

Digital antitrust: a global snapshot of latest developments

Digitalisation continues to reshape industries and economies with huge advantages for business and society. But the growth, strength and influence of tech companies remains a mounting concern for many antitrust agencies.

Sometimes under political pressure, many agencies are asking themselves whether existing antitrust rules and procedures remain fit for purpose or need to be supplemented with new rules, concepts, enforcement policies and even regulation. The overarching theme of the International Competition Network's 2019 annual meeting was 'digital'. Over a hundred antitrust agencies from all over the world shared their ideas on what digitalisation means for mergers, cartels and abuse of dominance.

Europe

Europe has already witnessed high profile enforcement in relation to the digital economy focussing on, but by no means limited to, abuse of dominance. Investigations have even sought to challenge core business models, arguably pushing the boundaries of antitrust laws. Detailed policy work has resulted in wide-ranging and controversial recommendations that would have major ramifications for the digital economy.

In March 2019, the UK Government published a report by an expert panel led by Harvard economist and former White House economic adviser, Jason Furman, on reforms to competition rules and regulation in the digital sector: "[Unlocking digital competition](#)". One of the key recommendations of the UK Furman report was to introduce a digital markets competition regulator with special powers to regulate significant players in digital markets including by developing a code of competitive conduct applicable "only to particularly powerful companies", i.e., those designated as having "strategic market status". The panel's recommendation is consistent with the notion of 'participative antitrust' promoted by Nobel-Prize-winning economist Jean Tirole as a means of addressing competition problems in digital markets. The Chairman of the UK Competition & Markets Authority has also [recommended](#) major changes to the competition and consumer law regime in light of the increasing digitalisation of the economy.

In April 2019, the European Commission published a detailed expert [report](#) titled "Competition Policy for the Digital Era" on how competition enforcement should evolve to deal with "novel" issues raised by the digital age. The EU Commission is reflecting on the large number of recommendations contained in this report but has already embarked down a regulatory path in the form of a [platform- to-business regulation](#). The regulation was adopted in June this year and will start to apply on 12 July 2020. It aims to address what the Commission perceives as an imbalance of power between large digital platforms and their users. It establishes a legal framework which guarantees transparent terms and conditions for business users of online platforms, as well as effective possibilities for redress when these terms and conditions are not respected. To that effect, the EU regulation includes a range of requirements for online intermediation services to be more transparent about their practices, including by describing any differential treatment they give to themselves.

Perhaps encouraged by these policy recommendations, antitrust officials in the EU are quick to describe the impact of network effects and data sets, the "enduring" market power of certain players and consequent "special responsibility" not to impair the competitive process. More inquiries and investigations seem inevitable.

Asia Pacific

In the Asia Pacific region, governments and antitrust agencies acknowledge the roles of data and digitalisation in driving economic growth. China accounts for 40% of the world's e-commerce and it is estimated that by 2030, the digital sector will enable USD 5.5 trillion of economic activity in China.

And yet an active policy debate is underway in some countries. Australia, Japan and Korea are each reflecting on how to address antitrust concerns in relation to digital markets and the debate is similar to that playing out in the EU. Indeed, the Australian Government is currently considering the Australian Competition and Consumer Commission's recommendations for comprehensive reforms following its [inquiry into digital platforms](#). These include amendments which would enable the Australian antitrust agency to take into account loss of potential competition and the impact of data when assessing mergers.

The Americas

The US antitrust agencies are among those examining the digital economy in some way. For example, in July 2019, the Department of Justice Antitrust Division announced an, at this point undefined, antitrust review into "market leading online platforms", and the Federal Trade Commission has held hearings—as part of its Hearings on Competition and Consumer Protection in the 21st Century—on certain aspects of "technology-based platform businesses" as well as issues involving big data.

While, like in many places, these issues are receiving significant scrutiny, and it is expected that this will only continue, the US agencies have also emphasised the need to evaluate claims about data cautiously, and they have stressed the importance of evidence-based enforcement within the existing legal framework and the flexibility of the consumer welfare standard.

In Latin America, antitrust regulators appear to be in the early stages of analysing digital markets. The Mexican antitrust agency published a [report](#) in February 2018 analysing the digital economy from a competition law perspective, while the Brazilian authority has launched an investigation into platforms.

Outlook

Overall, the digital economy and the pace of change is clearly adding pressure to many agencies. On the one hand, agencies need to be able to defend themselves against accusations of under-enforcement (and be able to reassure governments about this). But, on the other hand, they must also preserve incentives to innovate and avoid raising regulatory barriers to competition.

The US antitrust agencies, among others, are right to issue, at times, the reminder that agencies should remain disciplined in order to reduce the risks of interfering with fast-moving markets. Enforcement activity should be reserved for situations where there is evidence of actual or likely harm. It is our view that there are good grounds to argue that the existing antitrust toolbox is sufficiently flexible to address antitrust concerns arising in the digital economy.

Authors:



Creighton Macy
Partner
Washington, DC
Creighton.Macy@bakermckenzie.com



Samantha Mobley
Partner
London
Samantha.Mobley@bakermckenzie.com



Stephen Crosswell
Partner
Hong Kong
Stephen.Crosswell@bakermckenzie.com



Carolina Pardo
Partner
Bogota
Carolina.Pardo@bakermckenzie.com



Grant Murray
Lead Knowledge Lawyer
London
grant.murray@bakermckenzie.com