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TOWARDS A COMPETITION ENABLING FRAMEWORK IN ASIA PACIFIC

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The Asia Pacific region – broadly defined – is key to the global economy. Global supply chains depend critically on the economic functioning of this part of the world. In its broad definition, "Asia-Pacific" includes South, East, and Southeast Asia, as well as Oceania. An understanding of this region is essential to any global understanding of antitrust.

The articles in this Chronicle include contributions from the entire Pacific rim. The topics covered range from the regulation of digital advertising in Japan, to the development of the mobile app ecosystem in India, to the controversy concerning online news in Australia.

The topics explored in these pieces reflect the state of the art in antitrust thinking, while also referring back to general themes that have long informed such thinking worldwide.

As such, they run the gamut of the issues specifically affecting the Asia Pacific region, but also are of great relevance to readers worldwide.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks Google for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

SUMMARIES

SUMMARIES

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

BY RENATO NAZZINI [1]

1 Professor of Law, King's College London and partner, LMS Legal LLP, London.

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.

RECENT DEVELOPMENTS IN COMPETITION LAW AND POLICY IN THE DIGITAL ECONOMY IN JAPAN

BY TOSHIO DOKEI, ARTHUR M. MITCHELL, HIDEO NAKAJIMA & TAKAKO ONOKI[1]

1 Toshio Dokei (Partner at White & Case LLP/White & Case Law Offices); Arthur M. Mitchell (Senior Counselor at White & Case LLP/White & Case Law Offices); Hideo Nakajima (Special Advisor at White & Case LLP/White & Case Law Offices); Takako Onoki (Counsel at White & Case LLP/White & Case Law Offices).

I. INTRODUCTION

Recently, the digital economy has grown massively worldwide, and people's lifestyles have changed accordingly. Such developments will most likely continue. Agencies around the world have been exploring options for greater regulation in the digital economy, including for digital platforms. Both innovation and competition are important. Can they coexist? How can we balance them?

This article discusses rules and principles which have been developed to promote transparency and fairness as well as free and fair competition in connection with digital platform businesses. A new Headquarters for Digital Market Competition ("Digital Headquarters") has been established to monitor the market and amendments have been made to the guidelines and policies of the Japan Fair Trade Commission ("JFTC") to clarify how mergers involving digital platforms will be evaluated, and how rules under the abuse of superior bargaining position ("ASBP") provisions of the Anti-Monopoly Act will apply to business-to-consumer transactions. The article will then detail the new rules applicable to digital platform businesses and describe issues for further market research, measures to strengthen the JFTC and likely future legal reform.

II. 2018 CABINET DECISION TO PREPARE RULES FOR DIGITAL PLATFORMS AND BASIC PRINCIPLES

On June 15, 2018, the Government of Japan made a cabinet decision on growth strategy, which includes rules for the digital market, such as the need to prepare basic principles for digital platforms by the end of 2018. Accordingly, three major government agencies, including the JFTC, the Ministry of Economy, Trade and Industry ("METI") and the Ministry of Internal Affairs and Communications ("MIAC") jointly set up a "Study Group on the Improvement of the Trading Environment surrounding Digital Platforms" to discuss the current situation involving digital platforms. Based on the discussions at the study group, those agencies jointly issued a draft of interim report on November 5, 2018[2] and sought public comments. Thereafter an interim report was issued on December 12, 2018.[3] On December 18, 2018, they issued "Basic principles for developing rules to respond to the rise of digital platform-based businesses" ("Basic Principles").[4] The Basic Principles aim to achieve (i) transparency to ensure fairness and (ii) fair and free competition regarding digital platforms. In order to achieve such goals, the Basic Principles suggest conducting large-scale and comprehensive surveys to understand the reality of the business situation, and establishing a specialized organization with diverse and advanced knowledge including digital technology and business to discuss new rules for transparency and fairness. They also suggested further considering merger review policies and procedures taking data and innovation into account, and the application of an ASBP to business-to-consumer transactions. The Basic Principles recognize the importance of giving due consideration to innovation in the digital market while some regulations would likely be required.

III. 2019 CABINET DECISION ON SPECIFIC PLANS

On June 21, 2019, the Government of Japan further made a cabinet decision (i) to establish the Digital Headquarters under the Cabinet Secretariat to evaluate market competition in the global and rapidly developing digital market, (ii) to update rules for merger review by the end of 2019 in order to conduct review appropriately in accordance with developments in the digital market, and (iii) to review approaches to applying abuse of superior bargaining position to business-to-consumer transactions by summer of 2019, and (iv) to make efforts for submitting a bill on improving transparency of transactions of digital platform operators ("Bill for the DP Act") at the ordinary Diet session in 2020.

A. Digital Headquarters

On September 27, 2019, the Digital Headquarters was established under the Cabinet's Secretariat in order to implement competition policies for promoting competition and innovation in the digital market in a timely and effective manner.[5] Under the Headquarters, the Digital Market Competition Council and the Digital Market Competition Working Group were established to discuss specific issues. In addition, the Trusted Web Promotion Committee was established in accordance with the Report on Mid-Term Vision in the Digital Market (see below) that was published on June 16, 2020.[6]

The Digital Market Competition Council and the Digital Market Competition Working Group discussed various issues, including

2 The draft is available only in Japanese (https://www.jftc.go.jp/houdou/pressrelease/h30/nov/kyokusou/181105betten2.pdf).

3 The interim report is available only in Japanese (https://www.jftc.go.jp/houdou/pressrelease/h30/dec/kyokusou/181212betten1_1.pdf).

4 The Basic Principles are available at https://www.jftc.go.jp/houdou/pressrelease/h30/dec/kyokusou/181218betten1.pdf.

5 "Establishment of Headquarters for Digital Market Competition" is available in English at https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_190927.pdf.

6 The summary of the report is available in English at https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-2.pdf.

the Bill for the DP Act, competition in the digital market, digital advertisements, drafts of amendments to the JFTC guidelines with regard to merger and ASBP (see the next section). Whether the DP Act (see below) should apply to digital platforms that provide digital advertisements is still being discussed.

B. Amendments to Merger Guidelines and Policies

On December 17, 2019, the JFTC issued amended "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" ("Merger Guidelines")[7] and "Policies Concerning Procedures of Review of Business Combination" ("Merger Policies").[8] Previously, it issued proposed amendments to the Merger Guidelines and Merger Policies on October 4, 2019 and sought comments from the public by November 5, 2019.[9] The Merger Guidelines were originally prepared in 2004 and the Merger Policies in 2011, and the amendments this time were made pursuant to the Cabinet decision made on June 21, 2019 in order to conduct review appropriately in accordance with developments in the digital markets.

Amendments to the Merger Guidelines include, among others, the JFTC's views about (i) characteristics of digital platforms, including multi-sided markets and a definition of relevant markets where competition is based on quality rather than price, (ii) exceptional situations where the JFTC conducts substantial review even when a transaction meets the safe harbor criteria, (iii) cases where the parties are conducting research and development for overlapping products/services, and (iv) vertical and conglomerate mergers.

The amended Merger Policies clarify that the JFTC will conduct review of merger cases, including for those notifications are not required, but when the transaction value is large (i.e. more than JPY40 billion which is approximately USD370 million) and are expected to affect domestic consumers. Further, the amended Policies suggest the parties consult with the JFTC voluntarily when the transaction value exceeds JPY40 billion and when one or more of the following factors is met: (i) when an acquired company has an office in Japan and/or conducts R&D in Japan, (ii) when an acquired company conducts sales activities targeting domestic consumers, such as providing its website and/or pamphlet in the Japanese language; or (iii) when the total domestic sales of an acquired company exceed JPY100 million (approximately USD920,000).

C. New JFTC Guidelines on Application of ASBP to Business-to-Consumer Transactions

On December 17, 2019, the JFTC issued "Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc." ("ASBP Guidelines for DP").[10] In advance of finalizing the Guidelines, the JFTC issued a draft of the guidelines on August 29, 2019 and sought comments from the public by September 30, 2019.[11]

ASBP is a type of prohibited single firm conduct (e.g. private monopolization or unfair trade practices). ASBP is somewhat analogous to "abuse of a dominant position," but, unlike prohibitions on behavior by dominant firms, ASBP does not require market power. ASBP exists when a party in a relative superior bargaining position – as opposed to a dominant position – engages in abusive conduct that runs the risk of being an "impediment to competition."

There is no such limit under the law, but up until then, the JFTC had applied ASBP only to business-to-business transactions, but not to business-to-consumer transactions. There had been, and there still are arguments whether the JFTC should apply ASBP to business-to-consumer transactions, and if yes, in what situations they shall do so because the scope of ASBP that can be applied could be too broad. The ASBP Guidelines for DP intend to provide clarity and predictability for the situations where conduct would be problematic in business-to-consumer transactions under the ASBP regulation, specifically for transactions where consumers provide information (e.g. personal information) to digital platforms.

Most of the abusive conduct that the ASBP Guidelines for DP considers problematic as ASBP would concurrently violate the Act on the Protection of Personal Information ("APPI").[12] Ac-

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7 The tentative English translation of the Guidelines is available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf.

8 The tentative English translation of the Policies is available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf.

9 The tentative English translation of the JFTC press release on October 4, 2019 is available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191004.html.

10 The tentative English translation of the ASBP Guidelines for DP is available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217DPconsumerGL.pdf.

11 The JFTC press release of August 29, 2019 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190829_dpfpc.html.

12 The tentative English translation of the APPI is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=2781&vm=04&re=01.

cording to JFTC's responses to the public comments on a draft of ASBP Guidelines,[13] the JFTC takes a position that conduct that does not violate the APPI would still violate the ASBP, but it is not that clear yet what kind of conduct would be involved, and what the companies should keep in mind for compliance purposes in addition to complying with the APPI.

D. Act on Transparency and Fairness of Specified Digital Platforms ("DP Act")

On February 18, 2020, the METI submitted the Bill for the DP Act to the Diet.[14] The bill was passed on May 27, 2020 and promulgated on June 3, 2020. The DP Act became effective on February 1, 2021.

The DP Act was modeled after the European Commission's Regulation on platform-to-business relations ("P2B Regulation) which became effective in July 2019.[15]

The purpose of the DP Act is to contribute to the improvement of people's lives and the sound development of Japan's economy by promoting fair and free competition for the specified digital platform operators ("Specified DPOs"). As the basic principles of the DP Act, it provides that it is fundamental for digital platform operators ("DPOs") to voluntarily and proactively take initiatives to improve the transparency and fairness of digital platforms, and, as a result, it expects government involvement and other regulations to be minimum.

On December 22, 2020, the METI proposed a draft of cabinet order ("Cabinet Order"),[16] implementing regulations ("Implementing Regulations")[17] and guidelines ("Guidelines")[18] for the DP Act and sought comments from the public by January 20, 2021. They became effective on February 1, 2021.[19]

The Cabinet Order provides two business categories and the thresholds of business size respectively; the Minister of the METI designates Specified DPOs among the DPOs that meet those two requirements. Two business categories identified by the Cabinet Order are: (i) the business of providing products to consumers by the Merchandise Providers[20] and (ii) the business of providing software or rights in software to consumers by the Merchandise Providers. For the thresholds for the business size is JPY 300 billion (approximately USD2.9 billion) for (i) and JPY200 billion (approximately USD 1.9 billion) for (ii), including Japanese sales by the Merchandise Providers and by a DPO.

Currently, online malls and app stores are subject to the DP Act, but digital advertisements are not. However, the Digital Headquarters continue to discuss digital advertisements and plan to publish a final report before spring 2021 (see below).

IV. MARKET RESEARCH REPORT

In accordance with the 2018 Cabinet decision to conduct large-scale and comprehensive surveys to understand the reality of the business situation in the digital market, various market surveys have been conducted including (i) a Report regarding Trade Practices on Digital Platforms (Business-to-Business transactions on online retail platform and app store) on October 31, 2019 by the JFTC,[21] (ii) an Interim Report regarding Digital Advertising

13 The JFTC's responses are available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2019/dec/191217_dpfgl_12.pdf.

14 The METI issued a press release in Japanese on February 18, 2020 which is available at https://www.meti.go.jp/press/2019/02/20200218001/20200218001.html.

15 P2B regulation is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150.

16 Draft of ordinance is available only in Japanese at https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211688.

17 Draft of implementing regulations is available only in Japanese at https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211692.

18 Draft of guidelines is available only in Japanese at https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211690.

19 The Cabinet Order, Implementation Regulations and Guidelines are available in Japanese at https://www.meti.go.jp/policy/mono_info_service/digitalplatform/index.html.

20 The Merchandise Provider is defined as a person or business that uses digital platforms for the purpose of providing products or services under Article 2, Paragraph 3 of the DP Act.

21 The JFTC press release on October 31, 2019 in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html; summary of the report in English is available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Summary.pdf; tentative English translation of the report is available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf.

on April 20, 2020 by the JFTC,[22] (iii) an Interim Report on the Evaluation of Competition in the Digital Advertising on June 16, 2020 by the Digital Market Competition Council,[23] and (iv) a Report on Medium-Term Vision on Competition in the Digital Market on June 16, 2020 by the Digital Market Competition Council.[24]

Interestingly, both the JFTC and Digital Headquarters issued an interim report on digital advertisement respectively. They apparently plan to issue a final report respectively before spring 2021.

In addition to the above, the JFTC has actively conducted market surveys in various areas including a market survey on transactions related to common point services, for which it issued a report on June 12, 2020.[25] The JFTC considers that common point services function as a digital platform that connects consumers and merchants, and have an impact on people's lives in terms of consumers' choice of products and services, and the economic activities of retailers, etc.

The JFTC is also active with regard to business practices involving startups. It issued an Interim Market Survey Report on Business Practices of Startups on June 30, 2020[26] and a finalized Market Survey Report on Business Practices of Startups on November 27, 2020. [27] In addition, on December 23, 2020 the JFTC and METI jointly issued proposed Guidelines regarding Business Collaboration with Startups and sought public comments until January 25, 2021.

On December 24, 2020, the JFTC, Secretariat of the Growth Strategy Council at the Cabinet, Small and Medium Enterprise Agency and the Ministry of Health, Labour and Welfare jointly issued proposed "Guidelines re: Creating Safe Working Environments for Freelancers." They sought public comments by January 25, 2021.

On December 24, 2020, the Competition Policy Research Center ("CPRC") of the JFTC announced a list of proposed issues to be discussed at the Study Group on Competition Policy for the Data Market ("Study Group"), and asks for public comments by March 12, 2021 (the due date was originally set as January 15, 2021, but was extended). The Study Group was established on November 13, 2020 to discuss measures to stimulate competition more actively in data driven businesses from the perspective of competition policy. In the rapidly changing digital age, competition is shifting from "cyberspace," where online platform-type businesses provide services, to a so-called "Second Stage" where businesses are expected to compete in the "fusion of cyber and physical," using data analyzed in cyberspace to enhance businesses in the physical space, such as automated driving, medical and nursing care, and agriculture.[28]

V. STRENGTHENING JFTC ORGANIZATION

On April 1, 2020, the JFTC established a new office at the Economic Affairs Bureau; the Office of Policy Planning and Research for Digital Markets. It conducts large-scale, comprehensive and thorough surveys of the digital market, further promotes understanding of the reality of transactions in the digital market, and collects a wide range of information on the digital market with the cooperation of external experts.[29] In addition, a Senior Investigator in charge of digital platforms was added.[30]

22 The JFTC press release on April 28, 2020 (tentative English translation) is available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200428.html; one-page summary (tentative English translation) is available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/2004281Sheet.pdf; 12-page summary (tentative English translation) is available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20042812Sheets.pdf; the report (tentative English translation) is available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20092901.pdf.

23 Summary (tentative English translation) is available at https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-1.pdf.

24 Summary (tentative English translation) is available at https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-2.pdf.

25 The JFTC press release on June 12, 2020 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200612.html; report is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200612_2.pdf.

26 The JFTC press release on June 30, 2020 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630.html; report is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630_2.pdf.

27 The JFTC press release on November 27, 2020 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease.html; two-page summary in Japanese is available at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_3.pdf; 18 page summary in Japanese is available at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_4.pdf; report is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_2.pdf.

28 The JFTC press release on November 13, 2020 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113_2.html.

29 April 1, 2020 Briefing by the Secretary General of the JFTC is available only in Japanese at https://www.jftc.go.jp/houdou/teirei/2020/apr_jun/kaikenkiroku200401.html.

30 The JFTC press release on August 30, 2020 is available only in Japanese at https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190830yosanyoukyuu.html.

VI. PROSPECTIVE NEW DEVELOPMENTS IN 2021

As mentioned above, the DP Act became effective quite recently on February 1, 2021. The scope of digital platform businesses subject to the DP Act is currently limited to two types of businesses as mentioned above, which does not include digital advertisements. The JFTC and Digital Headquarters continue to conduct research on digital advertisements, and plan to issue a final report respectively before spring 2021. In addition, the Study at the CPRC/JFTC is expected to publish the results of their discussion on competition policy for the data market. ■

THE BATTLES BETWEEN GOOGLE, FACEBOOK, AND NEWS MEDIA PROPRIETORS OVER FAIR VALUE EXCHANGE FOR NEWS CONTENT

BY PETER LEONARD[1]

1 Peter Leonard is a Sydney-based business consultant and lawyer advising data-driven business and government agencies in the South East Asian region, including Australia. Peter is principal of Data Synergies and a Professor of Practice at UNSW Business School (Management and Governance, and IT Systems and Management). Peter chairs the IoT Alliance Australia's Data Access, Use and Privacy work stream, the Law Society of New South Wales' Privacy and Data Committee and the Australian Computer Society's Artificial Intelligence and Ethics Technical Committee. Peter was a founding partner of Gilbert + Tobin, now a large Australian law firm. He serves on a number of corporate and advisory boards.

I. GOVERNMENTS AND THEIR INDUSTRY POLICY FOR THE MEDIA SECTOR

In most countries around the word, the structure of traditional print and broadcast television and radio media has been determined by industry policy set by government. Governments, or regulators appointed by them, have determine who may own major print mastheads, how many they can own, whether they can also own broadcast or pay television or radio broadcasters, and the conditions of licenses issued to them. In those democracies that are reasonably functional, the government when making or adjusting these policy settings justify their decisions by stating diffuse concepts such as needs for diversity or plurality of voice (leading to restrictions such as a prohibition on owning both a major print masthead and a broadcaster in the same city), maintenance of distinct national cultural characteristics, ensuring "local voice" (either nationally, or within geographical regions within a jurisdiction). More recently, some governments have ventured into justification of media regulation to promote continuation of responsible and investigative journalism, which requires drawing a contestable distinction between "good journalism" and mere reportage of alleged facts, or "fake news."

Whatever the stated policy justifications for a government's industry policy as to who is licensed or otherwise (through approval or rejection of changes to ownership or control) of media assets, government and media proprietors have evolved complex symbiotic relationships of mutual dependence. Governments desire support of influential domestic media outlets. The continued ability of those media outlets to do business, and to differentiate their journalism, is dependent upon continuing political patronage and susceptible to grant or withdrawal of preferred access for favored media outlets to breaking stories out of government and government agencies.

Many countries do not directly regulate ownership or control of print media mastheads, other than through restrictions on foreign investment of major print mastheads. By contrast, ownership, control and operation of broadcast television or radio is usually highly regulated, with regulation sometimes including cross media controls such as a prohibition on ownership of a major masthead and a free to air broadcast television station in the same city. Often these restrictions operate entirely outside general competition law and the remit of competition regulators, sometimes administered by sector-specific (broadcasting and media) regulators, and sometimes directly by the legislature. As a result, broadly accepted reasoning in antitrust economics is often largely absent from justifications for government policy settings and in framing of legislation affecting the structure of traditional print and broadcast television.

II. THE INTERNET DISRUPTS WORKABILITY OF INDUSTRY POLICY FOR THE MEDIA SECTOR

The internet changed everything, including the workability of industry policy for the media sector. Broadly, that disruption rolled in two waves.

The first wave was new online derivatives or copies of offline businesses, building audiences from about 2000. These first wave online businesses had already substantially eroded the business model of traditional print and electronic media by 2010, when the smartphone arrived. From that point the rate of erosion in the business of print and electronic media substantially increased, brought on by combined effect of take-up of smart phones and penetration of broadband internet. Broadband and its wide adoption enabled growth in usage of social media. At the same time, developments by Google in deep data analytics and digital ad technology underpinned Google's rise to ubiquity in universal search and the digital advertising.

The first wave of online businesses rapidly eroded the "rivers of gold" –revenue of mastheads from classified and display advertising which reliably drove profitability, funded in-depth and investigative journalism, and enabled low per print copy prices to consumers. Print media and free to air television were mature two-sided attention markets, already in decline before antitrust policy makers adopted concepts such as "two-sided markets" and "attention markets". Traditional media outlets were readily disrupted by shift in the focus of consumer attention to alternative online marketplaces, such as eBay, online realty, online car sales and online employment ads. Most mastheads were reluctant to disrupt their proven business model. Print media by its nature was data poor as to behavior of its readers, at a time when data analytics rapidly fueled value of online business. Online businesses rapidly escalated in value because of the range and depth of data about online interactions (including metrics as to effectiveness of alterative calls to action through measured consumer response) that was available to online businesses, coupled with rapid developments in algorithmic methods and applied data science and network effects.

As a result, when the second wave of internet disruption really took hold (around 2013), few print media outlets had claimed defensible territory in the online classifieds space. Some masthead proprietors gave up and sold off their fledgling online classified businesses to the early online providers. Some of the sellers then burnt up the sale proceeds in loss making publication of mastheads, while waiting for a much heralded but never arriving new dawn of consumer willingness to subscribe, or to make micro-payments for story-by-story access, for quality journalism. Media owners that were late entrants to online were unable to catch up to online rivals who by then already enjoyed advantages in data analytics capabilities and network effects.

III. FURTHER CHALLENGES OF SEND WAVE INTERNET DISRUPTION FOR THE MEDIA SECTOR

The second wave brought more fundamental challenges. Growth in consumer utility of universal search disrupted the business model of the online classifieds marketplaces: organic search and AdWords on Google disintermediated many marketplaces. Internet users could more readily browse more widely, and their attention could be captured and directed by the new intermediaries of social media and universal search.

Good online journalism could itself capture attention, but even when it did the economic value of that attention to the media outlet was bounded by the relative paucity of the data about the interaction of the user and the story as compared to the richness and depth of data captured by the new intermediaries of social media and universal search. Value shifted from the entity that owned the destination – the media proprietor - to those entities that could meter, measure and analyse the journey that led to that destination, and those entities that could correlate actual or inferred interest, preferences and characteristics of the journeying consumer and the decisions that they made as to the news that they consumed.

Once the route that a journeying consumer (whether or not identifiable) might elect to take could be predicted in real time and with reasonable probability), intermediaries could seek to influence the choice of destination, and offer products or services to the journeyer was offered along the route to a destination. This new, data analytics driven, capability of intermediaries fundamentally altered both politics and distribution of value along the digital advertising supply chain. Along with manifest consumer benefits of interconnectedness, convenience and choice, we saw emergence of Cambridge Analytica, "fake news," populist politics, and ever more granular and intrusively targeted digital ads.

Australian media illustrated the global trend. Between 2002 and 2018, Australian newspaper revenue fell from AU$4.4 billion to AU$3 billion. Of that decline, 92 percent was from the loss of classified ads: most of these classified revenues went to specialist online providers that targeted niches such as job advertisements, second-hand goods and or real estate listings.[2] Another estimate was that classified advertising revenue declined in nominal terms from AU$2 billion in 2001 to AU$200 million in 2016, or in inflation adjusted terms from AU$3.7 billion to AU$225 million.[3]

As profitability of big mastheads leached away, so did the capacity of masthead owners to fund in-depth and investigative journalism. This further promoted a shift in audiences to international trusted brands such as *The New York Times*, *Financial Times,* and *The Economist*, or new specialist segment commentators, such as *The Conversation*. It is now forgotten by many commentators, government policy makers and competition regulators, that the fundamental disruption of the business model of masthead print journalism preceded by at least a decade the rapid growth of the global digital platforms. By 2013, and before the subsequent rapid expansion of the respective advertising businesses of Google and Facebook, many print media readers had already moved online, and many were already unmoored from habits and allegiances to reading of local masthead brands. Most of these readers (as new online users) directly navigated to the mastheads, or used media outlet apps on their new smartphones to conveniently find the online news published by these mastheads. But already by 2013, many online users were starting to find and use alternative news sources. Some of these alternative media were reputable, in-depth and investigative journalism outlets. Many were entertainment driven, light on reportage alternatives.

The second wave internet intermediaries also disturbed the relationship of mutual dependence between politicians and media proprietors. The global digital platforms were increasingly profitable, less dependent upon local political patronage and operating largely outside constraints of regulation of traditional media regulation. Data and algorithms tilted the business battleground for consumer attention in favour of the new intermediaries, but they remained behind in the battle for political patronage. The power of traditional media to shift public opinion continued as a potent political issue. In Australia, this well illustrated by Australia's largest-ever parliamentary e-petition, initiated by former prime minister Kevin Rudd (Australian Labor) and later supported by his political opponent and former Prime Minister Malcolm Turnbull, which called for a royal commission into media diversity and had more than 500,000 signatures. The petition stated:

> Our democracy depends on diverse sources of reliable, accurate and independent news. But media ownership is becoming more concentrated alongside new business models that encourage deliberately polarizing and politically manipulated news. We are especially concerned that Australia's print media is overwhelmingly controlled by News Corporation, founded by Fox News billionaire Rupert Murdoch, with around two-thirds of daily newspaper readership. This power is routinely used to attack opponents in business and politics by blending editorial

2 AlphaBeta, Australian Media Landscape Trends, September 2020, available at https://alphabeta.com/wp-content/uploads/2020/09/australian-media-landscape-report.pdf.

3 ACCC, Digital Platforms Inquiry: Final Report, June 2019, page 17, available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

> opinion with news reporting. Australians who hold contrary views have felt intimidated into silence. These facts chill free speech and undermine public debate. Powerful monopolies are also emerging online, including Facebook and Google.[4]

A contrasting perspective was recently expressed by Australian Prime Minister Scott Morrison, in his Facebook post following the Facebook's decision to block Australian users from accessing and sharing news on the Facebook platform:

> These actions will only confirm concerns that an increasing number of countries are expressing about the behavior of "BigTech" companies who think they are bigger than governments and that the rules should not apply to them. They may be changing the world, but that doesn't mean they run it.[5]

IV. ELECTRONIC BROADCASTING UNDER CHALLENGE

Thus far, our discussion has focused upon print news media and its online disruption of print mastheads from the year 2000 to the present.

Over the same period of disruption of print media, television and radio broadcast media was suffering its own, technologically driven, existential crisis.

Scarcity of radiocommunications spectrum was relieved by shift of broadcasting from analog to digital and rapid improvements in compression technologies for radiocommunications.

Improvements in compression technologies for digital audiovisual content delivered over broadband cable, shift from 3G to 4G mobile communications networks, and upgrade of cable and line-based broadband networks, created bandwidth for new over-the-top and other audiovisual programming streams.

On-demand audiovisual platforms accessible through new broadband networks enabled consumer choice, and enabled programming to be targeted to online audience segments created through data analytics, or tailored to a particular individual.

Fragmentation of audiovisual content audiences eroded the advertising revenue base for broadcast television streams and the ability of television and radio broadcasters to fund in-depth and investigative journalism, resulting in downsizing or closure of television and radio newsrooms. As with text-based news media, data and algorithms tilted the business battleground for attention of consumers of audiovisual news coverage in favour of the new intermediaries.

V. THE POSITION BY 2013

In summary, by 2013 and accordingly before the rapid expansion of the advertising businesses of Google and Facebook, the disruption of the business of in-depth and investigative journalism, and the concomitant rise of "fake news," were well underway.

There had been no relevant failure of competition policy, no failure of media policy, no relevant neglect of competitor regulators or data privacy regulators, abuse or misuse of market power by global digital platforms, or endemic breach of copyright (in media reports generated by media outlets) by global digital platforms.

There had been a technologically driven shift in attention markets for consumers of both text-based and audiovisual "news" in all its varieties – heavy journalism, light entertainment reportage, speculation, gossip and mischievous or malevolent "fake news" – driven by collapse of the two-sided market for newspapers, magazines and television and radio broadcasting.

VI. DISRUPTION OF TRADITIONAL MEDIA ACCELERATES FROM 2013 TO THE PRESENT

The rapid expansion of the respective advertising businesses of Google and Facebook from about 2013 exacerbated then existing trends.[6]

A. Google Bowls a Googly

In the case of Google,[7] consumers of media reports already unmoored from habits and allegiances to reading of local masthead brands could more readily search by story for media content, using increasing poorly spelt and less specific search terms, and thus further unmoor from previous habits and allegiances.

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4 Petition EN1938 - Royal Commission to ensure a strong, diverse Australian news media, available at https://www.aph.gov.au/petition_list?id=EN1938.

5 https://www.facebook.com/scottmorrison4cook/posts/3992877800756593 (February 18, 2021).

6 A 2019 University of Canberra Digital News Report found that that 33 percent of Australian consumers report accessing news through social media, with 25 percent using search engines to search for news brands and 20 percent using search engines to search for particular news stories. The ACCC noted that between 8 and 14 percent of Google search results trigger a "Top Stories" result, which typically includes reports from news media websites (including niche publications and blogs).

7 A *googly*, also known as a *flipper* or a *wrong un*, is a cricket ball bowled as if to break one way that actually breaks in the opposite way. I could go on to list those few bowlers who were global leading exponents in their day, but any attempt at that list would create more controversy in certain countries than anything else that I say in this paper.

As Google search algorithms improved, so did the quality of algorithmic inferences as to interests, or preferences or characteristics of individual users. Google become less reliant upon identification of a user or correlation of user with actual or express interests, preferences or characteristics. As inferences that Google could draw became more granular and better correlated across groups of users to create audience segments of individual users (whether or not those individuals identifiable by Google) inferred to share inferences or preferences in common, the value to an advertiser of being able to address those audience segments continued to escalate.

Google AdWords – perhaps the greatest marketing innovation of the 21st century – enabled users to better self-service, advertisers to better target, and Google to derive premium for closer match of buyer and seller.

As well as inferences down by users' organic search activities, use of AdWords and clicks on "sponsored links," Google was able to refine audience segments by reference to activities of internet users on YouTube, on Android devices, on media content sites for which Google provided digital advertising services, and so on. Economies and efficiencies of scale and scope created unprecedented business value for Google.

These economies and efficiencies were not directly related to continuing disruption of the business of in-depth or investigative journalism. However, the business success of Google in captured an escalating share of total expenditures by advertisers on digital advertising further eroded the two-sided funding of in-depth or investigative journalism.

Clearly, disruption of funding for in-depth or investigative journalism is not good for democracy, at least where that journalism is reasonably independent of influence by politicians. But did this disruption promote mere reportage, or fake news? A reasonable contention may be that Google is not economically incentivized to promote in-depth or investigative journalism over mere reportage or fake news, and might be incentivized to put mere reportage or fake news before users that Google algorithms infers prefer such entertainment content over heavy journalism. However, even if this contention is correct, it is no more indicative of a competition policy problem than a choice by a bookseller as to the respective prominence given to categories of books or individual titles, to match known or inferred preferences of the audience segment being likely patrons of the bookstore.

In other words, it is not at all clear that the success of Google's advertising businesses fundamentally changed the dynamic of continuing disruption of the business of in-depth and investigative journalism as already well underway before the success of those businesses.

Further, Google's search business delivers users to content, not content to users.[8] The media content provider determines whether a story is discoverable through search (the provide can readily block searchability of the provider so wishes), how a story is presented to a user who comes through Google search, and whether digital ads are presented to a user who views a story.

B. Facebook: Moving Destinations by Metering the Pathways

Facebook's advertising businesses are more vertically integrated into the primacy Facebook platform than Google's more diverse ad tech offerings. Business value of Facebook's advertising businesses is closely aligned to depth of knowledge of Facebook of each particular and known user's use of Facebook and associated Facebook properties including Instagram, Facebook Messenger and WhatsApp.

Facebook itself creates audience segments that it markets to advertisers.

Facebook also enables advertisers to match their own audience segments to Facebook's audience segments: the Facebook Custom Audiences enables Facebook to conduct this matching within an anonymization zone and thereby derive further premium from closer fit of buyer and seller, targeting advertising content to Facebook users segmented at a higher granular level. In the main Facebook service, Facebook can serve inferred of-interest news stories in or through a Facebook frame that also presents accompanying, granular targeted display or banner advertising to the Facebook user. Unprecedented business value of Facebook derives from combination of availability of audiences at scale, ability to closely target digital ads to actual or express interests and preferences of Facebook users, ability to draw inferences and make correlations to create lookalike audiences and to market audience segments to advertisers, and ability to measure and report upon individual responses to calls to action. Journalist generated news stories are a small part of content made available through the Facebook platform. As with Google, Facebook is not economically incentivized to promote in-depth or investigative journalism over mere reportage or fake news. To the contrary,

8 There is an important qualification to this statement: Google Search results may also include a summary, or snippet, from or about the story. This leads to a reasonable proposition that Google may divert traffic from a destination at which a story is displayed, by a user seeing sufficient information to then self-select an alternative destination. If the snippet is in fact a direct derivation of text from the story at the destination, a further legal question may arise as to whether the snippet is a copy of, or adaption from the original story, and sufficiently substantial as to be an infringing copy of a copyright work. There is significant divergence between national copyright laws as to such matters. As to snippets, see further ACCC, Digital Platforms Inquiry: Final Report, June 2019, page 16.

the depth of Facebook's knowledge of individual users' interests and preferences, and Facebook's ability to derive premium from display or banner advertising that is granularly targeted to the Facebook user, create financial incentive for Facebook to serve mere reportage to Facebook users known to prefer such content. However, it is not clear that the success of Facebook's advertising business fundamentally changed the dynamic of continuing disruption of the business of in-depth and investigative journalism as already well underway before Facebook become the dominant social network. As with Google, Facebook delivers users to content: Facebook claims that in Australia in 2020 Facebook sent 5.1bn clicks to Australian media publishers, which it claims were worth AU$407m (US$317m).[9]

VII. THE AUSTRALIAN NEWS BARGAINING CODE: WHY SHOULD GOOGLE AND FACEBOOK BARGAIN WITH NEWS PROPRIETORS?

Given the preceding analysis, it may seem strange that news media proprietors, Google and Facebook have recently been in high profile dispute in Australia as to implementation of a news bargaining code as promoted by a competition regulator, the Australian Competition and Consumer Commission ("ACCC").

Why is the Australian Government legislating to require Google and Facebook to pay media proprietors for their business activities as described above?

What is the competition policy rationale for the ACCC being involved in this dispute? Why is continuing disruption of the business of production of in-depth or investigative journalism being addressed by a competition regulator?

Why do both the competition regulator and the Australian Government refer to market power of Google and Facebook as a factor relevant to the question of whether, and if so, how much, these global digital platforms "should" pay to media proprietors?

These questions have uniquely Australian answers, as discussed below.

However, the media policy concerns that underlie these questions are common across many countries, some of which are considering levy, subsidy or targeted taxation schemes to transfer value from global digital platforms to domestic media proprietors. The balance of this paper considers how and why the underlying media policy concerns as to disruption of the business of in-depth and investigative journalism in Australia came to be associated with the business success in Australia and elsewhere of Google and Facebook.

VIII. THE AUSTRALIAN GOVERNMENT SETS OFF THE MEDIA BARGAINING DEBATE

The direct association of global digital platforms, Australian media proprietors and the Australian competition regulator started with a referral from the Australian Government in December 2017.

That referral followed a political deal that the Australian Government did to secure agreement of minority party parliamentarians to passage through the Australian Senate of a statute[10] abolishing the "75 percent audience reach rule" and the "two-out-of-three rule." The audience reach rule began life in 1987 and had the effect that the population of the broadcasting license areas controlled by one person or company could not exceed 60 percent (later 75 percent) of the total Australian population. The "two-out-of-three rule," introduced in 2006, was intended to prevent a single person or company from controlling more than two out of three media platforms – commercial radio, commercial television and newspaper – in the same radio license area.

The intended effect of these and related rules was to provide a safety net for voice diversity. Abolition of the rules was proposed as a response to erosion of profitability of broadcast journalism. Abolition of the rules enabled mergers between regional and major city television networks, and cross-media mergers, such as the acquisition of major print masthead owner Fairfax Media by television broadcaster Nine Entertainment, and further consolidation of print mastheads into the portfolio of News Corporation's many mastheads. Prior to these changes Australian media ownership, and print media in particular, was among the most con-

9 See Facebook's submission to the Australian Senate's Economics Legislation Committee, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions.

10 The Broadcasting Legislation Amendment (Media Reform) Bill 2016, later passed as the Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017. See the Report of the Australian Senate Select Committee on Environment and Communications on the Bill, and submissions made in relation to the Bill, at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/MediaReformBill45/Report. As to the link between passage of the Bull and the referral to the ACCC, see Amanda Meade & Katharine Murphy, "Media bosses praise Xenophon and government for deal on ownership law," The Guardian Australia, September 15, 2017, at https://www.theguardian.com/media/2017/sep/14/media-bosses-praise-xenophon-and-government-for-deal-on-ownership-law, Andrew Tillett & Max Mason, "'It was a close run thing': how media reform finally got done," Australian Financial Review, September 23, 2017, at https://www.afr.com/companies/media-and-marketing/it-was-a-close-run-thing-how-media-reform-finally-got-done-20170922-gymo6d.

centrated in the world.[11] These subsequent corporate transactions significantly increased this concentration of ownership.

The Government's deal with the minority party parliamentarians included funding for rural and regional news reporting and requiring the ACCC to inquiry and report as to "the impact of digital search engines, social media platforms and other digital content aggregation platforms (platform services) on the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers." Matters to be taken into consideration were to include: "the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers; the impact of platform service providers on the level of choice and quality of news and journalistic content to consumers; the impact of platform service providers on media and advertising markets; and the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and the impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets."[12]

The ACCC, in its 618-page Digital Platforms Inquiry: Final Report, concluded that Google has substantial market power in the supply of general search services in Australia, substantial market power in the supply of search advertising services in Australia, and substantial bargaining power in its dealings with news media businesses in Australia. The ACCC concluded that "a significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity."[13]

The ACCC stated that Facebook has substantial market power in the supply of social media services in Australia, substantial market power in the supply of display advertising services in Australia, and substantial bargaining power in its dealings with news media businesses in Australia. Facebook's alleged bargaining power derived from "the case that many news media businesses in Australia would likely lose significant revenue, with adverse impacts on their business, should they forego referrals from Facebook."[14]

IX. THE INABILITY OF NEWS MEDIA BUSINESSES TO INDIVIDUALLY NEGOTIATE TERMS OVER THE USE OF THEIR CONTENT BY DIGITAL PLATFORMS

The ACCC expressly noted that it did not "focus on whether digital platforms have misused their market power,"[15] instead concluding that "the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power. Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content."[16]

The ACCC's key recommendation on news content bargaining was as follows:

> Given the imbalance in the relationships between the leading digital platforms and Australian news media businesses, the ACCC recommends that designated digital platforms should each separately be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses. The ACMA would be responsible for designating which digital platforms should be required to implement a code. The development of each code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism.[17]

This writer contends that "the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms" is not indicative of "imbalance in bargaining power." News and other content – quality journalism, mere reportage and fake news- are shared on digital platforms. Some news content is shared by the content providers electing to post links on social media. Some news content is made available by digital platforms selecting and posting links. Some news content is shared for by users who post links for use by other users. There are two

11 See Tim Dwyer & Denis Muller, "FactCheck: is Australia's level of media ownership concentration one of the highest in the world?," The Conversation, December 12, 2016, https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437.

12 Terms of Reference dated 4 December 2017, Appendix A to ACCC, Digital Platforms Inquiry: Final Report, June 2019.

13 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 8, see further Chapter 5.

14 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 10.

15 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 10.

16 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Executive Summary at page 16.

17 ACCC, Digital Platforms Inquiry: Final Report, June 2019, Chapter 5, Recommendation 7.

principal beneficiaries: the digital platforms, for whom such links generate traffic and intelligence as to user preferences and interests, which drives revenue for the digital platform, and the content providers, who post links or permit third party links because they want people to click on them. Both beneficiaries receiving benefits and both have the ability to veto the practice (content providers can block linking if they so elect). If the regulatory objective is to compensate beneficiary content providers to the extent that they are disadvantaged in negotiation of a value exchange between these beneficiaries (an exchange which remains one that content providers can elect not to allow), the fair amount of true up to compensate for that disadvantage needs to be capable of objective assessment in order for a regulatory intervention to be reasonable. However, the "fair" true up amount is not capable of calculation by applying commonly accepted economic analysis.

Further, use of advantage in a commercial negotiation is not a misuse or abuse of market power for which compensable legal liability should arise.

Given the difficulty in determining a fair amount of true up for imbalance of bargaining power in a voluntary negotiation and in absence of any evidence of misuse or abuse of market power, it should not be surprising that the regulator elected not to undertake this Herculean task itself, instead sending the task back to the beneficiaries, for them to argue amongst themselves.

A further level of complexity confronted the beneficiaries. Regulating to address imbalance in bargaining power can be simple enough when a product or service is supplied in return for money or money's worth. Where (as in this case), value flows both directions across multiple party, two-sided attention markets, calculating a true-up for imbalance in bargaining power is another level of difficulty.

Even before a fair and reasonable compensatory payment can be considered, it is necessary to find some level of consensus as to whether value captured by one party should flow at all. News media operators dispute the value delivered to the news outlet by Google and Facebook respectively presenting links to the news content to Google and Facebook users. But more fundamentally and intractably, news media operators also ascribe part of digital advertising value captured within Google and Facebook to use of news content as destination clickbait, in essence saying this value is unfairly appropriated. In response, Google and Facebook contend that this capture of value is not the result of imbalance in bargaining power, because there is no commercial bargain that legally needs to be made. Digital advertising value accrues to a digital intermediary through creation of data value through the intermediary's own analytics, which is associated with provision to users of *links to destination news content.* This is not value fairly to be ascribed to any *use by the intermediary of the news content itself*.Should a commercial bargain be expected by a regulator or a government in circumstances where changes in technology have caused value to shift from news content destinations to intermediaries within a supply chain? Absent any evidence as to misuse or abuse of market power, a reasonable question might be whether accretion of digital advertising value in digital intermediaries is so egregious that this revenue should be specially taxed, or so likely to endure that changes to the role and structure of intermediaries the supply chain should be forced through divestiture orders, structural separation or other regulatory mandated action. Absent these measures, it is reasonable to expect that Google and Facebook respectively and news media operators will be unable to find a bargain, because the bargain is really about how much Google and Facebook are taxed to the benefit of the tax recipient being the news outlet, and there is no accepted economic theory to apply to determine what a fair level of taxation might be.

X. COMMERCIAL BARGAINING FAILS AND THE LEGISLATURE STEPS IN

The Australian Government in December 2019 announced its response to the ACCC's recommendations. The Government accepted the ACCC's recommendation that Facebook and Google respectively and the respective major media proprietors each be required to negotiate a code as to value exchange from news content,but did not accept the ACCC's proposal to refer responsibility to the media regulator, the Australian Communications and Media Authority ("ACMA"), for overseeing development of codes. Accordingly, the ACCC remained the relevant overseeing authority, although no breach of competition law had been found.

Facebook and Google respectively and the major media proprietors then commenced discussions about a code.

Neither the ACCC, nor the Australian Government, provided any kind of parameters, or guidance, or definition of value, as to financial liability of Google or Facebook if they participated in a code. There was no mechanism proposed for ensuring that any code support diversity of media ownership, or for weighting incentives towards in-depth and investigative journalism.

Niche quality journalism outlets complained that the proposed scheme "should create meaningful financial support for Australia's 100 or so small-to-medium regional and urban news publishers – so that the vast proportion of funding does not end up in the pockets of News and Nine."[18]

18 See for example Eric Beecher, "Digital bargaining code needs to protect Australia's media diversity," InDaily, February 2, 2021, available at https://indaily.com.au/opinion/2021/02/02/digital-bargaining-code-needs-to-protect-australias-media-diversity/.

The purported justification for a requirement for payment to the media proprietors as compensation for imbalance in value exchange was highly contested by each of Facebook and Google. Google argued that the driver for search results to include news is "societal and not economic." Facebook also argued that there should be no net payment. The chair of major Australian media proprietor Nine Entertainment (and former Australian Treasurer), Peter Costello, suggested that the fee payable should be 10 percent of annual Australian revenue and estimated this amount to be AU$600 million (about US$420 million). News Corporation proposed various amounts, ranging up to in aggregate AU$ 1 billion.

After about three months of unfruitful discussions between (principally) Nine and News and Google and Facebook, in April 2020 the Government directed the ACCC to develop and publish a mandatory code. The ACCC outlined a draft code on 31 July and opened a new consultation.

The draft code proposal recognised a "two-way value exchange" between Google and news media companies, reflecting Google's position that news businesses get a bigger audience when their products are on Google or Facebook. News Corp Australia's Executive Chairman, Michael Miller, said that the unveiling of the draft code was a "watershed moment to benefit all Australians," continuing that "the tech platforms' days of free-riding on other peoples' content are ending. They derive immense benefit from using news content created by others and it is time for them to stop denying this fundamental truth."[19]

Under the ACCC's code proposal, media businesses[20], individually or collectively, could notify Google or Facebook that they wish to negotiate under the code. The parties then have three months to strike a deal, and if they are unable to do so, there is a mandatory referral to "final offer arbitration" (also known as "baseball arbitration"). In the event of a referral, each party would be required to lodge a content payment offer with the arbitrator. The arbitrator must then choose either of the offers, but cannot substitute another amount. The draft code also proposed that Google and Facebook must give publishers 28 days' advance notice of any changes to their algorithms that might affect traffic to news sites.

The ACCC was unsuccessful in persuading Google and Facebook to make commercial proposals to forestall any need for a mandatory Code. In December 2020, the Australian Government introduced into the Australian Parliament an enabling statute for a legally mandated code.[21] The proposed statute broadly reflected the ACCC's code proposal. The new code would not require details of deals between Google or Facebook and media publishers to be revealed, or for media publishers to guarantee the money is spent on journalism.

The Australian Senate referred the Bill to Senate's Economics Legislation Committee, which received and reviewed 55 submissions[22] and held public hearings.[23] In a Senate hearing that took place on Friday 22nd January, Google Australia's Managing Director, Mel Silva, outlined issues with the proposed News Media Bargaining Code and suggested "technical amendments" that would make the Code "workable" for Google. These suggestions included that instead of (or in addition to smaller) payment for links and snippets, the Code could designate Google News Showcase. This appears to be a similar proposal to the deal struck with France in October 2020, whereby Google reportedly (full details have not been published) will pay French publishers for content showcased on Google News Showcase, negotiate individual licenses with media outlets whereby payment for use of snippets would be based on specific and measurable metrics, and Google would pay (on behalf of users) for any content published behind paywalls where users may access new content they otherwise they would not be able to see unless they made a payment.[24]

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19 Quoted in Josh Taylor & Amanda Meade, Google and Facebook to be forced to share revenue with media in Australia under draft code, The Guardian Australia, July 31, 2020, available at https://www.theguardian.com/media/2020/jul/31/google-and-facebook-to-be-forced-to-share-revenue-with-media-in-australia-under-acccs-draft-code.

20 To qualify, a news business would be required to predominantly create and publish news in Australia, serve an Australian audience, be subject to professional editorial standards, and editorial independence from the subject of the news coverage, and have revenue exceeding AU$150,000 per year.

21 The Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/.

22 Submissions are available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions; see also Google and Facebook responses to questions on notice at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Additional_Documents.

23 Transcripts are available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Public_Hearings.

24 The status of the arrangements in France remains unclear. In January 2021 Google and the Alliance de la presse d'information générale ("APIG") said that they had agreed to a copyright framework for Google to pay news publishers for content online, with payments based upon criteria the daily volume of publications, monthly internet traffic and "contribution to political and general information": Mathieu Rosemain, "Google seals content payment deal with French news publishers," Reuters, January 21, 2021.

In its submissions on the draft Bill, Google repeated its assertions that organic search should remain a free commodity, where no payment is required by either party to fill the search results, and sought "reasonable amendments to the arbitration mode," including abandonment of the baseball determination model.[25]

In February 2021, the Senate Committee reported to the Senate, recommending that the Bill be passed.[26]

XI. THE FINAL BATTLE: OUT OF THE PARLIAMENT AND BACK TO THE MARKETPLACE

However, events moved quickly, prior to passage of the Bill. In the week ending February 19, 2021, Google was reported[27] to have made over 50 deals with publishers in Australia. Seven announced a deal with Google worth AU$30 million per year, Google and Nine agreed a five-year AU$30 million-a-year cash deal, youth-focused publisher Junkee Media signed an agreement believed to be worth between AU$200,000 and AU$2 million, and Google agreed with The Guardian Australia to feature its journalism in the News Showcase product. Google also concluded a three-year global deal with News Corporation for an undisclosed sum, but also featuring News Corp journalism on Google News Showcase. News Corp content will include Australian based News Corp publications, including The Australian and The Daily Telegraph, and other News Corp mastheads including The Times of London and The (London) Sun, the Wall Street Journal and the New York Post. News Corp will also develop a subscription platform available through Google, share advertising revenue through Google's ad technology services, and build out audio journalism and develop video journalism published through YouTube. Google was also reported to be close to be close to finalizing a deal with the Australian Broadcasting Corporation.

Facebook took a different path.[28] Facebook asserted that news journalism makes up less than 4 percent of content that Facebook people see in Facebook's news feed, and complained that the coverage of "core news content" in the code was overly broad, encompassing anything that "reports, investigates, or explains issues that are relevant in engaging Australians in public debate." On February 18, 2021, Facebook blocked in Australia the sharing of all news articles, Australian or otherwise, as well as banning the sharing worldwide of any articles that originated in Australia: as the Australian Prime Minister Scott Morrison put it, Facebook unfriended Australia.[29] A flurry of telecons between the Australian Treasurer Josh Freudenberg and Facebook CEO Mark Zuckerberg then followed.

On the date of finalization of this paper (February 25, 2021), the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 passed both Horses of the Australian Parliament[30], including amendments made to address concerns raised by Facebook. Several days earlier, Facebook had agreed with the Australian Government to restore access of Australian Facebook users to Australian news pages. Facebook stated that it was recommencing negotiation of commercial deals with news organizations.

Amendments to the media bargaining code include a requirement that a decision to designate a platform under the code must take into account whether it has made a significant contribution to the sustainability of the Australian news industry through commercial agreements with local media companies. The government must notify a digital platform if it intends to designate a platform under the code, with the final decision about whether to include a platform to be made no sooner than one month after notification. Will Easton, Managing Director, Facebook Australia & New Zealand, blogged:

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25 See further Google, "Answering your top questions about the News Media Bargaining Code," Google blog post of January 31, 2021, at https://blog.google/around-the-globe/google-asia/australia/top-questions-news-code/, and Google, "Update on the News Media Bargaining Code and Google in Australia," undated, at https://about.google/google-in-australia/an-open-letter/. For an independent perspective on the baseball determination model, see Casey Newton, "Australia's bad bargain with platforms," Platformer, February 17, 2021, at https://www.platformer.news/p/australias-bad-bargain-with-platforms, contrast Rob Nicholls submission to the Economics Legislation Committee of the Australian Senate, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Submissions.

26 Report is available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/TLABNewsMedia/Report

27 Josh Taylor, "Guardian Australia strikes deal with Google to join News Showcase," The Guardian Australia, February 20, 2021, available at https://www.theguardian.com/technology/2021/feb/20/guardian-australia-strikes-deal-with-google-to-join-news-showcase.

28 For divergent views as to the divergent paths taken by Google and Facebook, see "Done over down under: Facebook walks as Google caves in," The Economist, February 18, 2021, at https://www.economist.com/business/2021/02/18/facebook-walks-as-google-caves-in-australia; "Australia's Big Tech fight does not provide a model," Financial Times, February 19, 2021, "Australia's misguided attack on Big Tech," Financial Times, August 31, 2020; Casey Newton, "Why Google caved to Australia, and Facebook didn't," The Verge, February 18, 2021, at https://www.theverge.com/2021/2/18/22288510/google-facebook-australia-news-media-bargaining-code.

29 Amanda Meade, "Prime minister Scott Morrison attacks Facebook for 'arrogant' move to 'unfriend Australia,'" The Guardian Australia, February 18, 2021, https://www.theguardian.com/technology/2021/feb/18/prime-minister-scott-morrison-attacks-facebook-for-arrogant-move-to-unfriend-australia.

30 See https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6652.

> We're pleased that we've been able to reach an agreement with the Australian government and appreciate the constructive discussions we've had with Treasurer Frydenberg and Minister Fletcher over the past week. We have consistently supported a framework that would encourage innovation and collaboration between online platforms and publishers. After further discussions, we are satisfied that the Australian government has agreed to a number of changes and guarantees that address our core concerns about allowing commercial deals that recognize the value our platform provides to publishers relative to the value we receive from them. As a result of these changes, we can now work to further our investment in public interest journalism and restore news on Facebook for Australians in the coming days.[31]

XII. CONCLUSION

The Financial Times on February 19, 2020, editorialized that "Australia's approach is flawed" because it is in essence an intervention "on behalf of one side in an intercorporate battle. It has helped the Murdoch empire – one of the big beasts of the 'old' media world – wring a deal out of a big beast of the new, but done little to help small, struggling local publishers."[32] The Financial Times then suggested that "governments and regulators need to co-operate across borders to police the biggest tech companies, which have become quasi-utilities, or "gatekeepers" to different online sectors," employing in combination "legal and regulatory tools on tax, competition, copyright, privacy and data protection, and potentially including a digital services tax (as proposed by the OECD)."

Earlier in this paper it was noted that in 2013 and before the rapid expansion of the advertising businesses of Google and Facebook, disruption of the business of media publishing of text and audiovisual journalism was well underway. This disruption was largely driven by market forces unleashed by the broadband internet: there had not been relevant failure of competition policy, of media policy, or neglect of competition or data privacy regulators. In the eight years to 2021, growth in market power of Google and Facebook further disrupted the business of media publishing of text and audiovisual journalism , but did not change the fundamental problem of shift in value along the digital advertising supply chain, or evidence relevant abuse or misuse of market power by Google or Facebook.

In this writer's view, the newer challenge of ubiquitous fake news, and the continuing challenge of providing incentives for production and distribution of reports of in-depth and investigative journalism, should not be addressed through competition regulatory tools, through blunt statutory interventions such as Australia's news bargaining code, or through jiggling of copyright law to require payment of licensing fees for links on global platforms to broadly defined news content. Regulatory interventions to compensate for imbalances in the bargaining power of leading digital platforms and news media businesses may be politically attractive, particularly when the government can avoid calling resultant payment flows a new form of business tax, when those news media businesses will report favorably to their readers as to the government's role in delivering those financial benefits, and those news media businesses can assert their intention to invest their financial windfalls in better and deeper journalism. The outcome may therefore be good politics. However, good politics is often not good competition policy or sound antitrust economics. The Australian news bargaining code example should be treated with due caution. ■

31 Will Easton, 'Changes to Sharing and Viewing News on Facebook in Australia', Facebook blog post, February 22, 2021, https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/.

32 "Australia's Big Tech fight does not provide a model," Financial Times, February 19, 2021. An alternative perspective was expressed by News Corp CEO Robert Thomson, in welcoming the proposed Code: "There is not a single serious digital regulator anywhere in the world who is not examining the opacity of algorithms, the integrity of personal data, the social value of professional journalism, and the dysfunctional digital ad market" (quoted in Dominic Ponsford, "News Corp strikes global cash-for-content deal with Google as tech giant fights regulation in Australia," Press Gazette, February 17, 2021). For a regulatory economist's analysis of the value exchange between media publishers and Google and Facebook, see Joshua Gans, "Australia surrenders to monopolists and codifies corporate oligarchy," blog post to Core Economics, February 19, 2021, available at https://economics.com.au/2021/02/19/australia-surrenders-to-monopolists-and-codifies-corporate-oligarchy/.

THE RISE (AND RISE) OF CONCERNS WITH BARGAINING POWER IMBALANCES: A LOOK AT THE ACCC'S PERISHABLE AGRICULTURAL GOODS REPORT

BY GEORGE SIOLIS & JENNIFER SWART[1]

1 George Siolis is a Partner with RBB Economics based in Melbourne. Jennifer Swart is an Associate based in Johannesburg. We are indebted to Simon Bishop, RBB Economics' Founding and Managing Partner and Dr Iestyn Williams, a Partner with RBB Economics in London, for helpful comments on earlier drafts. The views in this article reflect the views of the authors.

I. INTRODUCTION

"Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way." [2]

Those comments by two High Court justices in the *Queensland Wire* case described the nature of competition between two firms competing against each other at the *same* level of the supply chain – that is, firms competing in a horizontal relationship. Firms in such a relationship are expected – and, indeed, are driven by the profit motive – to act ruthlessly (and lawfully) to exploit any advantage they have to succeed in the market and this generally delivers desirable outcomes.

But what should be expected of the interaction between two trading parties operating at *different* levels of the supply chain; that is, among firms operating in a vertical relationship? Should evidence of the same ruthlessness being displayed in the interaction between firms that produce agricultural goods ("producers") and the firms that purchase those goods ("processors") be characterised in the same terms as identified by the court in *Queensland Wire*? Should a buyer in a stronger bargaining position than a seller it trades with be entitled and indeed encouraged to use that strength to drive as hard a bargain as it can? Does it matter whether that allows it to gain an edge in a downstream market where it supplies products to end customers?

Throughout 2020, the answer to these questions, at least in Australia, seemed to be "maybe not." Even though the same profit motive that drives firms competing against each other (in a horizontal relationship) to act ruthlessly also drives firms in a (vertical) trading relationship, the ACCC seemed to suggest that a firm may need to temper any bargaining advantage it has in some circumstances.

The questions that this short article tries to answer are why and when. What is the problem if firms operating in a vertical relationship display the same ruthlessness as firms in horizontal relationships? Are we worried about efficiency considerations or are concerns about fairness at the heart of the heightened concern about bargaining power imbalances in Australia? And does it matter if the benefits arising from those bargaining advantages are passed on to consumers in downstream markets?

The article starts by describing the potential economic harms that could come about because of an imbalance in bargaining power between two trading parties and then discusses how the concern was addressed in the Australian Competition and Consumer Commission's ("ACCC's") inquiry into Perishable Agricultural Goods. It then concludes by commenting on the "gap" that the ACCC identified when considering ways to deal with some of what it describes as the "significant harmful practices" created by imbalances in bargaining power in perishable agricultural goods ("PAG") markets.

II. BRIEF OVERVIEW OF ECONOMIC CONCERNS WITH AN IMBALANCE OF BARGAINING POWER

Many commercial negotiations between firms operating in a vertical relationship (which we refer to as trading parties in this article) are aimed first at creating value and then sharing that value. This section first sets out how economists generally view the value that is shared in a commercial negotiation between trading parties and then identifies some of the potential concerns with the agreements struck by trading parties when the parties have unequal bargaining power.

A. Aggregate Surplus vs. Distribution of Surplus Between Firms

Negotiations between trading parties usually boil down to a debate about how the "surplus" is divided among the trading parties although they can also affect the size of that surplus.

In general, economists (and policy makers) have not focused on how that aggregate surplus is divided between the buyer and seller, unless efficiency considerations are at stake. That is, unless the size of the aggregate surplus is affected. Disputes about how the aggregate surplus is divided are often considered to be matters of fairness or equity rather than efficiency concerns. It is the latter set of concerns that usually interest economists; that is, making sure that the aggregate surplus for society is maximised.

Surplus is essentially created by buyers and sellers interacting or trading with each other to create something of value to society. As part of the trading process that enables that surplus to be realised, the buyer and seller will enter into a commercial agreement that will (implicitly) establish whether and how that value will be created and how that aggregate value will be divided between the two parties.[3]

2 *Queensland Wire Industries v. BHP* (1989) 167 CLR 177 [22].

3 The welfare or surplus is the value to the buyer or seller from participating in the market. The welfare or surplus that the "buyer" receives is the difference between a buyer's willingness to pay (measured by a demand curve) and the amount that the buyer actually pays. The welfare or surplus of the seller measures the difference between what the supplier actually sold and the seller's (opportunity) cost.

The economic focus on aggregate surplus rather than the division of that surplus between parties can be explained through the following example. Suppose that there is a negotiation between a dairy producer, that operates in what we can define in this case as the upstream layer of the supply chain, and a processor that operates in the downstream layer of the supply chain. Suppose too that the processor purchases dairy products from a number of different dairy producers to sell (in more processed form) to supermarkets or directly to consumers.

In a negotiation between the dairy producer and the processor, the dairy producer will be trying to secure as high a price as possible from the processor for its dairy products, while the processor will be trying to pay as low a price as possible for the same dairy products.

The negotiation between the dairy producer and the processor is essentially a negotiation over how they will divide the value (or the aggregate surplus) that they create by trading with each other. The outcome of the negotiation will typically depend on the alternative buyers and sellers available to the producers and processors respectively (which are referred to their "outside options") as well as the degree of patience and the negotiating skill of the trading parties.

A low price will mean that the dairy producer extracts less value from the bargaining process than the processor and results in a lower share of the aggregate surplus going to the producer. More of the aggregate surplus is effectively allocated to the processor as a result. In this example, the welfare of the processor is increased at the expense of the dairy producer.

Conversely, a high price will mean that the dairy producer extracts more value from the bargaining process than the processor and results in a higher share of the aggregate surplus going to the dairy producer. This higher surplus comes at the expense of the processor who ends up with a lower surplus. In this case, the welfare of the dairy producer is increased at the expense of the processor.

B. Should Governments Intervene in Commercial Negotiations?

Competition agencies have become increasingly concerned about the role that a bargaining power imbalance between two trading parties has on their ability to divide the aggregate surplus between themselves in a way that benefits society. The concerns can be categorised into the following two areas.

First, agencies may be concerned that a firm in a stronger bargaining position than its trading party may be in a position **to exploit that strong bargaining power** and extract more from the commercial negotiation with the weaker party than it would have if the exercise of bargaining power was constrained by effective competition. This sort of concern around exploitative conduct is similar to a concern that a firm with market power may exploit customers by charging an excessive price for its good or service.

This concern was examined by the ACCC in its 2008 report into the Competitiveness of Retail Prices for Standard Groceries ("the Groceries inquiry") which focused on the market power of major supermarket chains and investigated whether those supermarket chains exploited their strong bargaining power. In the Groceries Inquiry, the ACCC appeared to accept that although a supplier in a weaker bargaining position may be exploited, that harm needed to be weighed against the benefits to end consumers of the major supermarket chains driving down the costs of goods purchased from those suppliers. In that inquiry the ACCC investigated the extent to which the benefits of lower wholesale prices that supermarkets were able to extract from suppliers were passed on to consumers in the form of lower retail prices. They found that competition between supermarkets was sufficient to ensure that they passed on at least some of the benefits to consumers. [4] Downstream competition was deemed to be effective despite the presence of buyer power.

Second, agencies might be concerned if an imbalance in bargaining power might **create an inefficiency in one part of the supply chain, affecting the overall surplus available to society**. An inefficiency could arise if a processor introduced a contract term which led to an inefficient allocation of risk to producers, for instance, which reduced that producers' incentive to invest. In turn, this may lead to increased costs of production in the long term (although the agency would need to understand why a processor would want to harm its supply chain and consequently increase its own long-term costs in this way).

The next section summarises the main findings from the ACCC's PAG inquiry and examines the reasons why the ACCC recommended that government may need to intervene in the commercial negotiations between producers and processers in that case.

III. THE ACCC'S PERISHABLE AGRICULTURAL GOODS INQUIRY

In August 2020, the ACCC launched a three-month investigation into perishable agricultural goods ("PAG") markets. These encompass horticulture products, eggs, dairy products, meat products and seafood. In its final report, released in December 2020, the ACCC identified gaps in the ability of the *Competition and Consumer Act 2010* ("CCA") to deal with the economic harms caused by bargaining power imbalances. [5]

4 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008. p. xiv.

5 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. viii.

A. A Focus on Bargaining Power Imbalance

The ACCC evaluated the bargaining power of firms operating across all levels of the supply chain, and how the relationships between firms at different levels affected bargaining outcomes.

One of the main reasons why bargaining power was a key focus of the inquiry was because the ACCC found that PAG markets often have characteristics that are likely to bring about bargaining power *imbalances*.

The ACCC also argued that market structure contributed to bargaining power imbalance. In particular, it argued that in markets with an imbalance in the number of buyers and suppliers (i.e. an oligopoly or oligopsony market structure on one side of the market), as is common in PAG markets, the outcome will, in general, be less efficient and less desirable than the competitive outcome that the ACCC believed would be delivered in a more "balanced" market.[6] Its reasoning is shaped by the consideration of the outside options available to buyers and sellers. The stronger bargaining position resides with the party with the better outside option, which allows it to negotiate better terms in commercial or contractual agreements.

B. The Nature of the Concern

The ACCC's concern in the PAG inquiry covered both of the concerns outlined in section 2.2 of this article – concerns with exploitative conduct, concerns about the nature of competition, and concerns around inefficiencies caused by market failure.

In terms of concerns relating to the firm in a stronger bargaining position (usually a processor) exploiting a firm in a weaker bargaining position (usually a producer), the ACCC argued that "*the more perishable a product, the weaker the producer's position from which to negotiate favourable terms of supply with the buyers of their goods, and the more vulnerable they are to take-it-or-leave-it terms from buyers or exploitative conduct.*"[7]

In terms of concerns around competition, the ACCC found that PAG markets were highly predisposed to market failure in the form of insufficient competition, but this was not really the focus of the PAG inquiry. Interestingly, in the PAG inquiry the ACCC did not appear to place any weight on the argument that bargaining power imbalances upstream – that is at the level of producer/processor interactions – were less concerning if the benefits from any low prices were passed on to end consumers; that is, if consumer welfare (measured at the level of end customers) was increased. Its focus, instead, was on whether hard bargaining between producers and processors removed value from that layer of the supply chain to the ultimate detriment of producers.

The main concern raised by the ACCC in its PAG report was that the presence of bargaining power imbalances would impact the efficiency of these PAG markets and result in harm to consumers. Here the ACCC looked separately at two different layers of the PAG market.

First, with regard to processor-producer relationships, the ACCC found that imbalances in bargaining power manifest in a range of ways, including:[8]

- ***one-sided contracting practices, including potential "unfair" contract terms regularly being present in producer supply agreements;***
- ***practices that go beyond hard bargaining, including inefficiently allocating risk to producers or suppliers, which often puts producers at risk of significant financial detriment;***
- ***a lack of transparency in relation to prices or quality assessment processes, affecting a number of PAG markets; and***
- ***resulting from all of the above, reduced confidence and investment by producers, potentially limiting productivity growth.***

It concluded that these features could affect the efficiency of the market – that is, they undermined producers' ability to make sound decisions about what and how much to produce and where they can obtain the best price for their produce.[9]

Second, with regard to supermarket-processor relationships, the ACCC noted the strong competition at the retail level for certain products, particularly perishable goods, despite the high levels of concentration in the industry. It found that:[10]

> *"This inquiry and previous studies have found that the profit margins of processors have decreased substantially over time in PAG and other industries. There are related concerns that,*

6 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

7 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. ix.

8 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

9 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

10 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xii.

while consumers may benefit from these practices and situations, value is being removed from PAG industries to the ultimate detriment of producers. While there is some evidence that retail pricing places substantial pressure on suppliers, based on this inquiry, there is no substantial evidence to indicate the efficient supply of goods is threatened over the longer term."

C. Is There a "Gap" in the Law When it Comes to Bargaining Power Imbalances?

Assuming the ACCC's assessment of bargaining power imbalances is reasonable, the next question for the ACCC was whether it had the tools available to address the economic harm it believed flowed from those imbalances.

It argued that the tools currently at its disposal were limited. It found that the competition laws in the CCA were not intended to inhibit all harmful effects of bargaining power imbalances nor to restore competition. As a result, it felt that competition laws could not address all of the harm caused to producers arising from bargaining power imbalances.

Instead, the ACCC found that the Australian Consumer Law ("ACL") and industry codes were the better tools to address the harm it identified. [11] However, although the ACL protects against unfair contract terms in standard contracts for small businesses, including through the business-to-business unfair contract terms framework, the ACCC identified some central weaknesses in this framework. It found, for example, that unfair contract terms were not illegal under the CCA and financial punishments to companies that include such terms cannot be ordered by a court.[12]

The ACCC also considered whether "codes of conduct" such as the Dairy Code, Horticulture Code and the Food and Grocery Code could also protect businesses from "non-contractual" behaviour arising from bargaining power imbalances.[13] But while the ACCC considered industry codes could be highly effective in tackling issues of bargaining power and lack of transparency in the appropriate markets, their effectiveness would be limited if these Codes are not enforceable or do not guarantee credible penalties for contravention.[14]

As a result, the ACCC recommended reinforcing existing laws in order to combat unfair negotiations between trading partners at different levels of the supply chain.

D. The ACCC's Recommendations

The ACCC provided a set of four legislative recommendations following the PAG markets inquiry.

The first recommendation was to strengthen the business-to-business unfair contract terms framework which seek to protect small businesses. Currently, it is not illegal to include unfair contract terms in standard contracts under the CCA, and the ACCC used the PAG inquiry to advocate for the outright prohibition of unfair contract terms.

The second recommendation was to introduce an economy-wide ban on unfair trading practices in the ACL.[15] The ACCC stated that this is necessary to address the economic harm that is not currently being addressed by the ACL and which is not covered in the proposed unfair contract terms legislative reforms currently being considered by the Government.[16]

The third recommendation was to strengthen the Food and Grocery Code, which is a voluntary code prescribed to improve standards of business conduct in the food and grocery sector, by making it a mandatory code which will apply to all applicable retailers and wholesalers in the industry and bolstered by the introduction of significant penalties for any party that contravenes the Code.[17]

Finally, the fourth recommendation was to explore actions to improve price transparency in PAG markets. The ACCC has previously given advice on enhancing transparency in some specific markets (in past studies relating to cattle and beef, wine grapes and dairy markets) but did not seek to provide specific recommendations in the PAG inquiry, in order to avoid "unintended consequences".[18]

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11 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

12 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

13 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiii.

14 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xiv.

15 The ACCC has suggested drawing on the approach taken in the U.S and in the European Commission to define an unfair trading practice. See p. 124 of the PAG report.

16 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xvii.

17 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. xvii.

18 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 1.

IV. INSIGHTS FROM THE PAG INQUIRY

Several recent investigations by the ACCC present clear examples of the increasing frequency of cases concerning negotiations between trading partners operating at different levels of the supply chain.

In April 2020, for example, the ACCC was approached by the Australian Government to develop a mandatory bargaining code to address a perceived bargaining power imbalance between digital platform operators and Australian news media publishers. In December 2020, the ACCC released its Statement of Issues setting out a concern that Woolworths' proposed acquisition of 65 percent of the shares in PFD Food Services will increase Woolworths' already strong bargaining power in dealing with suppliers, as well as remove an important alternative buyer, which may lead to a substantial lessening of competition in the acquisition of food products from suppliers. And also, in December 2020, in New Zealand, the Commerce Commission released a preliminary issues paper for its retail grocery sector investigation and indicated that it would investigate the relative bargaining power of both retailers and suppliers at all levels of the grocery market supply chain as supermarkets are recognised to have significant bargaining power over suppliers of grocery products in New Zealand.

Given the heightened concern with bargaining power imbalances, competition agencies in other jurisdictions may pay close attention to the PAG inquiry to see whether it provides a sound template for assessing whether bargaining power imbalances are likely to lead to economic harm in the particular market that they are investigating.

In our view, the PAG report provides the following insights for other agencies when considering the effect of bargaining power imbalances in a market:

There is a gap when dealing with concerns around bargaining power imbalances, at least in Australia.

The main concern when looking at bargaining power imbalances is the risk to economic efficiency.

Intervention should be limited to those cases where serious economic harm is caused by bargaining power imbalances.

A structural approach to identifying the sources of bargaining power imbalances ignores other factors that affect the outcome of a commercial negotiation.

It is difficult to provide any meaningful guidance on when conduct crosses the line between (socially beneficial) hard bargaining and harmful conduct that damages markets.

We discuss each of these below.

A. There is a Gap When Dealing with Concerns Around Bargaining Power Imbalances, at Least in Australia

Competition law in Australia – and in particular, the prohibition on misuse of market power – is aimed at exclusionary conduct. A firm with a substantial degree of market power is prohibited from engaging in conduct that damages the competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. Exploitative conduct – where a firm exploits its market power by charging supra-competitive prices – is not prohibited (although certain regulated industries are subject to price regulation under industry-specific regimes).

The inability of Australia's competition laws to prohibit exploitative conduct matters when dealing with an imbalance in bargaining power. There is no prohibition that prevents or prohibits a firm with a substantial degree of bargaining power from using that power to extract better terms of trade in a commercial negotiation with a trading party in a weaker position.

Generally, competition laws are also not well suited to deal with the potential inefficiencies that arise when a firm in a stronger bargaining position deals with a firm in a weaker position in a way that extracts value (or surplus) from the market and leads to economic harm.

As a result of these gaps, the ACCC has had to rely on vague laws around prohibiting "unfair trading practices" or "unfair contract terms." One of the risks with this approach is that it relies on laws that depend on subjective, undefined and unclear notions of fairness to address concerns that are actually about efficiency. Another is that it is concerned about the welfare of producers without considering the effect of the conduct (in terms of delivering benefits to) on consumers. This is discussed further below.

B. The Main Concern When Looking at Bargaining Power Imbalances is the Risk to Economic Efficiency

Although the ACCC argued that imbalances in bargaining power raised concerns with exploitative conduct (which it cannot address through Australia's competition law) and potentially competition (because of concentration at the processor layer of the supply chain), the main concern it raised was that the imbalance in bargaining power might lead to outcomes that were inefficient in the sense that they might discourage investment and/or cause otherwise efficient firms to exit the market in one part of the supply chain.

We agree that this is the main concern when looking at potential harms from an imbalance in bargaining power. The challenges,

however, are that there are often few laws or suitable remedies available to address the concern (discussed above) and that it is often difficult to identify when the inefficiency created by the imbalance of bargaining power is serious enough to warrant intervention (discussed below).

We note, however, that there is a risk when focussing on the potential inefficiency created by an imbalance in bargaining power, that the substantial benefits that hard bargaining might deliver to consumers in downstream markets might be overlooked.. The balancing of those upstream costs (to society) against the benefits (to downstream customers) is ultimately a task for policy makers, but the (upstream) efficiency effects of bargaining power imbalances should not be considered in isolation without considering their effects on other markets.

C. Is intervention Limited to Cases Where Hard Bargaining Leads to Serious Economic Harm?

In the PAG report the ACCC set out how efficiency might be affected by a bargaining power imbalance. In relation to the producer-processor layer of the supply chain, for example, the ACCC pointed to the risk of several "harmful" practices, including unfair or one-sided contract terms, inefficient allocation of risk to producers, and inadequate transparency of price and quality assessments at lower levels of the supply chain. According to the ACCC, these practices were likely to reduce a producers' incentive to invest and diminish their overall confidence in PAG markets.

Unfortunately, one of the weaknesses of the PAG report is that the ACCC was not able to first demonstrate that those harms were significant enough to warrant intervention and second, to establish that costs of intervention did not exceed the inefficiencies it identified as a result of the bargaining power imbalance. For instance, while the ACCC found that some harms may have occurred in PAG industries as a result of reported market failures, it acknowledged that it had "*not been able to quantify the extent to which this has occurred*."[19] In fact, not only was the ACCC unable to quantify the harm, it was also not able to even substantiate a number of the claims that it had heard about how processors with a stronger bargaining position behaved.

This could have been excused if the ACCC was confident that the conduct it identified would lead to harm in the round, but it admitted that it wasn't certain that it did. Its conclusions, for example, state that the "*information submitted to the ACCC for this inquiry indicates some harm has **likely** resulted from imbalances in bargaining power in PAG supply chains*."[20] And that "*while not all suppliers and producers are likely to have been impacted equally, there are **some trends** in behaviour which are **likely** to lead to inefficient outcomes.*"[21]

It is concerning that, on the basis of these findings, the ACCC felt that it could make wide-ranging and far-reaching recommendations to introduce vague and undefined prohibitions to deal with "unfair" contract terms or "unfair" trading practices that may or not have led to harm that may or may not be significant. At a minimum, further analysis of the potential costs of intervention – such as raising transaction costs by prohibiting standard form contracts or increasing the risks of coordination by promoting price transparency – should be undertaken to ensure that these will not exceed the benefits.

D. A Structural View of the Sources of Bargaining Power Imbalances is Too Narrow

In the PAG report, the ACCC argued that the *number* of competitors at each level of the supply chain determines how trading parties interact with each other across that supply chain.[22]

The view that the "*intensity of competition and efficiency of outcomes generally change in accordance with the number of buyers and sellers on each side of the market*"[23] ignores the large number of factors other than market structure that affect bargaining power.

For instance, its 2019 inquiry into the *Economic Regulation of Airports,* the Productivity Commission (PC) in Australia noted the following factors, which it claimed determine the nature of the interaction between trading parties:[24]

- alternative buyers or sellers (outside options) — a party has more bargaining power if it is able to choose between alternative buyers or sellers, than if it has few or no alternatives. For example, an airport that services

19 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 50.

20 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 72.

21 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 72.

22 Its view was that a market structure which has many buyers and many sellers is optimal for competition and efficiency, but is less common in PAG markets and that a greater degree of regulatory intervention can be warranted in markets with the least efficient outcomes, as the cost of intervention is more likely to be offset by the greater efficiency gains to be made. See ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

23 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

24 Productivity Commission, *Economic Regulation of Airports*, Report no. 92, June 2019. p. 122.

several airlines may have more bargaining power over an individual airline than if it has a single airline customer

- access to information — a party has more bargaining power if it is privy to information that could influence the transaction and that other negotiating parties do not know. This could include information on, for example, market conditions such as demand forecasts, or information specific to the bargaining position of other parties, such as a seller's cost structure or a buyer's willingness to pay

- previous commitments — a party can undertake actions prior to or during negotiations that commit it to a particular position

- the risk of breakdown — a party has more bargaining power if it is unconcerned about a breakdown or "stalemate" in negotiations

- patience — a party that has a higher opportunity cost of negotiating and a greater relative benefit from reaching an agreement typically has less bargaining power[25]

In our view, the approach taken by the PC to identify the factors that determine the nature of the interaction between trading parties should be preferred as it discusses the strength or credibility of the *outside options* available to parties rather than just the market structure. Although a large number of outside options may be preferable to a smaller number of outside options, it is the strength and credibility of those options that matter rather than the number of them.

E. It Is Difficult to Provide Meaningful Guidance on When Conduct Crosses the Line

In the PAG report, the ACCC accepted that there was a line between hard bargaining that is a feature of a competitive market and which can help to improve overall market outcomes and hard bargaining that causes economic harm. The former can help to promote efficient allocation of resources and helps to ensure prices do not increase above competitive levels, which would be harmful to end customers and the broader economy.[26] The latter may lead to a market failure which risks misallocating resources.

But what was missing from the PAG report was any serious attempt to identify the type of conduct that goes "*beyond hard bargaining,*" to constitute significantly harmful practices.[27]

The approach that the ACCC took to identify when bargaining was too hard was to present some specific examples where some of the potential outcomes of harmful conduct *may* have happened.

A problem with the ACCC's approach, however, it is often very difficult to distinguish bargaining that is a feature of a competitive market and bargaining which causes economic harm. The only attempt made by the ACCC to draw a distinction was to identify conduct that appeared to cause commercial harm to one part of the supply chain.

For instance, the contracts that the ACCC pejoratively defines as "take-it-or-leave-it" contracts are often simply standard form contracts that reduce the transaction costs incurred by both parties when entering into an agreement. A blanket prohibition on such contracts will increase the costs associated with contracting and may deter mutually beneficially transactions and actually make it harder for producers and processors to remain viable.

Similarly, a concern that a powerful buyer could push down the price that it pays to producers below the competitive level[28] may simply reflect the choice made by a producer to accept a lower price in exchange for a longer-term agreement that provides certainty of sales.

The approach taken by the ACCC in the PAG inquiry risks too quickly condemning conduct that may not necessarily lead to market failure and recommends changes to laws that will apply to markets well beyond the PAG markets which the ACCC felt were particularly susceptible to bargaining power imbalances. This leads to the risk that the intervention may be worse than a (potential) inefficiency identified by the ACCC that may be relevant to only a small sub-set of markets.

V. CONCLUSION

The comprehensive Competition Policy Review chaired by Ian Harper recognised the difficulty with drawing a line between hard bargaining that is a feature of a competitive market and which can help to improve overall market outcomes and hard bargaining that causes economic harm. That review noted that "*[w]hile*

25 Concina, L. 2015, Negotiation and Economics: basics, The Foundation for an Industrial Safety Culture (Foncsi), https://www.foncsi.org/fr/blog/publication-nouveau-regardnegociation-economie; Muthoo, A. 2000, "A Non-Technical Introduction to Bargaining Theory," World Economics, vol. 1, no. 2, p. 145–166.

26 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 47.

27 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 47.

28 ACCC, *Perishable agricultural goods inquiry*, November 2020. p. 8.

imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited…such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors […]."[29]

The ACCC's PAG inquiry paid lip service to that difference but failed to grapple with the challenges it represented. The ACCC's approach in the PAG report does not provide a robust method of identifying when efficiency and investment in related markets is seriously damaged by bargaining power imbalances and suggests an increased willingness to intervene in commercial negotiations in a way that simply re-allocates economic rents (that is, the surplus discussed earlier) across the supply chain when efficiency considerations are not at stake. What is even more disappointing, however, is that on the basis of scant evidence and no quantification, the ACCC sought more powers to intervene in commercial negotiations between trading parties in industries well beyond those it considered during the relatively short PAG inquiry. ■

29 Harper *et al*, Competition Policy Review: Final Report, Competition Policy Review Panel, Commonwealth of Australia, 2015, page 334.

COMPETITION IN ONLINE MARKETS

BY JEFF PAINE, SARTHAK LUTHRA & EDIKA AMIN [1]

1 Jeff Paine: Managing Director, Asia Internet Coalition (AIC); Sarthak Luthra: Secretariat, AIC; Edika Amin: Analyst, AIC.

I. INTRODUCTION

Today, digital platforms have become the centerpiece and main drivers of digital transformation, through the rise of services such as marketplaces (Amazon), application stores (Apple), social networking sites (Facebook) and search engines (Google). These digital infrastructures have changed the nature of our daily transactions and created new opportunities for firms to scale up across all sectors.

It is important to note that the technology sector is not limited to a handful of big U.S. companies. There is a range of large firms from the U.S., Europe and Asia that compete globally to provide innovative services to their users. In Asia, Baidu, Alibaba and Tencent to name but a few, generate billions of dollars of revenue and can tap on a very large user base.

There is also intense competition among big tech companies across products and regions. For example, on general search, DuckDuckGo hit a record[2] 1 billion monthly searches in January 2019 demonstrating that a new entrant can compete in this space. And growing fast, with nearly 2.4 billion monthly searches in November, averaging 80 million daily searches. In APAC, the competition is even more intense, with very strong local players, such as Naver in Korea.

II. KEY COMPETITION ISSUES OBSERVED

In recent years, many competition authorities and competition law scholars have focused on technological dimensions and its impact on traditional business models. Their efforts have commonly revolved around additional regulation with regard to issues related to data and digital ads. This section looks to shed light on these concerns and misconceptions that exist today.

A. Data and Competition

The wide availability and ease of obtaining data are among the factors that have fueled the development of the digital economy. While many commentators stress the importance of the collection and processing of datasets by tech companies, there are two additional factors that have an even more significant contribution to digital markets: First, computational resources and in particular cloud computing, provides access to hardware and software at no or low cost and on demand basis. Second, technical expertise in the field of computer science allows firms to analyze, understand and derive insights from data.

Data is increasingly abundant. By the end of 2020, it is estimated that 1.7MB of data will be created every second for every person on earth.[3] Data is also non-rivalrous. Its consumption does not decrease its availability to others, unlike other raw materials or inputs required in traditional industries. A user can upload the same information (e.g. photos, contact details etc.) to different social networks and firms can process the same datasets. For instance, Commoncrawl has built an open repository of web crawl data that can be accessed and analyzed by anyone.[4]

Many companies in different sectors have proven that you can quickly outperform incumbents just by having a better product or service but not more data. New entrants can quickly accumulate the data they need to enter the market, as the proliferation of dating apps and genealogy services show. In little more than 10 years, 23andMe has gone from a start-up to having more than 5 million customers. In 2018, it announced a cooperation agreement with GlaxoSmithKline, which also made a US$300 million investment in the company. When Google first developed its voice assistant, it opened up a free telephone directory service to obtain enough voice samples to get its speech recognition software off the ground. This is an approach that other companies could likely replicate.

Amid such competition, data is not an entry barrier to search engines. Large amounts of data have diminishing returns for search providers, and search providers without large amounts of data compete by innovating and offering differentiated services. The basic components of a search engine, such as a web crawler, are relatively simple and in many cases are available to new entrants on a free and/or open source basis. New entrants can (and do) partner with existing search engine providers (like Bing) to complement their own web crawling and indexing efforts. This allows rivals to focus their investment in the "special sauce" of differentiating features, which is where most search competition and innovation happens.

B. Digital Ads Do Not Dominate the Market

Digital companies compete with TV broadcasters, newspapers, radio, podcasts, and outdoor for a piece of a single advertising budget. Advertising investments are a reflection of consumer trends. Most advertisers and agencies use a mix of different media as the most effective way to reach a target audience. Different media, both online and offline, compete with one another

2 https://www.searchenginejournal.com/duckduckgo-hits-a-record-1-billion-monthly-searches-in-january-2019/291609/.

3 https://www.socialmediatoday.com/news/how-much-data-is-generated-every-minute-infographic-1/525692/.

4 http://commoncrawl.org/.

for consumer attention and ad spend. Advertisers focus on their goals (reaching audiences, ROI, etc.), not on artificial distinctions based on media.

Secondly, the ad tech ecosystem is famously crowded and competitive. There are thousands of companies operating in "ad tech" that work together and in competition with each other. Some of them are big, familiar names like Adobe, Amazon, AT&T, Facebook, Google, Oracle, and Verizon. Others — including Criteo, Index Exchange, MediaMath, OpenX, Magnite, and The Trade Desk — are less well-known outside the industry but operate important, scaled businesses.

Lastly, digital ads allow advertisers and publishers benefit from a plethora of options**.** Advertisers and publishers work with multiple ad tech vendors to get the best possible deal, achieve the best possible results or take advantage of innovative new offerings from startups or established players. They are able to freely choose different players at each level of the ad tech stack and use more than one provider for the same function (i.e. "multi-home"). Publishers and advertisers also can, and do, switch between suppliers. In the US, market research firm Advertiser Perceptions interviewed 441 marketers and found that, on average, advertisers used 3.7 demand-side platforms ("DSPs").[5] 41 percent of advertisers used Amazon's DSP, 35 percent used Google's, and 26 percent used The Trade Desk. In addition, suppliers are incentivized to ensure their products are interoperable with others, because many businesses use a combination of ad tech products. In a study this year of 155 major digital publishers, Advertiser Perceptions found that the average publisher uses six supply-side platforms ("SSPs") and intends to use eight SSPs next year.[6] The Wall Street Journal sells their inventory through 17 different platforms[7] (see WSJ's ad.txt file). In Australia, advertisers and publishers regularly multi-home and mix-and-match ad tech products from different vendors.

III. BENEFITS OF A DIGITAL ERA AND TECH'S ROLE IN SPURRING ECONOMIC RECOVERY

A. Consumers benefit from an unprecedented choice in digital

Digital goods (e.g. smartphones) and services (search engines, messaging etc.) have created consumer surpluses and large gains in well-being that are not reflected in conventional measures of GDP and productivity. A recent study from MIT[8] (April 2019) shows that people valued search engines at an average of US$17,530 per year, and email at US$8,414. Consumers around the globe have never had such a wide choice of digital products and services that (i) meet their needs for information (ii) enable them to connect with one another and (iii) seamlessly perform tasks that used to take sizeable amounts of their days.

The ad tech industry has enabled small and medium size businesses to grow. The benefits, among others, include:

- **Maximizing ROI**: the development of the ad tech industry has enabled small and medium businesses to utilize advertising in continually more efficient and cost-effective ways. The use of targeted advertising and pay-per-click (rather than per-impression) allows small advertisers to maximize returns from their campaign.

- **User relevance:** unlike other traditional forms of advertising, ad tech helps deliver more targeted and relevant advertisements to users. Another benefit over traditional forms of advertising is that ad tech provides for detailed reporting and analysis through sophisticated analytic tools, allowing businesses to clearly track the effectiveness and success of campaigns.

- **Leverage inventory:** ad tech, and in particular programmatic advertising, has created many more monetizing opportunities for the publishers. It has also enabled publishers to maximize the yield from their inventory, and allows publishers to realize profits per impression.

B. Covid-19 & Economic Recovery

Tech companies' diversified, stable businesses coupled with cash reserves to weather a downturn, means the tech sector can help power the recovery for the broader economy.[9]

- *Apps*: Google Play and App Store downloads were up in Q1 2020, with over 30 billion new app downloads, driving value to developers and increasing choice for consumers.[10]

- *E-Commerce:* Google Shopping recently made it free to sell

5 https://www.marketingdive.com/news/amazons-dsp-jumps-ahead-of-googles-as-most-used-by-advertisers-study-say/541464/.

6 https://www.adexchanger.com/platforms/amazon-emerges-as-google-challenger-in-advertiser-perceptions-ssp-report/.

7 https://www.wsj.com/ads.txt.

8 https://www.pnas.org/content/116/15/7250.

9 https://www.wsj.com/articles/surging-tech-stocks-nearly-push-nasdaq-out-of-the-red-11588248000?mod=tech_featst_pos1.

10 https://www.appannie.com/fr/insights/market-data/weekly-time-spent-in-apps-grows-20-year-over-year-as-people-hunker-down-at-home/.

on Google.[11] This increases competition and choice in online shopping and among retailers. It gives retailers free exposure to millions of people who come to Google every day for their shopping needs. And it gives shoppers access to more products from more stores.

IV. MOVING FORWARD, A GLOBAL POLICY MINDSET IS NECESSARY

We wish to reference a position paper on EU competition policy,[12] jointly developed by the Nordic competition authorities about the potential changes to EU competition law, they emphasize the need for regulatory harmonization to avoid fragmentation and ask for clarity on the problems that regulations aim to tackle.

The Nordic competition authorities also stress the importance of ensuring compatibility between traditional competition enforcement tools and the proposed legislative initiatives by clarifying the kind of problems intended to be tackled by these different policy tools. This is essential for ensuring the effective enforcement of the competition rules to the benefit of consumers and companies, as well as appropriate legal certainty and transparency for all, paving the way for open markets and innovation incentives."

Finally, it is essential to note that these digital platforms have also played an important and positive role in our economies, not only fostering innovation and underpinning economic growth, but also creating opportunities for companies and consumers. Therefore, regulatory intervention may not ensure the same level of flexibility and adaptability seen in the enforcement of competition law. In particular, it is doubtful that it would be beneficial to introduce a detailed list of obligations and prohibitions within an ex ante regulatory framework**.** This is because the same type of conduct can have both pro and anticompetitive effects depending on the market and/or the specific gatekeepers, and because digital markets are fast-moving. Furthermore, such a regulatory intervention should rely on a clear and objective set of criteria.

V. APPENDIX

Competition landscape:

- **Australia**: The Australian Competition and Consumer Commission ("ACCC") is increasingly focusing on digital platforms, and competition and consumer law issues in the digital economy and traditional markets affected by digital disruption. ACCC is working on Digital Platforms Inquiry, which is examining the impact of search engines, social media platforms and other digital content aggregators on competition in media and advertising services markets.
- **Singapore:** The Competition and Consumer Commission of Singapore ("CCCS") has a keen interest in competition issues relating to digital platforms, and has been actively considering the opportunities, challenges and policy implications of digital platforms for several years. CCCS is updating its competition guidelines to provide more clarity and guidance to businesses in the digital sector. This follows the commission's e- commerce platform market study report released on 10 September 2020. CCCS has urged e-commerce platform operators to raise sellers' awareness and understanding of the Consumer Protection (Fair Trading) Act (CPFTA) and encouraged sellers to adopt its recommended "good trade practices." As the COVID-19 pandemic catalyzes business digitalization in Singapore and the region, it is expected that CCCS will continue its focus on competition issues in the digital sector well into 2021.
- **Japan**: The JFTC is updating the Draft Guidelines concerning Abuse of a Superior Bargaining Position Transactions between Digital Platform Operators and Consumers.
  - The Draft Guidelines is a further departure from international competition law norms. Abuse of Superior Bargaining Power (ASBP) in its original application to B2B was already a departure from international competition law principles (i.e. enforcement against abusive conduct based on dominance or substantial degree of market power). The extension of ASBP to cover B2C — in particular with regard to personal data — is a further departure from international norms.
  - Divergence of Japanese competition law policy from internationally-recognized competition law principles risks creating a significant barrier to entry into the Japanese market, particularly given the global nature of the digital economy.
  - AIC proposed aligning definition of "digital platforms" to be consistent with international discussion. For example, in the EU, Platform to Business (P2B) regulations defines "platform business" as Online Intermediation Service which fulfils 1) It is an online platform 2) It allows other businesses to offer goods or services to consumers so that those businesses can transact with consumers.
  - The regulation should also avoid duplication of or inconsistency with existing laws. Where other laws and legal regimes already address the protection of consumer data and are naturally better suited to do so, it is ill advised to create additional rules.

11 https://www.blog.google/products/shopping/its-now-free-to-sell-on-google/.

12 https://www.kfst.dk/media/ockjqz0b/digital-platforms-and-the-potential-changes-to-competition-law.pdf.

- **India**:

  - The Government of India introduced new e-commerce rules in 2018 to promote competition and prevent restrictive practices by online e-commerce platforms. The new rules, which came into effect on 1 February 2019, prohibit e-commerce platforms from selling products from companies in which they have an equity interest; platforms are required to provide services, including fulfilment, logistics, warehousing, advertisement and marketing, payments and financing to sellers on the platform at arm's length and in a fair and non-discriminatory manner; and platforms are not permitted to mandate any seller to sell any product exclusively in their marketplaces.

  - India also amended the Competition (Amendment), Bill 2020. The Draft Bill proposes to introduce several changes which shall have the effect of making the overall competition enforcement more efficient, thereby benefiting the market players, end consumer as well as the overall market. ■

THE DIGITAL COASE THEOREM AND THE NEWS

BY AURELIEN PORTUESE[1]

1 Director, Antitrust & Innovation Policy, Information Technology and Innovation Foundation; Law Professor, Brussels School of Governance, Free University Brussels (VUB).

I. INTRODUCTION: THE NATURE OF THE PROBLEM

The rise of digital platforms has enabled individuals worldwide to access news articles with unprecedented ease.[2] Digital companies have innovated and designed applications whereby individuals can access tailor-made news content (hereafter, the "news aggregator apps"). The multiplication of news aggregator apps has not eclipsed the ascendency of two highly appealing companies to users: the social media platform Facebook and the search engine Google.[3] These two companies have designed complex algorithms to best suit the individuals' preferences concerning news topics and trends.

A. The Problem Identified

News aggregator apps, including Facebook and Google, curate online third-party news but do not publish them (hereafter, the "news publishers"). News aggregators are legion and include medium-sized companies as well as digital leaders.[4] On the other hand, news publishers, from newspapers to magazines, have traditionally been slow to react to the on-going digital innovation which has disrupted the way individuals consume news: printed matter, generating income streams by selling physical copies and by the advertising included inside, were gradually but inevitably on the wane as individuals vastly preferred digital news format, which in many cases were harder to monetize.[5] Traditional news publishers experienced a sizable decrease in their revenues. Most of them developed their apps, and all of them were referenced in news aggregator apps as a necessary venue for increasing web traffic to their websites.[6] While on the publisher websites, readers generate income through advertising revenues associated with articles, through paywalls,[7] or a combination of the two.

Nevertheless, publisher trade associations coalesced to lobby governments and raise awareness about the news publishers' decrease in revenue in the digital age. Allegedly, their revenues through both their own websites and their reference in news aggregator apps were much lower than previously realized. Admittedly, news publishers' unpreparedness to digital disruption and the increased competition in news markets with online-only news platforms, thanks to the digital disruption, all contributed to a noticeable decrease in revenues.

The coalition of news publishers experiencing a loss of revenues generated anger, frustration, and the need to push for government interventions, through regulations and subsidies, to preserve the "traditional" model of curating news articles.[8] Because the news aggregator apps were designated as the source of the decline in news publishers' revenue, governments felt the need to intervene to save news publishers and increase their profitability, news publishers argued worldwide. The problem was easily identified. The scapegoats were quickly singled out; since news aggregator apps used excerpts and pictures from news articles (so-called "snippets") protected under copyright laws, governments had to regulate the use of protected content by news aggregator apps. The news publishers argued these aggregator apps freerode on news publishers' copyrights while generating their own advertising revenue.

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2 Damian Radcliffe & Christopher Ali, Local News in a Digital World: Small-Market Newspapers in the Digital Age, *Tow Center for Digital Journalism, Tow/Knight Report*, Fall 2017; Jahangir Karimi, Zhiping Walter, The Role of Dynamic Capabilities in Responding to Digital Disruption: A Factor-Based Study of the Newspaper Industry, 32 *Journal of Management Information Systems* 1, 39-81 (2015).

3 Celina Ribeiro, Can Australia Force Google and Facebook to Pay for News? *Wired*, August, 30, 2020.

4 Angela M. Lee & Hsiang Iris Chyi, The Rise of Online News Aggregators: Consumption and Competition, 17 *The International Journal on Media Management* 1, 3-24 (2015); Chris Fitzgerald, 7 Great News Aggregator Websites You Should Check Out (Plus How to Build Your Own), *Themeisle*, January 13, 2021 (where none of them are either Google or Facebook); Doh-Shin Jeon, Nikrooz Nasr, News Aggregators and Competition among Newspapers on the Internet, 8 *American Economic Journal* 4, 91-114 (2016); Doh-Shin Jeon, Economics of News Aggregators, *Toulouse School of Economics Working Paper N°18-912*, April 2018.

5 George Brock, *Out of Print: Newspapers, journalism and the business of news in the digital age*, London: Kogan Page Limited (2013); Derek Thompson, The Print Apocalypse and How to Survive It, *The Atlantic*, November 3, 2016; OECD, The Evolution of News and the Internet, *DSTI/ICCP/IE(2009)14/FINAL,* June 11, 2010.

6 Elizabeth Grieco, Fast facts about the newspaper industry's financial struggles as McClatchy files for bankruptcy, *Pew Research Center, February* 14, 2020.

7 Or "datawall" on based on an ad-funded business model, see Tom Evens, Kristin Van Damme, Consumers' Willingness to Share Personal Data: Implications for Newspapers' Business Models, 18 *International Journal on Media Management* 1, 25-41 (2016).

8 Kristy Hess, The government's regional media bailout doesn't go far enough – here are the reforms we really need, The Conversation, August 19, 2020; Bree Nordensen, The Uncle Sam Solution, *Columbia Journalism Review,* September-October 2007; Jelle Boumans, Subsidizing The News? *Journalism Studies*, 2264-2282 (2017); Marc Tracy, With Little Hesitation, Struggling News Outlets Accept Federal Aid, *The New York Times,* April 29, 2020; Charles Rusnell, Financially struggling newspapers to get federal money within weeks, heritage minister says, *CBC*, April 27, 2020.

In comparison, news publishers' advertising revenues depleted mostly because individuals were satisfied with the excerpts of news articles and were often unwilling to click through to visit the news publishers' websites. Therefore, news publishers argued that news aggregator apps created a negative externality by freeriding legally protected content. More eloquently, Facebook and Google were identified amongst the news aggregator apps responsible for such freeriding as the perfect scapegoats. The media and Government then shifted their focus to consider how best to regulate their practices.[9]

This problem has been addressed in two alternate, yet comparable, ways the Australian solution of a Code and the French solution of court proceedings.

B. The Solutions Compared

The Australian Government intervened to protect traditional news publishers' income with a so-called "Media Bargaining Code."[10] Assuming that news aggregator apps, especially Facebook and Google, enjoy an excellent monopsony power at the expense of traditional news publishers, the Australian Government's goal is to address bargaining power imbalances between Australian news publishers and digital platforms. The chosen digital platforms are only Facebook and Google due to a discretionary selection amongst many other news aggregator apps. The mandatory Code forces news aggregator apps Facebook and Google to "adequately" compensate news publishers for viewing monetization and revenue-sharing commitments. By designing a bargaining framework to address the digital platforms' monopsony powers, the Code requires digital platforms to reach an agreement, "in good faith," with news publishers within three months after the Code comes into effect. Should the negotiations fail to reach an agreement or the agreement raise disputes, a third-party mediator could force the digital platforms to pay for using the articles' excerpts. The legislative obligation to financially compensate for the negative externality created by digital platforms' use of snippets at the expense of news publishers is equivalent to a fiscal tax, given the financial levy's mandatory aspect. The economic rationale underpinning such fiscal duty appears blatant: it is a Pigouvian tax.[11] Named after Arthur Charles Pigou, such a financial duty aims to internalize the negative externality created by the tortfeasor. Here, the financial duty paid directly to news publishers is expected to cause Facebook and Google to internalize the alleged externality stemming from the use of news publishers' snippets without compensation.

The French approach to the problem illustrates another solution. The European Union has copyright legislation encompassing eleven directives and two regulations. Of highest relevance, the 2019 EU Directive on copyright and related rights in the Digital Single Market enshrines news publishers' entitlement to be remunerated for snippets referenced by news aggregators.[12] The justification for such compensation are the so-called "neighboring rights" – a regulation-created right granting content creators a right to be compensated whenever a reference to their creations are made. Thus, news publishers become entitled to remuneration whenever snippets of their articles, albeit protective of copyrights thanks to paywalls, are referenced by news aggregators. Article 18 of the Directive states that "Member States shall ensure that where the authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration" but also paradoxically and immediately states that "in the implementation in the national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and fair balance of rights and interests." The regulator can interfere in such contractual freedom and set the allegedly appropriate remuneration. This is precisely what occurred in France, where the French Competition Authority delivered a decision on April 9, 2020, where interim measures against Google were imposed.[13]

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9 Cecilia Kang, The Decimation of Local News Has Lawmakers Crossing the Aisle, *The New York Times*, January 12, 2020; John Horgan, How Facebook and Google are killing independent journalism, *The Irish Times,* July 13, 2016; Shira Ovide, Google and Facebook Killed Free Media, August 9, 2016; Jawad Iqbal, Tech giants can't be allowed to kill local journalism, *The Times*, October 6, 2020; Adrienne Lafrance, The Mark Zuckerberg Manifesto Is a Blueprint for Destroying Journalism, *The Atlantic*, February 17, 2017; Jill Lepore, Does Journalism Have a Future? *The New Yorker*, January 28, 2019.

10 The Parliament of the Commonwealth of Australia, House of Representatives, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2002*, December 9, 2020, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId:r6652%20Recstruct:billhome; Australian Competition & Consumer Commission, *Mandatory News Media Bargaining Code*, Concepts Paper, May 19, 2020, https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf.

11 Arthur Charles Pigou, *The Economics of Welfare,* London: MacMillan & Co. Ltd (1920), https://archive.org/details/dli.bengal.10689.4260.

12 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, L 130/92, May 17, 2019.

13 French Competition Authority, Decision 20-MC-01 of April 9, 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information Générale and others and Agence France-Presse, April 9, 2020, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf.

The claimant, the French trade association of news publishers and others ("Alliance de la presse d'information Générale" and others and Agence France-Presse), protested that Google preferred to no longer show snippets rather than remunerating news publishers for snippets' display. After having granted Google free licenses for their snippets' use and display, news publishers were granted the right to force Google to display and pay for these snippets, even though the European Directive and French implementing law only required duty to negotiate fairly should Google want to display snippets. The Paris Appeal Court has confirmed the French competition authority's decision on October 8, 2020.[14] Akin to the Australian approach where the forced display of snippets is associated with a forced remuneration, the French approach to sue Google is tantamount to enforcing a Pigouvian tax. The French decision requires Google to enter negotiations with no other outcome possible but to display and pay for the snippets it wanted to withdraw.

Both approaches, the Australian Code and the French proceedings, entice a Pigouvian tax aimed at internalizing the perceived negative externality created by Google or Facebook when using snippets of news publishers' articles. Both approaches, it can be argued, have pitfalls if one ponders the reciprocal nature of the problem identified.

C. The Reciprocal Nature of the Problem

Both approaches address the identified disagreement as a problem where digital platforms, arbitrarily confined to Google and Facebook, are considered freeriding on the value created by news publishers without generating an added value when displaying snippets. This inaccurate view overlooks the so-called reciprocal nature of transaction costs, as seminally emphasized by Nobel Prize laureate Ronald Coase.[15] Coase indeed stressed that:

> "The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."[16]

In the problem inquired, we can certainly acknowledge the use by digital platforms of articles' snippets under copyright protection. However, these snippets are licensed for free to digital platforms such as Google and Facebook.[17] Additionally, many news publishers post these snippets themselves on social media platforms.[18]

More importantly, the externalities never are one-sided, as eloquently demonstrated by Ronald Coase's demonstration of the reciprocal nature of the problem of transaction costs. Indeed, in our case, Google and Facebook (and many other news aggregator apps) may cause an externality by using and referencing snippets created and curated by news publishers. However, Google and Facebook's use of snippets also generate incommensurable benefits to news publishers; it provides free referencing, thereby developing web traffic to websites where the news publishers can earn revenues through advertisements and paywalls.19 Consequently, the news aggregator apps, notably Google and Facebook, generate a positive externality towards news publishers. Their referencing generates massive web traffic and high exposure to internet users' attention. They attract clients to news publishers' websites in the manner of Yellow Page listings used to attract potential clients to professionals. The fact that Google and Facebook, among others, reference news publishers' websites for the latter to generate profits once the end-users browse these websites inevitably leads to the conclusion that the externality thus created is positive.

The positive externality was acknowledged both in Spain and Germany, where, in both countries, Google and Facebook were

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14 Paris Appeal Court, *Société Google LLC, Société Google Ireland Ltd, Société Google France SARL c/ Le Syndica des Editeurs de la Presse Magazine (SPEM), Agence France-Press (AFP), Alliance de la Presse d'Information Générale,* 20/08071, October 8, 2020, https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf (available only in French).

15 Ronald H. Coase, The Problem of Social Cost, 3 *The Journal of Law & Economics*, 1-44.

16 *Id*. at p.2.

17 This free licensing raises doubts as per the reality of the protected nature of the snippets since copyrights owners may legitimately be claimed to have implicitly, with this free licensing, waived off its claims on the snippets.

18 Again, the nature of the protected content may be put into question since, assuming the copyright owner cannot generate a self-inflicted harm, the copyright owner can be alleged to have abandoned his copyright claims.

19 Deloitte, The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain, and the UK, March 2016; Susan Athey, Markus M. Mobius & Jeno Pal, The Impact of Aggregators on Internet News Consumption, *Stanford University Graduate School of Business Research Paper N°17-8,* (2017); Alice Ju, Sun Ho Jeong & Hsiang Iris Chyi, Will Social Media Save Newspapers? Examining the effectiveness of Facebook and Twitter as news platforms, 8 *Journalism Practice*, Issue 1, (2014); Charlotte Tobitt, Facebook and Google referrals boost contributed to jump in news traffic at start of Covid-19 crisis, *Press Gazette*, July 31, 2020.

required to compensate for the news snippets.20 Instead of forced pay, the digital platforms de-referenced and started to shut their news services in these countries. Immediately, web traffic for news publishers plummeted. Their reactions were unanimous; publishers preferred to revert to the previous situation where news aggregator apps were "freeriding" by using snippets for free. Indeed, the negative externality cost is much lower than the benefit derived from increased web traffic to the publishers due to the use of snippets. Therefore, the news publishers are the cheapest-cost avoiders here. Publishers can avoid the costs by not requesting financial compensation for the snippets and instead allowing news aggregator apps to freeride by not requesting compensation for the snippets. The cheapest-cost avoiders (i.e., news publishers) could maximize their benefits while allowing digital platforms to generate benefits. Mutual gains from bargaining over snippets' rights could be developed given the imbalance between the small costs incurred by the use of snippets (namely, opportunity costs of missed compensation) and the considerable benefits generated by these snippets (namely, increased web traffic and increased revenues).

Consequently, as Ronald Coase had argued in his seminal examples, the problem identified is reciprocal nature. Thereby, the problem at stake enables us to delineate the contours of a "Digital Coase Theorem."

II. THE DIGITAL COASE THEOREM

A. The Problem of Transaction Costs

In his article from 1960, Ronald Coase used the example of a neighboring property's occupation by a cattle-raiser. He considered that whenever the costs of the crop damaged are greater than the net benefits derived from the sale of the undamaged crop, then the two neighbors may enter into a mutually beneficial bargain according to which that tract of land is left uncultivated.[21] Coase then demonstrates that irrespective of the liability rules (whether the cattle-raiser is responsible for damages or the farmer is responsible for protecting the crop), a mutually beneficial bargain would be reached if property rights are well assigned, and transaction costs are low. Coase contemplates that the mutually beneficial outcome, which minimizes the social cost, may very well be that the cattle-raiser pays the farmer to fence the crop since the farmer is the one who can minimize the costs most cheaply. However, the traditional approach assigns liability to the cattle-raiser to fence his land at a more significant cost than the farmer would fence his. Most fundamentally, the ideal solution envisaged by Coase is prevented from occurring in real life due to a formidable impediment present in all interactions: the presence of transaction costs. Because the cattle-raiser and the farmer may be hindered from bargaining (due to opportunism, the number of actors involved, the information asymmetries, etc.…), such Coasian bargaining cannot occur, and a less efficient solution prescribed by traditional liability rules will be enforced. This is the problem of transaction costs, whereby efficient outcomes are out-of-sight due to high transaction costs. Absent transaction costs in a theoretical world, the assignment of property rights becomes less relevant since market actors will be able to bargain over their property rights to reach efficient, mutually beneficial solutions identifying the cheapest-cost avoiders of any damage.

In our case of neighboring rights granted to news publishers, the number of news publishers and the presence of many opportunistic behaviors (such as rent-seeking practices, hold-up problems, etc.…) prevent news publishers and the digital platforms from reaching a mutually beneficial agreement where the social cost is minimized by the proper identification of the cheapest-cost avoider. Moreover, property rights are poorly assigned despite legislative attempts to clarify; neighboring rights may contradict access rights. Neighboring rights may also unduly expand the reach of copyright protection to allow for opportunistic behaviors and prevent the free use of ideas and content deliberately circulated by the content creator. Because both transaction costs are high and because property rights are poorly designed and enforced, Coasian bargaining can hardly take place in an environment where the cheapest-cost avoider may very well be the one most incentivized to adopt opportunistic behavior thanks to political sympathies.

The Coase Theorem, coined after Ronald's Coase article, which emphasized the potential for Coasian bargaining in a costless transaction world, has spurred a vast amount of literature and policy insights.22 A political Coase theorem has been proposed

20 Joan Calzada & Ricard Gil, What Do News Aggregators Do? Evidence from Google News in Spain and Germany, 39 Ma*rketing Science* 1, 134-167 (2020).

21 See, more generally, Steven Medema, Richard O. Zerbe, The Coase Theorem, In *The Encyclopedia of Law and Economics*. Ed. Boudewijn Bouckaert and Gerrit De Geest. Aldershot: Edward Elgar; Steven Medema, The Coase Theorem at Sixty, 58 *Journal of Economic Literature* 4, 1045-1128 (2020).

22 For relevant reviews of literature, see Steven Medema, Richard O. Zerbe, The Coase Theorem, In *The Encyclopedia of Law and Economics*. Ed. Boudewijn Bouckaert and Gerrit De Geest. Aldershot: Edward Elga; Herbert Hovenkamp, The Coase theorem and Arthur Cecil Pigou. *Arizona Law Review* 51 (3): 633-649 (2009); Steven Medema, The Coase Theorem at Sixty, 58 *Journal of Economic Literature* 4, 1045-1128 (2020); Cento Veljanovski, The Coase theorem—The Say's law of welfare economics? *Economic Record* 53 (December): 535-541 (1977); Warren J. Samuels, The Coase theorem and the study of law and economics. *Natural Resources Journal* 14 (January): 1-33 (1974).

in a voters' environment.23 In contrast, a linguistic Coase theorem has been suggested in a multilingual environment where bargains may take place over linguistic rights.24 Our present case may further foster Coase's legacy with a so-called Digital Coase Theorem.

B. The Importance of Allocation of Rights

Let us scrutinize the problem before us. Allocation of rights could differ depending on the outcome desired by the lawmakers.[25]

Under the first proposition, the rights are allocated to news publishers under a liability rule. News publishers are entitled to be compensated for any damage, use, and reproduction of any part of their created content. Copyrights and neighboring rights are enforced to the broadest extent, thereby including any use by any their content by any digital platforms. This is a liability rule assigned to news publishers where damages are acceptable subject to appropriate compensation. This liability rule is the traditional approach used in Spain and Germany.

Under the second proposition, the rights are allocated to news publishers under a property rule. News publishers are entitled to prevent any trespass by third-party onto their property, protected content, and content subject to neighboring rights. The property rule paves the way for injunctive relief claimed in courts, with the trespasser urged to no longer use protected content. The property rule both entitles for compensation against the trespasser and an order to return to the ante-trespass situation. The property rule assigned to news publishers has enabled news publishers to request injunctive reliefs against digital platforms and ultimately having the latter barred from using news publishers' snippets. This rule has never been applied since the news publishers derive benefits from the digital platforms' use of snippets as outlined above in discussing the reciprocal nature of the problem.

Under the third proposition, the rights are allocated to the news publishers as inalienable rights. Akin to the property rule, the inalienability rule proscribes trespassers to use any protected or related content and orders them to affect the situation that existed before the trespass occurred. However, the inalienability rule differs from the property rule by prohibiting news publishers from contracting and bargaining over the use of snippets by third parties. The inalienability rule prescribes that under no circumstance a news publisher can consent to have a third party using protected content, irrespective of the contractual arrangements. The inalienability rule is nowhere yet enforced, but some advocates suggest that this rule may be desirable according to them.

Under the fourth and final proposition, the rights are allocated to the digital platforms under a liability rule. Digital platforms are entitled to use news publishers' snippets and are entitled to compensation for the benefits generated for news publishers. On the other hand, news publishers are allowed to be compensated for snippets by digital platforms. The two compensation awards are canceled out so that the party that generates more positive externality to the other party creates negative externalities. That party becomes the net benefactor of compensation from the other party. In our case, rather than having digital platforms being requested to compensate news publishers for the use of snippets, such liability rule with rights assigned to digital platforms may ultimately lead to news publishers paying (or at a minimum allowing) digital platforms for the use of snippets. Such use increases web traffic and generates advertising as well as pay-articles revenues.

C. The Alternative Approach

It must be noted that each of the propositions results in different outcomes. Contrary to the Coase Theorem, we assume that transaction costs are positive and that information is asymmetrical. Consequently, the assignment of rights matter when looking to reach an efficient solution. The efficient solution is the one where the cheapest-cost avoider mitigates the costs, and the wealth maximizer compensates the cheapest-cost avoider for the mitigation costs. In our case, it can reasonably be assumed that the cheapest-cost avoiders are the digital platforms since they can most easily mitigate the opportunity costs of not sharing news content, and thereby creating wealth through advertising and paid-articles. On the other hand, news publishers are the ones who initiate wealth-creation by creating content, and therefore they need to be optimally incentivized to create this content. They will receive the optimal incentive once they know their content will be widely shared and viewed while reaping benefits for every viewer.

Consequently, the digital platforms may hypothetically compensate news publishers for the use of protected content. In return, news publishers may compensate digital platforms for the web traffic created as part of the news referencing. Once equalized, these two compensations may reveal a net positive externality from digital platforms to news publishers' benefit because of the unequal financial flows. Therefore, should Coasian bargaining take place, a net payment from news publishers to digital plat-

23 Francesco Parisi, Political Coase Theorem, 115 *Public Choice*, 1-26 (2003).

24 Aurelien Portuese, Law and Economics of the European Multilingualism, 34 *European Journal of Law & Economics*, 249-325 (2012).

25 Guido Calabresi, A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 *Harvard Law Review* 6, 1089-1128 (1972).

forms may prove to be the most efficient outcome where the social cost is minimized, and the value creation is maximized.[26]

Unfortunately, not only may such an efficient outcome prove hard to materialize because of the presence of transaction costs, but most utterly, the law has increased transaction costs by promoting opportunistic behaviors. The law has indeed unreservedly sided with news publishers against digital platforms by designing a liability rule together with a Pigouvian-like tax. Not only are the identified tortfeasors compelled to pay, but they are also compelled to pay for a service they have become compelled to deliver. This socially detrimental outcome overlooks the flawed identification of tortfeasors – namely Google and Facebook – by ignoring the externalities' reciprocal nature that is inevitably generated.

On the contrary, in the presence of high transaction costs, the law should mimic Coasian bargaining, whereby an efficient outcome is reached for the benefit of social welfare and digital innovation. Reducing the cost of accessing information while ensuring that news creators are fairly remunerated should be the law's objective. ■

26 More generally, on the antitrust implications of Coasian bargaining, see Alan, J. Meese, Antitrust balancing in a (near) Coasean world: The case of franchise tying contracts. Michigan Law Review 95 (1): 111-165 (1996).

PLATFORM MARKETS: THE ANTITRUST CHALLENGE IN INDIA

BY DR. GEETA GOURI[1]

1 Former Commissioner, Competition Commission of India.

I. INTRODUCTION

The fundamental question for any competition authority in its assessment of a market is: "What to regulate"? To address this question, the law identifies possible abuses in which an enterprise or firm could potentially engage. Any follow-up action is then defined by how and when to regulate. The economics of defining and measuring the market power of dominant enterprises are well-honed and tested in mature competition regimes such as the U.S. and Europe. Competition agencies in new market regimes lean heavily on the structure of these laws and the decisions of these two jurisdictions. In India, the bias tends to be more European. Case references and arguments used by lawyers before the Competition Commission of India ("CCI") typically refer to decisions of the EU Commission with occasional reference to the U.S. FTC/DOJ. Interestingly several of the cases filed with the CCI were replicas of cases filed in the EU, albeit with an Indian flavor, a trend that is growing in digital markets.

Several cases recently analyzed by the CCI, concerning Google, Amazon, Flipkart, and Facebook, reflect concerns identified in Europe. As global giants, the normal expectation is that allegations of anti-competitive abuse against these companies would be similar worldwide. My unease with the universality of these antitrust abuses is that the diversity of economic systems, and, more importantly, the diversity of consumers and consumption patterns, risk being painted with an overly broad brush. This unease, which began with the first CCI Order in the Google case in 2017, continues to apply in relation to current competition issues in platform markets.[2] The Indian way of doing business, and the behavior of Indian consumers need individualized analysis, in the form of market studies relating to business practices and consumption patterns. The diversity of customs, habits, income distribution, and consumption patterns remain unaddressed by CCI in assessing competition.

Platform markets are inherently consumer-centric in their approach to attracting business.[3] The economics of competition in traditional markets were not necessarily consumer-centric. In platform markets, antitrust assessment remains inadequate and incomplete. This short note is an initial exploration of my unease with antitrust analysis in ignoring the behavioral economics of Indian consumers and emergent innovations that propel the Indian mobile ecosystem. A broad, homogenous definition of "consumer," without reference to innovations in the next layer of the e-commerce markets for certain goods and services (e.g. the numerous mobile apps in the mobile ecosystem in India) is a perspective on competitive constraints, on access to data and on market responses that mainstream antitrust literature has ignored.

II. PRODUCT MARKET DEFINITION AND PLATFORMS

David Evans, as a moderator of a Competition Policy International discussion on APAC, posed the following question to me: "Are there general principles that you think regulators, everywhere, should apply when devising policies towards the digital economy?" The question clearly concerns antitrust abuses in traditional markets as opposed to platform markets, but it also raises the question of the homogeneity of the concepts underlying antitrust abuses in the two types of markets. Indeed, the distinction in terms of the structure of markets and of socio-cultural diversities between countries is brought into sharper focus in platform markets.[4]

A product market which consists of buyers (consumers) and sellers (producers, enterprises, firms) forms the basic underlying structure of any competition law analysis. Differences in market structures can raise issues in defining competition and in the dynamics of firms restraining each other from exerting market power. In a traditional product market, a number of firms are characteristic of competitive markets. In markets dominated by a single firm or enterprise, competitive constraints arise either from firms within the market (even if limited in number), or from the threat of entry. Antitrust economists value "effective competition," and deem intervention by competition authorities necessary only if there is harm to consumers. Attention does not focus on the mere number of firms in a market, but rather the presence of effective competitive constraints, assessed in terms of consumer harm. The notion of a "consumer," however, remains undefined, as does the notion of harm to consumers. It bears repeating that the basic goal of antitrust law is to benefit consumers.

Defining the "consumer" is much more difficult in the case of platform markets. Platform markets are, almost by definition, two-sided. As an aggregator of markets, all actions by platforms are defined in terms of generating network effects. Platforms negotiate this equation from the perspective of consumers. To marketing strategists, this may seem a trivial distinction. To a competition regulator, however, customer-centric innovation within the multiple layers of digital ecosystems is crucial. Spaces are created by platforms, where interfaces between markets create depth (net-

2 Case No 7 and 30 of 2017, Matrimony.com and Consumer Unity Trust of India, Competition Commission of India, New Delhi.

3 Competition Commission of India., MARKET STUDY ON E-COMMERCE IN INDIA Key Findings and Observations August 1, 2020, Geeta Gouri & M. Salinger, "Protecting Competition v/s Protecting Competitor: Assessing the Antitrust Complaints against Google," co-authored with M. Salinger, The Criterion Journal of Innovation, Vol 2, 2017, p 531-558, also at http://ssrn.com/abstract=2787343.

4 *Ibid.*

work effects) and attract consumers. Digital markets are shaped by technology and consumer centric innovation.

The digital ecosystem has two layers. First, there has been the explosion of apps and smartphones in the mobile ecosystem in India. Second, there is the diversity of consumers, their preferences and choices, as captured in these apps. A nuanced approach to platform markets would stand in contrast to a homogenous concept of abuse. The mobile app system factored in competition analysis of global platforms in digital markets perhaps reveal perspectives hitherto unexplored.

III. MOBILE ECOSYSTEM – THE MOBILE APP SYSTEM

The amazing growth in the use of the internet on inexpensive smartphones in India is remarkable. There are 775 million users of such devices, and maybe more, as each could well have multiple users. Perhaps COVID-19 gave a push to the usage of these devices, given the country-wide lockdown. Apps are often multilingual, and are used for almost all consumer needs, including purchases of groceries, health advice, and education. The diversity of apps has seen growing usage in both rural and urban areas. As competition heats up, different business models are discernible. This takes the form both of the entry of global players such as Amazon, Uber, Airbnb, Coursera, Foodpanda, OLX, and PayU, and the emergence of new local players. These start-ups will continue to evolve. M&A activity is growing, as exemplified by moves such as Flipkart's acquisition of Myntra, and the merger between Amazon and Flipkart. Google and Amazon are also investing in Reliance Jio, a new platform market. The Mobile App ecosystem is an innovative arena in India.

How is this business model to be viewed through the lens of competition? Most Indian app developers prefer Google's Android and its Play store. A key element relates to the cost of operating systems. Android can be used on inexpensive phones, and not just Apple iPhones, as in the case iOS. This clearly indicates that Indian consumers are motivated by cost. Further, cases filed with the CCI are invariably made by the competitors of successful rivals, even in the ecommerce domain.

IV. ASSESSMENT AND EVIDENCE

The Competition Act, 2002 defines a "consumer" as:

> "any person who—
>
> a. buys any goods for a consideration which has been paid or promised or partly paid and partly promised
>
> b. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised

"Goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

> A. products manufactured, processed or mined;
>
> B. debentures, stocks and shares after allotment;
>
> C. in relation to goods supplied, distributed or controlled in India, goods imported into India;

"Service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement.

These are broad definitions which allow considerable discretion to CCI in defining consumers, products, goods or services. The definition of the relevant market strengthens this flexibility

> r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;
>
> s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services, are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;
>
> t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

The first Indian case on platform markets[5] related to the Google Search Engine (Cases No. 07 and 30 of 2012, Order dated: August 2, 2018) filed by Matrimony.com and Consumer Unity & Trusts Society CUTS. Matrimony.com is an internet based matrimonial site and in the ranking of sites affects advertisers and consumers. CUTS is a non-profit organization "working on

5 Op. cit, The MCX-SX-NSE case No, CASE NO. 13/2009 Information filed on 16.11.2009 In continuation of order dated 25.05.2011 Date of order under section 27 of the Competition Act, 2002: 23.6.2011 Informant: MCX Stock Exchange Ltd v. 1. National Stock Exchange of India Ltd. 2. DotEx International Ltd. had the beginnings of a platform market.

public interest including those related to *consumer interests and protections*" (Order).

The Order (190 pages long), passed by a majority of five members with a dissent from two. The dissent raises several unaddressed issues that raise questions under the Competition Act. The Order defines two relevant markets – the market for general web search and the market for online advertisements. In both markets, the definition of "consumer" as per Section 2(t) is not taken into account. As stated above, that Section refers to consumers' preferences for products or services that are interchangeable as setting the boundaries of the relevant market. To date, none of these cases define the relevant market with respect to Section 2(r).

The central allegation in the Google Search Engine case revolved around the ranking of "verticals" and websites influencing consumer choice.[6] The Order relied on "heat map" tests and expected "eyeballs" and clicks to establish an abuse, in a manner similar to the equivalent EU case. The dissent Order did not find sufficient evidence of Google supposedly favoring a few travel firms to accept the allegation of anti-competitive behavior in terms of creating entry barriers.[7] Google's ranking of web sites (in this case travel firms) did not translate into substantive business for these firms. The "heat map" or "eyeballs" only on ranked verticals is of little consequence to the Indian consumer, whose only consideration is the cost of tickets and finding cheap flights. Indian surfers typically go to each site in order to find the cheapest product, in this case flight tickets.

In a two-sided platform market, consumer preferences are presumably captured through data analysis where there is easy access to consumer data. As a search engine, data analysis of Google India is similar to any data-based business experimenting with data and profiles of consumers and their preferences. Large global companies are known to fail despite the resources to experiment that smaller companies arguably do not have. Large amounts of data often lead to white noise. Successful companies often proceed on hunches perhaps backed only by limited consumer surveys.

Reluctance of global giants to share data cited as a major entry barrier maybe overstated. Apps and mobile ecosystem instead, suggest entrepreneurial alertness (CCI, 2020).[8]

Discriminatory pricing or discriminatory treatment has long been a common antitrust allegation. In platform markets, cases on discriminatory practices reference is to allegations of exclusive agreements and unfair agreements of sellers with platforms. The allegation in the *Google Search Engine* case concerned discrimination in the ranking of verticals. Arguments on discriminatory policies by big platform market firms are common (Case No. 80 of 2014, Case No. 22 of 2017, Case No 20 of 2018, etc.).

In an early case (No. 80 of 2014)[9] the allegation against Flipkart and Amazon was of engaging in anticompetitive practices in the nature of "exclusive agreements" with sellers of goods/services. The argument was that neither the consumer had a choice on the price she could pay, nor had the sellers on the platforms any choice to opt out of the terms and conditions dictated by global platforms, and that this was clearly anti-competitive. The agreements in this case fall under Section 3(4) on vertical restraints. The Commission, on examining the factors listed under Section 19(3), found no evidence that the exclusive agreements resulted in an AAEC or in creating entry barriers. The Order states:

> "*It seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are illustrated in the information to be sold through exclusive e-partners (OPs) face competitive constraints.*"

In *All India Vendors Association v. Flipkart* (Case No. 20 of 2018) the allegation was on discriminatory pricing. The complaint was based on a newspaper article (Economic Times, 07.04.2018) that small vendors prefer selling to Flipkart and Amazon on favorable discount rates rather than directly to consumers on online marketplace sites found no favor with CCI observing: "*Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation.*"

The Order was not acceptable to the traders and a fresh case on similar lines has been filed.

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6 *Ibid.*

7 Convergence of competition policy, competition law and public interest in India, Russian Journal of Economics 6 (2020) 277–293 DOI 10.32609/j.ruje.6.51303 Publication date: September 25, 2020 https://rujec.org/issue/1830/. Geeta Gouri & Kalyani Pandya (2020): The Indian competition law experience–its history and its (digital) future, Indian Law Review, DOI: 10.1080/24730580.2020.1843316.

8 The importance of data that large platforms have access to data has not restricted the surge in apps in the Mobile ecosystem. These apps, seeks to capture the "felt needs" of consumers by sensing an opportunity. For example, COVID-19 led to an increase in apps in the health sector. The Biotechnology Industry Research Assistance Council noted that out of 1,500 proposals 1200 and odd start-up apps emerged in one year (2020) (Economic Times, Sunday Magazine January 17-23, 2021). Apps use the platform markets of Amazon and Flipkart prompting a study by CCI on e-commerce and apps in India. Consumer centric innovations of the mobile ecosystem is discernible in these apps.

9 Case No. 80 of 2014 Mr. Mohit Manglani and Flipkart, Amazon et al.

Following the Google Search Engine Order, the CCI has taken a broad view of platform markets and their benefits to consumers. These decisions however pertain to agreements and arrangements (Section 3) and not on "abuse of dominance" (Section 4). A recent complaint against Android along the lines filed in EU and by two former interns of the CCI marks a return to antitrust on dominance.[10] The allegation is that Android OS and Play Store dominate the mobile ecosystem restricting the use of Android to either smart phones or smart TV and not to both.[11] Android an open-source mobile OS is a licensed OS. Smart phone manufacturers use Android in combination with Google Mobile Services ("GMS") which is a collection of Google applications and Application Programming Interfaces ("APIs") necessary for interoperability and compatibility across devices. The informant has only extended the Google Search market definition from two to four markets. Restrictions on the use of Androids or the use of alternate versions of Android (Android forks) is a perspective of restrictions on competition from startups and app developers.

While awaiting the investigation and detailed report from CCI the initial response in the *prima facie* order that Google has *"reduced the ability and incentive of device manufacturers to develop and sell devices thereby limiting scientific development relating to goods or services to the prejudice of consumers" voice* concerns for development of new algorithms that are data driven dependent upon queries from users. Sensitivity to consumer centric innovation of mobile ecosystem with the imperatives of knowledge-based innovations for digital India require not only understanding platform markets but of the market of licensing of patents and software. The several agreements that Google is insistent to club them as antitrust abuse of a dominant enterprise is to ignore the market for patents and of cluster of patents (Standard Essential Patents SEP).

The *prima facie* Order remains bound by the underlying product market conceptualization of the Competition Act:

> *The Commission is of the prima facie opinion that mandatory preinstallation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act.*
>
> *It also amounts to prima facie leveraging of Google's dominance in Play Store to protect the relevant markets such as online general search in contravention of Section 4(2)(e) of the Act. Mobile search has emerged as a key gateway for users to access information and Android is a key distribution channel for mobile search engines. Search engines exhibit data-driven scale effects. Improvements in search algorithm require sufficient volume of data, which, in turn, needs sufficient volume of queries from users who are increasingly resorting to mobile search. Thus, the impugned conduct of Google may help perpetuate its dominance in the online search market while resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act.*

A fallback from the first decision on the Google Search Engine is noticeable, and attributable to the development of new algorithms that are data driven and dependent upon queries from users.

Software development for internet usage, and SaaS provision for web sites have to meet international standards, by way of clearances from Standard Setting Organizations. Algorithms are data driven. Firms involved in software development license their products as cluster of patents (Standard Essential Patents) that ensure interoperability and compatibility. CCI's decisions on Android and the GMS licenses will have to be consistent on its interventions in cases against Ericsson and Qualcomm. Underlying these responses to licensing conditions of SEP firms and a detailed empirical validation of consumer profiles and of consumer harm are critical inputs.

Yet another case on the dominance of Google on the radar of CCI relates to its promotion of its Google Pay app.[12] These are cases filed by startup Fintech Apps, potential contenders to competition in the App scenario that is attracting foreign investors. The domain regulatory for Fintech Apps is the Reserve Bank of India.

V. OBSERVATIONS

The question posed earlier was as follows: Are there general principles that regulators, everywhere, should apply when devising

10 *Ibid.*

11 Umar Javeed & Others AND Google LLC & Others bearing Case No. 39 of 2018 (Google Android Order) As per newspaper reports, by Aditi Shah, Aditya Kalram, Exclusive: Google faces new antitrust case in India over abuse in smart TVs market, Reuters, Oct. 7, 2020.

12 Case No. 07 of 2020 In Re: XYZ Informant And 1. Alphabet Inc. Opposite Party No. 1 2. Google LLC, Opposite Party No. 2 3. Google Ireland Limited et al.

- Competition Law and Competition Policy in India: How the Competition Commission Has Dealt with Anticompetitive Restraints by Government Entities, with Aditya Bhattacharjea & Oindrilla De*, Review of Industrial Organization*, June 2018 online released.
- "Protecting Competition v/s Protecting Competitor: Assessing the Antitrust Complaints against Google," co-authored with M. Salinger, *The Criterion Journal of Innovation*, Vol 2, 2017, p 531-558, also at http://ssrn.com/abstract=2787343.

policies towards the digital economy? My observations in response, based on the above analysis, are the following:

1. There are some general principles that regulators need to follow in regulating the digital market and perhaps more marked than in the case of the traditional product market.

2. My experience as a regulator, and from the few cases of platform markets selected, suggests the following general principles when the CCI decides on the merits of allegations of anti-competitive conduct in the digital economy:

a. Markets have their own logic and a regulator cannot play god – often a tempting role – especially with the revival of looking at operating systems and platforms as "essential facilities" or as natural monopolies on account of high capex. Digital protectionism for regulators is tempting and lurks high.

b. Distinctions in market structure of product market and platform markets are the realities of large players who own spectrum spaces of hosting platforms as against markets on these platforms

c. Digital markets are shaped by technology and innovation – it is important for a market regulator to appreciate the innovativeness with the long chain of digital market system that consists of platform markets, data markets and market for ideas. And of innovations within sub-markets.

d. Consumer choices must be respected – which requires identification of the consumer – and related principles of welfare maximization and consequent clouding of protecting competition with protecting competitors.

Differences arise in these general principles in the implementation of competition law. The divergent approaches between two mature competition authorities (DOJ and EU) does raise discomfort in the universality of general principles.

4. The importance of consumer profiles for selling products and services on ecommerce defines the success of the platform. In this framework is it possible to build a uniform consumer profile group for a country as large and diverse as India? Are consumers one uniform group?

5. The ability to build consumer profiles by large platforms or by small apps are evenly shared. The mobile ecosystem functions on the quickness to capture changing habits and trends within the country. The splurge of apps on mobile phones stand testimony to this capacity. The risk is higher in the case of large platforms.

6. Suggested structural remedies of data portability or data sharing, as appropriate, for reining in large global players may only be a muted intervention given the diversity of the Indian mobile ecosystem.

7. Discriminatory practices or preferential treatment as regards some sellers of access to data, or of sharing data, warrant intervention if market players create entry barriers. ■

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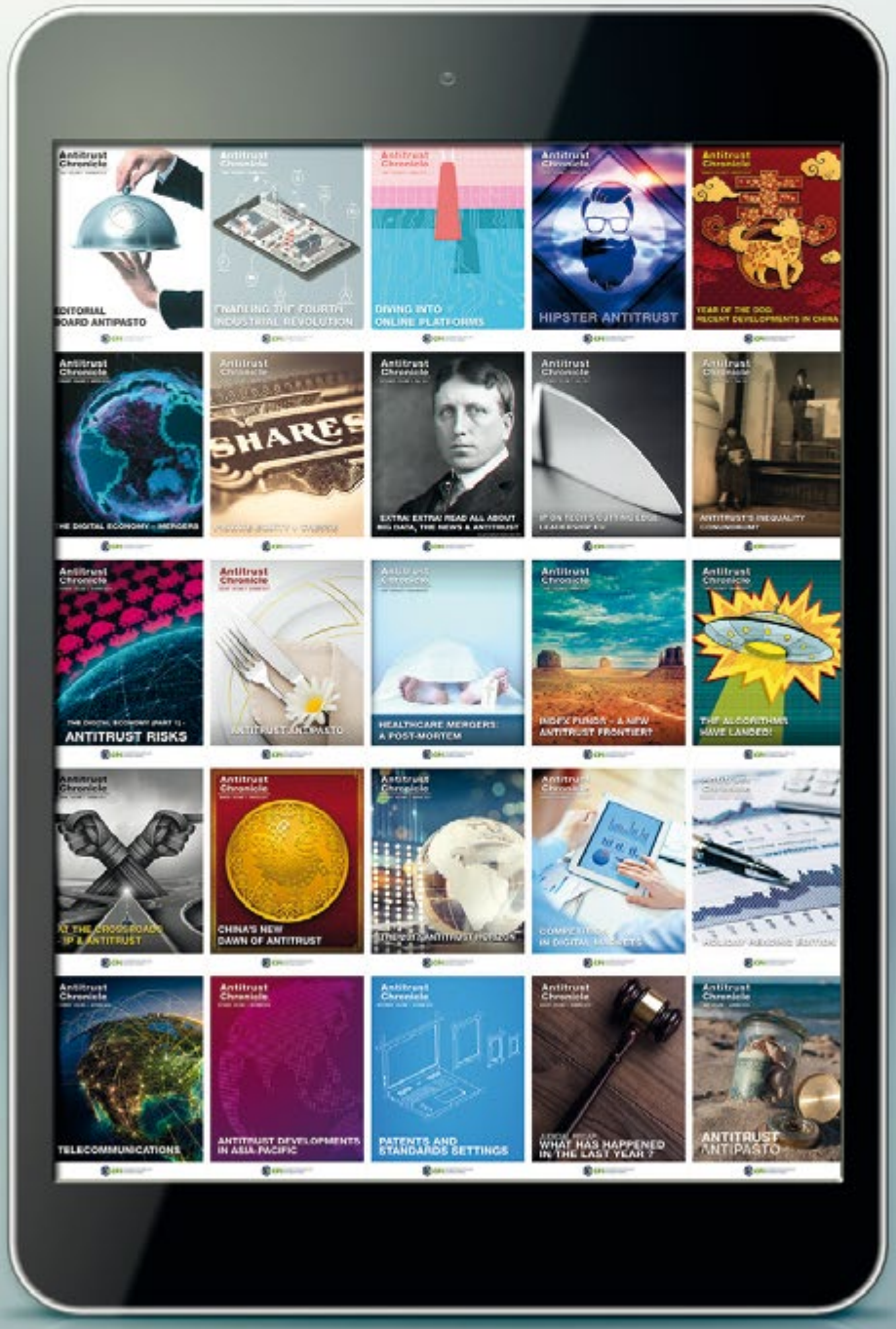


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