

Basics of exploitative abuse regulation

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2 Exploitative abuse and other items

- Competition laws consist of four items.
 - Exclusionary abuse
 - Collusion (e.g., cartel)
 - Merger
 - Exploitative abuse
 - The alleged infringer imposes a disadvantage on its counterparties without involving its competitors.
- Some forms of conduct spread over more than two items above.
 - Non-compete clause
 - Self-preferencing conduct

3 Policy debate

- The United States has been (had been) uninterested in exploitative abuse regulation, prioritising the promotion of current competition by allowing unlimited rewards in the future.
- Many of the other jurisdictions consider there should be some exceptional cases that need exploitative abuse regulation.
 - Some of them explain that it is for the direct protection of counterparties against abuse as a result of insufficient competition.
 - Others explain that it will pave level playing fields for competition.

4 Position

- We should talk about:
 - NOT an irrelevant “market” (i.e., paraphrase of “industry”)
 - BUT a relevant market, starting from the substitutability for allegedly abused counterparties.
- In the relevant market above, still, there can be two propositions.
 - 1) Dominance should be established.
 - 2) Superiority (dependency or relative market power) suffices.
 - JFTC: Even less than ten percent in the relevant market above can suffice under some conditions.
 - Some EU Member States, Taiwan, Korea, among others, have created recent developments.

5 Abuse

- Two main factors in establishing abuse:
 - whether the disadvantage was unforeseeable at the time of the negotiations, and
 - whether the disadvantage is unreasonably large.

6 JFTC Report on mobile OS and app store

- Exploitative abuse propositions by the JFTC (9 Feb 2023) include:
 - Concerning commission rate (30%, etc.), the Report “recommends” the platform operators
 - disclose the costs and the revenues that are relevant to the operation of the app stores, and
 - initiate negotiations to figure out a reasonable rate with those counterparties with eligible sales amounts.
 - Concerning others, including the obligation to adopt the platform operator’s payment system, the Report discussed security and privacy as possible justifications. Such justification claims will fail, if the operator has successfully introduced alternative methods in other jurisdictions to meet the *ex-ante* regulations there.

7 EU Commission's clarified SO to Apple

- The European Commission (28 Feb 2023)
 - does no longer pursue the IAP obligation imposed on music streaming app developers to adopt Apple's payment system,
 - but rather focuses on the contractual restrictions of “anti-steering obligations” as “unfair trading conditions”.
 - “Apple imposed [the anti-steering obligations] on app developers which prevent them from informing iPhone and iPad users of alternative music subscription options at lower prices outside of the app and to effectively choose those.”
- Security and privacy have less relevance here.
- Exploitative abuse emerges as the leading concern.