REGULATING DIGITAL ADS: IS A GLOBAL APPROACH THE WAY FORWARD FOR JAPAN AND OTHER ADVANCED ECONOMIES?

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Regulating Digital Ads: Is a Global Approach the Way Forward for Japan and Other Advanced Economies?

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This article addresses the problem of the regulation of digital advertising in Japan from a comparative and global perspective. There are a number of possible concerns about digital advertising, ranging from the lack of transparency of transactions and "unfair" conduct to conflicts of interest and self-preferencing by certain operators, from the way personal data are gathered and used to excessive concentration and market power in the supply chain. Several reports have been produced, including in the United Kingdom, in Australia, in Japan, and in a number of EU Member States. The European Commission's proposals for a Digital Markets Act and for a Digital Services Act, if adopted, would introduce regulation that would also apply to online advertising. This paper examines the potential concerns that have been identified, focusing on the Interim Report by the Headquarters for Digital Market Competition of the Japanese Cabinet Office of Japan and comparing it to regulatory initiatives in the European Union and the United Kingdom. It concludes that an international approach should be adopted, with the right mix of Government intervention, under the aegis of institutions such as UNCTAD, UNCITRAL or the OECD, and Government-backed industry self-regulation. This is the only way to avoid regulatory unilateralism, which would fragment markets, hinder trade and ultimately harm business and consumers world-wide, depriving them of the benefits that the digital economy has already brought about and has the potential to deliver in the future.

I. INTRODUCTION

Digital advertising is a hugely important sector in today's economy and, as such, it rightly attracts the attention of competition authorities and other governmental agencies around the world. Japan has not been an exception. In 2019, the Cabinet established the Headquarters for Digital Market Competition (the "HDMC") in order to implement policies to promote competition and innovation in the digital market in a timely and effective manner. On June 16, 2020, the HDMC published an Interim Report on the Evaluation of Competition in the Digital Advertising Market ("Japanese Interim Report"), on which it sought the views of stakeholders. The consultation closed on July 27, 2020. While the Interim Report does not contain any final recommendations or proposals, it does suggest that, in a number of areas, regulation should be introduced to address perceived problems.

Similar initiatives have been undertaken in other jurisdictions. In the United Kingdom, for example, the Competition and Markets Authority conducted a market study on online platforms and digital advertising, which resulted in a substantial Report published on July 1, 2020 ("UK Report").[2] The UK Report calls for regulation of the digital ads market both in the form of an enforceable code of conduct and of pro-competitive interventions ranging from behavioral remedies to ownership separation. In the European Union, on December 15, 2020, the European Commission made proposals for two Regulations. A proposed Digital Markets Act[3] would apply to unfair practices of "gatekeepers"[4] providing certain core platform services, including "advertising services, advertising networks, advertising exchanges and any other advertising intermediation services."[5] A proposed Digital Services Act would apply to intermediary services of online platforms, with additional obligations for very large platforms having a number of average active monthly recipients of their services amounting to 10 percent of the population of the Union.[6] The Japanese Interim Report raises a number of challenging issues that are being considered around the world, were considered in the UK Report and are addressed, at least in part, in the Proposal for a Digital Market Act and the Proposal for a Digital Services Act. It offers an opportunity to reflect on the state of the digital ads market, whether regulation may be necessary because of instances of market failure or other public policy considerations, and, if so, whether a global response rather than jurisdiction-specific measures should be adopted. This article will start by summarizing the findings of the Japanese Interim Report on the state of the digital advertising sector in Japan. It will then address a number of areas covered in the Japanese Interim Report, namely transparency, opaqueness of prices and transaction details, measurement of achievement metrics by third parties, data utilization, the "black box" problem, conflict of interest and self-preferencing resulting from vertical integration, change of parameters in search engines, and concerns regarding acquisition and use of personal data. Finally, conclusions will be drawn.

II. THE COMPETITIVE NATURE OF DIGITAL ADVERTISING

The Japanese Interim Report highlights the many competitive features of online advertising. By way of example, the following findings in the Interim Report should be noted:

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2 CMA, Online platforms and digital advertising, Market study final report, July 1, 2020, available at https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf, accessed on July 22, 2020. Numerous initiatives have flourished in other jurisdictions as well: see, e.g., in Australia, the ACCC, Digital Advertising Services Inquiry, Issues Paper, available at https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-advertising-services-inquiry/issues-paper, accessed on 22 July 2020 and ACCC, Digital Platforms Inquiry - final report, June 2019, available at https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, accessed on July 22, 2020 ("ACCC DPI Final Report"); in Spain, CNMC, Public consultation on online advertising in Spain, press release available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20190425_NP%20Inicio%20Estudio%20Publicidad%20Online_EN.pdf, accessed on July 22, 2020; in France, FCA, *Avis 18-A-03 du 06 mars 2018, portant sur l'exploitation des données dans le secteur de la publicité sur internet*, available at https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//18a03.pdf, accessed on July 22, 2020; in Germany, FCO, Online advertising, Series of papers on "Competition and Consumer Protection in the Digital Economy," February 1, 2018, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_III.pdf?__blob=publicationFile&v=5, accessed on July 22, 2020.

3 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) Brussels, 15.12.2020 COM(2020) 842 final ("Proposal for a Digital Markets Act"). Provisions that apply specifically to online advertising are Articles5(g) and 6(d), (g), (h) and (i).

4 A gatekeeper is a provider of core platform services designated according to the criteria in Article 3 of the proposal for a Digital Markets Act.

5 Proposal for a Digital Markets Act, Article 2(2)(h).

6 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC - Brussels, 15.12.2020 COM(2020) 825 final ("Proposal for a Digital Services Act"). Provisions that apply specifically to online advertising are Articles 24, 30 and 36.

a. The Interim Report states that, while Google and Facebook have a combined global market share of 60 percent, 40 percent of the market is populated by other players. Among them Amazon is becoming increasingly prominent. These market shares are inconsistent with a finding of dominance. It may be debatable whether the market is an oligopoly but, of course, oligopolies may be highly competitive and dynamic and do not necessarily give rise to any competition concerns.

b. Prices of pay-per-click in Japan are lower than in Europe or US. This points to the competitive nature of the Japanese market.

c. DSP operators feel that generally advertisers are able to choose additional DSPs together with Google, Yahoo! or Facebook as media.

d. Platform operators have high R&D spending and provide high cost-effectiveness to operators.

e. The JFTC Questionnaire Survey Report referenced in the Interim Report shows that publishers transact with digital platform operators for pro-competitive reasons, namely the number of advertisers (advertising agencies), the convenience of services due to the integration of multiple ad tech services and reasonable pricing based on targeting accuracy.

f. In response to customer demand, Apple and Google introduced better management of cookies to protect privacy. This is consistent with a competitive market in which privacy concerns are taken seriously.

g. Digital ad services provide business, including SMEs and sole traders, with the means to reach customers who were previously unreachable. At the same time, revenues from digital ads enable provision of various services on the Internet to consumers for free.

The above features are all clear evidence of a dynamic, competitive market. Before introducing heavy handed regulation in such a market, a careful analysis should be carried out that should take into account not only whether certain constituencies would like better protection or better services but also what the impact of any proposed regulation would be on all market players, including advertisers, publishers, digital platforms and consumers.

III. TRANSPARENCY CONCERNS

The Japanese Interim Report relies on the views of certain publishers and advertisers that digital platforms disclose too little information about prices and costs and the result of the bids. Furthermore, there is apparently a perception that the fees publishers are paying for intermediated ads are too high. This is said to pose a risk for publishers who would not be able to sustain this state of affairs and could go out of business. Based on this qualitative evidence, the Interim Report suggests that it is desirable to improve: (1) the transparency of transaction details and prices; (2) the transparency of fees and costs; (3) the transparency of ad spaces and ad media.

The UK Report also concludes that there is lack of price and bidding transparency in the market and this may limit publishers and advertisers' "ability to make optimal choices on how to buy or sell inventory, reducing competition among intermediaries."[7]

The Proposal for a Digital Markets Act provides, at Article 5(1)(g) that gatekeepers shall "provide advertisers and publishers […] upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper."

The proposals in the Japanese Interim Report are rather general. If there is evidence of lack of transparency of prices and terms of business applied by online platforms to publishers and advertisers, respectively, then there may be a case for intervention aimed at improving transparency. It is correct that if a customer does not know or cannot verify accurately the price it pays for the services it receives or cannot assess the quality of such services, its choices may be affected in a way that leads to a suboptimal market equilibrium. It is much less clear why, as the proposals seems to suggest and the Proposal for a Digital Markets Act envisages, advertisers should know the terms of business applied to publishers or vice versa or bidders should know the details of other bidder's tenders. Such a level of market transparency could even lead to collusive outcomes and would appear to require the disclosure of confidential terms of business to the market.

In terms of economics and commercial reality, it is clear from basic economic theory that ad tech operators, including vertically integrated digital platforms, do not have any incentive to under-compensate publishers, at least not to the extent – as stated in the Interim Report – that they could go out of business. Ad tech operators and digital platforms rely on publishers and advertisers to fund their business model and monetize the services that they offer to consumers for free. This is the case for any ad tech operators but even more so for vertically integrated digital platforms. The latter, indeed, not only make money from

7 UK Report, paras 53 - 55.

their ad tech business but have also an incentive to display relevant and interesting ads to their users. An innovative and competitive advertising market is in their interest. If their user experience deteriorates, digital platforms stand to lose business as users will click less for ads or even use the platform less or switch platform, which will lead to less advertising revenues, not more. Furthermore, platforms such as Google, acting as intermediaries, connect publishers and advertisers. Any strategy that had as its effect that of marginalizing or even eliminating publishers would inevitably result in lower, not higher revenues from intermediation. For such a strategy to be profitable, the loss of revenue would have to be compensated by increased revenues generated by the intermediary's sale of its own inventory. This is, of course, theoretically possible. However, before coming to such an extreme conclusion, market evidence should be carefully scrutinized. Currently, it would appear that the market is dynamic and expanding. The UK Report analyzed Google's fees and compared them to those of other intermediaries to test the hypothesis that, given its higher market shares, Google might be charging higher fees or hidden fees, which would be consistent with Google having substantial market power. The CMA concluded that, at an aggregate level, Google's intermediation fees were "similar to those if its competitors."[8] The CMA also found that there was no evidence that Google was charging "hidden fees."[9] This is consistent with the thesis that, if publishers are charged fees that are too high or have too little control over their transactions, they would switch to other ad tech operators and even to other platforms. One can imagine, for instance, that if vertically integrated search engines were engaging in practices consisting in overcharging publishers, this could be a significant business opportunity for the nascent advertising business of Amazon or lead larger publishers to diminish their reliance on ad intermediation.

There are, clearly, commercial demands by publishers and advertisers for more transparency. There may also be an argument that lack of transparency as to a customer's own terms of business may be affecting the well-functioning of the market, creating an imbalance between platforms, on the one hand, and advertisers and publishers, on the other. If this is the case, however, the problem is best addressed by way of principles-based regulation in an industry code of conduct that could be enforced through speedy and cost-effective dispute resolution mechanisms rather than by heavy-handed regulation administered by bureaucratic national busybodies around the world, each according to its own standards and rules.

IV. MEASUREMENT OF ACHIEVEMENT METRICS BY THIRD PARTIES

The Japanese Interim Report relies on views from advertisers that achievement metrics reports from demand side platforms ("DSPs") may not be reliable and do not allow side-by-side comparison across different platforms. There is a suggestion, therefore, that metrics should be verified by a third party and provided to advertisers in a standard format. The UK Report raises similar concerns.[10]

The Proposal for a Digital Markets Act provides, at Article 6(1)(g), that gatekeepers shall "provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory."

It is, generally, a legitimate contractual demand for a customer to audit the performance of its supplier when such performance is not otherwise immediately apparent or verifiable. It is, therefore, common in certain contracts for customers to be given audit rights. However, as the Japanese Interim Report clearly implies, auditing achievement metrics of digital ads is not necessarily an easy task and requires sophisticated technical expertise. Furthermore, introducing wide-spread, generally applicable audit rights by regulation may impose a significant cost on the industry. Auditing, its scope and its technical requirements are often best left to the industry and, in particular, to negotiations between advertisers, on the one hand, and DSPs, on the other. If there is clear evidence that DSPs are systematically refusing to grant audit rights or are applying technical solutions that make side-by-side comparison impossible, there may be a case for principles-based regulation imposing on DSPs an obligation to grant audit rights to advertisers with a minimum content and to implement technical solutions that allow side-by-side comparison, along the lines of Article 6(1)(g) of the Proposal for a Digital Markets Act. One or more industry bodies or private sector companies could then provide such audit services in a competitive market, which should ensure that advertisers are charged a competitive price for such services.

V. "BLACK BOX" PROBLEM, CONFLICT OF INTEREST AND SELF-PREFERENCING RESULTING FROM VERTICAL INTEGRATION

The Japanese Interim Report expresses a possible concern about vertically integrated undertakings using data to favor their own services to the detriment of advertisers. There is also a concern

8 UK Report, para 5.239.

9 UK Report, paras 5.240 – 5.243.

10 UK Report, para 53.

relating to possible conflicts of interests of undertakings operating both DSP and supply side platform ("SSP") services and a concern about self-preferencing by vertically integrated publishers operating also ad servers, DSP and SSP services.

The UK Report also refers to a "black box" problem[11] and explains:[12]

> This reliance on opaque algorithms poses a fundamental challenge to traditional notions of how markets work. Since they are unable to scrutinize the basis on which decisions are made, platforms' users are often required to accept outcomes on trust. From the platforms' perspective, it can be difficult to convince skeptical users that they are making decisions in their best interests, since there is no independent verification of this. Effectively, platforms both set the rules and are the sole arbiters of whether they abide by them.

This type of concern does not apply only to digital advertising. In theory, exactly the same problems may arise in relation to most vertically integrated businesses, from supermarkets with a degree of market power and selling own label products to telecoms operators. In the sector of integrated utilities such as telecoms or energy, historically former state monopolies were subject to regulation given their ownership of bottleneck facilities. In other sectors, vertically integrated companies have introduced internal firewalls to give their customers assurance that they will be treated fairly. In the supermarket sector, while no regulation has been introduced at EU level, the UK has introduced a mandatory Code of Practice for designated retailers, that is, retailers that are considered to have a certain degree of market power vis-à-vis their suppliers. The Code of Practice sets forth a number of obligations of designated retailers to ensure that suppliers are treated fairly and transparently.[13] Any disputes concerning the Code of Practice may be referred to arbitration. The costs of the arbitrator are borne by the designated retailer unless the arbitrator determines that the supplier's claim is vexatious or wholly without merit, in which case the costs are at the discretion of the arbitrator.

All the other costs of the arbitration are at the discretion of the arbitrator.[14] The Groceries Supply Code of Practice in the UK is mandatory and was adopted by order of the Competition Commission. However, the same result of a mandatory code of practice enforced by effective alternative dispute resolution ("ADR") could be achieved by the market players. The latter is a better and more effective solution to ensure that regulatory measures are effective and harmonized globally. In grocery retailing, given the national scope of the markets, it is entirely reasonable to have national regulation. In digital advertising, national regulation would impose disproportionate costs on businesses, not only on platforms but also on publishers and advertisers, and ultimately on consumers. It would jeopardize the benefits of global scale economies and ultimately harm consumers precisely in those countries where, no matter how well-intentioned, heavy-handed and costly regulation will be introduced.

Article 36 of the Proposal for a Digital Services Act envisages a voluntary Code of Conduct for digital advertising, encouraged and facilitated by the European Commission but drawn-up and adopted by market players on a voluntary basis. Any perceived "conflict of interest" or "black box" problem in the European Union could be addressed in the envisaged Code of Conduct.

It seems, therefore, that in digital advertising, should there be proven concerns about the relationship between digital platforms and their business users, that is, publishers and advertisers, the first level of intervention should be at industry level. A voluntary code of practice, which could be structured around general principles of fair dealing and transparency, could be adopted by industry players, possibly encouraged or facilitated by public authorities, and enforced through cost-effective and speedy dispute resolution mechanisms such a mediation and, if mediation fails to produce a settlement, fast-track arbitration. National regulation, on the other hand, should be seen as a last resort as it risks fragmenting the global competitive eco-system.

VI. PARAMETERS IN SEARCH ENGINES

The Japanese Interim Report suggests that, because publishers rely on search engines for users to visit their websites, when the search engine algorithm changes, publishers should be given prior notice of changes and information about the major parameters. Furthermore, there should be a procedure for a consultation with domestic players, including on how to rank secondary use websites, and a system that monitors the measures in question.

11 UK Report, para 49.

12 UK Report, para 52.

13 Groceries Supply Code of Practice, 4 August 2009, available at https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice, accessed on 23 September 2020. The Groceries Supply Code of Practice is contained within schedule 1 of the Groceries (Supply Chain Practices) Market Investigation Order 2009, which was made by the UK Competition Commission following a market investigation reference by the Office of Fair Trading on 9 May 2006 in the exercise of its powers under section 131 of the Enterprise Act 2002.

14 The Groceries (Supply Chain Practices) Market Investigation Order 2009, Art 11.

These proposals seem very draconian and may result in significant consumer harm. The only evidence the Japanese Interim Report relies upon to propose such intrusive regulation is views by publishers. Of course, publishers have an interest in being displayed as prominently as possible on a search result pages and would like to have as much control over a search algorithm as possible. This is obvious and entirely rational from an economic and business perspective. The point is, however, that a search engine optimizes its algorithm to provide the best possible service to the users of the search service, that is, the consumers. A publisher will want to be displayed as prominently as possible regardless of whether other results may be more relevant to consumers. But a search engine has the consumers in mind.

A consumer running a search has given interests and given expectations. It is possible to set an algorithm that tries to match those interests and expectations as closely as possible. Publishers, on the other hand, have conflicting interests. Every publisher would like to be the first in the raking. If not the first, every publisher would like to be the second. And so on. Giving publishers more control over search algorithms would mean destroying the consumer benefits that search services have brought to consumers and enslave the consumers to the commercial interests of the publishers. Furthermore, such a system would give rise to endless disputes as each publisher would claim that it should be displayed more prominently than others. The search business would become all but unworkable.

Furthermore, in order to respond well, and better and better, to search queries, algorithms need to be updated quickly. When a major event occurs, for instance, algorithms need to be updated as soon as possible in order to be responsive. The introduction of notice periods and consultation procedures would run counter to the very purpose of updating and fine-tuning algorithms. Search results will quickly become less relevant and responsive, and consumers' experience will worsen significantly, ultimately harming not only consumers but also publishers and advertisers, as search results and, as a consequence, ads will become less and less relevant to consumers.

This is an area where regulation would appear to be unwise and unworkable.

VII. DATA AND FORECLOSURE

The Japanese Interim Report points out that platform operators use the data they obtain to improve their targeting accuracy. This is said to give them an advantage and to make it difficult for other operators to compete effectively. However, earlier on, the Japanese Interim Report states that there is a problem with brand value because ads may appear on inappropriate website or may be irrelevant to users. This suggests that targeting accuracy is a consumer benefit, not a problem. It cannot be both. Publishers and advertisers benefit from targeting accuracy as ads are more relevant, are likely to generate more business, are better received by consumers, and do not risk devalue the brand. Consumers benefit because they obtain relevant information and are not annoyed by ads they are not interested in. Online platforms benefit because they provide a better user experience to consumers and higher-value services to advertisers and publishers. This is competition on the merits to the benefit of all market players and, in particular, to the benefit of consumers, not a competition problem.

This problem should be distinguished from lack of transparency of ad targeting to end-users. The Proposal for a Digital Services Act, for example, at Article 24, provides that online platforms that display advertising on their interface shall provide information allowing end-users to understand that what is being displayed is an ad, on behalf of whom the ad is displayed and the main criteria based on which the user was chosen as a recipient of the ad. This form of regulation is not aimed at addressing the foreclosure problem raised in the Japanese Interim Report but the different problem of a perceived lack of transparency vis-à-vis the end-user. In other words, the underpinning rationale for this provision of the DSA is consumer protection, not anti-competitive foreclosure.

The Japanese Interim Report points out that a source of the possible foreclosure concerns resulting from data is restrictive privacy laws, which prevent the transfer of data from one operator to another. This means that operators that can acquire data themselves have an advantage over operators that rely on data provided by third parties. On the other hand, consumers value privacy. Standards of privacy protection are a qualitative parameter of competition.[15] However, if strong privacy laws hinder competition, this cannot be the "fault" of any of the market players. Either the privacy laws should be relaxed to allow for more competition, or the restriction of competition in question should be accepted in light of the fact that the value of privacy protection overrides the benefits of competition.

A solution to potential concerns relating to data could be data portability. In the European Union, Article 20 of the General Data Protection Regulation ("GDPR") provides for the right of an individual, or "data subject," to receive the personal data concerning him or her held by a business, or "controller," in a structured, commonly used and machine-readable format and

15 R. Nazzini, 'Privacy and Antitrust: Searching for (Hopefully Not Yet Lost) Soul of Competition Law in the EU after the German Facebook Decision' Competition Policy International, March 2019.

transmit them to a third party provided that: (a) the processing is based on consent; and (b) the processing is carried out by automated means. The data will have to be transmitted directly from one controller to another, where technically feasible, if the data subject so requires.[16] This right to data portability is not a competition remedy but can address competition concerns relating to data as a barrier to entry. For example, in the EU merger case *Sanofi / Google / DMI JV*, a competitor argued that the joint venture would have the ability to lock-in patients to use its services for the management and treatment of diabetes using an integrated digital platform. Ultimately, the Commission dismissed this concern but only on the ground that the (then) draft GDPR would in due course confer on users a statutory right to data portability.[17]

Article 6(d) of the Proposal for a Digital Markets Act strengthens and broadens the opportunities for data portability when data is held by a gatekeeper. It envisages that gatekeepers shall ensure effective portability of data not only for end-users but also for business users. For end-users data portability will have to be in line with the GPDR and include the provision of continuous and real-time access to avoid any disruption or interruption of services.

Data portability is not a panacea and much more thought should be given both to the content of the right and to its implementation and enforceability to improve on the current regime in the GDPR and the proposals in the Digital Markets Act. However, data portability has certain advantages: (a) it places the individual or business in control of its own data; (b) it may lower data barriers to entry on digital ads markets; (c) it is capable of being applied neutrally on an international level without giving rise to excessive and damaging regulatory fragmentation.

VIII. CONCERNS REGARDING ACQUISITION AND USE OF PERSONAL DATA

A significant part of the Interim Report is devoted to consumers' perceptions about advertising and use of their personal data. Broadly, it appears that certain consumers express concerns about the relevance, frequency or contents of digital ads and about online businesses obtaining and using their data.

These are clearly important issues. The privacy of individuals, especially when it comes to information concerning their health, religion, political views, sexual orientation and other sensitive matters must be protected. On the other hand, there is much information about individuals that can be processed by online businesses that does not concern particularly sensitive matters or that can be even processed anonymously or based on an informed, effective consent by the individual concerned. A balance must be struck between the protection of privacy and ensuring that the digital economy continues to work effectively. It is to be welcomed that the Interim Report adopts a flexible and sensible approach to this question:[18]

> … it is important to 'create a framework which will not excessively hinder innovation but will promote solution of issues through innovation' (Policy 2). Accordingly, the approach to be taken is one where a broad direction is indicated in the form of a framework and the details of the specific methods are left to the originality and ingenuity of the operators, and monitoring is conducted on whether they are effective, which ultimately leads to creation of a best practice and high-quality competition for consumers.

One way of giving consumers more confidence in digital advertising would be to provide them with more information about the ads they receive, as envisaged by Article 24 of the Proposal for a Digital Services Act, discussed above.

More generally, within the constraints of the applicable data protection legislation, it should be up to the relevant market players to further refine and strengthen their policies to give consumers ever more confidence to use the internet. Clarity and accessibility of operators' privacy policies, real opportunity to choose and change settings and data portability are important in this regard. Currently, the information requirements under many national laws and EU law result in consumers having to read long and complex "privacy policies." Instead, strengthening consumers' choice over what ads to receive and making it easier for consumers to exercise their choice and change their preferences should be a priority. Here, too, however, ideally solutions will be found by the industry at international level. National interventions would force operators to adapt their services to potentially tens or even hundreds of different rules across the world, which would be costly, inefficient, and ultimately harm consumers by depriving them of the opportunity to surf the internet on a global basis. National silos will, inevitably, be created as business would have to tailor their services to the requirements of each individual ju-

16 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, hereinafter 'GDPR'), OJ L 119, 4.5.2016, pp. 1–88, Art 20. The GDPR replaced Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31.

17 Commission decision of September 6, 2016 in Case M.7813 – *Sanofi / Google / DMI JV*, paras 67 – 71.

18 Unofficial translation with the author.

risdiction. While privacy laws cannot, of course, be abolished and, if anything, will become more pervasive, it is incumbent upon States and the supra-national organizations such as the EU to come together and create an international level playing field that avoids the pitfalls of fragmentation that have been highlighted. There are already some noteworthy examples of international harmonization in this field. For example, the APEC Cross-Border Privacy Rules ("CBPR") System provides an international certification for businesses complying with minimum requirements that is recognized by APEC member economies. The APEC Privacy Framework provides that a member economy should refrain from restricting cross border flows of personal information between itself and another member economy in certain circumstances, including when a business is certified under the CBPR System.[19] Article 19.8 of the Agreement between the United States of America, the United Mexican States, and Canada of 10 December 2019 recognizes the APEC CBPR System as "a valid mechanism to facilitate cross-border information transfers while protecting personal information."[20]

IX. CONCLUSIONS

The discussion of the Japanese Interim Report's proposals against the background of other international initiatives on digital ads strongly suggests that, even if there are problems concerning competition, fairness, data and consumer protection in the online advertising space, heavy-handed, unilateral, national or regional (e.g. EU) regulation should not be necessarily seen as the preferred or the only solution. National or regional regulation without any international coordination would cause regulatory fragmentation, raise costs on the digital ads markets to the detriment not only of platforms, but also of publishers and advertisers, and ultimately harm consumers.

Instead of regulatory unilateralism, there are two non-mutually exclusive approaches that could be pursued to address possible problems in this area: regulatory harmonization of State measures and international self-regulation.

There are undoubtedly measures that, if needed, should be taken by way of legislation or other binding State instruments (such as international treaties). In particular, when it comes to protecting and enhancing the right to privacy and data protection, it is clear that, not least because of the constitutional status that this fundamental value has in certain jurisdictions, including the European Union, legislation is the only option. However, it would be highly inefficient to have a set of jurisdiction-specific rules, that may amount to hundreds of different regimes. It seems, therefore, not only desirable but even necessary that States should engage in a serious effort to create a level playing field in this area. There could be different ways to achieve this, for example by way of an international convention, a model law, or a non-binding recommendation. Candidate institutions to take forward the initiative could be the United Nations through one of its agencies such as UNCITRAL or UNCTAD or the Organization for Economic Cooperation and Development ("OECD"). It is, of course, unrealistic to imagine that privacy laws, which are so deeply influenced by different socio-legal cultures and national constitutions, could be completely harmonized in the foreseeable future or, perhaps, ever. What is proposed here is a much narrower set of principles applying in the field of digital ads and, therefore, with a strong focus on balancing privacy and international business. Consumer's choice over what ads to receive - general, personalized, or no ads at all - and data portability would be clear candidates for minimum international standards. We are aware that, even with this narrow scope, the proposal may appear overly ambitious but, in our view, this approach is also unavoidable. As the world has become a global, interconnected digital space, so should certain minimum consumer rights become global and uniform.

Other measures are, however, best left to the industry and addressed by way of self-regulation. There is, without any doubt, much disquiet on the part of certain publishers and advertisers about the behavior of digital platforms. There may well be a case for a global code of conduct in which standards of fair dealing and transparency are enshrined with binding contractual force, backed by cost-effective, speedy dispute resolution, such as mediation, followed, if mediation is unsuccessful, by fast-track arbitration. There are, again, problems associated with crafting such a code of conduct. One obvious objection is that if the code is necessary because of the superior power of online platform, any such code, if purely voluntary, would be likely to be biased in favor of platforms and would not solve any problems at all. To address this objection, an industry code could be negotiated under the aegis of an international organization such as UNCITRAL or UNCTAD in the same way in which the Proposal for a Digital Services Act envisages that the European Commission would encourage and facilitate the negotiation and adoption of a Code of Conduct for digital advertising. Or States and the European Union could adopt harmonized legislative measures that set minimum standards, while leaving to industry the detailed negotiation of the code and the dispute resolution mechanism underpinning it. ■

19 APEC Privacy Framework https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System (accessed on October 12, 2020), para 69.

20 Agreement between the United States of America, the United Mexican States, and Canada of December 10, 2019, Chapter 19 "Digital Trade," Art 19.8.

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