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Antitrust and Developing Economies in an Era of Crises

Webinar #2: Big Data, Platforms, and the Internet Of Things: Opportunities and Challenges For Developing Countries

Webinar - 29 October 2020*

This webinar was organized as part of the 7th Annual Antitrust in Emerging Countries Conference by Concurrences.

Panel Discussion

The moderator, Professor **Harry First**, opened the panel by introducing the topic of the panel and by asking the panelists to discuss the importance of platforms in developing countries.

Frédéric Jenny (OECD) started by explaining the different patterns he observed from the competition authorities in Brazil, Russia, India, China, and South Africa (BRICS). He noted that the Federal Antimonopoly Service of the Russian Federation (FAS) has been an active competition authority focused on exclusionary practices by big players, as illustrated in cases like Yandex v. Google, Kaspersky/Microsoft, and Kaspersky/Apple. He also thought India has been fairly active, particularly with a focus on unfair pricing with cases such as Amazon/Flipkart, where Amazon and Flipkart were accused of distributing certain products unfairly compared to the retail stores, and Ola, which was accused of pricing unfairly low compared to local taxis. In comparison, he said that the South African Competition Authority acknowledged in a major report that there had been underenforcement in this area up to the time that the report was released. In Brazil, the competition authority abandoned the Google Shopping case, which was the same kind as the one that the European Commission and the U.S. Federal Trade Commission also brought. Mr. Jenny commented that China had little to no activity.

As for the non-BRIC African countries, Mr. Jenny noted that the competition authorities in Morocco have seen cases of telecom operators trying to slow down the development of Wi-Fi or voice-over-the-Internet. However, he distinguished between communication technology, where he thinks some of the challenges lie, and information technology, which has room for opportunities. Mr. Jenny thought that the main challenge in Africa was in the infrastructure, but that there has been a rapid development of communication, particularly in undersea fiber optic cable, which may increase the capacity for internet access and development of digital services.

Mr. Jenny, then, went through different service areas where digital markets provide a huge opportunity for developing and least-developed countries in Africa. First, he spoke about the development of local apps in health services, and mentioned as an example, a local app in East Africa that connects people living in rural areas with specialists, who tend to live in major cities. Digital services have also allowed farmers to obtain information on market prices, predictions about the weather, and advice on using fertilizers and water. This is likely to increase the productivity of farmers, and also allow them to do away with intermediaries. Mr. Jenny noted that the fin-tech sector has been the most successful in Africa, particularly with a mobile money transfer app, which allows people who do not have access to banking services to transfer money, to save, or to borrow money. Educational programs through the Internet are also in the process of development, to provide a chance for people, particularly in sub-Saharan Africa, who do not have access to

“WHAT WE ARE DISCUSSING HERE IS BASICALLY NO LONGER THE “IF” THERE NEEDS TO BE A COMPLEMENT TO COMPETITION LAW BUT MORE THE “HOW” — HOW ARE WE GOING TO COMPLEMENT ANTITRUST LAW SO THAT THE ISSUES THAT COME UP, ESPECIALLY WITH LARGE GATEKEEPER PLATFORMS, CAN SUITABLY BE TACKLED. ”

THOMAS KRAMLER



higher education. Overall, Mr. Jenny thought these apps were being developed to bring economic opportunities to those who are lacking them.

As for the challenges in Big Data, Mr. Jenny noted that most countries do not have data protection and privacy laws in place, putting user data at risk for exploitation.

Thomas Kramler (European Commission) explained what sparked the discussion of treating digital markets differently. He noted that around the globe, there have been reports concluding that there are some specificities in digital markets which we do not find in many other markets. In relation to developing countries, Mr. Kramler said that the question of dependency and of the gatekeeper status of some of these platforms and the dependency or the superior bargaining power that these platforms might have towards smaller players, are extremely relevant, especially in e-commerce. He pointed out that some countries, including India, have already started taking measures to protect smaller e-commerce players from bigger ones by prohibiting providers of the marketplace platform from providing its own retail services.

That raises the question of whether antitrust law is the appropriate approach in tackling the dependency issues. Mr. Kramler mentioned that in Europe, there is an intense debate on how to complement antitrust laws to deal specifically with gatekeeper issues. He stated that the source of the problem is actually the dominance or the monopoly power and not so much the conduct. Therefore, competition authorities will probably need to go beyond antitrust, but that antitrust tools must be sharpened.

Professor First commented that he was unsure whether for developing countries, Google, Amazon, Facebook, and Apple (GAFA) posed a problem. He then turned to Lars Mesenbrink and asked how developing countries deal with either GAFA or general platform problems.

Lars Mesenbrink (Orrick) commented that focusing on GAFA is also reasonable for developing countries, as these firms either already have a presence in developing countries or that they are seeking or trying to seek such a presence. He questioned whether we should strive for convergence among different competition authorities or whether there is room for experimentation. To answer this question, he suggested considering: (1) the regulatory efforts of the so-called developed countries; and (2) previous experience and challenges that enforcers and regulators have been facing.

“IT IS VERY CLEAR THAT THE DIGITAL TRANSFORMATION IS HELPING NOT ONLY BY PROVOKING A LOT OF INITIATIVES BUT ALSO HELPING THE DEVELOPMENT OF AFRICA QUITE CONSIDERABLY.”

FRÉDÉRIC JENNY



Mr. Mesenbrink also spoke about the extent to which politics influences development. He mentioned the Chinese Anti-Monopoly Law as an example of a statute that was looked


upon skeptically when it came into effect because it did not clarify which authorities would be responsible for the enforcing the law and for unclear catchall phrases like “other tasks stipulated by the State Council” or “other monopoly agreements identified by the Authority.” Closely after enacting the law, the Authority prohibited the intended acquisition of the Chinese juice company Huiyuan by Coca-Cola, which commentators outside China said would have been approved with flying colors had there not been any political influence. However, looking back in the last decade since the law came into effect, Mr. Mesenbrink did not think the statute met up to the negative expectations people had of it.

Overall, Mr. Mesenbrink thought convergence and political influence are two key aspects that must be considered when speaking about Big Data and platforms not only in so-called developed countries, but also in developing countries.

Pamela Mondliwa (RBG/CCRED) began by speaking about issues presented by e-commerce platforms in developing countries. Although platforms like Amazon offer benefits by offering retailers in developing countries a route to market, it also poses problems of data exploitation by the platforms to improve their own offering.

Ms. Mondliwa also explained the results of a study done by the Centre for Competition, Regulation and Economic Development (CCRED), which presented some of the issues arising from second tier platforms, such as Airbnb in tourism and Uber. The study found that one great benefit from such platforms, particularly for small businesses, is open access to an international tourism market that smaller hotels and tour guides previously had limited access to. On the flip side, the study noted that the most-favored-nation clause or rate parity dampens price competition in the market and the flexibility of small players to try to increase demand through discounts.

Ms. Mondliwa then discussed how Kenya and South Africa have been tackling these issues. Though South Africa has been the only country in the continent to write a report on the digital economy, other countries have been engaging in these questions. Kenya, for example, has recently reviewed its market definition guidelines partially to determine how two-sided markets and geographic markets should change or adapt with the increasing digitalization of markets, such as M-Pesa (mobile money transfer app). In the meantime, the Authority released guidelines, at least with regard to mergers and how they would be reviewed. Ms. Mondliwa noted that Kenya actually has experience with these types of issues, mentioning the time that the Authority required interoperability by Safaricom to open up access for other players to be allowed to interact with its network. This allowed M-Pesa to grow.




“ CONVERGENCE AND POLITICAL INFLUENCE WILL BE TWO KEY ASPECTS THAT NEED TO BE CONSIDERED WHEN SPEAKING ABOUT BIG DATA AND PLATFORMS NOT ONLY FOR THE SO-CALLED DEVELOPED COUNTRIES BUT ALSO FOR DEVELOPING COUNTRIES AND CLIENTS.”

LARS MESENBRINK

Turning to South Africa, Ms. Mondliwa said that the country faced problems with “killer acquisitions” similar to Europe. She observed that many mergers do not involve international platforms, but rather

center around growing domestic platforms. For example, Takealot is relatively small, but as part of Naspers, which has shares in Tencent, it has opportunities for growth. Currently, competition authorities are wrestling to balance Takealot’s ability to innovate and compete effectively with Amazon when it fully enters the South African market, while ensuring that Takealot does pose monopoly problems. She also mentioned that in some instances where there may be an added layer of regulation, international target firms threaten to exit the South African market because they do not want to go through the trouble of dealing with additional regulations for a market that they believe is so small.

“WE RECOGNIZE THE IMPORTANCE OF THE FLOW OF DATA, BUT IT SHOULD BE UNDER SOME SORT OF REGULATION TO ENSURE THAT THERE IS FAIR VALUE CREATION AND CAPTURE FROM THAT DATA DEPENDING ON WHERE IT IS COMING FROM.”



PAMELA MONDLIWA

Another issue South Africa faces is whether the same or similar remedies should be applied in South Africa as those in Europe. Certain aspects of South Africa’s competition laws are specific to South Africa, such as the public interest provision, which may not be completely

compatible with remedies designed in the West.

Kirti Gupta (Qualcomm) offered the perspective of global businesses and how they are navigating antitrust laws and policies in different jurisdictions. From a business perspective, Ms. Gupta said that if rules or policies that do not have clear goals and definitions come into effect, they might reduce investment and innovation. She questioned whether a merger should be considered if there are no definite and clear merger review guidelines. For example, when Qualcomm tried to acquire NXP a few years ago, it needed approval from ten international jurisdictions. Nine out of ten approved, but the merger did not go through because China did not approve the merger until the deadline and there was no clear reason for the clearance — in large part due to the broader policy issues, not merger and antitrust issues.

Furthermore, startups and small inventors may be less inclined to get started if they know that it will be increasingly difficult for them to get acquired.

Ms. Gupta suggested attacking these challenges by learning from our experience over the decades and by conducting economic competitive effects analysis, as opposed to relying on presumptions of harm arising from conduct that has been demonstrated sometimes to be procompetitive or competitively neutral. Going forward, Ms. Gupta thought competition authorities should present clear goals and a clear rule of law, all the while holding themselves accountable to prevent regulatory capture.

Mr. Jenny commented that since competition laws are the result of political processes, they would not have a purely economic standard or goal in the law. Secondly, he did not think that having public interest goals necessarily lead to confusion and uncertainty leading to diminished investments. He pointed to the South African public interest provision and the Competition Authorities' guidelines on how they are going to engage with those issues, as examples of a law that is not uncertain, but has a wide specter. He emphasized that competition authorities must be explicit and transparent on how they would deal with such issues.

Ms. Mondliwa chimed in and said that many developing countries have public interest goals, but that their laws and interpretation of those laws place a greater weight on consumer welfare, not efficiency. Though the goals of the South African Competition Authority are clearly stated in the Act, Ms. Mondliwa explained that public interest goals are not considered if they are not explicitly stated in the particular provisions of the Act. Therefore, the public interest factor has largely been considered only in mergers, which the Act explicitly allows consideration of the public interest. Lastly, Ms. Mondliwa questioned how we could have a competitive process without competitors.

Ms. Gupta agreed that public interest does not translate into uncertainty, but emphasized again, that competition authorities must come up with a way to ensure that the public interest goals are clear and measurable to reduce uncertainty.

Professor First then asked whether exit threats by major platforms are a real issue in developing countries.

Mr. Jenny thought that exit threats are less likely in the digital world because digital technology allows differentiation of production, differentiation of services, to really fit the needs of local people. For example, Jumia, referred to as the “African Amazon” was able to grow because it chooses products that are particularly geared to the demand of Africans that are usually not carried by the major e-commerce firms like Amazon. He thought that if Amazon were to take over Jumia, it would not discontinue operating Jumia, but rather expand them if they only gave the kind of offers they have.

Questions and Answers

One attendee asked whether there is a need to recognize and define predatory or disruptive innovation with the increasing reliance on global and tech-dependent players. **Mr. Mesenbrink** said that there is a procedural issue because it would be difficult to find the exact point that the market behavior is predatory or disruptive. He worried that government intervention under these circumstances could possibly come with serious consequences for the innovation of the firm offering the service. Mr. Mesenbrink also pointed out that the market conditions in different jurisdictions must be taken into consideration. Mr. Jenny commented that in order to answer the question, we have to understand that competition in the digital world is different from the more traditional sectors in that the digital technologies can be applied in different markets and sectors. To distinguish between innovations that may disrupt another sector, we have to think about the scope of the application of the technology, whether it will be reinforced by the merger (if it is a question of merger), and the different markets that the technology could be used.



“WE HAVE TO EMBRACE OUR LEARNING OVER THE LAST SEVERAL DECADES AND OUR ABILITY TO CONDUCT AND UTILIZE RIGOROUS ECONOMIC COMPETITIVE EFFECTS ANALYSIS AND NOT RELY ON PRESUMPTIONS OF HARM ARISING FROM CONDUCT THAT HAS BEEN DEMONSTRATED SOMETIMES TO BE PRO-COMPETITIVE OR COMPETITIVELY NEUTRAL”
KIRTI GUPTA

Another attendee asked the panelists for their thoughts about large “bulldozer” companies that enter into the markets of the different countries and have great opportunities to shape those markets. **Mr. Kramler** stated that if we have a more unified approach across the globe,

it would make it harder for companies to exploit the divergences and differences in approaches as they do now. **Mr. Jenny** commented that with respect to the digital economy, there are more opportunities for global cooperation and arrive at a balanced consensus, pointing to the BRICS report on the digital economy as a contribution to that consensus.