

Inter MEDIA



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CONCENTRATION AND CONTROL

Natascha Just, Alena Birrer and Danya He on media regulation in the era of platformisation

WHEN ECONOMIC MODELS COLLIDE

Perfect contestability vs perfect competition

DIGITAL EMPOWERMENT

Paul Twomey says consumers need to be participants in the market for data

FAIR CONTRIBUTION?

Augusto Preta argues that the EU consultation ignored the interests of consumers



PRESERVING PLURALITY

Why competition regulation isn't enough
by Elisa Giomi





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Inter MEDIA

THE LIMITS OF COMPETITION LAW



The rise of the 'multi-sided platform' over the last decade has added an entirely new dimension to the long-standing challenges of media governance. Their market dominant positions meant that the natural solution seemed to lie in using competition law, with content plurality guaranteed by plurality of ownership. This approach is challenged in two outstanding contributions from experts in their field.

Natascha Just and her team note the deregulation of media concentration rules, while Elisa Giomi points out that it is possible to envisage more plurality from a monopoly aggregating a range of viewpoints than from a competitive environment in which all the media favour a few 'opinion-bearers'. Both Natascha and Elisa suggest that evidence of the success of the competition law approach remains elusive and that, while still necessary, may not be enough. Meanwhile my Australian and ICANN colleague, Paul Twomey, offers a different take on what he sees as an imbalance in the power of digital markets. Rather than consumers being the product, make them into 'active economic participants'. It is indeed an interesting idea, building on many of the new and existing regulations in the EU.

I'm delighted to welcome our newest IIC members: Starlink, Telstra, Channel 4, the Commission on Television and Radio of Armenia, the Luxembourg Independent Audiovisual Authority and RB Economics. It's great to have them with us as the phenomenal growth in our membership continues. Finally a reminder that, while I am a director of ICANN, my comments here are made entirely in my IIC role.

Chris Chapman, President, IIC

www.iicom.org

The International Institute of Communications is the world's leading independent, non-profit membership forum engaged with digital communications policy and regulatory affairs. It is the policy platform for the digital ecosystem.

Intermedia editorial enquiries:

enquiries@iicom.org

Intermedia subscription and IIC membership enquiries:

Joanne Grimshaw,
J.Grimshaw@iicom.org

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NEWS

FROM AROUND THE GLOBE



Above: Intel headquarters, Santa Clara, California

INVESTMENT

FAULTLINES IN SEMICONDUCTOR PLAN

Germany's finance minister has ruled out demands from Intel for an additional €3 billion in funding for its new fabrication plant, currently under construction in Magdeburg. The company says that increased energy and construction costs mean that the €6.8 billion it was due to receive is insufficient and it now needs closer to €10 billion. Intel's project is the largest foreign investment in post war German history and is seen as pivotal to EU plans to double its share of the global semiconductor market from less than 10 per cent to 20 per cent by 2030. Many in the German government believe every effort must be made to match the huge support being provided under President Biden's Chips and Science Act, which includes \$52 billion in funding to boost US domestic semiconductor manufacturing. However, a number of economists argue that subsidies are a waste of taxpayers' money and that the ambition to reduce dependence on Asian suppliers is unrealistic, given the complexity of supply chains in the semiconductor industry. Some parties in the coalition government are also likely to be resistant to increased subsidies. But Chancellor Olaf Scholz is believed to be open to the idea, encouraged that Intel might increase both the scope of the project and its investment.

PRIVACY

1.2 BILLION EURO FINE FOR META

The EU has fined Meta, owner of Facebook, 1.2 billion euros for privacy violations and ordered the company to suspend transfers of user data to the US. The fine was handed down by Ireland's Data Protection Commission, and is the largest in the EU's history. The Commission said that Meta's response to a previous ruling by the European Court of Justice hadn't addressed 'risks to the fundamental rights and freedoms' of its data transfers. Meta described the decision as 'flawed, unjustified and is setting a dangerous precedent for the countless other companies looking to provide services in Europe'. In a separate judgement, the EU General Court has ruled against Meta in a claim that documents required by the EU for an antitrust investigation went 'beyond what was necessary'.

ARTIFICIAL INTELLIGENCE

INCREASED REGULATORY COOPERATION

Google CEO Sundar Pichai has urged the US and Europe to work together on developing regulation for AI. Describing the technology as 'at an inflection point' he said AI is 'too important not to regulate, and too important not to regulate well'. He went on to say that 'the US and Europe are strategic allies and partners. It's important that the two work together to create robust, pro-innovation frameworks...'. Following a meeting with Pichai, EU Commissioner Thierry Breton committed to creating an 'AI Pact' involving European and non-European countries before rules to govern the technology are established. The UK will host an 'AI summit' later this year, following an agreement between President Biden and Prime Minister Rishi Sunak. The meeting will consider the risks of the technology and discuss how they can be mitigated through internationally coordinated action. Meanwhile, UN Secretary-General António Guterres has backed a proposal by some AI executives for the creation of an international AI watchdog similar to the International Atomic Energy Agency (IAEA). See reut.rs/3qCRL2T

CYBERSECURITY

CYBER GANG EXPLOITED SUPPLIER VULNERABILITY

The 'Clop' cyber extortion gang, which has admitted being behind a major security hack, has threatened to publish the data it has stolen from mid-June. The Russia-based group exploited a vulnerability in MOVEit file transfer software, owned by Progress Software. The victims are all thought to be users of Zellis, a supplier of payroll and human resources services. They are known to include the BBC, British Airways, the University of Rochester in the state of New York and the government of Nova Scotia. The latest organisation to admit being targeted is the UK regulator, Ofcom. Confidential data about some companies regulated by Ofcom and personal information from 412 employees was downloaded during the attack. The hack is seen as an example of the latest trend in cyberattacks, involving the targeting of 'supplier' vulnerabilities. See bit.ly/3p27YhO

INFRASTRUCTURE

TELCOS 'SEEKING 5 PER CENT'

The GSMA and telecoms operators' association ETNO are seeking fees from online companies that account for over 5 per cent of a telco's average peak traffic. It is based on a 'fair contribution that allows balanced negotiations'. In a 'summary of the joint telecom industry response to the

EU consultation, the groups proposed the 5 per cent threshold to ensure that only 'large traffic generators' were in scope. They suggested that other criteria could include meeting the threshold in at least three member states, to reflect the overall impact on European networks.

COMPETITION

MICROSOFT TO APPEAL UK TAKEOVER VETO

Microsoft has filed an appeal against the decision by the UK's Competition and Markets Authority (CMA) to block the company's \$69 billion acquisition of gaming company Activision Blizzard. The regulator ruled against the takeover in April, saying: 'Microsoft already enjoys a powerful position and head start over other competitors in cloud gaming and this deal would strengthen that advantage, giving it the ability to undermine new and innovative competitors.' The case will be adjudicated by the Competition Appeal Tribunal. Activision argued last month that the CMA's decision was a sign that the UK was 'clearly closed for business'. Microsoft said the CMA's move 'discourages technology innovation and investment' in the UK. The situation is complicated by the fact that the EU has approved the acquisition, subject to conditions. Microsoft has offered free licences over a 10-year period allowing European consumers who purchase Activision PC and console games to stream them on other cloud gaming services. Separately, the US Federal Trade Commission is also suing to block the deal and has applied for a restraining order and preliminary injunction. This could potentially prevent the deal going through by the 18 July deadline. See bit.ly/45Xq8So and bit.ly/43B6N7N

AFRICA

NIGERIA EMBRACES MVNOS

The operations of mobile virtual network operators (MVNOs) are due to begin in Nigeria after the Nigerian Communications Commission (NCC) granted licences to 25 companies. The move comes almost two years after the NCC first made public the plan to license MVNOs in Nigeria in order to deepen the state of telephony services in the country. MVNOs need no infrastructure of their own and can utilise the networks of existing mobile network operators. It is hoped that, once up and running, the new licensees will contribute to improved service offerings and competitive pricing, especially around voice and data. Although there has been no official announcement, the Commission appears to have created 5 different categories of licences under the MVNO framework, ranging from tier 1 to tier 5. The 25 companies so far licensed are in categories 2 to 5, while no company has acquired a tier 1 licence which is the lowest. Speaking at an industry forum, the Commission's Executive Vice Chairman, Professor Umar Danbatta, described how 'facilitating the roll-out of 5G Service provision, and the introduction of a mobile virtual network operator licence' will 'bridge the gap between unserved and underserved areas.' He went on to say that, while there are growing concerns about over-the-top (OTT) players eating into operators' revenues, the new plan offers a prime opportunity for partnership with these platforms and the chance to direct some revenue back to MVNOs through wholesale agreements. More detail at bit.ly/3J7ojsh

IIC EVENTS

5-7 July, Ulaanbaatar
Mongolia Forum 2023

2 August, online
Small Nations Regulators Forum 2023

15-16 August, Sydney
Telecommunications and Media Forum 2023

16-17 October, Cologne
International Regulators Forum 2023

18-19 October, Cologne
IIC Annual Conference 2023

iicom.org/events/

IN BRIEF

AWARD WINNING AI: German artist Boris Eldagsen has rejected a prize at the Sony World Photography Awards after revealing that his winning entry, 'Pseudomnesia: The Electrician', was generated by AI. Eldagsen said that his intention was to open up a debate around AI-generated images.

AI LOLLIPOP: Nassim Nicholas Taleb tweeted: 'ChatGPT is a statistical representation of things found on the web, which will increasingly include ITS OWN output (directly and second hand). You post something picked up from it & it will use it to reinforce its own knowledge. Progressively a self-licking lollipop. Enjoy.'

CABLE MAP: The latest submarine cable map has been published by TeleGeography. It shows a surge in projects in Africa and the Middle East, while there are new landings in Barcelona, Genoa and Crete. Viewable at submarine-cable-map-2023.telegeography.com/

DSA DESIGNATIONS: The European Commission has adopted the first designation decisions under the Digital Services Act, designating 17 Very Large Online Platforms and 2 Very Large Search Engines. Companies have four months to comply with their obligations under the Act. See bit.ly/3LtE8es

DIGITAL INDIA: India is due to publish a draft 'Digital India bill', updating a previous act from 2000. The new bill is expected to cover changes to 'safe harbour' regulations for social media platforms, as well as new rules on user harms, including misinformation, cyberbullying, doxing and identity theft.

BILL RETHINK: The UK government has been pushed to 'urgently rethink' its online safety bill. An open letter signed by a number of online platform executives states that 'as currently drafted, the bill could break end-to-end encryption, opening the door to routine, general and indiscriminate surveillance...'

15 MINUTES WITH...

LIZANIA PÉREZ, Executive Secretary, COMTELCA

Q. COMTELCA is a unique organisation – could you explain a little about its history and purpose?

A. The Regional Telecommunications Technical Commission (COMTELCA) is a regional entity created as a result of the Central American Telecommunications Treaty signed in 1966, by the governments of Guatemala, El Salvador, Honduras, Nicaragua and in 1967, by Costa Rica. Given the constant evolution in telecommunications and the new regional scenario, the leaders of Central American countries decided to modernise the treaty with the Central American Telecommunications Protocol, signed in 1995, as part of the Central American Integration System (SICA). The Republic of Panama joined COMTELCA at this time, followed by the Dominican Republic and Mexico.

COMTELCA's objective is to coordinate and promote the integration and development of telecommunications and information and communication technologies among its members. It issues binding resolutions through a legal framework designed to harmonise regulations and manage telecommunications systems to meet the needs of its members' citizens.

Q. How are responsibilities divided between COMTELCA and the national regulatory authorities? How are decisions reached and enforced?

COMTELCA is managed under a membership scheme whereby the member states designate which body will represent their country at the Commission. This entity becomes the designated member, with all members coming together to form the board of directors. This board makes decisions and resolutions requiring mandatory compliance by members.

Q. What are the priorities for the organisation at the moment?

In accordance with our 2022-2025 strategic plan, COMTELCA's priorities are:

- Institutional strengthening
- Capacity building and skills in telecommunications and information technology
- Strengthening of regional integration and international representativeness
- Harmonious development of telecommunications and information technology
- Regulatory harmonisation
- Promote public and regulatory policies within the framework of the sustainable development goals for the development of the region
- Quality of telecommunications services.



On 28 February, COMTELCA Executive Secretary, Lizania Pérez and IIC Director General, Lynn Robinson signed a memorandum of understanding to formalise the friendship between the two organisations.

Q. What do you see as the benefits of your cooperation agreement with the IIC?

The IIC and COMTELCA have common objectives in generating a space for dialogue between interested parties in the telecommunications sector. As a result of these discussions, digital agendas that anticipate technological innovation and promote investment can be developed. This in turn can guide decision makers to create both public policies and regulatory policies for the future. We're looking forward to attending each other's events in the coming years!

Q. What are the technologies on the horizon that excite you the most?

Artificial intelligence is the technology of the future that most attracts my attention and, in my opinion, is most worthy of study. It is an innovation that can generate major change in the world and in how things are done. But we must not lose sight of the objective for which it is being developed. We must promote its ethical use, be it through regulatory frameworks or principles, local, regional or global.

Quickfire:

What was the last book you read?

The 5 love languages by Gary Chapman.

What band would you like to play at your funeral?

Tercer Cielo, como si fuera mi último día (Like it was my last day).

Early mornings or late nights?

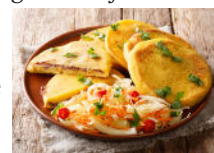
Early mornings.

Which country in Central America would you go to for your last meal, and what would you eat?

I would go to El Salvador to eat pupusas.

What's the first item you'd save if your house caught fire?

My cellphone.



Pupusas are a classic Salvadorean dish

ASIA REPORT

The annual Asia Telecommunications and Media Forum took place in Phnom Penh, Cambodia on 15 and 16 February 2023. What policies are driving the success of digitalisation in the region and what now needs to be done?

CRISTINA MURRONI reports

The opening speech highlighted the progress made in Cambodia towards laying the ground for digital transformation in order to stimulate productivity, harness new resources for growth and enhance citizens' quality of life. Representatives from industry praised the country's approach, which helps make investments sustainable. In some other markets low usage, currency turmoil and adverse macro conditions make it very difficult for operators to justify upgrading to the latest technology, particularly when spectrum auctions require large payments in US dollars. With low ARPU (average revenue per user), the long-term viability of investments is often under the spotlight. The private sector is responsible for about two thirds of total global investments in the digital space while one third of investments has come from the public sector including governments, multilateral development banks and aid agencies. Public-private partnerships have had a key role in some markets, while in others, operators have formed consortia to compete against Big Tech for ad revenues.

CONNECTIVITY AND NEW COMMUNICATION TECHNOLOGY

When it comes to extending geographical coverage, a range of technologies is likely to be the most efficient answer and therefore a technology-neutral approach should be adopted when it comes to utilising USO funds. One of the most talked-about technologies is that of low earth orbiting (LEO) satellites for fast, affordable and reliable broadband. LEO technology can be developed at a very large scale from the start, bringing down costs and increasing performance, offering a great opportunity to serve approximately one billion 'underserved' people worldwide – 60 per cent of whom are in Asia. The technology also offers opportunities to create mesh networks among the satellites themselves, which are complementary to the existing networks.

Combining 5G and Wi-Fi to improve performance brings another interesting development – one of the panellists mentioned the metro system in Seoul as an example, where the 5G backhaul to the trains, and then Wi-Fi within the trains, were able to attain a 25-fold performance increase. This opportunity, it was



suggested, highlights the fact that Wi-Fi for many countries in the region is planned more as an afterthought, which may undermine the experience people have with 5G, augmented reality and virtual reality. In view of how much spectrum has been allocated for 5G, panellists argued in favour of long term planning for globally harmonised blocks of spectrum for both satellites and Wi-Fi.

COMPETITION IN DIGITAL MARKETS

As digital platforms gathered power in the last decade and became the stage for an ever-expanding range of services, many countries grappled with the consequences. A global overview of investigations and litigation shows that several approaches are now being tested. On the one hand, countries such as the US and China are adjusting their competition law frameworks to face the challenges posed by digital service providers. Other approaches combine statutory regulation and competition rules, as is the case for the EU's Digital Markets Act. South Korea imposed specific legislation to prevent Apple, for example, from imposing in-app purchases made only through its own app store. Japan focused less on enforcing any specific kind of behaviour or fines for non-compliance, but on transparency – obliging companies in the digital market to explain their practices, exposing those that might be seen as unfair.

A complementary approach ensures that sector-specific regulators work alongside competition authorities and other agencies while recognising industry-specific concerns. One benefit of cross-disciplinary fora is that they enable regulators to work out difficult or controversial issues from every angle. Cooperation across countries is also valuable, since the platforms enjoy economies of scale and network effects that require scale on the side of the regulator too. A panellist from a small nation regulator

observed that international cooperation could make a difference in this area. While shared responsibility can work out well, it is also important to have someone who is ultimately in charge, particularly in small countries.

PRIVACY, DATA PROTECTION AND CROSS BORDER DATA FLOWS

The existence of many competing regional frameworks for cross border data flows raises compliance costs for companies. Often seen as the global standard, the EU's GDPR is an adequacy system, in which a trading partner has to be declared to be 'adequate' in order to enjoy free flows of data. (Most countries in the Asia Pacific region are not.) The focus shifted to the Cross Border Privacy Regime (CBPR) that emerged from APEC and is an accountability system. Alternatives and 'work around' solutions, such as contractual clauses, have a key role to play in bilateral negotiations. 'Privacy by design' solutions were also discussed, along with other measures to improve international trust and data protection, such as security qualifications and certifications, particularly for cloud-based operators.

As long as the principles underpinning privacy regimes (protection, transparency, proportionality) are there, there should be room for multi-country systems requiring a lower bar than the consent-driven GDPR. Voices from industry encouraged the creation of regional frameworks to reduce the current fragmentation of rules and the cost of compliance. Localisation is often discussed as a way for a country to secure and control data, particularly sensitive information involving health, the government or finance. However, the cost of investing in local data centres is likely to be a barrier to small companies aiming to trade internationally in the region. These policies tend to be restrictive rather than enhance trade.

FACILITATING A CREATIVE ENVIRONMENT

Content regulation is about promoting local culture and language, ensuring a viable local production industry, supporting economic growth, protecting consumers and children, and projecting soft power – which often promotes tourism. In Asia, the country that has been most successful in this field is South Korea. Providing a lot of support for the Korean creative industries, first in music, and now in film, reaped the benefits in terms of soft power and tourism. Policymakers should look at the core elements of the creative economy value chain. Policy must underpin every stage of the chain, as well as contributing broadly to a business-enabling environment.



Top: The TMF venue; below: Nathaniel 'Njel' De Mesa, MTRCB, Philippines; Michael Coonan, SBS, Australia; Yee Ler Lau, Tencent; Darren Ong, Amazon

A content regulator on the panel described their approach as 'soft touch' and the organisation engaged with foreign players and Big Tech to develop a pragmatic approach. The model adopted by the video game industry, where the producers complete a questionnaire that is already populated (with questions like: does this contain foul language? Gore? Violence?) to generate a rating for the video game, creates a system that is cheap, automated and fast, and yet able to deal with cultural nuances. Content with an age rating of 7+ in Russia, for example, might be rated differently for the Philippines.

The experience of a public service broadcaster set up to serve multilingual, multicultural and indigenous audiences reinforces the belief that there is a role for regulation in ensuring that free-to-air content is available and prominent on any platform, both video and audio. New audiences can be (and have been) developed by offering services in many languages, including very niche languages. Prominent exposure offers opportunities for communities to cross-fertilize. It is one of the leading ways to foster a vibrant industry.

COUNTERING HARMFUL ONLINE CONTENT

The conversation about online content regulation also covered a range of measures tailored to prevent consumer harm: from legacy broadcast regulation to voluntary industry codes, co-regulation and quasi-regulation. In the UK seven out of ten people believe that the benefits of being online outweigh the risks. Forthcoming online regulation will adopt a pragmatic approach that calls on platforms to assess and manage these risks, with an overarching focus on illegal content.

The industry reviewed the lessons learned in the last decade:

the importance of a concerted effort against harmful content, the good practices in existence and the need to establish very clear priorities and guidelines around what is illegal. Several new fora, such as the Digital Trust and Safety Partnership (DTSP) are trying to coalesce around a best practice framework to share amongst industry. The hope is that the DTSP will cover developers as well as operators, and work on safety by design. Multi-stakeholder collaboration is seen as the most effective way to tackle content harm. Election misinformation, for example, is a multi-sectoral problem that requires a multi-sectoral approach, starting with user-content platforms. In addition to platforms taking down fake content (a first pillar), there must be credible sources readily available to counter it (the second pillar) and general investment in digital literacy – a critically important third pillar.

CYBERSECURITY RISKS AND REALITIES

Strategies to promote online security must include measures to ensure people understand the risks they are facing online, so that they do not ‘leave the doors open, and not realise they were left open’. A major telecoms provider agreed that, in addition to providing the highest technical security standards on the network, securing the end level is a critical part of the process – digital literacy and training are key measures. Globally recognised security standards for devices that are not part of the critical

infrastructure are also very important for manufacturers to be able to produce devices at scale. The conversation further explored the concept of information exchange and shared responsibility in cybersecurity, which many felt is the best way to deal with a constantly evolving landscape. This should involve both government and industry, perhaps as a public-private partnership, and build dynamism into its framework.

THE METAVERSE AND DIGITAL ASSETS

Expected to be the next iteration of the internet, the metaverse is a challenging topic because it is still undefined, evolving, and only in its nascent stage. The metaverse is envisaged as a world of interconnected virtual communities where people can live, learn, work, play, shop, and interact, with endless possibilities. It will mean different things for different companies and different sectors. It is also one of the disruptive areas of innovation, with great potential to change the economy, ways of living and communicating, and society.

Today’s digital players have specific initiatives around the metaverse, and the panel discussed financial developments and the economic impact of digital currency. A speaker proposed that a digital currency would allow users to transact inside the metaverse instead of leaving it to make a purchase and then returning. This means that with their low-cost decentralised system, cryptocurrencies can support economic activities in the metaverse. Another speaker proposed that NFTs could be used to confer a digital identity to any digital asset (essentially any digital creation) and thus support value creation. Since different companies will try to develop their own version of the metaverse as a walled garden, interoperability has a critical role to play. The panel explored the possibility that the wider community combine with industry actors and policymakers to develop policy in general, and standards in particular, for the metaverse.

THEMES AT THE ASIA IRF

Members of the Asia Regional Regulators Forum met to discuss the theme: *‘Regulation in the digital era: what does it take to adapt to the rapidly changing landscape’*.

- Projects in the region include the use of 5G and AI technology in a main hospital and in ambulances. In one case the aim is for the system to be connected nationally, so that hospitals can all have access to the same patient data. One regulator has responsibility for both the broadcasting and telecoms industries, which has enabled the creation of a favourable market for innovation and investment based on free market competition. The development of 5G was driven firstly by the release of spectrum, with demand stimulated by opening up government buildings and infrastructure for cell installation at a nominal fee, and radio base stations built on the walls of tall buildings. There is now a consultation on new laws that will require property developers to reserve sufficient space for the construction of a base station.

- In a Middle East jurisdiction, the story was one of using sandboxes, involving no fees, for companies to try new services, but also to share their experiences, even if a project results in failure. Most organisations are trying to do similar things and can learn from each other.

- Contributors discussed the growth of IP (OTT) television and its impact on domestic broadcasting. Television and cinema production is recognised as a ‘soft power’ tool for the APAC region. The influence of IPTV was mostly seen as positive, broadening the available content but also energising local content creation.

- There was agreement that much depends on learning and collaboration, but it is important that regulators ensure they are open to this, including being prepared to share data. Collaboration is also needed formally in areas like mobile roaming. Where in the past there was a focus on telecoms networks, now with business critical services it’s increasingly the reliability of the content delivery networks that is important. Much of the internet supply chain was not designed for its current level of use. The forum heard from a European regulator about a series of different models of regulation in the different sectors for which the regulator is responsible. In general there is a move towards a more supervisory approach that focuses on outcomes and principles. The idea is to incentivise the behaviour that is desired rather than tell companies what to do.

DEBATING EUROPEAN REGULATION

The Brussels Telecommunications and Media Forum took place on 22 and 23 March 2023. The discussions centred on the new regulations in Europe, including the AI and Data Act, European Media Freedom Act, online safety regimes and the implementation of the DMA.

RUSSELL SEEKINS reports

FUNDING THE INFRASTRUCTURE GAP

The meeting began with reflections on the draft gigabit recommendation¹ and the extent to which it is in line with the Electronic Communications Code (EECC). It was observed that, in the case of commercial agreements, the code seems to favour investment to the detriment of competition, and promotes deregulation for investment in dense areas. The next speaker pointed out that 5G networks covered 72 per cent of the population. The number of base stations per 100,000 population in Europe is 57, compared to 415 in South Korea, 132 in China and 30 in the US. He noted that the investment gap in Europe is 65 billion euros, as against a capex of European telcos of 45 billion euros. He emphasised the importance of sustainability – environmentally, financially and socio-economically. Rather than just consumption, there is a value and revenue generating opportunity for telecoms networks which will benefit the majority of users.

Mutually beneficial investment

A representative from a platform noted that they had worked successfully with telecoms companies on a range of projects, including on laying subsea cables across the Atlantic. While telcos invest in infrastructure, platforms invest in content, which in turn drives demand for take-up of the infrastructure. She pointed out that the content industry contributed \$120 billion per year directly in infrastructure investment, saving \$5 billion for telcos.

A panellist from a UK operator outlined the difficulty of delivering a network to handle the expected increase in mobile traffic of 21 to 52

times current levels by 2030. Even though average bandwidths had increased by 50 per cent, from 42 Mbps to 65 Mbps, revenues remained flat. Raising prices is difficult in a market where consumers are offered unlimited tariffs and one operator or another is always looking to gain market share. The solution lies in innovation, such as network slicing, technical efficiency and economic efficiency, especially around peering and commercial relationships. For example, customers won't want to see an additional cost for assisted automotive coverage, so it will have to be built into the cost of the car. This requires an ongoing debate with the regulator on what is allowed under net neutrality rules.

THE DMA IN PRACTICE

A speaker from a consultancy outlined the importance of getting the implementation of the Digital Markets Act (DMA) right, noting previous examples in the telecoms industry where differences in implementation had led to markedly different outcomes. His view was that, while there were some economic issues, the principal constraints concerned engineering. He cited exchange of search data as one example, but also felt that the capacity and specialist expertise available in the European Commission would make implementation less effective, especially given the short timescale.

A panellist from a network operator viewed the DMA as a commercial opportunity that could result in a 'levelling of the regulatory playing field'. His company's interest was in being able to compete in downstream markets for digital products and services which are complementary to the core business of connectivity and internet access services.

The 'ecosystem effect'

A representative from the European Commission noted that the DMA represented an experiment in working between different specialties and agencies in the Commission. Third parties and gatekeepers will be talking to all of the agencies at once. This is a recognition of the 'ecosystem' effect, and the need for a holistic approach to implementation. The process is an iterative one, in that guidelines will be issued following some of the experiences of implementation, both by the market and other authorities. The panel discussed what outcomes might be expected from the DMA. Portability would be a specific measure, along with market penetration for new actors. A wider aim was a change in culture, with demand for new services not tied to core platforms. One panellist summarised the beneficial outcome as a 'more heterogeneous marketplace, with new entrants and more choice for the consumer'. At a broader level, another panellist suggested that a measure of success would be seeing more innovation coming from Europe.

A measure of success would be seeing more innovation coming from Europe.

ENTERPRISE CONNECTIVITY IN EUROPE

It was noted by one speaker that the business-to-business (B2B) market is more diverse than before. 5G is designed with B2B applications in mind and there is increasing interest in private networks, to which telcos are adapting through slicing or cloud edge solutions. It is a new ecosystem of localised, private and vertical networks that can be seen as a collaboration between telecoms companies and cloud operators.

Another speaker emphasised the importance of entrepreneurship to promote innovation in the European telecoms sector. Many alternative operators had grown from nothing to provide a diversity of services. But there was too much concentration and larger businesses operated in an integrated fashion within the internal market. Ultimately, it's important that all sectors of the economy benefit from a diverse offer of products and services from a diverse range of providers.

A market-driven model

A panellist from a regulator said that they see a largely functioning commercial market for business solutions, with no need to regulate. This approach had been successful in Sweden, where there had been a huge infrastructure build-out and now 97 per cent connectivity in households and businesses. Another contributor noted that there is a difference between 5G in the lower bands, which is good for spread but not much faster than 4G, and in the higher bands where it is much faster

and has lower latency. It was hard to distinguish between the two in terms of targets.

SUSTAINABLE NETWORKS

The ambition of the European Green Deal is a 'call to arms' for innovators to assist in helping reach climate goals of 40-45 per cent renewable energy by 2030. Smart energy solutions are needed, along with energy market reforms such as neighbourhood energy sharing. Renewables need a 'digital grid' to enable diverse power storage and transmission. There was a widespread view that smart energy solutions need a competitive space, with regulators ready to help support business plans by allocating spectrum. There is also a role for demand response programmes, but these require devices to be connected to the grid along with interoperability of data. This could be achieved through market design reform, which the EC is considering. The EU's new Data Act was seen as a means of ensuring that the process of data collection enabled data to be effectively re-used for other applications – what one panellist described as a 'consortium of universal automation'.

AUDIO-VISUAL REGULATION

The forum heard how regulation can contribute to a flourishing AV market. It was noted that many countries were seeing high levels of investment without any financial obligation or levy, and there was no apparent correlation between obligations and growth markets. The EU country of origin rules are seen as positive in encouraging greater output from Europe, and it is a good thing that the European Media Freedom Act (EMFA) upholds these principles but it is important that they don't result in protectionism. Local obligations can present barriers to entry, especially for smaller video-on-demand players.

European Media Freedom Act

The EMFA proposal, a presenter explained, is designed to ensure a consistent level of



◀ protection for media pluralism, the independent provision of media services and reduced regulatory divergence. This includes preventing state interference, which research shows is increasing, with high or medium risks to media pluralism identified in 21 member states.² A legal expert identified that the Act provides a centralised source of legal authority to fight disinformation, but doesn't interfere with national legislation. The idea is that the plurality of national regulators can act to bring undemocratic behaviours under control. A representative from a national media regulator described the EMFA as 'the missing part of the Digital Services Act' – where the latter is market driven, the EMFA addresses media and democracy. Independent media regulation is a cornerstone of democracy, and the role of the EC should revert to intervening only as guardians of the treaty. Another regulator, arguing from an academic perspective, noted the problem of defining pluralism specifically in terms of the number of players, as is the case in competition law, rather than in terms of the variety of information and opinions. The Act recognises that limiting market concentration is not sufficient to protect pluralism, and audiences need to be confronted with divergent opinions. An example was the lack of criticism of vaccination in international media.

THE DATA ACT

An EU representative described the purpose of the Act as ensuring fairness while liberating valuable data. The aim is to empower users through giving them more control over their data, establish contractual fairness, and improve data sharing, especially between businesses and the public sector. The Act is also designed to create a more competitive and fluid cloud market. There was a need to address issues like the ownership of data from a connected product remaining only with that manufacturer for the product lifetime. While the IP of manufacturers and the ability to protect trade secrets is recognised and important, the users of their products are also entitled to access the data generated by them.

Another view was that it is not an example of market failure, and much data-sharing is already taking place. There was also a tension with the GDPR, and the difficulty, with mixed datasets, of getting companies to share data on a legal basis. A panellist from a smaller technology company involved in electric vehicle charging welcomed the proposals. He saw it as an effort to create the open protocols and interoperability essential for growing the EV market, and greener mobility in general. He agreed with the idea of 'fair, reasonable and non-discriminatory terms' (FRAND) in principle. However there were already lengthy negotiations under way with manufacturers, who didn't see small companies as a priority. The EU panellists emphasised that the Data Act shouldn't be thought of as just about compliance, but as a market design rule that is creating a new field of economic growth, especially for traditional companies who can now monetise their data streams.

ONLINE SAFETY REGIMES

A panellist from an Ireland regulator, described the creation of a media commission comprising commissioners in online safety, media development and digital services. The commission is currently consulting on an online safety code,

recognising the special responsibility Ireland has for services that will operate across the EU, given that many of the largest platforms are established in Ireland. They are also working closely with Ofcom and the Australian safety commissioner as part of the Global Online Safety Regulations Network (GOSRN). In the UK, there is now an online safety group established in preparation for the new legislation. The UK's online safety bill is based on risk assessment and places responsibility on the platforms to decide what responses are appropriate for their services. The bill has had to take account of concerns about free speech – especially adult 'legal but harmful' content – and worries about the effect on innovation and competition. A panellist from an online platform emphasised that their new responsibilities under the DSA do not conflict with the principles of liability limitation. These principles are important because current distinctions, such as that between online platforms and private messaging, may blur in the future. The 'legal but harmful' content poses a particular issue, since it becomes a matter of judgment based on societal norms and context – what is seen as a joke in some countries might lead to violence in another. Platforms are aiming to deal with this through community standards, but this is difficult to apply consistently.

RESPONSIBLE AI

An analyst from a company working in AI reviewed the latest developments in the technology, especially 'Generative AI'.³ He pointed out that many of the concerns that are expressed, in terms of safety and bias, are familiar. Unlike other AI technology, it draws together a range of policy issues, including moderation, copyright, privacy and data protection. A representative from an Education Institute pointed out that, while Chat GPT was capable of passing exams, it was only average because of its lack of originality. 'University values', such as critical thinking, creativity and respect for evidence, leave a great deal of room for humans. Concerns about the use of Chat GPT in education are therefore beginning to recede as its limitations become more apparent. Overall, the impacts can be seen as positive, and generative AI will improve people's lives. One area of concern is that it can often appear to do jobs well that it's actually poor at. Bard and Chat GPT are not designed to provide access to factual information and they're not good at it, yet they are consistently used for this and other inappropriate purposes. It was pointed out that performing a task with AI that was previously conducted without using it doesn't invalidate the existing regulation. Synthetic video creation has many advantages, but is easily misused to create deep fake images and videos. It's not realistic to try to prevent this. Instead the aim is to build into the products a watermark-style label that identifies synthetic video and audio, and makes it easier to take down when its used in the wrong way. The industry is working to create these tools.

REFERENCES 1 <https://digital-strategy.ec.europa.eu/en/library/gigabit-connectivity-recommendation> 2 Rule of law report 3 AI capable of creating new content, such as images, text, video and audio.

DIGITAL CHALLENGES FOR SMALL NATIONS

Telecoms security and emergency services were on the agenda at the Small Nations Regulators Forum in Miami. **RORY GRAHAM** reports



The LatAm and Caribbean TMF in Miami got off to a lively start with a discussion among delegates to the Small Nations Regulators Forum of topics chosen by members as being of most importance. Attendees included representatives from the regulators of Barbados, Bermuda, Botswana, the British Virgin Islands, Guatemala, Jamaica, Jersey, Saint Lucia, Trinidad and Tobago and the United Kingdom.

CYBERATTACKS ON PUBLIC BODIES

Cybersecurity in the context of telecoms was the initial subject debated, with several delegates reporting that there was a reluctance amongst customers to embrace digital services due to fear of the consequences of cybercrime. Delegates recounted high profile ransomware and other attacks on public bodies in particular. It was also felt that many operators themselves were insufficiently aware of the risk to their networks – and therefore to critical national infrastructure – of either an attack from a third party or inherent lack of resilience. One consequence of this was continuing reliance on ‘old’ technology for the exchange of information rather than an uptake of online methods of communicating, particularly with medical or government institutions. However delegates also described putting on successful programmes aimed at educating users, including children and vulnerable users, on the safest ways to use digital services.

Small nations are at particular risk from ‘bad actors’ probing their networks from other jurisdictions. For this reason it is important that telecoms regulators have the legal powers to ensure that operators meet their responsibilities in maintaining the resilience and security of their networks for the benefit of consumers and businesses. Regulators also have a key role to play in educating both telcos and users on how to avoid being the victims of cyberattack and to address the fears some users may have of using digital services, particularly public sector services.

EROSION OF EMERGENCY CALL SERVICES

Delegates next drew on their experiences of natural disasters, such as floods and hurricanes, to explore the importance of providing access to emergency call services and of providing essential information to the public in the case of an emergency. Concern was expressed that rapidly changing technology – such as ‘over the top’ voice services via WhatsApp and others – was eroding the ability of telecoms regulators to enforce public emergency call service (PECS) obligations in traditional operators’ licences. The move to fibre to the home and the replacement of copper (which continues to provide power to handsets even when other power has failed) could put vulnerable users at risk unless alternative access could be provided. Both the law and regulatory practice needed to evolve to address this, given that access to a PECS must be seen as a fundamental public need. Delegates reported on successful discussions with non-traditional access providers, such as satellite broadband providers, on the provision of a PECS.

Several delegates described the essential role that their authorities were playing as part of a coordinated approach to a PECS amongst operators, emergency services providers and government. Irrespective of the vulnerability of the jurisdiction to natural or other emergencies, it was concluded that SNRF members had a vital regulatory duty to ensure that all providers of voice services delivered an effective PECS, and to participate in the wider consideration of how advances in technology could deliver the best results to the public in their jurisdiction.

The session was chaired by Rory Graham, General Counsel of the Jersey Competition Regulatory Authority, standing in for SNRF Chair Tim Ringsdore. The view of the attendees was that it had been a useful and productive exchange of experiences and knowledge. The next meeting will be held online on 2 August 2023. Topics to be discussed will include use of satellite services and the sharing by operators of network elements.



WHAT WAS WRONG WITH THE CONSULTATION ON FAIR CONTRIBUTION

The EU's public consultation on the contribution to the costs of network development was missing one thing, argues **AUGUSTO PRETA** – the consumer

Anounced some time ago, the European Commission finally launched a 12 week public consultation on so-called 'fair contribution' on the 23rd February.

The official scope of the consultation was to understand how the growing demand for connectivity¹ might affect the future development of the sector, taking into account the goal of 1 gigabit connections for all European citizens and businesses by 2030. In particular, it aimed to identify the types of infrastructure Europe needs to keep up with technological developments necessary for the digital transformation in the coming years. Views were sought on how the investment needed for the deployment of infrastructure could be mobilised, recognising that all actors benefiting from the digital transformation should contribute to it.

FAVOURING BIG TECH

In reality the structure and content of the questionnaire seemed designed to favour the contribution of Big Tech. The limited playing field meant that the issue was reduced to the relationship between those who provide access to the infrastructure (the internet service providers or ISPs) and the providers of content, applications and services (the content application platforms or CAPs).

This is in a context where the regulation of Big Tech, (the so-called 'very large platforms' or gatekeepers) has become one of the European Union's priorities. The same principle could be applied to the telecommunications

sector, which uses similar terminology – fair compensation – to describe the remuneration of intermediaries (the digital platforms) in favour of publishers, adopted in the world of content and media through the Copyright Directive. This 'parallelism' is, however, at the very least rash.

MARKET SECTOR OR ECOSYSTEM?

The development of the internet has made possible the process, envisaged in the last century, of convergence between infrastructures/networks and services/content, the former traditionally owned by the telecommunications or electronic communications sector and the latter by the media sector. The internet has facilitated this process, creating a wider ecosystem which increased the complexity and interdependence of the two markets. At the infrastructure level, this has meant that alongside the traditional operators, the telcos, new players have emerged. These 'large platforms' contribute directly to the development of networks with cloud services, content delivery networks and the laying of submarine cables. So it's not at all clear that reducing everything to an issue of interconnection charges will automatically lead to an increase in the resources available for connectivity development.

There is currently a strong complementarity and a high level of collaboration between the telcos and platforms, based on a model of voluntary commercial negotiation. So far this has ensured a constant upgrade in the quality

of digital infrastructure. Higher remuneration for ISPs from the regulation of interconnection tariffs, 'sending party pays', risks the unintended consequence of making the service less efficient, reducing investment in areas of higher innovation. Emblematic and perhaps overused is the case of South Korea, the only country where this model has been applied and where the effects have proved counterproductive.

THE LIMITS OF CONSULTATION

Proponents of interconnection tariffs offer the theory of the quasi-parasitic use of the network – CAPs monetise it without bearing the costs of the strong increase in traffic. ISPs don't have sufficient bargaining power to define fairer network access conditions, goes the argument, so the solution is regulated network usage fees. Based on the principle of sending party pays, this would entail compulsory payments, linked to the traffic created, from the platforms to the ISPs.

BEREC (the body that brings together the European national telecommunications regulators) issued a preliminary assessment noting that an increase in traffic volume does not directly entail significant incremental network costs. IP network infrastructures are not particularly sensitive to traffic and costs are in any case recovered over time through customer subscriptions. Furthermore, for fixed networks, the access network components closest to the end user generally tend to be sized according to the number of customers served or potentially served.

Mobile networks have a certain degree of traffic dependency, as the cost of building additional base stations to increase capacity is often traffic sensitive. However, the marginal costs of additional data usage are low, and the mobile network operators reflect this in their prices, which typically include data allowances.

As far as IP interconnection is concerned, BEREC pointed out that agreements only provide for the provision of interconnection link capacity and not for the end-to-end transmission of particular data flows across several autonomous IP networks. In practice, the costs for increasing this capacity are often shared by the parties involved (i.e. between the CAP and ISP), so it is mutually beneficial for both parties to increase the interconnection nodes. In any case, the absolute costs for increasing interconnection capacity are very low compared to the costs of building access networks.

DOUBLE CHARGING

A further consideration is that the demand for data does not usually come from the content providers, but directly from the end customer, from whom the ISP is receiving revenue. The platforms contribute to creating the demand for telecommunications services, which in turn is paid for by the end users of those services. Under a regulated payment regime, the ISPs would be charging two different parties for the provision of the same service.

Seen from the downstream side, it is as if the producers of content are demanding a regulated, and thus higher, price in order to get more money from streaming services. In fact the increase in demand for this content is pushing platforms like Netflix, Disney and Amazon Prime Video to invest more and more in content and to increase the resources they provide to the content industry. This has led to the explosion of video streaming services, with great benefits for all players in the value chain. A further risk of regulated interconnection would be to negatively affect product diversity, end-user prices and ultimately the quality of services.

In the end, therefore, what made the proposal in the consultation and the consultation itself unconvincing was that it is not just an issue between Big Telco and Big Tech related to traffic. It is an issue for the whole internet ecosystem. Consumers – those who ultimately hold the system up – are being excluded.

SUMMARY

The issues of net neutrality and the open internet are not explored here, but they add further to the objections to the fair contribution proposal from many parties. The decisive points to highlight are twofold:

- The demand for charging arises from a few large ISPs – most of the alternative telco operators and providers are against it. It is not justified by any analysis of real traffic problems, and there is no evidence of market failure. Changing a system of open competition that has so far been fruitful both in terms of the quality of services to the consumer and of prices, would be both unreasonable and counterproductive. Imposing tariffs with regulated prices on the CAPs would give more power to the big telecoms players, who already hold the termination monopoly.

- Limiting the issue solely to the economic relationship between two players is reductive, ineffective and ignores the broader reality – it is an ecosystem and not separate markets. Imposing regulated interconnection charges could produce negative effects on this ecosystem, firstly at the infrastructural level, since it reduces the incentives of the CAPs to invest in innovation; secondly at the supply level to the end user, since higher interconnection costs would mean higher prices for consumers or less money to invest in content, which in turn would result in less or lower quality content. The loser in all cases would be the consumer, the 'stone guest' in this consultation. This would not only be as economically irrational as it would be inefficient but, as has already been pointed out by others including the German Media Association Vaunet,² also unacceptable from a social point of view, because it might jeopardise the current high quality of media supply in Europe and ultimately media pluralism.



AUGUSTO PRETA is CEO of IT Media Consulting and a Visiting Professor of Media Economics at Urbino University, Sassari University and Università Cattolica di Milano. He is an IIC board director and President of the Italian chapter of the IIC. The views expressed in this article are his own.

REFERENCES 1 Meta (Facebook, Instagram, WhatsApp), Alphabet (Google search, YouTube), Apple (iTunes, iCloud, AppStore), Amazon (AWS, Amazon Prime), Microsoft (MS Office, Xbox) and Netflix account for 56 per cent of global data consumption. Source: Sandvine Global Internet report, 2022. 2 bit.ly/3N74nbv

WHEN ECONOMIC MODELS COLLIDE

The conflict between models of perfect contestability and perfect competition is damaging to European telcos and consumers, argues **FERNANDO HERRERA GONZÁLEZ**. Regulators need to choose

Telecommunications operators have been suffering for a while in the European Union, as can be attested by any analysis of their financial metrics. Accordingly, investors remain cautious about funding new developments, such as fibre to the home or 5G networks, jeopardising in turn the prospect for future consumer welfare in the coming wave of ‘metaverses’. In this article, it is argued that the situation is due to a collision between the economic models of reference implicit in the decisions of telco national regulatory authorities (NRAs), the EU’s Directorate General of Competition (DGCOMP) and the national competition authorities (NCAs).

Mainstream economists consider that the most efficient market in terms of social welfare is one that conforms to the conditions of the model of perfect competition. Thus, when at the beginning of the 1980s politicians decided to open legal monopolies to competition, it was hardly surprising that this was the model they attempted to use. However, several of the soon-to-be liberalised markets featured conditions, such as the requirement for large investments in order to enter, that were in direct opposition to those proposed by the model.

THE MODEL OF PERFECT COMPETITION

The competition model requires the existence of many firms of small size, so that none can influence the market price. Also, it does not allow for economies of scale around the equilibrium point. Both these conditions, together with the rest of the requirements, cause the equilibrium price to be equal to the marginal cost of the goods in the model of perfect competition. Obviously, with this price, there is no possibility of recouping any fixed costs; thus a firm requiring any type of investment to compete would go bankrupt. On top of which, as economies of scale are not allowed, costs, and therefore prices, would be higher than otherwise. Once again, this would be at odds with achieving higher social welfare.

These are the reasons that led Baumol and Sidak¹ to declare, with respect to the use of the perfect competition model to liberalise the market for local telephony in the USA, that it was ‘inappropriate because the actions that it counsels the regulator to take are neither feasible nor desirable’.

Instead, they suggested an alternative model to guide such a process – the model of contestable markets, proposed by Baumol² and used previously for markets such as the US airline industry.

THE MODEL OF CONTESTABLE MARKETS

As defined by Baumol,

‘A contestable market is one into which entry is absolutely free, and exit is absolutely costless . . . the entrant suffers no disadvantage in terms of production technique or perceived quality relative to the incumbent, and that potential entrants find it appropriate to evaluate the profitability of entry in terms of the incumbent firms’ pre-entry prices. . . ’

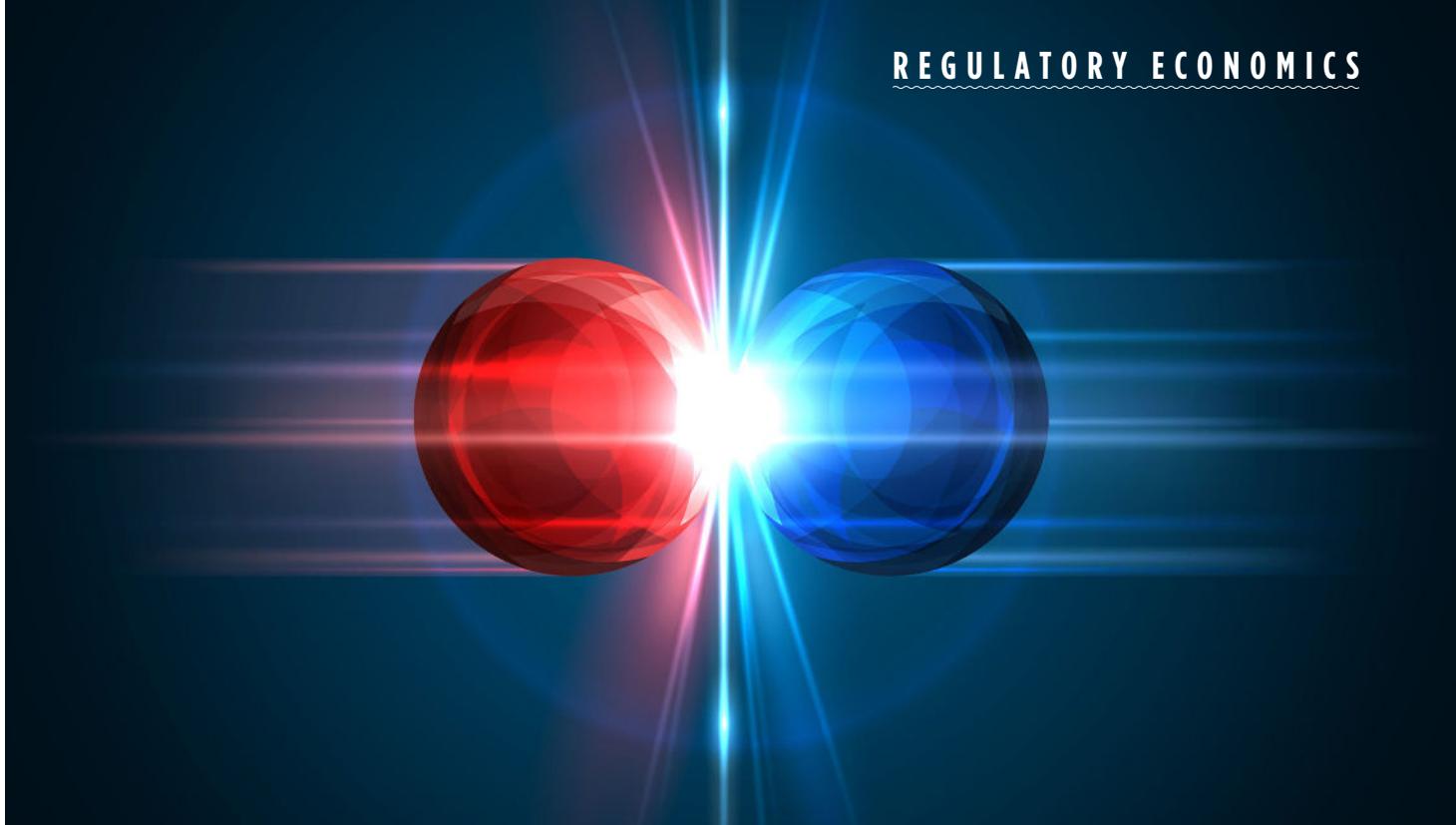
It can be shown that perfect contestable markets deliver similar social welfare results to the model of perfect competition: the same level of profits, no viability of inefficient firms, and the impossibility of cross subsidies. More importantly, the resulting prices are those required by economic efficiency.

The crucial point is that the perfect contestable market achieves the same social results as the market in perfect competition without requiring small firms and, consequently, allows economies of scale. In other words, a market may be perfectly contestable and optimal from the social point of view in the presence of big firms and, in the extreme case, of only one firm in the market.

This is easy to understand intuitively: if there are no entry and exit barriers, firms can enter and exit the market without cost. If the firms present in the market raise their prices above the competitive level, new entrants appear, increasing the productive capacity and driving the price down to the competitive level, reaping the profits in the process. Once the price is at the competitive level, these entrants can leave the market with their profits, and the productive capacity is restored to the equilibrium point at which the incumbents are sustainable.

REMOVING ENTRY BARRIERS

In sum, perfect contestable markets provided a guide for regulatory authorities when opening to



competition markets that required large investments. The focus should be on easing entry to recently liberalised markets – that is, removing the entry barriers.

This was the approach followed both in the USA (with the Telecommunications Act of 1996) and in the EU (starting with the 1997 ONP Directive³) for the opening to competition of the telecommunications market.

The removal of entry barriers went far beyond the elimination of legal obstacles. Following the recommendations of Baumol and Sidak, access obligations were imposed on former monopolists and a long debate ensued about regulated wholesale prices, starting with Laffont and Tirole⁴, a debate which has not yet concluded.

Contestable markets also require that *'exit is absolutely costless'*, but this seems to have been regarded as non-problematic. Baumol and Sidak (1994) did not include any related measure in their decalogue for the opening of the telecommunications market to competition. And regulatory authorities have not made explicit efforts in this regard. This is also acknowledged by the OECD (2019): *'The focus to date has mostly been on barriers to entry and their effects on competition. However, for competition to be effective there must also be exit.'*

At any rate, it is clear that the model of perfectly contestable markets is behind the liberalisation of telecommunications in the EU (and initially in the USA).

COMPETITION AUTHORITIES IN THE EU

As in any other economic sector, telecommunications operators are also subject to competition or antitrust law. Competition authorities arguably base their decisions on the model of perfect competition.⁵

As any good handbook of microeconomics can explain, the model of perfect competition requires the following conditions:

1. The market is atomized; all providers are small relative to the total market.
2. The product is homogeneous and undifferentiated, so

that the only variable left for competition is price.

3. There is perfect information for all parties involved; the information is correct, certain and free.

4. There are no transaction costs (in particular, there are no barriers to entry or exit).

A glance at these conditions, specifically the first one, explains the suspicions that big firms cause among competition authorities. If the 'ideal' market is composed of many small firms, then the existence of big companies is a departure from that paradigm; anticompetitive behaviours should be punished, so that the size problem does not translate into inefficiencies in the market. Hence, antitrust considers certain commercial practices to be anticompetitive when carried out by dominant players.

In the same vein, mergers should be carefully examined and even blocked if necessary, because they run counter to the ideal of having an atomized market. It should be noted that, in this pursuit, competition authorities sacrifice one of the above requirements (condition 4) in favour of another (condition 1). It remains to be explained why condition 1 is more important than condition 4 to achieve a perfectly competitive market, but that is the current practice.

In the EU, the telco sector has been the 'usual suspect' for competition authorities, probably due to the large size of the actors. There are well-known cases for both the concerns noted above. In the Wanadoo case, Telefónica was fined 158 million euros for abusing its dominant position in the Spanish market. Some years later, the acquisition of O2 UK by Hutchison was blocked by the EC.

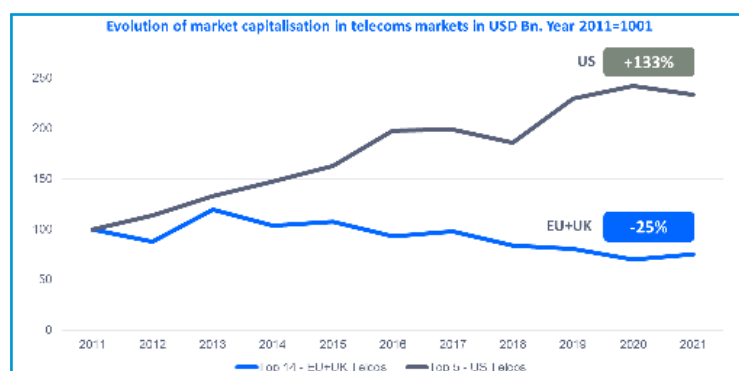
TWO ECONOMIC MODELS IN THE EU

The telco sector is thus subject to two economic models, each pursuing a different ideal of social welfare. On the one hand, sector-specific regulation bets on the model of perfect contestable markets, following the lead of Baumol and Sidak. It does not care about the size of the competing firms, and the focus is on eliminating entry

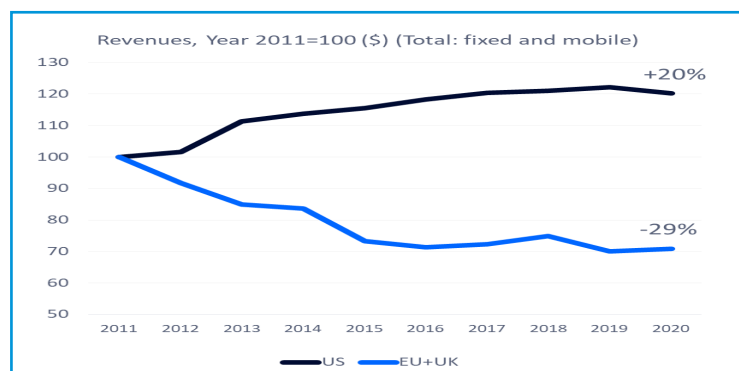
◀ barriers. There are no concerns about exit barriers because they do not seem problematic.

On the other hand, competition authorities follow the model of perfect competition, and they focus on the size and the number of firms in the telco market. They reckon that, due to the required investments, there is a minimum size to be viable, so they do not pursue a large number of small firms, as the model dictates, but they are set on a ‘magical’⁶ number of three or four agents depending on the national market. Consequently, their decisions are driven by the attainment of that number of competitors in a given market, even at the cost of having barriers to exit. In summary, the telco NRAs are reducing entry barriers to the market in order to achieve perfect contestability, while the antitrust authorities are creating exit barriers in order to achieve perfect (or at least ‘atomized’) competition. What could go wrong?

Something can and is going wrong. One just has to look at the performance of the EU telco operators against any financial metric, such as stock prices or revenues. These are shown below in comparison with the United States.



1 Annual average market cap. Telcos by region: EU+UK telcos: BT (UK); Deutsche Telekom (DE); Elisa (FI); Iliad (FR); KPN (NL); Orange (FR); Proximus (BE); Swisscom (CH); Telecom Italia (IT); Telefónica (ES); Telekom Austria (AT); Telenor (NO); Telia (SE); Vodafone (UK) US telcos: Verizon; AT&T; T-Mobile; Comcast; Sprint



Source: Omdia, Communications Provider Revenue and Capex Tracker – 1Q21 (Released in August 2021)

This illustrates the effects that regulatory schizophrenia has had for a while on these operators and their shareholders. It is probably putting their sustainability at risk. Why is this?

THE IMPACT OF EXIT BARRIERS⁷

There are good reasons why both models require that there be no exit barriers. The reasons are symmetrical to those that explain the requirement of no entry barriers to the market. Both conditions together make sure that the productive capacity, or supply, tends to adjust to the demand, so that there is no possibility of either extraordinary profits or extraordinary losses. The former would be obtained at the cost of consumer welfare, whereas the latter would reduce producer welfare, jeopardizing their sustainability.

The benefits of not having entry barriers are readily seen, especially in a market that originates from a legal monopoly, as was the case for most telco markets across the world. If new entrants find it difficult to enter the market, the former monopolist will be able to keep prices high and obtain extraordinary profits at the expense of consumers.⁸

The role of exit barriers is less obvious, but equally important. Entrepreneurial activity is prone to errors. In every market, there are moments of optimism in which entrepreneurs see a mass of opportunities. Investments are made, supply excess appears and market profitability falls. Some firms then have to leave the market in order to readjust capacity to demand and lift profitability back to the normal level. This is a normal process in all economic activities, not just the telecommunications market. For it to work, it is necessary that there are no obstacles to exiting the market. Otherwise, the excess in supply remains and the loss of profitability becomes endemic, disincentivising further investments.

In markets such as telecommunications, operators that have invested heavily in the network do not simply abandon their capacity and operations. What typically happens is that exit is achieved through mergers or acquisitions. After the merger, supply excesses are addressed, and the sector becomes profitable again. In turn, investors renew their interest in the market, making possible a virtuous circle of investment, normally by deploying assets based on new technologies. An example in the telecoms market is 5G technologies for mobile networks, which are being deployed rapidly in the USA and Asia, but slowly in the EU.

ENTRY ON PRIVILEGED TERMS

However, it is precisely at the moment of the merger that enables the ‘cleaning up’ that NCAs create exit barriers in their pursuit of the atomized market that supports their goal of a perfect competitive market. These exit barriers may take the extreme form of blocking the operation (as was the case of the acquisition of O2 UK by Hutchison), but normally their form is more subtle: imposing conditions on the merged operator so that the advent of a new entrant is guaranteed. This is what happened in the case of the merger between O2 TD and E-Plus in Germany and in the acquisition of Jazztel by Orange in Spain. In both cases, as a result of the imposed conditions, a new entrant was able to quickly obtain a significant position in the market by using privileged access terms and the oversupply was not cleared.

The problem is not that a new entrant is able to quickly win market share – that is what both economic models consider efficient for social

welfare. The problem is that the new entrant does not win its position on merit, but by getting privileged access as a result of a condition imposed on a merger (a privilege that, by the way, harms competitors present in the market even if not involved in the concentration) to make sure that there is no exit of supply. This requirement is not formally an exit barrier but acts as such because it ensures that the excess of supply remains in place in the short and medium term.

What is clear is that putting in place obstacles to mergers erects barriers to exit from the market. This runs counter to the pursued model of economic efficiency, be it one of perfect contestability or of perfect competition.

THE COLLISION OF ECONOMIC MODELS

The problem is compounded in the EU because, as we have seen, NRAs are focused on removing not just legal, but structural barriers. The consensus solution to overcoming structural entry barriers is access regulation of the former monopolist network, as proposed by Baumol and Sidak (1994). The main component of access regulation is, of course, the regulated price for the wholesale service, for example mobile termination rates or the fee for renting the last mile (unbundled local loop).

NRAs' decisions on regulated prices are based on a limited amount of information about markets, costs, services and other parameters. This is a well-known problem, on which there is plenty of economic literature. The fact is that NRAs cannot avoid errors when setting those prices. If the regulated prices are higher than the efficient market prices, then entry into the market does not occur. Because NRAs want to see entry into the market, they tend to lower prices until it does. The chances are that, at that level, the regulated price is actually below the efficient market price when, by definition, inefficient entry to the market is bound to happen. In fact, regulated prices below the efficient market level may cause a 'bubble' in investments, excessive entry, and excessive supply. For example, in Spain, there are three fixed NGN networks that overlap in most of the country, a phenomenon that is not observed anywhere else in the world. Could it be caused by regulated prices of ducts being well below the efficient market level?

In sum, the pursuit by NRAs of a perfect contestable market may have led to disproportionate ease of entry and, in turn, excessive market supply. This excess should be 'cleared' by less efficient actors leaving the market but as already explained, NCAs erect exit barriers by blocking or imposing conditions on mergers.

Whatever shape they take, it has been shown that the creation of exit barriers runs counter to the efficiency of the market and harms consumer welfare. It is because of this that the colliding

models require the absence of barriers to exit from the market. What was more difficult to anticipate is that these barriers to exit would be created by one authority pursuing an economic model different from the one guiding the liberalisation of the market.

CONCLUSION

Telecommunications operators and their shareholders have been suffering for a while in the EU. In this article it is argued that this is due to the contradictions inherent in the different economic models pursued by NRAs and NCAs.

Whereas NRAs have as a goal a perfect contestable market, where both entry and exit are perfectly possible and optimal efficiency is attained regardless of the number of operators present in the market, NCAs pursue a perfect competitive market, in which there should be many small agents to achieve the same goal of optimal efficiency.

Both economic models have their pros and cons and this is not the place to discuss them. But it is important to highlight the contradiction in their goals because it is wreaking havoc in the EU telco market. On the one hand, NRAs create extremely good conditions for entry, likely to create a bubble of inefficient operators; on the other hand, NCAs hinder the exit of those inefficient operators by blocking or imposing conditions on acquisitions, so that the inefficient supply remains artificially in place.

It seems time for the EC to clarify its thinking. It is just not possible to reconcile both economic models, nor according to economic theory is it even necessary. The pursuit of both 'ideals' threatens the sector at a moment when, after the experience of the COVID pandemic, telecommunications providers are regarded as more important than ever.

Both NRAs and NCAs, including DGCOMP, should be aligned in the pursuit of just one of the economic models: perfect contestability or perfect competition. Let us hope that they choose wisely, and at least that they choose.



FERNANDO HERRERA GONZÁLEZ is Manager of Economic Regulation at Telefónica SA, and Associate Professor at Universidad Politécnica de Madrid. He holds a PhD in telecommunications engineering and a degree in business and economics.

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REGULATING PLURALISM

ELISA GIOMI says that we need to move beyond economic determinism and bring the focus back on what matters – information

This article reflects on the notion of media pluralism and the forms of its protection. It first offers a definition of pluralism drawn from recent proposals developed in the field of media studies. It then turns to an analysis of pluralism regulation taking Italy as a case study, Italy being the subject of a ruling by the Court of Justice of the European Union (ECJ) because it had disavowed the deterministic approach prevalent at the European level. The limitations of this approach are analysed with reference to the digital ecosystem, describing how the role of online platforms with respect to information pluralism is more multifaceted than it appears in mainstream narratives. Lastly, this article offers proposals to reconcile the prevailing scholarly theories in the field with the approach that has emerged from the legislation in order to bring the asset protected by pluralism – information – back to the focus of attention.

A DEFINITION OF PLURALISM

Notwithstanding a common understanding of the notion of pluralism, a definition is lacking in the legislation of most European countries.¹ Not even the European Media Freedom Act (EMFA), the most recent attempt to regulate pluralism at the EU level, proposes a definition.² It does, however, address its two traditionally accepted components – pluralism understood as a market arrangement and pluralism understood as a plurality of voices.

In search of a definition of pluralism, it is useful to refer to the proposal that comes from Raeijmaekers and Maesele in a 2015 article entitled 'Media, pluralism and democracy: What's in a name?'³ The authors pin down two criteria identifying media pluralism.

The first lies in the 'consensus/conflict' distinction. In the so-called 'affirmative' media theories, the role of media is evaluated by their ability to represent and reproduce social consensus and the dominant socio-political order. These theories are characterised by the absence of critique of the status quo and by the tension towards reconciliation of dissent. Other theories, such as 'critical media studies', share a socio-centric approach and believe that media should be able to represent the structural

inequalities and discriminations, the power conflicts and asymmetries of contemporary society.

The second distinction underlined by Raeijmaekers and Maesele is 'diversity/pluralism'. Diversity understands plurality as pre-existing media representations, a variation of society that is empirically observable. Pluralism refers to a contingent and embedded ideological variation, that is, to a diversity of opinions about and visions of society.⁴ While 'diversity' is a descriptive concept, 'pluralism' can be understood as a social value.

Cross-referencing the two criteria of consensus/conflict and diversity/pluralism, four different notions of media pluralism emerge. Depending on which one is referred to, assessments of the conditions that favour or harm pluralism and the role of the media will vary.

For the purposes of this contribution, it is useful to analyse only two of the notions proposed, both of which are based on the pole 'diversity'. 'Affirmative diversity' refers to the idea of media as a 'marketplace of ideas' or a mirror of society. The media are expected to faithfully represent social heterogeneity. In this view, pluralism is ensured by a balanced and unbiased representation of social diversity, for instance, in terms of actors, issues and viewpoints.

The understanding of pluralism as 'critical diversity' focuses on the neutral and truthful representation of pre-existing social diversity too. However, in line with critical media studies, the 'critical diversity' approach stimulates contestation and questions the existing social order, assuming that this is characterised by economic power imbalances. Therefore, instead of focusing solely on media content, the concern here 'lays mainly with the commercial interests and mechanisms of media organisations and the routines of media practitioners, and how these determine the level of diversity within media coverage'.⁵ The critical diversity approach to pluralism pays special attention to the economic dimensions of media, that is, their dimension as (cultural) industries. Subsequently, diversity of media content is interpreted as the result of a competitive mediascape, which is in turn understood as the presence of media outlets of different ownership. This is considered a



necessary and sufficient condition for ensuring media pluralism.

What should be stressed is that firstly, this approach is characterised by economic determinism and secondly, despite being only one of many possible approaches, it has become prominent. In Italy and in Europe, the safeguard of media and information pluralism has developed mainly from a competition law perspective and has always rested on the implicit equation that concentration and pluralism – however one understands it – are inversely proportional. There is no automatism, though. As Karppinen notes, ‘increased competition in the media market can lead to greater diversity of media content as well as further homogenization’.⁶ The limitations of the competition approach become even more evident in the digital ecosystem when considering the relationship between publishers and platforms. Let us now consider the legislation, with reference to the Italian case.

THE LIMITS OF PLURALISM AS COMPETITION AND THE ROLE OF PLATFORMS IN NEWS ACCESS

Until December 2021, the protection of pluralism in Italy was entrusted to TUSMAR (Testo Unico dei Servizi dei Media Audiovisivi e Radiofonici). Established in 2005, it introduced Agcom⁷ control on agreements and concentrations between companies as well as on the revenue thresholds that could be achieved by the operators in the markets included in the so-called ‘Integrated Communications System’ (SIC). However, in 2020 the ECJ expressly declared that this provision was contrary to EU law, on the grounds that merely exceeding certain thresholds automatically constituted an infringement of pluralism and, conversely, below this threshold pluralism was safe.⁸

Nevertheless, the approach of economic determinism also remains in the TUSMA (Testo Unico sui Servizi dei Media Audiovisivi)

adopted in November 2021.⁹ The law entrusts the protection of pluralism to the assessment by Agcom of ‘positions of significant market power that are detrimental to pluralism in the Integrated Communications System’ (Article 51). In addition to that, some changes to the list of markets forming the SIC are introduced.¹⁰ These changes do not appear to be sufficient to overcome the critical issues noted by the ECJ in its judgment, which considers revenues that derive from heterogeneous markets, which have little to do with information, to be misleading. An example is the online advertising market, which is now included in the SIC, even though advertising, online or offline, is not an issue of pluralism as commercials and banners are not information sources! The advertising market is nonetheless included among the relevant markets by TUSMA. This is because it contributes to determining the value of the SIC expressed in terms of operators’ revenues, which is the basis for determining their market shares and the possible exceeding of concentration thresholds which results – now only potentially rather than automatically – in a violation of pluralism.

Certainly, advertising is part of the information value chain and a central element of the news business. It is not an accident that the 2021 Media Pluralism Monitor identifies as a critical aspect of the digital environment the fact that platforms drain advertising resources (66 per cent is distributed among the three major tech firms, Google, Amazon and Facebook, with the remaining third divided among publishers).¹¹ In fact, it is the competition between Big Tech and traditional publishers for advertising revenue, user attention and data, even through fake news, that is the main argument made by those who advocate an antitrust approach to counter the damage to democratic processes in data-driven markets.¹²

However, in market assessments oriented to information pluralism, advertising should

◀ be considered in relation to news content only. If, for example, a platform grows through the collection of online advertising revenue associated with pornographic services, there is no harm to pluralism. However if only one news outlet collected 100 per cent of online advertising revenue, this would be a symptom to be taken into account when assessing the health of information pluralism, since all available financial resources would benefit only that one news outlet.

At the same time, the role of platforms in information pluralism cannot be interpreted simplistically as a ‘cannibalisation’ of advertising revenues by platforms. News aggregators, search engines, social media and other online services play a significant role in providing access to a plurality of news content produced by third parties, including local and little-known sources.

The news services of online platforms benefit pluralism but also provide the traditional media with an important showcase, enabling them to secure a significant share of users’ attention. Elaboration of public data dating back to 2018 reveals that platforms represent the ‘front page’ of all newspapers for about 54 per cent of readers.¹³ For newspapers, it is possible to estimate an upper limit of revenues from traffic redirected by algorithms at about 500 million euros (valuing 54 per cent of information access from platforms). From this it can be calculated that it is press publishers who benefit from platforms rather than the other way around: news content represents for the latter 3-4 per cent of the content monetised through online advertising revenues – less than 100 million euros (4 per cent of total revenues).

The impact of platforms is especially evident in certain social categories and themes. If ‘older’ social media, such as Facebook, are divesting from news content and focusing on reels and entertainment, one in four young Americans get their information through TikTok, even on the war in Ukraine.¹⁴ It’s worth noting that social networks, as well as search engines, are often vehicles that direct users to the websites of the broadcasters and newspapers that represent the main source of information in many countries. For instance, the topmost visited Italian websites are precisely those of major news agencies and newspapers (Repubblica, Corriere della Sera, ANSA) with about 500 million visits each month and one billion page views.

This is not to downplay the critical aspects of the role played by platforms in the light of pluralism. Since platforms do not produce their own content but disseminate that produced by third parties, the main concern is about the moderation activity that stems from their business model and the role of algorithms in

this activity. Information and advertising are treated equally in this regard: algorithms direct to users only the news that is most interesting to them based on their preferences. Algorithms personalise the services offered, selecting news content and its order on web pages and search results. It’s believed that this can harm the completeness of information that is received by users (and therefore informed public opinion) because the algorithms get to know users and propose information that is interesting to them, exploiting selective attention and confirmation bias. In this way, it is argued, we will never be exposed to different opinions or have the chance to compare them, to the detriment of information pluralism. As the expression ‘hype machine’ by Sinan Aral recalls, the integrated ecosystem constituted by social media is a marketplace of persuasion in which companies and politics compete for attention through digital marketing techniques that, via social media, can maximize the ability to emotionally hook the audience.

Looking at data on distribution and profits, it is crucial to debunk the oversimplified and polarised narrative around ‘fair remuneration’ measures recently introduced in several

countries, Italy included. This narrative casts platforms in the role of economic predators and press publishers in the role of those which are preyed upon. In fact, as we have seen, their relationship is mutually beneficial, at least in economic terms. However, it is important to stress that revenues, per se, are a poor indicator of the health of information

pluralism, or at least a non-exhaustive and sometimes even misleading one.

This is because pluralism is, by definition, a ‘market failure’; that is, a goal which cannot be achieved by competition alone, nor by limiting the degree of market concentration. Going back to Raeijmaekers and Maesele’s classification, the weaknesses of the critical diversity notion of pluralism, linking the diversity of media content to the presence of media outlets of different ownership, now appear more evident: even a competitive context could harm pluralism if all the media outlets were to favour only a few social actors and viewpoints, to the detriment of social heterogeneity. On the other hand, and paradoxically, a monopolistic context could ensure pluralistic conditions if news media were able to give access to a plurality of opinion-bearers of different backgrounds and cultural orientations.



Pluralism is, by definition, a ‘market failure’; that is, a goal which cannot be achieved by competition alone.



CONCLUSIONS AND PROPOSALS

The Italian TUSMA decree sets out an attempt to safeguard pluralism that no longer relies on a purely competition law approach, but takes into account plurality of content. For example, pluralism is understood as ‘openness to different political, social, cultural and religious opinions and tendencies’.¹⁵ In addition, for the first time, pluralism is addressed in relation to the specific domain of news and information. (This would seem to go without saying, in the context of the protection of information pluralism, and yet the former TUSMAR did not make a single mention of news, current affairs or other journalism genres.)

In the text there is also mention of ‘user access, according to criteria of non-discrimination, to a wide variety of information and content offered by a plurality of national, local and other EU Member State outlets’, ‘plurality of editorial lines’ and even more relevantly, the ‘principle of specialty’ states that TUSMA prevails over the European Electronic Communications Code (EECC) ‘in view of the objectives of protecting pluralism’. This is an implicit admission that competition, which is protected by the EECC, is not alone capable of ensuring an adequate level of pluralism.

More importantly, the prohibition of positions of significant market power detrimental to pluralism no longer refers, generically, only to the ‘market’ but finally also to the specifics of ‘information services’. Non-economic and competitive parameters are introduced for the first time. This creates a new methodological challenge, given the multimedia and convergent nature of most media companies, the multiple vehicles of media content distribution and the different metrics involved.

There are two operations necessary to rethink the protection of this collective good in a way that transcends the economic determinism of the current legislation and develops what the TUSMA has introduced:

1. Bring information back to the centre of the system, by defining clearly not only the term ‘pluralism’, as this article has attempted to do, but also the term ‘information’ itself. In this way we can identify the type of media content and services that are relevant for the purposes of the legislation.

2. Develop reliable methodologies to measure the state of media representation of diversity – that is, to identify criteria, conditions and forms of access of opinion-bearers to the media.

Media and communication theories ascribe to the macro-genre of news and documentaries

all those media formats and genres deputed to represent factual reality, and with which the public establishes a ‘contract of truthfulness’, i.e. they expect such products to tell the truth.

‘True’ is to be understood not as opposed to ‘false’ (since truth is a controversial and disputable concept) but as opposed to ‘fake’ in the sense of artifact, or the result of imagination, such as fiction. As well as the wide galaxy of products somewhere between ‘real’ and ‘fictional’, such as factual entertainment, fiction contributes strongly to the social construction of reality by audiences, the shaping of public opinion and collective imaginaries. However, for the purpose of delimiting the object of our analysis, only properly ‘informative content’ – characterised by journalistic sources and correlation with current affairs and public sphere issues, such as politics, economics, finance, culture, society, etc. – are relevant. Examples include newspapers and news broadcasts as well as talk shows and infotainment.

Having clarified what is meant by ‘information’, it becomes necessary to circumscribe the scope of the discipline and identify which information services/content are offered by media companies (online and offline) and online platforms. This is crucial to avoid disproportionate measures that may distort the goal of ensuring complete and effective cultural diversity of information sources.

We come to the second ‘operation’, which is the measurement of the state of media representation of a variety of voices. The idea is that online platforms and media companies (online and offline) should be seen as intermediaries that connect producers of news content with the users of that content (the public). The media company should therefore be called upon to provide in a transparent and non-discriminatory manner the widest access to producers of information content and services with the aim of ensuring the visibility of the full spectrum of cultural diversity in a society. Instead, at present, in many European countries the conditions of access to media companies by opinion-bearers are largely unknown.

The first step is therefore a recognition of the criteria and conditions of access, without which effective measures cannot be developed to guarantee the completeness and diversity of information sources. The motto ‘to know in order to deliberate’ means introducing evidence-based regulation, which will enable sectoral authorities to make decisions based on quantified and verifiable data.



ELISA GIOMI is an Associate Professor at Roma Tre University, Department of Philosophy, Communication and Performing Arts and a Commissioner of AGCOM. The views expressed in this article are her own.

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CONCENTRATION AND CONTROL IN TIMES OF PLATFORMISATION

As regulators continue to struggle with issues of media plurality, **NATASCHA JUST**, **ALENA BIRRER** and **DANYA HE** review the findings from their recent study

Media concentration and its control have long been a central but controversial issue in communications governance to which new, market dominant internet companies add further challenges. Traditional approaches to regulating media concentration have primarily focused on the supply side, aiming to counter national ownership concentration by promoting a plurality of owners in the belief that this would foster content diversity. However, inconsistent empirical evidence has cast doubt on this assumption¹ and the new abundance of channels afforded by convergence and liberalisation led to major deregulation of media concentration rules in the early 2000s.² Equally challenging has been the question of how to measure and assess diversity in content and opinion, a contentious issue that has persisted over time.³

As the media landscape continues to evolve and is increasingly dominated by large, mostly US-based online platforms, the question arises of how and whether such platforms should be integrated into regulatory frameworks that protect media plurality and content diversity.⁴ These platforms have profoundly restructured our societal communications system and disrupted traditional national media markets. Through their algorithm-based selection, aggregation and presentation of content, they critically shape the way content is produced, distributed and consumed today.⁵ As a result, opinion power is shifting from legacy media to platforms and the nature of this power is changing too.

As policymakers and regulators worldwide grapple with these challenges, different responses have emerged. This article presents three observations on the current state of media concentration control in times of platformisation based on a cross-national study of six countries: Austria, Germany, Italy, Switzerland, the United Kingdom and the USA.⁶ Altogether the analyses show that dedicated reforms of media concentration control are not prioritised and deregulation of media ownership is continuing. There have been comprehensive reforms of general competition law, however, which focus on modernising the laws to adjust them to new market realities. The focus of reforms is on adapting competition laws to the characteristics of multisided markets and introducing measures to counter the anti-competitive practices of internet platforms.

In addition, reforms seek to strengthen the national media and to promote diversity and discoverability of public value content. The latter is best exemplified by Germany's pioneering diversity obligations for internet platforms aimed at taming their algorithmic gatekeeping powers.

REFORMS OF MEDIA CONCENTRATION CONTROL ARE NOT BEING PRIORITISED

With the exception of Germany and – if the discussed reforms take place – the UK, none of the countries studied has a pronounced policy focus on media concentration and opinion power control in the light of platformisation. On the contrary, there has been continued deregulation and further loosening of concentration rules. Traditional national media concentration control, with its focus on structure, is continuing to lose ground and just a few rules remain in the countries studied. Ownership regulation is no longer the major toehold for thinking of media power, as also noted in the UK's Office of Communications consultation document on 'The future of media plurality in the UK'.⁷ This is also due to its practical infeasibility in globally complex networked media systems and the decade-long methodological problems in the empirical measurement of concentration. Sometimes such regulation even stands back for the sake of supporting the national media's competitiveness vis-à-vis economically strong, globally active internet platforms. Accordingly, attention is shifting from the traditional focus on multiple owners supplying diverse content to the diversity of content actually consumed and to discussions of how to increase exposure to certain content. Other problems such as hate speech and disinformation online have taken policy precedence, exemplified by laws such as the 2017 German NetzDG, the 2021 Austrian Communication Platform Act, or the proposal for a UK Online Safety Bill. The impact and consequences of these problems are amplified by the use of sophisticated algorithmic selection in internet applications⁸ which have become a further policy focus.⁹ Notable examples are the 2023 UK principles-based pro-innovation approach to regulating artificial intelligence, the 2022 US Algorithmic



Accountability Act and the proposal for a European artificial intelligence act.¹⁰

While traditional media concentration control has not been prioritised, some reforms are worth mentioning. Italy updated its media ownership rules in 2021 in response to a ruling from the Court of Justice of the European Union (ECJ).¹¹ The Italian communications authority (AGCOM) must now consider the characteristics of online platforms, such as network effects or access to data, when assessing whether a company with significant market power has a detrimental effect on media pluralism in the integrated communications market. (See article by Elisa Giomi on p18). Germany started media reform discussions in late 2014, also with the aim of introducing a media concentration control that would take the new internet intermediaries into account. While it eventually failed at this, it is still assuming a pioneering role among the countries studied both with its competition law and media law reforms. In addition, there is continuing intent to reform German media concentration regulation as indicated by a joint protocol of the Federal States annexed to the new media law, which entered into force in 2020.

REFORMS ARE PRIMARILY TAKING PLACE IN COMPETITION LAW

Since a period of extensive deregulation of media concentration regulation in the early 2000s,¹² general competition law has figured prominently in communications markets and has now somehow assumed the role of most suitable instrument for limiting the market power of internet platforms. This, however, is on condition that it is modernised, because it no longer conforms to market realities.¹³ Germany, Austria and Italy have (repeatedly) amended their competition laws over recent years, and reforms are pending or being discussed in the UK and the US. Only Switzerland has neither discussed nor implemented reform. The changes effected address the characteristics of multisided markets such as indirect network effects and multihoming (for example in market power

assessments), the intermediary and gatekeeping powers of internet platforms, the critical role of data in the digital economy as well as early intervention possibilities in these markets. The main focus of reforms is on changes to the control of abusive practices, with some adjustments to merger control and the ban on cartels. While these changes may eventually contribute to a more diverse online environment, their goals are not expressly to secure diversity of content or ownership plurality. In line with competition law goals, they mostly focus on market power and its abuse.

The power to control access to key resources such as data and infrastructure and the impact this may have on the ability of other companies to compete and innovate has been a major concern. To remedy some of the expected anti-competitive behaviour, Germany, Austria and Italy introduced rules on data portability and interoperability in 2021 and 2022 respectively. A recent 2023 reform proposal would further give the German Federal Cartel Office (FCO) the power to require companies to grant access to data, interfaces or networks if it finds significant, persistent or repeated disruptions of competition. It would also gain the authority to order unbundling in dysfunctional markets without having to prove specific abuse, which is consistent with long-standing calls for ways to break up internet companies.

Reforms also point towards facilitating early intervention in digital markets and regulation-like controls of abusive practices have been introduced into various competition laws. For example, since 2021 the FCO has been allowed to determine that a company has ‘a paramount significance for competition across markets’. Once this is established, as is the case for Meta, Google/Alphabet, Amazon, and Apple, it may ex ante prohibit the company from engaging in anti-competitive practices such as self-preferencing or the exploitation of information asymmetries. The extent to which such national rules can be applied in parallel to the European Digital Markets Act,¹⁴ which introduces ex ante regulation to ensure contestable and fair markets, remains in question. Nevertheless, Germany’s approach has

← inspired reforms and discussions in other countries. For example, the UK Digital Markets, Competition and Consumers Bill, which is expected to enter into force in 2024, allows the designation of companies with ‘strategic market status’. Behavioural requirements and pro-competitive interventions can be imposed on these companies, including potential structural separation. Ex ante rules of conduct were also discussed in the US as part of a broader shift in competition policy, which now places a strategic focus on curbing platform power after having long neglected it.¹⁵ However, a package of ambitious bipartisan antitrust reform proposals targeting large internet platforms was ultimately postponed.

Early intervention in platform markets is also enabled by changes in merger control. The elimination of nascent or potential competitors or in the most extreme cases ‘killer acquisitions’ that result in the discontinuation of the acquired competitor’s product or service, have become a key concern for regulators. Such acquisitions may fall outside the traditional necessary turnover thresholds and thus escape merger control. Accordingly, Germany and Austria introduced criteria that focus on the transaction value of mergers in 2017 and 2018 respectively. A similar threshold is also set to enter into force in the UK in 2024. Furthermore, competition authorities have started to acknowledge the non-price effects of mergers in digital markets, for example by updating their merger guidelines to take into account factors such as attention, data, quality, and privacy.¹⁶ In this context, there is also a broader debate about whether current theories of harm and welfare standards must be re-examined in light of the peculiarities of digital markets.¹⁷ Finally, Germany has recognised zero price markets since its 2017 competition law amendment. This is a very significant change because it acknowledges the important role that zero prices play in internet markets, which has long been neglected in competition cases.¹⁸

Overall, comprehensive reforms of competition laws and particularly the introduction of ex ante instruments bring renewed discussions about the relationship between regulation and competition law in communications – a debate that first gained momentum during the deregulation of media concentration rules in the early 2000s. Thus far these discussions have not involved a comparable struggle over normative standards and value choices and have focused more on the respective strengths and efficiencies of each instrument, as well as on the allocation of competencies.¹⁹ This is also reflected in the establishment of inter-agency cooperation between media and competition authorities in Germany, Italy, Austria and the UK.

REFORMS FOCUS ON PROMOTING DIVERSITY AND STRENGTHENING NATIONAL MEDIA

In addition to traditional media concentration control, which focuses primarily on structures, there have been a variety of other measures to safeguard media or opinion diversity, including public broadcasting remits, diversity-ensuring regulations for private broadcasters or quotas for certain content. In current discussions, increased attention is being paid to these additional, supplementary measures. Germany is a pioneer here, with a unique set of rules for platforms and intermediaries introduced in its 2020 media law. These revolve around non-discrimination and transparency requirements and aim to safeguard pluralism of opinion and equality of communication opportunities. For example, certain platforms have to assure open transmission channels by guaranteeing non-discriminatory access, meaning that access may not be obstructed by conditional access systems or by charging different prices for similar offerings. A further requirement is signal integrity, necessary to guarantee the sovereignty of providers over their own content. Internet platforms may, for example, not apply any overlays to original content without the providers’ consent. In addition, there are various transparency obligations, especially with regard to providing information on the aggregation, selection and presentation of content. This is in response to the increasingly prominent role that algorithms play in the curation of content. However, according to a study by the German media authorities,²⁰ the platforms have not yet adequately complied with this duty to inform.

The easy discoverability of public value content and actual exposure to it have become central concerns for policymakers. Germany introduced must-be-found rules to assure that public value content (defined by its proportion of news programming, local relevance or number of professional journalists involved) can easily be found and discovered on non-discriminatory terms. There is also a duty to privilege certain public value content, such as the content of public service providers. This goes hand in hand with discussions of how people can be exposed to a variety of perspectives and ideas. In this regard, diversity-optimised ‘democratic’ recommender systems are suggested,²¹ which could nudge users to engage with such content.

In addition, promoting the production of national, regional and European media content as well as supporting local and regional journalistic initiatives have taken on new importance. Examples include the 2022 ‘Lex Netflix’ in Switzerland, which requires streaming services to invest part of their revenue in Swiss film production, or the UK’s pilot news innovation fund established in 2019 to support public interest journalism.

As more and more people turn to online platforms instead of traditional media and advertising revenues decline, the strengthening of national media’s competitiveness moves centre stage. Among other things, the continuous repeal of domestic ownership and licensing restrictions effectively allows for more concentrated national media markets and thus national champions that may be better able to compete against platforms. This is also facilitated by the loosening of rules for media mergers, such as the 2021 lowering of turnover multiplication factors in merger cases in Germany, and by exempting press companies from the ban on cartels in Germany and Austria in 2017 and 2018 respectively. Another way of strengthening national media has

been via ancillary copyright, which gives them the power to negotiate remuneration for their content with online platforms when it is used or distributed. After various national efforts, this is now being regulated by the European Copyright Directive²² and has been proposed in the USA with the 2022 Journalism Competition and Preservation Act. Finally, a focus has been on strengthening traditional national media and their digital offerings, for example through subsidies such as the Austrian fund for the promotion of digital transformation. However, this has been politically contested, among other things due to concerns over editorial independence, as evidenced by similar but failed efforts to introduce media subsidies in Germany in 2021 and in Switzerland in 2022.

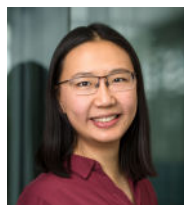
CONCLUSIONS

The rise of internationally dominant internet platforms has disrupted national communications markets, creating both new policy problems and new challenges to old ones. Policymakers, regulatory agencies, and competition authorities worldwide are struggling on various fronts and must therefore set strategic priorities accordingly. Traditional sector-specific media concentration control has so far been a low political priority. The focus is mostly on reforms of general competition laws, which aim at constraining the market power of internet platforms. Such reforms specifically address the characteristics of multisided markets and especially the varied anti-competitive practices of platform companies. They focus on enabling early intervention in platform markets, for example by tightening merger control and introducing ex ante instruments. Instead of reforming media concentration control, policymakers are currently aiming to strengthen the competitiveness of national media vis-à-vis international digital platforms by exempting press companies from competition law scrutiny, introducing media subsidies or promoting public value content. Thus, in view of increasingly complex media systems and platformisation, instruments of traditional media concentration control must be situated within a broader context of further measures that contribute to safeguarding media plurality. The European Commission is seeking increased involvement in this policy area, despite a lack of explicit competencies for media policy issues.²³ Among other things, the newly proposed European Media Freedom Act seeks to establish a set of common rules on media market concentration in the European Union²⁴ and requires member states to assess the impact of media market concentrations on media plurality and editorial independence with explicit consideration of the online environment. Recalling earlier highly controversial discussions between member states and the Commission on this issue (such as initiatives to harmonise media concentration regulation 30 years ago), it remains to be seen whether and how this proposal will prevail.

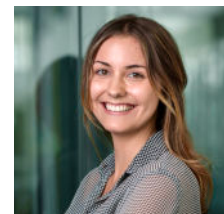


NATASCHA JUST is a Professor of Communication and Chair of the Media and Internet Governance Division at the Department of Communication and Media Research of the University of Zurich.

ALENA BIRNER is a Research and Teaching Associate in the Media and Internet Governance Division at the Department of Communication and Media Research of the University of Zurich.



DANYA HE is a Research and Teaching Associate in the Media and Internet Governance Division at the Department of Communication and Media Research of the University of Zurich.



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A HUMAN-CENTRED DIGITAL FUTURE

PAUL TWOMEY of the Global Initiative for Digital Empowerment argues that consumers need to be a central part of the 'market for data'

Recent advances in artificial intelligence have only served to accentuate the need for consumers to have control over how and when data about them is processed and used, and in what circumstances. At the Global Initiative for Digital Empowerment (GIDE), we believe that there is a fundamental imbalance of power in digital markets, that this is creating a range of both societal and economic problems, and that the best way to resolve these is to make consumers active economic participants. In this respect, our proposal builds on many of the ideas within the EU's new Digital Markets Act and Digital Services Act, and in the General Data Protection Regulation.

PROBLEMS WITH DATA GOVERNANCE

The current regime for data governance has enabled all kinds of problems to proliferate on the internet. From inadequate privacy protection to misinformation, manipulation and hate speech, it is becoming increasingly clear that the great benefits of the digital transformation are being undermined by damage inflicted on social cohesion, market economies and democracy itself. Small wonder that a global survey of over 14,000 citizens in 20 countries shows a strong majority of respondents agreeing that new government policies are required to improve trust on the internet.¹

While the problems are many, we believe the cause can be traced to a single and fundamental point of origin: third-party digital barter, leading to a misalignment of interests between digital consumers and third-party actors. It's worth considering this in more detail.

WHY IT'S NOT A FUNCTIONING MARKET

A traditional economic model involves the exchange between consumer and provider in which revenue flows to the latter from the former, with products and services travelling the other way. This could be described as 'visible trade' and online is best evidenced by e-commerce. However, the other 'revenue' of digital service

providers is mainly in the form of the personal information extracted by them to an extent almost no consumer understands. This is a digital barter, or 'invisible trade', in which the service provider effectively bundles personal information and sells it to other producers and influencers. While the exchange between providers and other influence actors, such as advertisers, acts as a market, the invisible trade in extracting personal data does not, because the consumer is effectively excluded from the understanding and from any decision making.

The current policy approach is to deal with the symptoms in isolation through a combination of privacy policy, competition law, consumer rights legislation, taxation and voluntary guidelines. However, this results only in policymakers engaging in a never-ending battle against systemically inappropriate incentives. We argue that a much better solution is to make consumers active market participants by giving them control of their personal data, individually and collectively. They should be able to approve who has access to their personal data and on what terms, giving them a point of leverage and rights of association. In return, individuals would be required to maintain accurate, authenticated data.

PERSONAL DATA

The data normally required for entering a contract or satisfying the identity requirements of government or major institutions is 'personal data', such as that defined in the EU's General Data Protection Regulation. Examples include names, addresses, personal identification numbers, personal characteristics such as biometric data and personal asset information like MAC addresses.

Personal data should be maintained by citizens in a trusted repository and they should have the obligation to ensure that the data is authenticated by legally accepted sources. Just as data on a passport or identity card held by an individual is legally required to check in to a European hotel, the repository should be the sole initial legal source of this data for public and private transactions, unless specifically stated otherwise by law. The data accessed by an entity could carry a transaction-specific digital signature confirming that the data in the hands of the entity has been sourced correctly. These data holdings would be open to audit.

An extension of personal data is that related to individuals, but which is not collective and does not require authentication by third parties. It includes 'first party' data, such as blogs and personal photographs which are generated by the data subject



and ‘second party’ data, generated by a second party about the data subject, such as location data from smartphones or records of a person’s past purchases. This includes AI inferences and passive data obtained autonomously.

First party data is placed online by the user in the context of a contractual or other legal relationship with a company such as a cloud operator, telco, app provider or employer. This legal relationship will require the company also to link to or hold the individual’s personal data and negotiated preferences as part of their account management processes. Use of this data should be negotiated on behalf of citizens by data market professionals, who would advise on what terms should apply to the use of their personal data. Citizens would be provided with effective rights of association and representation.

Second-party data is inferred about the data subject and just as in existing offline rules (like doctor-patient standards), such data is to be used only in the interests of that subject. Legal protections can be drawn from ‘fiduciary law’ frameworks.

DATA COMMONS

A data commons is a legal entity that protects and uses the data of members to serve defined collective objectives, subject to a fiduciary duty to serve their interests. This would include, for example, medical databases and location data for traffic management. The data commons is a defined and protected structure to which people can delegate the stewardship of certain subsets of their personal data. Drawing on existing types of organisations including clubs, cooperatives, trade unions and trade associations, legal guidance and definitions will encourage the emergence of data commons that meet currently unmet demand for data sharing that protects and extends the interests of data subjects. We propose that:

- Legal structures are created to support the establishment of ‘data commons’.

- Common data are under the control of effective, trustworthy and competitive organisations that promote the benefits of data subjects and the broader society.

- The data commons are permitted to use data only for specified purposes and its use is transparent and accountable.

The proposed representative/agent role to support consumers will also be an effective mechanism for determining if consumers are interested in participating in data commons initiatives.

ADDRESSING DIGITAL POWER

In order to address the asymmetries of digital power our proposals include the provision of effective rights of association (enabling consumers to act in their own best interest) and legal protection for vulnerable users. It’s important that competition in the online world is in every respect analogous to that in the offline world. Data should be cryptographically hashed specific to each entity and consumer records subject to oversight through GAAP-style standards², enforced through audits. This ensures that entities collecting personal

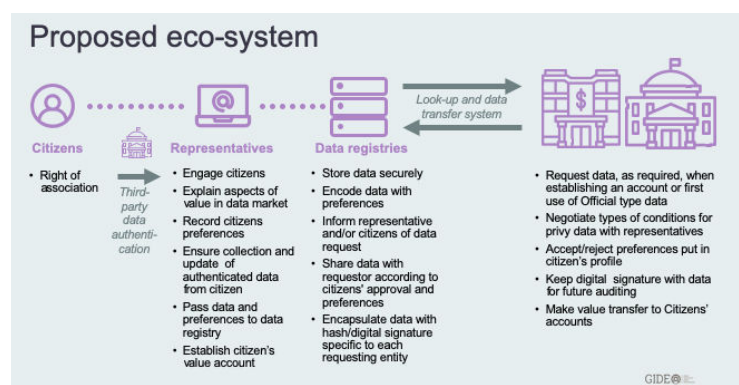
KEY PRINCIPLES FOR RELINKING SOCIAL WELL-BEING WITH ECONOMIC BENEFITS IN THE DIGITAL SOCIETY

- Bring all users into the market and empower them as market participants: to approve who accesses their data and on what terms
- Give individuals a point of leverage and rights of association so that they can access data market skills
- In return, require individuals to maintain accurate, authenticated data
- Adopt a multi-tiered definition for personal information with different policy requirements for each tier
- Build on existing technology and business models like the Domain Name System or credit card processing system
- Apply long standing rules in the offline economy to protect the vulnerable from manipulation (e.g. doctor-patient) to online actors
- Improve the cybersecurity around individuals’ personal data and reduce fraud in business, for citizens and in government.
- Enable and incentivise data commons for the public good

information, especially those involved in data trafficking, abide by the rules to source personal data only from the consumer-controlled repository. Audits would ensure that entities use personal data from the prescribed source and provide a third party to verify that those holding intimate user data act in a way that is transparent to consumers and is in the individuals' interests.

BUILDING ON EXISTING RULES

The policy thrust of the EU's General Data Protection Regulation, the Digital Services Act, Digital Markets Act and Data Governance Act all represent steps in the right direction towards the principles we are advocating. However, they fall short of affording individuals full transparency and control over who has information on them, nor do they establish the long term benefits of integrating consumers as economic actors in the digital data market. By treating personal data as a means of production and giving citizens control over it, our proposals redraw the relationship between markets, companies and consumers.



A PROPOSED ECO-SYSTEM

The system proposed by the Global Initiative for Digital Empowerment envisages four principal actors:

- **Citizens**, armed with the right of association.
- **Representatives** will record citizens' preferences, and collect and update their personal data before passing it on to a data registry. They will also establish a citizen's 'value account'.
- **Data registries** securely store the data, encoded with preferences. They share data with requestors according to those preferences, informing representatives and/or citizens. They encapsulate data with a digital signature specific to each requesting entity.
- **Requestors:** companies and organisations making use of personal data, establish an account for use of personal data and negotiate conditions for the use of first and second party data with representatives. They keep a digital signature for future auditing and make value transfers to citizens' accounts.

Multiple technologies exist to support these data flows. Examples include high speed database and resolution systems such as the Domain Name System, hybrid blockchain storage such as Seal and personal ID wallets such as the European Digital Identity (eID) system currently under trial. Policymakers do not need to pick a technology, but rather encourage an industry standard or promote competition with interoperability. Governance would be supported by a system of security, commercial and stability audits, in many cases building on existing audit regimes.

SUMMARY

Human-centred digital governance empowers individuals and

market forces to enable many of the privacy, consumer protection, and transparency concerns to be negotiated in a manner that keeps pace with rapid technological change. It brings tangible benefits to businesses by ensuring accurate customer information and reducing the likelihood of fraud, and will fuel innovation and new business creation. Governments still have a role in protecting their citizens through evolving privacy rights built on a foundation of consumer protection reforms. But government is slow. Rather than having to play catch-up after several electoral cycles, governments will be able to have confidence that the negotiations on behalf of citizens within the new market will resolve many of the consumer's concerns. Introducing market forces to the relationship between empowered consumers, digital service providers (those that collect the data) and third-party influencers (those who purchase and use it) will help diminish the whack-a-mole problem of having to counter mutating types of data misuse that permeates the current system.

CURRENT STATUS

The proposals put forward by GIDE have attracted increasing interest from international policy makers. A series of ongoing detailed discussions have been held at EU organs, especially the European Commission and the European Parliament. Other developed and developing country governments have expressed interest and at least one is conducting exercises to consider the implications of introducing such a model. Recently GIDE was asked to present its proposals to member states of UNCTAD³ and to the Think20 organ of the G20. Similarly, the World Bank has partnered with GIDE to further the Bank's GovTech initiative.⁴

The Global Initiative for Digital Empowerment is an international group of researchers, policymakers, civil society advocates, technical experts and business people dedicated to reforming the rules for the global digital economy. For the full report, 'Empowering Digital Citizens' see thegide.org/empowering-digital-citizen-report/



PAUL TWOMEY is Co-Chair of the GIDE and a distinguished fellow at the Centre for International Governance Innovation. He was a founder and former CEO of ICANN, and CEO of the Australian Government's National Office for the Information Economy. He holds a PhD from the University of Cambridge.

REFERENCES ¹ This survey was conducted in 2021-22 by Ipsos for Fen Osler Hampson, Carleton University and Visiting Fellow, The New Institute. ² Generally accepted accounting principles', the accounting standard adopted by the US Securities and Exchange Commission and the default accounting standard used by companies based in the United States. ³ UN Conference on Trade and Development. ⁴ <https://www.worldbank.org/en/programs/govtech>

Events Calendar

Events form the backbone of the IIC and take place throughout the year and around the world. They give members and non-members the chance to meet in a neutral environment, form informal bonds and explore solutions to policy and regulatory issues.



Mongolia Forum Ulaanbaatar, Mongolia

5 - 7 July 2023

Wednesday 5 July - Regulators' Roundtable & Dinner
Thursday 6 July - all day Mongolia Forum
Friday 7 July - all day cultural event



Small Nations' Regulators Forum (SNRF) Online meeting, invitation only

2 August 2023



Telecommunications & Media Forum 2023 Sydney, Australia

15- 16 August 2023



Communications Policy & Regulation Week 2023 Cologne, Germany

Kindly hosted by Bundesnetzagentur (BNetzA), 16-19 October 2023

16 - 17 October - International Regulators' Forum
17 October (afternoon) - Small Nations Regulators' Forum
18 - 19 October - 54th Annual Conference

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Further IIC events, including IIC Chapter events, can be found at iicom.org/events/



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Online: www.iicom.org

International Institute of Communications
Suite 107, 143 Kingston Road, London, SW19 1LJ
United Kingdom
Tel **+44 (0)20 8772 4824** | Email enquiries@iicom.org

