

**Dynamic Competition in Dynamic Markets:
*A Path Forward in the APAC Region***

SELF-PREFERENCING AND ONLINE PLATFORMS:
A UNIVERSAL THEME?



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Self-Preferencing and Online Platforms:
A Universal Theme?

CPI Live*

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Background Note:

This panel discusses the topic of self-preferencing as it relates to competition law enforcement in regards to the alleged abusive practices of large tech firms in many jurisdictions.

- There are sharply divided views among competition authorities, economists, and courts over whether self-preferencing by dominant firms is always unfair and anti-competitive, or whether it can be pro-competitive.
- For example, whereas in Europe, dominant firms have a special responsibility to ensure that they do not act in a way which could impair the competitive structure of markets. Firms with monopoly powers in the U.S. do not have a duty to help their competitors, as we were reminded in the *Trinko* Decision.
- Further, while some economists are used to the concept of self-preferencing as a normal business practice, and note that it may in fact promote innovation and increase competition.
- For example, the self-preferencing of private labels by supermarkets, is seen as a sign of increased competition in products. Others are of the view that self-preferencing by large digital ecosystems is unfair and can deprive consumers of the benefits of innovation.

Participants:



Reiko AOKI | Commissioner, JFTC



Tsuyoshi IKEDA | Founding Partner, Ikeda & Someya



Madoka SHIMADA | Partner, Nishimura



Marcus BEZZI | Executive General Manager, ACCC



Michael JACOBINES | Sir Donald Gordon Professor of Entrepreneurship and Innovation, London Business School

Moderator:



Frédéric JENNY | Chairman of the OECD Competition Committee, Professor at ESSEC Paris Business School

Panel Summary

The chair was **Frederic JENNY** (Chairman of the OECD Competition Committee).

Panelists included **Reiko AOKI**, commissioner of the Japan Fair Trade Commission and Professor of Economics at Hitotsubashi University; **Marcus BEZZI**, Executive General Manager of the ACCC; **Tsuyoshi IKEDA**, a prominent antitrust competition law practitioner in Japan with Ikeda & Someya; **Michael JACOBIDES**, the Sir Donald Gordon Professor of Entrepreneurship and Innovation and Professor of Strategy at the London Business School; and **Madoka SHIMADA** from Nishimura & Asahi.

Reiko AOKI notes that self-preferencing is hard to define, but can be anti-competitive. The mechanics of leveraging it is liable to produce, and its effects are very unique to digital platforms within an ecosystem, particularly when involving data.

Key Talking Points | Reiko Aoki

- Self-preferencing may lead to more data, but not necessarily more sales in the short run. In the short run, there may be no immediate effect, but will give the platform an advantage in the long run, allowing it to reach into and define future markets.
- This avenue to advantage is not available to platforms without an ecosystem. In the long-run, competition is about innovation, which was also included in the argument. Self-preferencing used for innovation services is always going to be suspect.
- An ecosystem can leverage from a given product or market without innovation, and it is going to be detrimental to long-run competition. Self-preferencing by a digital platform could replace innovation.
- I am very skeptical of *ex-ante* regulation in general. And economics has told us that things like mega new design models have told us how you can regulate an industry or firm, but it also tells us about its limits.
- It is very important to have very good information in order to have successful *ex-ante* regulation. In particular because digital platforms and ecosystems are very new, it is very difficult to have successful *ex-ante* regulation.



Reiko AOKI Commissioner, JFTC

Madoka SHIMADA notes that self-preferencing should not be deemed to be presumably anti-competitive.

Key Talking Points | Madoka Shimada

- It is natural for every business to promote their own products. This is related to vertical integration that could produce enhanced innovation and efficiency. There are different factors at play with digital platforms, but the basic economic idea is the same.
- There is a need to examine whether the supplier is in a dominant position. Not all the self-preferencing should be allowed, of course. Only for specific cases.
- As to those specific cases, they are hard to identify: not any particular other theory of harm could be applicable things.
- Another issue to examine carefully would be refusal to supply, if a platform is kind of an essential facility, an indispensable service. But this should apply only in extreme cases. There need to be lines drawn.
- However, *ex-ante* regulation can be very difficult to craft and design in a manner that is effective to update that in a timely manner to catch ever-changing, fast-changing digital platform businesses.



Madoka SHIMADA Partner, Nishimura

Michael JACOBIDES noted that one of the main concerns is interoperability.



Michael JACOBINES Sir Donald Gordon Professor of Entrepreneurship and Innovation, London Business School

Key Talking Points | Michael Jacobides

- The Australian Commission has done a good job in terms of analyzing APIs. The problem is that the nature of market power is wholly different. And what we are also appreciating is the behavioral propensities that lock customers in.
- In the digital context, there is a remarkable concentration of power of these firms, in their information advantages and the creation of the ecosystem lock-ins.
- In the digital context, power works in different ways. And there are some firms that are becoming the essential gatekeepers between us and the environment. Within this universe, there are characteristics, and we are using in terms of anti-trust the term of gatekeepers in a very loose term.
- Reliance on numbers is unhealthy. We need some criteria to determine the nature and the exercise of power in some firms. Provided that these criteria are met, any self-preferencing should be, *per se*, not allowed.
- We should really be striving for mandatory, and as common as it can be, interconnection. In the digital economy, I think that the question of how interconnected and interoperable these services are will significantly promote innovation.
- Self-preferencing and also should be mandated to have those that can provide similar service the same right of interconnecting. Why? Because they benefit from inherit economies of network economies and economies of this behavioral capture that reduce competition.

- On the question of *ex ante* regulation, past experience has shown that it can and has been done before. Take for example telecoms regulation in the UK. A set of tests can be laid out that can be implemented by regulators and courts.
- There is no need to over-intellectualize the question - the regulation can be worked out in practice. At most there should be limited and focused *ex ante* regulation as a complement to traditional enforcement.

Marcus BEZZI noted that in 2021, competition agencies, and perhaps also the courts, have a much deeper understanding of the important role of data and network effects in empowering digital platforms.



Marcus BEZZI Executive General Manager, ACCC

Key Talking Points | Marcus Bezzi

- A number of market studies have gained access to confidential information that shows self-preferencing is common in contexts such as app marketplaces, choice screens, and ad tech.
- There is evidence of considerable anti-competitive self-preferencing when the firms favor their own interests over downstream rivals in a number of different ways, and that depends a bit on the market. This can include things like pre-installation and default first party services using algorithms to give first party services. This, over time, is creating significant barriers to entrant expansion.
- There's also a lack of transparency between platform operators and users in the operation of many digital markets, as they are both businesses and consumers.
- Self-preferencing is not always a problem. But there may be circumstances where it is. If these firms are

engaging in systematic and widespread self-preferencing in the course of their business, that it is likely to be a problem.

- But, if privacy concerns or security concerns favored a stronger ecosystem for consumers, that may well be an argument for restraint. But we start from the strong presumption that if these dominant firms within the markets that are identified are engaging in self-preferencing, then it's likely to be a problem.

Tsuyoshi IKEDA noted that Japan has seen some self-preferencing cases in the past (though they were not explicitly classified as such).



Tsuyoshi IKEDA Founding Partner, Ikeda & Someya

Key Talking Points | Tsuyoshi Ikeda

- For example, in a case involving mechanical parking lots, the manufacturer of the mechanical parking lot offered repair parts, but when it came to offering the repair process parts to the third-party, not the manufacturer itself, it delayed supply.
- Also in the past, the JFTC gave a warning to an internet service provider because it allegedly took advantage of information it obtained through third-party internet service providers. But these cases were assessed under the traditional, private monopolization or unfair trade practice rules.
- In assessing any future course of conduct, we have to recall the fact that the Japanese law doesn't have a per se, even for the very obvious price-fixing cartels or bid-riggings, So we have to prove the anti-competitive conduct around the competitive effect in the relevant market. That's the basic theory under the Japanese Law.
- We have to have a case-by-case analysis for proving the anti-competitive effects. But when it comes to the conduct, the illegal conduct part, or element, of course we have to consider or take into account the pro-competitive effect toward innovative aspects of the self-preferencing.
- That may lead to the kind of a presumption that their conduct does not have any justification when we evaluate the conduct element of the Big Tech behavior. And so in that sense, self-preferencing has a special meaning in the context of antitrust law enforcement.

SPEAKERS



Reiko AOKI

Reiko Aoki is Commissioner of Japan Fair Trade Commission. She has conducted research and published on economics of patents, patent pools, standards, innovation and intergenerational political economy. She had academic positions at the Ohio State University, SUNY Stony Brook, University of Auckland and Hitotsubashi University. She served as Executive Member of Council for Science and Technology Policy, Japanese Cabinet Office 2009-2014 and Member of Science Council of Japan 2014-2016. Prior to joining the JFTC, she was Executive Vice-President (International, Gender Equality, and Intellectual Property) at Kyushu University. She received her B.S. from University of Tokyo and PhD in economics and MS in statistics from Stanford University. She is the current Vice-President of Japan Law and Economics Association.



Tsuyoshi IKEDA

Yoshi served as an investigator of the Japan Fair Trade Commission (JFTC), where he participated in around 20 dawn raids; prepared the implementation of the leniency system; and investigated a case involving standard essential patents. With his success in the most cutting-edge cases of cartel, merger review, and other types of antitrust/competition cases, Yoshi has been recognized as one of the most prominent antitrust/competition law practitioners in Japan by lawyer ranking institutes such as Who's Who Legal.



Madoka SHIMADA

Ms. Shimada advises clients at Nishimura & Asahi on various matters of competition law, including domestic and international cartels, bid-rigging, M&A transactions, investigations by the JFTC, leniency applications and general antitrust law compliance. She is especially active in cross-border transactions, such as international cartels. She has represented clients in connection with the investigation into an alleged cartel among forwarders regarding surcharges on air cargo, an international cartel in connection with marine hoses, an international cartel in connection with TFT-LCDs, an international cartel among airlines regarding rates and surcharges on cargo, an alleged international cartel in connection with bearings, and various merger control cases, including a vertical integration between semiconductor equipment manufacturers, the merger between Nippon Steel and Sumitomo Metal, and the opposition to BHP Billiton's proposed takeover bid of Rio Tinto.



Marcus BEZZI

Marcus has been an Executive General Manager (EGM) at the Australian Competition and Consumer Commission (ACCC) since January 2009. He is responsible for the ACCC's Specialist Advice and Services Division. This division incorporates the ACCC Legal Service and Economic advisors, it manages the ACCC's International engagement and runs the ACCC Infocentre, Strategic Data Analysis, Intelligence and Legal Technology units. Marcus participates in internal Boards which oversee ACCC work on Digital Platforms, Competition, Cartel Enforcement and Financial Services Competition.



Michael JACOBINES

Michael G Jacobides is the Sir Donald Gordon Professor of Entrepreneurship & Innovation and Professor of Strategy at London Business School. His work, which has received the Sloan Foundation Award, has appeared in the top academic journals such as SMJ, AMJ, AMR, OrgSci and Industrial & Corporate Change, where he is a co-Editor. He studies industry evolution, value migration, firm boundaries and organization design. His recent work has shed light on the emergence and development of digital platforms and ecosystems and has looked at the strategic and policy issues this raises. He has visited Harvard, NYU, Cambridge, Imperial, Bocconi and Wharton, where he obtained his PhD, after studying at Athens, Cambridge and Stanford. He is the Chief Expert Advisor on the Digital Economy at the Hellenic Competition Commission and a co-author of the WEF's White Paper on Digital Platforms and Ecosystems. He is also a Visiting Scholar at the New York Fed, working on the shifting business model of financial intermediation.



Frédéric JENNY

Frederic JENNY is professor of Economics at ESSEC Business School in Paris. He is Chairman of the OECD Competition Committee (since 1994), and Co-Director of the European Center for Law and Economics of ESSEC (since 2008). He was previously Non Executive Director of the Office of Fair Trading in the United Kingdom (2007-2014), Judge on the French Supreme Court (Cour de cassation, Economic Commercial and Financial Chamber) from 2004 to August 2012, Vice Chair of the French Competition Authority (1993-2004) and President of the WTO Working Group on Trade and Competition (1997-2004). He was Global Professor of Antitrust in the New York University School of Law's Hauser Global Law School (2014), visiting professor at University College London Law School (2005-2012), Haifa University School of Law in Israel (2012), University of Capetown Business School in South Africa (1991), Keio University Department of economics in Japan (1984), Northwestern University Department of Economics in the United States (1978). Professor Jenny holds a Ph.D in Economics from Harvard University (1975), a Doctorate in Economics from the University of Paris (1977) and an MBA degree from ESSEC Business School (1966)