DIGITAL MARKETS: THE CHALLENGES OF NATIONAL ENFORCEMENT IN A GLOBAL WORLD

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Digital Markets: The Challenges of National Enforcement in a Global World

By Rachel Brandenburger & Christopher Hutton

The proliferation of measures across the globe designed to address concerns about the functioning of digital markets has been remarkable. In the last 18 months, a veritable patchwork of new regimes and measures has been introduced or canvassed; and more are likely. Although the measures are at different stages of design and implementation, they appear to have the same broad aims: to address a perceived gap in antitrust enforcement powers and concerns about digital platforms' exercise of market power. But very different approaches have been adopted to the nature of the measures being proposed or introduced and the methods and scale of enforcement. The absence of a single global approach will likely create considerable challenges for all concerned: the digital platforms, the users and others the new measures are intended to benefit, and those tasked with enforcing the new measures.

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I. INTRODUCTION

The proliferation of measures across the globe designed to address concerns about the functioning of digital markets has been remarkable. Within the last 18 months alone, a veritable patchwork of regimes and measures have been introduced or canvassed.

Although the measures are at different stages of design and implementation, all have (on the face of it at least) the same broad aims: to address a perceived gap in antitrust enforcement powers and concerns about the exercise of market power by digital platforms. However, despite those common aims, very different approaches have been adopted. The differences in approach are manifested not just in the nature of the measures being proposed or introduced, but also in the methods and scale of enforcement.

This multiplicity of measures, and the absence of a single global approach, gives rise to considerable challenges. The need to navigate multiple regulatory regimes is not a new phenomenon, but the nature of digital platforms and the vast number and variety of businesses and customers that interact with them, heightens the challenges. Those challenges are not only for the digital platforms to navigate, but also for those who the new measures are intended to benefit, and those whose task it will be to enforce the new measures.

It is in the interests of all stakeholders that any measures aimed at digital platforms work effectively for all concerned, especially when legislation and enforcement occur at the national (or sometimes regional) level, whereas the digital marketplace is increasingly global in scope and reach.

II. DIGITAL MARKETS REGIMES

A Patchwork of New Regimes

Whatever your views are on the necessity or otherwise of the enhanced scrutiny that digital platforms now find themselves under, it is undeniably the case that the recent focus on digital platforms, and the multiplicity of measures that focus has given rise to, is one of the most remarkable developments in antitrust (or competition) law and enforcement in recent times.

One of the most noteworthy aspects of these developments is the fact that they are rooted in an acknowledgement of the apparent inadequacy of the current law and enforcement. As the Chief Economic Adviser of the UK Competition and Markets Authority said, when asked to comment on the different approaches to the regime changes being proposed in the UK and the European Union ("EU"): "*Both regimes respond to long-standing concerns that existing enforcement powers aren't sufficient to address competition concerns in fast-moving digital markets, nor have the requisite deterrent effect on the largest digital players.*"[2]

The necessity or otherwise of new enforcement powers is an issue on which people have often strongly opposing views. The basic principles of antitrust law have hitherto generally been regarded as being sufficiently flexible and adaptable to serve their purpose even though the enforcement of those laws is often complex. This is reflected in the fact that, although there are differences in substance and enforcement across jurisdictions, the basic principles of antitrust law are common to many jurisdictions, and have remained unchanged for many decades. That many law-makers and antitrust enforcers, across the world, now consider existing antitrust laws and enforcement tools to be insufficient to meet the challenges arising in digital markets, is therefore noteworthy.

To a certain extent, the aims of the various new measures and regimes are common across jurisdictions: to limit the ability of digital platforms to exercise their market power at the expense of those who interact with, or depend on, those platforms, and to promote competition and consumer choice. However, alongside those aims is another noteworthy feature of the measures that are being proposed and adopted: the diversity of the different approaches that are being taken.

2 Mike Walker speaking at Innovation Economics Conference for Antitrust Lawyers #2, Geopolitics of Platform Regulation webinar (28 April 2021). Available at https://www.concurrences.com/en/conferences/innovation-economics-conference-for-antitrust-lawyers-2-geopolitics-of-99064.

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Such is the multiplicity and diversity of those measures, introduced or proposed, that a comprehensive survey of them is beyond the scope of this article. However, looking at just a few jurisdictions illustrates this:

- In the EU, the proposed Digital Markets Act will, if adopted as proposed, enable the European Commission to designate certain digital platforms as "gatekeepers," and impose an extensive list of antitrust-inspired obligations on those platforms.

- In the UK, the proposed Digital Markets regime will, if implemented, see some digital platforms designated as having "strategic market status" and being the subject of binding codes of conduct "tailored to each firm."

The differences between the proposed EU and UK regimes in particular highlight the potential for conflict. The EU approach is to adopt a single set of rules across all "gatekeepers," whereas the UK approach is to adopt individual sets of rules for each digital platform to reflect the differences in the platforms and the ways in which they are used. There are advantages and disadvantages to each approach, but it is easy to envisage that a digital platform subject to both regimes could face having to comply with two sets of rules. Even if, for the most part, the rules were consistent, it is perhaps inevitable that some aspects of one set of rules may be stricter than the other set, or sufficiently divergent that they require different operational approaches by the affected digital platforms. In some instances, the rules could even be contradictory.

Across the Atlantic, the U.S. is seeing a plethora of legislative proposals focused on digital markets and in some cases also more broadly to introduce substantive and procedural changes to Federal and some State antitrust laws generally and to increase the funding of the Federal antitrust agencies. Prior to the introduction of these proposals, the Democratic members of the U.S. House of Representatives Judiciary Subcommittee on Antitrust, Commercial and Administrative Law issued a report[3] on competition in digital markets. The Report provided an overview of what the authors regarded as the limited effectiveness of the current US antitrust laws as applied to digital markets. The themes outlined in the Report laid the groundwork for the subsequent various legislative measures targeting digital platforms that were introduced by both the House and the Senate in early 2021.[4]

If passed into law, these measures would have a direct effect on the business practices of certain digital platforms. Four of the bills introduced into the House of Representatives in Spring 2021 are particularly noteworthy for the purposes of this article. They would apply to "covered platforms" and would 1) impose interoperability and data portability requirements intended to lower barriers to entry and switching costs for businesses and consumers[5]; 2) make it illegal for covered platforms to operate another line of business or leverage their control across multiple business lines to self-preference, disadvantage competitors, or create a conflict of interest[6]; 3) prohibit covered platforms from engaging in discriminatory conduct that "advantages the covered platform operator's own products, services, or lines of business" over its rivals[7]; and 4) prohibit covered platforms from acquiring nascent competitors.[8] At this stage, it is unclear whether there will be sufficient support to achieve legislation and, if so, on which measures.

Legislative changes directed at strengthening enforcement against digital platforms have also been adopted, or are being considered, elsewhere around the world, including Australia, China, Germany, Japan and South Korea.

3 U.S. House, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets (2020) (hereafter the "Report"). Available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

4 See Office of Representative David Cicilline press release, Cicilline Statement on Big Tech Markup (24 June 2021); see also Competition and Antitrust Law Enforcement Reform Act, S.225, 117th Cong. (2021).

5 Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, H.R. 3849, 117th Cong. (2021).

6 Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021).

7 American Innovation and Choice Online Act, H.R. 3816, 117th Cong. (2021).

8 Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021).

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B. Enforcement

It is not just the nature of the measures implemented that may differ from one jurisdiction to another. There may also be significant differences in the ways in which the measures will be enforced. As with many laws and regulations, the practical boundaries of individual regimes will be set by enforcement activity, which is, in turn, driven not only by overarching policy but also by complaints from third parties and the varying institutional frameworks within which the regimes operate. The role and influence of courts and judges, for example, differs significantly between prosecutorial regimes (such as the U.S.) and administrative regimes (such as the EU).

A large number of investigations have been opened, and litigation cases brought, against digital market players in the last two years (including by Federal and State enforcers in the U.S., the European Commission and EU Member States including France and Germany, as well as in Australia, China, India, Japan, Russia, South Korea and elsewhere). The number of investigations and cases continues to increase – sometimes, seemingly on a weekly basis. That many of the investigations and litigation cases have been launched using existing antitrust powers - and often ahead of the implementation of applicable digital markets regimes - is revealing, in terms of the importance agencies are placing on antitrust enforcement in the context of digital markets. It seems that even if agencies consider their current enforcement tools need revision to match the challenges of digital markets, they also consider that they cannot wait to take action until new enforcement regimes are in place.

Although the number and scope of these opened investigations and cases indicates a direction of travel, and could (even without coming to conclusion) influence changes on a voluntary basis on the part of digital platforms, the full impact will only become clear if and when final decisions and judgments are reached.

Moreover, it is noteworthy in that regard that:

- Not all investigations that are opened may be pursued, and some may settle (with or without commitments). However, even those cases will be instructive in illustrating the practical impact of individual regimes, particularly where digital platforms voluntarily introduce changes to reflect concerns and settle investigations in place of litigating to an end result.

- A common theme across cases involving digital platforms is that they tend to be far from straightforward: the operational, factual and legal issues are often extremely complex and novel (as the perceived need by many regimes for new enforcement powers against digital platforms testifies). As a result, it will take some time, maybe years, before the outcomes of the current wave of investigations and cases is known. Indeed, given the pace of innovation and development in digital markets, the outcomes of some of the current investigations and cases could have limited practical impact by the time they come to a close.

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III. THE CHALLENGES OF MULTIPLE NATIONAL REGIMES IN GLOBAL MARKETS

It would be foolhardy to predict the exact scope and focus of future enforcement. However, what is clear is that there is unlikely to be a single global approach adopted by either those regimes that are currently proposing changes to their laws or by those that do so in the future. Such an absence of a global approach will create challenges for all concerned: the digital platforms, those that interact with them, and enforcing agencies.

A. Challenges for Those Under Scrutiny

The need to navigate multiple regulatory environments is something that digital platforms have experience of. Similar challenges are also faced by other global corporations (particularly those in heavily regulated sectors – for example, pharmaceuticals). The challenges of navigating multiple regimes is inherent in the national nature of such regimes, and those subject to such multiple regimes may become more familiar with, and adept at, dealing with the situation over time.

However, the challenges are increased in relation to digital markets because, although there will be some "micro" regulations, the fundamental purposes behind the proposed digital markets regimes are broad in scope, and seek to go to the heart of the digital platforms' relationships with the companies and individuals that they interact with. Complexity is also added by the fact that many of the issues that digital markets raise extend beyond traditional antitrust considerations to privacy, consumer protection and other issues outside the scope of antitrust enforcement. This has been recognized by, for example, the novel initiative by the UK Competition and Markets Authority and the UK communications (OFCOM) and data protection (Information Commissioner's Office) agencies to establish a Digital Regulation Cooperation Forum to provide a "joined-up approach to digital regulation in the UK."[9]

As a result, digital platforms may be presented with new challenges to navigate, and may take various approaches to address them:

- A global approach, by taking the strictest regime, and applying the standards and rules of that regime globally. Although this might be simpler from a regulatory and compliance perspective – a single set of rules consistently applied brings certainty and clarity – it may not reflect commercial reality. This is not just a question of whether digital platforms should unnecessarily "straightjacket" themselves by applying stricter rules even in those markets or jurisdictions where the applicable regime is less restrictive. It may also be the case that digital platforms that may be considered to have market power in certain markets or jurisdictions do not necessarily hold that market power in others. The ability of a digital platform to grow and develop (and create competitive pressure) in new markets and jurisdictions could be impaired if it decided to apply globally the standards or rules of the most restrictive regime it operates in.

- A national approach, by applying national standards and rules to the digital platform's activities and relationships in the relevant jurisdictions. This would likely provide digital platforms with flexibility and greater commercial freedom in the least restrictive regimes. But it would not be without complexity: navigating multiple national rules in a global world may be additionally costly and may be impractical (particularly if the relationships between a digital platform and its users and others it does business with cross multiple jurisdictions).

- A mixed, issues-based approach, by applying a consistent cross-jurisdictional approach only in those jurisdictions of greatest perceived regulatory risk (or where such an approach is feasible and desirable), and applying a tailored approach in other contexts. This is an approach that many global businesses will recognize, and already adopt. It may enable digital platforms also to avoid unnecessary regulatory straightjackets. However, although this approach provides flexibility, it may also create confusion and the risk of inadvertent breaches of applicable laws, particularly in the context of global markets and relationships.

In all cases, a key consideration will be practicability: what can operationally be achieved, given the global nature of the markets? The answers to this question could drive important navigation decisions on the part of digital platforms – deciding where to invest, where to innovate, and where to challenge. In other words, the legal and regulatory landscape that emerges from the current proposed regime changes around the world may have an effect not only on the digital platforms subject to the regimes, but also on the wider digital ecosystem and beyond.

9 Competition and Markets Authority policy paper, Digital Regulation Cooperation Forum launch document (July 1, 2020). Available at https://www.gov.uk/government/publications/digital-regulation-cooperation-forum.

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B. Challenges for Those the Regimes are Intended to Protect/Benefit

Looking at the likely patchwork of regimes from the perspective of those companies that hope to benefit from the regimes, they too will have to navigate the new regimes and their consequences.

A key point to note is that many businesses that interact with digital platforms are themselves global. It is therefore too simplistic to view the issue as one of whether and how to address the balance of power between global digital platforms on the one hand, and small national users, on the other.

As a result, the patchwork of digital regimes gives rise to a particular practical issue for those the regimes are intended to protect or benefit: different approaches across jurisdictions may mean that some of key relationships may have different flavors in different jurisdictions. For example, if a global business (A) relies on a global digital platform (B) to reach its customers, it too will have to decide whether to approach the legal and regulatory patchworks on a global or local basis. The fact that (A) is active in a jurisdiction where there is a stricter approach does not necessarily mean that it would be advisable for (A) to aggressively challenge (B) in that jurisdiction: the fact that it could make a complaint or take action against (B) in one jurisdiction may not assist it if that means it is then commercially exposed in another jurisdiction. Alternatively (A) might seek to use a threat of action in one jurisdiction to leverage an advantage in the context of its global relationship with (B). This may give rise to forum shopping (on the part of potential complainants and digital platforms), and companies may look to one jurisdiction to lead the way and bring about a global change.

C. Challenges for Regulators

The different regimes to regulate digital markets, both those that are currently in place and new ones that are under consideration, are generally designed to address and facilitate national enforcement priorities. (The regional EU regime is, of course, an exception.) The national focus reflects a practical reality: the powers of national agencies will (for the most part) be limited to challenging conduct that occurs within, or has an effect in, their jurisdiction.

A concern for national enforcement agencies is therefore whether the, necessarily national, limits of their powers could undermine the effectiveness of national laws or enforcement policies:

- Can a national agency bring about real change if its enforcement is limited to only one geography of the relationships between the digital platform and its users and others it does business with? In practical terms, national agencies may find it difficult to prevent an exercise of market power in their jurisdiction, or prevent the practical impact of such an exercise of market power, if the digital platform can exert commercial pressure outside of that jurisdiction in a way that is beyond the reach of national enforcement.

- A further question (which is not new) is also relevant: the extent to which agencies have the power to impose global remedies and, even if they do have such powers, whether they have the wherewithal to enforce such remedies in practice. Absent the enforcement of global remedies - which could be achievable by, for example, effective cooperation between agencies across different jurisdictions - enforcement activity in one jurisdiction is unlikely to bring about the global change that may be required fully to achieve a national agency's enforcement objectives.

That is not to say that national enforcement can lack impact. It will obviously have a direct impact on national markets and relationships contained within the jurisdiction in question. But where the relationships between digital platforms and their users and others the platforms do business with is not so contained, there may be practical limitations to what agencies can achieve without cooperation with their counterparts in other jurisdictions. It is therefore not surprising that there has been considerable multilateral discussion about the regulation of digital markets, at political and agency levels. The discussions that led to the Ministerial Declaration following the G7 Digital and Technology Ministers' meeting earlier this year[10], the work of the Organization of Economic Cooperation and Development[11], and exercises such as the International Competition

10 Ministerial Declaration, G7 Digital and Technology Ministers' Meeting (April 28, 2021). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981567/G7_Digital_and_Technology_Ministerial_Declaration.pdf.

11 OECD, Abuse of Dominance in Digital Markets (2020). Available at http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

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Network's Survey On Dominance/Substantial Market Power In Digital Markets,[12] are a few examples of fora in which policy discussions have taken place. There are many more.

Also, it is likely that enforcement agencies will increasingly cooperate with each other in relation to specific investigations as well as issuing joint statements highlighting the scope for cooperation and consistency of approach to enforcement in relation to digital markets. The recent statement of the UK Competition and Markets Authority, the Australian Competition and Consumer Authority and the German Bundeskartellamt on their common understanding about the need for rigorous and effective merger enforcement in relation to digital markets and more generally is an interesting example of cooperation between two non-EU and one EU jurisdiction.[13]

IV. CONCLUSION

As many jurisdictions introduce measures to address concerns about the functioning of digital markets, consistency of approach will be a key factor.

That does not mean that a global regime is desirable or necessary (even if it were achievable); nor does it mean that the multiplicity of national regimes will be ineffective. However, an absence of a consistent global approach presents challenges for all stakeholders, including enforcement agencies.

The balance that national agencies and lawmakers are trying to strike between the desire to encourage innovation and investment and the desire to limit potential risks to competition and consumers is particularly complex in digital markets. In addition, there may not be agreement between the stakeholders within a jurisdiction – let alone across jurisdictions - about exactly where the balance should be stuck

Whether or not a more coordinated approach develops over time, digital platforms, and those that interact with them, will need to continue to develop commercial and regulatory approaches to navigate the patchwork of regimes that they are likely to continue to face as the number of regimes that are reviewing and adapting their laws to address digital markets continues to increase.

12 Unilateral Conduct Working Group, Report on the Results of the ICN Survey on Dominance/Substantial Market Power in Digital Markets (July 2020). Available at UCWG-Report-on-dominance-in-digital-markets.pdf (internationalcompetitionnetwork.org).

13 Competition and Markets Authority policy paper, Joint Statement on Merger Control Enforcement (20 April 2021). Available at Joint statement on merger control enforcement - GOV.UK (www.gov.uk).

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