop in order to achieve their desired level of engagement with competition regulators, a great majority of CSOs indicated a need to develop legal expertise and coordination with other CSOs, and a small majority said they would need better technological expertise. Quite a few CSOs highlighted the need for more capacity and funding to work on these issues – reflecting the fact that funding priorities have not yet turned to supporting civil society in this type of work.

What do you need to develop in order to achieve your desired level of engagement?



CONCLUSIONS AND RECOMMENDATIONS

The increased recognition of the role that personal data play in digital markets raises opportunities and challenges for competition regulators and CSOs. While the responses to the survey that PI carried out in 2021 cannot provide a comprehensive picture, they point at some key trends.

Competition regulators are recognizing the challenges posed by the roles of data in digital markets and many have conducted studies which looked at the interplay of personal data and competition. As a result, assessing the role of personal data is becoming an integral part of competition regulatory work, coming into play when considering market power in assessing mergers, when articulating theories of harm in relation to abuse of dominance, and when developing or responding to policy or legislative consultations.

The responses by regulators also suggest that they are considering ways to address concerns about data concentration at the stage of designing and implementing regulatory interventions and behavioural remedies. However, many CSOs noted that regulators often fail to fully consider the societal impacts of data concentrations and data dominance. Indeed, while there are encouraging signs that regulators seek to include data-oriented safeguards when implementing remedies (see e.g., EC Google/Fitbit) there is still reluctance (with some notable exceptions) to take in full consideration privacy and data protection rules when assessing the behaviour of a company in a dominant position or the potential effect of a merger.

Significantly, the responses provided by CSOs suggest that effective competitive assessments of entities that rely on the collection and processing of vast amounts of personal data will usually require an existing regulatory framework. This is important, because data protection legislation is still not in place in some of the countries where respondents are based, while, in others, data protection legislation is not comprehensive, adequate or up to date.

Our findings indicate a general agreement that the digital economy has posed certain challenges for existing competition laws. While many regulators suggested that the existing competition tools still allow them to address many of these challenges related to data concentrations, there are areas that would require or benefit from legislative reform. Although it is not within the scope of this report to analyse the various competition legislative reforms ongoing across the world, it is notable that regulators and CSOs express the view that competition laws need to adapt in order to be able to respond to some of the challenges of digital market and data concentration or abuse.

Further, to better understand how data concentrations work in the digital economy some regulators have conducted studies and consultation (to which CSOs contributed) and developed in-house expertise on data related issues. Moreover, there seems to be significant support to the view that competition regulators benefit or would benefit from the expertise of data protection authorities, with several respondents indicating that they have already worked together with data protection regulators in the context of anti-trust investigations or merger reviews.

However, while many competition regulators, particularly in Europe, have recognised the role that CSOs can play in supporting their activities and better equip them to assess the role of personal data in digital economies, there are still significant obstacles to effective CSOs engagement with competition authorities. In particular, CSOs often lack the legal standing to make formal interventions or complaints to regulators, or to challenge decisions made by regulators before courts. While competition authorities could and do in some jurisdictions pro-actively seek the participation of CSOs in their investigations, legislative reform may be necessary to ensure CSOs have standing to bring complaints and to intervene in proceedings.

Collecting evidence and analysing the information provided by companies during a regulatory investigation remain a significant obstacle. This is partly due to the opacity of many digital platforms, whose processing of personal data are renowned for their lack of transparency. But it is also a result of lack of standing before competition authorities. Reform would be needed to ensure complainant CSOs have access to evidence provided by companies even if only on a confidential basis.

CSOs also noted the potential cost risks of challenging companies before regulators or courts and the general lack of funding opportunities to conduct this work.

Lastly, because of the global character of the digital economy, with many platforms operating, often in dominant position, across the world, it is no surprise that coordination and information sharing among competition authorities and among CSOs operating in different jurisdictions was flagged as an important measure.

While each context is different, the following recommendations seem to be supported by our findings:

- Competition regulators should develop strategies to deal with digital markets and the role of personal data, in consultation with CSOs;
- Competition regulators should proactively engage with CSOs and invite them to provide their views and expertise as part of policy consultations, market studies and merger reviews or investigations;
- Competition regulators should develop in-house expertise, including technical and legal expertise, to assess privacy parameters in competition investigations and work closely with their data protection counterparts;
- Competition regulators should support legislative reforms aimed at addressing the privacy challenges in digital markets and support initiatives that seek to ensure CSOs have legal standing and are able to bring or intervene in proceedings before them;
- CSOs should collaborate and share expertise to support their capacity to engage with competition regulators;

- CSOs should raise awareness of how competition can and should address data concentration concerns and seek opportunities for advocacy, including legislative reform and the granting of legal standing before competition authorities;
- Funders should further invest in the capacity of CSOs to work at the intersection of data protection and competition.

PI welcomes additional feedback by competition regulators and CSOs across the globe to further refine its analysis and recommendations contained in this report.

ENDNOTES

1 While various jurisdictions, particularly the ones outside the European Union, might have different understandings of what constitutes personal data, for the purposes of this report personal data should be defined as any information that relates to an identified or identifiable living individual. While the terms 'privacy', 'data' and 'personal data' are often used interchangeably, the focus of this report is on personal data and their effects on competition in the digital economy.

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ANNEX A: QUESTIONS TO REGULATORS

A. The role of data privacy in competition assessments: State of play

1. Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain.
2. Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc. Please provide specific examples highlighting the relevant context and outcome.

B. Adequacy of existing legal frameworks

1. In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?

C. Challenges

1. What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?
2. How have you sought to overcome any of the challenges identified in Question C.1. above?

D. Engagement with civil society

1. Have you engaged with digital rights organisations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews etc)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc) and the outcome. Did you find their data privacy expertise useful to overcoming the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organisations, could you please explain why?
2. If digital rights organisations have submitted evidence or legal, technical or any other analyses in the context of investigations or reviews carried out by you, how helpful were their submissions for your organisation? If possible, please provide examples.

E. Future

1. Do you expect that you will engage or continue to engage with digital rights organisations in the future? If possible, please provide examples of engagement you expect to have with digital rights organisations.
2. How could digital rights organisations better support your work in the context of the digital economy? Please provide specific examples or suggestions.
3. If a digital rights organisation sought to intervene before an on-going merger review or market investigation carried out by your organisation in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples.

F. Other comments

1. Please provide any other remarks you may consider relevant.

ANNEX B: TEMPLATE QUESTIONNAIRE SENT TO CIVIL SOCIETY

COMPETITION & DATA PRIVACY – SURVEY FOR CSOS

A. Introduction

1. What is the name of your organisation?
2. Which country(ies), region(s) or continent(s) does your organisation's work cover?
3. Please state your organisation's mission, or key issues you work on, in a few words.

B. The role of data privacy in competition assessments: State of play

4. In your view, which of the below issues are most significantly affected by the fact that a few digital companies hold dominant market positions?
    i. Privacy / Data protection rights
    ii. Freedom of expression / Access to information
    iii. Consumer choice and rights
    iv. Innovation
    v. Other (please specify):

5. In your opinion and experience, to what extent are data privacy and competition issues addressed in your country or region?

    i. Not at all (e.g. government and regulators are silent on those issues)
    ii. Moderately (e.g. these issues have been mentioned a few times)
    iii. A lot (e.g. these issues are frequently mentioned and some authorities/regulators take them into account)
    iv. Other (please specify):

6. Are you aware of any recent examples of competition regulators in your country or region taking issues of data privacy into account (for example in their policy consultations, investigations, merger reviews, decisions etc)? If Yes, please mention some examples in the "Comments" box.

    i. Yes
    ii. No

C. Your programmatic work

7. Has your organisation previously worked, or does it currently work, on competition and data privacy issues?

i. Yes
ii. No

8. You said your organisation has worked or currently works on competition and data privacy issues. Which of the below best describes how such issues form part of your work?

    i. Issues of competition and data privacy are part of our strategic priorities
    ii. We have one or more project(s) focused on competition and data privacy

iii. We don't have any projects specifically dedicated to those issues, but we've conducted some activities related to them (research, advocacy...)
iv. We sometimes support other organisations working on those issues
v. Other (please specify):

9. When you work on such issues, what do you do to familiarise yourself with the relevant competition law frameworks?

i. Some of our staff already have the required expertise
ii. We conduct our own research
iii. We engage external consultants/experts
iv. We engage external counsel/lawyers
v. Other (please specify):

10. Please mention any examples of activities or outputs (e.g. research paper, online article, letter to regulator...) you have conducted on competition and data privacy. Feel free to share any links if relevant.

11. You said your organisation has not previously worked on competition and data privacy issues. Can you tell us why?

i. These issues have not come up in our jurisdiction
ii. We never thought about it
iii. We don't have the expertise
iv. We don't have the resources
v. Other (please specify):

12. Do you intend to make competition and data issues part of your programmatic work in the future?

i. Yes
ii. No
iii. Maybe
iv. Other (please specify):

D. Your interaction with competition regulators

13. Have you ever interacted in any way with competition regulators in your country or region with regard to data privacy issues? (For example, meeting with them, intervening before an investigation, submitting evidence or filing complaints). If you answer "No", you will be taken to the next survey section.

    i. Yes
    ii. No

14. You said you haven't before interacted with competition regulators in your jurisdiction with regard to data privacy issues. What was the main reason?

    i. We tried, but the regulator(s) were not interested
    ii. Issues of data privacy have never come up in competition regulators' activities in our jurisdiction
    iii. We don't have the expertise
    iv. We don't have the resources
    v. Other (please specify):

15. You said your organisation has previously interacted with competition regulators. Please specify the nature of that(those) intervention(s).

    i. Formal or informal meetings with competition regulators to discuss data privacy issues/concerns
    ii. Submitting complaints before competition regulators or signing on to complaints submitted by others on data privacy issues
    iii. Intervening in ongoing investigations or merger reviews as a third party or making submissions in ongoing investigations or merger reviews
    iv. Submitting evidence in the context of policy consultations, surveys or market studies
    v. Submitting statements or signing on to statements submitted by others in the context of wider advocacy work
    vi. Other (please specify):

16. Please mention specific examples of the intervention(s) identified above, including for example: details about the context of your intervention the regulator you interacted with whether you intervened independently or with other organisations subject of the case or investigation issues that arose in the case Feel free to share any relevant links or documents if easier than answering here fully.

17. In the interventions identified above, did you come across any of the following challenges (please check any that apply):

    i. Issues with evidence collection/gathering
    ii. Lack of access to material
    iii. Difficulties in establishing legal standing
    iv. Intervention costs
    v. Hesitance by regulators to deal with data privacy issues
    vi. None
    vii. Other (please specify):

18. Did you find that your intervention(s) had an impact on the regulator's decision(s)?

    i. Yes
    ii. No
    iii. A bit

19. Based on your overall experience, to what extent are regulators willing to engage with you on data privacy issues and/or take your concerns and submissions into consideration?

    i. A lot
    ii. A bit
    iii. Not at all
    iv. Other (please specify):

E. Paving the future and overcoming obstacles

20. How would you ideally see your organisation engaging with competition regulators in your country or region on data privacy matters in the next 3-5 years?

21. What types of skills, knowledge or expertise would you need to develop in order to achieve this level of engagement? Please check all examples of the support you would need:

    i. Technological expertise (understanding how technology works, where data flows...)
    ii. Better understanding of legal frameworks
    iii. Research skills
    iv. More opportunities to make submissions to regulators
    v. Coordination with other civil society organisations
    vi. We do not want to engage on such matters
    vii. Other (please specify):

F. Other comments and personal data

22. Please share any other thoughts or comments with regards to the topics above that might not have been addressed through the questions in this survey.

23. In case we have any follow-up questions, would you be OK with us contacting you to seek further information or to arrange a call? If yes, please state your email address only.

    i. Yes
    ii. No

24. If you wish your responses to be attributed to you individually, please state your name, surname and position.

25. PLEASE NOTE: Parts of the responses you have provided might be used or quoted in an anonymised form in PI's report and associated material. If you wish to have any quotes attributed to you, please provide your EXPLICIT CONSENT in the box below (please write "I hereby explicitly consent to Privacy International, in any published materials, attributing the answers I provided in the survey to my organisation" or something to the same effect). If you wish to retain anonymity for only some of your answers, please state as such within the relevant answers.

ANNEX C: RESPONSES RECEIVED BY REGULATORS

RESPONSE BY AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (AUSTRALIA)

Subject: RE: Privacy International survey on data privacy and competition [SEC=OFFICIAL]
From: International ACCC <InternationalACCC@accc.gov.au>
Date: 30/07/2021, 01:07
To: "[redacted]@privacyinternational.org" <[redacted]@privacyinternational.org>
CC: International ACCC <InternationalACCC@accc.gov.au>

OFFICIAL

Dear Mr [redacted],

Thank you for the invitation to participate in the Privacy International survey on data privacy and competition. The ACCC has decided not to participate in the survey.

For your information, the ACCC's 2019 report for the Digital Platforms Inquiry provided a range of discussion on the intersection between competition and privacy in digital markets. Furthermore, the ACCC's 2020 submission to the Australian Privacy Act Review outlines the ACCC's views on the intersection of competition and privacy issues more generally.

The ACCC is also participating as a co-chair in the International Competition Network's project on "Competition law enforcement at the intersection between competition, consumer protection, and privacy". Further information on the project can be found here.

Regards,

[redacted]
Director | International | Specialist Advice and Services Division
Australian Competition & Consumer Commission
23 Marcus Clarke Street, Canberra, ACT 2601
T: + 61 2 6243 1320
www.accc.gov.au

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

RESPONSE BY BUNDESKARTELLAMT (GERMANY)

Andreas Mundt
Präsident
Bundeskartellamt

D-53113 Bonn
Kaiser-Friedrich-Straße 16
Telefon: 02 28 - 94 99 200
Telefax: 02 28 - 94 99 140
e-mail: L1@bundeskartellamt.bund.de

14 June 2021

[redacted]
Privacy International
62 Britton Street
London EC1M 5UY
United Kingdom

Dear Mr [redacted]

Thank you very much for your kind invitation to contribute to the Privacy International survey on data privacy and competition.

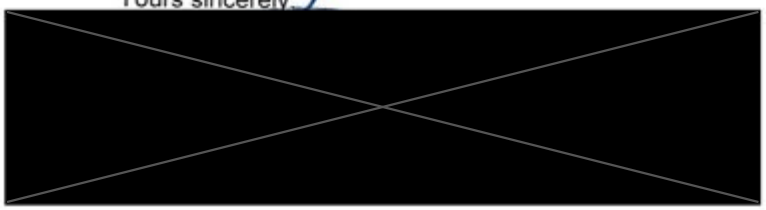
The Bundeskartellamt shares your believe that considering the intersection of data privacy and competition law has become more and more important. Our agency has been confronted with assessing the role of data in general and personal data in particular, due to the pivotal role data has in the digital economy.

For instance, privacy considerations can potentially be a factor within the assessment of an abuse of a dominant position. The German Facebook case is a prominent example in which privacy considerations were relevant for the Bundeskartellamt's finding of an abusive practice. Our agency found that Facebook's terms of service and the manner and extent to which it collects and uses data amount to an abuse of dominance. In assessing the appropriateness of Facebook's behaviour under competition law, the Bundeskartellamt had regard to the violation of the European data protection rules to the detriment of users. Our authority closely cooperated with data protection authorities in clarifying the data protection issues involved.

The Bundeskartellamt's decision is not yet final, Facebook has appealed the decision. Recently, the Higher Regional Court has suspended proceedings and has requested a preliminary ruling by the European Court of Justice on a number of questions directly related to privacy matters.

I very much regret that we currently have to refrain from taking positions on privacy considerations to the extent covered by your survey, as they might have a direct or indirect bearing on our court proceedings. Nevertheless, I applaud your intentions of developing a guide aimed at civil society organisations to increase their expertise on issues of digital dominance and send my best wishes for what I am sure will be a highly successful endeavour.

Yours sincerely,



RESPONSE BY COMMISSION FOR THE DEFENSE OF FREE COMPETITION OF THE NATIONAL INSTITUTE FOR THE DEFENSE OF COMPETITION AND PROTECTION OF INTELLECTUAL PROPERTY (PERU) (ORIGINAL IN SPANISH)

Cuestionario Privacy International (PI)

A. El papel de la privacidad de datos en el análisis de la competencia:

1.Situación actual 1. ¿Considera que su enfoque ante los temas de la economía digital tiene en cuenta la interacción entre la privacidad de datos y la competencia? Por favor explique

La Secretaría Técnica de la Comisión de Defensa de la Libre Competencia del Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual (INDECOPI) se encuentra atenta a las últimas tendencias mundiales y al enfoque se brinda a nivel internacional a la interacción entre la privacidad de datos y la competencia.

En el contexto de la economía digital, muchos productos y servicios son *data-driven*, lo que significa que basan su modelo de negocios en la data de los consumidores. En ese sentido, el uso y explotación de la data ha cobrado relevancia en el análisis en casos de competencia y en la emisión de opiniones y reportes de diversas autoridades a nivel internacional, en particular, respecto del análisis de la data como un parámetro de competencia.

No obstante, hasta la fecha, la Comisión de Defensa de la Libre Competencia no ha analizado un caso, investigación o estudio de mercado que desarrolle un análisis sobre la interacción entre datos personales y competencia.

2. ¿La privacidad de datos ha sido un parámetro en alguna de sus decisiones o informes, por ejemplo, en el contexto de estudios de mercado, exámenes de fusiones, investigaciones, análisis de mercado, el diseño de recursos o intervenciones regulatorias, etc.? Por favor de ejemplos concretos, subrayando el contexto y el resultado pertinentes.

Hasta la fecha, la Comisión de Defensa de la Libre Competencia no ha llevado a cabo ninguna investigación, procedimiento, estadio de mercado o regulación, que desarrolle en específico la privacidad de datos como un parámetro de competencia.

B. Idoneidad de los marcos jurídicos actuales

1. En su opinión, ¿los marcos normativos o regulatorios existentes pueden abordar adecuadamente los problemas de competencia derivados de la concentración de datos? ¿Cuáles son los cambios que considera necesarios para el marco normativo o regulatorio existente?

El Decreto Supremo que aprueba el Texto Único Ordenado de la Ley de Represión de Conductas Anticompetitivas, brinda facultades a la autoridad de competencia para investigar posibles actos de abuso de posición de dominio, lo que podría incluir -dependiendo del análisis específico- conductas derivadas de la concentración de datos, en tanto estas tengan efectos en el territorio nacional.

En relación co la situación del análisis de operaciones de concentración empresarial, cabe destacar que desde 1997, el Perú contaba con una norma de evaluación de operaciones de concentración empresarial aplicable únicamente al sector eléctrico peruano. Sin embargo, a partir del 14 de junio de 2021, se encuentra vigente la Ley 31112, Ley que establece el control previo de operaciones de concentración empresarial, la cual permite a la autoridad de competencia el poder analizar operaciones de concentración empresarial en todos los sectores de la economía peruana. Por ello, la autoridad de competencia podría considerar la privacidad de datos como un parámetro de competencia en el marco de análisis de una operación de concentración empresarial.

C. Retos

1. ¿Cuáles considera que son los principales retos, en cuanto a conocimientos técnicos y/o sobre derechos digitales, que podría enfrentar en el contexto de la competencia y la privacidad de datos?

Como agencia de competencia, consideramos que el desafío más importante es entender adecuadamente las dinámicas que caracterizan a los mercados digitales, así como su contexto específico.

1. **¿Cómo ha tratado de superar cualquiera de los retos identificados anteriormente en la pregunta C.1?**

Al respecto, consideramos que los estudios de mercado son muy importantes porque permiten convocar a los distintos actores públicos y privados que conforman el ecosistema digital y, de este modo, nutrirnos de sus conocimientos y experiencia para entender mejor los derechos digitales, el funcionamiento técnico y las dinámicas que caracterizan a los mercados digitales**.** En ese marco, hemos emitido un informe preliminar del estudio de mercado que analiza las condiciones de competencia en los sistemas de tarjetas de pago, en el que también se explora el uso de medios de pago digitales, los que son claves para lograr la inclusión digital y financiera de cada vez más peruanos.

Asimismo, una consideración esencial para enfrentar los desafíos de la economía digital es la capacitación de los funcionarios de la agencia de competencia. En este sentido, el Indecopi alberga el Centro Regional de Competencia de la OCDE en América Latina que brinda capacitación a los funcionarios de la región en materia de aplicación de la normativa en competencia y abogacías, enfocándose en la actualización de los conocimientos del personal sobre los nuevos temas de competencia, que incluye, los desafíos de la economía digital

D. Participación de la sociedad civil 1. ¿Ha interactuado con organizaciones de derechos digitales en cualquier aspecto de su trabajo respecto a temas de economía digital (por ejemplo, investigaciones, consultas políticas, estudios o informes de mercado, exámenes de fusiones)? Por favor proporcione información detallada sobre el contexto de la interacción (por ejemplo, presentaciones o intervenciones formales, reuniones o eventos informales, etc.) y su resultado. ¿Considera que el conocimiento de las organizaciones sobre privacidad de datos fue útil para superar los desafíos identificados en la sección C (Retos)? Si no ha interactuado con organizaciones de derechos digitales, ¿podría explicar por qué?

Hasta la fecha, la Comisión de Defensa de la Libre Competencia no ha tenido la oportunidad de interactuar con organizaciones de derechos digitales respecto a temas de economía digital. Sin embargo, el Indecopi se encuentra siempre abierto al diálogo y a la comunicación con las diversas organizaciones en aras de la promoción de la competencia.

2. Si las organizaciones de derechos digitales han presentado pruebas o análisis jurídicos, técnicos o de cualquier otro tipo en el contexto de las investigaciones o los exámenes que ha efectuado, ¿qué tan útiles fueron sus aportes para su organización? De ser posible, por favor proporcione ejemplos

No aplica.

E. Futuro

1. ¿Espera que interactuará o continuará interactuando con organizaciones de derechos digitales en el futuro? De ser posible, por favor proporcione ejemplos de la interacción que espera tener con organizaciones de derechos digitales.

La Secretaría Técnica de la Comisión de Defensa de la Libre Competencia espera interactuar con organizaciones de derechos digitales y con cualquier organización que desee contactarnos y contribuir con la promoción de la competencia en los mercados.

Así, por ejemplo, la Secretaría Técnica de la Comisión de Defensa de la Libre Competencia, publica versiones preliminares de los estudios de mercado y abogacías de la competencia que elabora, a fin de recibir comentarios de los interesados en el tema. Por ello, los comentarios de organizaciones de derechos digitales en su calidad de expertos constituirán un valioso aporte cuando la Secretaría Técnica de la Comisión de Defensa de la Libre Competencia realice un estudio o abogacía que involucre el análisis de las condiciones de competencia en mercados digitales.

2. ¿De qué manera podrían las organizaciones de derechos digitales apoyar mejor su trabajo en el contexto de la economía digital? Por favor dé ejemplos o sugerencias específicas.

Las organizaciones de derechos digitales pueden contribuir con la promoción y defensa de la competencia de diversas maneras, el Indecopi es una institución que recibe y promueve la participación ciudadana y de expertos.

Por ello, las organizaciones de derechos digitales pueden solicitar reuniones informales con nuestros funcionarios para explicar sobre una situación que les causa preocupación en su materia, pueden realizar denuncias informales por escrito y remitir información o datos estadísticos que consideren pertinentes, entre otros. Asimismo, pueden aportar su experiencia y conocimientos en los estudios de mercado o abogacías de la competencia que involucren mercados digitales.

3. Si una organización de derechos digitales quisiera intervenir en el examen de una fusión o una investigación de mercado en curso realizada por su organización en el contexto de la economía digital, ¿qué tipo de pruebas o análisis esperaría que aportaran para apoyar de la mejor manera el examen? Por favor dé ejemplos específicos.

El artículo 21 de la Ley 31112, Ley que establece el control previo de operaciones de concentración empresarial, señala que en el procedimiento aplicable al trámite de la solicitud de autorización de la operación de concentración empresarial durante la segunda fase de evaluación, la Comisión publica un breve resumen de la resolución que sustenta el inicio de la segunda etapa, de manera que los terceros con interés legítimo puedan presentar información relevante ante la autoridad, sin que por ello sean considerados como partes intervinientes en el procedimiento.

Por ello, las organizaciones de derechos digitales que prueben un interés legítimo pueden intervenir en el examen de una concentración presentando información relevante a la autoridad de competencia.

En relación con información o pruebas que esperaría, pueden presentarse informes, estadísticas o cualquier tipo de información que sea considerada relevante.

F. Comentarios adicionales

1. Por favor aporte cualquier otra observación que considere pertinente.

La Comisión de Defensa de la Libre Competencia ha publicado el informe preliminar del estudio de mercado en los sistemas de tarjetas de pago donde analiza las condiciones de competencia existentes en el mercado y realiza recomendaciones para mejorar la competencia en los mercados. Este documento evidencia el creciente interés por obtener un mayor entendimiento sobre el funcionamiento de la competencia en los mercados digitales. El documento mencionado se encuentra disponible en el siguiente link: https://www.indecopi.gob.pe/documents/51771/6194832/Estudio+de+Mercado+Sistema+de+Tarjetas+de+Pago+en+Per%C3%BA.

RESPONSE BY COMMISSION FOR THE DEFENSE OF FREE COMPETITION OF THE NATIONAL INSTITUTE FOR THE DEFENSE OF COMPETITION AND PROTECTION OF INTELLECTUAL PROPERTY (PERU) (UNOFFICIAL ENGLISH TRANSLATION)

Privacy International (PI) Questionnaire

A. The role of data privacy in competition assessments:

1. State of play 1. Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain

The Technical Secretariat of the Commission for the Defense of Free Competition of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) closely monitors the latest global trends and international approaches to the interaction between data privacy and competition.

In the context of the digital economy, many products and services are data-driven, which means their consumer model is founded on consumer data. In this sense, data use and exploitation has gained relevance to analyze competition cases and issue opinions and reports by various authorities at the international level, in particular regarding the analysis of data as a competition parameter.

However, to date, the Commission for the Defense of Free Competition has not analyzed any case, investigation or market study that conducts an analysis of the interplay between personal data and competition.

2. Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc.? Please provide specific examples highlighting the relevant context and outcome.

To date, the Commission for the Defense of Free Competition has not conducted any investigation, proceeding, market or regulatory study that specifically analyzes data privacy as a competition parameter.

B. Adequacy of existing legal frameworks

1. In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?

The Supreme Decree approving the Single Unified Text of the Law for the Repression of Anti-competitive Conduct grants powers to the competition authority to investigate the potential abuse of a dominant position, which could include –depending on the specific analysis– conducts resulting from the concentration of data, as long as they have effects in the national territory.

In terms of the status of the analysis of corporate concentration operations, it is noteworthy that since 1997, Peru has had regulations to evaluate corporate concentration operations that only apply to the Peruvian electricity sector. However, on June 14, 2021, Law 31112 came into force; this law establishes the ex ante control of business concentration operations, which allows the competition authority to analyze business concentration operations in all sectors of the Peruvian economy. As a result, the competition authority could consider data privacy as a competition parameter in the framework of the analysis of a business concentration operation.

C. Challenges

1. What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?

As a competition agency, we consider that the most important challenge is to properly understand the dynamics that characterize digital markets, as well as their specific context.

1. **How have you sought to overcome any of the challenges identified in Question C.1. above?**

In this regard, we believe market studies are very important because they allow us to convene the different public and private actors that make up the digital ecosystem and, consequently, draw on their knowledge and experience to better understand digital rights, technical operation and the dynamics that characterize digital markets**.** Within this framework, we have issued a preliminary report of the market study that analyzes competitive conditions in payment card systems and also explores the use of digital payment methods, which are key to achieving the digital and financial inclusion of more Peruvians each day.

Additionally, a key consideration in meeting the challenges posed by the digital economy is capacity building for competition agency officials. In this regard, Indecopi hosts the OECD Regional Competition Center in Latin America, which provides training to the region's officials on the enforcement of competition laws and advocacy, with a focus on updating staff knowledge in relation to new competition issues, including the challenges of the digital economy.

D. Engagement with civil society 1. Have you engaged with digital rights organizations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews etc.)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc.) and the outcome. Did you find their data privacy expertise useful to overcoming the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organizations, could you please explain why?

To date, the Commission for the Defense of Free Competition has not had the opportunity to interact with digital rights organizations in relation to digital economy issues. Nonetheless, Indecopi is always open to dialogue and communication with the different organizations in the interest of promoting competition.

2. If digital rights organizations have submitted evidence or legal, technical or any other analyses in the context of investigations or reviews carried out by you, how helpful were their submissions for your organization? If possible, please provide examples.

Not applicable.

E. Future

1. Do you expect that you will engage or continue to engage with digital rights organizations in the future? If possible, please provide examples of engagement you expect to have with digital rights organizations.

The Technical Secretariat of the Commission for the Defense of Free Competition expects to interact with digital rights organizations and with any organization that wishes to contact us and contribute to the promotion of competition in the markets.

Therefore, for example, the Technical Secretariat of the Commission for the Defense of Free Competition publishes preliminary versions of the market studies and competition advocacy it prepares, with the aim of receiving comments from those interested in the topic. Consequently, comments from digital rights organizations in their capacity as experts will be a valuable input when the Technical Secretariat of the Commission for the Defense of Free Competition conducts studies or advocacy involving the analysis of competitive conditions in digital markets.

2. How could digital rights organizations better support your work in the context of the digital economy? Please provide specific examples or suggestions.

Digital rights organizations can contribute to the promotion and defense of competition in a variety of ways; Indecopi is an institution that welcomes and promotes citizen and expert participation.

Therefore, digital rights organizations can request informal meetings with our officials to explain situations that raise concerns in their area, they can make informal written complaints and submit information or statistical data they consider relevant, among others. Likewise, they can contribute their experience and knowledge in market studies or competition advocacy involving digital markets.

3. If a digital rights organization sought to intervene before an on-going merger review or market investigation carried out by your organization in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples.

Article 21 of Law 31112, which establishes the ex ante control of business concentration operations, provides that in the proceeding applicable to the request for authorization of the business concentration operation during the second evaluation phase, the Commission publishes a brief summary of the resolution that substantiates the initiation of the second stage, so that third parties with a legitimate interest may submit relevant information to the authority without being considered as intervening parties in the procedure.

Consequently, digital rights organizations that prove a legitimate interest may intervene in a concentration review by submitting relevant information to the competition authority.

In relation to information or evidence that it would expect, any report, statistics or any type of information that is considered relevant may be submitted.

F. Other comments

1. Please provide any other remarks you may consider relevant.

The Commission for the Defense of Free Competition published the preliminary report of the market study on payment card systems where it analyzes the existing competitive conditions in the market and makes recommendations to improve market competition. This paper is evidence of the growing interest in gaining a better understanding of how competition works in digital markets. The paper is available at the following link: https://www.indecopi.gob.pe/documents/51771/6194832/Estudio+de+Mercado+Sistema+de+Tarjetas+de+Pago+en+Per%C3%BA.

RESPONSE BY COMPETITION AND MARKETS AUTHORITY (UK)

Subject: RE: Privacy International survey on data privacy and competition
From: Andrea Coscelli <[redacted]@cma.gov.uk>
Date: 28/05/2021, 16:45
To: "[redacted]@privacyinternational.org" <[redacted]@privacyinternational.org>
CC: [redacted] <[redacted]@cma.gov.uk>, [redacted] <[redacted]@cma.gov.uk>, [redacted] <[redacted]@cma.gov.uk>

Classification: **Official**

Dear [redacted],

Thank you for your email. We would be happy to provide some input.

We see strong synergies between the interests of data protection and competition. So much so that we recently issued a joint statement with the ICO on how the two interact in digital markets. We also provided advice to the UK Government in December on market power in digital markets, concluding that there is a need for a new pro-competition framework for the most powerful digital firms. The Government is now working towards implementing this, including launching the Digital Markets Unit last month.

Between the first two documents, you will find the CMA's views in respect of many of your questions. Can I therefore suggest that you take a look at these, and if you have further questions thereafter, you have a short discussion with relevant colleagues here in July – most likely Simeon Thornton and Cat Batchelor, copied.

Kind regards,

Andrea

Andrea Coscelli | Chief Executive | Competition and Markets Authority
The Cabot | 25 Cabot Square | London | E14 4QZ | +44203 738 6286 | +44796 0716 710

Due to the ongoing Covid-19 situation, we are not able to process any documents or correspondence sent by post or courier to any of our offices

RESPONSE BY EUROPEAN COMMISSION (EU)

ANNEX A: QUESTIONS TO REGULATORS

Contribution of EVP Margrethe Vestager, European Commission

A. <u>The role of data privacy in competition assessments: State of play</u>

1. Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain.

The interplay between data privacy and competition has always been part of the Commission's approach to the digital economy . In particular, competition rules are concerned with preventing or addressing situations in which the exercise of market power could harm competition. In cases where market power arises in connection with the access to or availability of personal data (*e.g.* large databases are built or personal data are used as a currency or as a shadow price for "free" services), competition rules will apply and address competition concerns. To the contrary, competition rules are not deemed to intervene in the absence of competition concerns, even when market behaviour involves the processing of personal data and/or leads to an infringement of data protection rules. In other words, data protection issues "as such" are not a matter for competition policy, but they are certainly relevant and considered when the accumulation of personal data is at the centre of a competition concern. The Court of Justice indicated in the *Asnef* judgment that "*issues relating to the sensitivity of personal data are not, as such, a matter for competition law* [and] *may be resolved on the basis of the relevant provisions governing data protection*".

2. Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc. Please provide specific examples highlighting the relevant context and outcome.

While, data protection is not a matter for competition policy unless there is a competition concern, the Commission gives due account to the increasing importance of data protection in the competitive dynamics of digital markets, as consumers become more conscious of the importance of privacy and stronger regulation has entered into force at EU level.

This is for example relevant in merger investigations if it emerges that data protection is an element of quality, which is significant for consumers. The Commission has in the past intervened in the *Microsoft/LinkedIn* case where, in the course of its investigation, the Commission found that data protection was an important parameter of competition between professional social networks on the market, which could have been negatively affected by the transaction.

Privacy and data protection and the processing of users' personal data have been one of the subjects of another recent Commission merger decision in the case *Google/Fitbit* (M.9660). In that case, the Commission has examined whether the combination of the merging parties' data and data collection capabilities would raise competition concerns. The conclusion has been affirmative in relation to the market for online advertising, where it has been found that the addition of Fitbit's user data would strengthen Google's entrenched market position in online advertising. Consequently, a remedy was adopted to segregate and hold separate Fitbit's data in a data silo and prevent their use by Google's advertising functions. In addition, in the context of the commitments offered to secure clearance to the transaction, Google committed to offer all Fitbit

users a specific and separate choice of whether to consent to the use of their data by Google's non-advertising functions, a commitment that reinforces existing data protection safeguards on data processing.

Other competition investigations have looked into data as an asset whose accumulation or use could be anti-competitive. In *Apple/Shazam*, the Commission compared the data collected by the parties against other comparable datasets available on the market, using four relevant metrics: (1) variety of data; (2) velocity of data accumulation; (3) volume of the dataset; and (4) data value. In the *Amazon* antitrust case, we preliminarily concluded that Amazon misused the data gathered from the activities of sellers on the Amazon marketplace to compete against those sellers when Amazon sells itself competing products. In the recently opened *Facebook marketplace* antitrust investigation, similar concerns will be investigated.

B. Adequacy of existing legal frameworks

1. **In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?**

   As illustrated by recent cases in the digital economy, the current competition framework enables the Commission to address competition concerns stemming from data processing and concentration. In addition, on 15 December 2020, the Commission has launched a proposal for a Digital Market Act (DMA) that comprehensively address the competition risks associated to the raise of gatekeepers in digital markets and data-related markets. The Digital Markets Act (DMA) proposes regulation covering obligations on designated as gatekeepers, some of which relate to the handling and uses of data.

C. Challenges

1. **What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?**

   It is crucial for competition agencies to understand the scope and type of data collected by the investigated companies, how data are processed within complex technology environments, which are the entities and corporate functions that are actually processing the data and whether similar databases are available to other players in the market. Support from data protection authorities in competition investigations is helpful in this respect.

2. **How have you sought to overcome any of the challenges identified in Question C.1. above?**

   For example, in its recent *Google/Fitbit* merger investigation the Commission has worked in close cooperation with the European Data Protection Board.

D. Engagement with civil society

1. **Have you engaged with digital rights organisations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews etc)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc) and the outcome. Did you find their data privacy expertise useful to overcoming**

the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organisations, could you please explain why?

In the *Google/Fitbit* merger investigation, the Commission engaged with a number of organisations protecting consumers' digital rights, fundamental rights and privacy and data protection rights, in particular. The engagement took place through calls, informal meetings and written submissions. All opportunities were used to facilitate interaction with the Commission in the framework of the procedural rules. Their contribution was helpful in understanding privacy considerations and rules that could be relevant in the assessment of the competition case.

2. **If digital rights organisations have submitted evidence or legal, technical or any other analyses in the context of investigations or reviews carried out by you, how helpful were their submissions for your organisation? If possible, please provide examples.**

The contribution of such organisations in pointing to the privacy implications of the *Google/Fitbit* case were useful. They provided useful insights on how data could be exploited in a given business model. As is the case for all investigations, the input provided by such organisations would typically be complemented with other evidence, such as internal documents of the merging parties and replies to market investigation questionnaires by customers and competitors of the merging parties.

E. Future

1. **Do you expect that you will engage or continue to engage with digital rights organisations in the future?**

Yes, most likely. The Commission found the cooperation with Privacy International, which was active in both phases of the Google/Fitbit investigation (e.g. with submissions, expert opinions, replies to the questionnaire and to market test of the remedies), and other digital rights organisations useful. For future cases, the Commission welcomes input from all relevant stakeholders. This applies both to future merger cases as well as any antitrust investigations concerning conduct in which the collection and use of personal data is a relevant factor in the assessment.

If possible, please provide examples of engagement you expect to have with digital rights organisations.

Various routes are open to organisations that are willing to contribute their knowledge to the Commission, such as meetings, calls, submissions of written contributions as happened in recent cases.

2. **How could digital rights organisations better support your work in the context of the digital economy? Please provide specific examples or suggestions.**

There is not only one specific way in which digital rights organisations may support the Commission in its role as competition enforcer. Their proactive participation in merger or antitrust investigation can involve different levels of engagement, which – as mentioned above – have proven helpful.

More generally, digital rights organisations would support competition policy by fostering people's awareness that their control over personal data is important also in the context of their

market interactions with digital services providers (for example when data is shared in exchange of digital services) and that privacy could be a quality aspect of such services.

3. **If a digital rights organisation sought to intervene before an on-going merger review or market investigation carried out by your organisation in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples.**

   The type of evidence or analysis relevant in a merger review or antitrust investigation would depend on the case and the types of competition concerns raised by the merger or conduct under investigation. As mentioned above, a digital rights organisation will have multiple routes to participate in the procedure, including that of replying to the market questionnaires sent by the Commission or applying as an interested third party in a merger procedure, for example.

RESPONSE BY FEDERAL ECONOMIC COMPETITION COMMISSION (MEXICO) (ORIGINAL IN SPANISH)

Respuesta a la consulta de la Privacy International

A. El papel de la privacidad de datos en el análisis de la competencia: Situación actual

1. ¿Considera que su enfoque ante los temas de la economía digital tiene en cuenta la interacción entre la privacidad de datos y la competencia? Por favor explique.

A inicios de este milenio la división entre las esferas de competencia económica y protección de datos personales parecía muy clara. No obstante, el desarrollo y avance de la digitalización de la economía ha hecho que esta división sea cada vez más borrosa, debido a la relevancia que tienen los datos (muchos de ellos personales) para los distintos modelos de negocio que operan en el entorno digital. Conforme se desarrollan nuevos modelos de negocio y empresas en la economía digital, resulta cada vez más claro que una misma conducta por parte de una empresa digital puede tener implicaciones sobre estos dos ámbitos de política pública.

Tomando en consideración lo anterior, desde hace algunos años, la Comisión Federal de Competencia Económica (COFECE o Comisión) ha integrado dentro de sus análisis, en aquellos casos que así lo amerite, el uso o explotación que se le puede dar a los datos privados de los consumidores como una variable adicional para entender el funcionamiento de estos mercados. Asimismo, la COFECE reconoce que, para garantizar la protección integral de los consumidores dentro del entorno digital, se requiere de un esfuerzo coordinado de diversas autoridades, entre ellas las responsables de salvaguardar la privacidad de los datos de los individuos.

En este sentido, es importante considerar que tipo de normas y/o medidas de política pública relacionadas con la privacidad de datos pueden tener efectos positivos en el proceso de competencia. Por ejemplo, la imposición de obligaciones que limiten la finalidad del uso de datos e información de los usuarios puede contribuir a evitar que empresas con cierto poder de mercado utilicen la información que recaban al ofrecer algún servicio para en un mercado adyacente. Una medida de este tipo no solo evita afectaciones al derecho de privacidad de los consumidores, sino que también reduce la capacidad de una empresa dominante de apalancar su poder en un mercado, en otro adyacente por el uso de los datos que tiene por operar el primero.

2. ¿La privacidad de datos ha sido un parámetro en alguna de sus decisiones o informes, por ejemplo, en el contexto de estudios de mercado, exámenes de fusiones, investigaciones, análisis de mercado, el diseño de recursos o intervenciones regulatorias, etc.? Por favor de ejemplos concretos, subrayando el contexto y el resultado pertinentes.

De manera paulatina la privacidad de los datos ha comenzado a integrarse como una de las variables a considerar en los análisis de competencia a cargo de la COFECE. En particular, en dos casos analizados por la Comisión, la consideración de dicha variable ha sido fundamental para su resolución.

Walmart-Cornershop

A finales de 2018, la cadena de supermercados Walmart anunció que había llegado a un acuerdo para adquirir por 225 millones de dólares la totalidad de la empresa Cornershop, una startup que operaba como la principal plataforma digital de entrega a domicilio de compras en supermercados, clubes de precio, entre otros.

A partir del análisis de la concentración, la COFECE resolvió no autorizar la transacción al identificar diversos riesgos, de los cuales los más relevantes se relacionaron con los datos de los usuarios (muchos de ellos personales), los cuales se describen a continuación:

- El agente económico que surgiera de la fusión podría inducir a los competidores de Walmart a abandonar la plataforma Cornershop debido a la falta de certeza sobre el uso estratégico de los datos producidos y proporcionados por dichos competidores para vender sus productos.
- Walmart podría utilizar los datos de los usuarios de Cornershop con fines anticompetitivos como: (i) ofrecer ofertas personalizadas a usuarios que normalmente compran productos de otros supermercados; y, (ii) favorecer los productos de Walmart sobre los de sus competidores dentro de la plataforma de Cornershop.

Así, y en relación con el tema de privacidad de datos, la principal preocupación de la Comisión se centró en la posibilidad de que Walmart pudiera un uso estratégico de datos de otras tiendas competidoras y de los consumidores finales que proporcionan y producen en la plataforma Cornershop, que incluyen hábitos de consumo, ofertas, entre otros, en su propio beneficio. Ante estos potenciales riesgos detectados durante su análisis, a mediados de 2019 el Pleno de la COFECE determinó no aprobar esta transacción.

Ley Fintech

En octubre de 2017, la COFECE emitió una opinión no vinculante dirigida al Senado mexicano sobre el Proyecto de Decreto para reformar varias leyes del sector financiero y emitir la primera ley mexicana para regular las Instituciones de Tecnología Financiera (Ley Fintech). El Proyecto de Decreto tenía por objeto regular algunos de los servicios financieros prestados por este tipo de empresas, conocidas como Fintech, así como su organización, operación y funcionamiento.

En el sector financiero, la información del usuario es esencial para que los nuevos participantes, como las Fintech, compitan en igualdad de condiciones con las instituciones bancarias y crediticias tradicionales. Las recomendaciones al Senado estuvieron principalmente dirigidas a que las instituciones financieras tradicionales quedaran obligadas a brindar dicha información a otros participantes del mercado, con el consentimiento de los usuarios.

A principios del 2018, la Ley Fintech fue promulgada, tomando en consideración distintas recomendaciones realizadas por la COFECE, entre éstas se encontraron: (i) reconocer explícitamente que la información financiera es propiedad de los clientes, no de las instituciones financieras; (ii) facilitar el acceso por parte de empresas Fintech a la

información de los clientes que se encuentren bajo el control de entidades financieras tradicionales, así como determinar que los reguladores establecerán tarifas no discriminatorias para la transmisión de información y las condiciones bajo las cuales se permitirán las interrupciones de transmisión.

B. Idoneidad de los marcos jurídicos actuales

1. En su opinión, ¿los marcos normativos o regulatorios existentes pueden abordar adecuadamente los problemas de competencia derivados de la concentración de datos? ¿Cuáles son los cambios que considera necesarios para el marco normativo o regulatorio existente?

La Comisión como órgano constitucional autónomo encargado de velar por la competencia y libre concurrencia en los mercados,[1] cuenta con diversas herramientas que permiten enfrentar buena parte de los retos de la digitalización de la economía en lo que respecta a temas relacionados con competencia en México. Como parte de lo que se consideran las herramientas de competencia tradicionales, la autoridad de competencia cuenta con el análisis de concentraciones, la investigación por la comisión de prácticas monopólicas absolutas (colusión) y relativas (abuso de dominancia). Asimismo, la COFECE cuenta con facultades de emisión de opiniones en materia de competencia respecto de iniciativas de leyes, anteproyectos de reglamentos, decretos, ajustes de programas y políticas, celebración de tratados internacionales, entre otros; así como la facultad para para determinar la existencia de insumos esenciales o barreras a la competencia.

Consideramos que la suma de estas herramientas nos permite hacer frente a buena parte de los problemas de competencia que derivan de la concentración de datos que han sido identificados a nivel internacional; sin embargo, existen áreas de oportunidad. Por ejemplo, el marco normativo actual no permite a la Comisión investigar y sancionar prácticas explotativas, las cuales en el entorno digital se traducen en la imposición de términos y condiciones abusivos con el fin de obtener una mayor cantidad de datos privados de usuarios y consumidores y que han sido sancionados en otras jurisdicciones, tal como lo hizo la autoridad de competencia alemana recientemente.

Por cuanto hace a la protección de datos personales, el Instituto Nacional de Acceso a la Información Pública (INAI) es el órgano constitucional autónomo con facultades exclusivas para velar por su protección, para lo cual cuenta con herramientas dentro del marco normativo nacional, entre las que destaca la Ley Federal de Protección de Datos Personales en posesión de los particulares. Esta ley, si bien incorpora algunos principios como los derechos de Acceso, Rectificación, Cancelación y Oposición a la información que manejan los particulares, los cuales son fundamentales para garantizar la protección de la información de los usuarios de los servicios digitales, no establece expresamente la colaboración con otras

[1] Con excepción de los sectores de telecomunicaciones y radiodifusión, de competencia exclusiva del Instituto Federal de Telecomunicaciones.

autoridades en aquellos temas de intersección con otras materias, como la competencia económica.

Además, desde nuestra perspectiva, el marco normativo actual en materia de protección de datos presenta áreas de oportunidad que de ser atendidas podrían incidir de manera positiva en el proceso de competencia. Entre los temas que hemos detectado en la Comisión se encuentra, por ejemplo, el de establecer un mecanismo de portabilidad de datos a favor de los usuarios, que los empoderaría como titulares de sus datos para decidir en qué plataforma, aplicación o servicio compartir esta información, además de que propiciaría una mayor competencia, al permitir que empresas que quieran participar en los mercados digitales pudieran acceder a dichos datos que generalmente están concentrados en las grandes empresas ya establecidas. Con efectos similares también se encuentra la interoperabilidad de datos, que desde la perspectiva de competencia podría reducir las barreras a la entrada para nuevos competidores y el efecto "*single-homing"* relacionado con un único oferente de productos o servicios en el entorno digital.

Otro tema de protección de datos que puede tener incidencia en la competencia económica es la minimización de datos, principio regulatorio que obliga a las empresas a recopilar únicamente los datos que son necesarios para un fin en específico, sin que pueda utilizarse para fines distintos. Esto puede limitar el uso de datos de los usuarios por parte de empresas con posición de dominio en mercados adyacentes o relacionados (practica conocida como "*leveraging"*).

Asimismo, este principio de minimización podría venir acompañado de la obligación de informar a los usuarios y consumidores de manera clara y precisa el uso y finalidad que se le dará de los datos que son recabados en una plataforma o servicio determinado. El derecho del usuario a ser informado tiene incidencia positiva en los mercados en el sentido de que al contar con consumidores mejor informados, se reduce la asimetría de información entre consumidores y empresas. Al mismo tiempo, facilita que los consumidores identifiquen a aquellas empresas que les ofrezcan mejores condiciones en el tratamiento de sus datos, lo que se traduce en incentivos para que las empresas compitan entre sí en términos de calidad en sus procesos recolección y análisis de los datos personales.

Por lo anterior y tal como se señaló con anterioridad, la Comisión reconoce que en el contexto de la economía digital, cada vez se requieren mayores esquemas de cooperación entre las autoridades responsables de garantizar la protección de los datos personales y las autoridades de competencia.

C. Retos

1. ¿Cuáles considera que son los principales retos, en cuanto a conocimientos técnicos y/o sobre derechos digitales, que podría enfrentar en el contexto de la competencia y la privacidad de datos?

Desde el ámbito de la política de competencia, los retos más relevantes en materia de privacidad de datos identificados por la Comisión son:

1. Ahondar en el entendimiento sobre el papel que juegan la privacidad de los datos (ya sean comerciales o personales) para algunos modelos de negocio y estructuras de mercado dentro de la economía digital.
2. Reconocer los potenciales efectos anticompetitivos que podrían derivar de conductas de empresas relacionadas con la recopilación, almacenamiento y/o uso de datos personales.
3. Identificar los potenciales efectos anticompetitivos que podrían resultar de la concentración de bases de datos personales a partir de una adquisición o fusión de dos o más empresas, incluso en mercados aparentemente no relacionados.
4. Comprender el alcance que podrían tener ciertos acuerdos entre Agentes Económicos (o con usuarios comerciales) que involucren el almacenamiento y/o uso de datos personales.
5. Disuadir y sancionar aquellas prácticas de discriminación de precios que disminuyan el bienestar de los consumidores y que deriven de la explotación de los datos personales o comerciales de los usuarios.
6. Comprender la pertinencia y el alcance de las herramientas actuales de competencia y protección de datos personales, así como reconocer si será necesaria alguna modificación al marco legal vigente con miras a enfrentar de mejor manera los desafíos que plantea la economía digital.
7. Identificar si el diseño institucional vigente es suficiente como para enfrentar los retos de coordinación interinstitucional que demandan los mercados digitales.

2. ¿Cómo ha tratado de superar cualquiera de los retos identificados anteriormente en la pregunta C.1?

En marzo de 2020, la Comisión publicó su Estrategia Digital, en la cual explica las acciones que llevará a cabo para abordar con éxito sus análisis e investigaciones en los mercados digitales. Dentro de las acciones consideradas en la estrategia se encuentran: (i) elaborar un documento con propuestas de política pública para que los mercados digitales beneficien a más consumidores mexicanos; (ii) realizar foros con expertos internacionales que nos permita actualizar y robustecer el conocimiento de nuestro personal en el entendimiento de la operación de plataformas digitales, aprender de la experiencia internacional, especialmente de casos y políticas y normativas realizadas con el entrono digital ; (iii) fortalecer las capacidades técnicas de nuestros colaboradores y robustecer la infraestructura tecnológica de la Comisión, que permitan, entre otras cosas, recopilar y analizar grandes cantidades de datos y entender los alcances de la inteligencia artificial; (iv) fortalecer la cooperación internacional; y, (v) establecer una Unidad de Competencia en Mercados Digitales.

Las acciones consideradas en la Estrategia Digital COFECE, sin duda, han permitido a la Comisión avanzar en el entendimiento sobre las implicaciones que tiene la recolección, almacenamiento y uso de los datos personales para los modelos de negocio que operan en el mundo digital, así como su impacto en el proceso de competencia en ciertos mercados. Ya

se señalaba arriba que hemos hecho un análisis de la normativa mexicana de protección de datos personales, advirtiendo algunas áreas de oportunidad en términos que del manejo de datos que pueden hacer las empresas de los datos personales de sus usuarios y el impacto de esta conducta en los mercados.

Un ejemplo adicional a lo ya mencionado se relaciona con la forma en la que las plataformas y empresas del entorno digital hacen uso de diversas herramientas para recabar y explotar datos personales, frecuentemente sin informar adecuadamente a los usuarios de cuál será el uso que se dará a estos datos o mediante términos y condiciones opacos o bajo condiciones de "take it or leave it", sin más opciones para el usuario.

D. Participación de la sociedad civil

1. ¿Ha interactuado con organizaciones de derechos digitales en cualquier aspecto de su trabajo respecto a temas de economía digital (por ejemplo, investigaciones, consultas políticas, estudios o informes de mercado, exámenes de fusiones)? Por favor proporcione información detallada sobre el contexto de la interacción (por ejemplo, presentaciones o intervenciones formales, reuniones o eventos informales, etc.) y su resultado. ¿Considera que el conocimiento de las organizaciones sobre privacidad de datos fue útil para superar los desafíos identificados en la sección C (Retos)? Si no ha interactuado con organizaciones de derechos digitales, ¿podría explicar por qué?

No, hasta el momento la COFECE no ha interactuado con organizaciones de derechos digitales para alguno de los procesos a cargo de ésta. Sin embargo, la Comisión reconoce que los retos que plantea la economía digital, cada vez se vuelven más relevante el surgimiento de espacios de colaboración no sólo con otros organismos involucrados en garantizar el correcto funcionamiento de los mercados digitales, sino también con organizaciones del sector privado y de la sociedad civil, a fin de garantizar que estos mercados funcionen en beneficio de los ciudadanos. En este sentido, la COFECE no descarta la posibilidad de futuros esfuerzos de colaboración con organizaciones de derechos digitales.

2. Si las organizaciones de derechos digitales han presentado pruebas o análisis jurídicos, técnicos o de cualquier otro tipo en el contexto de las investigaciones o los exámenes que ha efectuado, ¿qué tan útiles fueron sus aportes para su organización? De ser posible, por favor proporcione ejemplos.

Debido a que, hasta el momento, no se ha presentado una colaboración formal entre la COFECE y alguna organización de derechos digitales, la Comisión no ha recibido ninguna prueba o análisis por parte de dichas organizaciones para alguno de los procedimientos a su cargo.

E. Futuro

1. ¿Espera que interactuará o continuará interactuando con organizaciones de derechos digitales en el futuro? De ser posible, por favor proporcione ejemplos de la interacción que espera tener con organizaciones de derechos digitales.

Como se ha señalado en respuestas anteriores, el rápido desarrollo de la economía digital sin duda exige mayores espacios de cooperación entre las autoridades de competencia y las organizaciones de derechos digitales.

Por ello, es previsible que, un futuro cercano, surjan mayores esfuerzos de colaboración entre la COFECE y organizaciones defensoras de los derechos digitales en México (por ejemplo, Red en Defensa de los Derechos Digitales (R3D), Asociación para el Progreso de las Comunicaciones, Derechos Digitales, Artículo 19, Tec-Check, entre otras), particularmente, en el entendimiento de la relación entre la privacidad de datos y la competencia económica, así como la denuncia de potenciales prácticas anticompetitivas que pudiesen estar afectando el proceso de libre competencia y concurrencia como consecuencia del uso indebido de los datos personales de los usuarios.

2. ¿De qué manera podrían las organizaciones de derechos digitales apoyar mejor su trabajo en el contexto de la economía digital? Por favor dé ejemplos o sugerencias específicas.

Al proporcionar información relevante para la realización de estudios que permitan mejorar el entendimiento de la Comisión con respecto del desarrollo de los mercados digitales en México y el estado que guarda la defensa de los derechos digitales en nuestro país, especialmente en aquellos aspectos que escapan de la competencia de la Comisión pero que requieren ser entendidos para mejorar la labor de la COFECE. Por ejemplo, información sobre el comportamiento de los consumidores en el entorno digital. Adicionalmente, en caso de contar con información, denunciar la realización de prácticas anticompetitivas por parte de Agentes Económicos que participen en los mercados digitales, como consecuencia de vulnerar los derechos digitales de los consumidores en México.

3. Si una organización de derechos digitales quisiera intervenir en el examen de una fusión o una investigación de mercado en curso realizada por su organización en el contexto de la economía digital, ¿qué tipo de pruebas o análisis esperaría que aportaran para apoyar de la mejor manera el examen? Por favor dé ejemplos específicos.

La Ley Federal de Competencia Económica no prevé algún un mecanismo para la intervención *motu proprio* de alguna organización durante el análisis de una concentración o de investigaciones por prácticas anticompetitivas o para determinar la posible existencia de barreras a la competencia e insumos esenciales. Sin embargo, en ambos casos la Comisión cuenta con facultades para requerir a cualquier persona información o documentos que se encuentren relacionados con el procedimiento en cuestión, por lo que la participación de organizaciones de derechos digitales puede hacerse por este medio. En el caso de concentraciones, por medio de una entrevista a solicitud de terceros que pudieran verse afectados con el resultado de una operación, la Comisión ha escuchado sus argumentos y preocupaciones, lo que ha permitido contar con una perspectiva más amplia sobre los posibles efectos anticompetitivos cuando se analiza la transacción en cuestión.

En el caso de las investigaciones mencionadas, en ciertas condiciones y bajo los requisitos que establece la ley, estas organizaciones pueden presentar denuncias que permitan iniciar investigaciones en el entorno digital donde pudieran verse vulnerada la privacidad de la información y hubiera afectaciones al proceso de competencia. En estos casos, las organizaciones de derechos digitales pueden proveer de información o evidencia que ayuden a detectar la comisión de prácticas anticompetitivas por parte de ciertos agentes económicos o información sobre los beneficios que genera la realización de ciertas conductas en favor de los consumidores.

Por último y por cuanto hace a los estudios de mercado que elabora la Comisión,[2] las organizaciones de derechos digitales podrían colaborar con la COFECE al brindarle información relevante sobre el funcionamiento de los mercados que forman parte de la economía digital, así como información sobre las conductas, la percepción y las problemáticas identificadas por los consumidores de productos y/o servicios digitales.

F. Comentarios adicionales

1. Por favor aporte cualquier otra observación que considere pertinente.

Ninguno.

[2] Los estudios de mercado analizan las características de un mercado en específico con el fin de emitir un documento no vinculante que describa dicho mercado, sus ventajas y problemáticas y generalmente van a acompañadas de recomendaciones de política pública que contribuyan a generar o mejorar las condiciones de competencia del mercado analizado. Esto difiere de las investigaciones por prácticas anticompetitivas, que pueden culminar en una sanción impuesta por el Pleno de la Comisión, y de las investigaciones para determinar la posible existencia de barreras a la competencia e insumos esenciales, que pueden culminar en la imposición de obligaciones a particulares, recomendaciones a otras autoridades o la regulación del acceso a un insumo esencial.

RESPONSE BY FEDERAL ECONOMIC COMPETITION COMMISSION (MEXICO) (UNOFFICIAL ENGLISH TRANSLATION)

Reply to Privacy International's Inquiry

A. The role of data privacy in competition assessments: State of play

1. Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain.

At the start of this millennium, the division between the spheres of economic competition and personal data protection seemed very clear. However, the evolution and advancement of the digitization of the economy has increasingly blurred this division owing to the relevance of data (much of it personal) for the different business models operating in the digital environment. As new business models and companies develop in the digital economy, it becomes increasingly clear that a single behavior by a digital company can have implications in both public policy areas.

In light of the above, in recent years, the Federal Economic Competition Commission (COFECE or Commission) has included in its analysis, in the cases that warrant it, the use or exploitation of consumers' private data as an additional variable to understand how these markets operate. COFECE also recognizes that, to guarantee the comprehensive protection of consumers in the digital environment, a coordinated effort is required from various authorities, including those responsible for safeguarding the privacy of individuals' data.

In this sense, it is important to consider the different types of data privacy norms and/or public policy measures that might have a positive effect in the competition process. For example, imposing obligations that limit the end use of users' data and information can help prevent that companies with a certain degree of market power use information they collect to offer services in adjacent markets. This kind of measure not only prevents harming consumers' right to privacy, but also diminishes a dominant firm's ability to leverage its power in a market in an adjacent market by using the data it has from operating in the first one.

2. Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc.? Please provide specific examples highlighting the relevant context and outcome.

Data privacy is gradually being integrated as one of the variables considered in the COFECE's competition analyses. In particular, this variable was key to resolving two of the cases analyzed by the Commission.

Walmart-Cornershop

In late 2018, the supermarket chain Walmart announced an agreement to acquire for USD 225 million the totality of the company Cornershop, a startup that operated as the main digital platform for home delivery of purchases in supermarkets, price clubs, among others.

Based on its concentration analysis, COFECE decided to not authorize the transaction because it identified several risks, the most relevant of which relate to user data (many of it personal) and are described below:

- The economic agent resulting from the merger could induce Walmart's competitors to abandon the Cornershop platform due to lack of certainty about the strategic use of the data produced and provided by the competitors to sell their products.
- Walmart could use data from Cornershop users for anti-competitive purposes such as: (i) offering personalized offers to users who normally purchase products from other supermarkets; and, (ii) favoring Walmart's products over those of its competitors on the Cornershop platform.

Therefore, and in relation to data privacy, the Commission's main concern was the possibility that Walmart could strategically use for its own benefit data from competing stores and end consumers that supply and produce on the Cornershop platform, including consumption habits, offers, among others. As a result of these potential risks identified during the analysis, in mid-2019 the COFECE Plenary decided not to approve this transaction.

Fintech Law

In October 2017, COFECE issued a non-binding opinion addressed to the Mexican Senate in connection to the Draft Decree to reform several financial sector laws and issue the first Mexican law to regulate Financial Technology Institutions (Fintech Law).The Draft Decree sought to regulate some of the financial services provided by this type of company, known as Fintech, as well as their organization, operation and functioning.

In the financial sector, user information is essential for new entrants, such as Fintechs, to compete on a level playing field with traditional banking and credit institutions. The main purpose of the recommendations to the Senate was requiring that traditional financial institutions provide this information to other market participants, with the consent of the users.

In early 2018, the Fintech Law was enacted, taking into consideration different recommendations made by COFECE, including: (i) explicitly recognizing that financial information belongs to customers and not financial institutions; (ii) facilitating Fintech companies' access to customer information controlled by traditional financial institutions, as well as determining that regulators will establish non-discriminatory fees for the transmission of information and the conditions under which transmission interruptions will be allowed.

B. Adequacy of existing legal frameworks

1. In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?

The Commission, as an autonomous constitutional body responsible for overseeing free competition in the markets,[1] has several tools to address many of the challenges posed by the digitization of the economy that involve issues related to competition in Mexico. As part of what are considered traditional competition tools, the competition authority has the analysis of concentrations, the investigation by the commission of absolute (collusion) and relative (abuse of dominance) monopolistic practices. COFECE is also empowered to issue opinions on competition matters in connection to legislative initiatives, draft regulations, decrees, program and policy adjustments, and international treaties, among others, as well as the power to determine the existence of essential inputs or barriers to competition.

We consider that the sum of these tools allow us to address many of the competition problems arising from the concentration of data that have been identified at the international level; however, there are areas of opportunity. For example, under the current regulatory framework the Commission is not allowed to investigate and sanction exploitative practices, which in the digital environment translate into the imposition of abusive terms and conditions with the purpose of obtaining more private data from users and consumers, which has been sanctioned in other jurisdictions, as the German competition authority recently did.

In terms of personal data protection, the National Institute for Access to Public Information (INAI) is the autonomous constitutional body with exclusive powers to ensure its protection, for which it is equipped with tools in the national regulatory framework, including, notably, the Federal Law for the Protection of Personal Data Held by Private Parties. Although this law incorporates some principles such as the rights of Access, Rectification, Cancellation and Opposition to the information held by private parties, which are key to ensuring the protection of the information that belongs to digital services users, it does not expressly establish cooperation with other authorities on issues that intersect with other areas, such as economic competition.

Furthermore, from our perspective, the current regulatory framework on data protection offers areas of opportunity that, if addressed, could positively impact the competition process. For example, one of the issues the Commission has identified is establishing a data portability mechanism for the benefit of users, which would empower them as the owners of their data to decide on which platform, application or service they share this information, while also promoting greater competition by allowing companies that wish to participate in digital markets to access this data, which is generally concentrated in large established companies. Data interoperability also has similar effects, which from a competition perspective could reduce barriers to entry for new competitors and the single-homing effect associated with the existence of a sole supplier of products or services in the digital environment.

[1]With the exception of the telecommunications and broadcasting sectors, which are under the exclusive jurisdiction of the Federal Telecommunications Institute.

Another data protection issue that may impact economic competition is data minimization, a regulatory principle that requires companies to collect only the data that is necessary for a specific purpose and not use it for other purposes. This may limit the use of user data by companies with a dominant position in adjacent or related markets (a practice known as leveraging).

Likewise, this minimization principle could be accompanied by the obligation to inform users and consumers in a clear and precise manner about the use and purpose of the data collected on a given platform or service. A user's right to be informed has a positive impact on markets in the sense that having better-informed consumers reduces the asymmetry of information between consumers and companies. It also makes it easier for consumers to identify the companies that offer them better conditions in the processing of their data, which translates into incentives for companies to compete with each other in terms of the quality of their personal data collection and analysis processes.

Considering the above, and as previously noted, the Commission recognizes that in the context of the digital economy, there is a growing need for improved cooperation schemes between the authorities responsible for guaranteeing personal data protection and competition authorities.

C. Challenges

1. What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?

From the perspective of competition policy, the most relevant data privacy challenges identified by the Commission are:

1. Gaining a deeper understanding of the role of data privacy (whether commercial or personal) for some business models and market structures in the digital economy.
2. Recognizing the potential anti-competitive effects that could arise from company behaviors related to the collection, storage and/or use of personal data.
3. Identifying potential anti-competitive effects that could stem from the concentration of personal databases resulting from the acquisition or merger of two or more companies, even in apparently unrelated markets.
4. Understanding the potential reach of certain agreements between Economic Agents (or with commercial users) that involve the storage and/or use of personal data.
5. Deterring and sanctioning price discrimination practices that decrease consumer welfare and result from the exploitation of the personal or commercial data of users.
6. Understanding the relevance and reach of the existing competition and personal data protection tools, as well as recognizing whether it will be necessary to modify the current legal framework to respond more effectively to the challenges posed by the digital economy.

7. Identifying whether the current institutional design is sufficient to meet the interagency coordination challenges posed by digital markets.

2. How have you sought to overcome any of the challenges identified in Question C.1. above?

In March 2020, the Commission published its Digital Strategy which explains the actions it will take to successfully address its analysis and research in digital markets. Some of the actions considered in the strategy are (i) preparing a document setting forth public policy proposals to ensure that digital markets benefit more Mexican consumers; (ii) holding forums with international experts to keep our staff up to date and to strengthen their knowledge and understanding of the operation of digital platforms, to learn from international experience, especially from cases and policies and regulations developed in connection with digital environments; (iii) strengthening our staff's technical capabilities and the Commission's technological infrastructure, which will allow, among other things, collecting and analyzing large amounts of data and understanding the reach of artificial intelligence; (iv) strengthening international cooperation; (v) establishing a Unit for Competition in the Digital Market. The actions considered in the COFECE Digital Strategy have undoubtedly allowed the Commission to advance its understanding of the implications of the collection, storage and use of personal data for the business models that operate in the digital world, as well as their impact on the competitive process in certain markets. As mentioned above, we have analyzed the Mexican regulations on personal data, noting some areas of opportunity in terms of how companies manage their users' personal data and the impact of this behavior on the markets.

In addition to the aforementioned, another example relates to the way in which platforms and companies in the digital environment use various tools to collect and exploit personal data, often without adequately informing users of how the data will be used, or under opaque terms and conditions or "take it or leave it" conditions, leaving the user with no other options.

D. Engagement with civil society

1. Have you engaged with digital rights organizations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews etc.)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc) and the outcome. Did you find their data privacy expertise useful to overcoming the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organizations, could you please explain why?

No, so far COFECE has not interacted with digital rights organizations for any of the processes under its responsibility. However, the Commission recognizes that in the face of the challenges of the digital economy, the emergence of collaborative spaces with other agencies involved in ensuring the proper functioning of digital markets and also with private sector and civil society organizations, to ensure these markets work for the benefit of citizens, is becoming increasingly relevant. In this sense, COFECE does not rule out the possibility of future cooperation efforts with digital rights organizations.

2. If digital rights organizations have submitted evidence or legal, technical or any other analyses in the context of investigations or reviews carried out by you, how helpful were their submissions for your organization? If possible, please provide examples.

Since, to date, no formal collaboration between COFECE and any digital rights organization has taken place, the Commission has not received any evidence or analysis from such organizations for any of the proceedings under its responsibility.

E. Future

1. Do you expect that you will engage or continue to engage with digital rights organizations in the future? If possible, please provide examples of engagement you expect to have with digital rights organizations.

As outlined in previous responses, the rapid development of the digital economy undoubtedly calls for greater areas of cooperation between competition authorities and digital rights organizations.

Therefore, it is foreseeable that in the near future, there will be an increase in cooperation efforts between COFECE and organizations that defend digital rights in Mexico (e.g., Red en Defensa de los Derechos Digitales (R3D), Asociación para el Progreso de las Comunicaciones, Derechos Digitales, Artículo 19, Tec-Check, among others), particularly regarding the relationship between data privacy and economic competition, as well as reporting potential anti-competitive practices that could be affecting the free competition process as a consequence of the improper use of the users' personal data.

2. How could digital rights organizations better support your work in the context of the digital economy? Please provide specific examples or suggestions.

By providing relevant information related to studies that enhance the Commission's understanding of the development of digital markets in Mexico and the status of the defense of digital rights in our country, especially in those aspects that are beyond the Commission's competence but need to be understood to improve COFECE's work. For example, information on consumer behavior in the digital environment. Additionally, if possessing information to report the anti-competitive practices of economic agents participating in digital markets, as a consequence of violating the digital rights of consumers in Mexico.

3. If a digital rights organization sought to intervene before an on-going merger review or market investigation carried out by your organization in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples.

The Federal Economic Competition Law does not provide any mechanism that allows organizations to intervene at their own initiative during concentration analysis or investigations of anti-competitive practices or to determine the existence of barriers to competition and essential inputs. However, in both cases, the Commission has powers to request from any person information or documents related to the proceeding in question,

therefore, digital rights organizations may participate in such way. In the case of concentrations, through interviews requested by third parties potentially affected by the transaction, the Commission has listened to arguments and concerns, which has allowed it to have a broader view of potential anti-competitive effects when analyzing the transaction.

In the case of the aforementioned investigations, in certain circumstances and under the requirements established by law, these organizations may file complaints that allow launching investigations in the digital environment, where information privacy could be violated and the competition process could be affected. In these cases, digital rights organizations may provide information or evidence to help identify whether anti-competitive practices have been committed by certain economic agents or information on the benefits to consumers of certain conducts.

Lastly, in relation to market studies prepared by the Commission,[2] digital rights organizations could cooperate with COFECE by contributing relevant information pertaining to the operation of digital economy markets, as well as information on the behaviors, perceptions and problems identified by consumers of digital products and/or services.

F. Other comments

1. Please provide any other remarks you may consider relevant.

None.

[2] Market studies analyze the characteristics of a specific market, with the purpose of issuing a non-binding document that describes such market, its advantages and problems, and are generally accompanied by public policy recommendations that seek to generate or improve the competitive conditions of the analyzed market. This differs from investigations into anti-competitive practices, which may culminate in a sanction imposed by the Plenary of the Commission, and investigations to establish the existence of barriers to competition and essential inputs, which may culminate in the imposition of obligations on individuals, recommendations to other authorities or regulating access to an essential input.

RESPONSE BY HELLENIC COMPETITION COMMISSION (GREECE)

ANNEX A: QUESTIONS TO REGULATORS

A. The role of data privacy in competition assessments: State of play

1. Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain.

While there are no cases to date examining data privacy considerations, the Hellenic Competition Commission ("HCC") has adopted an approach that takes adequate stock of the interplay between competition and data privacy.

First, it has recently revamped its internal organisation (see here https://epant.gr/en/ea/organizational-chart.html and here file:///Users/[redacted]/Downloads/NewsLetter_issue_3_EN%20(2).pdf , p. 4). Amongst other changes, it has established a dedicated Directorate on media, online services and e-infrastructure.

Second, it has undertaken a number of sector inquiries in sectors where data privacy considerations may be a concern. On the sector inquiry into e-commerce see here https://epant.gr/en/enimerosi/sector-inquiry-into-e-commerce.html . The Interim Report (para 380) notes that the uniform application of personal data protection rules at Member State level in the European Union can boost cross-border sales and encourage the completion of the digital single market. From a business perspective and in light of the various applicable legal rules under both EU and national law (personal data and privacy legislation, as well as e-commerce and consumer protection legislation), the publication of guidelines will improve legal certainty. The report also stresses the importance of cooperation between the competent authorities.

On the sector inquiry into fintech see here https://epant.gr/enimerosi/kladiki-erevna-stis-xrimatooikonomikes-texnologies-fintech.html

On the sector inquiry into private healthcare see here https://epant.gr/enimerosi/health.html (in Greek)

2. Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc. Please provide specific examples highlighting the relevant context and outcome.

See answer above.

B. Adequacy of existing legal frameworks

1. In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?

The HCC acknowledges that data concentrations challenge the application of existing competition law tools, both ex post (Art 1 and 2 Greek Competition Act -Law 3959/2011- and Art 101 and 102 TFEU) and ex ante (merger control instruments). There is already an ever growing amount of academic literature and policy reports on this topic (see for instance, N. Economides & I. Lianos, Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective, *Journal of Competition Law & Economics*, 2021;, nhab007, https://doi.org/10.1093/joclec/nhab007).

With respect to potential changes to the existing legal framework, the HCC endorses the contemplated legislative changes at EU level, subject to the proposals put forward by the heads of the national competition authorities within the European Competition Network (see here https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf)

At national level, the Law Commission tasked in early 2020 with revising the Greek Competition Act in order to, amongst other issues, make it fit for the digital age has put forward concrete proposals on amending Law 3959/2011. These proposals were put to public consultation (from August 6th – September 3rd 2021). The Law Commission suggested a new provision in the Competition Act (Article 2A), under which the HCC could prohibit an undertaking holding a position of power in an ecosystem of paramount importance with regards to competition in Greece from abusing its power.[i]

C. Challenges

1.What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?

The main challenges, from a practical perspective, with regard to technical and digital rights expertise relate to the lack of the relevant expertise within competition authorities. From a substantive perspective, the main challenges pertain to constructing theories of harm with respect to exploitative abuses, platform discrimination/envelopment and moving beyond traditional economic IO analysis.

The HCC, aware of the challenges posed by the digital economy and in order to boost the respective expertise within the HCC has established a dedicated Directorate on media, online services and e-infrastructure. It has also established a Forensic Investigation/ Detection Unit and will hire a Chief Technology Officer with a team of data scientists as well as a Chief Economist supported by a dedicated team.

In addition, it has established the HCC Data Analytics and Intelligence Platform, which allows better market monitoring in real time (see here https://www.epant.gr/en/enimerosi/press-releases/item/1373-press-release-presentation-of-the-hcc-data-analytics-and-economic-intelligence-platform.html).

The HCC has also invested in the use of computational law and economics tools (see the HCC report, Computational Competition Law and Economics (epant.gr)

2. How have you sought to overcome any of the challenges identified in Question C.1. above?

See above

D. Engagement with civil society

1. Have you engaged with digital rights organisations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews etc)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc) and the outcome. Did you find their data privacy expertise useful to overcoming the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organisations, could you please explain why?

The HCC has engaged with digital rights organisations in the context of the e-commerce sector inquiry. Homo Digitalis in particular has contributed actively at the initial stages of the HCC's E-commerce Sector Inquiry through its participation in the public consultation, both by submitting written comments and by

delivering a presentation on the issue of data protection in the digital environment during the relevant teleconference organised by the HCC (see para 1091 of the Interim Report). Additionally, we have noted that industry representatives (such as APPLIA HELLAS) have also taken a keen interest into the interplay between competition and data privacy (see para 1075 of the Interim Report).

In addition, in the context of all the above sector inquiries the HCC has held (or is planning) an open consultation and invited all interested parties/ stakeholders to share their views and comments.

2. If digital rights organisations have submitted evidence or legal, technical or any other analyses in the context of investigations or reviews carried out by you, how helpful were their submissions for your organisation? If possible, please provide examples.

See above.

E. Future

1. Do you expect that you will engage or continue to engage with digital rights organisations in the future? If possible, please provide examples of engagement you expect to have with digital rights organisations.

The HCC looks forward to a closer engagement with digital rights organisations both as part of its ongoing sector inquiries as well as in potential cases in the future.

2. How could digital rights organisations better support your work in the context of the digital economy? Please provide specific examples or suggestions.

They can participate in ongoing sector inquiries or possibly alert the HCC of possible competition law violations.

3. If a digital rights organisation sought to intervene before an on-going merger review or market investigation carried out by your organisation in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples.

It would be particularly useful to provide evidence of consumers' approach to privacy, possibly as an aspect of quality competition. In addition, their intervention may assist the HCC at the stage of remedial design.

F. Other comments

1. Please provide any other remarks you may consider relevant.

[i] Discussing this proposal and its respective potential to address, amongst other issues, data concentrations see M G. Jacobides and Ioannis Lianos, "Ecosystems and Competition Law in Theory and Practice" (CLES Research Paper Series 1/2021) p.32 et seq (forthcoming *Industrial and Corporate Change*, 2021).

RESPONSE BY HUNGARIAN COMPETITION AUTHORITY (HUNGARY)

Subject: RE: Privacy International survey on data privacy and competition
From: international <international@gvh.hu>
Date: 04/06/2021, 10:18
To: [redacted] <[redacted]@privacyinternational.org>
CC: [redacted] <[redacted]@privacyinternational.org>, [redacted] <[redacted]@privacyinternational.org>

Dear Mr [redacted],

Thank you for your inquiry.

As you may know, in the practice of the Hungarian Competition Authority (GVH) the question of data privacy has arisen mainly in relation to consumer protection type of cases, such as Facebook (Reg. No. Vj/85/2016.), Google (Reg. No. Vj/88/2016). Please find the links of the press releases on the cases in English.
https://www.gvh.hu/pfile/file?path=/en/press_room/press_releases/press-releases-documents/press_releases_2019/sk_vj_85_2016_lezart_facebook_a&inline=true
https://www.gvh.hu/en/press_room/press_releases/press_releases_2018/competition_proceeding_against_google_is_closed
The full text of the Facebook decision is also available in English.
https://www.gvh.hu/en/resolutions/resolutions_of_the_gvh/resolutions_2016/vj-852016189
Additionally, we would like to note that the International Competitional Network (ICN) has a Steering Group project on *Competition law enforcement at the intersection between competition, consumer protection, and privacy*, in which the GVH also involved. The project is still ongoing; however, the scoping paper of the project is available on the ICN website.
https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/05/SG-Project-comp-cp-priv-scoping-paper.pdf
We hope you will find the above useful.

Kind regards,

International Section
Gazdasági Versenyhivatal (GVH)
the Hungarian Competition Authority
••
address: HUNGARY H-1054 Budapest, Alkotmány u. 5.
mailing address: H-1391 Budapest, 62. Pf. 211
http://www.gvh.hu

RESPONSE BY SUPERINTENDENCE OF INDUSTRY AND COMMERCE (COLOMBIA) (ORIGINAL IN SPANISH)

Industria y Comercio
SUPERINTENDENCIA

Bogotá D.C.,

1000

Señor
[redacted]@privacyinternational.org

Asunto: Encuesta de Privacy International sobre protección de datos y competencia

Respetado señor [redacted]:

Se ha recibido su comunicación electrónica, en la que invita a esta Superintendencia a responder algunas preguntas, formuladas en el Anexo A, relacionadas con la intersección entre la privacidad de datos y las normas de competencia. Dichas preguntas serán respondidas a continuación:

A1 "*¿Considera que su enfoque ante los temas de la economía digital tiene en cuenta la interacción entre la privacidad de datos y la competencia? Por favor explique.*"

En los últimos años la Superintendencia de Industria y Comercio (en adelante "**SIC**") ha hecho importantes aproximaciones al análisis de competencia en mercados con plataformas digitales. Estas experiencias han resultado de trascendental importancia porque (i) vinieron acompañadas de procesos de aprendizaje, (ii) tuvieron como resultado un trabajo coordinado entre las autoridades encargadas de velar por el cumplimiento del régimen de datos personales y el régimen de competencia y (iii) ayudaron a entender la importancia de este tipo de plataformas para el desarrollo de los mercados y la innovación tecnológica.

Así las cosas, esta superintendencia en su rol de Autoridad Única de Competencia ha podido concluir que existe una fuerte complementariedad entre la protección de datos y la protección de la competencia cuando se trata de garantizar los derechos de los consumidores y la eficiencia general de la economía digital. En efecto, existen sinergias, entre los dos regímenes mencionados, que se materializan, en primer lugar, durante el examen de los hechos del caso, ya que el análisis desde la perspectiva de los datos personales permite evidenciar el rol que estos juegan en mercados con plataformas digitales, especialmente por el volumen de usuarios y la correlativa cantidad de datos personales involucrados. Y, en segundo lugar, desde el diseño de soluciones óptimas, como por ejemplo en el caso de condicionamientos impuestos durante el control previo de integraciones empresariales, que realmente tengan en cuenta la lógica que subyace a la transacción o negocio y que depende principalmente de los datos personales.

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A2 ***"¿La privacidad de datos ha sido un parámetro en alguna de sus decisiones o informes, por ejemplo, en el contexto de estudios de mercado, exámenes de fusiones, investigaciones, análisis de mercado, el diseño de recursos o intervenciones regulatorias, etc.? Por favor de ejemplos concretos, subrayando el contexto y el resultado pertinentes"***

En 2019, los tres bancos más grandes del país, solicitaron la preevaluación de una operación de concentración ante la entidad encargada de la vigilancia y control de los mercados financieros, la Superintendencia Financiera de Colombia (En adelante "SFC"). Los tres bancos pretendían crear una empresa en común (en adelante NewCo) con sustento en una innovación tecnológica que conectaría a instituciones públicas y privadas con los ciudadanos en una plataforma digital para intercambiar datos necesarios para certificar su identidad personal. NewCo es la primera empresa que prestaría el servicio de identidad digital en Colombia.

NewCo estaría encargada de consolidar información de los usuarios contenida en las diferentes instituciones que la custodian para luego ponerla a disposición de instituciones públicas y privadas interesadas en tener acceso a la información, previa autorización del usuario. Esta operación podría fortalecer la toma de decisiones y minimizar los riesgos de fraude que pueden verse reflejados en menores costos y mayores eficiencias en general . Por ejemplo, desde el punto de vista de un banco, es útil conocer cuáles de las personas que adquieren obligaciones financieras están en capacidad real de cumplirlas. Si el banco conoce esa información a través de un aplicativo capaz de brindar certeza acerca de la identidad real de las personas que acceden a sus servicios, entonces sabrá cuál es la probabilidad de que la persona cumpla o no con sus obligaciones financieras. En ese sentido, el banco podrá prestar dinero más barato a personas capaces de cumplir pues no tendrá que incluir costos de tiempo ni de investigación. Esto, a su vez, reducirá las pérdidas por concepto de obligaciones incumplidas y contribuirá a que los consumidores de estos servicios financieros obtengan créditos más baratos.

La SFC le solicitó concepto a la SIC para integrarlo al análisis del impacto de la operación de NewCo sobre el mercado. Para emitir el concepto la SIC estudió los mercados donde tendría efectos la operación. Por un lado, el mercado de los servicios financieros por tratarse del mercado en el que operan los bancos y, por otro lado, el mercado de aplicativos para identificación digital.

La SIC determinó que el mercado financiero no se altera estructuralmente porque la nueva empresa no operaría en este mercado junto a los bancos. Sin embargo, NewCo le otorga un activo diferenciador frente a sus competidores a los tres bancos más grandes en Colombia al ser la única plataforma en el mercado de aplicativos para la identificación digital. Es importante mencionar que en conjunto estos bancos cuentan con más de treinta millones de usuarios activos (aproximadamente al 78% de la población económicamente activa a nivel nacional para 2018), circunstancia que podría ser relevante para el análisis de los efectos de red de la operación y la constitución del poder de mercado tanto de los bancos como de NewCo. Como los efectos de red son positivos, entre más usuarios (ciudadanos e instituciones) existan en la plataforma, mayores serán sus beneficios y mayor poder tendrá NewCo.

Por lo expuesto, la SIC le sugirió a la SFC incluir algunos condicionamientos a la operación para mitigar cualquier efecto restrictivo de tipo horizontal y vertical que pudiera ocasionarse en la competencia. En lo que respecta al poder de mercado de NewCo, la SIC destacó la

necesidad de mantener la independencia entre la nueva sociedad y sus futuros accionistas (los bancos), así como su obligación de incluir un trato equitativo y no discriminatorio entre los distintos clientes y usuarios de la nueva sociedad.

Vale la pena resaltar que la SIC también recomendó el adecuado tratamiento y protección de los datos personales de los clientes o usuarios de la nueva sociedad. En particular, llamó la atención acerca de que no debería gestionarse la migración automática y no consentida de los datos personales e información confidencial de los usuarios o clientes de los bancos a la nueva sociedad. Para esa migración se requerirá autorización previa, expresa e informada por parte de los clientes. Este último condicionamiento y la obligación de mantener la interoperabilidad de los nuevos desarrollos para la migración de usuarios a otras plataformas sin costos adicionales, resultó de la participación activa de la autoridad de protección de datos personales y la autoridad de competencia (que hacen parte de la SIC), dado el rol que los datos personales juegan en mercados con plataformas digitales, especialmente por el volumen de usuarios y la correlativa cantidad de datos personales involucrados en este caso particular.

En conclusión, las recomendaciones de la SIC estuvieron orientadas a la prevención de las prácticas anticompetitivas que pudieran surgir de la operación de NewCo frente a (i) la restricción de entrada de nuevos rivales en el mercado de aplicativos para la identificación digital y (ii) el posible aprovechamiento del poder de mercado en el sector financiero para consolidar con los datos de sus usuarios poder de mercado para NewCo.

En el siguiente vínculo se podrá consultar el concepto mencionado para una mejor referencia del lector: https://www.sic.gov.co/sites/default/files/files/integracion_empresarial/pdf/2019/julio/BANCOLOMBIA%20-20DAVIVIENDA%20%20BANCO%20DE%20BOGOT%C3%81.pdf

B1 ***"En su opinión, ¿los marcos normativos o regulatorios existentes pueden abordar adecuadamente los problemas de competencia derivados de la concentración de datos? ¿Cuáles son los cambios que considera necesarios para el marco normativo o regulatorio existente?"***

El régimen general de protección de la competencia, establecido por el legislador en el artículo 4 de la Ley 1340 de 2009, norma que además determina los componentes de ese régimen, al señalar que está constituido por "La Ley 155 de 1959, el Decreto 2153 de 1992, la presente ley y las demás disposiciones que las modifiquen o adicionen". Dicho régimen tiene como finalidad general la protección del derecho a la libre competencia, referenciando la necesidad de su actualización "a las condiciones actuales de los mercados", conforme al objeto establecido en el artículo 1 de esa ley.

Así las cosas, el marco normativo existente permite a esta Superintendencia abordar los problemas de competencia derivados de la violación al régimen de protección de datos personales.

C1 ***"¿Cuáles considera que son los principales retos, en cuanto a conocimientos técnicos y/o sobre derechos digitales, que podría enfrentar en el contexto de la competencia y la privacidad de datos?"***

- **Definición del mercado relevante**

Escenarios con plataformas digitales retan la estrategia tradicional que se emplea para definir el mercado relevante. Las herramientas para la definición del grado de sustituibilidad del producto en ocasiones no son suficientes para comprender con rigor la totalidad de la estructura del mercado[1], el comportamiento de los agentes involucrados y el resultado de sus interacciones cuando existen múltiples lados. La estrategia tradicional, si bien no debe ser descartada, está diseñada para abordar tradicionalmente las dinámicas en mercados de un solo lado, razón por la cual omite el análisis de los efectos de red y algunas condiciones contractuales centrales referidas a los mercados con múltiples lados.

- **Determinación del poder de mercado**

Para determinar el poder de mercado de cada uno de los agentes que interactúan en los múltiples lados que componen una plataforma es preciso analizar las externalidades de red. No basta el estudio de las condiciones de mercado de un solo lado, sino que es necesario estudiar el efecto de las presiones competitivas de los demás lados que hacen parte de la plataforma[2], incluida la plataforma misma. La cantidad de individuos presentes en cada lado del entorno económico y las condiciones del mercado en las que se desenvuelven, afectan indirectamente todas las interacciones que tienen lugar en ecosistemas con plataformas.

Las condiciones contractuales que regulan la interacción entre los agentes de la plataforma son relevantes porque coordinan los incentivos que cada uno tiene para participar en ese mercado[3]. Que las autoridades de competencia omitan estas circunstancias y en su lugar, haciendo uso de sus herramientas preventivas o correctivas, intervengan mercados que por sí mismos han equilibrado sus incentivos podría ocasionar el desbalance de objetivos que soportan su existencia y motivan el desarrollo de innovaciones tecnológicas.

- **Detección de conductas anticompetitivas**

Las plataformas en sí mismas son innovaciones tecnológicas que han cambiado la forma en que los usuarios realizan transacciones en los mercados. Los consumidores cuentan con mayor información relacionada con los bienes y servicios que buscan adquirir a través de este medio. Los oferentes tienen acceso a una mayor cantidad de consumidores que no tendrían si no existieran estos nuevos canales. Estas condiciones propias de los mercados digitales contribuyen a la perfección de la información disponible para la toma de decisiones de los agentes de quienes se encuentran a cada lado del mercado. Por ejemplo, en un contexto de información completa los oferentes pueden llegar a discriminar los precios porque conocen la disponibilidad a pagar de cada consumidor[4]. Mientras que en contextos tradicionales donde la información es incompleta tal discriminación difícilmente podría explicarse sin considerar un eventual escenario anticompetitivo. El reto de las autoridades de competencia en este escenario será identificar si las dinámicas que son de la naturaleza de este tipo de mercados tienen alcances procompetitivos o anticompetitivos y si se justifica cualquier tipo de intervención.

[1] Ver: Etgar y Goodwin (1982), Filistrucchi, Geradin, Damme, y Affeldt (2014), entre otros.
[2] Ver: Rochet y Tirole (2004), Tremblay (2017), entre otros.
[3] Ver: Wals y Schinkel, (2018),Behringer y Filistrucchi (2015).
[4] Ver: Reed Shiller (2014).

- **Acceso a la información relacionada con las transacciones, contratos y demás interacciones desarrolladas en las plataformas**

Esta información es relevante para la aproximación de las autoridades pues pueden servir como insumo para la detección de nuevas conductas tendientes a limitar la libre competencia económica. El problema es que en muchas ocasiones las empresas encargadas de almacenar, usar y explotar la información de la plataforma no se encuentran radicadas en la zona geográfica donde las interacciones económicas surten efecto. Esta circunstancia limita en gran medida la capacidad de las autoridades de competencia para adoptar medidas efectivas en procura de un adecuado funcionamiento del mercado.

La razón por la que se genera ese problema está relacionada con el carácter global de los mercados analizados y de las tecnologías en las que se sustentan. Frente a ese carácter global, las autoridades de competencia, individualmente consideradas, apenas si tienen una influencia y un poder de acción local[5].

C2 ***"¿Cómo ha tratado de superar cualquiera de los retos identificados anteriormente en la pregunta C.1?"***

Es conveniente resaltar la actuación de la SIC frente al reto de acceso a la información relacionada con las transacciones, contratos y demás interacciones desarrolladas en las plataformas

Ante esa barrera la entidad acudió a un mecanismo previsto en la normativa colombiana en materia de Competencia que, además de reprimir comportamientos orientados a la obstaculización de las investigaciones, tiene la capacidad de enviar un mensaje de prevención general al mercado. Con base en el mecanismo en cuestión, en el año 2019 la SIC impuso a una plataforma digital que opera en Colombia y a algunos de sus agentes una multa por casi USD630.000. Esta multa se impuso porque la empresa y sus agentes, acatando una política corporativa orientada a limitar el acceso de las autoridades a la información relevante de la compañía, lograron obstaculizar el curso de la investigación que estaba dirigida a determinar si su conducta en el mercado podía constituir restricciones a la libre competencia económica.

El punto central de este tipo de actuaciones es que, más allá de las dificultades metodológicas que implica la estrategia que emplean las autoridades de competencia para abordar mercado con plataformas digitales, el acceso a la información relacionada con las interacciones dentro de estos mercados también se encuentra limitada. La situación empeora si no existe suficiente colaboración por parte de las empresas o dinámicas de coordinación entre las autoridades de competencia para poner en marcha todas las gestiones necesarias para brindar obtener la información necesaria para el ejercicio de sus funciones.

D1 ***"¿Ha interactuado con organizaciones de derechos digitales en cualquier aspecto de su trabajo respecto a temas de economía digital (por ejemplo, investigaciones, consultas políticas, estudios o informes de mercado, exámenes de fusiones)? Por favor proporcione información detallada sobre el contexto de la interacción (por ejemplo, presentaciones o intervenciones formales, reuniones o eventos informales, etc.) y su***

[5] Ver: Eleonor Fox (2009).

resultado. ¿Considera que el conocimiento de las organizaciones sobre privacidad de datos fue útil para superar los desafíos identificados en la sección C (Retos)? Si no ha interactuado con organizaciones de derechos digitales, ¿podría explicar por qué?"

La Delegatura para la Protección de la Competencia de la SIC aún no ha interactuado con organizaciones de derechos digitales.

Sin embargo, resulta pertinente mencionar que la Ley 1340 de 2009 en su artículo 19[6] prevé que los terceros interesados podrán ser reconocidos y participar como tales en las investigaciones por prácticas comerciales restrictivas de la competencia (actuación administrativa), aportando las consideraciones y pruebas que consideren pertinentes.

E3 "*Si una organización de derechos digitales quisiera intervenir en el examen de una fusión o una investigación de mercado en curso realizada por su organización en el contexto de la economía digital, ¿qué tipo de pruebas o análisis esperaría que aportaran para apoyar de la mejor manera el examen? Por favor dé ejemplos específicos"*

En primer término, se aclara que de acuerdo con la normatividad vigente (Ley 1340 de 2009 y la Resolución SIC No. 2751 del 29 de enero de 2021, básicamente), en el procedimiento administrativo de integraciones empresariales (Notificación y Pre-evaluación), en principio solamente las intervinientes de la operación participan en el procedimiento; aparte claro está, de las entidades de regulación, control y vigilancia del sector que corresponda y en la etapa procedimental dispuesta en el numeral 4 del artículo 10 de la Ley 1340.

Cabe precisar que en el procedimiento de pre-evaluación existe un plazo preclusivo de diez (10) días, contado a partir del día hábil siguiente a la publicación en el portal web institucional de una síntesis de la operación proyectada, durante el cual, terceras personas (diferentes de las intervinientes) pueden aportar información para allegar elementos de juicio a esta Superintendencia que servirán para complementar el análisis de Autoridad de la operación.

En cuanto a las pruebas, no existe un medio probatorio exclusivo como tampoco una tarifa legal de los medios probatorios. En cada caso, los elementos probatorios para acreditar la información presentada dependerán del sector económico o mercado relevante que corresponda analizar, si se trata de una integración horizontal o vertical y en general, de los posibles efectos que sobre la libre competencia económica tendría la operación proyectada.

En este sentido, y solo a manera de ejemplos, se pueden aportar pruebas documentales diversas, como estudios de mercado con la debida idoneidad técnica y profesional, pruebas de naturaleza técnica y en general, medios probatorios que sustenten los argumentos

[6] Artículo 19 Ley 1340 de 2009

"Los competidores, consumidores o, en general, aquel que acredite un interés directo e individual en investigaciones por prácticas comerciales restrictivas de la competencia, tendrán el carácter de terceros interesados y además, podrán, dentro de los quince (15) días hábiles posteriores a la publicación de la apertura de la investigación en la página web de la Superintendencia de Industria y Comercio, intervenir aportando las consideraciones y pruebas que pretendan hacer valer para que la Superintendencia de Industria y Comercio se pronuncie en uno u otro sentido.

Las ligas y asociaciones de consumidores acreditadas se entenderán como terceros interesados.

(…)"

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presentados respecto de los efectos que la operación proyectada tendría en la libre competencia económica (eliminación de un competidor importante, aumento en los niveles de concentración, ausencia de productos sustitutos, existencia de barreras de entrada al mercado relevante definido, posibles cierres de mercado, posibles efectos coordinados, entre otros).

F1 "*Por favor aporte cualquier otra observación que considere pertinente*"

la SIC es una entidad con funciones de inspección, vigilancia y control tanto sobre la Protección de la Competencia, como de la Protección de Datos personales y la Protección del Consumidor.

Los regímenes legales en los que se enmarcan dichas disciplinas, aunque son de naturaleza diferente, se relacionan al estar construidos sobre la misión de avanzar en la protección de los derechos constitucionales individuales y colectivos reconocidos en Colombia. (i) derecho fundamental a la privacidad, a la protección de la información personal y al buen nombre. (ii) derecho a la libre competencia económica

Cuando una de las delegaturas de la SIC identifica que un caso puede involucrar hechos que pueden ser relevantes para otra área, se encuentra obligada a remitir el caso al área competente. Estos casos pueden ser manejados en paralelo por las delegaturas competentes, cada una de ellas enfocándose en hacer cumplir el régimen aplicable según las competencias a su cargo. Esto significa que los mismos hechos pueden ser investigados desde diferentes perspectivas.

Atentamente,

[redacted]

SUPERINTENDENTE DELEGADO PARA LA PROTECCIÓN DE LA COMPETENCIA

Elaboró: [redacted]
Revisó y apro : [redacted]

RESPONSE BY SUPERINTENDENCE OF INDUSTRY AND COMMERCE (COLOMBIA) (UNOFFICIAL ENGLISH TRANSLATION)

Bogotá D.C.

1000

Mr.
[redacted]
PRIVACY INTERNATIONAL (PI)
[redacted]@privacyinternational.org

Subject: Privacy International Survey on Data Protection and Competition

Dear Mr. [redacted]:

We have received your electronic communication inviting this Superintendency to answer some questions, formulated in Annex A, in relation to the intersection between data privacy and competition rules. Please find the answers to these questions below:

A1 "Do you feel that your approach to digital economy issues takes adequate stock of the interplay between data privacy and competition? Please explain."

In recent years, the Superintendence of Industry and Commerce (hereinafter "SIC") has made important inroads in the analysis of competition in markets with digital platforms. These experiences have been crucially important because (i) they resulted in learning processes, (ii) they led to coordinated work between the authorities responsible for ensuring compliance of the personal data and the competition regimes, and (iii) they helped understand the importance of this type of platforms for the development of markets and technological innovation.

In light of the above, in its role as Single Competition Authority, this superintendence has concluded that there is strong complementarity between protecting data and protecting competition in terms of guaranteeing the rights of consumers and the overall efficiency of the digital economy. In effect, there are synergies between these two regimes that materialize, firstly, when the facts of the case are examined, because an analysis that includes a personal data approach highlights its role in markets with digital platforms, especially given the volume of users and the correlative amount of personal data involved. And, secondly, in the design of optimal solutions that actually take into account the logic underlying the transaction or business and that depend mainly on personal data, for instance in the case of conditions imposed during the ex ante control of business integrations.

A2 "Has data privacy been a parameter in any of your decisions or reports, for example, in the context of market studies, merger reviews, investigations, market assessments, design of remedies or regulatory interventions etc.? Please provide specific examples highlighting the relevant context and outcome."

In 2019, the country's three largest banks requested the pre-evaluation of a concentration operation by the entity responsible for the oversight and control of financial markets, the Financial Superintendency of Colombia (hereinafter "SFC"). The three banks wished to create a joint venture (hereinafter "NewCo") founded on a technological innovation that would connect public and private institutions with citizens on a digital platform to exchange the data necessary to certify their personal identity. NewCo is the first company that would provide digital identity services in Colombia.

NewCo would be tasked with consolidating user information held by the different institutions that custody it and then making it available to public and private institutions interested in accessing the information, subject to user authorization. This operation could strengthen decision making and minimize the risks of fraud, which could be reflected in lower costs and greater efficiency in general. For example, from a bank's point of view, it is useful to know which of the people who acquire financial obligations are actually able to meet them. If the bank learns this information through an application that can provide certainty about the real identity of the people accessing its services, then it will know the likelihood that the person will or will not meet his or her financial obligations. In that sense, the bank will be able to lend cheaper money to people who are able to meet their obligations because it will not have to include the cost of time or research. This, in turn, will reduce losses arising from defaults and help the consumers of these financial services obtain cheaper credit.

The SFC requested an opinion from the SIC to incorporate it into the analysis of the effect of NewCo's operation in the market. To issue the analysis, the SIC studied the markets impacted by the operation. On the one hand, the financial services market, since it is the market in which banks operate, and on the other, the market for digital identity applications.

The SIC found that the financial market would not be altered structurally because the new company would not operate in this market alongside the banks. However, NewCo provides a distinguishing asset to the three largest banks in Colombia, as it is the only platform for digital identity applications in the market. It is important to note that in aggregate these banks have more than thirty million active users (approximately 78% of the national economically active population for 2018), a circumstance that could be relevant in analyzing the network effects of the operation and the structure of both NewCo's and the banks' market power. As network effects are positive, the more users (citizens and institutions) there are on the platform, the greater the benefits and the greater the power of NewCo.

For these reasons, the SIC suggested to the SFC that it include conditions to the operation that would mitigate any restrictive horizontal and vertical effects it might have on competition. Regarding NewCo's market power, the SIC highlighted the need to maintain the new company's independence from its future shareholders (the banks), as well as its obligation to include equitable and non-discriminatory treatment among the different clients and users of the new company.

It is worth noting the SIC also recommended the adequate treatment and protection of the personal data of customers or users in the new company. In particular, it highlighted that the personal data and confidential information of the banks' users or customers should not be automatically and non-consensually migrated to the new company. This migration should require the prior, express and informed authorization of customers. This last condition and the obligation of maintaining the interoperability of new developments for the migration of users to other platforms without additional costs, resulted from the active participation of the personal data protection authority and the competition authority (which are part of the SIC), given the role that

personal data is playing in markets with digital platforms, especially due to the volume of users and the correlative amount of personal data involved in this particular case.

In conclusion, the SIC's recommendations sought to prevent anti-competitive practices potentially resulting from NewCo's operations in relation to (i) restricting the entry of new rivals in the market for digital identity applications and (ii) the potential exploitation of market power in the financial sector to consolidate NewCo's market power through the data of its users.

The above-mentioned opinion may be accessed in the following link, for the reader's further reference:
https://www.sic.gov.co/sites/default/files/files/integracion_empresarial/pdf/2019/julio/BANCOLOMBIA%20-20DAVIVIENDA%20%20BANCO%20DE%20BOGOT%C3%81.pdf

B1 "In your view, can existing legal or regulatory frameworks adequately address the competition concerns stemming from data concentrations? What changes to the existing legal or regulatory framework would you consider necessary?"

The general regime to protect competition, established by the legislator in article 4 of Law 1340 of 2009, a norm that also determines the components of such regime by stating that it encompasses "Law 155 of 1959, Decree 2153 of 1992, this law and the other provisions that amend or add to them." This regime's general purpose is to protect the right to free competition, noting the need to update it "to the current conditions of the markets," in accordance with the purpose set forth in Article 1 of this law.

Accordingly, the existing regulatory framework allows this Superintendency to address competition issues arising from the infringement of the personal data protection regime.

C1 "What would you identify as the main challenges, with regard to technical and/or digital rights expertise, that you might be confronted with in the context of competition and data privacy?"

- **Defining the relevant market**

Digital platform scenarios challenge the traditional strategy used to define the relevant market. The tools to define a product's degree of substitutability do not always suffice to rigorously understand the entire market structure[1], the behavior of the agents involved and the outcome of their interactions when there are multiple sides. The traditional strategy, which should not be discarded, is designed to address in a traditional manner the dynamics in one-sided markets, which is why it omits an analysis of network effects and some central contractual conditions related to multi-sided markets.

- **Determining market power**

To determine the market power of each one of the agents interacting on the multiple sides that constitute a platform, it is necessary to analyze the network externalities. Studying only one side's market conditions is not enough; it is also necessary to study the effect of the competitive pressure of the other sides that are also part of the platform[2], including the platform itself. All the interactions that take place in platform ecosystems are affected by the number of individuals

[1] See Etgar y Goodwin (1982), Filistrucchi, Geradin, Damme, y Affeldt (2014), among others.
[2] See Rochet y Tirole (2004), Tremblay (2017), among others.

present on each side of the economic environment and the market conditions in which they operate indirectly.

The contractual conditions regulating the interactions between the platform's agents are relevant because they coordinate the incentives that each one of them has for participating in that market[3]. If competition authorities ignore these circumstances and instead, using their preventive or corrective tools, intervene in markets that have balanced their own incentives, the result could be an imbalance in the objectives that support their existence and motivate the development of technological innovations.

- **Detection of anti-competitive behavior**

The platforms themselves are technological innovations that have changed the way in which users carry out transactions in the markets. Consumers have more information regarding the goods and services they seek to purchase through this channel. Offerors have access to more consumers than if these new channels did not exist. These conditions, intrinsic to digital markets, contribute to perfecting the decision-making information available to the agents of the participants on each side of the market. For example, in a full-information context, offerers could discriminate prices because they have knowledge of each consumer's the willingness to pay[4]. On the other hand, in traditional contexts where information is incomplete, such discrimination could hardly be explained without considering an eventual anti-competitive scenario. In this scenario, competition authorities are confronted with the challenge of identifying whether the dynamics intrinsic to this type of markets are pro-competitive or anti-competitive and whether any type of intervention is justified.

- **Access to information related to transactions, contracts and other interactions conducted on the platforms.**

This information is relevant for the authorities' approach, as it can be used as an input to identify new conducts that tend to limit free economic competition. The issue is that in many cases the companies that store, use and exploit information on the platform are not located in the geographic area where the economic interactions take place. This circumstance significantly limits the ability of competition authorities to take effective measures to ensure the proper functioning of the market.

This problem is caused by the global nature of the markets being analyzed and the technologies on which they are founded. Faced with this global nature, the competition authorities, individually considered, only have local influence and power to act[5].

C2 "How have you sought to overcome any of the challenges identified in Question C.1. above?"

It is convenient to highlight the actions of the SIC regarding the challenge posed by access to information related to transactions, contracts and other interactions carried out on the platforms.

In response to this barrier, the entity turned to a mechanism established in Colombian Competition law that, in addition to repressing behaviors that seek to obstruct investigations, has the capability to send a general precautionary message to the market. Based on this mechanism,

[3] See Wals y Schinkel, (2018),Behringer y Filistrucchi (2015).

[4] See Reed Shiller (2014).

[5] See Eleonor Fox (2009).

in 2019, the SIC imposed a fine of almost USD630,000 on a digital platform operating in Colombia and some of its agents. The fine was imposed because the company and its agents, abiding by a corporate policy aimed at limiting the authorities' access to the company's relevant information, managed to obstruct an investigation that sought to establish whether its conduct in the market might restrict free economic competition.

The main point of this type of action is that, beyond the methodological difficulties posed by the strategy used by competition authorities to engage with markets with digital platforms, access to information related to interactions in these markets is also limited. The scenario is made worse if the companies do not cooperate sufficiently or if there are no coordination dynamics among the competition authorities to implement all the necessary steps to obtain the necessary information to exercise their duties.

D1 "Have you engaged with digital rights organizations in any aspects of your work on digital economy issues (e.g., investigations, policy consultations, market studies or reports, merger reviews, etc.)? Please provide details about the context of the engagement (e.g., formal submissions or interventions, informal meetings or events etc.) and the outcome. Did you find their data privacy expertise useful to overcoming the challenges identified in section C (Challenges) above? If you have not had any engagement with digital rights organizations, could you please explain why?"

The SIC Office for the Protection of Competition has not yet interacted with digital rights organizations.

However, it is relevant to note that article 19[6] of Law 1340 of 2009 provides that interested third parties may be accredited and participate as such in investigations into business practices restrictive of competition (administrative action), submitting the considerations and evidence they believe is relevant.

E3 "If a digital rights organization sought to intervene before an on-going merger review or market investigation carried out by your organization in the context of the digital economy, what kind of evidence or analyses would you expect them to provide to best assist you in your review? Please provide specific examples."

First of all, it should be clarified that pursuant to the regulations in force (Law 1340 of 2009 and SIC Resolution No. 2751 of January 29, 2021, basically), during the business integration administrative procedure (Notification and Pre-evaluation), in principle only the parties involved in the operation participate in the procedure, aside from, of course, the relevant sector's regulatory, control and oversight entities and during the procedural stage provided for in numeral 4 of Article 10 of Law 1340.

It is relevant to note that in the pre-evaluation procedure there is a non-extendable term of ten (10) days, counted from the business day after the publication on the institutional web portal of a

6 Article 19 of Law 1340 of 2009

"Competitors, consumers or, in general, anyone who can prove a direct and individual interest in an investigation of restrictive business practices, will be considered an interested third party and may also, within fifteen (15) working days after publishing the initiation of the investigation on the website of the Superintendency of Industry and Commerce, intervene by providing the considerations and evidence they intend to invoke for the Superintendency of Industry and Commerce to rule in one way or another.

Accredited consumer leagues and associations will be deemed interested third parties.

(…)"

summary of the proposed transaction, during which third parties (other than the intervening parties) may submit information that will complement the Authority's analysis of the transaction.

In terms of evidence, there is not a sole or exclusive type of evidence, nor a statutory or preset system to weigh evidence (*tarifa legal*). For each case, the evidentiary elements to prove the submitted information will depend on the relevant economic sector or market under analysis, on whether it is a horizontal or vertical integration and, in general, the potential effects on free economic competition.

In this sense, and by way of example, different types of documentary evidence can be submitted, such as market studies with the appropriate technical and professional suitability, technical evidence and, in general, evidence that supports the arguments presented about the effects of the proposed transaction on free economic competition (elimination of an important competitor, increase in concentration levels, absence of substitute products, existence of entry barriers to the relevant market identified, possible market closures, possible coordinated effects, among others).

F1 "Please provide any other remarks you may consider relevant."

The SIC is an entity responsible for inspecting, monitoring and controlling the Protection of Competition, as well as the Protection of Personal Data and the Protection of Consumers.

The legal regimes that frame these disciplines, although different in nature, relate to each other as they are built on the mission of advancing the protection of individual and collective constitutional rights recognized in Colombia: (i) the fundamental right to privacy, to the protection of personal information and to one's good name. (ii) the right to free economic competition

When one of the SIC offices determines that a case may involve facts that may be relevant to another area, it has the duty to refer the case to the competent area. These cases may be handled in parallel by the competent offices, each of them focusing on enforcing the applicable regime according to the duties under their responsibility. This means that the same facts may be investigated from different perspectives.

Sincerely,

[redacted]
DEPUTY SUPERINTENDENT FOR THE PROTECTION OF COMPETITION

Prepared by: [redacted]
Reviewed and approved by: [redacted]

RESPONSE BY US DEPARTMENT OF JUSTICE (UNITED STATES OF AMERICA)

Subject: RE: Media Inquiry from [redacted] - Privacy International (non-governmental organisation)
From: "[redacted]" <[redacted]@usdoj.gov>
Date: 22/07/2021, 19:44
To: "[redacted]@privacyinternational.org" <[redacted]@privacyinternational.org>

Hello [redacted],

We thank you for your interest, but decline the request at this time.

Best,
[redacted]
DOJ Office of Public Affairs

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