

Navigating the New Competition Law Frontier: Reviewing Global Antitrust Approaches to Technology Platforms

MICHAEL BYOWITZ, JACQUELINE DOWNES, JOHN EICHLIN,
ELIZABETH WANG, AND PIERRE ZELENKO*

Up to date through March 24, 2019

I. Executive Summary

Large multi-sided technology platforms have redefined how people interact around the world. As network effects concentrate usage onto a relatively small number of platforms (e.g., Amazon, Apple, Facebook, and Alphabet's Google), those firms are increasingly targets of politicians, regulators, and enforcement authorities who express concern about the economic importance of one or more platforms, and whether each has or could achieve dominance. While many antitrust experts argue that traditional antitrust tools are ample to address any legitimate concerns about these firms, others (sometimes referred to as antitrust "hipsters") question whether more is required to adequately protect consumers, advertisers, or journalists.

The issue is complicated because the application of competition laws to technology platforms in key jurisdictions has been diverging. This article provides an overview of the current dialogue globally, including the status of enforcement and market studies in Europe, the United States, Australia, China, and other key economies.

II. Key issues

Antitrust enforcement authorities in leading jurisdictions have been evaluating this new frontier of competition law either in enforcement actions targeting specific platforms or in more general market studies. In particular, several key questions have emerged:

- How should dominance be defined in the context of large multi-sided technology platforms, and under what circumstances should any firms

* Mr. Byowitz is Of Counsel (and a former Partner), Wachtell, Lipton, Rosen & Katz LLP, New York, New York. Ms. Downes is a Partner, Allens, Sydney, Australia. Mr. Eichlin is Senior US Associate, Linklaters LLP, New York, New York. Ms. Wang is Executive Vice President, Compass Lexecon, Boston, Massachusetts. Mr. Zelenko is a Partner, Linklaters LLP, Paris, France. Any views expressed in this article are not to be attributed to any of the authors' firms or clients.

that may have achieved dominance by superior performance be constrained going forward?

- When is a technology platform's preferential treatment of its own service offerings sufficient to sustain a monopolization or abuse of dominance action?
- Do traditional competitive effects tests focused on consumer welfare rely too heavily on price effects, when large technology platforms generally offer services free of charge to one user group (e.g., consumers) while being paid by another group (e.g., advertisers)?
- How should a technology platform's collection, use, and storage of user data be assessed relative to other measures of market power? How should the potential to exploit this data to the possible detriment of consumer privacy be evaluated? Should such concerns be the subject of antitrust analysis or privacy regulation?
- Does traditional merger analysis underestimate the potential competitive significance of startups and technology innovators when acquired by more established competitors?

The debate on the appropriate answers to these questions is continuing. Some worry that under-enforcement and under-regulation will result in further consolidation and entrenchment of market power among incumbent platforms leading to significant long-term harm to consumers. Others emphasize that the risks of over-deterrence are higher in dynamic industries, where long-term competitive effects are inherently uncertain and short-term intervention may ultimately deter investment in innovative new offerings.

III. Overview of Policy and Enforcement Initiatives by Jurisdiction

Enforcement and legislative responses to these trends have varied. European competition law enforcers – both at the European Commission and in some Member States – have been more aggressive based on concerns about potential under-enforcement against conduct by potentially dominant firms and perceived abusive practices by some platforms. By contrast, US antitrust enforcers have tended to perceive the most significant risk to be over-enforcement, potentially resulting in a stifling of innovation and loss of efficiencies, although that stance is currently being debated. Australia, China, and other countries are carving out their own approaches tailored to their own market structures but with broader implications.

A. EUROPEAN COMMISSION

Over the past few years, the most active competition enforcement involving digital platforms has been in Europe, both at the European Commission and several EU Member States. At the Community level, the European Commission has proceeded against Google for exclusionary and discriminatory practices favoring its own platforms over competitors in a number of enforcement actions.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019] NAVIGATING THE NEW COMPETITION LAW FRONTIER 161

- In June 2017, the Commission imposed a fine of EUR 2.4 billion on Google relating to algorithms on its search platform giving preferential treatment to its own Google Shopping Service relative to competing shopping services.¹
- A year later, the Commission imposed a record fine of EUR 4.34 billion related to restrictions on Android devices promoting the use of Google’s allegedly dominant search platform.²
- And in March 2019, the Commission fined Google EUR 1.49 for what were deemed anticompetitive clauses in its AdSense contracts with third-party websites restricting rivals from placing their search advertisements on these websites.³

The Commission has separately been conducting an extended market inquiry into the e-commerce sector since 2015, including issues that may arise where a vertically integrated platform competes with retailers offering products or services on its site.⁴ As a culmination of this inquiry, the European Commission announced in September 2018 that it was investigating Amazon and its role as a “hybrid” retail platform.⁵ The investigation focuses on whether Amazon is improperly gathering data from third-party retailers on Amazon Marketplace and using it to develop sales of its own products. As part of its Digital Single Market initiative, the EU has also adopted a new Regulation aimed at creating what it deems to be a fair, transparent and predictable environment for businesses and traders using online platforms.⁶

B. EUROPEAN MEMBER STATES

In European Member States, national competition authorities are taking an active enforcement posture. The German and French authorities have been particularly active, conducting wide-ranging investigations targeting alleged discriminatory or exclusionary abuses of dominance. Enforcement

1. Press Release, European Commission, Commission fines Google _2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), *available at* http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

2. Press Release, European Commission, Commission fines Google _4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine (July 18, 2018), *available at* http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

3. Press Release, European Commission, Antitrust: Commission fines Google _1.49 billion for abusive practices in online advertising (Mar. 20, 2019), *available at* http://europa.eu/rapid/press-release_IP-19-1770_en.htm.

4. European Commission, *Final report on the E-commerce Sector Inquiry*, SWD (2017) 154 final (May 10, 2017), *available at* http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

5. See Rochelle Toplensky & Shannon Bond, *EU opens probe into Amazon use of data about merchants*, FIN. TIMES, (Sept. 19, 2018), *available at* <https://www.ft.com/content/a8c78888-bc0f-11e8-8274-55b72926558f>.

6. Press Release, European Commission, Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms’ trading practices (Feb.14, 2019), *available at* http://europa.eu/rapid/press-release_IP-19-1168_en.htm.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

162 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

has also targeted so-called exploitative conduct involving “big data” based on concerns that blur the line between antitrust, consumer protection, and privacy.

1. *Germany*

In Germany, the Federal Cartel Office (“FCO”) has conducted a high-profile three-year enforcement action against Facebook that resulted in a February 2019 FCO decision concluding that Facebook had abused its “dominant position” in Germany by making use of its social network conditional on the collection of user data from multiple sources. The FCO termed this an “exploitative” abuse. While Facebook was not fined, it was ordered to change the way it collects data. If not overturned on appeal, Facebook will no longer be allowed to combine data gathered from other sources (social networking services such as its WhatsApp and Instagram platforms as well as third-party sources) without voluntary user consent.⁷ Some have criticized the FCO’s attribution of market power to Facebook based on its access to user data, and questioned the use of competition laws to address this conduct (rather than privacy regulation).

The FCO has recently launched an investigation into Amazon largely focused on data usage, but it is also examining Amazon’s terms of business and practices towards third-party retailers.

2. *France*

The French Competition Authority (“FCA”) is proactively seeking a competition policy suited to the digital age. In 2018, for the first time, the FCA examined the merger of two online platforms resulting from the acquisition of the French company Logic-Immo by the German group Axel Springer. Both undertakings managed online advertising portals that allow real estate agencies to display ads to potential buyers in France, and were thereby operating on a two-sided market. The FCA took this opportunity to define an analytical framework which takes into account market-specific issues, such as the competitive risks associated with cross-network effects and the exclusive collection of personal data.⁸

The FCA has also indicated that the online advertising sector will continue to undergo an in-depth examination as part of investigations opened at the end of 2018, but the FCA has not disclosed the details of the

7. Facebook, *exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*, BUNDESKARTELLAMT [FEDERAL CARTEL OFFICE] (Feb. 6, 2019), available at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf>.

8. See Isabelle de Silva, President, FCA, *Assessing online platform mergers: Taking up the new challenges faced by the French Competition Authority in the digital economy*, CONCURRENCES COMPETITION L. REV., No. 02-2018, at 39-49, available at http://www.autoritedelaconurrence.fr/doc/05.concurrences_2-2018_article_i.de_silva.pdf.

investigations or the firms being looked at.⁹ The sector has already been the subject of an inquiry in which the FCA identified potential anticompetitive practices, such as restrictions on the accessing certain data, strategies involving bundling or tied sales, discriminatory practices and impediments to interoperability.¹⁰

The German and French authorities have launched a joint study on algorithms and their implications on competition, to be completed later this year.¹¹ The FCO and FCA will examine to what extent algorithms might facilitate collusion, assist in implementation of cartels or create additional market-entry barriers.

3. *United Kingdom*

The UK Parliament in a recent report has highlighted Facebook's practices in competition and data privacy, and called on the UK competition authority to investigate whether Facebook has been involved in anticompetitive practices and to review its business practices towards other developers "to decide whether Facebook is unfairly using its dominant market position in social media to decide which businesses should succeed or fail."¹² A UK parliamentary committee in another recent report has considered how competition regulation should respond to challenges of digital markets. In merger control, the committee recommended that the government consider introducing a "public interest test" for data-driven mergers allowing the competition authority to intervene if a merger would result in the creation of a data monopoly.¹³ An independent panel tasked with examining competition in digital markets has also recently released a

9. See Press Release, FCA, The Autorité de la Concurrence announces its priorities for 2019 (Jan. 11, 2019), available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=697&id_article=3329&lang=en.

10. See Press Release, FCA, Sector-specific investigation into online advertising (Mar. 6, 2018), available at http://www.autoritedelaconcurrence.fr/user/standard.php?lang=EN&id_rub=684&id_article=3133 (announcing results of a preliminary investigation in sector inquiry on "display" advertising). See also Press Release, FCA, Sector inquiry / Online advertising (Dec. 14, 2010), available at http://www.autoritedelaconcurrence.fr/user/standard.php?lang=EN&id_rub=368&id_article=1514 (announcing results of sector inquiry on "search" advertising); Press Release, FCA, The French Autorité de la concurrence and the German Bundeskartellamt publish joint paper on data and its implications for Competition Law (10 May 2016), available at <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-autorite-de-la-concurrence-and-german-bundeskartellamt-publish-joint-paper-data-and>.

11. Press Release, FCO, The French Autorité de la concurrence and the German Bundeskartellamt launch a joint project on algorithms and their implications on competition (June 19, 2018), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Press_ermittlungen/2018/19_06_2018_Algorithmen.html.

12. House of Commons Digital, Culture, Media and Sports Committee, *Disinformation and fake news: Final Report* (Feb. 14, 2019), available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>.

13. House of Lords Select Committee on Communications, *Regulating in a digital world*, (Mar. 9, 2019), available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

164 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

report commissioned by the UK government setting out its recommendations for effective regulation of the digital economy.¹⁴

4. *Other Member States*

Other national authorities have opened investigations and considered market studies on these issues. In February 2019, the Austrian authority announced an investigation of whether Amazon is discriminating against retailers by favoring its own products on its platform.¹⁵ And the Dutch Government has recently published a discussion paper on online platforms and the need for additional regulation.¹⁶

C. UNITED STATES

The US agencies – the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) – have largely refrained from public enforcement actions against large multi-sided technology platforms, but things may be changing. The White House and members of Congress from both parties have called for closer scrutiny of the platforms (focusing on varying concerns). The DOJ leadership has been actively engaged in dialogue on their policy approach to technology platforms. While leaving open the potential for enforcement, Makan Delrahim, Assistant Attorney General (AAG) in charge of DOJ’s Antitrust Division, has suggested that traditional antitrust tools should continue to be applied and caution should be exercised to avoid over-enforcement that would threaten to deter innovation, taking “action only with credible evidence of harm to competition and not harm to just competitors.”¹⁷

The future direction of the US enforcement authorities will bear watching. In his confirmation hearing before the US Senate, recently-confirmed Attorney General William Barr recognized that being big was not necessarily bad, but said that “a lot of people wonder how such huge behemoths that now exist in Silicon Valley have taken shape under the nose of the antitrust enforcers”, adding that “You can win that place in the marketplace without violating the antitrust laws, but I want to find out more

14. *Unlocking digital competition: Report of the Digital Competition Expert Panel* (Mar. 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

15. FCA, *Austrian Federal Competition Authority initiates investigation proceedings against Amazon* (Feb. 14, 2019), available at https://www.bwb.gv.at/en/news/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon/.

16. *Discussion of competition policy on online platforms*, OVERHEID.NL (Dec. 19, 2018), available at https://www.internetconsultatie.nl/mededinging_platforms.

17. Makan Delrahim, AAG, DOJ, *Prepared Remarks on “Start Me Up”: Start-Up Nations, Innovation, and Antitrust Policy 8*, (Oct. 17, 2018), available at <https://www.justice.gov/opa/speech/file/1101506/>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019] NAVIGATING THE NEW COMPETITION LAW FRONTIER 165

about that dynamic.”¹⁸ Similarly, AAG Delrahim has stated in addressing the issue of whether large firms should be required to share data with smaller rivals: “we do not generally require firms, even dominant ones, to deal with competitors. I am not yet convinced that we should have different rules for data.”¹⁹

The FTC has been considering the direction of enforcement in the technology sector for several months. Since Fall 2018, the agency has been conducting an ambitious set of public hearings on issues relevant to technology platforms as part of its broader review of the digital economy. Completed hearings to date have included multi-day sessions on topics relevant to technology platforms, including: (i) identification and analysis of collusive, exclusionary and predatory conduct by digital and technology-based platforms and evaluating acquisitions of potential or nascent competitors in digital marketplaces; (ii) privacy, big data and competition; (iii) algorithms, artificial intelligence and predictive analysis; (iv) data security, and (v) competition and consumer protection issues in US broadband markets.²⁰

The FTC also announced a new Technology Task Force in February 2019.²¹ Working closely with the Bureau of Economics and the Bureau of Consumer Protection, the Task Force will include 17 staff attorneys from across the Bureau of Competition with relevant expertise in markets for online advertising, social networking, mobile operating systems and apps, and platform businesses. The Task Force will reportedly be dedicated to monitoring competition in US technology markets, investigating potential anticompetitive conduct, and taking enforcement actions when warranted including against previously consummated mergers.²²

The US Congress has held hearings on technology sector enforcement. In December 2018, there were House of Representatives hearings on digital

18. See Lauren Feiner, *Attorney General Pick Barr Hints He Would Look at Antitrust in Tech*, CNBC (Jan. 15, 2019, 2:53PM), available at <https://www.cnbc.com/2019/01/15/attorney-general-nominee-william-barr-addresses-antitrust-and-tech.html>.

19. Delrahim, *supra* note 17, at 13.

20. Further sessions (which were delayed by the federal government shutdown) include, *inter alia*, sessions on: (i) the FTC’s role in a changing world, and (ii) merger retrospectives. See generally *Hearings on Competition and Consumer Protection in the 21st Century*, FTC: POLICY, <https://www.ftc.gov/policy/hearings-competition-consumer-protection> (last visited Mar. 11, 2019).

21. See Press Release, FTC, FTC’s Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), available at https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology?utm_source=govdelivery [hereinafter FTC’s Bureau of Competition Launches Task Force].

22. The FTC on-going hearings will consider merger retrospectives in a session scheduled for April 12, 2019. Press Release, FTC, FTC Announces Agenda for the 13th Session of its Hearings on Competition and Consumer Protection in the 21st Century (Mar. 4, 2019), available at <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-announces-agenda-14th-session-its-hearings-competition>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

166 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

platforms, including on Google's collection, use, and filtering of data²³ The Antitrust Subcommittee of the Senate Judiciary Committee recently held hearings on the subject.²⁴ And at least one Democratic Presidential candidate, Elizabeth Warren, has proposed breaking up large platforms, making part of their operations public utilities.²⁵

D. AUSTRALIA

Australia's approach to large multi-sided technology platforms is quickly evolving. The Australian Competition and Consumer Commission ("ACCC") has undertaken a broad market study of digital platforms at the direction of the government, focusing on the impact of platforms on media and journalism as well as competition in advertising services markets.

In late 2018, the ACCC issued an interim report considering several novel amendments to Australian competition and regulatory laws.²⁶ The detailed preliminary report included a finding that Google and Facebook both have a substantial degree of market power in several relevant markets. While the ACCC did not make any finding of anti-competitive conduct, it found the platforms had the potential ability to favor their own interests in data, advertising and the supply of content. Recommendations under consideration include:

- introducing amendments to Australian merger law that would: (i) require certain "digital platforms" to provide the ACCC with advance notice of the acquisition of any business with activities in Australia; and (ii) make clear that when assessing the likely competitive effects of a merger, relevant factors include removal of a potential competitor and access to data (including both amount and nature of the data);
- mandating that mobile device operating systems not provide a default internet browser and suppliers of internet browsers not have a default search engine; and
- establishing regulatory oversight of platforms' activities, including algorithms, in the ranking of advertising and news and journalistic content, and the potential consequences of those activities for news media businesses and advertisers.

The ACCC report also recommends privacy law reform to address potential consumer harm stemming from these digital platforms' collection

23. *Hearing on Transparency & Accountability: Examining Google and its Data Collection, Use and Filtering Practices*, H.R. Judiciary Comm. (December 11, 2018), available at <https://republicans-judiciary.house.gov/hearing/transparency-accountability-examining-google-and-its-data-collection-use-and-filtering-practices/>.

24. Ben Remaly, *Don't move away from consumer welfare, subcommittee head warns*, GLOBAL COMPETITION REVIEW (March 6, 2019), <https://globalcompetitionreview.com/article/usa/1181178/don%E2%80%99t-move-away-from-consumer-welfare-subcommittee-head-warns>.

25. Elizabeth Warren, *Here's how we can break up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

26. *Digital Platforms Inquiry Preliminary Report*, ACCC (Dec. 10, 2018), available at <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report>.

of user data and information. The recommendations include requiring (i) express notification where data is collected by the platform or a third party, (ii) express, opt-in, adequately informed and voluntarily given consent to data collection, and (iii) that platforms erase personal information if consumers withdraw their consent. The ACCC has further recommended the development of an enforceable code of conduct for digital platforms to increase transparency and control for consumers.

A large number of submissions have been made in response to the preliminary report. The final report is due to be issued in June. In the interim, the ACCC has confirmed that it is currently investigating five possible contraventions of Australia's competition and consumer laws by as yet unidentified digital platforms.

E. ASIA PACIFIC

Competition authorities in Asia are focusing on large multi-sided technology platforms, but the market structure in these jurisdictions vary.

Like Australia, the Japan Fair Trade Commission ("JFTC"), along with two other Japanese ministries,²⁷ published a policy paper defining several fundamental principles for rulemaking concerning digital platform businesses. The paper focused on promoting transparency and fairness in competition with policy related to merger review and conduct investigations.²⁸ These principles require the effects on data and innovation to be taken into consideration in merger review and investigations relating to digital markets. The Japanese government is reportedly planning to create a new expert body to support policy making and implement rules related to competition and the data privacy practices of technology companies including Facebook, Google, Amazon, and more geographically limited firms like Tencent and Alibaba.²⁹

Considering the distinct competitive dynamics of its national technology markets, China's newly-consolidated competition authority the State Administration for Market Regulation ("SAMR") – following the trajectory of its three predecessors – is taking a more cautious approach to enforcement related to large "digital" platforms than in other technology segments such as hardware markets. A recent draft regulation on abuse of dominance notes additional factors that need to be considered in determining whether internet-based businesses have market dominant positions including relevant competition characteristics, business models, network effects, technological characteristics, market innovations, possession

27. Ministry of Economy, Trade and Industry ("METI") and Ministry of Internal Affairs and Communications ("MIC").

28. *Fundamental Principles for Rule Making to Address the Rise of Platform Businesses*, METI (Dec. 18, 2018), available at https://www.meti.go.jp/english/press/2018/1218_002.html.

29. *Interim Report of the Study Group for the Improvement of the Trade Environment Involving Digital Platform Businesses*, METI (December 12, 2018), available at http://www.meti.go.jp/english/press/2018/1212_004.html.

of relevant data and the power of operators on associated markets.³⁰ SAMR has devoted increasing scrutiny to these markets with proposed regulation of digital platforms reportedly under development and has begun to pursue enforcement activities related to digital platforms with a particular focus on data. For example, last December, SAMR reportedly opened a separate abuse of dominance investigation against ride sharing platform DiDi, unrelated to its acquisition of Uber China which was also under investigation.³¹ More recently, two local antitrust authorities in China started probing Meituan's food delivery service platform for potential abuse of dominance violations.³² There are also recent private enforcement actions alleging digital platforms' abuse of dominance.³³

Other Asian countries may launch regulatory or enforcement initiatives focused on technology platforms. In India, for example, the government has reportedly introduced more direct regulatory measures to prevent discriminatory practices by e-commerce vendors, preventing platforms such as Amazon from giving its own products or those of its affiliates preferential treatment by banning such sales altogether.³⁴ The regulation followed a ruling by India's Competition Commission that Amazon and Walmart subsidiary Flipkart did not abuse any dominant positions to favor select sellers, in response to complaints from trade groups.³⁵ Further developments in each of the Asia-Pacific countries will need to be watched.

IV. Outlook for the “New Frontier” of Enforcement Involving Digital Platforms

As the foregoing review confirms, the spotlight is firmly set on technology platforms as an actual or potential enforcement focus in a number of jurisdictions. While many in-house and outside antitrust practitioners agree that existing competition law tools are sufficient to handle potential antitrust concerns involving platforms, going forward, there are several key themes

30. See *Draft Regulation on Banning the Abuse of Dominant Market Position*, SAMR (Jan. 30, 2019), available at <http://gkml.samr.gov.cn/nsjg/bgt/201902/W020190216628441906168.pdf>.

31. *China's SAMR launches probe of Didi for alleged abuse of e-hailing dominance*, PARR (Dec. 7, 2018), available at <https://app.parr-global.com/intelligence/view/prime-2752079>.

32. *Chinese local authorities probe Meituan for 'choosing one from two' under AML*, PARR (Feb. 15, 2019), available at <https://app.parr-global.com/intelligence/view/prime-2786317>.

33. For example, JD.com recently filed an antitrust suit against Alibaba in a Beijing court, alleging that Alibaba's Tmall.com required merchants “choosing one from two [ecommerce sites]” harms competition and amounts to abuse of dominance. See *JD.com files antitrust suit against Alibaba in Beijing court*, PARR (Jan. 10, 2018), available at <https://app.parr-global.com/intelligence/view/prime-2566007>.

34. Aftab Ahmed & Sankalp Phartiyal, *India tightens e-commerce rules, likely to hit Amazon, Flipkart*, REUTERS (Dec. 26, 2018, 12:11PM), available at <https://www.reuters.com/article/us-india-ecommerce/india-tightens-e-commerce-rules-likely-to-hit-amazon-flipkart-idUSKCN10P14M>.

35. Mugdha Variyar, *Flipkart, Amazon not dominant hence not in contravention of Competition Act*, ECON. TIMES (Nov. 8, 2018, 12:25PM), available at <http://economictimes.indiatimes.com/articleshow/66534244>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019] NAVIGATING THE NEW COMPETITION LAW FRONTIER 169

that can be expected from enforcement and regulation of platform markets. Given that large technology platforms operate around the world, developments in some jurisdictions may have significant impact on the operations of technology platforms in other places.

A. FURTHER CONSIDERATION OF THE BURDEN TO SHOW
EXCLUSIONARY EFFECTS

The leading antitrust enforcement concern is that technology platforms will use their substantial size and position to exclude or discriminate against potential competitors (e.g. Google Shopping/Search, Amazon Marketplace, Apple App Store). As enforcers scrutinize potential conflicts of interest and delve deeper into the mechanics of platform algorithms, they will need to carefully weigh the enforcement risks of not challenging potential exclusionary or discriminatory conduct against those of proceeding against conduct that turns out to be pro-competitive or competitively benign.

While political sentiment may or may not encourage a lower threshold for challenging potential anticompetitive effects, this may be cabined by established standards and judicial precedent. For example, under established US precedent, firms (even monopolists) generally have no obligation to deal with their competitors or provide them with equal treatment. In the US, enforcers and private litigants bear a significant burden in court to show the likelihood of a potential anticompetitive effect. US enforcers have in the past chosen not to pursue enforcement actions against platforms where there is a plausible pro-competitive benefit in service offerings and innovation, including, for example, the FTC closing an investigation of Google search bias in 2013.³⁶

Europe has shown greater willingness to pursue enforcement actions where there is a perceived risk of anticompetitive effects involving similar or the same conduct. Unlike the US, the prevailing view in Europe is that there is no need to demonstrate actual exclusionary effect, and all that is required is that the firm in question be shown to be dominant, the conduct be shown to be abusive and potential anticompetitive effects be shown to be possible. Once such a showing is made, the pursued firm can base its defense on proving in fact the absence of potential anticompetitive effects or showing offsetting pro-competitive benefits.³⁷ In view of the substantive differences between EU and US standards, European enforcers have diverged from the FTC in their assessment of prior investigations involving Google's search platform, imposing the significant fines described above. One question is whether competition authorities in other parts of the world

36. *Statement of the Federal Trade Commission Regarding Google's Search Practices*, In re Google, FTC File No. 111-0163 (Jan. 3, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

37. Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, ECLI:EU:C:2015: 651 (CJ Oct. 6, 2015) [hereinafter "Post Danmark II"].

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

170 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

will hue more closely to the European or US approach, as well as whether the US will continue to adhere to its less activist approach. At the heart will be a fundamental question of weighing the relative risks of false positives in over- and under-enforcement, within the confines of precedent and other legal constraints.

B. GREATER FOCUS ON MULTI-SIDED MARKETS AND ZERO-PRICE OFFERINGS

In their assessments, enforcers will need to give closer and more explicit consideration to the special features of large multi-sided technology platforms. While the concept of two-sided markets has been well developed in academic writing, the practical impact on the assessment of competitive effects is still evolving. In the wake of the Supreme Court decision in *Ohio v. American Express*, US agencies and courts will need to more explicitly factor analysis of two-sided markets into the evaluation of overall competitive effects.³⁸ Other jurisdictions are likely to more closely consider these features as well.

As part of this evolution, non-price competition factors that are already examined as part of existing enforcement may become more important. In particular, enforcers are likely to look more closely at loss of innovation or service quality for consumers of free services.³⁹ But these features are difficult to quantify and assess on a standalone basis. While enforcers are likely to rely heavily on internal documents to establish competitive dynamics, care should be taken to critically assess party documents to avoid placing too much weight on what may be overly optimistic or unrealistic predictions of market effect in an inherently uncertain competitive environment.

C. EXPERIMENTATION WITH NEW THEORIES OF HARM

A more controversial concern is exploitation of consumer data.⁴⁰ As privacy considerations become increasingly important in the assessment of platform markets, lawmakers and enforcement authorities will need to consider the best avenue for addressing potential concerns. Many jurisdictions are likely to turn to privacy regulation as a solution for some of the exploitation concerns associated with consumer data. A careful balance will need to be struck between ensuring sufficient fairness and transparency without reducing consumer choice.

38. *Ohio v. American Express*, 585 U.S. ___, 138 S. Ct. 2274 (2018).

39. Makan Delrahim, AAG, DOJ, *Keynote Address at Silicon Flatirons Annual Technology Policy Conference: "I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy* (February 11, 2019), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons>.

40. *Id.* (warning against the distortion of antitrust standards based on concerns about privacy, inadequate notice, unauthorized use of data, and data protection).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019] NAVIGATING THE NEW COMPETITION LAW FRONTIER 171

As noted above, actions have already been taken under the rubric of privacy protection (rather than antitrust) in France and Germany, and other authorities may consider taking such actions. For example, the FTC is reportedly considering imposition of large fines on Facebook for privacy violations involving sharing of consumer data with a third party (Cambridge Analytics) without user consent, and the fines may exceed the \$22 million fine imposed on Google in 2012. And, as noted above, the UK parliament issued a report in February 2019 following an inquiry into conduct by Facebook recommending an investigation into alleged abuse of dominance and privacy issues.

In Australia, ACCC Chairman Rod Sims is opposed to introducing broader public interest considerations into the core of competition law enforcement.⁴¹ While such an approach would preserve antitrust doctrinal purity, the ACCC – as both consumer law and competition law regulator – has the option of taking action on either or both grounds. As noted above, the ACCC has also made recommendations to revise consumer and privacy law so as to address any issues that are not within the ambit of competition law.⁴²

D. RENEWED FOCUS ON TREATMENT OF DATA

Enforcement authorities will likely seek to further refine their assessment of the competitive implications of different types of data and the potential effect on competition, particularly where that data might reasonably create market power. While European national competition authorities may be taking a broad view of the market power established by consumer data on social media platforms, the US DOJ has urged caution in defining what data could convey market power considering factors such as how quickly data loses its competitive significance and the potential for other sources of equivalent data.⁴³ In the ACCC's recent preliminary report, the way in which purportedly dominant platforms collect and use consumer data was a focus of both the findings and the recommendations. Globally, the implications of data collection on competition look to be a continuing feature of public dialogue concerning technology platforms.

Enforcers will likely give closer consideration to remedies requiring access to data. In investigations focused on a platform's use of data on competing sales, for example, questions have increasingly been raised on whether a dominant firm could have an obligation to provide access to the data it collects. While this behavioral access remedy has generally not been required to date and most remedies have been focused on fines or prohibitions, there are suggestions that the European Commission and others may be considering these sorts of non-traditional remedies in cases

41. Rod Sims, Chairman, ACCC, *Speech to RBB Economics Conference* (Nov. 29, 2018), available at <https://www.accc.gov.au/speech/address-to-the-2018-annual-rbb-economics-conference>.

42. *Digital Platforms Inquiry Preliminary Report*, *supra* note 26.

43. See Delrahim, *supra* note 17, at 13

involving technology platforms. Competition Commissioner Margrethe Vestager has stated that it will be necessary to ensure that competition rules are “ready for a world where data becomes even more vital”; she has emphasized that any proposed rules will have to be fair to companies that need the data to compete as well as those who have put money and effort into building the datasets.⁴⁴ AAG Delrahim’s above-quoted comments about imposing obligations to share data with competitors are very much to the contrary.

In contrast to Europe, China is taking a relatively cautious approach in enforcement involving technology platforms and other internet-based businesses. SAMR has not developed a separate strategy to tackle the big-data issue, partly because Google and Facebook are still not allowed to operate in China. But public concerns regarding the three large domestic platforms – Baidu, Alibaba, and Tencent – have prompted SAMR to study internet-based businesses. SAMR appears to be cautious in defining relevant markets, a critical component of SAMR’s enforcement analysis.

E. CLOSER SCRUTINY OF MERGERS AND ACQUISITIONS INVOLVING START-UPS AND INNOVATORS

Merger reviews involving technology platforms acquiring startups and nascent competitors can be expected to receive increasing scrutiny. EU Competition Commissioner Vestager has discussed concerns around “killer acquisitions” where large technology companies purportedly block innovation by acquiring smaller innovators to close them down.⁴⁵ Nobel Economist Jean Tirole and European Commission chief economist Thomas Valletti have each noted that a possible solution would be to shift the burden of proof onto technology platforms, requiring them to prove efficiencies before a proposed acquisition is allowed to proceed.⁴⁶ In the US, the enforcement approach will need to be calibrated with judicial precedent for challenging acquisitions of potential competitors which sets a significant burden of proof for the government.⁴⁷

44. Margrethe Vestager, *Making the data revolution work for us*, Mackenzie Stuart Lecture (Feb. 4, 2019), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/making-data-revolution-work-us_en.

45. Margrethe Vestager, *Shaping Competition Policy in the Era of Digitisation*, Brussels (Jan. 17, 2019), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/shaping-competition-policy-era-digitisation_en.

46. Janith Aranze, *DG Comp chief economist: Reverse burden of proof to catch killer acquisitions*, GCR (Nov. 20, 2018), available at <https://globalcompetitionreview.com/article/1177095/dg-comp-chief-economist-reverse-burden-of-proof-to-catch-killer-acquisitions>; Allison Schragger, *A Nobel-winning economist’s guide to taming tech monopolies*, QUARTZ (June 27, 2018), <https://qz.com/1310266/nobel-winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/>.

47. See, e.g., *Federal Trade Commission v. Steris Corp.*, 133 F. Supp. 3d 962, 978 (N. D. Ohio 2015) (considering whether the potential competitor “probably would have entered the [relevant antitrust] market . . . within a reasonable period of time” absent the merger and rejecting the FTC’s request for a preliminary injunction to block the merger at issue).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

NAVIGATING THE NEW COMPETITION LAW FRONTIER 173

Overall, the debate around nascent competitors raises questions on antitrust tolerance for false-positives in enforcement actions against acquisitions where the future impact is uncertain and potential efficiencies may be lost as a result of what may ultimately be determined to have been an overly-aggressive enforcement. On the other hand, American Antitrust Institute President Diana Moss has argued that US enforcers have given too much credence to efficiency claims in allowing mergers to proceed with divestitures rather than stopping them outright. While the example Ms. Moss cited was airline mergers, this claim can be and has been made by European authority leaders against technology platforms, as noted above. FTC Commissioner Rohit Chopra, a Democrat, suggested in mid-February 2019 that there may be a need for far greater scrutiny of claimed efficiencies in mergers. Commissioner Chopra pointed to Google's \$1.65 billion acquisition of YouTube more than a decade ago as an example of an "eye-popping" price for a buyout that turned into a crucial transaction, as well as Facebook's \$1 billion acquisition of Instagram when it had no sales revenue.⁴⁸

Rebecca Kelly Slaughter, the FTC's other Democratic Commissioner, has similarly questioned the efficiencies associated with mergers and suggested potential post-merger retrospectives to better understand the competitive effect of transactions that have been allowed to close. On April 12, 2019, the FTC will hold a hearing in which the potential for a study of merger retrospectives will be considered. While FTC Chairman Joseph Simons has indicated an open mind on the subject, questions have been raised on the potential costs and Simons has noted that the analysis needs to focus on what would have happened absent the merger.⁴⁹ To further consider the subject, the FTC's new Technology Task Force will reportedly not only support staff in reviewing prospective mergers, but also in reviewing consummated mergers in the technology sector.⁵⁰ It is far from clear whether such an approach would improve the FTC's ability to judge competitive effects of mergers of potential competitors, while posing significant risks for potential acquirers if this can be used to support future post-consummation challenges.

In Australia, the ACCC has acknowledged the difficulty of predicting the "likely future" when reviewing acquisitions involving nascent competitors and startups, since it is often only with hindsight that it becomes clear that particular technologies had the potential to thrive and compete vigorously, while also noting that such transactions can lead to a large reduction in

48. . Rohit Chopra, Commissioner, FTC, *Prepared Remarks for the Silicon Flatirons Conference 2* (Feb. 10, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1453633/remarks_of_commissioner_chopra_at_silicon_flatirons.pdf.

49. Nadia Dreid, *Size Doesn't Matter for Old Mergers, FTC Chair Says*, LAW360 (Mar. 20, 2019, 6:50PM), <https://www.law360.com/consumerprotection/articles/1141153/size-doesn-t-matter-for-old-mergers-ftc-chair-says>.

50. *See* FTC's Bureau of Competition Launches Task Force, *supra* note 21.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

competition.⁵¹ The ACCC is also recommending that certain platforms provide it with advance notice of the acquisition of any business with activities in Australia and that the country's merger laws be amended to make clear that the nature and volume of data is a relevant consideration in merger assessment. It is worth noting that arguably the ACCC is already able to take this into account (and has already done so in a merger not involving a digital platform⁵²).

Some EU Member States have been considering amending merger control provisions to include size of transaction tests as an alternative to turnover thresholds to capture potentially anticompetitive acquisitions involving startups. Such laws were adopted in Germany and in Austria in 2017,⁵³ and these authorities have adopted joint guidelines to explain how the new thresholds work.⁵⁴ There have also been discussions in France as to whether size of transaction thresholds should be adopted or whether the FCA could review transactions below the current thresholds, after closing, to determine if they have led to anticompetitive effects.⁵⁵ The European Commission has also considered whether its rules should be amended to ensure that they catch data-related transactions that might affect competition. At present, the only way this can be done is through what is

51. *Digital Platforms Inquiry Preliminary Report*, *supra* note 26, at 63-64; *Data economy drives dynamic changes*, ACCC (Oct. 15, 2018), *available at* <https://www.accc.gov.au/media-release/data-economy-drives-dynamic-changes> (containing excerpts of speech by ACCC Chair Rod Sims).

52. In a proposed acquisition involving toll road operators in which one party enjoyed access to "highly detailed traffic data" unavailable to other competitors, the ACCC allowed the deal to proceed subject to the acquirer agreeing to an undertaking to regularly publish that traffic data so it was available to rivals. *See Sydney Transport Partners Consortium (including Transurban) – proposed acquisition of WestConnex interest*, ACCC: PUBLIC INFORMAL MERGER REVIEW REGISTER (Aug. 30, 2018), *available at* <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/sydney-transport-partners-consortium-including-transurban-proposed-acquisition-of-westconnex-interest>.

53. In Germany, the 9th Amendment Package to the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, or GWB) which came into force on June 9, 2017; In Austria, the Austrian Cartel and Competition Law Amendment Act 2017 (Kartellgesetz, or KartG) which became effective on November 1, 2017.

54. BUNDESKARTELLAMT, GUIDANCE ON TRANSACTION VALUE THRESHOLDS FOR MANDATORY PRE-MERGER NOTIFICATION (SECTION 35 (1A) GWB AND SECTION 9 (4) KARTG) (July 2018), *available at* https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2; *see also* Press Release, Bundeskartellamt, Joint guidance on new transaction value threshold in German and Austrian merger control - Publication of final version (July 9, 2018), *available at* https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/09_07_2018_Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=3.

55. *See* Press Release, FCA, The Autorité de la concurrence announces several measures aimed at streamlining and simplifying mergers' procedures for companies (June 7, 2018), *available at* http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3182&lang=en.

referred to as a “back door” approach whereby a Member State’s competition authority refers the matter to the Commission.⁵⁶

F. DEBATE ON CONSUMER WELFARE VS. TOTAL WELFARE TESTS

Finally, one source has suggested a different approach than considered above. Christine Wilson, one of the FTC’s Republican Commissioners, has suggested increased attention be paid to a total welfare standard in evaluating mergers and conduct restrictions rather than the consumer welfare approach, noting that Canada has long pursued a total welfare approach.⁵⁷ From an economic perspective, a total welfare approach takes into account consumer welfare plus producer welfare. While there may be some confusing nomenclature, some activists and antitrust “hipsters” are also advocating that non-competition factors be included in antitrust reviews. Chairman Rod Sims has stated that the ACCC generally uses a consumer welfare standard in competition assessment, although it may occasionally use a total welfare standard to prevent more general economic harm (in infrastructure decisions and a small number of merger and enforcement decisions). At the same time, as noted, Mr. Sims is opposed to introducing broader public interest considerations into the core of competition law enforcement.⁵⁸

V. Conclusion

It remains to be seen where antitrust enforcement regarding large multi-sided technology platforms is heading. As this review shows, there are common themes and concerns prominent in the global dialogue. The business practices of platforms will undoubtedly remain in the spotlight for many politicians and enforcers – not just the US-based tech companies such as Amazon, Facebook, and Google, but also firms that are presently more geographically limited in scope such as Tencent and Alibaba. There may be

56. For example, the *Apple / Shazam* deal received EU scrutiny only because the Austrian competition authority referred the matter to the Commission. *Apple/Shazam* (Case M.8788) Commission Decision C(2018) 5748 final (June 9, 2018).

57. Christine E. Wilson, Commissioner, FTC, *Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium on Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get* (Feb. 15, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf. There have been vocal debates in the US Congress, particularly among Senators on the Antitrust Subcommittee of the Senate Judiciary Committee. Several Senators have decried an increase in overall concentration, while others, including the current Chairman, have counseled against moving away from a consumer welfare standard. See Remaly, *supra* note 24.

58. Rod Sims, Commissioner, ACC, *Address to the 2018 Annual RBB Economics Conference* (Nov. 29, 2018), available at <https://www.accc.gov.au/speech/address-to-the-2018-annual-rbb-economics-conference>; *ACCC 2019 focus on consumer guarantees and anti-competitive practices*, ACCC (Feb. 26, 2019), available at <https://www.accc.gov.au/media-release/accc-2019-focus-on-consumer-guarantees-and-anti-competitive-practices> (containing excerpts of speech by ACCC Chair Rod Sims).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

176 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

efforts to implement the results of the market studies currently being conducted in the US, Europe, and Asia into legislation, regulation, and potentially new enforcement actions across common theories of harm. Mergers and acquisitions in the sector can be expected to garner increasing public scrutiny, particularly those involving significant valuations for startups and nascent competitors. And prevailing views on how to assess data, innovation, and platforms will continue to be developed and debated by scholars and enforcers alike.

There are many open questions on how the new frontier of competition law will develop. Will European competition authorities continue to take an activist approach (as appears likely), when there are serious concerns about those actions potentially stifling innovation and depriving consumers of services they value? Will the US authorities continue to pursue a cautious approach or will the FTC and Congressional hearings lead to more activism pushing the boundaries of judicial precedent? And where will the competition authorities in other jurisdictions land? The answers to these questions will likely have significant effects not only for the global businesses of these platforms, but for the future development of the technology sector more generally.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW