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KING'S College LONDON

THE INNOVATION ECONOMICS CONFERENCE

FOR ANTITRUST LAWYERS

WEBINARS | **FROM APRIL 27TH TO 30TH**

5th Innovation Economics Conference for Antitrust Lawyers

#1 The DSA & DMA: A Radical Change in the EU

Tuesday 27 April 2021

*Interview with Richard Whish (King's College London), by Ingrid Vandenborre (Partner, Skadden)**

***Richard Whish** (Emeritus Professor, King's College London) has been interviewed by **Ingrid Vandenborre** (Partner, Skadden) in anticipation of the 5th edition of the **Innovation Economics for Antitrust Lawyers Conference** to be held online with a series of 4 webinars on April 27th, 28th, 29th and 30th.*

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Ingrid Vandenborre: **The DMA proposal provides for a centralised enforcement framework with the European Commission as sole enforcer. National competition authorities' (NCAs) and courts' officials are calling for more involvement in the implementation and enforcement of the rules. Recently, Martijn Snoep, the chairman of the Dutch Competition Authority, commented that national enforcers can, and should, act as the "eyes and ears" of the Commission on the ground. What enforcement issues do you foresee with the current proposal? In your view, is it appropriate to have a centralized enforcement system? What would be the most efficient way to share competences between the Commission and national enforcers?**

Richard Whish: The draft DMA is very thin on the role of the Member States (including NCAs and national regulators): as currently drafted the Commission has a 'monopoly' under the DMA, with 'assistance' from a Digital Markets Advisory Committee (Article 32). It seems to me that there is a lot more work to be done here. In antitrust the NCAs share competence to enforce Articles 101 and 102 TFEU with the Commission, albeit subject to the Commission's power under Article 11(6) of Regulation 1/2003 to take over a case. In the EUMR we have one-stop merger control, albeit with the possibility of references up and down (e.g. Articles 9 and 22). Of course, the DMA is not 'competition law' as such; we should remember that its legal basis is Article 114 TFEU on the approximation of laws, and that designated gatekeepers will be subject to obligations irrespective, for example, of whether they are dominant or not. There is no reason why the enforcement system in the DMA should be the same as we have under competition law. This having been said, it seems inconceivable to me that NCAs and relevant national regulators should not have some role in the future system. No matter how good its telescope, it will not be easy for the Commission in Brussels to be able to see everything that is happening across the entire EU, from Ireland to Greece and from Portugal to Finland: some national authorities already have considerable experience with digital platform markets and others are acquiring it now; some remedies will need to be responsive to local conditions. Martin Snoep is surely right to say that national authorities can act as the 'eyes and ears' of (and I would say advisors to) the Commission. The DMAC as currently envisaged in Article 32 is a long way short of this. Indeed it is not necessarily the case that national authorities will have a role in the DMAC - this seems to be a matter for the Member States to decide. I expect to see considerable development of the legislation in this area.

Giovanni Pitruzella, Advocate General at the European Court of Justice, commented that the DMA may sit uneasily with the EU principles of proportionality, the freedom to conduct business and the right to enjoy and dispose of property set out in the Charter of Fundamental Rights and the treaty on European Union. What are your views on the DMA's coherence (or lack of alignment) with the EU principle of proportionality, and what is the appropriate framework for judicial review of new platform regulation?

Yes, I saw the comments of AG Pitruzella, and of course, it will be important - indeed legally necessary - for the Commission to comply with the requirements of the Charter and with the general principles of EU law. Competition law is enforced subject to the same requirements. The Court of Justice in the recent *Slovak Telekom* case noted the importance of property rights in its discussion of the essential facilities doctrine; proportionality lies at the heart of many judgments, for example, where the General Court disagrees with the level of a fine imposed by the Commission in a competition law case. Proportionality was an important factor in the

Court of Justice's recent *Group Canal* judgment on the effect on third parties of Article 9 commitments in the Hollywood film studio case, in which it followed the advice of AG Pitruzella. Specifically on the question of property rights, this is an issue with which competition lawyers, and EU lawyers generally, are very familiar: the exhaustion of rights doctrine recognises the existence of property rights, but notes that in some circumstances those rights may be exercised in violation of the Treaty; Frankfurt Airport was unable to rely on its ownership of the airport to prevent competition from baggage handlers; the owner of an essential facility may, in 'exceptional' circumstances, be obligated to provide access to it. These are important issues, and the role of the General Court will be very important. The DMA gives it unlimited jurisdiction in relation to decisions in which fines and periodical penalty payments are imposed, pursuant to Article 261 TFEU. But just as important will be Article 263 TFEU, providing for the review of the 'acts' of the Commission, including acts under the DMA.

The CMA's Digital Markets Unit advice to the UK government to create additional competition rules for large tech firms and platforms differs, in some aspects, from the Commission's DMA proposal. Recently, the CMA's chief executive Andrea Coscelli indicated that UK large tech regulation efforts will be an "early test of Brexit" in terms of how far the UK government is willing to diverge from the EU. While Mr. Coscelli emphasized the value in converging approaches to other jurisdictions, he acknowledged that UK lawmakers could look for other options in some areas. How do you anticipate the EU and UK respective approach and legal framework to differ from each other?

The position of the UK is very interesting in this debate. Clearly, as a result of Brexit, the UK is free to develop its own rules for digital platforms, just as the US, Australia and every other non-EU country can. But at the same time, it is obvious, because of the very nature of digital markets, that close cooperation is desirable as a matter of principle; and it is clear that in practice cooperation is already a reality. Tremendous work has been done by competition authorities, regulators and numerous others worldwide in recent years in trying to understand how digital platforms work and whether, and if so which, problems they present for public policy. There are strong positive externalities in all this research experience and decision-making. The UK is committed to close international cooperation. But that does not mean that it should adopt the same standards as the EU (or anyone else). Of course we do not have draft legislation yet in the UK (although we have a 'shadow' Digital Markets Unit). So it remains to be seen how similar, or dissimilar, our system will be to that of the EU. But I think that we are likely to have a slightly different approach to the application of *ex ante* obligations, in that there will be a market power element to the identification of those activities of firms that will be controlled; and I think that we will take a tougher line on mergers involving 'nascent' competitors. We will probably require certain mergers to be pre-notified (remember this in a country where there is no mandatory notification of 'normal' mergers); and we may have a stricter standard of proof for mergers involving platforms.

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