

Analytical note on the G7 inventory of new rules for digital markets

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This analytical note was prepared by the OECD Competition Division for the G7 Joint Competition Policy Makers and Enforcers Summit, held on 8 November 2023 in Tokyo.

It accompanies the G7 inventory of new rules for digital markets also prepared for the same meeting and draws some high-level findings, highlighting common patterns and points of convergence and divergence across G7 jurisdictions.

The inventory can be found separately at <https://www.oecd.org/competition/g7-inventory-of-new-rules-for-digital-markets-2023.pdf>.

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1 Introduction, definitions and process

1.1. The goal of the inventory and accompanying note

In the context of Germany's G7 presidency, the OECD Competition Division was entrusted with the task of compiling an inventory of proposed or enacted legislative reforms that have been developed to address digital competition issues in G7 jurisdictions (hereinafter, the "Inventory"). This work has continued to develop in 2023 under Japan's presidency, expanding to non-G7 jurisdictions as well. The aim of the detailed Inventory is to provide an objective comparison of "ex ante" regulations in digital markets in selected jurisdictions, based on their status, scope, institutional setting and content. This note (hereinafter, the "Note") has the purpose to accompany the Inventory and assist the reader in understanding its content, while drawing some high-level findings. The two documents should therefore be read together.

The Inventory and this Note capture the regulatory framework and proposals as of September 2023. Based on the inputs received from ministries and competition agencies, the laws and proposals included in the Inventory and the Note are the following:

- EU's Digital Markets Act ("DMA");¹
- Germany's Act against Restraints of Competition (Competition Act – GWB), in particular Section 19a;
- Japan's Act on Improving Transparency and Fairness of Digital Platforms ("TFDPA");
- UK's (i) Advice of the Digital Markets Taskforce for "A new pro-competition regime for digital markets" (the "Taskforce's advice"); and (ii) UK Government consultation and response on "A new pro-competition regime for digital markets".
- US's (i) American Choice and Innovation Online Act S.2992, as reported by the Senate Judiciary Committee; and (ii) the Open App Markets Act S. 2710, as reported by the Senate Judiciary Committee.
- Korea's Fair Online Platform Intermediary Transactions Act
- Brazil's Law Proposal 2768

As not all countries have yet proposed reforms, and several regulations are currently under discussion, the Inventory will require future updates to reflect relevant developments.

¹ Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (hereinafter, DMA).

1.2. How were regulations selected?

The regulations, enacted or proposed, included in the Inventory and the Note, have been identified based on the following cumulative criteria:

1. **Ex ante nature.** The goal of the regulations is to impose (or to enable authorities to define and impose) clear explicit obligations that apply before any competition enforcement investigation regarding a specific past conduct takes place. Although some provisions may contain specific ex post elements, amending traditional competition law enforcement regimes, the main goal of regulations in the Inventory is to impose clear upfront before-the-event obligations that will be of more straightforward and speedy application compared to ex post enforcement, which assesses the conduct and its illegality once it has occurred.
2. **Applicable to digital markets.** Although the specific spectrum of covered activities varies across regulations, the common feature is that regulations will apply to one or more digital activities or services, in particular to digital platforms.
3. **Regulations have been enacted or are currently under discussion.** Regulations included in the Inventory are already in force or are being actively discussed by legislative bodies. Thus, proposals that have already been abandoned or have little chances of moving forward according to stakeholders' inputs have not been included. Similarly, proposals made in study reports that are at a very preliminary stage are not included.

1.3. The process

The OECD Competition Division developed a template with categories of variables that would reflect the key aspects of the reforms, both in terms of their content and the institutional context around it. The different categories were chosen in order to provide a fixed structure of variables that could be applied to all current and future reforms, thus creating a single and inclusive frame for analysis, allowing an objective comparison across countries. The template also benefited from inputs by other OECD directorates with experience on diverse aspects of regulations in digital markets.

The Inventory was compiled with official information, based on the official reform proposals, original texts of the legislation, or on official translations. It was then submitted to the relevant ministries or authorities for review and final checks on their respective jurisdictions' information.

This exercise further complements OECD Competition Committee's work on regulations in digital markets (OECD, 2021^[1]) (OECD, 2022^[2]), providing a comprehensive inventory as well as a solid base and framework for future discussion around digital markets reforms.

1.4. Definition of the variables/categories

The Inventory is organised around nine groups of variables. Each group encompasses between two and seven sub-questions, as shown in the Annex to this Note.

Without purporting to define exhaustively all the variables in the Inventory, they are grouped under the following categories:

- **Reform status.** This includes information on whether the provisions are already in force or are being discussed by legislative bodies, as of September 2023. It also provides an overview of the instruments through which authorities will ensure future updates of the provisions.

- **Regulated entity.** All regulations in the Inventory are applicable to a set of firms, identified based on specific criteria and designated through a formal procedure. This information is included under this group of variables.
- **Type of proposed reform.** This group of variables captures the nature of the proposed reform. It describes the general features of new regulations, in particular the activities to which they will apply, the level of details of obligations imposed upon designated firms and their *per se* or rebuttable nature. In addition, it depicts provisions on the relationship between the new regulations and existing competition law.
- **Institutional setting and powers.** These variables capture the main characteristics of the bodies in charge of applying the new provisions.
- **Merger control.** These variables cover the main provisions introducing new rules (or amending existing ones) on notification and assessment of concentrations between designated subjects and other firms.
- **Conduct (commercial interactions between platforms and their business users).** This category encompasses provisions establishing obligations or prohibitions of certain behaviours that designated firms can or cannot adopt vis-à-vis their business users.
- **Access to data.** These variables portray provisions that address (i) the issue of competitive advantages that designated firms enjoy by having access to large amount of (specific) datasets; or (ii) issues arising from refusal to grant access to certain data in a readable format.
- **Limits to gatekeepers' use of data.** Unlike the previous category, these variables capture provisions addressing issues arising from the *use* of (as opposed to access to) data.
- **Compliance and remedies.** This category provides an overview of authorities' powers to ensure compliance with new regulations, by imposing sanctions and behavioural or structural remedies.

2 Comparison and findings

Building on information from the Inventory, the following sections summarise the main findings, drawing common patterns and divergences across the regulations. These sections are structured according to the categories of the Inventory. More details on the specificities of each jurisdiction can therefore be found in the Inventory.

2.1. Regulated entity

The ex-ante regulations in the Inventory are all asymmetric regulations, as they will only apply to a subset of firms rather than to all firms in the market. As a result, two questions arise: (i) what do these firms have in common? (ii) How will they be identified?

Despite differences in their regulatory models, all regimes in the Inventory share broadly similar concerns vis-à-vis certain digital firms and adopt similar approaches to identify them.

2.1.1. *The fil rouge for identification of firms*

Although the concepts developed to refer to the firms subject to the new ex-ante regulations vary across jurisdictions, the market power of these firms seems to constitute legislators' main concern.

Competition authorities face new enforcement challenges due to the characteristic dynamics of digital markets (shaped by multi-sidedness, network effects and conglomerate business models, among others). While they have accumulated significant experience in the assessment of market power in digital markets, relying on traditional and new tools, a question has arisen as to whether market power in these markets should be a source of immediate concern, also with regard to firms that are not (yet) dominant (OECD, 2022^[3]). The regulations in the Inventory answer in the affirmative, as they introduce obligations and prohibitions applying to certain firms that, though not necessarily dominant, possess some (form of) market power.

In this context, the terminology for the designation of the entity subject to the digital regulation varies across jurisdictions. From the EU notion of "gatekeeper" to Japan's "specified digital platform providers", the nomenclature is highly diverse.² However, in all cases the conceptualisation of regulated entities is based on the existence of some form of market power, although not necessarily on dominance in its traditional sense. The conceptual link between the size of the firms and their market power, on the one hand, and the various new legal concepts to designate regulated entities, on the other, is clear in all the regulatory regimes, although each focuses on different manifestations of such power.

² The following list contains the different concepts and notions used across jurisdictions to designate regulated entities: firms with "**strategic market status**" (UK); undertaking "**of paramount significance for competition across markets**" (Germany); "**gatekeeper**" (EU); "**specified digital platform providers**" (Japan); "**covered company**" (US), online platform intermediary with "**superior bargaining position**" (Korea), digital platforms with the power to control essential access (Brazil).

- In some of the proposed ex-ante regimes, the characterisation of regulated digital entities is explicitly related to their market power, such as in the UK's "strategic market status" definition (hereinafter, SMS), which only applies when a firm holds substantial and entrenched market power.
- Others, like Germany's "paramount significance for competition across markets" status only contain an implicit reference, which is based on the consideration of a non-exhaustive series of factors, including dominance, financial strength or vertical integration.
- In the case of the EU's DMA, the designation of gatekeepers depends on the durability of the position, contestability, and the intermediation role of platforms, all of them being concepts implicitly related to market power.
- Brazil's proposed law refers to the concept of platforms having 'power to control essential access', which suggests a link to market power. However, so far there is no formal definition of this term other than a turnover threshold criteria specified in the proposed law.
- Across the Atlantic, the US' Open App Markets Act applies to "covered companies" which possess intermediation powers (i.e. a form of market power by platforms offering access to a given proportion of demand) and are thus able to restrict or impede access to one side of the market in question.
- This intermediation power held by platforms vis-à-vis business users is also taken into account by Japan's Act on Improving Transparency and Fairness of Digital Platforms when designating "specified digital platform providers" (SDPP).
- Similarly, in Korea, the proposed act applies to all platforms providing an online platform intermediation service, but the provisions prohibiting unfair business practices apply only to those that hold a "superior bargaining position" over online platform business users.

As it appears from the above, despite their different choice for implicit or explicit links, all regimes end up resorting to market power to select the set of entities to which the new regulations will be applicable. In light of this common concern, market power is far from being restricted to the existence of a dominant position. Across jurisdictions, the concepts used to designate regulated entities are significantly broader than pure dominance, which becomes just one of the possible factors to be considered. The rationale behind this broad approach is to expand the new regulatory regimes to entities which possess some form of market power or act as gateways for business users in spite of not being dominant, thus allowing authorities to intervene more agilely before firms reach dominance or irrespective of such finding.

2.1.2. Criteria to identify firms

Despite market power, in its different forms, being a common concern, not all the proposed ex-ante regimes apply the same criteria to designate firms subject to the new rules. This is the consequence of the uniqueness of the assessment of market power in digital markets. While market shares may be limited proof of market power (or a lack thereof), certain market characteristics contribute to digital firms' market power in new ways compared to traditional markets. Network effects and multi-homing, linkages between products and digital ecosystem business models, economies of scale and scope, data and feedback loops, have taken on a wholly new dynamic in digital markets and are only examples of how certain features of such markets make it challenging to reach definitive conclusions on the existence of durable and entrenched market power (OECD, 2022^[3]). In light of this challenging context, two models can be identified concerning the criteria used to designate firms:

- One having recourse to qualitative *and* quantitative criteria;
- Another only relying on qualitative criteria.

Interestingly, none of the regulations exclusively relies on quantitative criteria, as this may risk not capturing firms that fall below the thresholds, despite having some form of market power. This is indeed

one of the concerns traditionally raised under merger control regimes, where turnover-based thresholds have often failed to capture acquisitions of highly-valued start-ups by large firms, as the business models of the latter may concentrate on creating a large user base, on collecting or analysing significant amounts of data and/or on carrying out research and development before seeking to monetise their services or generate revenue by selling their products (OECD, 2020^[4]). Therefore, legislators seem to have taken this issue into account when designing new ex ante regulations.

The exception to this may be Brazil, where the proposed law does not define in detail the concept of "power to control essential access" nor contain any qualitative criteria to further specify this concept and accompany the quantitative criteria provided.

A large majority of jurisdictions rely on both quantitative and qualitative factors of market power for the designation of regulated entities.³ Thus, they have recourse to specific turnover-based or capitalisation-based thresholds, annual sales and number of active end users and active business users on the platform. However, while such straightforward criteria give legal certainty and ensure that the very largest platforms are captured by the new regulatory regime without any need to conduct in depth assessments, they are applied alongside qualitative criteria, which grant authorities some flexibility in the designation of firms. Therefore, although quantitative criteria are not met, authorities may still be able to designate a firm based on a qualitative assessment of certain characteristics. These can include the ability to restrict firms' access to certain customers, the widespread use of certain platforms by a category of business users, or the existence of an entrenched and durable position.

Germany is a notable exception as, among the regulations in the Inventory, it is the only jurisdiction that has recourse exclusively to non-exhaustive qualitative criteria. These include access to data, financial strength, a dominant position,⁴ vertical integration and activities on related markets or importance of the firm's intermediation services, which are all considered non-exhaustively and non-cumulatively.

Qualitative or quantitative, all jurisdictions apply these criteria without necessarily requiring a previous definition of the relevant market, which proved to be difficult in enforcement cases and could thus delay the enforcement of the proposed ex-ante regulations.⁵

2.1.3. Procedural aspects of designation

Most of the proposed regimes foresee procedures for designating firms subject to the new ex-ante rules in which the authority is responsible for proactively assessing whether a platform meets the abovementioned qualitative and quantitative criteria. However, Japan and the EU have designed a different scheme, in which firms are obliged to self-assess and verify if they meet the specified criteria and, if so, they must then notify the authorities which will issue a decision confirming the pertinent

³ Namely, the US, the UK, the EU, and Japan have proposed ex ante regulations which consider quantitative thresholds together with qualitative criteria.

⁴ The existence of a dominant position could be based, for instance, on prior investigations pursuant to traditional competition law provisions. However, as highlighted in the explanatory memorandum to the German bill (*Beschlussempfehlung*), given the special risks in digital markets, the existence of such a position is not a prerequisite for the application of the new regulation.

⁵ In the EU, although no change is expected in the secondary legislation instruments, the Commission is revising its Market Definition Notice, which sets out the broader competition enforcement framework. Although its principles for market definition will remain unchanged, the revision plans to tackle additional complexities of digital markets which are not fully addressed in the current version of the Notice. For this purpose, the traditional SSNIP test might be complemented with tests on decreased quality (SSNDQ) and increased costs (SSNIC) to provide a more precise definition for digital markets.

'specified digital platform provider' and gatekeeper designations, respectively.⁶ Similarly in Korea, the obligation is on firms to self-assess and notify the authority if they meet the criteria, but there is no formal designation decision. Meanwhile under Brazil's proposed law, the process for designation is not yet clear.

2.2. Type of proposed reform

The jurisdictions included in the Inventory have approached the need for ex ante interventions in digital markets and the interrelation with existing competition law for the most part in similar ways. Most reforms depicted in the Inventory are generally contained in separate acts which do not amend existing competition laws. Thus, existing competition law enforcement instruments will remain intact. Germany is the exception as the German Act against Restraints of Competition has been modernised to empower the Bundeskartellamt to prohibit ex ante certain conducts by designated firms fulfilling the conditions under the new Section 19a.⁷

The fact that the majority of proposed reforms will be enacted as separate acts raises the question of how co-ordination with existing traditional competition provisions will be ensured. Interestingly, few jurisdictions have introduced specific rules on the relationship and co-ordination between the new ex-ante regulation and existing competition law enforcement.⁸ Even for those reforms that explicitly address this issue, co-ordination mechanisms are articulated in relatively broad terms. In Germany, these rules provide that the specific traditional competition regime on abuse of dominance remains unaffected by the new provisions. In Japan, they focus on procedural co-ordination between the enforcer of the new regime (the Ministry) and the competition authority. Similarly in Brazil, there are very high-level provisions relating to the respective powers of the National Telecommunications Agency (Anatel), which will enforce the new regime, and the competition authority (for example, clarifying that merger control will remain the domain of the competition authority).

2.2.1. Rules-based vs principles-based regulations

Amongst the ex-ante regulations in the Inventory, one of the main differences concerns the level of detail that the obligations and prohibitions (will) have, and the discretion granted to the enforcement authority when defining conduct rules imposed upon the designated firm. Indeed, while certain regulations seem to define an exhaustive pre-defined list applying to all designated firms, others give the enforcer the power to adapt them to the specific firm, thus tailoring the dos and don'ts to its specific business model, within the framework defined by the general principles laid down in the law. In this regard, the UK's proposal grants the enforcement authority the highest degree of discretion, adopting a principles-based approach. Legislation will only specify general categories of requirements and principles, while the CMA's Digital Markets Unit (DMU), within those set limits, will have the power to design precise conduct requirements for particular behaviours, tailored to the specific SMS firm and its activities. This will allow the enforcer to give specific content to the legislative general principles and thus tailor obligations upon firms on a case-by-case basis.

⁶ In the EU, this obligation is specifically imposed on firms which provide the so-called "core platform services", which are listed under Article 2 of the DMA. Furthermore, non-compliance with the obligation to notify does not preclude the Commission from designating these firms as gatekeepers.

⁷ It is worth noting that Section 19a is not limited to digital markets but can apply to all firms fulfilling the conditions thereunder. However, an explicit precondition for designating a firm under Section 19a is that the undertaking is active to a significant extent on multi-sided markets or as a network.

⁸ In the UK, the EU, and the US, specific co-ordination rules have not been included in the new acts.

Opposite to this principle-based regime, most jurisdictions follow a less flexible rules-based system.⁹ Under this alternative approach, a distinction could be made between those regulations whose obligations will apply as such in their entirety, and those where the authority will be able to make adjustments to the designated firm, for instance by selecting applicable obligations out of a set list. Section 2 of the American Choice and Innovation Online Act falls within the first category.

Similarly, the DMA has adopted a rules-based system which applies to designated gatekeepers in its entirety. Its Chapter III contains a list of obligations which would all be imposed on the core platform services of gatekeepers, as result of the Commission's designation decision.¹⁰ However, this needs to be nuanced. First, for each firm, the designation decision will specify to which relevant core platform services the obligations will apply. Second, under exceptional circumstances the Commission can issue an implementing act, suspending, in whole or in part, one or more specific obligations. Finally, if the Commission designates as gatekeeper a firm that does not yet enjoy an entrenched and durable position, but that will foreseeably enjoy it in the near future, it may issue a decision declaring only one or more of the obligations laid down in the DMA applicable to the specific gatekeeper.¹¹ These last features bring the DMA closer to the regime established in Germany, which allows the Bundeskartellamt to select applicable obligations within a set list.

Similarly, Brazil's proposed law sets out high-level rules, however it also grants the enforcing agency seemingly broad discretion to impose other obligations, including those that could be specific to certain types of digital platforms.

Combining these flexible and more rigid approaches, Japan's proposed reform is guided by both rules and principles. Within this dual regime, a series of desirable measures (labelled as principles) is set for businesses to follow voluntarily. Alongside this recommended self-regulation, the Act on Improving Transparency and Fairness of Digital Platforms requires the regulated entities to disclose terms and conditions to users and send a prior notification of changes in such conditions to them.

Finally, under both approaches, all G7 jurisdictions apart from, to a certain extent, the EU, allow designated firms to submit an objective justification of their conduct, with the burden of proof placed on the firm itself. Under the DMA, prohibitions are designed as "per se", and thus the gatekeeper cannot bring forward arguments and evidence to show that its conduct is objectively justified.

2.2.2. Scope of application (*ratione materiae*)

Regardless of the specific type of reform proposed or introduced, and the discretion granted to authorities for their application, regulations in the Inventory vary in their material scope.

The UK and Germany have opted for open-ended regulations in which there is no pre-determined list of services and activities to be covered by the new rules, although in the UK proposed Bill chapter 2(3) highlights in broad terms the meaning of the "digital activities" in scope in order to guarantee an easier application. For the remaining jurisdictions, activities and services are defined in advance in legislation,

⁹ Germany, the EU, the US, Brazil and Korea have excluded a principles-based approach in their proposals for ex-ante regulations.

¹⁰ The DMA distinguishes between two types of obligations: those that will be imposed in their entirety (Article 5) and those that will be tailored by the Commission (Article 6) through a discussion procedure with the gatekeeper that will serve to specify the dos and don'ts. In addition, in the future the Commission will have the power to issue delegated acts to update the list of do's and don'ts following a market investigation (see Inventory, "Instruments to ensure fast update of regulation").

¹¹ Pursuant to Article 17(4) of the DMA, in such a case, the Commission shall only declare applicable those obligations that are appropriate and necessary to prevent the gatekeeper from achieving, by unfair means, an entrenched and durable position in its operations.

although varying in their level of detail. In this regard, article 2(2) of the DMA stands out as the most exhaustive and detailed list of activities to be regulated, which are grouped as “core platform services”, with Brazil also proposing a similar approach. In the US, Section 3 of the American Choice and Innovation Online Act defines general categories of services provided by online platforms to which the new rules will apply. Although they generally encompass the services covered by the DMA, they are formulated in broader terms and thus may allow for the capturing of services or activities which fall out of the scope of European regulation.

2.3. Institutional setting

The institutional models for the application of the new rules display a certain degree of convergence. With the exception of Japan and Brazil, in all jurisdictions the enforcement of the new regulations will be carried out by competition authorities, possibly in co-operation with other bodies.¹²

In certain countries, the new rules will be enforced by the competition authority (or authorities) as currently structured, without any explicit legal obligation to create a new unit or establish a new body. This is the case of the US, where the two enforcement agencies (DoJ and FTC) will still be responsible for the designation of covered platforms, with the sole novelty that the FTC will have independent litigating authority. The increase in responsibilities and powers of the enforcer is also seen in Germany, where there has been an extension in the powers of the competition authority.

Under a variation of this institutional model, a specialised unit or body is established within or outside the competition authority, such as in the UK. In this case, the CMA has created a new Digital Markets Unit with new ex-ante powers and a non-statutory design which guarantees operational readiness.

The DMA presents a particular institutional setting for the EU, in which the Commission will be the sole enforcer of the new provisions (possibly working across departments beyond DG Comp), although assisted by a new Digital Markets Advisory Committee. Furthermore, national competition authorities will be allowed to launch investigations into gatekeepers’ possible infringements of obligations under the DMA and report their findings to the Commission.¹³

Finally, Japan’s proposed regime sets a different institutional framework, in which the enforcer is a political body (the Ministry of Economy, Trade and Industry) instead of a regulator or authority. In the case of Brazil these powers would lie within a regulator, the National Telecommunications Agency.

2.4. Merger control

A shared concern in the ex-ante regimes in the Inventory is the scrutiny of transactions by designated firms. In the past, some of the acquisitions by large firms fell below the thresholds laid down in merger control rules and were therefore not reviewed by the authorities. The risk was that acquisitions aimed to discontinue the progress of the target’s innovative projects and prevent future competition (traditionally referred to as “killer acquisitions”) were not captured or scrutinised by merger control regimes (OECD, 2020_[4]). While examples of killer acquisitions can be found across a wide range of

¹² Some jurisdictions have designed rules on co-operation with other regulators. This is the case of the UK, where the CMA’s Digital Markets Unit (DMU) will be obliged to consult with other sectoral regulators when designating a regulated entity. In the EU, the European Commission will have to co-ordinate its enforcement activities with authorities across Member States.

¹³ Recital 91 of the DMA specifies that this will be possible, in particular, where it cannot be determined from the outset whether the gatekeeper’s behaviour infringes the DMA or national competition rules. However, the Commission will remain the sole enforcer of the DMA.

sectors, their impact on the digital sphere has been particularly concerning since it is common, as mentioned above, that in their initial stages highly-valued start-ups have low turnover as they may focus on creating a large user base and/or on carrying out research and development before seeking to monetise their services and generate revenue by selling their products (OECD, 2020^[4]).¹⁴ Given the risk of under-enforcement, certain jurisdictions have proposed amendments in their new digital regulations, so that transactions by designated firms are brought to the attention of the competition authority.

This is the case of the EU and the UK,¹⁵ although the precise extent of the obligations varies across jurisdictions. In the EU, a general obligation is imposed on gatekeepers to *inform* the authority about all their transactions. In contrast, in the UK, only the most significant transactions that meet a UK nexus and a minimum value threshold criteria will be subject to mandatory notification, with completion prohibited prior to clearance. While Germany does not foresee this general reporting or notification obligation, its new regime, though not specifically targeted to acquisitions by global digital firms, allows the competition authority to impose a targeted and time-limited obligation on companies which meet certain criteria, obliging them to *notify* every acquisition they conclude in a given industry.¹⁶

2.5. Conduct

As explained in section A above, the common factor for the designation of regulated entities across jurisdictions is the existence of some form of market power. Due to this shared concern for the regulation of digital platforms, the proposed ex-ante regimes focus on similar conducts, which mainly relate to the commercial interactions between platforms and their business users. Namely, with the exception of Japan, whose regulations have a narrower scope, the regulations of the UK, the EU, Germany and the US all explicitly address the following anticompetitive behaviours: self-preferencing, bundling and tying, lock-in strategies and anti-steering practices.

The EU, the US and Germany explicitly prohibit (or allow the authority to prohibit) the designated company from favouring its own products and services over those of competitors, for instance through ranking or by presenting them in a more favourable manner, with minor variations in terms of the details of this prohibition. In Brazil, the proposal provides a general obligation of non-discriminatory treatment in the offer of services to business users and end users, with self-preferencing being expressly mentioned in the provision's justification. In line with its principles-based approach, in the UK the new regime will allow the authority to set a requirement on firms not to self-preference.

Similarly, the UK regime will allow the authority to set a requirement on firms not to tie or bundle products/services. Regarding such practices, the German Act keeps the potential prohibition broad, listing different examples of ways in which the undertaking can use such conducts to foreclose competitors,¹⁷ and prohibiting them. Along the same lines, in the US, the American Choice and

¹⁴ Between 2009 and 2019, Amazon, Apple, Facebook, Google, and Microsoft completed around 400 acquisitions globally (UK Government, 2019, p. 91^[16]). However, as they did not trigger the notification thresholds, very few were looked at in detail by competition authorities.

¹⁵ The US, Japan, Korea and Brazil have not included any modification to their merger control regimes within their ex-ante digital regulation proposals.

¹⁶ In Germany, the application of Section 39a (request for notification of future concentrations) is not limited to digital markets. Under the 9th amendment to the German Competition Act in 2017, specifically with a view to capturing acquisitions by digital firms, Germany introduced a transaction value-based threshold alongside existing turnover thresholds.

¹⁷ German Act against Restraints of Competition, Article 19(a)(2) points 3 and 4.

Innovation Online Act forbids covered firms from making access to the covered platform conditional on the purchase of other products or services.¹⁸ In contrast, in the EU, the prohibition is narrower as it prevents gatekeepers from requiring users to subscribe or register with a core platform service as a pre-condition to use or access any other services.¹⁹ In Korea, the proposed reform would prohibit an intermediary to their trading position to force users to purchase goods or services that they did not intend to.

The UK, US, EU and Germany consider in their reforms the need to prohibit practices that might give rise to lock-in-effects, such as restrictions to use competing services and limitations of users' right to un-install any pre-installed software application. However, unlike for other practices, this is not reflected in one clear-cut provision, exactly because of the variety of conducts that may lead to such an effect.

While all jurisdictions, apart from Brazil and Korea, have enacted provisions on anti-steering practices, their content shows some differences. Indeed, while the DMA and the US introduce a prohibition on (wide and narrow) MFN clauses applying to product prices and conditions,²⁰ other jurisdictions (e.g., Germany) only allow prohibiting restrictions on product advertising through (or use of) different channels, without interfering with contractual provisions on pricing.²¹ In Korea, anti-steering practices and lock in strategies are exclusively addressed under the Competition Act and not the new proposed Act.

As to the regulation or prohibition of specific conducts, Japan's reform has a narrower goal than the other jurisdictions and focuses exclusively on fairness and transparency for the terms and conditions governing the interactions between platforms and business users. This obligation for fair and transparent terms and conditions is present across all jurisdictions, although the breadth of its scope varies. In the UK, it amounts to a general transparency goal seeking "fair dealing" and "trust", that will be translated into more specific requirements set on designated firms. In Germany, it is more precisely defined, requiring designated firms to provide their business users with sufficient information about the scope, quality or success of the service rendered or commissioned. Korea's reform has specific requirements around contracting in writing and providing notice prior to amending contact terms or restricting, suspending or terminating services. In the US, fairness and transparency provisions entail that platforms cannot discriminate among business users in the application of their terms and conditions. Similarly to Japan, in the EU, contracts between platforms and their business users constitute the main focus of transparency provisions. However, the European regulation foresees transparency provisions for specific services such as advertising, for which it mandates gatekeepers to provide advertisers with access to performance measuring tools. Indeed, the DMA provisions on transparency are the most narrowly defined across all jurisdictions, and only concern specific services involving advertisers and publishers. It is important to note that the DMA's provisions are complemented by the EU Regulation on platform-to-business relations ("P2B Regulation"),²² enacted in 2019, which

¹⁸ Section 3(a)(5) makes it unlawful to "condition access to the covered platform [...] on the purchase or use of other products or services offered by the covered platform operator that are not part of or intrinsic to the covered platform."

¹⁹ DMA, Article 5(8) provide that the gatekeeper "shall not require business users or end users to subscribe to, or register with, any further core platform services listed in the designation decision pursuant to Article 3(9) or which meet the thresholds in Article 3(2), point (b), as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services listed pursuant to that Article."

²⁰ DMA, Article 5(3).

²¹ German Act against Restraints of Competition, Section 19a(2), No. 2(b).

²² Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. This regulation was also applicable

sets a number of rules aimed at creating a fair, transparent and predictable business environment for businesses active on online platforms.²³

2.6. Access to data

Traditionally, access by a firm to a rare input has been considered a key source of market power (OECD, 2022^[3]). In digital markets, competition authorities have often labelled data as such an input: when incumbent platforms accumulate data, network effects and economies of scale are strengthened, thus possibly raising barriers to entry. Yet, data differs from traditional inputs. Its contribution to market power needs to be assessed under certain criteria, such as its scope, its substitutability, its quality and accuracy, the nature of data flows, and whether scale or specific resources are needed for an effective use of such data. However, when data does contribute to market power, it can also facilitate anticompetitive behaviour and the emergence of exclusionary practices. In this context, platforms' handling of data has become a key topic in the ex-ante regimes included in the Inventory.

Firstly, regulations in the EU, the US and the UK contemplate a mandatory access to data held by platforms. In the first two jurisdictions, such access is granted to business users in relation to the data generated by their activities and interactions on the designated entity's platform, while in the UK it will be set on a case-by-case basis. In the remaining jurisdictions, no provisions on mandatory access to data are foreseen.

Secondly, Germany, the UK,²⁴ the US and the EU all have introduced provisions to prevent restrictions of interoperability, in favour of both business and end users. However, the extent and pervasiveness of such provisions vary across regulations. While some jurisdictions (e.g. Germany, US) only provide for a negative prohibition not to hinder interoperability or make it more difficult, the EU and (possibly) the UK also foresee a positive obligation to ensure interoperability, for example to allow and provide readily accessible means for users to use third party apps. Furthermore, besides vertical interoperability obligations aimed to address digital bottlenecks issues,²⁵ some regulations (e.g., DMA) explicitly and precisely provide for a positive obligation to ensure horizontal interoperability.²⁶

Thirdly, these same four countries adopt a similar approach as to platforms' restrictions (contractual or technical) on data portability, laying down a prohibition to refuse it or make it more difficult (e.g.

in the UK as part of the transition period following the UK's exit from the EU. Following the end of the transition period on 31 December 2020, the EU version of the P2R Regulation was retained in UK law, with some amendments largely to make it UK-centric (see Taskforce's advice, Annex A, p. A1).

²³ These include for example a ban on sudden, unexplained account suspensions, a ban on changing terms and conditions without appropriate notice, a requirement to disclose the main parameters marketplaces and search engines use to rank goods and services on their site, as well as mandatory disclosure for a range of business practices.

²⁴ Once again, in the UK case this prohibition is not generic and will only be enforced upon request by the CMA's DMU.

²⁵ Vertical interoperability refers to the ability of services *at different levels* of the digital value chain to work together (e.g., different app stores being installed on the same operating system). Horizontal interoperability, in contrast, refers to the ability of products and services *at the same level* of the digital value chain to work together (e.g., different text message services).

²⁶ For example, Article 7 of the DMA requires the gatekeeper to ensure interoperability between its number-independent interpersonal communication services and those of another provider. This obligation covers different features and functionalities with the view of ensuring interoperability (e.g., providing technical interfaces, or enabling sharing of images, voice messages, videos and other files in end-to-end communication).

Germany, the US), which in the EU takes the form of a positive obligation to ensure effective portability of data, including by providing tools to facilitate its exercise.²⁷

In Brazil, while encouraging data portability and interoperability are stated objectives of the proposed law, no overarching obligations are set in this regard. However, the proposal does give the agency discretion to impose platform-specific obligations, which expressly include those related to data portability and interoperability.

2.7. Limits to designated firm's use of data

Market power and the resulting competitive advantages do not only arise from access and control of the data generated through users' activities on the platform, but also from the ability to process such data. Namely, platforms can combine the data generated on one of their core services with those of other services or with third-party databases through aggregation techniques, which can further increase the value of the data and thus the platform's market power. This practice can for example emerge when platforms have broad ecosystems, which not only allow them to expand their activities in a variety of different businesses, not necessarily related, but also to reap the benefits of combining data, including personal data, from different streams. For this reason, besides opening up access to data held by designated entities, certain jurisdictions also limit what designated entities can do with the data they hold (and namely, data combination and aggregation practices).

First, the proposals of the UK, Germany and the EU contain provisions on the combination of data from different sources. In the DMA, this prohibition is envisioned in Article 5, which restricts gatekeepers' options for the cross-use of personal data, "unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679."

Furthermore, these same three jurisdictions contemplate the imposition of data silos to keep different datasets separate and act as a limit to the designated firm's use of data.²⁸ In the UK, data silo remedies could be implemented by the DMU in order to restrict the sharing and use of data across business units of designated entities (i.e., firms with strategic market status), as part of the pro-competition interventions tool. In Germany, Article 19a.4 of the Act against Restraints of Competition can also be applied to limit the processing of third-party data to the provision of services by the platform to those third-parties.

The UK is the only jurisdiction to contemplate a potential time limitation for the retention of data, once again to be imposed by the DMU. The EU, UK and the US are in turn the only regimes to include line of business restrictions, while in the US, covered companies are prohibited from using non-public data (obtained through either the use of their platforms by businesses or interactions between businesses and end users) to support their products or services which compete with those of business users. Similarly, in the EU, Art 6(2) provides that gatekeepers shall refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users (including by the end users) of its core platform service, or provided by those business users (or their end users) of its core platform service.

²⁷ DMA, Article 6(9) provides for such a positive obligation to ensure data portability and provide, free of charge, tools to facilitate its effective exercise, including by the provision of continuous and real-time access to such data.

²⁸ For example, as mentioned in the UK Taskforce's advice, this could amount to a prohibition preventing data collected in a designated activity being used to provide an advantage in the firm's other activities.

Finally, Brazil's proposed law contains an obligation regarding a platform's "proper use of data collected in the course of its activities", however the scope of this obligation is not clear at this stage.

2.8. Compliance instruments

In order to ensure compliance with the new regulatory regimes, all proposals contemplate the possibility to impose sanctions and remedies. The specific conditions for their application, however, slightly change across jurisdictions.

2.8.1. Sanctions

All jurisdictions grant the competent body the power to impose fines. However, the UK and Japan consider fines as a last resort solution for ensuring compliance. In the UK, a more flexible system focuses on the reversal of infringements through constructive engagement with firms rather than punishing. Formal investigations and penalties of up to 10% of the firm's annual worldwide turnover are hence a last resort for serious regulatory breaches. A similar stance is taken in Japan, where, before imposing a fine, the enforcer (i.e., the Ministry for the Economy, Trade and Industry) will issue a warning notice to the designated entity and then advise it to comply. However, in continental Europe a more direct system is followed: fines of up to 10% of the firm's annual worldwide turnover are imposed directly upon an infringement and no co-operation procedure is contemplated.

2.8.2. Remedies

Besides guaranteeing compliance through the imposition of fines, some jurisdictions also have the possibility to address the infringement through remedies. Five of these envisage both structural and behavioural remedies (the EU, the UK, Germany, the US and Brazil), while Japan and Korea opt for behavioural remedies only.²⁹

In Germany structural remedies are only applicable in cases in which behavioural alternatives are insufficient or not as effective. In the US, structural remedies in the form of divestiture are contemplated for cases of conflict of interest arising from ownership of a specific line of business. Another significant difference regarding structural remedies is found in the conditions for their imposition. For instance, in the EU remedies can only be imposed in case to the gatekeeper has systematically infringed the obligations in the DMA and has maintained, strengthened or extended its position.

2.9. Conclusions

This Note draws a number of high-level findings from the Inventory of ex ante regulations. In particular, it finds that there are numerous points of convergence, despite the differences in the criteria for designation as well as the approach in defining prohibitions, obligations, and the specific covered conducts.

First, all the ex-ante regulations in the Inventory are asymmetric regulations, as they will only apply to a sub-set of firms rather than to all firms in the market. Furthermore, despite their specificities, the criteria for designation aim to capture the largest digital firms based on an agile assessment of market power, irrespective of a finding of dominance. Second, most jurisdictions have taken stock of the risks

²⁹ Behavioural remedies focus on correcting the infringing conduct, by imposing future-oriented obligations constraining firms' action (such as mandating interoperability), while structural remedies seek to alter the structure of the market in order to preserve competitive pressure (for example, by mandating the divestment of assets).

arising from digital firms' transactions, in particular killer acquisitions that were not captured and scrutinised due to the design of merger control regimes. Third, when defining dos and don'ts, legislators have specifically taken into account certain features of digital markets that likely confer market power, in particular access to and cross-use of data. Finally, in most jurisdictions the enforcement of the new regulations will be carried out by competition authorities, possibly in co-operation with other bodies.

On the one hand, given the global reach of digital firms, such convergence may help reduce the costs imposed by new regulations. On the other hand, differences in approach will help assess ex post which regulatory model has better achieved the initial goals.

Yet, divergences may give rise to risks. These may include higher compliance costs and lower legal certainty both for designated platforms and their customers and business users, for instance in relation to their rights and protections, as well as risks of conflicts in the design of remedies. This is discussed further detail in the annex to this note, using the example of requirements relating to data portability and interoperability. International co-operation can help promote regulatory consistency and reduce the costs of divergences, both at the stage of regulatory design as well as of their enforcement.

As a further point to note, with some exceptions, the momentum behind regulatory reform appears to have partially slowed down, since the peak of experts' proposals (e.g. Furman Review, Stigler Committee report, Crémer report) a few years ago. While the reasons for this are not entirely clear, there could be a number of factors at play.

For instance, it may be that some jurisdictions are waiting to see how implementation of the regimes by earlier adopters play out. Depending on the nature and geographic scope of changes gatekeepers make to comply with the requirements of the earlier regimes, some jurisdictions may consider that separate national regimes, or at least some aspects of them, are no longer required.. As such, international cooperation throughout the implementation stage will be important as a means of sharing experiences to help new, effective and targeted regimes move forward while avoiding inadvertent disalignment.

Another factor may relate to policy prioritisation, including potentially digital platform regulation moving lower down the list of government priorities and/or a disconnect between the will and motivation of competition authorities and governments in this space.

Finally, it may be that there have been outcomes from ex-post enforcement actions, or there are promising investigations underway, that are challenging the view that ex-post competition laws are inadequate for remedying anti-competitive conduct in digital markets. This may be because remedies imposed through such actions are viewed as sufficient to address competitive harms. Actions against one platform may also have a broader deterrent effect, leading to other platforms making voluntary changes to their practices to avoid the costs and negative publicity of potential subsequent court actions.

Annex A. Regulatory alignment and the case of interoperability and data portability provisions

The analysis provided in this note shows a certain degree of convergence between the different jurisdictions' regulatory approaches, accompanied, however, by some divergence in terms of the precise obligations imposed on designated firms. This annex aims at illustrating possible risks of partial divergence between reforms, using the example of interoperability and data portability provisions.

Globally, there is substantial consensus on the underlying rationale for the implementation of a pro-competitive regulation in digital markets, and further, the frameworks proposed to date, albeit different in their details, are not necessarily incoherent in their provisions. However, although it would be challenging to achieve full consistency at the global level, and coherence might be sufficient to guarantee effective implementation of such measures (Fletcher, 2022^[5]), there is still potential for problems to arise as a result of a degree of regulatory disalignment between jurisdictions when it comes to the proposed reforms.

Indeed, regulations in one jurisdiction will most likely have extra-territorial effects, as the new regimes will apply to global platforms, often at the centre of complex ecosystems that operate beyond the limits of national boundaries. Therefore, regulation design that takes into account the global nature of the companies subject to it, together with a good level of international coherence amongst the reforms, is needed to ensure regulations are effective and to limit unnecessary costs and unintended consequences, such as reducing innovation or the quality of services offered to consumers.

Moreover, related to the issue of divergence in the substance of regulations is the issue of divergence in timing. As the new regulations do not share the same timeline, there is the risk that the first jurisdiction to proceed with implementation will set the standard for platforms' conduct at the global level. Designated companies could indeed decide to adapt their business design and practices across all their global activities, de facto extending compliance with one specific regime to all other jurisdictions in which they operate, as this could be more efficient from a corporate perspective (de Stree et al., 2022^[6]). This could take place in the form of companies aligning their global operations to the most restrictive national regulation, rather than tailoring their operations and standards to each separate regulation.

Finally, the risk of fragmentation of regimes will continue to grow in the coming years, with more and more jurisdictions currently discussing reform proposals in this domain. This will potentially increase the complexity of the regulatory environment and the difficulties for platform users, being it business users or individual customers with international exposure, if faced with regulatory disalignment or divergence in key areas. Possible inconsistencies in the new regimes will emerge more clearly during the implementation phases where the interpretation and specification of the new provisions could potentially increase divergence in practice.

The next challenge for regulators trying to address the global issue of market power in digital markets will be determining how to mitigate the risks of inconsistent approaches, and to understand what type of cooperation, be it amongst multiple relevant domestic authorities or internationally, will ensure that the desired results can be achieved. In the absence of a global digital framework, in the next few years

international fora such as the OECD can help respond to the increasing demand for international coherence and cooperation (Competition Policy International, 2022^[7]).

The case of interoperability and data portability provisions

Even when different regulatory regimes appear to be broadly targeting the same types of conducts and competitive issues, divergences within the details of the specific provisions and in their practical implementation could potentially have significant implications. The related concepts of data portability and interoperability, and the varying ways in which, and degrees to which, these can be mandated can be used as examples to illustrate the inconsistencies that may arise and the potential risks of regulatory disalignment.

In respect of data portability, its value varies depending on factors such as the scope of the data captured, and the format and mechanism through which it is to be provided.

Theoretically, data portability initiatives can enhance competition in a number of ways. For example, data portability can potentially address the issue of consumers becoming 'locked-in' to incumbent services due to the inability of competitors to access their existing user data. Data portability allows users to move their accumulated data store to a competing supplier, enabling them to switch to that supplier and/or multi-home (OECD, 2021^[8]). As such, data portability schemes can exploit the non-rivalrous nature of data and shift competition between suppliers away from the collection of data towards the analysis of data to gain insights (Kramer, Senellart and de Streel, 2020^[9]).

However, data portability initiatives have limitations, and to date they have not proven sufficient to enhance competition in some markets. For example, in markets where there is a strong incumbent, consumers are not necessarily incentivised to move their data to an alternative supplier. This may be because there is no competing service to switch to (ACCC, 2019^[10]), or even if there is, there may be strong network effects benefitting the incumbent and reducing the attractiveness of the alternative (OECD, 2021^[8]). Further, the effectiveness of data portability depends on the means by which data can be ported as well as on the type of data. Data portability measures that facilitate only static, one-off or ad hoc data transfers that could become rapidly outdated may not provide much benefit to new competitors or providers of complementary services (OECD, 2021^[8]).

Finally, mandated data portability measures can carry certain risks, in particular with regard to data protection. Concerns have been raised that data portability may make users more willing to provide their data to a platform, knowing the switching costs associated with that data will be lower (i.e. it will be easier to access later on), leading to privacy and data security concerns. Moreover, if portability applies to the entire market, incumbents might have access to entrants' data, ported by new entrants' users, potentially preventing them from gaining a foothold (OECD, 2021^[8]).

Due to the limits of data portability provisions implemented in isolation, some regulators have shifted their focus towards more comprehensive interoperability requirements, which can constitute an effective instrument to restrain market power in digital markets.

As referred to in the accompanying note, interoperability can be categorised as vertical or horizontal, depending on whether it seeks to focus on competition within individual ecosystems or competition between different ecosystems. However, vertical interoperability can be further divided into two subsets – within-platform vertical interoperability, whereby third-party developers supply complements to a given platform, and cross-platform vertical interoperability, whereby those third-party developers offer their complements to the range of different platforms in the market. Because cross-platform interoperability requires that the interfaces between the different platforms be standardised to some extent, it also incorporates elements of horizontal interoperability (Bourreau, Kramer and Buiten, 2022^[11]).

The distinction between horizontal and vertical interoperability has important implications, as they have different advantages and limitations from a competition perspective. Theoretically, horizontal interoperability can enhance competition among digital platforms by removing the firm-specific advantages of network effects and aggregating them into market-wide network effects, shared amongst market participants. This could allow the entry of firms competing on other dimensions such as quality or privacy (Bourreau, Kramer and Buiten, 2022^[11]).

However, commentators have noted some potential downsides of horizontal interoperability, including the fact that it may disincentivise multi-homing by consumers or reduce incentives for service providers to innovate or differentiate (Colangelo and Borgogno, 2023^[12]). More specifically, mandating specific standards to ensure interoperability can have an adverse effect on competition incentives by entrenching certain business models, protocols, technologies, which can in turn help to entrench the market power of incumbents. Innovation levels could therefore decrease if the entrenchment of standards hampers entry of innovative players or limits firms' incentives to develop improved standards. Conversely, interoperability requirements could drive innovation and competition around new features that are not captured by the standards thus rendering the requirements obsolete (Colangelo and Borgogno, 2023^[12]). The use and implementation of standards will be discussed in more detail below.

Finally, measures promoting horizontal interoperability can, in some instances, increase the risk of anticompetitive behaviour. Enhanced transparency, standardisation, and multi-market contacts could facilitate collusion (Crémer, de Montjoye and Schweitzer, 2019^[13]), while the role and use of APIs may offer incumbents new means to abuse their dominant position (OECD, 2021^[8]).

While some of these risks could emerge also in the case of vertical interoperability, such requirements may be able to avoid some potential downsides of horizontal interoperability while promoting competition within ecosystems, and for this reason have been more of a focus for competition authorities to date (OECD, 2021^[8]). For instance, digital platforms often offer downstream products and services in competition with third-party providers. As such, vertical interoperability requirements can help prevent different forms of anticompetitive leveraging.

For instance, vertical interoperability can restrict the opportunity for digital platforms to implement technical tying. This is generally done by technically integrating products and selling them together, but also by limiting the compatibility of other products, so that consumers are eventually coerced into buying the dominant platform's tied product. In addition, interoperability can avoid the binary choice between prohibiting and allowing tying, meaning that platforms can still tie their products as long as they also allow interoperability. The binary choice is indeed difficult as often tying can bring efficiencies.

Similarly, vertical interoperability can reduce a platform's ability to self-preference as consumers can more easily select a combination of different providers of complementary product and services, rather than being locked into the incumbent's offering (OECD, 2021^[8]). Finally, vertical interoperability also facilitates the sharing of network effects as new downstream entrants can readily access the platform's significant existing user base.

As described in this accompanying note, the extent and pervasiveness of data portability and interoperability provisions vary across regulations, however many of the details are not yet clear. Despite general agreement that interoperability measures are needed to promote competition in digital markets, the specific details of the regimes implemented by different jurisdictions and the extent to which they might diverge will have important implications. Key considerations include the specific markets and services captured, as well as the nature and degree of interoperability imposed, including whether the regimes are vertical and/or horizontal in nature. For instance, a negative prohibition not to hinder interoperability, as seen in Germany, and a positive obligation to ensure interoperability, as in the DMA, might lead to different scenarios when implemented. Moreover, ahead of implementation it is difficult to tell if, under the UK Bill, SMS firms will be required to ensure vertical or horizontal interoperability, or both, and thus what will be the implications for firms subject to both the UK legislation

and the DMA, as well as their users. This is also the case in Brazil, where it appears that the enforcing agency could have quite broad discretion to impose platform-specific requirements relating to interoperability. Examples of the potential implications of this are outlined in the section below.

In respect of data portability, while obligations are envisaged (or at least accommodated for) under most the regimes proposed to date, these are expressed only in broad terms, and as such, it is not clear what the precise nature and scope of such requirements will be, including the extent to which there is international convergence. For instance, the German regime prohibits firms with paramount significance from ‘refusing... data portability, or making it more difficult’, however it does not specify the means by which data portability should be enabled, while the DMA requires gatekeepers to enable data portability including by the provision, free of charge, of ‘continuous and real time access to data’. The UK bill also does not specifically refer to data portability, however data portability measures could be imposed as part of the pro-competitive intervention mechanism, which broadly enables the CMA make orders regarding the conduct of a SMS firm for the purpose of remedying, mitigating or preventing an adverse effect on competition. In Brazil, as is the case for interoperability, the authority has discretion to impose platform-specific obligations, which are expressly stated to include those relating to data portability.

Implementation

The effective implementation of interoperability and most forms of data portability is dependent on standards; being sets of technical rules and characteristics that allow devices to connect and integrate while ensuring the quality and security of interactions (Colangelo and Borgogno, 2023^[12]). Standards can be closed, meaning that they are unique to the platform, which retains control over access and can impose certain technical and/or legal requirements (Colangelo and Borgogno, 2023^[12]). Alternatively, they can be open, meaning they are freely available to any party wishing to develop interoperable products and services. For example, in the case of messaging, there is the established XMPP standard, yet popular messaging services such as WhatsApp and Signal do not use this, instead opting for their own proprietary standards that do not permit interconnection (Riley, 2020^[14]).

Interoperability in digital markets is most frequently implemented through standards known as APIs, which are technical interfaces that allow streamlined access to a defined set of data and/or functionality (OECD, 2021^[8]). APIs may also include an authentication function to ensure a user has granted consent, and as such, they help give rise to multi-sided markets (OECD, 2021^[8]) and enable the re-purposing of non-rivalrous networks and data (Kramer, Senellart and de Stree, 2020^[9]).

Standards, including the development of APIs, can also be industry-led or formal, including through legislative requirements. Industry-led standards develop when market players (either independently or collectively) voluntarily define common procedures and characteristics which are required for product interoperability, such that they become ‘de-facto’ standards. Conversely, regulators may require the development of mandatory standards by independent standard-setting organisations which are then imposed on the market in a ‘top-down’ manner (Colangelo and Borgogno, 2023^[12]).

In terms of data portability, alternative mechanisms for implementation include ad-hoc downloads, whereby data is stored, ideally in a commonly used format, and made available online. Downloads do not guarantee interoperability as the data are not being exchanged on a continuous basis as they can be through APIs. The use of downloads may increase the digital security and privacy risks as the data is stored outside the original information system of the data holder (OECD, 2019^[15]). As referred to above, in the EU, the DMA specifies that data portability must occur on a ‘continuous and real time’ basis, but it is possible that downloads could form part of measures implemented in other jurisdictions’ regimes.

Data sandboxes can also be used to facilitate the re-use of sensitive data. Sandboxes are isolated environments which allow data to be accessed and analysed by third parties, but only exported, if at all, when the results are non-sensitive. The sandbox may be technical (a machine that cannot be connected to an external network) or may require on-site presence at physical location where the data is held (OECD, 2019^[15]).

In terms of digital market regulation, there is the prospect that the implementation stage may bring to light material divergence in different areas covered by the new provisions, one of such examples being the regimes' interoperability requirements relating to number independent messaging services.

So far, the DMA is the only regime to clearly implement a horizontal interoperability requirement (for number independent interpersonal communication services) and the implications if other jurisdictions choose not to do so are not yet clear. For example, there may be extra-territorial impacts if the affected messaging services elect to implement, on a global basis, any changes to their services that are necessary to comply with the DMA. The likelihood of this occurring is potentially increased by the fact that number-independent messaging services are not confined to national borders, given one of their benefits to users is that offer a frictionless means of communicating with other users across different jurisdictions. It is therefore unclear what the outcome will be, for example, for messaging communications between the EU and the UK if horizontal interoperability is ultimately not required under the UK's regime.

Further, even if multiple jurisdictions do implement horizontal interoperability regimes for the same services, there could be differences in the detail of their design. Horizontal interoperability requires the identification of important common features that standards can be designed around (for example, the DMA requires interoperability between the 'basic functionalities' of number independent interpersonal communications services). Complexities could arise, for example, if there are differences in the core features identified in different jurisdictions. These issues could also arise in respect of any cross-platform vertical interoperability requirements that are ultimately imposed.

As a further point, implementing horizontal interoperability will likely require at least some coordination between providers of competing services in order to develop common standards, which, as previously mentioned, could increase the risk of collusion. While jurisdictions requiring the implementation of horizontal interoperability may consider this risk acceptable in light of the perceived benefits of horizontal interoperability, issues associated with collusion can extend beyond geographic borders and its impact could still be felt in jurisdictions that have not implemented horizontal interoperability, including because either they have made a different risk assessment or have not yet reached a view. Relatedly, firms may be incentivised to develop and/or propose standards which, due to cost or other implications, may act as a barrier for potential new entrants. Given that many digital products such as messaging services operate internationally, this could have competitive impacts in jurisdictions that have not implemented the requirements.

Making these predictions more difficult (and speculative) is the fact that, from a competition perspective, there are few examples of mandated horizontal interoperability in the digital space which could provide insight as to how such requirements might be implemented in practice. This contrasts with within-platform vertical interoperability requirements, where there is precedent from the mergers context which may provide guidance as to their potential benefits and/or pitfalls. For example, in clearing the Google/Fitbit merger, the EC imposed conditions requiring Google to maintain interoperability between its mobile operating system and rival wrist-worn wearable fitness devices. The EC could draw from any lessons learned through its monitoring of implementation of this (and other similar) requirements when monitoring and liaising with gatekeepers in respect of the implementation of vertical interoperability requirements under the DMA.

However, important divergences could also arise in the case of vertical interoperability provisions, depending on the specific requirements for implementation. This could occur if, for example, one regime

imposed a top-down, prescriptive standard for interoperability between particular services (for example, an operating system and software) and another set out general principles but left the detail of technical implementation up to individual platforms.

Further, relevant to both horizontal and vertical interoperability, as services develop and their core features change over time, one jurisdiction may require a corresponding change or update to one or more standards, while another requires the platforms to remain compliant to an original standard, and it may not be technically feasible for the same service (or services) to simultaneously adhere to both.

In respect of data portability requirements, as previously mentioned, the value of such regimes can vary depending on the scope of the data captured. Issues may arise if there are significant divergences in this regard, particularly given some users may utilise services across jurisdictions. For example, there is a significant difference between a data portability scheme applying just to data that has been knowingly provided or volunteered by a user, to one that also includes data a platform has observed about a user (such as usage patterns), or even data a platform has inferred or derived about a user based on probabilistic analysis. These differences extend beyond the realm of competition and also have implications for privacy and security.

Conclusions

The reforms proposed to date generally show convergence with respect to the key conducts of concern and the broad mechanisms, including the imposition of data portability and interoperability obligations, to address them. However, there is already scope for some material divergences to arise. The extent of this may not be known until more details of the precise obligations of the current proposals are developed and implemented.

Further, there is scope for further divergences to arise as new regimes are proposed and advanced in other jurisdictions. The pace at which such reforms are developed may also impact the extent to which reforms in the first-mover jurisdictions have extra-territorial effects. For example, platforms may choose to roll out changes necessary to comply with the DMA more broadly in other jurisdictions which do not have their own framework, for efficiency reasons or even to pre-empt or deter the introduction of further regimes.

This phenomenon of uniform roll-out could also occur in respect of later reforms if, for example, they are more restrictive than earlier reforms, including because, at least in respect of some digital services, they are used by users (both businesses and consumers) across jurisdictions. In both cases, they may have the effect of altering the dynamics of particular digital markets in way that is not ideally suited to some jurisdictions, reducing quality and/or innovation.

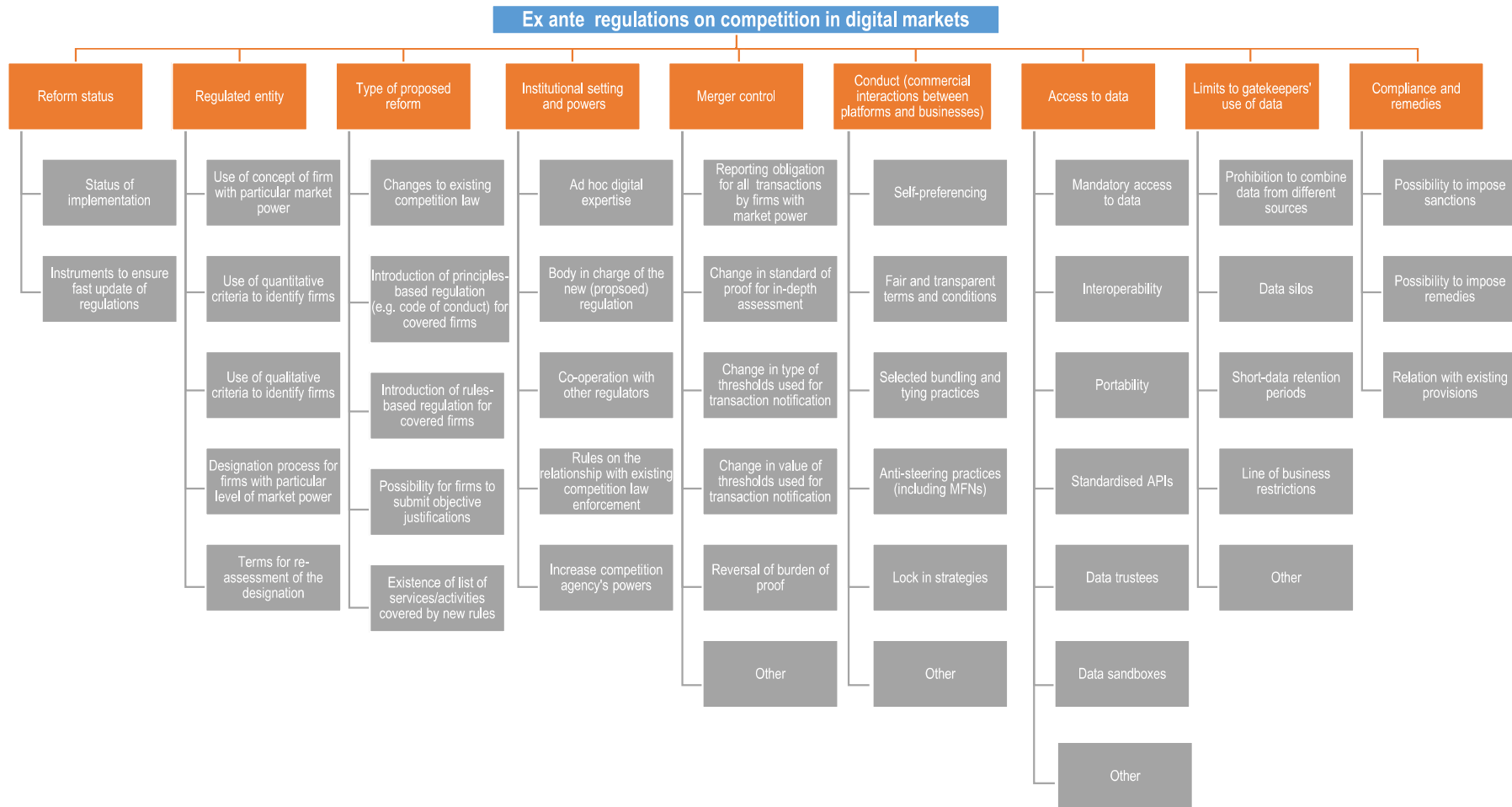
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Annex B. Chart of categories and variables of the Inventory



The OECD submitted a **G7 inventory of new rules for digital markets** during the G7 Joint Competition Policy Makers and Enforcers Summit held on 8 November 2023 in Tokyo, Japan.

This analytical note draws some high-level findings, highlighting common patterns and points of convergence and divergence across G7 jurisdictions.

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