



Panel Summary: The Notorious B.I.G. Tech Platforms¹

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Introduction

On October 6, 2021, the ABA Antitrust Law Section's Pricing Conduct, Media and Technology, and Legislative Committees sponsored a panel discussion on the consequences of proposed regulations of "gatekeeper" digital platforms for competition and innovation. Moderator Avigail Kifer (Cornerstone Research) led a discussion among panelists Louise Aberg (UK Competition and Markets Authority), Rachel S. Brass (Gibson, Dunn, & Crutcher LLP), Lesley Chiou (Occidental College), and John Newman (University of Miami School of Law).²

Scope of Proposed Regulations

The panel first discussed the scope of various proposed platform regulations in the U.K., E.U., and U.S.

Ms. Aberg explained that the current version of the proposed U.K. digital markets regulation ("A New Pro-Competition Regime for Digital Markets") would apply to firms with "strategic market status" that have "substantial and entrenched" market power in at least one digital activity, providing it

with a "strategic market position."³ Ms. Aberg said that under the proposal, a firm's classification as having strategic market status would relate to *particular activities* undertaken by the firm. Firms with a strategic market position in a digital market would include "gatekeepers," firms with a significant scale or size in a digital service, and firms with the ability to either entrench a position in a digital activity or use their position to extend market power to another digital activity. In contrast to the U.K. proposal, she noted that the proposed E.U. Digital Markets Act focuses on "core platform services" only.⁴ Ms. Aberg explained that under the U.K. proposal, there are no quantitative presumptions and no exhaustive list of companies that might be subject to the regulation—instead, each player with potential strategic market status will be subject to individual economic assessment. This assessment would address whether any activities of the firm met the strategic market status criteria. She contrasted this with the E.U. proposal which features quantitative thresholds as the basis of "rebuttable" quantitative presumptions to establish whether a firm is a "gatekeeper" of a core platform service.⁵

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² Disclaimer: During the panel, each panelist spoke solely in his or her individual capacity, and not on behalf of any institution or client. Any errors in summarizing the panelists' statements are my own.

³ "A New Pro-Competition Regime for Digital Markets," *U.K. Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy*, July 2021 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

⁴ "Regulation Of The European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)," *European Commission*, December 12, 2020, available at https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

⁵ The proposal sets quantitative thresholds for firm size (measured in terms of EEA revenue or market capitalization) and usage (measured in monthly active users or business users). See "Regulation Of The European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)," *European Commission*, December 12, 2020, pp. 36–37, available at

Professor Newman described a proposed bill in U.S. House of Representatives that would apply a threshold rule identifying digital platforms with more than 50 million monthly U.S. users (e.g., Twitter, TikTok) and a market capitalization of over \$600 billion as “covered platforms” subject to additional regulation.⁶ He noted that the threshold rule could be both over- and under-inclusive since it did not include market share—for example, Professor Newman said Zillow would not be covered despite having a high market share after acquiring Trulia as it would not meet either the usage or market capitalization requirements.

Dr. Kifer then asked the panel about the rationale for and consequences of subjecting a limited number of firms to a higher level of antitrust scrutiny. Professor Newman replied that the U.S. House legislation reflects the U.S. House Antitrust Subcommittee’s Report finding that despite the market power exhibited by large tech platforms, existing antitrust law has made it difficult to address their dominant position.⁷ Moreover, he noted that agencies have limited resources and the bill directs agency resource to the areas they will likely have the biggest impact.

Ms. Brass discussed the “significant risks” of selective antitrust enforcement. First, she noted that even large firms with market position can be dependent on smaller firms for niche or key inputs. As a result, gatekeeper rules may allow smaller firms to impose unfair terms on larger firms, unless they are applied regardless of size. Second, she contended that the House Report does not provide adequate justifications for—possibly unconstitutionally—treating vastly different companies like they are one whole and adopting a

broad set of rules that applies to them as envisioned in the House proposal. Third, Ms. Brass argued that the proposal did not sufficiently weigh any benefits of potentially increasing competition against the costs of potentially reducing vertical integration between upstream and downstream parties. She sees these as issues that may affect consumers through a reduction in innovation, increased exposure of consumer data, and other consumer privacy issues.

Effects on Competition

Dr. Kifer next directed the panel’s discussion to the implications these proposals have for competition both across and on Internet platforms. Turning first to across-platform competition, she asked Ms. Aberg what proposals were under consideration in the U.K. that may impact the ability of larger firms to acquire smaller firms. Ms. Aberg responded that the U.K. was considering changes to the merger control regime that may require some firms with strategic market status to inform regulators of all mergers (currently this is voluntary). Additionally, Ms. Aberg said the standard for triggering a “Phase 2” in-depth merger review may be lowered to a “realistic prospect that the merger may harm competition” rather than the current threshold of “more likely than not to harm competition,” which could particularly impact acquisitions of small competitors by big tech firms.⁸

Dr. Kifer then asked Professor Chiou to explain the economics underlying two other types of proposals that may impact large tech platforms: proposals designed to prevent a market from “tipping” to a dominant seller (e.g., Germany’s Digitization Act),⁹

https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

⁶ See “Platform Competition and Opportunity Act of 2021,” *U.S. House Bill, 117th Congress, 1st session*, available at <https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Platform%20Competition%20and%20Opportunity%20Act%20-%20Bill%20Text%20%281%29.pdf>. This bill is part of a proposed suite of legislation in the U.S. House consisting of six separate bills. See “House Lawmakers Release Anti-Monopoly Agenda for ‘A Stronger Online Economy: Opportunity, Innovation, Choice,’” *U.S. House Committee on the Judiciary*, June 11, 2021, available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4591>.

⁷ “Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations,” *U.S. House Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary*, 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

⁸ The U.K. Competition Markets Authority (“CMA”) conducts merger reviews in two phases. “At Phase 1, the CMA determines whether it believes that the merger results in a realistic prospect of a substantial lessening of competition (“SLC”). If so, the CMA has a duty to launch an in-depth assessment (Phase 2) ... At Phase 2 ... a CMA panel of independent Members conducts an in-depth investigation to assess if a merger is expected to result in an SLC. If an SLC is expected, the CMA decides upon the remedies required. Such remedies may include prohibiting the merger or requiring the divestiture (sale) of parts of the business.” See, “A Quick Guide to UK Merger Assessment,” *U.K. Competition Markets Authority*, 2021, p. 4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970333/CMA18_2021version.pdf.

⁹ “Amendment of the German Act against Restraints of Competition,” *Bundeskartellamt*, January 19, 2021, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html

and proposals that would shift the burden of proof in certain merger reviews, such as those involving “dominant” firms or those with large deal evaluations (e.g., the U.S. Senate Competition and Antitrust Law Reform Act).¹⁰ Regarding the economics of tipping, Professor Chiou noted that it is more common for a platform to be able to pull away from its competitors in cases where a platform exhibits strong network effects, where multi-homing and innovation are uncommon, and where there is a lack of product differentiation. Evaluating the likelihood of tipping requires evaluating which of these conditions are present in a particular market. For example, Facebook’s position as a dominant social network may appear to be the result of Facebook’s strong network effects. However, Facebook’s success was also driven by the significant innovations that allowed it to quickly displace MySpace, which is indicative of dynamic competition. Regarding proposals to shift the burden of proof in certain merger reviews, Professor Chiou noted that these proposals appear targeted in part at eliminating “killer acquisitions,” wherein larger firms buy firms that could be seen as nascent competitors. She said that it is hard to weigh the competitive impact of those proposals as they may have effects that both benefit and harm consumers. On the one hand, such proposals may benefit consumers by preventing the acquisition of firms that may in the future offer an alternative to an existing platform. On the other hand, these proposals might harm consumers by preventing acquisitions of firms that complement or enhance the service an existing platform offers. Moreover, there is a possibility that it could dis-incentivize innovation by start-up firms since acquisition is a possible exit strategy for such firms.

Professor Newman agreed that acquisition is often an exit path for entrepreneurs. However, he asserted that the common merger defense that incumbents are better at “process” and startups are better at product development doesn’t mean an acquisition in the same product space should be allowed. For example, he suggested a large firm in a different space might be a better partner. Moreover, Professor Newman emphasized the need for any accepted merger efficiencies to be both merger and *acquirer* specific.

Dr. Kifer next turned the conversation to how various proposals might impact competition on platforms. She first asked Ms. Aberg how U.K. proposals might impact firms that operate a platform but also offer products or services sold on that platform. Ms. Aberg responded that the U.K. proposal includes a code of conduct for firms with strategic market status to ensure fair behavior by these platforms, which can then be tailored to specific companies by the U.K. Competition and Markets Authority (“CMA”). It also includes the possibility of pro-competitive interventions by the CMA that might, for example, remove incentives for self-preferencing. While the CMA would be able to impose a range of structural remedies, it would not be able to impose ownership separation.

Dr. Kifer then asked Ms. Brass what competitive effects might result from proposals aimed at limiting self-preferencing by gatekeepers or requiring them to give other businesses access to the same hardware and software resources that gatekeeper’s services use. Ms. Brass expressed concern that proposals limiting self-preferencing and bundling for a certain set of firms are an unprecedented attempt to legislate competitive standards that address theoretical harm before it happens and undo legal standards requiring a demonstration of harm specific to the case at hand. She suggested the conduct could be consumer-enhancing through a combination of better prices and expanded options on a platform. She also stated that these proposals may undermine competition on the merits and shared concerns about the possibility that it might dis-incentivize investment in start-ups. In her view, the actual outcome for consumers from this sort of legislation may be a decrease in consumer choice and a reduction in platform reliability as they incentivize a “race to the bottom.”

Professor Chiou also emphasized the need to develop further empirical evidence to assess whether certain types of vertical integration or self-preferencing would harm or help users. For example, her research on vertical integration of platforms suggests that in some cases (e.g., Google’s incorporation of Zagat ratings), vertical integration can actually *increase* downstream competition. Moreover, while the vertical integration of Google Flights into Google Search

¹⁰ “Competition and Antitrust Law Enforcement Reform Act of 2021,” *U.S. Senate Bill, 117th Congress, 1st Session, available at* <https://www.klobuchar.senate.gov/public/cache/files/e/1/e171a>

[c94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf](https://www.klobuchar.senate.gov/public/cache/files/e/1/e171a).

reduced search traffic to other aggregators, the effect this had on consumer welfare is unclear. Consumers may have used aggregators less simply because Google Flights allowed them to find the information they were looking for faster.¹¹ That is, evidence of harm to competitors does not imply harm to competition or consumers.

Interoperability

The panel last turned to the antitrust questions raised by proposals requiring gatekeepers to facilitate multi-homing or interoperability. Ms. Brass explained that many, if not most, platforms already have a large share of users who multi-home and questioned whether there are additional benefits from requiring interoperability where it does not already exist. She noted imposing multi-homing on industries that do not have it—or demanding more of it in industries that do—may simply serve to increase costs of operating platforms, some of which will be passed to consumers. Additionally, it may inconvenience users who would be constantly prompted to switch to other service options rather than enjoying their previously streamlined services. She expressed concern at the ability of platforms to ensure user security in light of the data sharing necessary to facilitate interoperability.

Professor Newman echoed that there can be tension between the need for data security and privacy and the benefits of more competition. He noted that while usually in alignment (as security is part of an improved user experience that competitive firms should strive to support it), interoperability is unique in making it a tradeoff. He explained that while the U.S. House bill requires platforms to report violations of privacy and security rules, these rules could be used by platforms to disadvantage competitors; likewise, competitors could use the new rules to hold up policy changes that would improve user experiences on the platform. However, he noted that the bill as a whole is designed to regulate a new industry with new features, some of which require tackling these tensions.

¹¹ Lesley Chiou, "Vertical Integration and Antitrust in Search Markets," *Journal of Law, Economics, and Organization*, Vol. 33, pp. 653-685, 2017.

¹² "Executive Order on Promoting Competition in the American Economy," *The White House*, July 9, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential->

Q&A

The panelists ended by fielding some questions from the audience. One audience member asked about whether these proposals are inconsistent in how they treat tech platforms compared to other industries. Professor Newman responded that there is a sense that there is something unique about digital platforms and finds it appropriate that they command some special attention. Ms. Aberg noted that the U.K. proposals she discussed were specific to digital platforms and were meant to be tailored to that industry. Professor Chiou was asked about what types of data would be required to quantify when tipping might be likely. She said that evaluating the likelihood of tipping in a particular market would ideally involve data on consumer preferences, evidence of the extent of network effects and multi-homing, and the impact of innovation in the relevant market. She noted that assessing the likelihood of tipping would likely include both quantitative and qualitative data—and that these are widely available for digital markets. Ms. Brass responded to a comment on President Biden's recent executive order on competition,¹² noting that while the executive order may be an issue for digital platforms, the order appeared to focus on other industries as well. Mr. Newman echoed that this order dealt with a wide range of industries, including agriculture, which seemed most targeted by its "right to repair" provisions. Ms. Brass also expressed concern at the FTC's new focus on non-price, non-cost aspects of mergers,¹³ and the uncertainty of what that means for antitrust enforcement.

Lastly, Professor Chiou was asked how to evaluate the possible competitive benefits of proposed requirements for data sharing in light of potential privacy concerns. Professor Chiou responded that it is important to ask how big of a barrier user data is to competition and outlined two conditions for it to be a barrier: (i) that data are difficult to access, and (ii) that there are economies of scale for data use. She noted first that there are many companies that sell consumer information, so it may not always be difficult to access user data. Second, she noted that her own

[actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/](https://www.ftc.gov/news-events/blogs/competition-matters/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/).

¹³ "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave," *FTC*, September 28, 2021, available at <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>.

research had demonstrated that under at least some narrow circumstances, longer search histories do not confer significant advantages in optimizing search results.¹⁴ This finding suggests that it is possible that some gains targeted by these proposals could be achieved through more limited data sharing, which might reduce the competition-privacy tradeoff.

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¹⁴ Lesley Chiou and Catherine Tucker, "Search Engines and Data Retention: Implications for Privacy and Antitrust,"

Competition Policy International's The Evolution of Antitrust in the Digital Era: Essays on Competition Policy, Volume II, 2021.