Competition Law and Digital Ecosystems: Learning to Walk before We Run

From: Dr. Derek Ireland

Frederic, this is an excellent study and I agree with virtually every insight and proposal in the study. I will simply expand on some points based on my own research including a major study that I am now completing for the Consumers Council of Canada and the Government of Canada on the on-demand economy and the Canadian consumer, to be published sometime in the Spring of 2021. This study is of course focusing especially on Amazon, Uber, Airbnb, and other what we call on-demand service providers.

I share your concerns on competition policy and law moving into the unfamiliar territory of ex-ante regulation. Some of the reports making this argument are written by old friends of mine; but I am concerned that they know a lot more about competition policy and law than regulation. Some of their arguments are interesting and certainly worthy of consideration; but, based on my quite extensive experience with conventional regulation, future research and policy analysis should give greater weight to some of the negative sides of ex-ante regulation.

In particular, as antitrust and competition policy and law authorities and practitioners move into the relatively unfamiliar territory of ex-ante and anticipatory (before the fact and harm) regulation, the design and implementation of these rules and regulatory regimes should take full account of the rich regulatory literature on what can go wrong when ex-ante regulations are being designed, introduced, launched, and implemented. A partial listing of the key lessons from this literature and my own experience would include:

• Regulatory capture during both the design and implementation stages which in my view represent a greater risk in regulatory regimes than for competition policy and law authorities;

• The risk that ex-ante regulation can chill innovation, entrepreneurship and risk taking and can generate not only pro-competitive effects but

also anti-competitive effects, which are often not obvious until the regulation has been implemented for a fairly long period of time (making Type I over enforcement errors both more consequential and more hidden);

• The danger that the outright prohibitions in ex-ante regulations will ban business practices that in some contexts can promote competition, efficiency, innovation and consumer welfare;

• The risk that ex-ante rules and regulations directed at the big tech giants will be poorly designed, implemented and enforced (perhaps the consequence in part of questionable administrative and court decisions) and therefore will become "digital economy-wide" in scope with global ramifications – with potentially significant negative impacts on and implications for smaller, new and potential start-ups in the digital platform space, including in smaller more advanced economies and developing, transition, and emerging market economies;

• The related risk that prescriptive digital economy-wide ex-ante rules and regulations will not take account of the very diverse and asymmetric business models applied by the five very different GAFAM and other larger tech companies and platforms in their product market spaces, and how these different business models can evolve and change significantly through time – a point Frederic that you make very well;

• The distributional effects of regulation that can be unintended, unanticipated, and perverse – and too often ignored in regulatory impact and benefit-cost analyses that heavily discount and ignore more qualitative information and concerns;

• And the danger that regulations, which were ineffective from the outset or are no longer effective because of dynamic change in markets and technology are difficult to eliminate – because governments and their regulatory authorities do not like to admit to and publicize their errors, and because large incumbents and other vested interests can benefit significantly from bad regulations that e.g. prevent entry and expansion by more efficient and innovative smaller firms.

The time, effort and cost of getting rid of bad regulations that benefit vested interests should especially be emphasized based on the rich literature and my own experience including working closely with the

Minister of Transport to promote regulatory reform within and "re-engineering" of Transport Canada in the early 1990s.

Among the topics that concern me is the focus on self-preferencing and the potential abuses of self-regulation and governance by the GAFAM and other big tech firms such as Uber. I fully agree that, similar to major retail chains, the self-preferencing of Amazon, Google et al is an important competition issue. At the same time, many articles and Internet blogs as well as the comments and insights from the participants in our on-demand economy survey and focus groups illustrate that on-demand service providers and online retailers are expected to play a gatekeeper, self-regulation and governance role to protect them from counterfeit, pirated and other questionable, hazardous and unhealthy products in the case of Amazon and other online retailers, and to protect customers from poor drivers and driver misconduct in the case of Uber.

These respondents as well had varying degrees of trust and confidence in the ability of governments, consumers associations and other civil society groups to fully protect them from these and other potential risks and harms of the digital economy. Their views were quite consistent with an earlier 2011 paper by David S. Evans on multi-sided platforms governing the bad behaviour of their users at: https://chicagounbound.uchicago.edu/law_and_economics/220/. The lesson for me is that more research is needed on where appropriate gatekeeping ends and potential anticompetitive self-preferencing and related abuses of dominance begin.

Our on-demand economy research and analysis emphasized that the business models of the different on-demand economy service providers are very different, which is consistent with the broader digital economy literature on the differences between the GAFAM and other big tech platforms and firms. Moreover, over the past year, there have been a number of studies on the expanding competition that Amazon is facing in their digital space – which increased during the pandemic when firms like Walmart, Costco, Staples etc. put more emphasis on their online sales.

For example, in the 2020 article in Big Commerce on "Competing With Amazon: How Amazon's Top Ecommerce Competitors Survive and Thrive" at: https://www.bigcommerce.com/blog/amazon-competitors/, Duran Inci reports that Amazon's top ten competitors are: Walmart, Alibaba, Otto a European online retailer, JD/Jingdong which is another Chinese online retailer, eBay, Flipkart which is largest online retailer in India, Rakuten a Japanese online retailer, and Newegg an electronics online retailer.

In addition, other articles discuss how a Canadian firm Shopify has expanded greatly in this digital space – see a fairly recent New York Times report which compares Amazon and Shopify at: https://www.nytimes.com/2020/11/24/magazine/shopify.html?action=click&module=Well&pgtype=Homepage&section=The%20New%20York%20Times%20Magazine. These and other reports suggest to me that Amazon may be facing stiffer competition than the other GAFAM and will also be disciplined by the conventional bricks and mortar retail sector once the post-pandemic recovery period builds some momentum.

My final comment is that, while I am a major proponent of applying the insights of behavioral economics and other behavioral literatures to competition policy and law enforcement cases and other competition matters, I also fully agree with you that simply applying concepts like consumer inertia and other behavioral biases without case specific empirical evidence should be avoided.

We framed our questions to the online survey and focus group participants in a manner that would provide some indication of the behavioral aspects of their online decisions. In general, we found that many online consumers tended to exaggerate the perceived and actual benefits from their online purchases in terms of price, variety, choice, convenience and time savings; and that many tended to discount the personal and especially the social risks and harms associated with their on-demand economy purchases. This was particularly true for the more experienced online consumers who are also more tech savvy.

At the same time, the findings especially from the focus groups suggested that consumers are conducting quite reasonable, thoughtful,

and "rational" benefit, risk, and cost analyses regarding their online purchases. Incidentally, our data collection was completed in December 2019 and therefore just before the start of the COVID pandemic in Canada. My expectation is that the benefit side would have received even greater weight if the online survey and focus groups had taken place during the pandemic.

Frederic, sorry for the length of my response, but your excellent study triggered a lot of interest and thinking by yours truly. Best of luck with completing the study and with your further research on learning to walk before we run on governing digital ecosystems.

All the best and stay well, healthy, happy and productive.

Dr. Derek Ireland
Fellow, Arthur Kroeger College, Carleton University