

Towards a Competition Enabling Framework in Asia Pacific: *Opportunities and Challenges*

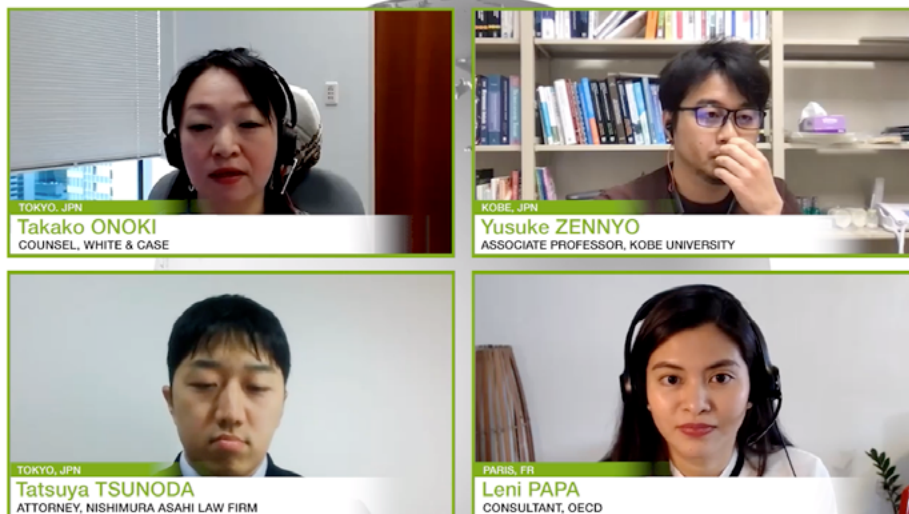
MOBILE ECOSYSTEMS:
COMPETITION, CHOICE AND USER PROTECTION



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Mobile Ecosystems:
Competition, Choice and User Protection

CPI Live



Background Note:

- Mobile ecosystems are playing an increasingly important role in today's economy. As such, ensuring vibrant competition and user choice in such markets is of vital importance to society and economic growth.
- This panel discusses the role of competition law in regulating mobile ecosystems, with a focus on Japan, including recent legislative and case law developments both there and around the world.
- The expert panel discusses various issues, including inter- and intra- ecosystem competition, the role of app stores, the possibility of new ex-ante regulation, the interaction between competition rules and existing legislation, and the likely future evolution of the rules as mobile ecosystems develop.

Participants:



Tatsuya TSUNODA | Attorney, Nishimura Asahi Law Firm



Leni PAPA | Consultant, OECD



Yusuke ZENNYO | Associate Professor, Kobe University

Moderator:



Takako ONOKI | Counsel, White & Case

Panel Summary

The Panel was chaired by **Takako Onoki**, counsel, White & Case, Tokyo. The Panel included **Tatsuya Tsunoda**, attorney at Nishimura & Asahi law firm, **Yusuke Zennyō**, Associate Professor at Kobe University, and **Leni Papa**, consultant for the OECD.

Takako ONOKI opened the discussion and requested opening statement from each of the panelists

Yusuke ZENNYO made the following statement concerning competition within and between submarkets of mobile ecosystems.

Key Talking Points | Yusuke ZENNYO

- First, there is allegedly a high level of market concentration in certain mobile markets. For example, Apple's App Store and Google's Play Store have been criticized as having dominant positions within their respective mobile OS app markets. But in terms of economic welfare, a monopoly is not necessarily bad, especially in markets with network externalities.
- For example, fragmented, incompatible networks would make it difficult for users to enjoy a large network size. In contrast, if all users join the same network, they can enjoy the largest network size and the network bandwidth. In short, depending on the market environment, a monopoly can generate a higher social welfare and consumer service (provided prices are not set too high)
- Second, the current state of mobile ecosystems is very complex. There are many submarkets that are closely interconnected with each other. There is competition, not only within each market, but also across different submarkets. In this case, even if a monopolist exists in each submarket, cross-market competition can achieve a competitive outcome without sacrificing network effects.



Yusuke ZENNYO | Associate Professor, Kobe University

Tatsuya TSUNODA introduced the competitive situation in mobile markets in Japan.

Key Talking Points | Tatsuya TSUNODA

- In Japan, as in other countries, the fundamental layers such as mobile devices, mobile OS, and the applications stores are essentially controlled by Apple and Google. Recently the JFTC has been conducting a market survey on this sector.
- In addition to this, this past September, the JFTC announced that they will be closing the investigation against the Apple once it updates its app review guidelines. Moreover, from this April, app stores are subject to new digital platform regulations governed by the Ministry of Trade, Energy and Industry. As a result, app store operators, are required to ensure transparent terms and conditions and provide a pre-notification when they.
- As a starting point, how each mobile ecosystem is designed is determined at the discretion of each business operator. On the other hand, Japan is seeking to promote competition between ecosystems, and on the platforms.



Tatsuya TSUNODA | Attorney, Nishimura Asahi Law Firm

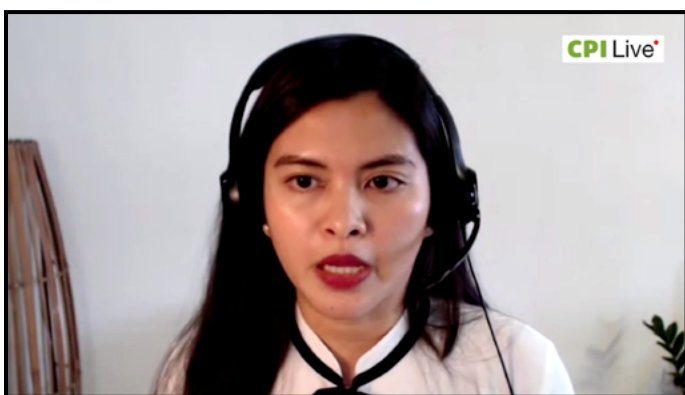
Leni PAPA provided the global economic context for the importance of the mobile sector

Key Talking Points | Leni PAPA

- During the pandemic, in OECD countries, mobile data usage has increased by more than 15 percent and mobile broadband subscriptions grew by 3.6 percent on average in 2020 across OECD countries, with the highest mobile internet penetration growth

in Japan. Mobile ecosystems are particularly important for pandemic recovery. In Europe, mobile technologies generated 4.6 percent of GDP for Europe, which equates to approximately 2.4 million jobs

- There is a small number of major digital platforms which have become entrenched in a position of market power. This is also a concern in the EU, as reflected in the Digital Markets Act. While there are 10,000 online platform providers in Europe, a small number of large online platforms capture the biggest share of the overall value. This is evidenced by a number of cases at the regional and national levels (e.g., *Google Shopping*, *Amazon Italy*).
- This is not limited to the US and the EU: In Korea, the Naver case involved the biggest online search engine in Korea, and KFTC found that Naver abused its market dominance when it entered into contract clauses that prevented contract providers from providing information to rivals of its Naver real estate platform business.
- There have been several policy developments across the world. Some jurisdictions are opting to amend their competition laws on the argument that current laws are not sufficient to address these concerns in the mobile economy. Some are proposing *ex-ante* rules like the EU and the UK. Also being considered, (as in Japan), is the development of a code of conduct.



Leni PAPA | Consultant, OECD

Takako ONOKI asked the panel for their views on cross-market competition, for example between app platforms and ads platforms?

Yusuke ZENNYO emphasized the importance of considering cross-market competition in developing good policy.

Key Talking Points | Takako ONOKI

- In Zenny's latest research work, he explored the complex relationship about cross-market competition between app platforms and advertising platforms. In particular, app platforms (e.g. Apple and Google) have

been criticized as having gatekeeper positions, but they are not true monopolists, because they are competing with other platforms, that is advertising intermediaries, or the so-called adtech companies.

- These advertising intermediary platforms enable developers to make revenue through in-app advertising in free apps, instead of app sales. 90 percent of app developers rely on this business model.
- Apple and Google are now facing pressure to reduce their commissions. This past year, they reduced their commission rate from 30 to 15 percent for some apps. In contrast, the report UK CMA Report, at least 35 percent of advertising value is derived by adtech companies.
- As such, advertising commissions are now much higher than app commissions. This may imply that recent pressures on app platforms, such as App Store and Google Play Store, may have distorted cross-market competition.

Leni PAPA discussed cross-market competition in digital markets from an international perspective.

Key Talking Points | Leni PAPA

- In a recent cross-country study, the OECD listed certain concerns in digital markets. First, there is so-called self-preferencing, whereby platforms that sell ad inventory and act as intermediaries for publishers and advertisers have the incentive to favor their own sources. Commentators have argued that certain platforms have given preferential treatment to their own business units in respect to access to consumers and data.
- Second there is leveraging. Commentators have raised concerns that vertically-integrated businesses with market power in one part of the digital advertising supply chain could leverage it into other parts of the supply chain. This is more likely where a platform can increase the barriers to switching on various sides of the market.
- Third, there is the collection of user data. There have been concerns, about certain platforms potentially abusing their market power to collect greater amounts of consumer data, which is a key input for targeted advertising, especially for digital display advertising (e.g. Facebook Germany).

Tatsuya TSUNODA then commented on recent developments in Japan:

Key Talking Points | Tatsuya TSUNODA

- When it comes to transparency, the Japan FTC conducted an investigation against Apple, resulting in a commitment by Apple that may improve transparency on their application platform. In addition, the Transparency Act will also improve the transparency of application stores as a whole in the future.
- This December, the JFTC announced that their investigation against Rakuten (a large e-commerce player in Japan), will be closed. It was alleged that Rakuten unilaterally changed shipping fees and that this was an abuse of a superior bargaining position. Rakuten claimed the change enabled them to compete with bigger players (Amazon).
- The case nevertheless went ahead. This implies that even if application stores enhance transparency there will remain conflict with the smaller and mid-sized enterprises.
- In addition, the fact that application stores seek to compete with bigger players does not justify their conduct under the Anti-Monopoly Act. I agree that we should focus on cross-market competition, but based on recent cases, the recent framework might need to be updated or modernize to some extent.

Takako ONOKI next raised the issue of user protection.

Leni PAPA noted that there are many policy approaches being explored around the world to ensure user protection in mobile ecosystems, that fall into three broad categories.

Key Talking Points | Leni PAPA

- The first type is measures which try to address conflicts of interests between the different platforms, which may give rise to anti-competitive conduct. The second is controlling potential anti-competitive conduct, including self-referencing and leveraging. The third is addressing market opacity.
- In terms of managing conflicts of interest, there have been different approaches. First there could be structural separation between the different entities involved (e.g. under the oversight of a specialized Digital Markets Unit as proposed by the CMA). In the U.S. there has been a similar proposal made by the House of Representatives to consider structural separations (if only in the form of Chinese Walls and disclosure rules).

- As to protecting against anti-competitive conduct, there is a growing call for *ex ante* regulations for mobile ecosystems (e.g. the EU the Digital Markets Act), which would require certain platforms to follow certain *ex ante* prohibitions or obligations, including interoperability and data portability and certain notification requirements. Similarly, the UK rules would require firms with “strategic market status” to adhere to codes of conduct and report certain transactions.
- We have to also be careful as policy makers, that when we suggest or propose competition laws to control or to foster competition in cross-market platforms, we would also need to consider the implications on data and privacy and assess the costs and benefits of the proposals.

Tatsuya TSUNODA noted that it is important to ensure the predictability and legal certainty in developing new regulation.

Key Talking Points | Tatsuya TSUNODA

- Even if competition law rules address user protection issues, they should reflect the baselines set in other specialty acts such as the Privacy Protection Act, or the Telecommunication Business Act, as they also protect communications-related data and privacy.
- There is also the Consumer Comfort Act and the Misrepresentation Acts. These other regulatory regimes have been developed through extensive policy discussion. Through these, business operators can gain certainty and revise their business models effectively and proactively.

Takako ONOKI then raised the issue of choice in mobile ecosystems. What choices are relevant from the perspective of competition law and policy?

Yusuke ZENNYO underlined the need to understand the current, very complex landscape of mobile ecosystems.

Key Talking Points | Yusuke ZENNYO

- Transparency is key, particularly in the advertising market. App commissions are 15 to 30 percent. By contrast, an advertising commission is at least 35 percent. Nevertheless, over 90 percent of app developers rely on advertising revenue.
- It is unclear why this is, but it is likely because the

advertising market is very opaque and not transparent. According to a report by the European Commission, app developers do not know who paid, or how much, for their advertising space.

Leni PAPA noted the need for consumers to be informed.

Key Talking Points | Leni PAPA

- Consumer choice is not mainly reliant on the price, or the quality, or any other factor affecting the product itself. It impacted by other dynamics in the market. A key question is how informed consumers choices really are. This relates to transparency and information.
- We should explore more how certain practices within mobile ecosystems affect how consumers exercise their choices, particularly online, and if there are significant or artificial constraints on their ability to choose effectively. Incumbents probably fear that competition would destroy this opacity, and so they would like to protect their business models at the expense of the consumers having more informed choices.

Takako ONOKI asked each of the panelists for some closing thoughts.



Takako ONOKI | Counsel, White & Case

Leni PAPA noted the following:

Key Talking Points | Leni PAPA

- It is clear that there are voices increasingly querying whether existing regulatory approaches and tools remain appropriate for this fast evolving ecosystem.

- This issue does not only involve competition: it impacts other policy spheres. We have privacy and data protection, we also have consumer protection to worry about. It could also impact other industries, e.g. media.
- Because mobile ecosystems are increasingly international, it would be of benefit to everyone to have international cooperation when discussing policy options.

Yusuke ZENNYO noted as follows:

Key Talking Points | Yusuke ZENNYO

- Tech companies have been expanding their business areas, so this movement will make the situation get more and more complicated. If so, it would be insufficient to look at individual markets for creating better policy making.
- We need to have a broader perspective over the mobile ecosystem and other related product markets, but this is not an easy challenge. Further discussions are required all over the world, not only in Asia, Europe, and North America.

Tatsuya TSUNODA noted as follows:

Key Talking Points | Tatsuya TSUNODA

- Transparency has becoming the buzzword in the world of mobile ecosystems. Ecosystem operators can design the system in itself, and it might have a big impact on our behavior. Even if more transparency-promoting measures are coming, we should carefully review whether such measures really promote or protect transparency.
- Another point is how the regulatory authority should tackle these kinds of problems. As a jurisdiction, Japan also has developing a regulatory tool to address competition-related issues in the mobile ecosystems. But these tools are generally based on communication or cooperation between the big players, and not a hard enforcement approach like in the EU, by imposing high fines.
- If the Japanese authorities pursue an enforcement approach in future, it is important to ensure transparency themselves. They have to show reasonable and objective evidence before taking any actions.

SPEAKERS



Vivek GHOSAL

Tatsuya Tsunoda has extensive experience in advising on various matters of competition law/anti-trust law for both domestic and international cases, including private monopolization, unilateral conduct and unfair trade practices, such as vertical restraints and abuse of superior bargaining position. Mr. Tsunoda also advises on data protection, telecom, consumer protection regulations and other regulatory issues, and he is particularly active in advising on digital platform operators-related regulations. He also actively advises on international law and trade matters.



Leni PAPA

Leni Papa works with the Competition Division of the Organisation for Economic Co-operation and Development (OECD).

Leni was a consultant for the Asian Development Bank, the Centre for Competition Policy of the University of East Anglia (UK), and the OECD on topics of regulatory and competition policy.

She was also an Assistant Director and Spokesperson of the Philippine Competition Commission, a legal counsel of Samsung Electronics, and a Senior Associate in Angara Abello Concepcion Regala & Cruz (ACCRALAW), advising on Public-Private Partnerships, public procurement, M&As, and investments.

She received her Master of Laws degree on EU and International Business, Competition, and Regulatory Laws from Freie Universität Berlin, Germany and is a Fulbright US-ASEAN Visiting Scholar for 2021.



Tatsuya TSUNODA

Yusuke Zenryo is an associate professor at Kobe University where his research interest lies in platform businesses, which have been adopted by recently fast-growing companies, such as GAFA (Google, Apple, Facebook, Amazon), Microsoft, Uber, and Airbnb. He is working on platform research from a wide range of perspectives, from marketing strategies for profit-maximization to competition policies for building a better society.



Takako ONOKI

Takako Onoki joined White & Case in January 2008 and specializes in antitrust/competition law matters, including advising and representing clients in relation to Japan Fair Trade Commission (JFTC) investigations for cartels and unilateral conduct as well as global merger review cases. She represented a client in connection with the first JFTC hearing decision on abuse of superior bargaining position after the surcharge system was introduced, where she succeeded in arguing for a substantial reduction in the surcharge and partial cancellation of cease-and-desist order.