



RETOS de la
COMPETENCIA
en el ENTORNO DIGITAL
2020



CHALLENGES on
COMPETITION in the
DIGITAL ENVIRONMENT
2020

Mega datos y competencia económica

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I

Preocupaciones y retos en relación con los mega datos



II





La acumulación masiva de datos no confiere automáticamente poder sustancial de mercado



III

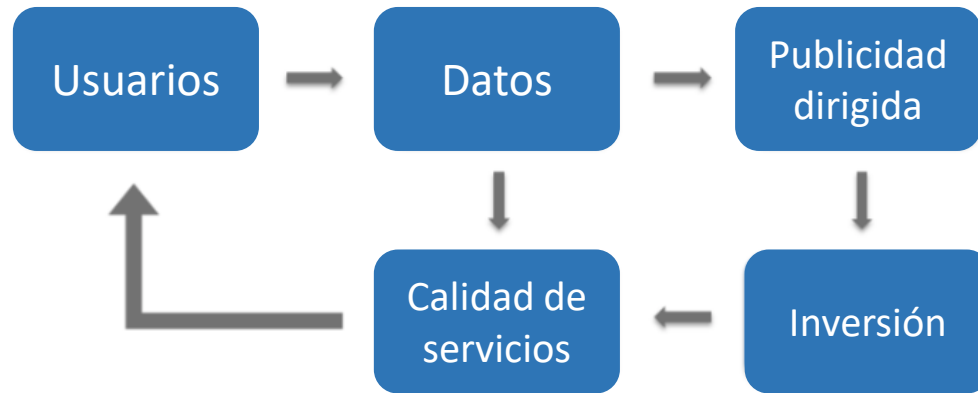
¿Regulación *ex ante*? Las herramientas en México permiten atender los problemas de competencia que pudieran generar conductas relacionadas con mega datos

¿Por qué nos preocupan tanto los mega datos?

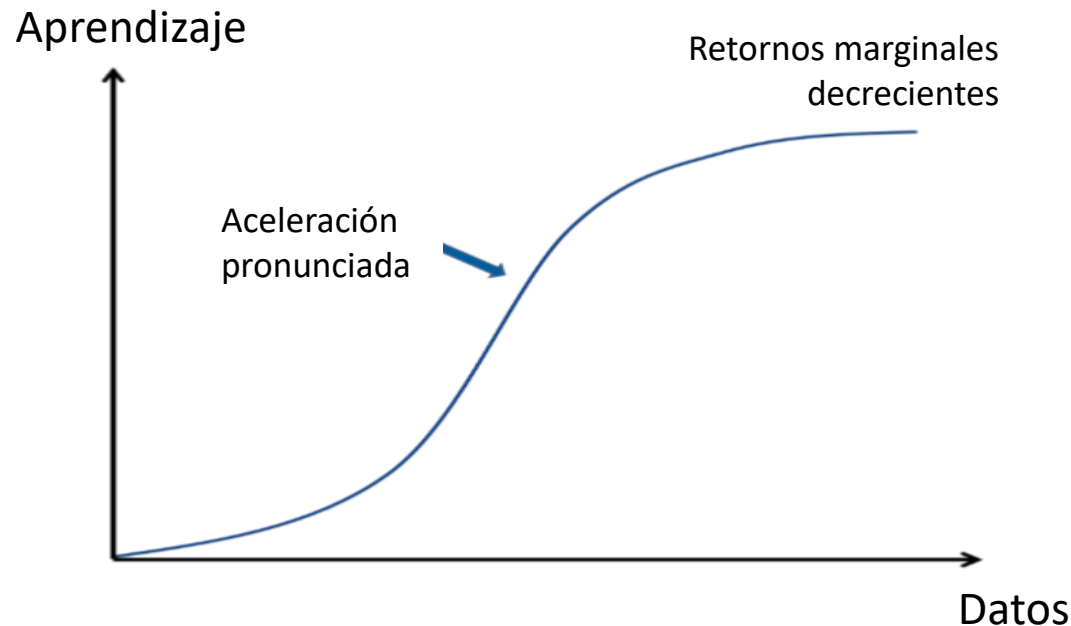
Ámbito	Riesgos	Posibles soluciones	Efectividad (rel.)
Política / democracia	<ul style="list-style-type: none">Distorsiones al proceso políticoUso malicioso por parte de enemigos del Estado	<ul style="list-style-type: none">Acreditación / censura de fuentes de información	
Legalidad / propiedad de contenidos	<ul style="list-style-type: none">Daño/afectación a las industrias periodística y creativas tradicionales (editorial, música)	<ul style="list-style-type: none">Incrementos a protección de propiedad intelectualNuevos esquemas de comercialización	
Privacidad	<ul style="list-style-type: none">Pérdida de control sobre datos personalesRobo de identidad, extorsión, <i>Big Brother</i>	<ul style="list-style-type: none">Herramientas tipo GDPRAsignación de derechos de propiedad sobre datos	
Competencia económica	<ul style="list-style-type: none">Creación de monopoliosAbuso de poder sustancial	<ul style="list-style-type: none">Leyes de competencia económica	

Los retos de los mega datos en materia de competencia son similares a los que hemos visto tradicionalmente, pero de manera más acelerada

Efectos de red



Ampliación de efectos de escala



- *Existen efectos de red en redes sociales (directos), sistemas operativos (indirectos), pero no necesariamente en búsqueda o comercio electrónico (demanda)*
- *El incumbente siempre sabe más que el entrante; pasa en todas las industrias*
- *Las ventajas no son automáticas; requieren inversión y talento*
- *La rápida evolución de los mercados también devalúa los datos*

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Los datos no son como el petróleo, ni como el aire: Tienen valor en la medida en que se usen efectivamente



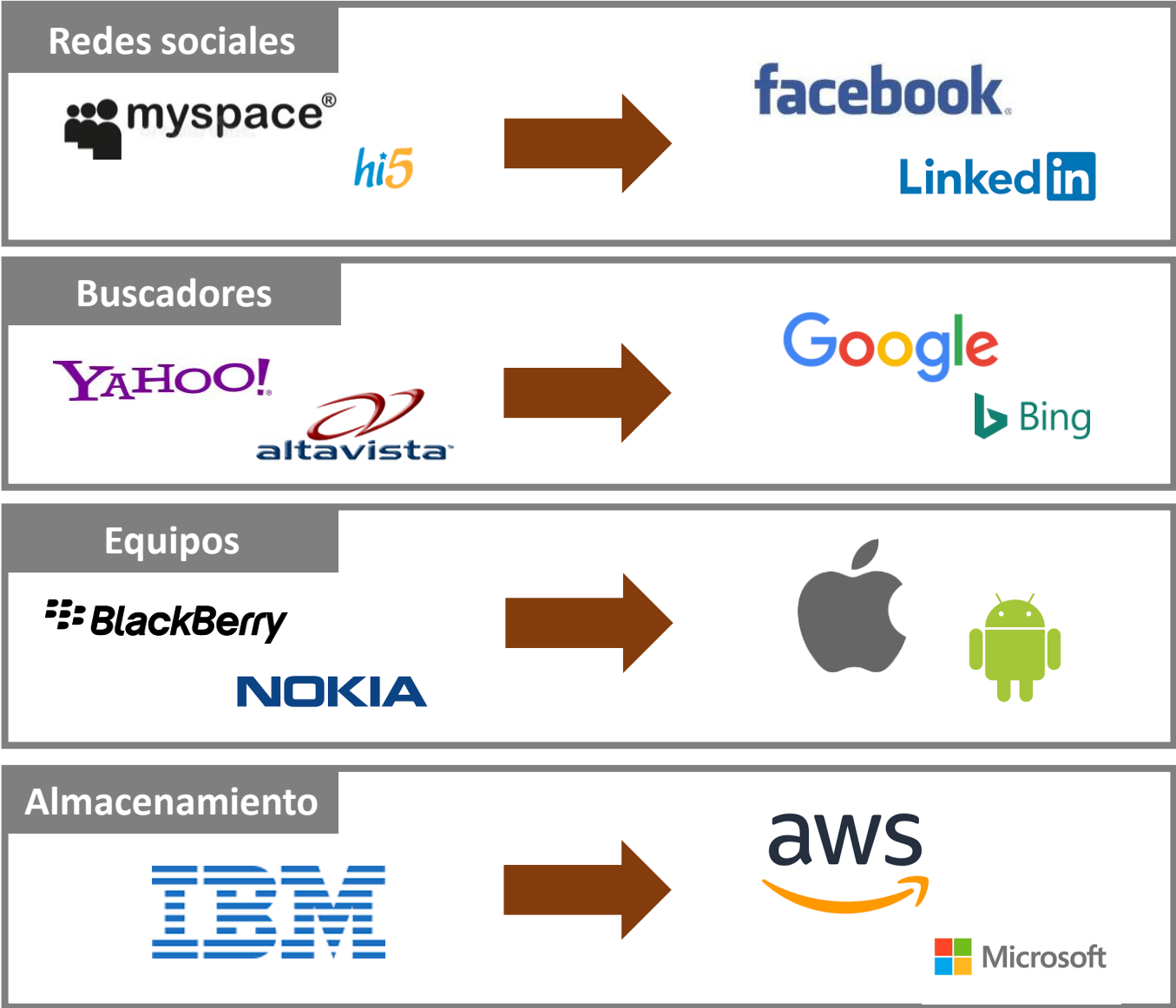
Factores de producción/insumos:

- **Software** (abierto, off-the-shelf)
- **Almacenamiento** (nube, barato y abundante)
- **Gente** (ingenieros)

Características de los datos:

- **Costos de adquisición**
- **Recopilación/uso no-excluyente**
- **Rápida obsolescencia**

Existen muchos ejemplos de empresas que han competido y ganado sin tener una ventaja inicial en datos



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La New Competition Tool planteada por la UE para esta circunstancia ...



Antitrust: Commission consults stakeholders on a possible new competition tool

Brussels, 2 June 2020

The European Commission has published today an inception impact assessment as well as an open public consultation inviting comments on exploring the need for a possible new competition tool that would allow addressing structural competition problems in a timely and effective manner. Stakeholders can submit their views on the inception impact assessment until 30 June 2020 and respond to the open public consultation until 8 September 2020.

Executive Vice-President Margrethe Vestager, in charge of competition policy, said: "The world is changing fast and it is important that the competition rules are fit for that change. Our rules have an inbuilt flexibility which allows us to deal with a broad range of anti-competitive conduct across markets. We see, however, that there are certain structural risks for competition, such as tipping markets, which are not addressed by the current rules. We are seeking the views of stakeholders to explore the need for a possible new competition tool that would allow addressing such structural competition problems, in a timely and effective manner ensuring fair and competitive markets across the economy."

The need for a new competition tool

Over the past years, the Commission has reflected on the role of competition policy and how it fits in a world that is changing fast, is increasingly digital and globalised, and must become greener. This reflection process is part of a broader policy debate about the need for changes to the current competition law framework so that enforcement agencies around the globe can continue to preserve the competitiveness of markets. Different stakeholders have engaged in this debate and contributed with reports and studies, making proposals on how to adapt or extend the competition law toolbox.

Against this background, the Commission has concluded that ensuring the contestability and fair functioning of markets across the economy is likely to require a holistic and comprehensive approach, with an emphasis on the following three pillars:

- (1) the continued vigorous enforcement of the existing competition rules making full use of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), including the use of interim measures and restorative remedies, where appropriate;
- (2) possible ex-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role; and
- (3) a possible new competition tool to deal with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules (e.g. preventing markets from tipping).

The parallel impact assessment on platform-specific ex-ante regulation, for which a separate stakeholder consultation has been launched today, covers the second pillar, while this stakeholder consultation deals with the third pillar.

The Commission's experience with enforcing the EU competition rules in digital and other markets, as well as the reflection process on the fitness of the existing competition rules by the Commission and national competition authorities, have helped the Commission identify certain structural competition problems that the current rules cannot tackle or cannot address in the most effective manner.

The new competition tool should enable the Commission to address gaps in the current competition rules and to intervene against structural competition problems across markets in a timely and effective manner.

After establishing a structural competition problem through a rigorous market investigation during which rights of defence are fully respected, the new tool should allow the Commission to impose behavioural and where appropriate, structural remedies. However, there would be no finding of an infringement, nor would any fines be imposed on the market participants.

Next steps

The Commission is consulting stakeholders from the public and private sector, including competition

Actualmente en consulta pública, iniciativa legislativa prevista para Q4 2020

"The new competition tool should enable the Commission to address gaps in the current competition rules and to intervene against structural competition problems across markets in a timely and effective manner. [...]

Structural competition problems [...] can be grouped into two categories depending on whether harm is about to affect the market or has already affected the market.

- **Structural risks for competition:** *Certain market characteristics (e.g. network and scale effects, lack of multi-homing and lock-in effects) coupled with the conduct of the companies operating in those markets can create a threat to competition. This is particularly the case for markets at risk of 'tipping'. The risks to competition arise through the creation of powerful market players with an entrenched market and/or gatekeeper position which could be prevented by early intervention. Other scenarios falling under this category include unilateral strategies by non-dominant companies to monopolise a market through anti-competitive means.*
- **A structural lack of competition:** *Certain market structures do not deliver competitive outcomes (i.e. a structural market failure), even without companies acting anti-competitively. For example, markets may display systemic failures due to certain structural features, such as high concentration and entry barriers, consumer lock-in, lack of access to data or data accumulation. Similarly, oligopolistic market structures increase the risk of tacit collusion, including markets featuring increased transparency due to algorithm-based technological solutions, which are becoming increasingly prevalent across sectors. [...]*

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... ya existe actualmente en México, lo cual da al IFT las herramientas para actuar oportunamente si lo considere necesario

LFCE, Artículo 3.- [...]

IV. **Barreras a la Competencia y la Libre Concurrencia:** Cualquier característica estructural del mercado, hecho o acto de los Agentes Económicos que tenga por objeto o efecto impedir el acceso de competidores o limitar su capacidad para competir en los mercados; que impidan o distorsionen el proceso de competencia y libre concurrencia [...]

Peculiaridades de organización industrial de plataformas digitales ...

Winner takes all, efectos de red, switching costs, big data...

... pueden generar incentivos a distorsionar competencia desde fases tempranas ...

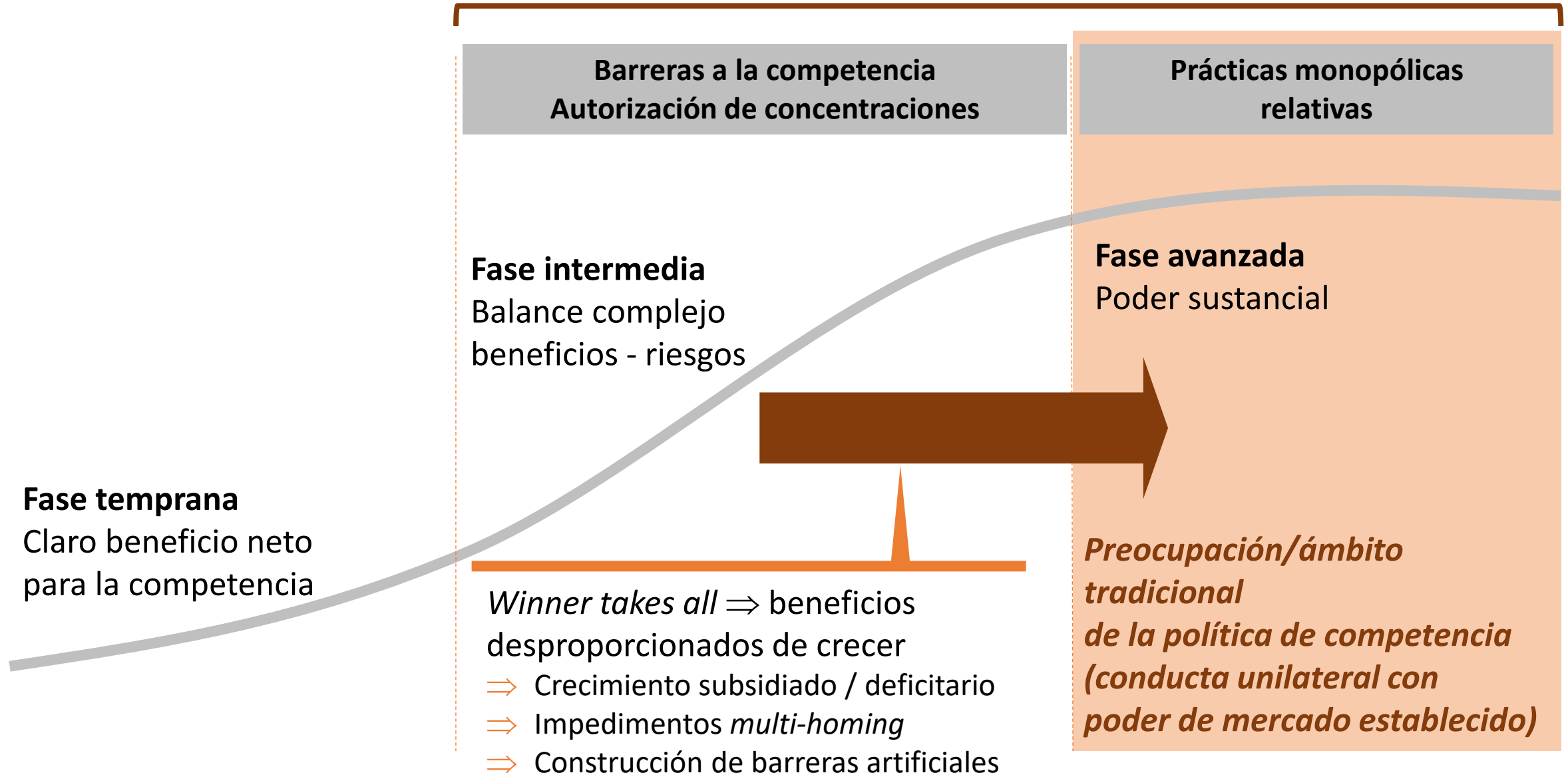
Mecanismos (depredación y subsidios, presión a vendedores, abuso de datos sobre transacción, paquetes / ecosistemas irreplacables, integración vertical).

... en detrimento del proceso de competencia

Preventivo, antes de que el poder de mercado sea irremediable (al contrario de prácticas monopólicas relativas)

Papel preventivo potencial importante en mercados sujetos a *tipping*

Procedimientos LFCE



Análisis de competencia de los mega datos, caso por caso

Instrumentos

Temas relevantes

Barreras de entrada / insumos esenciales

- Proteger entrada de nicho y *multi-homing*, pero no considerar la mera posesión de datos una barrera
- El riesgo de desplazamiento derivado de efectos de red tienen que sopesarse contra los beneficios

Prácticas absolutas

- Uso de algoritmos similares para reaccionar de manera coordinada ante las mismas variables de mercado
- Colusión tácita programada para castigar desvíos
- Uso de inteligencia artificial para maximizar utilidades y lograr efectos colusivos

Prácticas relativas

- Uso indebido de datos, analizando caso por caso y determinar legalidad de:
- Discriminación de competidores río abajo (*self-preferencing*);
 - Ventas atadas datos y de *data analytics*;
 - Uso de información de minoristas competidores vía plataformas; etc.

Concentraciones

- La posibilidad de que la combinación de empresas poseedoras de altos volúmenes de datos (escasos) reduzca la competencia
- Evaluación de posibilidades de competencia potencial



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