

Competition Law in Digital Markets (Advanced)

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1. Course vision

Dominated by the iconic companies of our time, known as GAFA – Google, Amazon, Facebook and Apple, a significant amount of business today is conducted on the Internet in markets known as digital markets. These markets are changing our society, our economy and our politics. GAFA can influence our opinions, our behaviour and how we interact socially. Digital markets are not only transforming traditional ideas of economic power, inequality and capitalism at the heart of competition policy. Competition in online markets challenges the traditional notions of how businesses compete. For instance, data is considered the new ‘currency’ of markets. Competition law governs the regulation of business behavior in markets. Changes to business behavior brought about through digital markets necessitate new ways of thinking about competition law. Do the tenets on which the framework of competition law was constructed still stand? How much of what we understand to be competition law needs to be re-examined and re-understood? Does competition law need to be reconfigured for digital markets? Does competition law need a new normative framework to incorporate concerns of privacy and data? This course will use digital markets as a medium through which to better understand competition law and policy. As such this will be an advanced course on competition law that will require existing knowledge of the subject. The course will study scholarly writings, the reports of competition agencies, case law and popular media articles on digital markets. As with other aspects of the study of competition law, this course will take an interdisciplinary approach and examine the economics and business of digital markets.

2. Pedagogical approach

As the course content is very much based on fast-changing legal developments, the class tailors to discussions on legal news and developments. In addition to lectures, the classes include detailed discussions of recent case law and debates on evolving regulatory architectures. The emphasis on tracking recent developments is also woven into the design of assessments for the course.

3. Pre-requisites: Competition Law

4. Course type: Law

5. Cross-Listed Course: No

6. Weekly outline of course

Weeks 1-2: Key Features of Digital Markets

Are digital markets different from other types of markets? What are the structural features of digital markets? How do digital companies impact consumers and competitors? How competitive/contestable are digital markets? What makes digital companies all-pervasive in today's society?

Key concepts: barriers to entry, tipping, direct and indirect network effects, platform congestion, economies of scale, economies of scope, innovation, data, competition in the market vs. competition for the market, platform markets, zero price business models, enshittification, attention markets, markets for human futures, interoperability, multi-homing.

Part I: business models and methods of monetization in digital markets

Part II: sources of power, concentration and competitiveness in digital markets

Part III: AI in digital markets

Week 3: Market Definition

What are the challenges to market definition in digital markets? How should platform markets be defined? What tests can be used for market definition in markets with zero pricing? Should platforms be defined on one or both sides? What role does multi homing play in defining platforms?

Key concepts: competitive constraints, substitutability, defining a market on one or both sides, SSNDQ, multi homing.

Part I: Ohio v Amex (should platform markets be defined from one or both sides of the platform?)

Part II: CCI's approach to market definition in digital markets

Week 4: Data, privacy and competition law

Are data-based business models anti-competitive? Does Facebook's reduction of privacy and sharing of data constitute an abuse of dominance? Should privacy be a concern of competition law?

Key concepts: privacy and competition law, using data to abuse dominance, acquiring nascent competitors, potential competition, innovation kill zones, data-driven mergers, vertical mergers, common ownership.

Part I: CCI order in WhatsApp privacy case (Is WhatsApp's change of privacy terms an abuse of dominance?)

Weeks 5-7: The Biggest of them All: Google

Has the Android business model protected Google from competition? Was Google's conduct in designing its search page anti-competitive?

Markets for search, digital advertising, mobile operating systems, play stores, maps, content and media streaming.

Key concepts: feedback loops, multi homing, externalities, dominance, switching costs, pricing strategies, essential facility doctrine, tying and bundling, self preferencing, leveraging, gatekeepers, foreclosure, ad tech stacks.

Part I: Google Android CCI and NCLAT order (Is bundling GMS / Play store anti-competitive?)

Part II: Google Shopping European Court of Justice judgment (Is Google's preferencing of its own comparison shopping sites over competitors anti-competitive?)

Part III: Google Ad tech: DOJ case against Google; acquisition of Double Click

Part IV: Google Play CCI order

Part V: Remedies against Google and the problems of remedying digital markets

Week 8: Amazon and Markets for E-commerce

Does Amazon act anti-competitively by being an intermediary and a seller on its platform? Are price parity clauses anti-competitive? Are exclusivity clauses anti-competitive? Do e-commerce platforms like Amazon and MMT engage in predatory pricing? What is the difference between predatory pricing and deep discounting?

Markets for e-commerce, retail, travel aggregators, restaurant aggregators.

Key concepts: platform neutrality, predatory pricing, vertical restraints – parity / MFN clauses, exclusive dealing, tying, use of data.

Part I: Parity clauses by MakeMyTrip / Amazon (Are MakeMyTrip's parity clauses anti-competitive?)

Part II: Deep discounting by Amazon / MakeMyTrip (Is MakeMyTrip's deep discounting anti-competitive?)

Part III: Amazon's coercion of sellers, self-preferencing (FTC's complaint against Amazon)

Weeks 9-10: Regulations and limitations of competition law in digital markets

What are the legislative or regulatory efforts taking place to regulate digital markets globally? Is there a need for a new set of regulations for digital markets? What are the benefits and disadvantages of ex ante regulation vis-à-vis ex post regulation? Are there other ways by which digital markets can be made more competitive?

Key concepts: gatekeepers, core digital services, ex ante regulation, ex post regulation, remedies.

Part I: the need for *ex ante* regulations; are their limitations to competition law in digital markets

Part II: EU Digital Markets Act, UK Digital Markets Competition and Consumer Act

Part III: Draft Digital Competition Bill, Amendments to the Competition Act, 2023.

Weeks 11-12: Algorithms, Artificial Intelligence, Privacy and Collusion

What is AI? What is the AI stack? Is AI disrupting big tech? How competitive are different markets in the AI stack? Are AI driven discriminatory pricing practices anticompetitive? Can algorithms facilitate collusion? How does hub and spoke collusion occur in digital markets? Is the training of large language models using consumer data anticompetitive?

Key concepts: cloud computing, large language models, pricing algorithms, algorithmic collusion, tacit collusion, hub and spoke collusion, price discrimination.

Part I: The AI stack and state of competition in AI

Part II: Algorithms as facilitators of collusion (Real Page case)

Part III: competition issues in AI

Week 13: Mergers

Is Facebook's acquisition strategy anticompetitive? Why are acquisitions a matter of concern in digital markets? Should mergers between potential competitors be held to be anticompetitive? What are killer acquisitions? Is competition law equipped to deal with the challenges of digital market acquisitions?

Part I: Meta / Giphy UK CMA order (Would the acquisition and access to data create anti-competitive vertical foreclosure?)

Week 14: Revision

7. Intended Learning Outcomes

At the end of the course students should be able to:

1. Be aware of different kinds of digital markets; understand the fundamental economic principles that govern digital markets and how business is conducted in these markets.
2. Understand how digital businesses have an economic, social and political impact on societies.
3. Develop an understanding of the competition law and policy concerns arising from digital markets and how these may be different from competition concerns in traditional markets.
4. Be familiar with the latest legislative developments in competition law relating to digital markets.

Selected Readings

- Stigler Committee on Digital Platforms: Policy Brief, Luigi Zingales & Filippo Lancieri (Page 39-43, <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>
- John Naughton, Slouching towards Dystopia: the rise of surveillance capitalism and the death of privacy (2020), <https://www.newstatesman.com/long-reads/2020/02/slouching-towards-dystopia-rise-surveillance-capitalism-and-death-privacy>
- Victoria Robertson, The EU's Attempt at Updating Antitrust Market Definition for the Digital Age, <https://www.promarket.org/2020/07/21/the-eus-attempt-at-updating-antitrust-market-definition-for-the-digital-age/>.
- In re: Updated terms of service and privacy policy for WhatsApp orders, Suo Motu case no. 1 of 2021 (2024), <https://www.cci.gov.in/images/antitrustorder/en/order1732001619.pdf> and NCLAT order on appeal, https://nclat.nic.in/display-board/view_order
- Yun, John M., Understanding Google's Search Platform and the Implications for Antitrust Analyses (March 8, 2018), *Journal of Competition Law & Economics*, Volume 14, Issue 2, 1 June 2018
- Umar Javeed v. Google, Case no. 39 of 2018 (2022) (Google Android) and Google v CCI, NCLAT order on appeal (Competition Appeal (AT) No. 1 of 2023 arising out of order dated 20.10.2022 from case no. 39 of 2018).
- XYZ v. Alphabet Inc., CCI Case No. 7 of 2020 (Google Play) 102-110, 125-153, 163-171, 186-189
- Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. (2016). Available at: <https://digitalcommons.law.yale.edu/ylj/vol126/iss3/3>
- Federation of Hotel & Restaurant Association of India (FHRAI) v. MMT, Ibibo and OYO, Case no. 14 of 2019
- Report of the Committee on Digital Competition Law & Draft Digital Competition Bill, <https://prsindia.org/files/parliamentary-announcement/2024-04-15/CDCL-Report-20240312.pdf>