



ICN UCWG Project Report

- Theories of Harm and Design of Remedies Concerning Unilateral Conduct With Dominance/Substantial Market Power in Digital Markets -

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Overview of the project

- “Report on the results of the ICN survey on dominance/substantial market power in digital markets”(2020)
- Successor project focusing on TOH and remedies
- Questionnaire survey: 46 agencies and 31 NGAs replied
- Summarize and share their experience, challenges and approaches



Theories of harm for unilateral conduct in digital markets(1/4)

- 18/46 authorities took 36 enforcement actions
- 8/36 cases includes “new forms of abuse of dominance in digital markets”(OECD,2020)

Theories of harm for unilateral conduct in digital markets(2/4)

- Anticompetitive effect
Not only consumer welfare but also effective competition, exclusionary effects, decreased consumer choices...
- Factors to analyze
 - Traditional: Extent of dominant position, position of competitors, availability of alternative choices...
 - Digital: Two/multi-sidedness, economies of scale, indirect network effects... (for analyzing relevant market)
 - ✓ Examples: Android Auto(Italy), Google News Corp(France), TREB(Canada), Google Shopping(EU)

Theories of harm for unilateral conduct in digital markets(3/4)

- Challenges and approaches: faced challenges in 12/36 cases
 - Assessing anticompetitive effects by a set of different practices
 - ✓ Example: Sports in Pay-TV (Switzerland)
 - Assessing anticompetitive effects based on characteristics of relevant market
 - ✓ Example: TREB (Canada)
 - Proving anticompetitive effects outweigh procompetitive effects
 - ✓ Examples: MFN cases (Brazil)

Theories of harm for unilateral conduct in digital markets(4/4)

- Challenges and approaches (continued)
 - Selecting, collecting or assessing necessary evidence
 - ✓ Examples: Naver(Korea), FBA Amazon(Italy)
 - Intersections with other legal areas such as privacy laws
 - ✓ Example: TREB (Canada)

Remedies for addressing unilateral conduct in digital markets

- Challenges and approaches: faced challenges in 6/36 cases
 - Designing appropriate remedies
 - ✓ Example: Google news corp (France)
 - Timely remedies
 - ✓ Example: iFood (Brazil)
 - Monitoring
 - ✓ Example: Google news corp (France), TREB (Canada)



Legal or structural challenges and approaches specific to digital markets (1/4)

- 40/45 agencies and 19/31NGAs pointed out challenges
- 11 agencies considered the necessity to prohibit unilateral conduct that does not meet the requirements of “dominance/substantial market power”

Legal or structural challenges and approaches specific to digital markets (2/4)

- Requirements of dominance/substantial market power
 - Challenges : difficulties in establishing “dominance/substantial market power”
 - Approaches: legislation to clarify or extend the notion of dominance/substantial market power
 - ✓ Examples: EU(DMA), Germany(section 19a), UK(“strategic market status”), Australia, Greece,.....

Legal or structural challenges and approaches specific to digital markets (3/4)

- Scope of unilateral conduct
 - Challenges : difficulty in addressing exploitative conduct, etc.
 - Approaches: Legislation to fill the gap
 - ✓ Examples: EU(DMA), UK, Australia, Turkey,.....
- Difficulty in collecting and analyzing evidence
 - Challenges :Difficulties in assessing and evaluating evidence, lack of technological expertise, etc.
 - Approaches: established special units to provide expertise
 - ✓ Examples: UK, Australia, France

Legal or structural challenges and approaches specific to digital markets (4/4)

- Institutional hurdles for efficient investigations
 - Challenges : Lack of capacity and human resources
 - Approaches: ex-ante regulation, earlier intervention, self- and co-regulation...

Background on lack of enforcement experiences

- 28/46 responding authorities do not have enforcement experience
- Received information but did not initiate formal or preliminary investigations; why?
 - Lack of experience, resources, ...
 - Watching overseas authorities, less priority,...



Existing legal and institutional frameworks - addressing companies without dominance(1/2)

- 14/46 responding authorities have legal frameworks
- 8 authorities have specific provisions focusing on abuse of economic dependence, relative market power, superior bargaining position.....("ASBP")
 - ✓ Examples: Germany, Switzerland, Japan, Korea, France, Italy....
- 5 authorities have general provisions for unilateral conduct by companies without dominance/substantial market power

Existing legal and institutional frameworks - addressing companies without dominance(2/2)

- Legislative efforts – adjust to digital markets
 - ✓ Examples: Germany, Italy, Korea....
(Guidelines: Japan, Thailand)
- Cases
 - ✓ Examples: Apple(France), Amazon(Japan), Yogiyo(Korea)
- Pros and Cons

Conclusion

- ICN documents
 - Good reference for policy making and law enforcement
- Role of the ICN



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Thank you for your attention !



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