

Antitrust Scrutiny of Digital Platforms Continues Globally

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While the COVID-19 pandemic has increased our dependence on digital platforms more than ever, dominant platforms with significant market power continue to draw the focus of antitrust regulators around the world. Eva Cole, Co-Chair of Winston's Antitrust Practice, recently participated in a panel discussion on Antitrust Issues in Digital Platforms, sponsored by the Competition Committee of the [Inter-Pacific Bar Association \(IPBA\)](#). The panel was moderated by [Janet Hui](#), of JunHe LLP in Hong Kong and [Atsushi Yamada](#) of Anderson Mori & Tomotsune in Japan. The panelists presented global perspectives on the rapidly developing law surrounding digital platforms and highlighted the different approaches taken by the United States and key jurisdictions in the Asia-Pacific region to competition issues raised by digital platforms.

The key takeaways from each jurisdiction are as follows:

Australia

Speaker: [Elizabeth Avery](#), of Gilbert + Tobin

The Australian Competition and Consumer Commission (ACCC) has been monitoring digital platforms since 2017 including through wide-ranging market studies into their impact on competition and consumer protection laws. So far, this monitoring has resulted in the adoption of a novel News Media Bargaining Code to facilitate payment by large digital platforms for news content, which has led to Facebook and Google negotiating with news organizations to pay for news content that they republish on their platforms. There have also been a number of court cases against digital platforms in Australia, including ACCC prosecutions alleging consumer protection breaches as well as competition cases brought by private plaintiffs. Finally, the ACCC is increasing oversight of mergers in Australia and monitoring how the acquisition of data by one company could limit overall market competition. In terms of reforms, the ACCC is considering a merger approval framework that would establish a presumption that a merger in a concentrated market is anticompetitive. It has also proposed a new prohibition on "unfair trade practices" that are not technically unlawful under current competition or consumer protection laws but are still "unfair." Both of these proposed reforms would have economy-wide impacts, including with respect to digital platforms.

Japan

Speaker: [Etsuko Hara](#), of Anderson Mori & Tomotsune, and an associate professor at the University of Tokyo, Graduate Schools for Law and Politics

The Japanese government and the Japan Fair Trade Commission (JFTC) are active in investigating and regulating digital platforms, including through market studies and the issuance of new guidelines. The Cabinet of Japan established the Headquarters for Digital Market Competition to work in tandem with various ministries and the JFTC to consider how best to regulate digital platforms. Notably, the Act on Improving Transparency and Fairness of Digital Platforms came into effect in February 2021 and requires specified digital platform providers to develop internal procedures and systems to promote greater transparency and fairness. The most notable regulation in Japan that impacts digital platform regulation is the Abuse of Superior Bargaining Position (ASBP) which is tied to the Antimonopoly Act and regulates parties with superior bargaining power that engage in abusive conduct. Unlike for a private monopolization claim, a party does not need to be in a dominant market position to be covered this act; rather, it simply needs to be in a superior bargaining position relative to vendors or other counterparties. (See our prior Competition Corner posts about Japan's efforts to regulate digital platforms [here](#) and [here](#).)

Singapore

Speaker: [Corinne Chew](#), of Drew & Napier LLC

The Competition and Consumer Commission of Singapore (CCCS) has conducted several studies on various competition issues surrounding digital platforms, including on e-commerce platforms, the online travel booking sector, and issues regarding data such as data portability and personal data protection, as well as intellectual property rights. It has also proposed changes to its guidelines based on the results of these studies. In addition, there may be upcoming developments on competition issues in fintech in particular.

South Korea

Speaker: [Youngjin Jung](#), of Kim & Chang

The Korea Fair Trade Commission (KFTC) is actively involved in the regulation and enforcement of antitrust law against digital platforms. This includes a proposal to introduce new legislation to regulate online platform service providers. Among others, the Online Platform Act would require online platform service providers to prepare written agreements to business users of online platforms and provide prior notice when terms and conditions are changed. There is, however, some conflict regarding which agency should have enforcement authority over online platforms—the Korea Communications Commission (KCC) or the KFTC—as the KCC has proposed similar legislation. The bills are currently under review by the National Assembly. The KFTC also proposed an amendment to Korea's E-Commerce Act which would introduce a mechanism to promote consumer safety and choice. In addition to these legislative initiatives, the KFTC also remains active investigating digital platforms. Recently, the KFTC imposed sanctions on online platform, Naver, for abusing its market dominant position through self-preferencing. In particular, the KFTC found that Naver artificially adjusted its search algorithm to place its own products and services at the top of search results. The KFTC has also set new standards for merger reviews where the transaction involves big data, recognizing that concentration of information assets may be anticompetitive. The KFTC announced its plans to conduct research on the digital advertising market this year.

United States

Speaker: [Eva Cole](#), of Winston & Strawn LLP

Government enforcers, private plaintiffs, and legislators in the United States are all focused on competition in digital markets. Multiple lawsuits have been filed against large tech platforms by different coalitions of federal and state

enforcers, as well as by various private plaintiffs. And multiple bills have been introduced at both the federal and the state level to reform antitrust laws to address issues in the digital economy while Congress continues to hold hearings to study competition concerns in connection with digital platforms. The Federal Trade Commission (FTC) and the Department of Justice (DOJ) have divided up federal jurisdiction over the Big Four (Amazon, Apple, Facebook, and Google), while state attorney generals have also filed complaints against digital platforms. Notably, the DOJ sued Google in October 2020 for allegedly entering into exclusionary agreements to ensure that Google is the pre-set search engine on many mobile devices and computers. However, under U.S. federal law and precedent, there are challenges to succeeding on a monopolization claim as U.S. law does not recognize an “abuse of dominance” standard that is available in other jurisdictions. There is growing interest in the intersection between privacy and competition and the novel theory that privacy (or reduced privacy protections) can be considered an antitrust harm rather than just a consumer protection issue as it has been traditionally understood. Under the new liberal administration, the Democratic-majority FTC is increasingly interested in novel theories of harm, and both agencies will likely see additional scrutiny of mergers in the tech space.

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