

The turtle and the gazelle: Can competition policies effectively regulate the digital economy?

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Contents

- INTRODUCTION** 3

- NETWORK EFFECTS AND MARKET DOMINANCE** 5

- MONOPOLIES AND COMPETITION** 6

- THE TURTLE AND THE GAZELLE** 7

- EFFICIENCY GAINS AND FREE SERVICES** 9

- DIGITAL COMPETITION REGULATION IN THE ASIA-PACIFIC** 12
 - Increasing scrutiny: select jurisdictions 14
 - Regional frameworks 18

- CIRCLING BACK TO THE CONSUMER WELFARE PRINCIPLE** 20

- CONCLUSION** 22

- RESEARCHER BIO: ASIAN TRADE CENTRE** 23

- ENDNOTES** 24

Introduction

In the late 1990s, the United States government took on a challenge that at the time seemed insurmountable: it tried to break up Microsoft, then the world's most influential software firm. Microsoft was accused of violating the Sherman Act – a 130-year-old anti-monopoly law originally aimed at regulating the railroad industry.¹

Though ultimately unsuccessful, Microsoft was found to have harmed consumers through distorting competition, ignoring consumer preferences, and pressuring processor maker Intel to halt the development of new software that would increase competition.² Regulators argued that Microsoft's actions inevitably led to efficiency and welfare losses for society at large. In attempting to address a perceived monopoly, policymakers hoped to remedy theoretical future harms.

In the intervening years, the digital economy has experienced exponential growth – and debates over monopolies have returned.

According to the World Economic Forum, 70% of the new value generated in the global economy over the next decade will be based on digitally enabled platform business models.

Although the kind of scrutiny over competition remains broadly similar, today's economy barely resembles that of two decades ago. Access to Information and Communications Technologies (ICT) has vastly increased. New digital business models are proliferating, as are innovations like digital marketplaces and software as a service (SaaS). Search engines and social networks have substantially altered traditional conceptions of markets and demonstrated explosive growth. According to the World Economic Forum, 70% of the new value generated in the global economy over the next decade will be based on digitally enabled platform business models.³

Often, digital platforms like marketplaces lead to efficiency gains, as data collection and aggregation can reduce market failures and trade distortions.⁴



Even amidst the sharp downturn caused by the COVID-19 pandemic, tech giants reached all-time-high market capitalizations.

The size of US tech giants

Concerns over the enormous and seemingly ever-growing, size and influence of tech giants is a global phenomenon, with regulatory and legislative bodies increasingly shifting focus to the digital sphere. The largest American tech firms – Apple, Microsoft, Amazon, Alphabet, and Facebook – are simply massive in terms of market capitalizations.

Figure 1 – The size of top US tech firms

Tech firm	Market cap (US\$ billion) ⁵	Total employees ⁶
Apple	2,252.3	147,000
Microsoft	1,966.6	182,268
Amazon	1,711.8	1,335,000
Alphabet	1,538.9	135,000
Facebook	939	60,543

The largest tech firms have market capitalizations larger than the gross domestic product of many countries.

But in parallel with the technology sector's rapid growth is ever increasing market concentration and capitalization. Even amidst the sharp downturn caused by the pandemic, tech giants reached all-time-high market capitalizations. The five largest companies on the US stock market – all tech companies – have maintained a combined value of more than 20% of the total market.⁷

The rapid growth of the digital economy is by no means a US phenomenon. The digital economy accounted for nearly 40% of China's GDP in 2020, while online shopping services grew by 70 million users in Southeast Asia in the same year.⁸

Many policymakers have argued that, if harnessed more effectively, existing competition policy frameworks should ensure healthy competition in the digital economy.

The sector's growth and apparent dominance of a handful of firms has prompted greater scrutiny of the tech giants and a renewed focus on the appropriate use of competition policy and regulation to manage outcomes. Many policymakers have argued that, if harnessed more effectively, existing competition policy frameworks should ensure healthy competition in the digital economy. However, without adequate regulatory tools and appropriate conceptualization of existing competition policy options, authorities have struggled to cope with non-traditional business models and evaluate alleged anti-competitive behaviours.

While the optimum solutions may not yet be in sight, this paper examines many of the current approaches and proposed responses to the growing power of digital firms. The risks of "getting it wrong" are also large, with potentially significant challenges ahead. As is often the case, the burden will fall most heavily on the smallest firms, including domestically located companies that are often assumed to be the biggest beneficiaries of new applications of competition policy. Consumers of platforms are not only citizens, but also represent other firms, as the digital economy increasingly occupies a critical role in supporting economic growth and development.

Network effects and market dominance

Digital platforms, like marketplace services, app stores, social networking sites, and search engines, are essential elements of the digital economy.⁹ These platforms are intermediaries, bringing different users such as buyers and sellers together in an online venue.¹⁰

Between some of these distinct user categories, there is an indirect network effect. This means that the value of participating in the platform for one user category can increase when more users from another category join. For example, when more buyers join an online marketplace, the value of participation increases for sellers, as there are more potential customers. Likewise, buyers benefit from increased choice when the number of sellers increase. For example, the value of a ride-sharing platform increases for drivers when there are more riders, and vice versa. This means users are often drawn to the largest platforms, which can come to dominate the market.¹¹

Often, first movers come to occupy large market shares, as the network effect boosts the value of already large platforms. This can lead to what is known as a 'natural monopoly'.

Often, first movers come to occupy large market shares, as the network effect boosts the value of already large platforms. This can lead to what is known as a 'natural monopoly', in which the first mover is the only firm in the market simply because no competing firm yet exists. Given market dominance and the associated revenue streams attached to being a market leader, it can be easier for such firms to snap up potential rivals long before they are large enough to threaten the lead firms for any specific sector.

Platforms like Amazon, Facebook, Airbnb, and Uber are also multisided – they create value by enabling interactions between user groups.¹² These platforms may act as intermediaries and take a percentage of sales or offer zero-price services and generate revenue from advertising to users. Multisided platforms may attempt to vertically integrate, where the platform both hosts a digital marketplace and acts as a seller on the same platform. Amazon is an example of a vertically integrated marketplace. This allows platforms to direct consumer traffic towards its own products or services with a process called self-preferencing.

In addition to vertical integration, digital firms frequently make efforts toward horizontal integration, wherein the firm seeks to acquire other businesses in the same industry. This growth strategy, while not unique to the digital sphere, can lead to large enterprises that offer a variety of differentiated services. Both vertical and horizontal integration contribute to the market dominance of digital platforms.

Monopolies and competition

The vigour with which national competition regulators pursue problems of perceived anti-competitive behaviour depends on several factors, including level of development, ideological leanings, and enforcement capacity.

Students of neoclassical economics will recall that in the theoretical ideal market structure, firms occupy small market shares, sell undifferentiated goods, and have no barriers to entry or exit. Perfect competition, theorists argue, produces the best possible outcomes for consumers and society at large.

The monopoly sits at the other end of the spectrum. One firm dominates the market, sets inefficiently high prices, and creates substantial barriers to entry for potential rival firms.

In competitive markets, businesses competing for consumer dollars are incentivized to offer high-quality products at lower prices than their competitors in order to better the competition and capture larger market shares.¹³ Competition further encourages businesses to remain as efficient as possible, including by potentially offering higher wages.¹⁴ This means labour and capital are allocated to successful businesses, increasing overall productivity.¹⁵ It is this pursuit of productivity, innovation, and growth that motivates the efforts of multilateral organizations and individual governments to foster competitive markets.

The vigour with which national competition regulators pursue problems of perceived anti-competitive behaviour depends on several factors, including level of development, ideological leanings, and enforcement capacity. While some governments carefully examine corporate mergers that threaten to limit consumer choice, others may actively defend, for example, the monopoly of a state-owned enterprise (SOE) in the telecommunications industry.

Policymakers are struggling to keep pace as the inherent scalability of digital platforms causes market structures to change quickly and often.

Increasingly, authorities share a purview that extends to the digital sphere. Policymakers are struggling to keep pace as the inherent scalability of digital platforms causes market structures to change quickly and often.

In the context of this rapid change, policymakers often find themselves ill-equipped to meet the challenge of regulating competition in the digital sphere. Armed with tools perhaps better suited to non-digital aspects of markets, they are unable to enact timely policy. Improper conceptualization of digital markets can also result in incongruent policies.

Competition policy in the digital sphere is made more complex through its relationship with Intellectual Property (IP) rights, e-commerce, data privacy and investment laws, all of which are intrinsically related to doing business in the tech industry. Competition, IP, laws on data privacy and investment are likely to be enforced by different authorities. Differing laws in these areas can greatly influence market structures and the viability of a given business model in a given jurisdiction. For example, a ride-sharing app may be permitted to buy out a competitor in one jurisdiction, leading to complete dominance of the market, while such an action may be forbidden in another.

The turtle and the gazelle: Government policies against big tech

Much of the current conversation around competition regulation is US-centric. This is partly due to the US' dominant economic position and its passing of some of the first modern-era competition laws. Modern competition policy first arose in the United States near the end of the 19th century as a response to rapid industrial consolidation in several key industries. To break up industrial cartels, policymakers passed the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1914 .

The consumer welfare principle remains central to global competition policies, wherein the harms of anti-competitive behaviours are conceptualized as high prices, low outputs, and the absence of innovation.

Perhaps the most significant of such efforts was the breakup of Standard Oil, which at one point controlled 91% of US oil production and made its founder, John D. Rockefeller, the wealthiest person in history.¹⁶ According to the reasoning of the US Supreme Court, firms with monopoly power can lower output, raise prices, and reduce innovation without losing market share.¹⁷ It was this harm to consumer welfare that ultimately justified government intervention in the market to correct clear market failures. Though the laws have since been updated with amendments, they remain the backbone of US competition policy – and were the first of their kind. The consumer welfare principle remains central to global competition policies, wherein the harms of anti-competitive behaviours are conceptualized as high prices, low outputs, and the absence of innovation.

As mentioned, Microsoft represented an important test case. According to the US Department of Justice, Microsoft had attempted to create a monopoly in the personal computer market by pre-installing Microsoft's Internet Explorer for free, ultimately leading to the collapse of competitor Netscape.¹⁸ Microsoft was found to have harmed consumers through distorting competition and ignoring consumer preferences.¹⁹ Though ordered to break up into two distinct entities, this order



The breakup of Standard Oil was perhaps the most significant of all modern-era efforts to enforce competition laws. At one point it controlled 91% of US oil production and made its founder, John D. Rockefeller, the wealthiest person in history.

was reversed on appeal. Microsoft settled with the Department of Justice, which dropped its move to break up the company in exchange for an agreement to share computing interfaces with other companies.

At the time, Microsoft was clearly the dominant player in the Operating System (OS) space, an industry where the firm still looms large. But usage of the pre-installed Internet Explorer has cratered from above 90% of internet users in the early 2000s to a single-digit percentage today.²⁰ Microsoft's actions in the late 1990s were clear attempts to maintain hegemony over the internet browser market. However, it is arguable whether Microsoft's actions to stifle competition had lasting negative impacts – the reasoning behind the DOJ case. Competing internet browsers have managed to temper Microsoft's dominance by putting forward new and innovative products.

Regulators pursued Microsoft to address anti-competitive actions, as these were argued to create harm to consumer welfare. However, critics have countered against “monopoly fatalism” and noted that authorities are ill-equipped to guess future market conditions.²¹ Instead, market-leading companies may be best positioned to fund extensive research and development, thus spurring innovation and growth.²²

It is worth noting that companies and products previously proclaimed to have reached monopoly status in the tech world – including Myspace, Apple's iTunes, Nokia, Yahoo's search engine, and Xerox – were unable to maintain their market dominance.²³ Instead, innovative competitors swooped in to replace the front-runners and disrupt markets. Theoretically, absent government intervention, it should be extremely difficult or impossible to disrupt an entrenched monopoly firm. Yet the repeated collapse or retreat of once dominant digital players and platforms belies this assessment.

The pace of antitrust litigation further complicates attempts at regulating digital competition. In the fast-paced world of tech, the subject of the case may no longer be relevant, having been replaced by an innovation from a competitor, as is so often the case. Policymaking is the turtle constantly passed by the gazelles of industry.

The pace of antitrust litigation further complicates attempts at regulating digital competition.²⁴ It can take years before a regulator recognizes a potentially actionable case. It can take as many years in court to achieve a ruling. In the fast-paced world of tech, the subject of the case may no longer be relevant, having been replaced by an innovation from a competitor, as is so often the case. Policymaking is the turtle constantly passed by the gazelles of industry.

This is not to say that attempts to regulate competition are bad or counter intuitive. However, policymakers are often insufficiently capable of dealing with a sector that can so quickly change – where market leaders can rise and fall rapidly and where innovation proceeds at break-neck speed. Much of the conversation about contemporary tech monopolies takes a similarly short-sighted perspective, wherein calls for the need for stricter regulation echo past complaints about the dominance of Internet Explorer, Myspace, and Yahoo.

Efficiency gains and free services

US regulators pursued the landmark Standard Oil and Microsoft cases under the same law, where both companies were accused of similar offences. Both companies were said to unfairly limit competition and use their position in one market – oil production and operating systems – to gain an unfair advantage in another market; that is, railroads and internet browsers.

Authorities may see vertical integration as enabling firms to accumulate too much market power, potentially violating the Clayton Act in the US and other anti-monopoly acts elsewhere.

However, policymakers are not necessarily focused on achieving allocative efficiency, as vertically integrated firms can realize efficiency gains. For example, an e-commerce company that brings previously contracted-out customer deliveries in-house is likely to cut expenses and reduce overhead. These cost savings can be passed on to consumers, and the firm can end up being more competitive than less efficient firms. Yet this is the type of action that attracts scrutiny from competition regulators. Authorities may see vertical integration as enabling firms to accumulate too much market power, potentially violating the Clayton Act in the US and other anti-monopoly acts elsewhere.

Further complications arise when considering competition regulation in the digital sphere. In tech, natural monopolies are common. Beyond the digital sphere, a natural monopoly occurs when start-up costs are insurmountable. Examples can be found in most public utilities – for example, in the water sector, where often SOEs account for the entirety of a market – and where the capital costs to start a new company in the industry are prohibitive.

In tech, ‘natural’ monopolies arise when digital platforms experience network effects. For users of digital platforms, the value of the platform in question often reflects the number of users. This can contribute to large platforms dominating markets, as users gravitate towards larger platforms.



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Market concentration in select global tech markets

Globally, tech markets are becoming increasingly concentrated. Markets worth hundreds of billions of dollars per year are dominated by a handful of tech giants, and their market shares continue to rise.²⁵

Figure 2 – Global cloud infrastructure market share (2021)

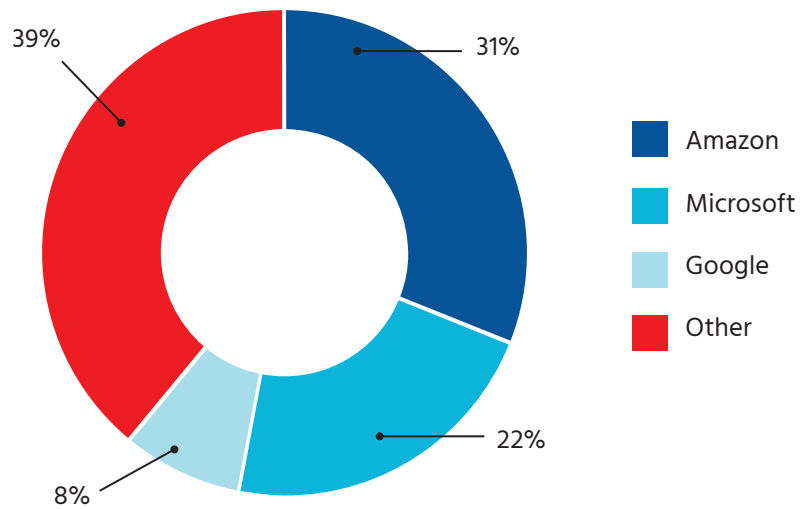
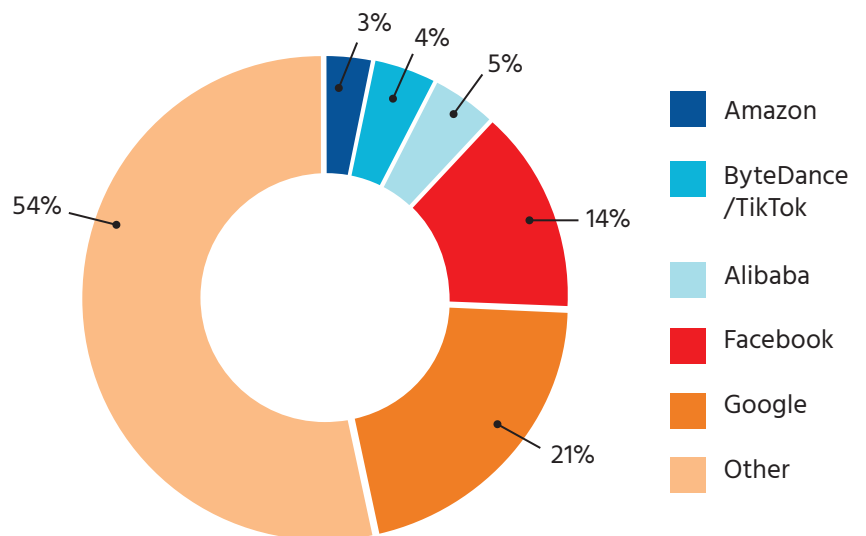


Figure 3 – Global ad revenue (2020)





The free or low-cost services provided by many digital platforms create a new host of issues for regulators assessing the damage caused by monopolies.

Anti-monopoly laws tend to address situations where competition is feasible – that is, government-supported natural monopolies are absent – but a single firm is perceived as unfairly dominating the market. Otherwise, laws and regulations simply attempt to limit the amount that a monopoly, whether natural or not, can charge consumers.

Originally, competition policy was developed in response to the potential (or actual) effect of a monopoly in driving up costs for consumers. The free or low-cost services provided by many platforms, however, create a new host of issues.

Unpriced digital platforms present a special challenge to regulators. Traditional conceptions of anti-monopoly law are not always congruent with the realities of tech markets. Originally, competition policy was developed in response to the potential (or actual) effect of a monopoly in driving up costs for consumers. The free or low-cost services provided by many platforms, however, create a new host of issues.

Rather than using price or costs, regulators refer to alleged harms to consumers and competition from the unpriced services of platforms, which do not fit traditional definitions of damage. If monopoly laws are framed around preventing exploitation through high prices passed on to consumers, the dominance of unpriced digital platforms – and the vigour with which critics warn of this dominance – signals a key disconnect between the tools and approaches regulators are taking to address big tech.

Digital competition regulation in the Asia-Pacific

The rapid growth of the digital economy in the Asia-Pacific region outpaces the rest of the world. Between 2016 and 2018, Asia accounted for 52% of total growth in the revenue of technology companies.²⁶

The Asia-Pacific region is diverse in terms of economic development. When it comes to competition regulation, the region experiences varying levels of buy-in and enforcement capacity. Myanmar, Lao PDR, and Cambodia, for example, are focused on market liberalization to increase ICT uptake through lower prices. Hence, policymakers in these countries seek to bring in more internet and cellular providers into markets previously dominated by a handful of SOEs. Conversations and concern around the digital platform giants should be careful not to exclude less developed nations, as they have overtly stated their intent to expand to new regions and users.

By 2025, Statista predicts that there will be 3.13 billion e-commerce users in Asia, an increase from 2.38 billion today.

Consider again the sector's explosive growth. In 2020, there were 782 million online consumers in China alone.²⁷ By 2025, Statista predicts that there will be 3.13 billion e-commerce users in Asia, an increase from 2.38 billion today.²⁸ While familiar players like Apple, Amazon, Microsoft, Google, and Facebook have a presence in the market, domestic and regionally focused digital platforms are also extremely popular.

Market structure can vary considerably by country. Southeast Asia is home to two very popular multi-service apps: Gojek, the ride-hailing app with 100 million monthly active users, and competitor Grab, which hit US\$507 million in revenue on the first quarter of 2021. Chinese markets are dominated by domestic firms, many with little presence outside of China. In addition to Gojek, dominance for Asian firms can be found in Alibaba's online marketplace Taobao, with 755 million monthly active users.

A key trend worth noting is the popularity of 'super apps,' applications in which users can enjoy multiple services on a single platform. Through the tangible benefits offered to users with both vertical and horizontal integration, these apps can keep users from straying from the platform, driving daily usage and maintaining user engagement.

A key trend worth noting is the popularity of 'super apps,' applications in which users can enjoy multiple services on a single platform. These services may include messaging, e-commerce, payments, hotel bookings, ride-hailing, and more. WeChat, with over a billion users, offers an estimated one billion services through integrated third-party programmes. Through the tangible benefits offered to users with both vertical and horizontal integration, these apps can keep users from straying from the platform, driving daily usage and maintaining user engagement. Already-dominant super apps are likely to capture much of the region's growth in coming years.

Such super apps may lead to several concerns about competition. As with other integrated platforms, these platforms attempt to keep users' transactions inside the app or platform. For instance, a WeChat user might order food from a WeChat driver using WeChat Pay, with the platform collecting its cut at several points in the transaction.

Super apps may further raise privacy and data usage concerns. Typically, user consumer preferences, financial information, and social media profiles are all under the same app. Access to this data can further entrench the dominance of specific

platform markets, as firms can leverage data to improve customer experiences and drive more user activity.

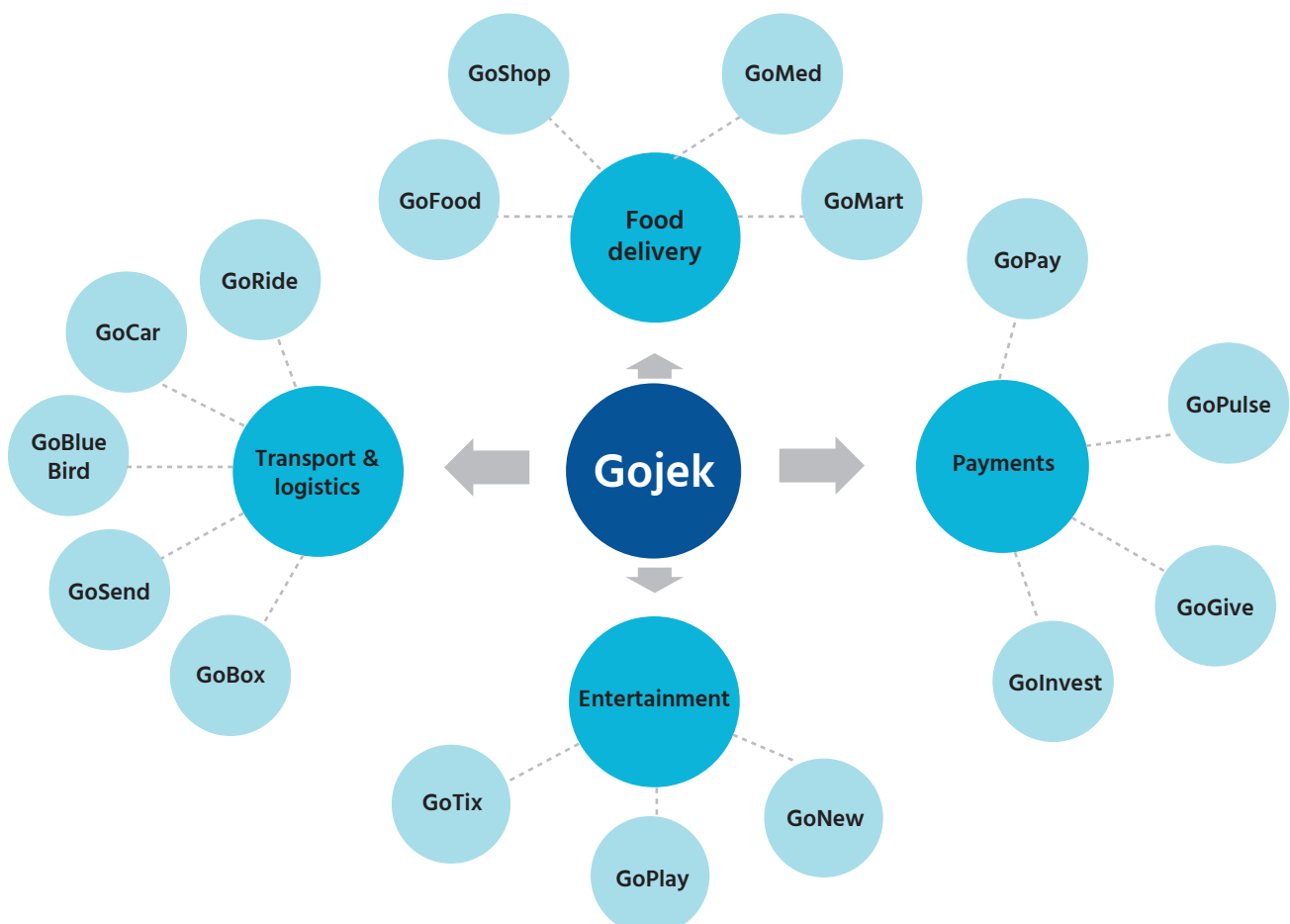
Despite concentrated tech markets in the region, especially for digital platforms, competition regulation has received relatively little attention. In Southeast Asia, enforcement actions against tech firms have been uncommon, with few examples to draw on. China is an obvious exception, as regulators have increasingly challenged the market power of large firms.

SPOTLIGHT

Super-app Gojek

Gojek is an Indonesia-based 'super app' that offers users a wide variety of services in a single integrated platform. As Indonesia's first 'unicorn' company, Gojek is currently valued at US\$10 billion.²⁹ In May 2021, Gojek merged with e-marketplace Tokopedia, attracting scrutiny from Indonesia's competition regulator.³⁰

Figure 4 – Gojek's services



Increasing scrutiny: select jurisdictions

Regulatory authorities have varying mandates, powers, and focus areas, depending on jurisdiction. However, relatively few jurisdictions have regulatory tools specially adapted to regulate the digital sphere and experts have debated whether existing competition laws and tools are sufficient. UNCTAD notes that views have been tipping in favour of legislative reforms and ex ante regulation.³¹ As digital platforms enjoyed explosive growth during the pandemic, digital tools and individual platform use by both consumers and firms will likely continue to increase.

With characteristics distinct from other business models, digital platforms are particularly difficult to regulate when authorities rely on traditional regulatory tools. Authorities encouraged to stimulate growth and innovation also try to strike a balance between over and under-enforcement. This section briefly surveys the underlying policy frameworks across key Asian markets and their apparent willingness or ability to use existing tools to address competition challenges.

China

It is worth noting that most of China's tech giants are largely domestic companies – a pattern rarely seen outside of the United States. The sheer size and scale of China's domestic market allows for ample competition and market size, without a need to find overseas consumers.

In addition to several additional provisions, China's competition regime is governed by the 2007 Anti-Monopoly Law, which is aimed at ensuring fair market competition and safeguarding consumer interests to promote the "... healthy development of [the] socialist market economy."³² Competition regulation is managed by the Ministry of Commerce, the National Development and Reform Commission, the State Administration for Industry and Commerce, and the State Administration for Market Regulation (SAMR). Penalties can be up to ten percent of total turnover in the previous year.

Authorities have put forward several competition regulations that are digital-focused. These include a draft amendment to the Anti-Monopoly Law that will increase scrutiny of online platforms and new anti-trust guidelines for digital platforms, which were released in February 2021. While the most recent of the regulations have not yet come into effect, this has not stopped authorities in China from pursuing digital platforms for violating existing laws.

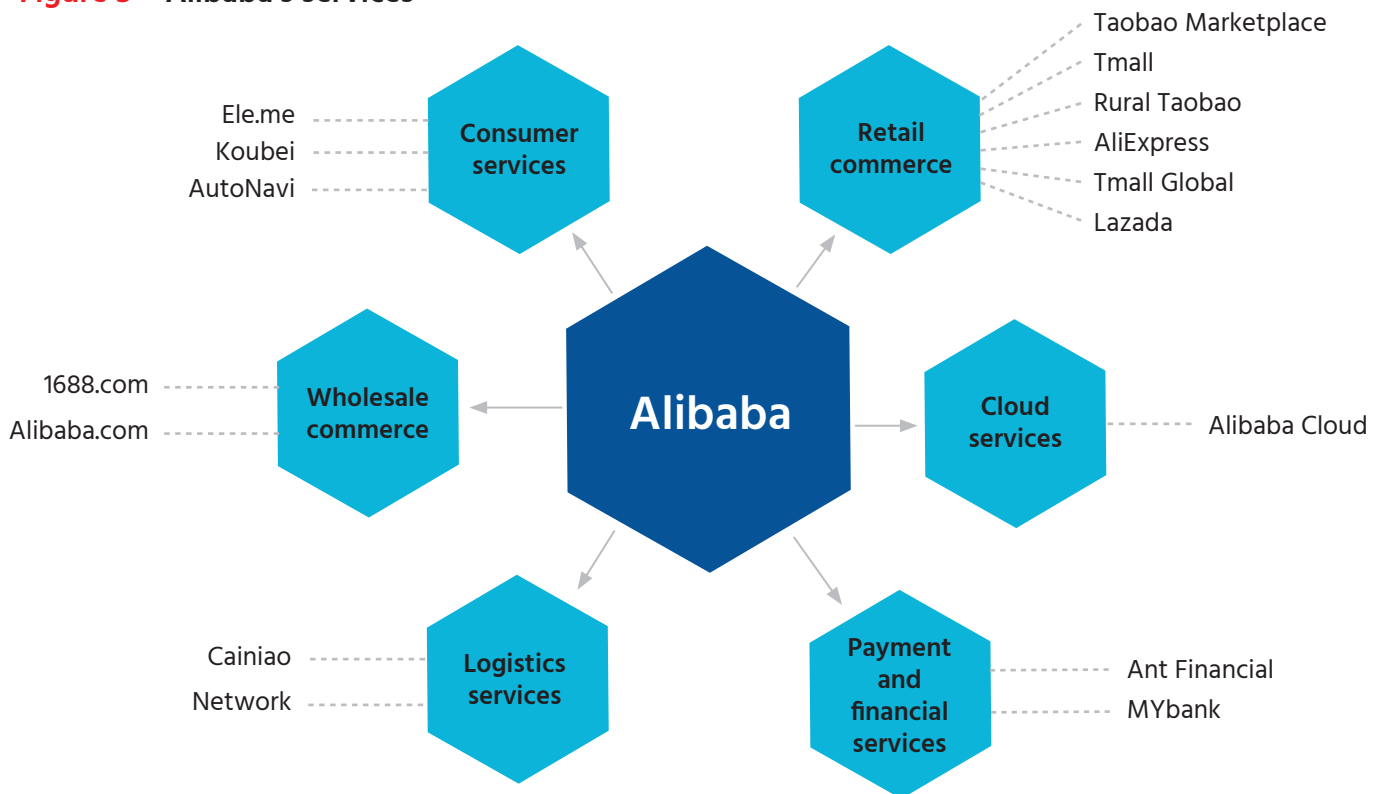
Examples of such policing efforts are both numerous and frequent. Widely termed a 'crackdown' on tech, frequent enforcement action against Chinese tech firms over the past year has led to market volatility and an uncertain outlook for digital markets in China, wiping out hundreds of billions of dollars in wealth for shareholders.³³ Many of China's leading tech companies, including Tencent, Meituan, Pinduoduo, Full Truck Alliance, Didi, Baidu, and ByteDance have been fined for various offences by the SAMR – of which some of the offences occurred before the regulatory body was created in 2018.³⁴

It is worth noting that most of China's tech giants are largely domestic companies – a pattern rarely seen outside of the United States. In general, these companies are focused on the domestic market, though some may have a presence in other countries. By contrast, American tech giants generally operate all over the world. Of course, the sheer size and scale of China's domestic market allows for ample competition and market size, without a need to find overseas consumers. Most economies do not have the same scale for domestic-only operations. For example, China's "Lipstick King" sold US\$1.7 billion in products by livestreaming for just 12 hours in the lead-up to a Singles Day event in 2021 on e-commerce platform Taobao.³⁵

Alibaba Group

China-based Alibaba is a successful and diversified e-commerce company with a domestic and regional consumer market presence. In 2014, the company made history when Alibaba's Initial Public Offering (IPO) rose a record-breaking US\$25 billion.³⁶ In 2020, Alibaba Group posted consolidated revenues of US\$109 billion.³⁷ China's competition regulators have increasingly scrutinized Alibaba Group and its affiliated firms. In April 2021, the SAMR fined Alibaba a massive US\$2.8 billion for abuse of market dominance.³⁸

Figure 5 – Alibaba's services



India

India is primarily guided by the 2002 Competition Act, enforced by the Competition Commission of India (CCI). The Act makes no specific mention of the digital sphere, but the 2019 Competition Law Review Report does offer recommendations to ensure the sufficiency of Indian competition law in this area. As such, authorities have increasingly scrutinized digital markets and several high-profile cases have demonstrated the CCI's willingness and ability to pursue global tech giants for violations of the Competition Act.

In March 2021, the CCI declared that WhatsApp had violated the Competition Act, through a new privacy policy that shared data with parent company Facebook.

This data sharing, the CCI argued, would complicate efforts by up-and-coming competitors to enter the market.³⁹

Information Technology Rules were released by the Ministry of Electronics and Information Technology in February 2021 and came into force in May. Though not overtly aimed at regulating competition, the legislation imposed increased compliance costs for large digital platforms featuring user-generated content, such as Facebook and Instagram, as well as communications platforms such as WhatsApp. The 2020 E-Commerce Rules further establish a compliance framework for digital platforms that are likely to disproportionately affect smaller platforms.⁴⁰

Like China, India's domestic market is substantial enough to support firms without the need for a cross-border strategy. However, unlike China, many of India's leading digital companies such as Infosys and Tata started as firms providing digital services to global firms. How India will manage the tension between outward-focused firms and its inward-looking regulatory approach remains unresolved.

Japan

In February 2021, the government of Japan enacted a law specifically designed to regulate digital platforms; the law is called the Act on Improving Transparency and Fairness of Digital Platforms. By requiring the platforms to be proactive in ensuring transparency and fairness, the Act adopts a 'co-regulation' approach.

The 1947 Anti-Monopoly Act is the primary legislation governing Japan's competition regime, which is enforced by the Japan Fair Trade Commission (JFTC). In February 2021, the government of Japan enacted a law specifically designed to regulate digital platforms; the law is called the Act on Improving Transparency and Fairness of Digital Platforms. Applying to specified digital platform providers designated by the Cabinet Ordinance, which set thresholds based on sales figures in defined fields of business in Japan, the Act is applicable extraterritorially. By requiring the platforms to be proactive in ensuring transparency and fairness – through a framework of guidelines issued by the Ministry of Economy, Trade and Industry⁴¹ – the Act adopts a 'co-regulation' approach. It provides a general framework while leaving day-to-day enforcement to businesses.

The JFTC is increasingly shifting focus to digital platforms. For example, it is conducting market surveys from the perspective of 'Abuses of Superior Bargaining Power' in respect to benefits to businesses and the privacy of general users.⁴² Thus far, big tech has not run afoul of the Anti-Monopoly Act. Hence, despite relatively active regulatory authorities, significant enforcement actions have not taken place.

Indonesia

In addition to several ex-ante regulations, the 1999 Anti-Monopoly Law governs Indonesia's competition regime. These rules are managed by the Supervisory Commission for Business Competition (KPPU) and the Competition Commission of Indonesia. Firms found to violate these regulations can be found civilly or criminally liable depending on the severity of the violation. The KPPU has also issued ex-ante regulations for competition in the digital sphere, signalling an increased focus off the back of a 2017 review of the digital economy.

In 2020, the KPPU assessed a fine of US\$3.2 million for Grab, which was found to have unfairly given preference to ride-hailing drivers from partner company Teknologi Pengangkutan Indonesia.⁴³ Though the decision is being appealed, the KPPU is showing prioritization of digital competition. According to global law firm Norton Rose Fulbright, the KPPU has also hinted more focus on the country's financial technology sector.⁴⁴



It is unclear how India will manage the tension between outward-focused firms, such as leading digital companies Infosys and Tata, and its inward-looking regulatory approach.

Singapore

Singapore's competition regime is guided by the 2004 Competition Act and the 2009 Consumer Protection Act, which are enforced by the Competition and Consumer Commission of Singapore and the Ministry of Trade and Industry. Regulatory authorities have increasingly prioritized anti-competitive behaviour in the digital sphere and have pursued a number of cases using the Competition Act.

Thailand

While not yet in force, the Thai government has put forward draft guidelines on digital platforms, digital services, and e-commerce, signalling more regulatory scrutiny on the digital sphere. The guidelines will supplement the 2017 Trade Competition Act, which is administered by the Trade Competition Commission and covers a variety of anti-competitive behaviours, including restrictive agreements, abuse of dominant position, and mergers.

Digital platforms are an emerging focus for competition regulators. The Online Food Delivery Guidelines, which came into force in December 2020, rein in the anti-competitive practices of app-enabled food delivery companies.⁴⁵ Further guidelines on the telecommunications and digital services sector are forthcoming.⁴⁶

South Korea

South Korea's competition regime is guided by the Monopoly Regulation and Fair-Trade Act, which is administered by the Korea Fair Trade Commission (KFTC).⁴⁷ The KFTC regularly pursues enforcement actions. In 2020 alone, it assessed a total of US\$196 million in fines across 29 cases.⁴⁸

Korean regulators have also enacted several digitally focused policies and regulations. The Information and Communications Technology taskforce was established in 2019 to investigate unfair practices in the digital sphere.⁴⁹ In August 2021, the Telecommunications Business Act was amended; it now requires

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The European Union has put significant efforts toward updating its competition rules to meet the new demands of the digital economy.

application market operators, like Apple’s App Store and Google’s Google Play, to offer consumers a choice of payment methods. App market operators, including Apple and Google, are also asked to turn in compliance plans that detail how the companies plan to meet the law’s requirements.⁵⁰

Further changes to Korea’s digital competition regulations are likely. In 2020, the KFTC proposed the Fair Intermediation Transaction on Online Platform Act, which remains under review.

Regional frameworks

The following section notes several relevant multi-country competition frameworks, which variously apply within the Asia-Pacific region or beyond. These frameworks – in the form of rules established by the economic unions that are ASEAN and the EU or by major regional Free Trade Agreements – reveal levels of prioritization and buy-in by governments and institutions.

Association of Southeast Asian Nations

With a mandate to foster strengthened and compatible competition regimes, the ASEAN Experts Group on Competition (AEGC) will deliver the ASEAN Investigation Manual on Competition Policy and Law for the Digital Economy in 2022.

Given the growing importance of the digital economy in the region, it is no surprise that the Association of Southeast Asian Nations (ASEAN) is prioritizing digital competition regulation. With a mandate to foster strengthened and compatible competition regimes, the ASEAN Experts Group on Competition (AEGC) will deliver the ASEAN Investigation Manual on Competition Policy and Law for the Digital Economy in 2022.⁵¹

Regional Comprehensive Economic Partnership

A free trade agreement between all ten ASEAN nations as well as Australia, China, Japan, South Korea, and New Zealand, the Regional Comprehensive Economic Partnership (RCEP) will be the world’s largest trading bloc when it comes into force for 10 members in January 2022. RCEP countries account for around 30% of global population and GDP. The agreement contains a competition chapter, which aims to promote competition while enhancing economic efficiency and consumer

welfare and affirms the rights of individual states to develop and enforce competition laws. It also provides for technical cooperation activities to build enforcement capacities.

RCEP is unlikely to meaningfully impact competition regimes in the region, as it simply affirms each member's right to police competition on its own terms. However, it is worth noting that critics highlighted the lack of provisions on SOEs, which can lead to trade distortions.

RCEP is unlikely to meaningfully impact competition regimes in the region, as it simply affirms each member's right to police competition on its own terms. However, it is worth noting that critics highlighted the lack of provisions on SOEs, which can lead to trade distortions.⁵²

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The United Kingdom, China, and Taiwan have applied for membership. As implied in its name, CPTPP is a progressive agreement – more so than RCEP. In addition to a legally binding chapter on competition similar to RCEP, the CPTPP also has a chapter on SOEs and designated monopolies. Yet despite the presence of these chapters, limited action has taken place in competition policy or enforcement for online or offline markets.

The European Union

The European Union has put significant efforts toward updating its competition rules to meet the new demands of the digital economy. This includes the Competition 4.0 Framework, which puts forward a number of recommendations to adjust existing EU competition policy to remain relevant in the digital sphere.⁵³

The EU has further proposed the Digital Services Act and the Digital Markets Act, both of which impose new obligations on digital platforms.⁵⁴ If passed by the European Parliament, the laws will allow for large fines for “bad” behaviour – up to ten percent of annual turnover. The Digital Markets Act allows for the break-up of a digital platform if fined three times over a five-year period.⁵⁵

Circling back to the consumer welfare principle

Since the first anti-monopoly laws were enacted around the turn of the 20th century, regulators have sought to boost consumer welfare through preventing monopolistic behaviour that limits choice, raises prices, and stifles innovation. But digital markets are qualitatively distinct. Many factors have shaped the digital sphere into an arena less clearly suited for existing regulatory policies: the services are unpriced. Users can switch between digital platforms with ease. Launching new services often requires limited capital. Constant innovation can generate significant rewards, especially as users find more needs met more quickly and easily.

The challenges facing competition regulators are apparent. Traditional regulatory tools are insufficient. Enforcement actions are also often insufficiently dissuasive. Competition law litigation tends to take a long time compared to the speed of change in the digital economy, and actions often use somewhat arbitrary turnover thresholds. Enforcement is also complicated by the tendencies toward 'natural' monopolies and the multisided nature of markets. If enforcement takes place, typically it only assesses nominal fines for "bad" behaviour and does not significantly alter market structures.

One question that is often overlooked is whether these efforts to rein in digital platforms are likely to meaningfully boost consumer welfare. The answer is not clear.

One question that is often overlooked is whether these efforts to rein in digital platforms are likely to meaningfully boost consumer welfare. The answer is not clear, especially where digital platforms appear to offer consumers and companies lower prices and more choices and demonstrate commitments to innovation. This raises further questions as to whether governments are, indeed, acting to boost consumer welfare. Conversations around breaking up big tech often present little evidence that such a move would contribute to lower costs or increased innovation.



One question that is often overlooked is whether efforts to rein in digital platforms are likely to meaningfully boost consumer welfare.

Losing sight of the primacy of the consumer welfare principle, governments, and international organizations have presented proposals to counter big tech that undermine the original goals of competition policy.

Guided by perceived unfairness rather than consumer benefit, some parties have advocated for governments to build their own digital marketplaces focused on small businesses to compete with the likes of Amazon and Taobao. Initiatives like CambodiaTrade provide domestic small businesses with a platform on which users can purchase their goods. Such platforms will compete with the already dominant Alibaba-backed AliExpress and Facebook Shops, which sell domestically made products at scale. As these platforms offer domestic products to local consumers while passing on the efficiency gains from vertical integration, the argument that government-backed e-platforms are necessary is questionable.

In addition, governments should re-evaluate how they conceptualize the end goal for domestic start-ups. Being bought out by a tech giant does not necessarily represent anti-competitive behaviour.

In addition, governments should re-evaluate how they conceptualize the end goal for domestic start-ups. Being bought out by a tech giant does not necessarily represent anti-competitive behaviour, despite the OECD labelling such buyouts as ‘killer acquisitions.’⁵⁶ As implied in the term, the OECD argues that acquisition of a nascent firm by big tech harms competition and innovation, and regulations should look to prevent such buyouts. However, such an outcome is the goal of many start-ups and their backers. Start-ups do not always want to be the next Google; often, they want to be bought out by Google. A ‘successful exit,’ a term used in the tech world to mean a buyout, is a sign of success – not failure.⁵⁷

Conclusion



Close collaboration between government, industry stakeholders, and academia is required to strike a balance between the pursuit of innovation with the preservation of consumer choice.

As the digital sphere continues to grow at an explosive rate, global digital firms have grown in parallel and reached astronomical market capitalizations. The size and reach of such companies have raised concerns about competition and calls to rein in big tech are becoming louder.

However, governments and international organizations appear to be losing sight of the overarching goal of competition policy, which is to keep prices low, outputs high, and encourage constant innovation. When confronted with the existence of such digital innovations as unpriced platforms, traditional red flags for anti-competitive behaviour become confused and inconclusive.

With improper framing of competition regulation, those seeking to challenge digital platforms often forget about the consumer welfare principle and pursue policies incongruent with their goals. Addressing these challenges will require close collaboration between government, industry stakeholders, and academia to strike a balance between the pursuit of innovation in the digital sphere with the preservation of consumer choice.

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ASIAN TRADE CENTRE

The Asian Trade Centre (ATC) is the regional thought leader, advocate and educator for trade in the Asia Pacific region and serves as the resource for trade-related activities in Asia. They are a team of trade policy and supply chain subject matter experts positioned to meet the trade related needs of businesses — small and large — and governments — regional and foreign — operating in the Asia-Pacific.

ATC's primary activities include research, corporate advisory and capacity building services.

ATC is also the Secretariat to the Asia Business Trade Association (ABTA) and the Asia Pacific MSME Trade Coalition (AMTC).



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Endnotes

1. <https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact> and <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>
2. <https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact>
3. <https://www.weforum.org/platforms/shaping-the-future-of-digital-economy-and-new-value-creation>
4. <https://www.bruegel.org/wp-content/uploads/2020/11/WP-2020-06-1.pdf>
5. <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/>
6. <https://www.visualcapitalist.com/the-tech-giants-worth-compared-economies-countries/>
7. <https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html>
8. <https://www.scmp.com/tech/policy/article/3131286/chinas-digital-economy-surges-2020-amid-pandemic-making-nearly-40-cent> and <https://www.cnbc.com/2021/09/16/southeast-asia-added-70-million-online-shoppers-since-covid-report.html>
9. https://unctad.org/system/files/official-document/ciclpd57_en.pdf
10. https://cerre.eu/wp-content/uploads/2020/11/CERRE_Digital-markets-and-online-platforms_new-perspectives-on-regulation-and-competition-law_November2020.pdf
11. https://cerre.eu/wp-content/uploads/2020/11/CERRE_Digital-markets-and-online-platforms_new-perspectives-on-regulation-and-competition-law_November2020.pdf
12. <https://sloanreview.mit.edu/article/strategic-decisions-for-multisided-platforms/>
13. <https://www.economist.com/open-future/2018/08/07/why-competition-matters>
14. Ibid.
15. https://ecipe.org/wp-content/uploads/2019/03/ECI_19_OccasionalPaper_Competition_01_2019-1.pdf
16. https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf
17. <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2>
18. <https://www.brookings.edu/articles/can-antitrust-keep-up-competition-policy-in-high-tech-markets/>
19. <https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact>
20. <https://gs.statcounter.com/browser-market-share>
21. <https://www.cato.org/sites/cato.org/files/2021-03/policy-analysis-872.pdf>
22. https://www.jstor.org/stable/1925876?read-now=1&seq=3#page_scan_tab_contents
23. <https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism#executive-summary>
24. <https://www.econlib.org/library/Enc/Monopoly.html>
25. These graphics are illustrative and not necessarily comprehensive.
26. <https://www.mckinsey.com/featured-insights/asia-pacific/how-asia-can-boost-growth-through-technological-leapfrogging>
27. https://www.eastasiaforum.org/2021/10/13/what-is-driving-chinas-e-commerce-growth/?utm_source=subscribe2&utm_medium=email&utm_campaign=postnotify&utm_id=410992&utm_title=What%20is%20driving%20China%26rsquo%3Bs%20e-commerce%20growth%3F
28. [statista.com/forecasts/1259097/e-commerce-users-asia](https://www.statista.com/forecasts/1259097/e-commerce-users-asia)
29. <https://www.cnbc.com/2021/05/25/gojek-disruptor-50.html>
30. <https://www.competitionpolicyinternational.com/indonesian-regulator-to-probe-gojek-tokopedia-deal/>
31. https://unctad.org/system/files/official-document/ciclpd57_en.pdf
32. <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>
33. <https://www.nytimes.com/2021/10/08/technology/china-meituan-antitrust-fine.html>
34. <https://supchina.com/2021/08/02/chinas-big-tech-crackdown-a-guide/>
35. <https://www.businessinsider.com/china-lipstick-king-sold-17-billion-stuff-in-12-hours-2021-10>

36. <https://hbr.org/2018/09/alibaba-and-the-future-of-business>
37. <https://www.statista.com/statistics/225614/net-revenue-of-alibaba/>
38. <https://www.cnbc.com/2021/04/09/china-fines-alibaba-in-anti-monopoly-probe.html>
39. <https://www.competitionpolicyinternational.com/whatsapps-2021-privacy-policy-update-from-india/>
40. <https://www.mondaq.com/india/dodd-frank-consumer-protection-act/977768/consumer-protection-e-commerce-rules-2020-a-compliance-framework-in-the-digital-market>
41. https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/pdf/0401_001b.pdf
42. <https://www.nortonrosefulbright.com/en/knowledge/publications/9d1779c2/japan-competition-law-fact-sheet>
43. <https://www.nortonrosefulbright.com/en-id/knowledge/publications/018aab37/competition-law-fact-sheet-indonesia>
44. Ibid.
45. <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/2020-an-unprecedented-year-for-thai-competition-law>
46. Ibid.
47. <https://www.nortonrosefulbright.com/en/knowledge/publications/8f18c445/competition-law-fact-sheet-korea>
48. Ibid.
49. <https://seoullegalriskmgmt.com/kftc-creates-team-to-probe-unfair-trade-practices-in-the-ict-industry/>
50. <https://www.kedglobal.com/newsView/ked202111050007>
51. <https://asean.org/asean-heads-of-competition-authorities-commit-to-strengthen-regional-cooperation-on-competition-policy-and-law/>
52. <https://www.csis.org/analysis/last-rcep-deal>
53. https://www.bmw.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3
54. <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>
55. https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf
56. <https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>
57. https://www.researchgate.net/publication/322832908_Compensation_in_the_Venture_Capital_Market_and_the_Success_of_Startup_Companies_Theory_and_Evidence

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