

## Competition and Regulation: Friends or Foes?

*By Christine Ryu-Naya, Jane Antonio & Santos Leyva Rubio  
Baker Botts*



*Edited By Ruben Maximiano & Cristina Volpin*

# Competition and Regulation: Friends or Foes?<sup>1</sup>

By Christine Ryu-Naya, Jane Antonio & Santos Leyva Rubio<sup>2</sup>

A stellar panel of competition experts from around the world gathered to debate the relationship between competition enforcement and regulation earlier this week, exposing a variety of viewpoints on the topic. The discussion was featured as part of a new competition forum sponsored by the [Business at OECD \(BIAC\) Competition Committee](#) – the voice of the business community at the OECD Competition Committee – and was co-sponsored by the International Bar Association Antitrust Section. Building on the June 2021 discussion at the OECD Competition Committee’s WP2 roundtable on [competition enforcement and regulatory alternatives](#) and the upcoming December 2021 Competition Committee hearing on [ex ante regulation and competition in digital markets](#), the lively discussion looked back at regulations past, and forward towards the digital market-focused future.

Panelists included OECD Competition Committee Chair Frédéric Jenny, who provided opening remarks, as well as U.S. Federal Trade Commission (“FTC”) Commissioner Christine Wilson, Japan Fair Trade Commission (“JFTC”) Commissioner Reiko Aoki, Chief Competition Economist for DG Competition Pierre Régibeau, and Deputy Chair of Enforcement at the Bank of England Philip Marsden. The program was moderated by BIAC Competition Committee Chair John Taladay.

An overview of BIAC’s work on the topic was provided by BIAC Competition Committee Vice Chair Michael Koch. He observed the “healthy tension” between the two regimes and the recent shift in many governments towards a more interventionist approach to markets. Koch noted that BIAC believes that “confusing the objective of competition law by pursuing non-competition objectives can have the effect of undermining the credibility of competition enforcement” and referenced the group’s

“lodestar,” the concern of businesses to ensure fairness, legal certainty, and predictability of enforcement. Koch’s remarks tied back to the BIAC Competition Committee’s [recent comments to the June 2021 roundtable on competition enforcement and regulatory alternatives](#).

Professor Jenny provided opening remarks, walking attendees through a brief history of the interaction between competition and regulation. He noted that the OECD began raising concerns about the impact of regulations on growth in the 1990s, but that “the interface between competition and regulation has attracted renewed attention in the 2000s, and the perspective on the relationship between the two has changed.” Jenny attributed this change to three key elements: the 2008 financial crisis, which “taught us that competitive markets can fail” and that strict regulation of the financial market was a necessary complement to competition between financial institutions; the ongoing COVID-19 crisis, which “revealed the competition instrument was ineffective” to address unique concerns such as price-gouging and the necessity of competitor collaborations to bring about rapid innovation; and the rapid development of the digital sector, which has shown the difficulty authorities can have in using competition law instruments to monitor anticompetitive practices, leading to increased discussion about *ex ante* regulation.

Prof. Jenny observed that there are differences between regulation and competition law as instruments, even if they pertain to the same goals, and that it is not easy to take a side given potential trade-offs with each option. He elaborated that regulations are likely to be more general and may miss precise, case-by-case conduct assessment, but allow for intervention before harm is caused, while competition enforcement takes a narrower approach focused on consumer welfare, but may not be

<sup>1</sup> Hosted by the *Business at OECD* (“BIAC”) Competition Committee and the IBA Antitrust Section, October 20, 2021.

<sup>2</sup> Ms. Ryu-Naya is a Special Counsel and Ms. Antonio is a Senior Regulatory Analyst in the Washington, DC office of Baker Botts; Mr. Leyva Rubio is an Associate in the Brussels office of Baker Botts.

equally effective across sectors. Citing the importance of predictability as a recurring theme with BIAC, he noted that the administrative regulatory process is faster and less costly and gives a higher level of predictability than enforcement.

### **Can Regulation Foster Competition?**

Following Prof. Jenny's opening remarks, Taladay began the discussion by asking what experience with economic activity teaches us about the ability of regulation and competition to coexist. Dr. Régibeau began by explaining that "the regulatory experience we've had is not necessarily relevant to the situation we have now," pointing out that past regulation has very rarely had the explicit goal of fostering competition. As an example, he discussed the rigorously regulated pharmaceutical sector as one in which the regulations may appear pro-competitive but were actually motivated by non-competition concerns (e.g. patient safety). Experience "tells us that regulation still needs antitrust quite a bit as a backup," Régibeau said, but he cautioned that "heavy" regulation could become a barrier to entry.

Commissioner Wilson picked up the theme of the past by citing a Russian proverb: "If you dwell on the past you will lose an eye, but if you forget the past you will lose both eyes." She expressed hope that others would reflect on past experiences with regulations, saying that "we can characterize our experiences in ways that cabin them and do it with a bit more experience this time." Wilson stated that the antitrust laws in the United States took "decades" to grow into a system based on sound economic principles that have allowed antitrust to develop "for the better." While noting that this development has not been perfect – citing her own repeated calls to the FTC to undertake retrospectives and studies to enhance enforcement of the antitrust laws – she lamented calls for a hands-on approach to regulating entire sectors of the economy. "In the United States, we've learned that this can turn out badly," she said, listing the historical failures of airline regulation and the Civil Aeronautics

Board, and railroad regulation and the Interstate Commerce Commission, citing a 2012 [article](#) by now-FTC Chair Lina Khan acknowledging this issue. Observing that there have been calls to use railroad regulation as a model for future regulations, Wilson concluded, "unfortunately, I believe that the proponents of increased regulation in the U.S. are ignoring our past mistakes."

### **The Interaction of Competition Agencies and Regulation**

Commissioner Aoki relayed the JFTC's considerable experience in cooperating with other agencies to jointly develop guidance and build a relationship between enforcement and regulation. These cooperative efforts, she explained, have included informal information and staff exchanges, as well as membership in government advisory committees. She gave a specific example related to the telecommunications sector, where the JFTC conducted a joint market survey of mobile phones and formulated guidelines for promoting competition in the sector, working to clarify problematic practices under both the Anti-Monopoly Act and the Telecommunications Business Law. Aoki also shared that the JFTC has been one of three agencies that has worked to establish a body to address digital market issues and has shared staff, assisted in setting up headquarters and counsel management, and provided background materials; going forward, competition issues identified by the body will be referred to the JFTC.

Dr. Marsden, a former senior official at the UK CMA and OFT prior to joining the Bank of England, declared that "regulation tends to step in where there's a market failure – but regulatory failure can happen too." Picking up on Régibeau's pharma example, Marsden pointed out that pharmaceutical firms can exploit loopholes and gaps in regulation and "like a geyser, prices shoot up." In these cases, he said, regulators cannot do anything – and are often the main complainant to competition authorities asking for action. Marsden called U.S. criticism of UK and EU excessive pricing

restrictions “amusing” given the United States’ lack of residual protection in antitrust for failure regulation, characterizing the regime as “less ‘in God we trust’ than ‘in regulation we trust’ than Europe.” Marsden then shifted to digital markets, which he said have highlighted the weaknesses of antitrust as “too slow, too limited, too late, too narrow,” and an example of a failure of antitrust necessitating *ex ante* regulation to assist the laws.

Wilson responded by noting that a “surgical” approach to regulation inevitably leads to loopholes, leading to eventual expansion. Discussing the recent calls for increased FTC rulemaking, she observed that the calls have been accompanied by backlash over the FTC’s authority to promulgate rules. She concluded that there is “a lot of risk in competition rulemaking,” predicting that this would be playing out in U.S. courts in the near term.

The next question asked the panelists to consider the extent to which it may be appropriate for a competition enforcer to design rules and make policy choices. Jenny’s succinct response was that “this is a role for legislators rather than for competition authorities,” noting however that competition authorities could serve a useful advisory role, if based on sound experience and analysis. Régibeau agreed, noting that the past few years have seen a tendency for legislators to avoid this responsibility and delegate to competition authorities (leading Taladay to observe that “no one wants to take the heat”).

## Regulation in the Digital Sector

Discussion then turned to the question of *ex ante* regulation in the digital sector. Jenny criticized a rush to regulation as ignoring the basic question of why the competition laws may have failed to deal with competition issues in the digital sector, opining that competition authorities and economists should first work together to understand how competition works in the digital sector. This will indicate, Jenny argued, whether competition law can adapt to address this unique sector – and if not, what

types of regulations are necessary. Jenny noted that with regard to the digital sector, it is largely competition on quality and innovation of services between ecosystems, while authorities have experience with competition on prices. Competition law needs a retooling, adapted to this new reality. Competition economists and authorities need to review how to use the same principles in this new environment to know if competition law can be used or needs to be fixed.

Régibeau echoed this call for preliminary work, saying, “we need to think much, much more deeply before we think *ex ante* regulation is going to get us out of the problems we have now.” The digital sector is large and diverse, he explained, which creates its own set of problems that need to be carefully weighed before regulations can be conceived. When Taladay questioned whether *ex ante* regulation should be clear enough to know the impacts, Régibeau observed, “It’s a little bizarre to find in proposed regulation aspects that are currently being investigated for the first time.”

Marsden presented a contrary view, arguing that “we’re not moving all that fast, actually.” “Walk before you run is good advice for a toddler,” he said, observing that Microsoft’s interoperability requirements are already nearly two decades old – “we’re already running” – and that regulators and competition authorities “need to speed up and leap ahead in enforcement.” Calling the current suite of regulation and antitrust initiatives “natural experiments,” Marsden drew an analogy to financial regulations, which he said were already implementing many of the rules that are seen as “new” in the digital markets context.

Marsden detailed the UK’s Open Banking regulations as an *ex ante* regime of data mobility and interoperability for financial platforms that was initially developed as part of a competition market remedy. “We proposed those remedies and the sky did not fall in,” he said, attributing this in part to a tight focus and clear principles, rules, and standards. These Open Banking regulations, Marsden argued, have led to the UK becoming a global leader in fintech. He

suggested innovation should be a primary consideration in regulations, noting that allowing some entry or economic diversity could lead to the next Google, leveling-up innovation standards, and that “lazy oligopolists” who are “reasonably innovative” are likely to increase innovation if required to interoperate and provide data access to would-be challengers.

Aoki responded, calling Marsden’s use of banking as a success story “a bit deceptive” given its status as a well-established industry and the UK’s long history as one of the world’s best financial markets, and highlighting the potential harm regulation could have in the future: “What makes sense now may not make sense 10 years, even five years from now.” Aoki admitted that some new ideas could be harmful and should be kept out of the market, but that *ex ante* regulation requires the ability to predict what is harmful. She cited conversations with innovators who have deplored the limited list of permissible activities under proposed regulations and proffered that listing permissible conduct in digital markets can be overly restrictive, and would amount to enabling gatekeepers with another form of licensing.

Jenny responded to Marsden, specifically his views on promoting innovation. “Of course we want to have as many innovators as possible,” he said, but how do innovators succeed in the digital sector? He ticked off possible necessities – algorithms, a sizeable user base, and a successful business model – and asked how this could be achieved. Is it by prohibiting platforms from buying innovators with new products but no resources? Or by allowing these mergers? He concluded that he did not have the answer but repeated his call for more preliminary legwork before determining whether and what regulations would be appropriate.

The group next considered the Digital Market Act (DMA) with Jenny opining that the Act “expresses a lot of concern for the competitors in ecosystems” but leaves the benefit to consumers unclear. He drew an analogy to past consideration of vertical integration that did not consider intra-brand competition. Régibeau posited that there is room for *ex ante* regulation

but that at this stage it should be reserved for conduct that is known to be harmful. Asking whether sufficient evidence exists to support the ban on practices covered by the DMA, he stated, “I fail to see why we should not systematically have the same standards for supporting this type of regulation” as required for enforcement efforts.

Marsden again drew an analogy to financial services, noting that much of what is required by the DMA, including interoperability and fair dealing, is already regularly required in financial markets. He gave the example of self-preferencing detection in options exchange platforms. Marsden did disagree with the DMA’s focus on breaking up data pools, noting that platforms merging data across business divisions can lead to benefits and that the best remedy to date has been interoperability requirements. He predicted that other countries would draw an analogy to financial services, particularly as financial regulations tend to focus most heavily on companies with systemic power, similar to the focus on gatekeepers. “What I hope for,” he concluded “is that we cannot leave this all to the courts,” noting efforts in the UK to “code for compliance” rather than prepare for infringement.

Finally, Taladay asked the panelists whether legislative approaches are the best path forward for antitrust reform. Wilson came out firmly skeptical of legislative change, calling American antitrust laws “broad and adaptable” and listing “significant concerns” with current reform proposals in Congress. These include proposals focusing on size rather than market power, proposals untethered from antitrust effects, an innovation-harming “competitor-first approach,” and proposals shifting the burden of proof that she called a defiance of due process coupled with civil penalties “that will encourage baseless lawsuits.” Wilson opined that legislative reform is unnecessary to address competition concerns surrounding Big Tech but may be necessary for other things, such as information asymmetries and Section 230.

## Approaches to Regulation

The panel concluded with a question about the DMA's current structure – with a focus on “gatekeepers” – and the appropriate balance between competition and regulation approaches given concerns about the use of *per se* rules, procedural fairness, and the scope of remedies. Régibeau flagged the trade-off between regulation and flexibility, while Aoki noted that immediately jumping into *ex ante* regulation is likely unnecessary. Suggesting the two should be more “friend” than “foe,” Marsden called for legislation with “very flexible enforcement tools,” such as compliance units engaged in regular dialogue with platforms and a complaints panel for speedy adjudication. Such features are “completely unheard of” in the

“competition bubble,” he said, but without them a single approach is likely to miss things on its own.

The discussion will continue before the OECD Competition Committee on December 2 with a hearing [on \*ex ante\* regulation and competition in digital markets](#). The session seeks to create an understanding of what *ex ante* proposals are on the table and the precise nature of the relationship between regulation and competition enforcement in digital markets. The hearing will also include discussion of issues related to *ex ante* regulation, including data privacy, consumer protection, the role of fairness, innovation, and economic concentration, and trade-offs with competition