

New Regulatory Frameworks for Digital Platforms

William E. Kovacic

George Washington University Law
School

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Today's Agenda

- The New Literature on Digital Platforms
- Modern Policy Diagnosis
- Proposed Solutions: Strengths and Weaknesses
- Timing
- Caveat: Personal Views Only
- Contact: wkovacic@law.gwu.edu

New Literature: A Sampler

- Furman (United Kingdom)
- Cremer Experts' Report (DG Comp)
- Stigler Center (United States)
- ACCC (Australia)
- House Judiciary Antitrust Subcommittee (United States)



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The Hearing

July 29,
2020

The Report

- House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, House Committee on the Judiciary, MAJORITY STAFF REPORT AND RECOMMENDATIONS: INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Released 6 October 2020) [449 Pages]

The Diagnosis: A Synthese

- Platform “Gatekeepers”
 - Have substantial, durable market power
 - Suppress competition (especially innovation) through acquisitions of nascent rivals
 - Impose oppressive contract terms
 - Harm rivals with “self-preferencing” and collection of information about platform transactions
 - Ignore privacy laws
 - Treat workers unfairly

The Solution: Competition Law?

- Partly: Do More With Existing Tools
 - Merger control: purchase of nascent rivals
 - Abuse of dominance: demands for exclusivity
- But Not Enough
 - Limitations of case-by-case litigation
 - Doubts about remedies achieved to date (e.g, EC Google prosecutions – fines and conduct)
 - Problems often arise in other policy domains
 - Note: Ebbing of competition law imperialism

The Solution: Competition Law Plus New Regulatory Tools

- Example: The Policy Reform Menu in the House Judiciary Subcommittee Report
 - Exhorts agencies to bring big cases
 - Proposes major amendments to existing US competition law statutes
 - **Proposes new regulatory frameworks involving platform structure and conduct**
 - See also EC DSA proposal, UK government's intent to create Furman Digital Markets Unit

Motivation

- Disappointment with Competition Law Enforcement to Date
- Rethink of Regulation
 - Is competition law so good, and is regulation so bad?
- Awareness of Relevance of Multiple Policy Domains: Competition Law, Data Protection law, and Consumer Protection Law

Proposed Regulatory Mandates

- Methods: Prescriptive, Ex Ante Rulemaking
- Substantive Commands: Focal Points
 - Self-preferencing
 - Structural separations/line-of-business restrictions
 - Abuse of superior bargaining position
 - Privacy

Proposed New Regulatory Frameworks

Reasons Why They Make Sense

- Recognizes Multiple Dimensions of the Observed Commercial Phenomena
- Ex Ante Rulemaking: More Comprehensive Collection of Relevant Information and Better Remedial Design/Implementation
- Avoids Tendency/Perceived Need to Stretch Competition Law to the Limits to Address Infirmities in Collateral Regulatory Schemes

Proposed New Regulatory Frameworks: Issues and Problems

- Who Is a Covered Gatekeeper?
 - When did the GAFA firms become “dominant”?
 - What is “durable” monopoly power in digital?
- Who Should Implement the Mandate?
 - New regulator?
 - Existing regulators? How will they cooperate?
- Will New Functions be Properly Resourced?
- How to Frame Substantive Commands?
- How to Execute Policy – e.g., bargaining power?

Concluding Thoughts

- Timing
 - DSA First?
 - Then Furman?
 - Then US Legislation?
- Role of Associations: BEREC
 - Experience
 - Knowledge
 - Implementation