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The future of digital platform regulation: a Japanese perspective

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1) Khan, who at 32 is the youngest-ever FTC chair, published *Amazon's Antitrust Paradox* in the *Yale Law Journal* in 2017 (<https://www.yalelawjournal.org/note/amazons-antitrust-paradox>). In the paper, she wrote "...there is sound reason to ask whether permitting Amazon to leverage its platform to integrate across business lines hands it undue economic and political power."

Executive Summary

Regulation of giant digital platform companies, epitomized by GAFA, is under increasingly serious discussion in response to concerns about the threats they pose to fundamental constitutional values in democratic nations. The history of regulation of financial industries is the best template for thinking about digital platforms' future.

Regulatory clampdown on GAFA accelerates

Tightening of regulations on the biggest global digital platform companies, particularly GAFA (Google, Amazon, Facebook and Apple), has been accelerating since last year. Last October, the US Department of Justice filed a civil antitrust lawsuit against Google for alleged anti-competitive conduct in the search and search advertising markets. In June 2021, president Biden appointed Columbia University Law School professor Lina Khan to chair the Federal Trade Commission. Khan has been a fierce critic of the anti-competitiveness of major platform companies' business models¹⁾.

In the EU, the European Commission proposed two new laws, the Digital Services Act (DSA) and Digital Markets Act (DMA) last December, to regulate social media, online marketplaces and other digital services. These two new laws seek to protect consumers, ensure market transparency and impose accountability on online marketplace operators and digital service providers. More specifically, they are intended to curb the anticompetitive conduct of giant IT platforms like GAFA. Anticompetitive conduct would be subject to heavy fines of up to 6% of annual intra-EU revenue under the DSA and up to 10% of annual global revenue under the DMA.

The Japan Fair Trade Commission has been investigating the business practices of digital platform operators (e.g., online malls, app marketplaces, advertising markets) since last year. In particular, it is calling out practices that pose concerns of abuse of dominant market position or unfair exclusion of competitors.

Are constitutional values under threat?

This regulatory clampdown on digital platform companies is largely driven by two factors. The first is a loss of consumer welfare due to concentration of economic power in the hands of digital platform companies. The second is a dawning recognition of a serious threat of loss of sovereign rights guaranteed by democratic countries' constitutions, including guarantees of individual freedom and durable democracy.

Kobe University professor Masahiko Kinoshita, a constitutional law scholar who heads the Ministry of Internal Affairs and Communications' Institute for Information and Communications Policy's media law committee, asserts that digital platform companies must be regulated by economic law because overconcentration of economic power in their hands is a threat to constitutional values²⁾. The rationale behind his argument is as follows.

2) Kinoshita, Masahiko, *The Constitutional Theory of the Digital Media Platforms*, Journal of Law and Information System, Volume 9 (May 2021).

1. Concentration of economic power reduces citizens' welfare

When a market is monopolized or oligopolized, consumers have to purchase products at higher prices than they otherwise would, resulting in decreased consumer welfare. In a democracy, "consumer" is synonymous with "sovereign individual." Monopolies and oligopolies reduce sovereign individuals' welfare. They also restrain diversity of economic activity if they result in less competition. They consequently may obstruct certain freedoms, such as the freedom of choice of occupation and freedom of expression.

2. Lopsided allocation of resources leads to skewed distribution of political influence

Businesses with overwhelming economic power capture exorbitant excess profits at the expense of consumers. The resultant lopsided allocation of resources enables monopolists to directly exert outsized political influence through lobbying and political contributions. Additionally, monopolists could gain a self-serving ability to control, through their advertisers' media spending, the information to which consumers (sovereign individuals) are exposed.

3. Monopolies facilitate government control of speech

Just as monopolists influence politics, the government can influence monopolists. By controlling the granting of licenses, public works contracts and subsidies to monopolists, governments can induce the monopolists to use their influence in ways that benefit the government, potentially including suppression of dissent against government policies.

In sum, the emergence of businesses with undue economic power is likely to undermine constitutional values or, put differently, harm sovereign individuals' welfare. To avoid such harm, governments have been erecting safeguards against overconcentration of economic power. In Japan, those safeguards include the Antimonopoly Act and a panoply of industry-specific laws.

Professor Kinoshita recommends separating platforms from the commerce conducted on them and enacting a new law to specifically regulate platform companies in addition to more strictly enforcing the Antimonopoly Act against platform companies.

Lessons from financial sector regulation

The financial sector, a huge network industry, is stringently regulated by industry-specific laws such as the Banking Act in addition to the Antimonopoly Act. The history of financial sector regulation may offer a blueprint of how the digital platform industry should be regulated.

1. Break up digital conglomerates

The post-war breakup of Japan's prewar conglomerates by occupying authorities was a drastic reform to rid the Japanese economy of state control and overconcentration of economic power. It unleashed a revival in competition. Today, regulatory authorities globally are discussing the need to split up the GAFA conglomerates. Digital conglomerates may be an endangered species.

2. Restrict anticompetitive M&A

Japanese banks are prohibited by both the Banking Act and Article 11 of the Antimonopoly Act from owning more than 5% of any non-financial company. This

5% rule reflects regulatory concerns about banks deploying their vast financial resources to obstruct market competition. Anticompetitive M&A is currently seen as a problem with GAFA. Acquisition of startups that could become future competitors in the aim of nipping threats in the bud will likely be restricted.

3. Enact new industry-specific laws

Industry-specific laws such as the Banking Act have been enacted to protect consumers and ensure that companies operate soundly. The need for a new law to similarly regulate platform companies is under increasingly serious discussion. Enactment of an industry-specific law in sync with the Telecommunications Business Act is a particularly urgent priority.

4. Adopt globally uniform regulations

The financial system, a global network, is subject to globally uniform regulations such as the Basel Accords. By the same token, global digital platforms with multinational operations also require globally uniform regulations.

Lastly, with cross-sector competition intensifying in certain markets, particularly the payment space, we hope governments and other concerned authorities hasten to ensure a fair competitive environment.

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