Antitrust Spring Meeting 2024 Panel Recap – Reining in Gatekeepers and Ecosystems

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The ABA panel "Reining in Gatekeepers and Ecosystems" was moderated by Rishi P. Satia (Morgan Lewis) and included speakers Juliette Caminade (Analysis Group), Janet Jones-Duffey (Freshfields), David Lawrence (US Department of Justice (DOJ)), and Noah Joshua Phillips (Cravath).

Platforms, Digital Ecosystems, and Gatekeepers

The ABA panel "Reining in Gatekeepers and Ecosystems" at the 2024 Spring Meetings began by introducing the concepts of platforms, digital ecosystems, and gatekeepers. Dr. Caminade defined platforms as entities that bring together economic agents that have complementary needs. She explained that there are three fundamental features of digital platforms: (i) they bring together distinct groups of users, (ii) they facilitate and encourage interactions between the distinct groups of users, and (iii) they create and expand value from indirect network effects. The panel then discussed that a platform's success is very often contingent on its ability to manage interactions of groups of users to ensure all receive benefits from this value creation. While the meaning of digital platforms is well established in the economic literature, the definition of ecosystems is something that is still being developed. Some scholars have defined an ecosystem as

a set of products and services jointly provided by a common platform, which exhibits some level of technological integration. It can be more efficient for one entity to supply those products and services either because of benefits on the supply side or linkages on the demand side (e.g., if there is demand for one product, then there is higher demand for the other). Mr. Phillips expanded on the concept of "gatekeepers" and how the term is used for platforms that control access to something valuable. He compared gatekeepers to the concept of a bottleneck. Then, Mr. Lawrence noted that an important question to ask is who created the value and who is the gatekeeper allowing access.

Then, the discussion turned to how enforcers, policymakers, and economists in the US and abroad generally think about digital ecosystems and their relevance in antitrust laws. Dr. Caminade noted that one angle often analyzed under different theories of potential harm is whether market power can be leveraged in the primary or adjacent services offered by the platform. The discussion then turned to Mr. Lawrence, who suggested that a dominant platform has a strong incentive to engage in self-preferencing to monopolize the markets operating on the platform. He further noted that if a platform engages in exclusionary conduct, the platform operator would get all the rents from having a monopoly in the markets operating in the platform, and it would also lessen other platforms' ability to enjoy the network effects associated with these markets.

The Digital Markets Act (DMA)

Ms. Jones-Duffey launched the discussion around the DMA. According to Ms. Jones-Duffey, the two core principles of the DMA are to promote fairness and contestability. She noted that fairness is interesting in the context of a gatekeeper because it is inevitably going to invite complaints. For instance, European regulators raised two notable questions on another panel: (i) how do you measure compliance, and (ii) when is enforcement appropriate? Ms. Jones-Duffey explained that although all the gatekeepers announced compliance plans in March, we are already seeing probes into certain gatekeepers' alleged noncompliance with the DMA's requirements. Ultimately, the goal of the regulation is contestability.

The DMA portion of the discussion also centered around compliance obligations for a gatekeeper under the DMA. For example, the panel discussed the significance of Article 8, noting that it is the responsibility of a gatekeeper to ensure and demonstrate compliance with the obligations set out by the DMA. This inevitably creates a burden for gatekeepers, since they are obligated to create an environment that promotes competition; however, some would argue that this is outside the scope of what gatekeepers need to do. In addition to Article 8, Ms. Jones-Duffey noted the provisions within the DMA that stipulate access. She discussed the balance that gatekeepers must strike between determining the extent of access required under the DMA and ensuring that that access supports a gatekeeper's overall business model, since access costs are borne by the gatekeeper.

Ms. Jones-Duffey also discussed the complementary nature of the DMA and competition law. The DMA is the response to many years' worth of regulators attempting to apply traditional antitrust laws to digital contexts. However, the jurisprudence at the time of the panel only applied to six gatekeepers. Thus, its effect on merger control is narrower than competition law. Then, Ms. Jones-Duffey discussed how Article 14 of the DMA specifies that the gatekeeper must inform the European Commission of any intended mergers and acquisitions. Unlike jurisprudence typically found in traditional competition law, the DMA does not require the establishment of dominance in a defined market, evidence of harm to competition, nor provide an efficiencies defense. This lowers the burden of proof for the European Commission, but in turn increases the amount of private litigations and stakeholder engagement throughout the DMA process.

Lastly, the panel participants connected the discussion of platforms, ecosystems, and gatekeepers to the DMA. Members of the panel discussed how the European Commission's designation of certain core platform services (e.g., the App Store) may affect the broader ecosystem (e.g., Apple's hardware designed to support the App Store) in unintended ways. For example, some panelists noted that opening gates may reduce the level of trust and security, and if this is how a gatekeeper has marketed its suite of products, then the DMA could create unintended consequences for the broader ecosystem.

Reining in Gatekeepers in the US

With the DMA as background context, the panel then discussed ongoing efforts to rein in gatekeepers in the US. Mr. Lawrence began the discussion with the current antitrust law enforcement situation regarding platforms in the US. He highlighted a number of ongoing proceedings, including *Epic Games v. Google*, *United States v. Google*, *United States v. Apple*, *FTC v. Amazon*, and *FTC v. Meta Platforms*. Mr. Phillips discussed how precedents resulting from these cases will provide guidance on how platforms are regulated in the US. Tying these proceedings back to the DMA, Mr. Lawrence noted that the platforms subject to these proceedings in the US, including Epic Games, are watching DMA compliance and thinking about what this tells platforms in terms of any remedies that would be appropriate.

With this background, the panel discussed whether the current laws are sufficient in the US, as there is no law equivalent to the DMA. Mr. Lawrence noted the complexity of passing judgement on sufficiency and stated that it depends on the overall objective and personal perspective. However, such murkiness is inherently good because it prompts a conversation to define what would be sufficient for a law in the US. The panel also evaluated whether taking a wait-and-see approach in the US, and thereby addressing any gatekeeper issues through the courts, is inherently better than passing legislation like the DMA in Europe. Mr. Lawrence highlighted that the US has already waited and

has seen broader digital implications, including the exercise of online market power posing a threat to individual liberty and the free market.

The panel also discussed more targeted theories of harm in current proceedings in the US. Dr. Caminade provided an overview of the theory of harm presented by enforcers in the most recent *United States v. Apple* lawsuit. For example, she noted the proposed relevant market for performance smartphones and explained that the DOJ is investigating whether the price of iPhones is excessive or whether there is not enough innovation. In turn, she explained that their alleged theory of harm centers around making it harder to switch away from an iPhone (i.e., to an Android) for users and, to some extent, developers. Dr. Caminade further noted that unlike the DMA, which is concerned with business users in the non-core market (the App Store), the Apple lawsuit in the US focuses on whether there is market power in what the DOJ defines as the primary at-issue market (smartphones/iOS).

The panel concluded with some considerations around merger control and how the introduction of entrenchment theory in the DOJ's and Federal Trade Commission's 2023 Merger Guidelines affects gatekeepers. Mr. Lawrence discussed entrenchment theory in the context of the US, including its history and past cases containing entrenchment theory until its recent inclusion in the 2023 Merger Guidelines.
