Digital Economy

Is there room for reform in competition law?

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- **Competition law is under scrutiny and policy makers are leading a lively social debate over the challenges raised by digital markets.**
- **Revisions to law and enforcement will likely focus on three goals: reducing the risks of under-enforcement; reassessing the notion of harm; and targeting digital markets.**
- **Reforms can bring down old paradigms or follow a conventional view. In any case, reform will probably affect the current approach to both merger control and antitrust cases.**
- **Key questions to answer are how to presume market dominance and on whom rest the burden of proof, how to approach harm in the long term, and how data sharing impacts competition.**

1. Competition law under scrutiny

There is an increasingly heated debate about the future of industrial policy in the EU that centers on a potential reform to competition policy. Some large EU members are advocating for a "competition law overhaul"**, including steps towards policies implemented by major global competitors that hinder internal competition**.

Unsurprisingly, several others, including competition authorities in the European Commission, defend a more cautious approach. **We mostly agree with such an approach because competition law and enforcement has been an ineffective tool –loaded with collateral consequences- when addressing the challenges faced by industrial policy**. Public procurement and investment, in addition to optimal trade policy, are better fit for purpose.

Up to now, European competition authorities have remained strict in enforcing the law and fulfilling their ultimate mandate: to prevent, punish and correct any abuse of dominance that hurts consumer welfare (be it through higher prices or through a reduction in either quality/options offered to consumers). That said, authorities are also **aware of the digital challenges posed to today's markets**, and are open **to reform** as long as it does not compromise their underlying mandate. On that effort, **they are promoting a social debate** to reassess and update today's competition framework without dismantling it.

Following the lead of EU antitrust authorities, **in the US**, both the Department of Justice (DoJ) and the Federal Trade Commission (FTC) **have recently paved the way for antitrust investigations** into the BigTechs, **signaling a tougher stance on digital competition**.

This note **focuses on the scope for reform to competition law**, laying all plausible alternatives on the table, and commenting on their impact on market efficiency.

2. Current competition law in the EU

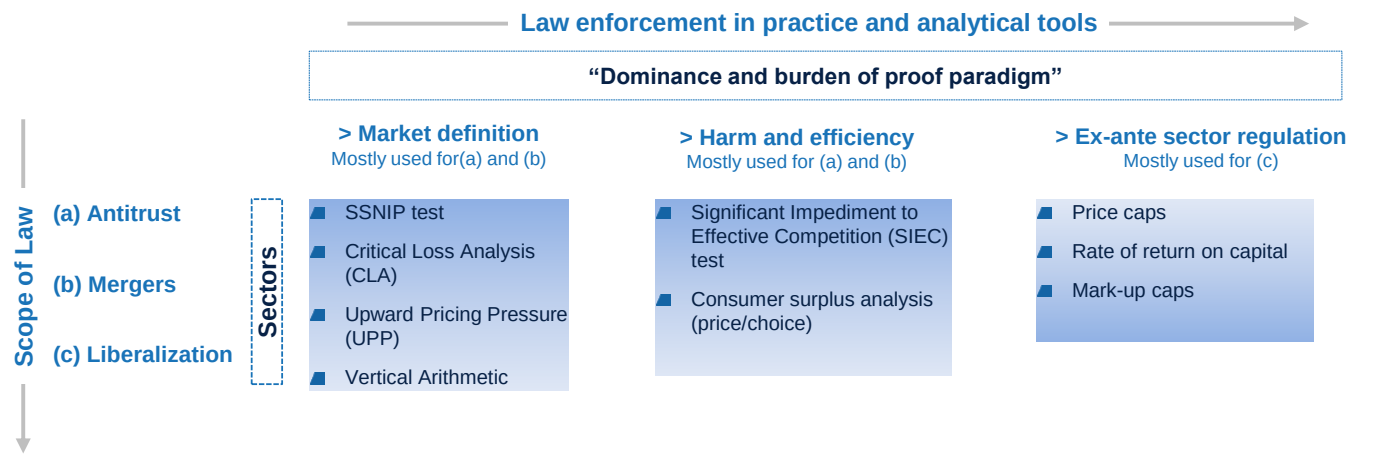
Table 1 illustrates the general framework[1] **currently underpinning competition law** as enforced in all European Union members - most of it being also conventional for most modern economies[2]. The table **is organized along two key dimensions: the scope of the law**, linked to the different sources of anti-competitive behavior, **and its actual enforcement**, linked to basic criteria used to deliberate over "presumptions and burden of proof" in any given case[3].

a. Scope of law

With respect to the scope, the **three sources of actual or potential anti-competitive behavior** currently addressed by the law are[4]:

- Antitrust (that addresses **existing** abusive behavior by a current player)
- Mergers (that addresses **potential** abuse by a future player)
- and Liberalization (that focuses on specific pre-defined sectors rather than a particular player, sectors that tend to constitute natural monopolies and that have usually been in the hands of the state).

Table 1. **UNDERSTANDING COMPETITION LAW AND ENFORCEMENT FRAMEWORK IN THE EU**



Source: European Commission – Competition and BBVA Research.

Law provisions addressing anticompetitive behavior are framed in terms of one of the aforementioned sources.

1 For more details, competition policy framework is embedded in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
2 The only aspect of the law that is unique to the EU, is the State Aid scope that basically deals with discriminatory tax or subsidies regimes within country members. This is not common in conventional competition law frameworks (like US Sherman/Clayton/Robinson–Patman/FTC Act). So although important, for simplicity we will leave-out this pillar from the analysis.
3 Those criteria come mostly from Law and Economics of Industrial Organization discipline, which are validated as accepted analytical tools, or in its case, specific rules or instruments to deal with specific sectors.
4 See note 2.

Under conventional competition law, **antitrust is mostly approached under an ex-post framework,** with cases being sentenced after years of accumulating evidence and complaints by harmed consumers; on the other hand, authorities approach **mergers preemptively**. In both cases, current enforcement is not necessarily effective in today's fast pacing digital markets[5] and is likely leading to **law under-enforcement**.

b. Law enforcement

With regard to law enforcement, its goal is to prevent, punish and correct **abuse of dominance that reduces consumer welfare** (be it through price overcharges or a reduction in either quality or options offered to consumers). Consequently, a first step for competition authorities is to assess whether a firm or a coordinated group of firms has or will have a dominant position in a given market. But **dominance in and of itself is not illegal. If dominance is presumed, authorities then assess whether such dominance translates into an abuse** that significantly harms consumers.

The burden of proof rests on the harmed or potentially harmed, not in the abuser or potential abuser of market power. In this framework, authorities and advocacy groups rely on multiple tools to assess presumption evidence in both market dominance and abuse:

- To assess dominance, authorities tend to rely on **market definition tools.** Those tools rest on model-based analysis of the hypothetical monopoly, and its incentives to set a small but significant and non-transitory increase in prices (SSNIP), using market information of prices and costs of the firms if available. These tests also account for **product substitution,** as a way to better define the relevant product market at hand. Definition can be narrow to **geographical areas,** to deal with local but also broader markets (regional or global).

- To assess abuse, analysis rely on **harm and efficiency tools** that measure the **loss of consumer welfare** due to an existing or potential abusive practice (infringement) that in the case of mergers and liberalization are further **weighed against potential efficiency gains** that could benefit consumers -in the form of lower prices or lower pressures to price increases.

- To assess markets or sectors that are structurally dominated by only one or few players while presenting **high natural barriers to entry** (e.g. ports, airports, utility distribution networks, bandwidth spectrum and telecom networks), authorities use **sector-specific regulation** that is less structured than the first two sets of tools. These tools take form given a plethora of regulatory alternatives for all players on those specific markets, alternatives such as price caps or mark-up caps.

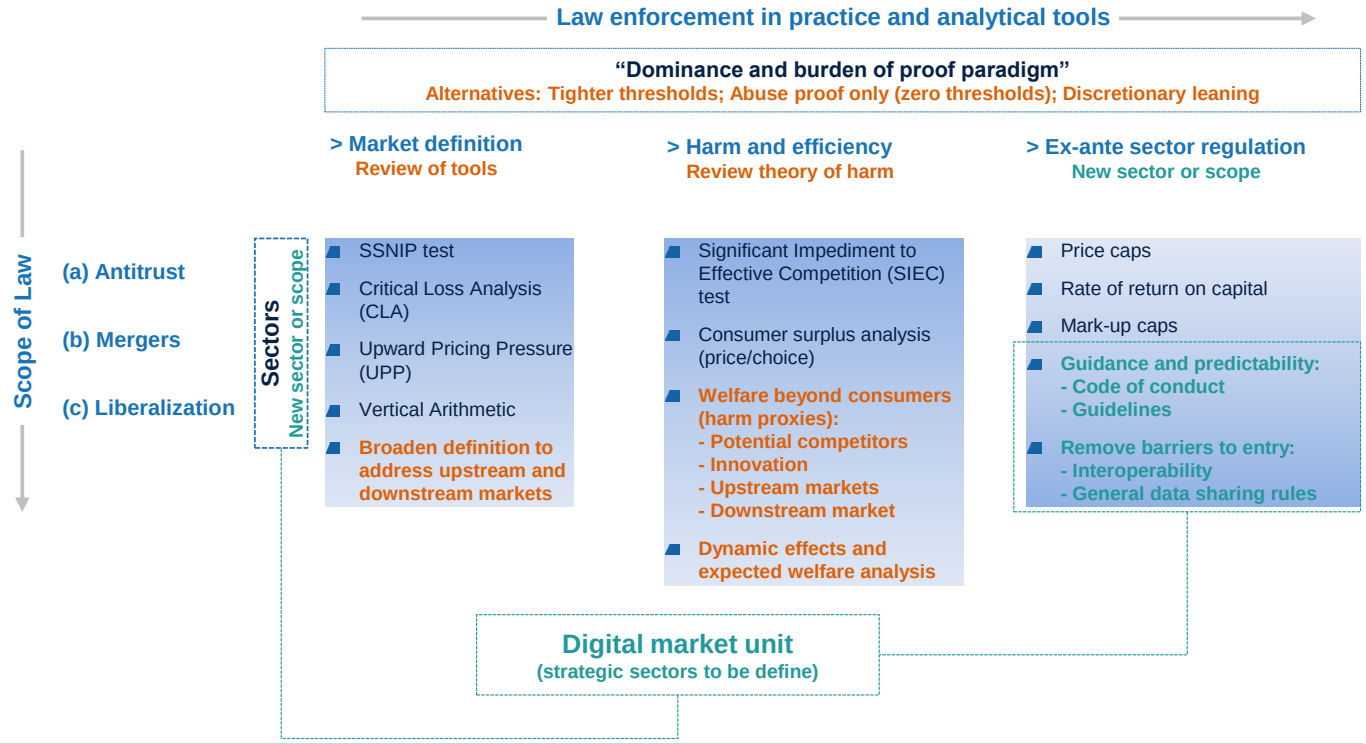
3. Competition in digital markets: guides for a law reform

Table 2 frames a set of reforms to EU competition law that are being considered, and whatever the outcome, it is likely to set a precedent for reforms in other modern economies. The following insights **are based on the proposals put forward by two recent independent reports** sponsored by competition authorities in Europe, both

5 See J. Stiglitz presentation for the US FTC hearings in 2018, "Competition and Consumer Protection in the 21th Century"

of which dealt specifically with the **challenges posed by digital markets**[6]. There are three broad goals behind the need for reform.

Table 2. **REVIEWING COMPETITION POLICY***



Source: European Commission – Competition and BBVA Research. * In orange reform topics that are general to the framework of competition policy; In green the specific ones, relevant for digital markets.

a. First goal: reducing the risks of under-enforcement

There is consensus on **lowering dominance thresholds** based on market concentration indicators.[7] Most modern competition laws define a dominant position as a firm having at least half of the sales in the defined market. But there is an unsettled debate on **to what extent those thresholds should be reduced.**[8] Although no figure is settled yet, this seems to be the **conventional view to deal with recent mergers driven by digital markets**[9]. With this approach and conditional to the slashed thresholds, some of the most recent emblematic mergers might had been curbed[10].

6 The Furman report in the UK, and the Crémer report in the EU.
7 Dominance thresholds are usually measured by market density of sales by a given firm, after the relevant market is defined. Concentration measurement, such as Herfindahl-Hirschman indexes are generally used to identify concentrated markets.
8 In digital markets dominance proof can be complemented by looking at the value of deals, the density of both active users and innovation expenditures or patents.
9 Other approaches try to set thresholds to the value of merger deals, or user's density in the case of social networks platforms.
10 Such as Facebook-Whatsapp.

An extreme case of the latter approach, is to drop the dominance paradigm and **look solely at abuse proof presumption** (for antitrust cases) **or abuse likelihood** (for merger cases, whether or not it ended up harming consumers). We discard this alternative because of the **impractical high costs** it imposes on society. Dropping dominance thresholds to zero (e.g. all small activity could be subject to control), is not only inefficient in terms of law enforcement but also ineffective, as you can end-up with a pile of false positives cases, slowing even further the due process. As an extreme case, it could substantially reduce the well-functioning of market institutions while discouraging the use of them.

Second, a **discretionary or state oriented approach** in competition policy do not warrants competitive markets, as state corporatism and big white elephants could emerge with no clear improvement -rather, a high burden- for consumer's welfare. Although likely -as a consequence of rising nativism and populism- this latter option should be the less preferable.

Finally, complementing the reduction in dominance thresholds, general criteria **that can easily correct risks of under-enforcement in merger control**, is the possibility that all **burden of proof should rest on the firm**, rather than the authorities or the eventually harmed. The idea is that the merging firm should be the one persuading authorities and society by disclosing the net benefits of their merge decisions, based on tangible evidence and plausible assumptions. Nonetheless, this is a highly debated issue among lawyers, as **changing the burden of proof could collide with some fundamental liberty rights.**

Overall, with these **reasonable instrument refinements; competition law can effectively deal with the risk of under-enforcement**, not only in the digital markets but also in the traditional ones.

b. Second goal: reassessing the notion of harm

Another possible change is the **reassessment of what we understand as harm**. Today's framework gives special **focus and attention to consumer welfare**; scope mostly reduced to the extent and likelihood of -or actual- permanent price increases. Looking at **price overcharge infringements is a good thing, but not enough in digital markets** where some services to consumers are often supplied at zero prices. Economists and other advocates are arguing that this theory falls short in various aspects.

First, conventional tools to assess harm do not consider the **long-term consequences of a given market dominance** driven by the likely dynamics of competition. So this narrow -short-run- view, could steam-up trough **competitors complaints and restriction to competition ex-post, or negative effects in consumer welfare** that do not seem to emerge at early stages. In digital markets, this narrow approach could be relevant for the **innovation efforts of actual or potential competitors**, and the corresponding contestability of markets. These problems arise mostly in markets where innovations are a relevant part of the business model, such as the pharmaceutical.

Second, in the digital world the definition of **"relevant market" sometimes narrows to intractable ways** -to extremes such as one individual one market. In this context, **harm should consider the effects in the upstream and downstream markets**, broadening the market definition to more than just the product or service and their substitutes. For example, this could be especially helpful to **deal with competition outcomes of digital distribution platforms,** such as digital advertising markets[11].

11 Some general pre-guidelines in some jurisdictions have already been taken place in some of those aspects. For example, infringements that give rise to a price overcharge can be pass-on to downstream markets and so on. But it is not generally accepted in competition law to assess this effect. The US federal law rejects

Third, there are **practical difficulties** in trying to **estimate welfare effects on society** of a given merge or actual behavior of a firm. Mergers can be useful and positive some times to society in the short-run if avoid bankruptcy and unnecessary workers layoffs, but not necessarily useful for consumers and innovation in the long-run. So given uncertainty and indeterminacy of outcomes, much of economic welfare **analysis should be relying on expected or likely outcomes**. It can be helpful to start considering **expected welfare** analysis **as a validated presumption tool** in competition law enforcement, taking into account both the **balance of probabilities** and the **balance of harms**[12]. Not only could it be especially effective for pinning down false positives in mergers cases, but also false negatives. The most difficult task will be to **convince lawyers and policy makers** of its usefulness and practicality.

c. Third goal: targeting digital markets

Most of today's challenges come from digital markets competition so it is highly likely that it ended up as a specific scope of analysis, with its own unit. So first, **how the organization of this unit will take form, is still debatable and has to be settled**. The main responsibility of this unit will be the design, updating and enforcing (compulsory) ex-ante regulations, and guidelines and code of conduct (non-compulsory) for the relevant platforms and markets players[13]. Guidelines and code of conduct could try to deal with misconducts inside platforms -**competition in the market**- but also among platforms –**competition for the market.** This is highly relevant for **platforms vertical integrated,** which are **rule setters but also a player** inside its own platform.

Second, as modern economies are more data driven, rules for data should be addressed. The **approach to data has to take an integral path and should not be addressed, for example, through competition law alone**. In this context, some efforts were made with GDPR, which deals with the rules regarding the propriety, control, access and portability of personal data[14]. Nonetheless, **there are remaining gaps in the law when dealing with non-personal data, real-time access or interoperability**[15]. Overall, the definitions of proprietary rights are a necessary condition for the well-functioning of markets, and data is not an exemption.

Third, much of policy efforts on data have been related to property, privacy and security -which is an important goal for data regulation-, but **for competition policy the role of information have some ambiguous implications.** For example, data sharing can encourage pro-competitive behavior but also anti-competitive misconduct. **Refusing access to platform generated data in some cases can be understood as barrier to entry** for a given firm -as an anti-competitive foreclosure infringement- that can be detrimental for innovation and efficiency, **also in other cases data exchange agreements between firms can be understood as an anti-competitive behavior**, if sensitive exchanges facilitate collusion[16]. **Competition policy should address what kind of information exchange has to be restricted**, **what kind of information can be shared** and under what terms –such as quality, frequency, etc.

Fourth, after broad data regulation is settled, **there is the question on how to organize data sharing or data markets**. The models at hand are various, one is a **decentralized system** with various data controllers (mostly

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this effect although some states apply them when assessing harm. In any case, the burden of proof of a pass-on effect always rest on the indirectly harmed, like in the EU competition law.

12 See, Furman report

13 For example, Furman report reduce them to the strategic ones, which need to comply with specific provision to reduce likely abuse.

14 Data can be characterized in various ways, such as personal and non-personal; volunteered, observed or inferred. The definition of “data” is important for the goals that public policy wants to achieve.

15 There is a sector specific rules already in place for the financial sector, embedded in PSD2 norm that force real-time access to individual’s account data for consented third parties.

16 For a good literature review on the consequence for competition of information exchange among firms, see Kühn and Vives (1994)

firms), the other takes the form of **a pooled -centralize- system or repository**[17]. Both can be of **free access** -after consumer consent requirements has meet- **or not** -by paying fees, regulated fees or by reciprocity clauses. The case for charging fees has to be understood as a way to finance basic infrastructure investments needed to implement a real-time access system but also to encourage innovation for data quality. There is some **skepticism in the latter model due to the unbalanced conditions in the control of data nowadays**, which tend to favor data dominant firms. Clearly, there are **distributive aspects behind data sharing arrangements** -among firms, within and between sectors-, which need to be taken into account when deliberating policy[18].

Overall, all those **complex competition incentives problems** regarding information and **data sharing arrangements are mostly an under-researched topic** and need to be taken in consideration for policy design and reform. Additionally, it is important to bear in mind that the **challenges posed by digital markets cannot be addressed through competition law and enforcement alone**.

17 If observable personal data shared among firms should be personally identifiable or anonymous, is another unresolved aspect from general data protection rules. Identifiability can be preferable to encourage portability of personal data footprint and multi-homing, restrained, of course, under a "consent regime".
18 For example, if data sharing rules will apply to all firms or only to the ones that meet some specific characteristics (be it size, data users density, or other).

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