

## **NYSBA International Section Meeting (November 8, 2019)**

### Competition Enforcement of Digital Platforms in the US, Japan and Other Jurisdictions

#### Co-Chairs:

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#### Panelists:

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#### Materials:

1. European Commission Press Release re Google fine ([https://europa.eu/rapid/press-release\\_IP-19-1770\\_en.htm](https://europa.eu/rapid/press-release_IP-19-1770_en.htm))
2. European Commission Report: Competition Policy for the Digital Era (<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>)
3. ACCC report (<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>)
4. DOJ Comments by Makan Delrahim at Antitrust New Frontiers Conference (June 11, 2019) (<https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers>)
5. JFTC guideline (a draft): “Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (draft)” (<https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.pdf>)

#### Outline:

- I. Introduction
  - a. Co-Chairs and Panelists
- II. Summary of recent enforcement actions by competition agencies concerning digital platforms
  - a. US
    - i. Enforcement by federal and state authorities
    - ii. Open investigations into Facebook, Google, and others
    - iii. Potential retroactive analysis of mergers/acquisitions
  - b. Japan
    - i. JFTC Developments in the Age of Digital Platforms
    - ii. Investigation and findings regarding Amazon and Apple
  - c. Korea
    - i. Investigations of Google, Facebook, Apple

- d. EU
  - i. Google fines
  - ii. Investigation of Amazon
  - iii. Potential investigations of others
- e. Australia
  - i. Report on digital platforms, including Google and Facebook
- III. Potential Harm to Competition
  - a. Let's begin with exploring why competition agencies in many jurisdictions, including the U.S., have recently ramped up enforcement efforts in this space. Digital platforms create numerous consumer benefits in the form of free access to search, networking, communications, and content sharing. Because one of the main goals of antitrust is to protect consumers, and digital platforms often provide a wide array of innovative services to consumers at zero or low cost, what is the antitrust concern?
  - b. Should an agency consider data and privacy concerns in an antitrust analysis?
  - c. As a result of network effects, often there are a limited number of players in some of these digital platform markets. How do agencies account for the limited number of market participants in many of these digital platform markets?
- IV. Analysis of Potential Harm
  - a. Traditionally, agencies look at the impact on price and output to determine whether certain conduct is anticompetitive. What analyses should agencies use to determine whether conduct by a digital platform is anticompetitive?
    - i. How do or should agencies consider the markets for online advertising as opposed to consumer/user-facing markets?
  - b. KFTC investigations focused on whether Google pressured local game companies to release their games exclusively on Google, and whether Apple had used its dominant position to force unfavorable terms on its carriers. Is KFTC analyzing whether these types of conduct had an indirect effect on consumers? What factors is the KFTC considering and are other jurisdictions conducting similar analyses?
  - c. One headline that seems to keep recurring is that some agencies are looking to break up consummated mergers. How should that be analyzed? Is it fair to a company if a merger or acquisition worked out better than it anticipated, such that it obtained a dominant place in a market, even if it (and the reviewing agencies) did not believe that to be a probable outcome in their contemporaneous analysis?
- V. Are Current Laws and Regulations Sufficient?
  - a. Some regulators have been clear that they believe current laws and regulations provide the appropriate framework for analyzing conduct in this space, and that such a framework can be used to rein in any abuse of dominance or monopolization. Do you agree? If not, what other tools would you recommend be adopted? Are new economic tools needed to measure potential/actual harm or are the current metrics sufficient?
    - i. Do Japan's Antimonopoly Act and Act on Prohibition of Private Monopolization and Maintenance of Fair Trade laws provide the appropriate framework in Japan?

- ii. There is currently a lot of buzz in the U.S., particularly from Democratic presidential candidates, about reforming the antitrust laws to better regulate digital platform markets. Is there a need for such reform?
            - 1. In the merger context, is there room for change to better allow the agencies to weigh potential anticompetitive harm from a combination, particularly where a dominant player acquires a nascent or early-stage competitor?
        - b. The EU has taken a somewhat different approach than the US with respect to its investigations and actions to date. Can you explain the different approaches and the results?
        - c. How do the approaches taken in Korea compare to the others?
- VI. International Coordination and Forecasts for 2020.
  - a. To date, it seems like there has been little coordination among the agencies worldwide. Investigations have proceeded at different times, under different standards, and with different results. Should there be more coordination, and if so, what suggestions do you have to enable this?
  - b. What do you see coming in the rest of 2019 and 2020? Will agencies break up consummated transactions? What sort of mandates and requirements do you see finding a home in consent decrees – data sharing requirements? What changes do you see coming to merger reporting requirements?