Antitrust Enforcers Gather at the ICN 2020 Virtual Annual Conference to Tackle Challenges Presented by Digital Markets

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October 2020

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On September 14-17, the International Competition Network ("ICN") held its 2020 Annual Conference. This year's conference was jointly hosted by the U.S. Department of Justice ("DOJ") and U.S. Federal Trade Commission ("FTC"). Due to the COVID-19 pandemic, the conference was held virtually and, for the first time, was open to the public.[2] Over the course of the four-day conference, more than 3,000 attendees heard from top competition enforcers and experts from around the globe.

The focus of the ICN 2020 Annual Conference was on challenges posed by digital markets and online platforms to competition policy. Participants remarked that the topic was especially relevant because the COVID-19 pandemic has accelerated the rate of digital development, but has also led to protectionist tendencies by some governments and calls to relax antitrust standards in deference to industrial policy. The DOJ and FTC expressed their conviction that antitrust enforcers should push back against these tendencies and ensure robust competition in the marketplace. Other enforcers agreed that antitrust enforcement is critical, and many expressed an urgency to meet these new challenges and advocate domestically for the importance of competition policy. Enforcers also agreed that going forward, competition policy in the digital age will become increasingly interconnected with data privacy and consumer protection.

Substantively, the main challenges identified by antitrust enforcers were alleged monopolization/abuse of dominance conduct by large online platforms; so-called "killer acquisitions" (acquisitions of small startup companies); and pricing algorithms. It was apparent during the conference that the U.S. agencies and non-U.S. agencies, notably the European Commission ("EC"), had divergent approaches to digital markets and online platforms, especially as they pertain to monopolization/abuse of dominance claims of the Big Four (Amazon, Apple, Google, and Facebook). While certain non-U.S. enforcers, such as the EC and the Australia Competition and Consumer Commission ("ACCC"), elaborated on new regulations and tools they are developing, the U.S. enforcers reiterated their position that the existing laws and tools in the U.S. are flexible enough to meet any challenges posed by digital markets. Top U.S. enforcers also repeatedly and strongly cautioned against new regulatory regimes and tools, including *ex ante* rules and interim measures, as "blunt tools of government mandated technology solutions" that are subject to "regulatory capture" and are likely to chill competition and innovation rather than promote them. There was, however, more consensus among U.S. and non-U.S. enforcers that merger thresholds may need to be adapted to catch acquisitions of small startups by large players and that companies need to adjust their compliance policies to address digital challenges, such as pricing algorithms.

Some Consensus…

As a general matter, competition enforcers and experts around the world agreed that the world has become rapidly digitized and the development may accelerate even more in the near future. Indeed, digitization is no longer confined to "technology" markets, but has permeated almost every facet of the economy. Many enforcers and experts also commented that digital markets, particularly online platforms, often have characteristics that may present challenges to competition policy, such as multi-sided platforms, zero-price business models, and indirect network effects.

In responding to these challenges, enforcers across various jurisdictions agreed that it is important for competition authorities to invest in new internal resources relevant to digital markets. To that end, many jurisdictions have reorganized or newly established staff who are exclusively focused on the digital economy. For example, the DOJ reorganized its Technology and Financial Services Section to focus exclusively on technology markets and platform business models. Other jurisdictions have brought in non-legal staff like data scientists and IT experts to strengthen their internal knowledge

base and skill set. For example, the Korean Federal Trade Commission ("KFTC") recently hired fifteen digital forensic experts. Moreover, many enforcers are utilizing sophisticated technology tools and large volumes of data to detect violations or monitor compliance, particularly in the cartel space. Enforcers also emphasized that companies need to make sure that their compliance programs are updated appropriately to address potential new areas of liability, such as machine pricing algorithms.

Enforcers across multiple jurisdictions further agreed that one of the challenges posed by digital markets are acquisitions of small companies that are below merger filing thresholds because they do not yet have significant revenues, but nevertheless may have other assets that pose a competitive threat, such as a large user base or a large amount of data. Enforcers from many jurisdictions indicated that they have implemented or are considering alternatives to turnover thresholds to address this issue, such as transaction value or market share thresholds. FTC Chairman Joseph Simons stated that the FTC is conducting a 6(b) study of Apple, Amazon, Facebook, Google, and Microsoft with regards to their acquisitions of nascent companies that are below the merger filing thresholds. The FTC hopes that the study will allow it to "examine trends in acquisitions and the structure of deals," "learn more about how small firms perform after they are acquired by large technology firms," and help it consider "whether additional transactions should be subject to premerger notification requirements."[3]

... and Some Differences

Despite consensus on many important issues, the conference also laid bare some key differences in how competition authorities view the need for new legal frameworks to address digital markets. The divergence was most apparent between the U.S. agencies and the EC. EC Commissioner for Competition Margrethe Vestager described digital markets and online platforms as unique because they are often winner-take-all and prone to tipping, meaning that winners can capture dominant market shares and become gatekeepers that put up barriers to keep other competitors out. Enforcers from other non-U.S. jurisdictions agreed that large market shares and high concentrations are potentially problematic. U.S. enforcers and experts disagreed for the most part. In his keynote speech, Professor Herbert Hovenkamp opined that for the most part, large online platforms like the Big Four are not winner-take-all (or natural monopolies) because there is significant product differentiation. FTC Commissioner Christine Wilson agreed that the winner-take-all assumption does not describe most online platforms. She also highlighted that consumers can benefit from network effects, so the existence of a platform with strong network effects does not necessarily mean there is a need for stronger enforcement. Similarly, Assistant Attorney General for the DOJ Antitrust Division Makan Delrahim reminded the audience that "digital" is not just one thing and digital companies have different business models, which modify their incentives.

This divergence plays out in the agencies' responses to challenges posed by digital markets. Several non-U.S. jurisdictions have established or are working on new regulatory regimes and tools. EC Commissioner Vestager spoke about two initiatives: 1) the New Competition Tool ("NCT"); and 2) the Digital Services Act ("DSA") *ex ante* rules for large online platforms. (The NCT would allow the EC to investigate and impose remedies in markets when it believes the market structures are inherently anticompetitive without a prior finding of infringement by any specific companies. Several European enforcers also expressed hope that the NCT may be a useful tool to investigate tacit collusions as a result of AI and machine pricing algorithms. The DSA *ex ante* rules would be a list of dos and don'ts for what the EC considers to be large gatekeeper platforms.) Another example discussed was the ACCC, which is working on the News Media Bargaining Code to address bargaining imbalances between platforms and businesses.

U.S. enforcers, including FTC Chairman Simons and Assistant Attorney General Delrahim, expressed the U.S. position that new regulatory regimes, especially *ex ante* rules, are not the answer, and that the U.S. antitrust laws are flexible enough to adapt to big technology companies and reach conduct that undermines competition. As Delrahim said, "[b]y timely using our existing laws to ensure robust competition in the digital marketplace, we can prevent having to resort to the blunt tool of government mandated technological solutions, which can stifle the very innovative atmosphere that our competition laws seek to promote."[4] Simons similarly advised "strong caution before adopting any regulatory regime rather than relying on a competition regime" because U.S. history shows that regulatory regimes are often subject to "regulatory capture and political influence, resulting in entrenched dominant firms and artificial barriers to new competition."[5] Delrahim agreed that agencies "get captured by the industries they regulate" because "the rules cannot adapt, and what happens is that businesses innovate to those rules rather than innovating for the consumer ultimately." For instance, Simons explained that the EC's proposed *ex ante* regulations for "gatekeepers" will need to have "some kind of a threshold at which somebody becomes a gatekeeper or some other kind of dominance threshold that triggers the regulation and what you have to worry about there is creating an incentive to stop competing before or to pull your punches before you hit that threshold," which is "very damaging to consumer welfare." Delrahim also emphasized that competition authorities have to make sure that any new regulations and tools do not "expand beyond the reach of competition law under the guise of competition laws." In summary, he iterated U.S. jurisprudence's long held conviction that "antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices" and government should "confine its responsibility to seeing that a true competitive economy functions."

How to Remedy

By the same token, the divergence was reflected in the agencies' approach to remedies. EC Commissioner Vestager explained that because digital markets are prone to tipping, it is sometimes appropriate to utilize interim measures during a pending investigation to ensure that there is no irreversible anticompetitive harm, as the EC did in *Broadcom*.[6] U.S. enforcers, on the other hand, cautioned strongly against interim measures, both for due process concerns and because several U.S. studies have concluded that antitrust remedies in past monopolization cases have largely been ineffective. As FTC Commissioner Wilson stressed, "if history demonstrates remedies in unilateral conduct cases have been at best irrelevant and at worst have inflicted harm on consumers, I worry that imposing interim measures before an investigation has completed increases the likelihood that we may harm rather than benefit consumers." For the same reason, Wilson stated that structural remedies are less likely to be appropriate in Section 2 monopolization cases, which Professor Hovenkamp also agreed with. Indeed, Wilson suggested that if there is no viable remedy available, enforcers should seriously consider whether to pursue enforcement.

Enforcers did generally agree that data will be an important aspect of remedy assessment because it plays a crucial role for many digital markets and online platforms. However, there was no consensus on what form a data remedy might take. Data access, interoperability, transparency, prohibition of data aggregation were all mentioned as potential remedies, but enforcers acknowledged that each has drawbacks and it can be difficult to devise an effective remedy. Indeed, U.S. enforcers have observed in the past that forced sharing of data "reduces the incentive to invest in innovation" and is an "inherently regulatory" approach, which is why U.S. laws generally do not impose a duty to share one's assets (data or otherwise) with competitors.[7] They have also cautioned that "legally mandated data access, data sharing, or data pooling involves significant administrative costs" and mandatory data sharing may "cause enhanced risks of cartelization."[8]

ICN Going Forward

As the ICN is entering its third decade, it will be interesting to see how it evolves and responds to the new challenges its members face. Participants at the conference praised the ICN for creating a forum for competition enforcers to collaborate and share best practices, as well as helping new competition agencies grow. Going forward, ICN plans to focus further on diversity and inclusiveness (especially inclusion of developing countries and new competition agencies) in composition, participation, and agenda. ICN members acknowledged that there is, and there will be, skepticism of the importance of competition law, especially during times of crises like the COVID-19 pandemic or in a jurisdiction where the competition authority has been established only recently. Many ICN members expect that they may need to tackle political questions or collaborate with other relevant government agencies, such as consumer protection and data privacy. ICN members also acknowledged that continued outward-looking advocacy (i.e., ICN as an external advocate) will be critical for the future of competition law and committed to continue to advocate for competition enforcement.

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[1] Susan Zhu is an Associate at Axinn, Veltrop & Harkrider LLP. Special thanks to Koren W. Wong-Ervin. The views expressed here are the author's alone and do not necessarily represent the views of Axinn or any of its clients. Axinn represents a number of clients, including Google, that may have an interest in the subject matters discussed in this article.

[2] Recordings of the ICN 2020 Virtual Annual Conference sessions are available at https://icn-2020.videoshowcase.net/.

[3] FTC Press Release, *Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp.* (Feb. 11, 2020), available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[4] Assistant Attorney General Delrahim Delivers Opening Remarks at the International Competition Network Conference (Sept. 14, 2020), available at https://www.justice.gov/opa/speech/assistant-attorney-general-delrahim-delivers-opening-remarks-international-competition.

[5] Prepared Remarks of Chairman Joseph Simons ICN 2020: Digital Showcase Introductory Remarks (Sept. 14, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1580355/simons_icn_2020_digital_showcase_introductory_remarks.pdf.

[6] European Commission, *Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets* (Case AT.40608, Oct. 16, 2019), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109.

[7] See Deputy Assistant Attorney General Barry Nigro Delivers Remarks at The Capitol Forum and CQ's Fourth Annual Tech, Media & Telecom Competition Conference (Dec. 13, 2017), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-capitol-forum-and-cqs; Deputy Assistant Attorney General Roger Alford Delivers Remarks at King's College in London, *The Role of Antitrust in Promoting Innovation* (Feb. 23, 2018), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-kings-college-london.

[8] Alden F. Abbott, General Counsel, FTC, *Big Data and Competition Policy: A US FTC Perspective* (Jul. 6, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1543858/big_data_and_competition_policy_china_presentation_2019.pdf.