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5th Innovation Economics Conference for Antitrust Lawyers

#2 Geopolitics of Platforms Regulation

Webinar - 28 April 2021*

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Reiko Aoki

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Reiko Aoki wished to present to the audience some recent developments in Japan. As an introductory remark, she said she considers competition policy to be a type of *ex post* regulation with the exception of merger review. It is an exception in Japan as the country has a tradition of industry *ex ante* regulation where each industry has an oversight ministry. When each ministry has a non-overlapping portfolio of industries it regulates, Japan Fair Trade Commission ("JFTC") enforces competition in all industries. The Japanese approach to digital platforms has been to combine sectoral regulation with antitrust enforcement. On the latter, the JFTC revised the Merger Guidelines in December 2019 to clarify its position on multisided markets and data in the context of their review of business combinations, encompassing the issues of killer acquisitions using purchase value along with qualitative measurements such as market shares. For instance, in *Google/Fitbit*, the JFTC conducted an assessment even though the deal was below regular thresholds. In doing so, it maintained close contact with foreign competition authorities. The headquarters responsible for digital markets in Japan were established to overview the sector, with combined efforts from the JFTC, the Ministry of Economy Trade and Industry, and the Ministry of Internal Affairs and Communications. The JFTC stays involved in all discussions relating to digital such as the ongoing one on advertising.

> Second panel of the 2021 « Innovation Economics for Antitrust Lawyers ». See synthesis of other panels on the Conferences section of concurrences.com (Webinar Series from April 27th to 30th)

* Tanguy Laurioz drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

As a result, the new Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms imposes several obligations on large-scale digital platform operators including: (1) an obligation to disclose the reason why they pursue changes of the terms of the transactions and the main parameters that determine search orders; (2) an obligation to establish procedures and mechanisms for handling complaints and for dispute resolutions; and (3) an obligation to report to the Ministry of Economy, Trade and Industry about their operations regarding the obligations. According to the Act, the Ministry is authorised to request the JFTC to take any necessary measures if the Ministry recognises any conduct by platform operators that would violate the Anti-Monopoly Act.

Mike Walker

> “Observing competition issues in the digital sector and the associated harm to consumer does not necessarily mean that one has to define a relevant market first.”
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> Mike Walker

Mike Walker highlighted that international convergence in enforcement makes sense both from the consumers’ point of view and from the firms’ point of view. Fortunately, convergence is gaining ground, as discussions occur more and more frequently among regulators. Legislative efforts also seem to look in the same direction: EU’s DMA and UK’s Digital Market Units rely on the same basic principles. Both proposals aim at minimising the ability of digital platforms to exercise their current market power and, more importantly, opening those markets to more competitors being able to come in and compete successfully. Using a different set of criteria, both proposals target substantial entrenched market power by firms that can exercise that to the detriment of consumers across a range of markets. Although the UK’s proposal makes more room for firm-specific prescriptions, the DMA’s list of dos and don’ts is based on coherent theories of harm that are recognised in both jurisdictions.

On merger control, however, a divergence exists. The UK chose to lower its merger control thresholds to ensure more efficient regulation whether the EU has not done so yet. But the new interpretation of Article 22 EUMR is likely to bring about the same result. On whether the needs for regulation are different in each jurisdiction, that does not seem credible. Competition drives innovation, not monopoly, and regulation that creates the right conditions for the continued competition will never undermine innovation incentives. Merger control is another tool to ensure that efficient competitors are not taken out. Even though the argument has been voiced that regulation may bring about costs and bad surprises, the cost of doing nothing cannot be afforded. For all these reasons, Mr. Walker does not believe that there is an important divergence among agencies on the fundamental reasons for regulation, as a global consensus exists on the questions of platforms market power, the risks that it creates and the failure of competition law to address it properly so far.

Mr. Walker explained that defining digital markets is very uneasy. One of the issues with digital firms is their ability to operate in multiple markets, to build up ecosystems, and thus to create barriers to entry for new entrants. Taking the example of digital advertising, it is clear that Google’s position allows it to charge higher prices for the same services its competitors may offer. It is also clear that this position allows it to engage in self-preferencing. But observing competition issues in the digital sector and the associated harm to consumer does not necessarily mean that one has to define a relevant market first.

Christine Wilson

Christine Wilson explained that in the US, like in other jurisdictions, there has been much activity related to competition in the digital environment. Consistent with that activity, she believes that U.S. antitrust laws are sufficient to deal with the fast-moving and dynamic tech markets. She thinks that ongoing cases against Facebook, Google and other platforms should be resolved before concluding that existing antitrust laws are not up to the task. She does not agree with Mr. Walker that the consensus is global on the need for specific regulation in digital environments. Before a rollback that took place in the 1970s, the US government had stepped in to regulate many industries, with that intervention resulting in significant inefficiency, stifled innovation, higher prices, and lower quality.

Taking recent cases as examples, the FTC has brought a case against Facebook in December 2020. This case will investigate Facebook’s acquisitions of Instagram and WhatsApp. Both may be analysed as driven by Facebook’s alleged preference for buying firms instead of competing with them. The FTC also alleged in its case that Facebook over many years has imposed anticompetitive conditions on third-party software developers access to valuable

interconnections to its platform, like API interfaces that allow developers' apps to interface with Facebook. The case is therefore seeking a permanent injunction in federal court that could, among other things, require divestiture of assets, possibly including Instagram and WhatsApp. In another case, the FTC challenged health information company Surescripts, alleging that the company employed vertical and horizontal restraints to maintain its monopolies over two electronic prescribing markets, both routing and eligibility, and is seeking to undo Surescripts' unfair methods of competition and provide monetary redress to consumers. Third, a case brought by the U.S. Department of Justice against Google relating to a series of exclusionary agreements that lock up primary avenues through which users access search engines, and thus the Internet, is also ongoing.

The FTC is also carrying out important market studies, making use of Section 6(b) of its Authorising Act that allows it to subpoena information from companies unrelated to an enforcement investigation. It is notably engaging in a study of acquisitions by tech firms – for this purpose, it has issued special orders to investigate some mergers involving GAFAM firms that did not meet Hart-Scott-Rodino (HSR) filing requirements and therefore avoided merger review. Another study is focusing on social medias and video streaming services space; one of its goals is to understand the way media and video streaming services collect, use, track, estimate, or derive personal and demographic information from their users. The findings of these studies will inform policies and enforcement efforts vis-à-vis digital platforms.

Finally, the House Antitrust Subcommittee of the House Judiciary Committee has issued several recommendations based on its 2020 investigation which are expected to be debated during this legislative session. Some of the bills in question are significantly broad in scope and could produce troubling results in terms of competition and innovation going forward.

> "U.S. antitrust laws are sufficient to deal with the fast-moving and dynamic tech markets."
>
> Christine Wilson

Gönenç Gürkaynak

Gönenç Gürkaynak agreed that it is not clear that a consensus exists on the need for regulation. Those who consider the need exists fear tipping possibilities, but the sense of urgency in that regard should be balanced with the need for counterfactual analysis. Agencies have to be assertive and resolute, but they cannot allow themselves to become opinionated. Equitable remedies and a focus on justifiable balances should remain central. This cannot be done without proper effects analyses, and proper definitions of markets. It is possible to over-regulate certain industries and the results of those regulations might be a decrease in innovation. It is very important to do counterfactual analysis with concrete facts and parameters and data before engaging in sweeping acts of regulation. While the cost of not regulating might be high and there may be a case in favour of regulation, the cost of perverse regulation could be even higher. Antitrust jurisprudence has evolved together with the markets, and antitrust is not inadequate to address the issues before us today: We are now using new terminologies such as "tipping", "gatekeepers" and "self-preferencing". This is proof that antitrust law is adapting to new circumstances, and a sweeping regulation in the digital markets might be uncalled for.

Looking at emerging markets, there seems to be a big hype in going after the digital players. One should remain careful however that the competition authorities of emerging markets may be influenced by major global regulators to take radical steps, and sweeping regulations adopted in sophisticated competition law regimes might over-inspire the regulators of emerging economies, encouraging them to take leaps of faith in their enforcement, in the absence of the same sophisticated tools of analysis available to their counterparts in leading antitrust enforcement jurisdictions. Such hijacking of competition law enforcement through scaremongering would hinder technology and innovation globally, as numerous agencies might start filling all kinds of gaps in their theories of harm with a wrong perception of tipping in the fabricated hands of an invincible monolithic incumbent player, which has not been proven as a reality in the history of digital markets. This we have seen in how quickly all agencies of the world have started moving away from the idea of defining relevant markets, the next stop of which has become an "assumption of market power". This was also observed in other related fields of law closely connected with the technology markets as well. For example, when the right to be forgotten, a new generation right, came into gameplay in some jurisdictions where fundamental rights are strong, has meant something interesting. However, when it was imported by some other jurisdictions that were not as solid on fundamental rights, suddenly the right to be forgotten was hijacked into something that could risk whitewashing public records. It is necessary to stay careful with sweeping regulation in more developed and sophisticated regimes because these might lead to reflexes that were not intended in other jurisdictions. This import may be equally harmful to the advancement of technology globally.

> "Agencies have to be assertive and resolute, but they cannot allow themselves to become opinionated."
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Experience has left us a well-established framework and economic evidence to understand when and where those conducts have procompetitive effects and when and where they have anticompetitive effects.”

Elizabeth Wang

Elizabeth Wang

Elizabeth Wang explained that the Chinese experience is particularly relevant to the debate on platforms. Very recently, Chinese regulators from three different ministries have organised a meeting that invited thirty-four platform companies operating over a wide range of services to discuss regulation in the platform space. What they have in common is the dynamic and disruptive nature of many of the entities. As they differ from most previous business models, the concern is that a “one size fits all” platform regulation will not be flexible enough to consider all those new and dynamic aspects of platforms. Another risk is focusing on the basic structure type of factors rather than on competitive effects. There are well-established antitrust economic theories and empirical methods available to help develop and test anticompetitive conducts in the digital economy. As an example, Chinese agencies are currently investigating exclusionary conduct by actors such as Alibaba or Tencent or TikTok. These are suspected to have imposed anti-competitive restrictions on platform access. Those types of conduct, even though they are carried out by digital platforms, are quite typical conducts that have been dealt with over many decades in antitrust case law. Experience has left us a well-established framework and economic evidence to understand when and where those conducts have procompetitive effects and when and where they have anticompetitive effects. An effects-based analysis can still prove to be useful and should prevent us from rushing towards *ex ante* regulation.

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Multihoming implies that -when it occurs-, a digital service is incapable of capturing a user completely.”

Kalyani Singh

Kalyani Sing

Kalyani Singh wished to bring up some recent developments in India. In 2018, the Competition Commission of India (CCI) and the government reviewed the competition laws and the adequacy of the Indian legislation to the changing economy. One of the chapters in the review committee was in fact “Technology and New-Age Markets.” An overall observation in that report was that the current legislation was sufficient for the CCI to address digital markets from an enforcement perspective. Changes to the merger rules have been suggested, e.g.: a change in the jurisdictional threshold requirements. However, overall, there seems to be a consensus that the current antitrust rules are sufficient for digital markets but at the same time, there seems to be a lot of scrutiny globally of digital markets in general and a reassessment of sufficiency of competition tools and standards regarding digital markets. This scrutiny seems to derive from the following arguments: digital platforms exhibit strong network effects, digital platforms have a data-driven advantage, and digital platforms are prone to tipping or market entrenchment. One should be aware that inequitable reliance on these presumptions could result in oversimplification of the actual realities in these markets and models. Networks effects are not absolute as there are clusters of users that insulate parts of the network from the others. Data is not an absolute necessity to enter digital markets either, and there is a record of successful entries of operators that did not have substantial data: TikTok and Snapchat for instance. Additionally, tipping is not a clear trend, as multihoming remains a constant challenge to entrenchment. Indeed, multihoming implies that -when it occurs-, a digital service is incapable of capturing a user completely.

In the end, innovation processes are not usually represented that well in current regulatory discussions, and competition from new entrants as well as existing digital players are also underestimated in these discussions. Digital markets are complex and evolving. This entails that any regulatory framework that focuses on digital markets needs to have some level of flexibility that can accommodate for learning and analytical correction. ■