

ANTITRUST TRADE AND PRACTICE

Expert Analysis

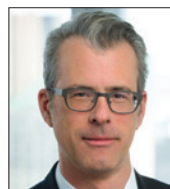
Global Competition Enforcement: Digital Markets and International Coordination

Discourse around the world increasingly focuses on the global nature of competition law, and perhaps more practically for many industry participants, the global nature of competition law enforcement. Many firms across a wide array of industries are significant participants in multiple international jurisdictions. Such firms must consider the antitrust regulatory and enforcement environment of these multiple jurisdictions before engaging in competitively sensitive conduct involving either unilateral action or arrangements with suppliers, customers or competitors.

The international community of competition law scholars and regulators have also recognized the pressing need for the members of the global community to come together and meaningfully coordinate their enforcement efforts. Leaders of the U.S. antitrust enforcement agencies—Chair Lina Khan of the Federal Trade Commission (FTC) and Assistant Attorney General (AAG) Jonathan Kanter of the



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Antitrust Division of the Department of Justice (DOJ)—recently participated in a conference with leaders of other competition authorities around the world to discuss their enforcement priorities and the importance of better collaboration in their enforcement efforts. On Sept. 13, 2022, AAG Kanter presented the keynote speech at the 16th Annual Global Antitrust Enforcement Symposium, which featured a panel of leaders of three national competition authorities—Reiko Aoki, Commissioner of the Japanese Fair Trade Commission (JFTC); Gina Cass-Gottlieb, Chair of the Australian Competition & Consumer Commission (ACCC); and Alexandre Cordeiro Macedo, President of the Brazilian Administrative Council for Economic Defense (CADE)—and Frédéric Jenny, Chair of the Competition Committee of the Organization for Economic Co-operation and Development (OECD), which represents the

interests of 38 member countries. Later that day, AAG Kanter and Chair Khan hosted a trilateral competition enforcement meeting with the United States' immediate northern and southern neighbors: Matthew Boswell, Commissioner of the Canadian Competition Bureau (CCB) and Brenda Hernández, Acting Chair Commissioner of the Mexican Federal Economic Competition Commission (COFECE). This trilateral North American meeting marked the first such meeting since 2019 (due to COVID-19) of the three countries' federal antitrust enforcement agencies.

AAG Kanter's comments throughout the day affirmed his view that competition law should reflect the realities of today's market as understood by *all* market participants. In his remarks about the ongoing merger guidelines revision in the United States, for instance, AAG Kanter explained: "These are people who see competition problems in our economy and an antitrust policy framework that appears out of sync with the market realities they live every day. We need to talk about merger policy in a way that is understandable to all of the Americans it impacts." Jonathan Kanter, Keynote Speech at Georgetown

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Antitrust Law Symposium: Respecting the Antitrust Laws and Reflecting Market Realities (Sept. 13, 2022). In the trilateral meeting with Canadian and Mexican competition enforcement leadership, he further explained that, “as antitrust enforcement increasingly spans international borders, building a unified response is vital to meeting today’s market realities.” FTC, “Federal Trade Commission and Justice Department Hold Trilateral Meeting with Competition Enforcers from Mexico and Canada” (Sept. 13, 2022). In this same meeting, Chair Khan emphasized the importance of international collaboration and cooperation, noting that such collaboration allows our nations to “strengthen our respective approaches to enforcement and better protect our citizens.” *Id.*

A Focus on Digital Markets

Unsurprisingly, regulators in both sessions strongly emphasized the importance and challenges of enforcement in digital markets. In the trilateral North American meeting, AAG Kanter expressly focused on the importance of merger enforcement in this area, while Acting Chair Commissioner Hernández focused on how changes in the legal environments in these three jurisdictions may shape future enforcement efforts.

During the Global Enforcers Panel, JFTC Commissioner Aoki highlighted the JFTC’s enforcement of competition law in digital markets, explaining that the Japanese agency has seen a notable increase in digital-related actions within the last few years. She identified, as a specific example, a recent action involving

Apple’s restrictions on third-party in-app purchases, which prevented app developers from displaying their own payment or subscription management website on the Apple version of their apps. Following communications with the JFTC, Apple announced that it would allow these apps to display a link to their native website where consumers could then manage their subscription, after which the JFTC terminated its investigation. Commissioner Aoki noted that Apple made this policy effective *globally* as of March 2022, which she claimed shows the global ripple effect of Japan’s regulatory efforts.

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She also spoke about Japan’s May 2020 Improving Transparency and Fairness of Digital Platforms Act, commonly known as the Transparency Act. According to Commissioner Aoki, this law essentially codified the Japanese regulatory tradition of co-regulation, where the regulator and the regulated firm work together in “very intense conversation” to achieve a desired outcome. The Transparency Act identifies specific providers—Amazon, Rakuten, Yahoo, Apple and Google—that are required to submit an annual report to the JFTC, detailing various practices of

potential competitive interest, such as ranking practices, app store rules, and advertising practices. An expert committee reviews the report for any perceived problems and, if any competition issues arise, the report is escalated to the JFTC for appropriate action. The stated goal of this co-regulation process is to permit both sides to learn from each other over time.

OECD Chair Jenny took an opportunity during this panel to provide a historical overview of how the digital markets discussion has evolved in the OECD since 2013. *First*, conversations revolved around the most immediate problems like vertical restrictions on online trade or price parity clauses. *Next*, the OECD transitioned to discussions about how tools of competition law enforcement should adapt to the digital sector; the members began exploring tools of data analysis and other methods to understand competitive effects in the technology sector. The OECD focused on analyzing the “practical effects” on digital markets, such as whether traditional elements like “relevant market” are useful (or not). The OECD has been “invest[ing] more deeply in the digital sector by looking at the economics of ecosystems” and understanding the relationship between competition concerns and the data economy. *Finally*, the OECD assessed how regulatory agencies can employ their respective antitrust tools to meaningfully address competitive issues in the digital marketplace. In that regard, Chair Jenny questioned whether current tools and regulatory processes

sufficiently address anticompetitive harm in technology industries. He emphasized the need for more cooperation and collaboration on these issues, as many countries clearly have similar concerns.

CADE President Macedo told the audience that Brazil does not have any new antitrust laws to address the digital markets, but *does* have a new data protection law which falls outside the scope of CADE's jurisdiction. According to CADE President Macedo, Brazilian regulators seek to adapt existing tools to address the challenges presented by digital industries—such as redefining relevant markets and analyzing two-sided platform markets. He shared Chair Jenny's view of global collaboration and the importance of global strategy. To him, collaboration means coming together and “exchanging experiences and practices” with respect to lessons learned about similar (or identical) investigations across jurisdictions.

ACCC Chair Cass-Gottlieb provided perspective on how the ACCC seeks to fulfill its consumer protection mission in digital markets. The ACCC has actively investigated potential consumer protection violations related to truthful disclosure of terms against Google, DoubleClick, Meta, Uber, Airbnb and others using the agency's consumer protection powers.

Looking Forward: Inclusion

Importantly, much of the discussion to date has omitted the input of leaders of competition authorities of countries from Africa and the Caribbean. According to a May 2022 report, 29 of the 32 African

jurisdictions surveyed, including Kenya, South Africa, Tunisia, Cote d'Ivoire, Tanzania, Egypt, Nigeria and Rwanda, have national competition laws. See Lerisha Naidu and Angelo Tzarevski, *Africa: Competition in Africa Report 2022*, Global Compliance News: A Blog by Baker McKenzie (May 21, 2022). In the Caribbean, the Caribbean Community (CARICOM),

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the international political and economic body of the Caribbean that represents fifteen Caribbean nations, inaugurated the CARICOM Competition Commission in 2008.

The omission of African and Caribbean nations from the global antitrust enforcement discussion is curious considering the global focus on digital markets. It is no secret that digital proliferation in African communities is moving exponentially faster than in other communities around the world. See, e.g., Center for Strategic and International Studies, “Digital Africa: Leveling Up Through Governance and Trade” (June 9, 2021). Likewise, digital proliferation in the Caribbean is rapidly increasing as technology firms and international aid providers better appreciate the interplay between Internet/digital access, education, and wealth, particularly in the wake of the COVID-19 pandemic and numerous natural disasters. See, e.g., News Center Microsoft Latinoamérica, “Caribbean

economic recovery heavily dependent on investment in technology” (April 16, 2021). Antitrust enforcers in Africa and the Caribbean are concerned about potential harm not only to competition, including nascent competitors and potential competition, but to consumers as well. In this period of rapid proliferation and the desire for greater digital availability, enforcers are likely to evaluate whether these firms' entry are likely to raise any concerns to competition or consumers.

Competition authorities around the globe will likely continue to engage in collaborative efforts to learn from one another in the ever-changing digital world. As digital markets and platforms continue to reshape economies and the way we understand competition law, that collaboration should expand to include antitrust regulators from Africa, the Caribbean, and other nations not currently seated at the table. Antitrust enforcement leaders from South Africa and Malawi's competition authorities are scheduled to participate in an upcoming webinar series, *New Challenges in Public Interest, Big Tech, and Regionalism*, hosted by New York University Law School and international antitrust journal, *Concurrences*. Perhaps this webinar series will provide the opportunity to expand some of these collaborative conversations.