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## **Exploring the Competitive Effects of Hyperscalers on the Local Communication Sector**

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### **Invitation to comment closes August 9, 2022**

The FTC is carrying out a study of the competition impact of hyperscalers on the local communication sector.

To assist with this study, the FTC invites comments from any interested party on the proposed issues outlined and/or other possible issues likely to impact competition in the local communication sector.

Those responding should provide their views, supported with relevant evidence where possible, by email to the FTC, by August 9, 2022.

Email: [ftc@cwjamaica.com](mailto:ftc@cwjamaica.com)

## Summary

Pursuant to the Memorandum of Understanding aimed at fostering cooperation between the Fair Trading Commission (“FTC”) and the Broadcasting Commission (BC) in addressing concerns that intersect competition policy and regulation in the communication sector, the FTC will conduct a market study into the communication sector. Specifically, the FTC will assess the competitive effects of digital hyperscalers’ participation in communications markets in Jamaica. Digital hyperscalers are e-commerce entities that dominate the public cloud and cloud services industries and are expanding their businesses into numerous related industries; for example, media and communication.<sup>1</sup> Such companies include Amazon, Facebook, Google and Apple.

## Proposed Issues

- Abuse of market power by hyperscalers
- Exploitation of personal data in terms of use, access and excessive collection
- Regulation imbalances between hyperscalers and local advertising/ media firms
- Intellectual property infringements
- Enforcement measures (lack thereof or lengthy delays) to address anticompetitive behaviour and breaches
- The vertical and horizontal integration of the hyperscalers
- Government coercion

## Existing Knowledge

Governments and regulatory authorities around the world have recently begun to face considerable challenges brought about by the rapid emergence and proliferation of online services that function on a global magnitude (Coscelli & Denham 2021). The business model of these service providers -hyperscalers- has also rapidly evolved in a way that not only allows their online services to seamlessly occupy multiple geographies simultaneously but to also cut across previously well established markets, jurisdictions and regulation. “The fundamental business model of both Google and Facebook is to attract a large number of users and build rich data sets about their users”<sup>2</sup> One ramification of this is that previously separate policy areas have now become interlinked, and

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<sup>1</sup> <https://www.digitalrealty.com/blog/what-is-hyperscale>

<sup>2</sup> [Digital platforms inquiry - final report.pdf \(accc.gov.au\)](#)

individual regulatory agencies now have to reconsider their policy aims and objectives which are lagging behind the business models of these global online service providers (Coscelli & Denham 2021). Now, given the inter-sectoral nature of hyperscalers and the limited regulatory framework governing them, it is easy to appreciate that these companies may have an unfair competitive advantage over other traditional, well-regulated markets such as the broadcasting industry.

In Part I of a December 2021 article posted on the website of the *The Gleaner*, Professor Anthony Clayton explained that hyperscalers are a small group of companies who have achieved massive scale and now control the public spaces on the Internet where people meet, talk, trade and connect. Clayton goes on to say that an extraordinary potential for numerous types of abuse is created by the concentration of monopoly power shared by this small group of companies. In his view, the three major abuses to the markets that hyperscalers can pose come in the form of exploitation of personal information, coercion and the aggressive removal of competition. In 2018, the European Commission (EC) fined Google EU€4.34 billion for abuse of a dominant position<sup>3</sup>. The EC found that between 2011 and 2014, Google imposed illegal restrictions on Android device manufacturers and mobile network operators to solidify its dominance in general internet search. One of the contractual restrictions included conditioning the licensing of Google Play Store on pre-installing the Google Search and Google Chrome apps to Android device manufacturers.<sup>4</sup>

Concerning the exploitation of personal data, (Sundaram 2021) posits that having more and better data is seen as a competitive advantage in today's business landscape. Also, while the public generally understands the concept of data security in terms of business databases being hacked, they are less likely to see embedded code on business websites that track customers, visitors and employees -without their knowledge or consent- as an exploitation of privacy. In fact, Sundaram uses the term data privacy, which is a branch of data security, to describe the proper safeguarding of private citizens' personal electronic data. The issue of data being collected, stored, sold and used without the user's content is neither a new nor niche practice for large-scale companies. For years, it has been used to deliver targeted advertisements, inform market campaigns, bring in new customers and anticipate consumer behaviour down to a click (Sundaram 2021). Sundaram also makes it clear

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<sup>3</sup> Ibid.

<sup>4</sup> [Digital platforms inquiry - final report.pdf \(accc.gov.au\)](#)

that without a general understanding and consensus of the issues surrounding data privacy it is hard to chart far-reaching and internationally binding legislation.

It is evident that hyperscalers have a comparative advantage in accessing consumer data when compared to traditional broadcast media. According to (Murschetz & Schlütz 2018) traditional broadcast companies should have the capability to collect vast amounts of consumer data from subscription and registration services but are generally failing to put this data to practical use. Some of the reasons for the lack of actionable use of the data collected by traditional broadcast media lies in the type of data within their reach; broadcasters can usually capture asset-based data such as number of subscriptions, while hyperscalers are able to collect behavioural data from their users which are more actionable in targeted marketing (BfK 2015, as cited in Murschetz & Schlütz 2018). An example of this may be seen in the type of data old media subscriber (cable) television providers can collect in comparison to a hyperscaler such as Netflix.

Similarly, in recent years hyperscalers have become prominent stakeholders in many governmental and bilateral decision-making and policy formulation. To advance the United Nation's Sustainable Development Goals of key technology, humanitarian, environmental, development and security issues, Microsoft announced the creation of a permanent delegation to the United Nations in New York City in January 2020 (Jorge Ricart 2020). At the same time, multinational technology firm IBM set up a lab on technology policy, whose members participate in drafting high-level tech policy. Jorge Ricart goes on to say one of the main reasons for the rapid emergence and rise of hyperscalers is the presence of strong stakeholder lobby groups to pressure governments and legislative decision-makers. In the past, these lobby groups were external entities, but now they have started to take on the role of policymakers themselves (Jorge Ricart 2020). One case study of hyperscalers negotiating policy is the passing of Australia's World-First Law and Facebook's reaction to it in early 2021. Under the law, Facebook and Google would have to pay for Australian news. The aim of the law was for local Australian media companies to gain some remuneration when their work is posted on Facebook or Google. However, Facebook retaliated by blocking all news content that flows through their media to Australia. After fierce negotiations with the Australian government, much of the regulations proposed were altered in the tech companies' favour. Although this law was seen as creating precedence for legislation to regulate and increase competition between hyperscalers and old media, it begs the

question as to whether a country like Jamaica can effectively pass law like the Data Protection Act 2020, and how said law will be received when it comes into operation.

Lastly, it is hypothesised that hyperscalers have mechanisms by which they become vertically and horizontally integrated, as a result forcing competition out of the markets they enter. Facebook and Google initially came onto the scene and expanded by offering innovative and cutting-edge online services. However, (CMA 2020) states that over the years both companies have developed and now benefit from strong network effects that insulate them from competition. (CMA 2020) further expounds that because of Google and Facebook's horizontal and vertical integration, coupled with the reliance many other sectors have on them, it is easy for them to force new innovative firms out of the market. Google and Facebook do this by manipulating and sometimes degrading the level of interoperability that other platforms get from them. (CMA 2020) however, still outlines that there may be consumer benefits from the scale and interconnectivity of hyperscalers in the form of increases in choice and accessing a wide cross-section of services with less friction. On the other hand, the Competition and Markets Authority still warns that if hyperscalers are allowed to venture into different markets at will, due to their scale and self-sufficiency, they may be able to use predatory pricing to squeeze out the original firms in that market. This will not only give the hyperscalers almost complete autonomy to set their own prices but also limit choice and innovation.

In essence, the extant literature suggests hyperscalers provide vital services for consumers worldwide, especially in the new digital age. These services range from more targeted and effective advertising, search engine optimization, electronic banking, and the list continues. But, the literature also indicates that as these large-scale cloud computing agglomerations expand in related markets-issues of privacy, government coercion and general uncompetitive behaviour may be detrimental in the long run if effective policy is not soon developed and put in place. One aspect not conclusively covered by the literature is the effect of government policy aimed at regulating hyperscalers, not only domestically but how they handle personal and sensitive data on international servers. An attempt to address this is seen in the General Data Protection Regulation (GDPR) which the European Union implemented in 2016. Another point of contention in the literature is whether the benefits of scale and ease of access to consumers outweigh the potential costs of limited competition in sectors related to information, communication and technology.

The EC in its market study asserted that there is no regulation or public oversight of Google's conflicts of interest of having strong market power at every layer of ad intermediation. "The lack of transparency in ad intermediation exacerbates this conflict of interest and induces it to engage in exploitative behaviours such as self-preferencing". At the Antitrust Subcommittee's sixth hearing in 2020, insights into Google's arbitrage (self-preferencing) were identified. Congresswoman Jayapal stated "So Google is running the marketplace, it's acting on the buy side, and it's acting on the sell side at the same time, which is a major conflict of interest. It allows you to set rates very low as a buyer of advertising (ad) space from newspapers, depriving them of ad revenue, and then also to sell high to small businesses who are very dependent on advertising on your platform. It sounds a bit like a stock market, except unlike a stock market, there's no regulation on your ad exchange market"<sup>5</sup>

Hyperscalers not only lack regulation and oversight but there is also a lack of measures to be enforced to deal with some anti-competitive conduct. The Australian Competition and Consumer Commission (ACCC) in its market inquiry done in 2021 purported that its current available tools are insufficient to address Google's dominance and vertical integration in ad tech services. As a result of Google's conduct, competition has been lessened in the supply of a range of ad tech services. This ultimately harms the consumers, but rivals, advertisers and publishers are adversely affected. The nature of enforcement action in Australia is a challenge that the ACCC face because investigations must focus on a very specific breach of the Competition and Consumer Act. This then hampers enforcement action's ability to efficiently deal with the breadth of problematic conduct that a dominant firm can engage in.

Another major issue identified by the ACCC was that the competition investigation process takes many years to conclude consisting of findings and remedies long after the harm happened. This allows the behaviour or position of the digital platform to be deeply entrenched resulting in greater harm to the competitive process. Especially in a fast-paced environment (as it is in the ad tech market), this will have serious implications.

The ACCC sees the alignment of ad tech regulation with other jurisdictions internationally as a viable solution. Since Google (and other digital platforms) operate internationally and many other

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<sup>5</sup> [U.S. House of Representatives, 2020. investigation of competition in digital markets, majority staff report and recommendations, subcommittee on antitrust, commercial and administrative law of the committee on the judiciary. - Search \(bing.com\)](#)

competition regulators have done similar work on the topic. The alignment of regulations would offer benefits such as:

- Enabling consumers and businesses to benefit from regulation to improve competition being implemented globally.
- Reinforcing the ability of Australia and other regulators to enforce the rules as they apply to ad tech providers' global businesses.
- Ensuring regulatory rules do not deter the entry of new ad tech providers, due to the additional burden of complying with Australia's rules in addition to those in other jurisdictions.
- Providing regulatory certainty to designated ad tech providers (and ad tech providers more broadly) about the standards of behaviour that apply to them.

The market study by the Competition and Markets Authority (CMA) in 2020 agrees with the view of the ACCC regarding enforcement regulations. The CMA expressed that the current laws and enforcement regulations are not tailored to the fast-moving digital markets. Neither do they deal with the number and complexity of issues that arise. The CMA recommended that there be a new regulatory framework regime that has strong and clear ex ante rules which can be enforced rapidly to reduce harm caused by a dominant firm's conduct.

The South African Competition Commission in its market study too asserted that there is an unequal application of regulation, which enables firms that make use of digital platforms to have a competitive advantage over traditional operators. This is because the usage of digital platforms has little or no cost of compliance. In Australia, the statements of principle, standards of practice, and code of ethics in print and online news publishing that is regulated by the Australian Press Council (APC) are not applicable to digital platforms. Also, a great number of the Acts, license conditions, regulatory standards, and codes of practice in advertising, telecommunications, and radio and TV broadcasting regulated by the Australian Communication & Media Authority (ACMA) are not applicable to digital platforms. The South African Competition Commission recommended that regulation should utilize a technology-neutral approach that levels the playing field. Whereby, there is no differentiation in treatment between traditionally operating firms and those that use digital platforms which will reduce the barriers to entry

## **Intended Outcomes**

Advocacy for amendments to the regulatory policies governing the local media and advertising sector.

## **Target Audience**

The target audience for this study comprises individuals or organizations with an interest in the study. However, particular focus will be given to members of the commercial broadcast and media fraternity, players on the sell-side of media advertising, and government policy makers and regulators such as the Broadcasting Commission.

## **Methodology/ Data Collection**

The study will follow a qualitative methodology, using both primary and secondary sources of information. Firstly, desktop research will be utilized to obtain secondary information on the general operating model of hyperscalers. Secondly, primary sources of information, via questionnaire administration and interviews, will be used to analyse the first-hand impact of the theorized harm faced by stakeholders in the local advertising market. A list of stakeholders will be created by the research team, and then a public invitation for participation will be made to solicit a more comprehensive group of stakeholders. Stakeholders will be placed into focus groups based on their impact on the market.

For the secondary sources of information, market studies from competition authorities focused on the communications sector in other jurisdictions will be used to critically assess the effects hyperscalers pose to competition and consumer welfare. Academic, regulatory and grey literature will be used to analyse any significant trends generic to the competition between hyperscalers and traditional media for advertisement revenue. Also, case studies will be gathered to interpret any policy adjustment which may need to be addressed. The case studies will also be used as a guide to recommend how the process of introducing or lowering regulation in the communications sector should progress.

As previously mentioned, interviews and questionnaires will be used to obtain primary information on the estimated impact of hyperscalers on advertisement revenue. Possible stakeholders will be placed into groups based on their proximity or level of involvement in the market. This is to effectively facilitate the administering of questionnaires and interviews given the



Fair Trading Commission’s resources. The first group involved in this process will be those closest linked to the policy framework of the Jamaican communications sector, namely the Ministry of Education, Youth and Information, Spectrum Management Authority and Broadcasting Commission; the aforementioned will be informed of the market study in its initial stages and offered the possibility of partnering in the study. This group will be instrumental in the policy advocacy and as such will be involved in constant communication throughout and after the market study via meetings, briefings, conference calls and sharing of information. The second group of stakeholders will be the suppliers and consumers of advertising mediums. This stakeholder group will be contacted mainly through one-way channels i.e. information requests, interviews and questionnaires; although they will frequently be allowed to give feedback on findings throughout the study. The final group of stakeholders will be the end-users of advertising mediums i.e. persons whom advertisement is targeted to. This final group may have limited input into the market study barring questionnaire administration to find out specific information depending on how the market study unfolds.

Proposed Stakeholders		
<b>Group 1</b>  Regulators and players with the greatest influence in the market.	<b>Group 2</b>  Players in proximity to the market but do not possess significant market power.	<b>Group 3</b>  Consumers or players in complementary/ substitutable markets.
<ul style="list-style-type: none"> <li>• Broadcasting Commission</li> <li>• Spectrum Management Authority</li> <li>• RJR/Gleaner Communications Group</li> <li>• CVM TV</li> <li>• Hyperscalers (Meta, Google, Amazon, Microsoft)</li> </ul>	<ul style="list-style-type: none"> <li>• Local Subscriber Television Operators</li> <li>• Internet content creators</li> </ul>	<ul style="list-style-type: none"> <li>• Digicel</li> <li>• Flow</li> <li>• Office of Utilities Regulations</li> </ul>
<b>Means of communication:</b> <ul style="list-style-type: none"> <li>• Interviews</li> <li>• Information requests</li> <li>• Focus group panels</li> <li>• Issuing draft findings</li> </ul>	<b>Means of communication:</b> <ul style="list-style-type: none"> <li>• Questionnaires</li> <li>• Information requests</li> </ul>	<b>Means of communication:</b> <ul style="list-style-type: none"> <li>• Questionnaires</li> </ul>

**Reporting**

The study will culminate in a written report which will be disseminated for public consumption and feedback mainly through the Fair Trading Commission's website. Preliminary findings will also be published for review and feedback by the stakeholders throughout the course of the study.

**Ethical Considerations**

Commercial information regarding but not limited to financial information, trade secrets, marketing strategy and production data will be kept confidential unless an agreement is made between the supplier of this information, the FTC and a third party for the transfer of this information. Where there are numerous instances of sensitive information a confidential copy of the final report may be reserved for exclusive use by the FTC while a censored copy may be disseminated for general consumption.

**Further Outcomes**

Further outcomes are for this study to be used as precedence for further advocacy pertaining to communications and data protection policy on a regional scale.

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