Digital Markets and Merger Control

Abstract

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Following the ascension of digital economy, businesses have been keen to adopt new business strategies based on multi-sided market theories and competitive tactics that leverage the power of the crowd, both made possible or enhanced by the growing ubiquity of the Internet. Digital markets thus distinguish themselves with significant network effects, strong focus on markets for attention, markets of scale and markets of scope, near-zero marginal production cost, non-transparent platform operation and global competition. Combined, these characteristics make digital markets ripe for growing such huge platforms as Google, Apple, Facebook, Amazon and Microsoft (so-called GAFAM).

While GAFAM and other digital conglomerates are sweeping the markets, many are caught off guard, from seasoned industrial icons to experienced antitrust/competition law regulators and theorists. As a result, regularity agencies have been trying to reign in on the "giants," mainly through astronomical fines against antitrust violations, to seemingly limited effects.

Frustrated, regularity authorities around the world are increasingly contemplating more drastic measures, among which new merger regulations aiming at curbing digital giants' abilities to keep bulking themselves up through mergers and acquisitions, an area those giants have enjoyed very limited resistance.

To ensure all merger attempts by digital giants (or gatekeepers as they are called nowadays) are scrutinized, EU is proposing new regulations that would impose stringent prior notification obligations. Not to be outdone, legislators on the other side of the pond have gone a step further and propose to treat mergers and acquisitions by digital giants presumptively anticompetitive (and hence impermissible). The digital giants will bear the burden of proving their acquisitions harmless. Granted, none of these measures have been made law yet. Fierce debates in legislatures on both side of the Atlantic are expected. The fact that regulators and legislators would go to such length to curb new mergers by digital giants, however, itself is something deserve a close look.

Such draconian measures were not proposed for no reason. There have been

numerous mega mergers that attracted regulatory scrutiny in recent years, chief among them Google's Doubleclick acquisition in 2007, Facebook's Instagram acquisition in 2012, WhatsApp acquisition—again by Facebook—in 2014, Apple's Shazam acquisition and Google's Fitbit acquisition in 2020. All of them sailed through merger review with only relatively few strings attached. Hundreds of other deals, furthermore, were made without the slightest scrutiny.

Getting to the bottom of it, this study found traditional merger control mechanisms ill-equipped to address the competitive impacts of mergers in digital economies. How do we define the relevant market when multi-sided market platforms are involved, for starters, in particular how could the vaunted Hypothetical Monopolist Test be deployed in such cases? How to properly identify players in the market or potential new entrants even when one manages to define a relevant market? The trouble with market definition does not stop there. "Smallest market principle," one of the cornerstones of modern market definition, often has a hard time catching the most relevant market, one that would highlight the competitive impacts of a merger. Instead, the principle often serves to situate merging firms in different markets, making the case neither horizontal nor vertical, getting little regulatory scrutiny as a result.

One way to address the above issues is to adopt a more flexible approach in market definition, without the restraints of the "smallest market principle." How to read market concentration and market powers in such markets, how to assess the competitive implications of a merger at issue, as well as how to gauge its efficiency gains etc. will remain Herculean tasks, but at least we will have an easier time identifying markets that are truly "relevant."

Regardless how flexible an approach we take in market definition, a lot of digital market mergers will be non-horizontal, if only because acquiring data, technologies and other competitive resources are often more important than gaining market shares per se. Developing more fine-grained categorization with non-horizontal mergers—such as diagonal and compliment mergers as defined by the ill-fated 2020 US Vertical Merger Guidelines—deserve high-priority. The effort should not stop at defining such mergers, however, as we also need new evaluation matrices pertinent to the assessment of the competitive impacts and efficiency gains for those mergers.

If the emphasis is on dynamic rather than static competition, in addition, much of the economic rationale behind modern competition law, which has been notoriously incoherent to begin with, would be further in flux. Workable ways to read the market dynamics of large-scale competition among ecosystems commanded by the various digital giants are urgently needed.

Each of the above tasks is daunting in itself, and astronomically so when combined. It is therefore our humble opinion that merger regulators would be better off refraining from taking up other non-competition legal interests during might reviews, unless such interests can readily be transformed into cognizable competition interests. Privacy, free speech and so on around all important concerns, and yet they should be addressed by more competent laws and regulators than merger regulators.

Unlike the United States or the Europe Union, Chinese-Taipei is a small-market country with great foreign-trade dependency and little diplomatic might. Any legal dealing with multinational digital conglomerates would have to be based on solid legal grounds, not might. It is therefore wise for the regulators to start small proceed with ample caution. Instead of trying to reign in on any digital giants, it would be better trying to make small and yet tangible changes slowly and carefully, watching international development in the meantime.

Indeed, while multinational conglomerates are dominating the scenes, national and regional regulators and academics are still having a hard time working together to safeguard fair trade and healthy competition in international arenas, especially when disagreements exist in concepts as basic as “fairness” and “efficiency,” as well as the core mission of competition law. Much is at stake, and yet much is unknown. After a 9-month study, we have to admit, the team has perhaps discovered more questions than answers. More research has to be done.