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5th Innovation Economics Conference for Antitrust Lawyers

#2 Geopolitics of platforms regulation

Wednesday 28 April 2021

*Interview with Mike Walker (UK Competition and Markets Authority), by Elizabeth Xiao-Ru Wang (Compass Lexecon)**

***Mike Walker** (Chief Economic Adviser, UK Competition and Markets Authority) has been interviewed by **Elizabeth Xiao-Ru Wang** (Executive Vice President, Compass Lexecon) in anticipation of the fifth edition of the **Innovation Economics for Antitrust Lawyers Conference** to be held online with a series of 4 webinars from April 27th to 30th, 2021.*

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Elizabeth Xiao-Ru Wang: What are the key areas of antitrust concerns associated with digital platforms considered by CMA?

Mike Walker: I think we have learned four important lessons around competition policy and the digital platforms in recent years.

First, relying on unilateral conduct provisions under competition law (i.e. abuse of dominance provisions, or monopolisation provisions) alone is not going to be enough to constrain the market power of these firms. The main problems are that the cases take too long and that they tend to be primarily backwards-looking. Competition law can only take action once the alleged anti-competitive behaviour has become visible. It may then be able to stop that behaviour, but it is often unable to deal with the root cause of the anti-competitive behaviour. The result is that firms have an incentive to find other ways to exploit their market power. Large, sophisticated firms are likely to be rather good at this.

This is not to suggest that we should entirely give up on unilateral conduct cases in this area. In the UK we have recently launched two unilateral conduct cases involving the large digital platforms. One is a case involving Google and its proposed changes to the use of third-party cookies in Chrome[1]. The other involves Apple and its app store[2]. But it is to suggest that unilateral conducts cases on their own are not enough.

Second, the digital platforms' very strong market positions are not likely to be self-correcting in the near future. For instance, Google has had a very high share of online search for many years and the network effects associated with search suggest that this position will not be eroded in the near future. Its market share in search in the UK has been above 90% for more than a decade. I note that even a firm of the size of Microsoft has been unable to challenge Google's dominance in this area. Facebook has a very high share of social media and has had for a number of years. At least in the UK, Facebook appears to be the "must-have" social media platform, with other social media platforms being largely additions, not substitutes.

This persistence of market positions is partly due to network effects inherent in the relevant products, but also significantly because the firms have been able to make it hard for consumers to switch away. Some of this relates to standard consumer biases around inertia and defaults, but much relates to online choice architecture and nudges that make consumers "sticky". Some of this persistence also relates to more standard anti-competitive behaviour, such as Facebook cutting off Vine's API access once Facebook perceived it to be a competitive threat.

Third, the ability to build up ecosystems is a powerful way of protecting their core monopolies. Google, for instance, has built up an ecosystem that includes search, YouTube, Android, Chrome, Google Play, maps and others. Facebook's ecosystem includes WhatsApp, Instagram, Oculus and so on. There are undoubtedly efficiencies related to some aspects of these ecosystems, but they also seem to be a successful way to increase the barriers to entry for potential competitors.

[1] "CMA to investigate Google's 'Privacy Sandbox' browser changes" CMA Press Release (8 January 2021).
[2] "CMA investigates Apple over suspected anti-competitive behaviour" CMA Press Release (4 March 2021).

The fourth important lesson is that privacy regulation and competition policy need to be joined up. There is a danger that privacy regulation can have adverse consequences for competition. Where data is a key competitive asset and where privacy regulation imposes restrictions on how data can be shared and used, that can have implications for competition between firms. For instance, it is pretty clear that the GDPR in Europe has been used by some incumbents as a competitive weapon: they have shared data within their ecosystems whilst denying access to that data outside their ecosystems. The lesson here is not that privacy regulation and competition policy are in conflict. It is that they need to be considered together.

How does CMA identify a platform with "strategic market status (SMS)"?

Ok, let me provide some context first before I answer this question. As you know, the UK is setting up a tech-specific regulator, the Digital Markets Unit. The CMA has provided recommendations as to how the regulatory regime should work[3]. These are largely based on the Furman Review[4] and on our own work on the digital advertising market[5].

The aim of the proposed regulation is threefold. First, to limit the ability of firms that currently have substantial market power to exploit that market power. Second, to make it easier for firms to challenge the positions of the incumbents. Third, to ensure that incumbents cannot protect their positions via acquisitions.

My view is that the proposed regulation will likely cover only a few firms directly. It will cover firms that are found to have *strategic market status*, hence your question. These are firms that have substantial entrenched market power in a digital activity and where this provides the firm with a strategic position which means that the effects of its market power are widespread and significant. There are two important points to note about this designation. First, the market power must not only be substantial, it must also be *entrenched*, with little prospect of it being competed away in the foreseeable future. Second, that market power must have effects across a wide range of markets.

I think this will fundamentally be an economic analysis: is there market power? How much? What is the source? How pervasive are its effects?

It is very important to understand that the proposed UK regulation is not some form of traditional rate of return or price regulation. The aim of the regime is to encourage competition and innovation, not to bake in current outcomes. My view, and I think the view of most economists, is that competition, not monopoly, drives innovation, and so the proposed regime should encourage innovation, not discourage it. Allowing large incumbent firms to squash potential competitors, or to buy them, is unlikely to encourage innovation.

I noted above that despite the weaknesses of antitrust in this area, we are still running some antitrust cases against large digital platforms. I think this is important for a number of reasons. First, the DMU is unlikely to get its full powers much before 2023 and so we should continue

[3] "A new pro-competition regime for digital markets: advice of the Digital Markets Taskforce" CMA (December 2020).
[4] "Unlocking digital competition" Report of the Digital Competition Expert Panel (March 2019).
[5] "Online platforms and digital advertising: market study final report" CMA (1 July 2020).

our enforcement work in the meantime. Second, there may be cases where antitrust is fit for purpose, such as where firms are willing to give commitments quickly or where interim measures can be imposed. Third, there may be occasions where we want to establish precedents around anti-competitive behaviour that is not limited to just SMS firms. Fourth, there will be rather few firms designated with SMS and so antitrust will remain the primary tool for anti-competitive behaviour by other firms.

In your recent panel discussion at Public Knowledge, you mentioned some "bad mergers" involving digital platforms such as Facebook /Instagram and Google/Double Click. What are the key factors in merger analysis associated with digital platforms? Do we need new tools for analyzing such mergers to better address the challenges and complexity associated with digital platform mergers?

I think that enhanced merger scrutiny in this area is important given the evidence of historic under-enforcement. The Furman Review noted that collectively GAFAM made more than 400 acquisitions over the period 2008-18 but that none of them were blocked, few were even investigated and even fewer had any conditions attached to them. I am sure that the majority of these acquisitions were not anti-competitive. Many of them were of firms operating in complementary products and services and so likely had positive efficiency effects. However, it is far from clear that they were all benign. Our Digital Advertising Market Study recommended giving the DMU powers to break up Google's position in the ad tech stack. This implies that the Google/DoubleClick merger was probably a mistake. There is a strong case that when Facebook bought Instagram, it thought it was buying a potentially strong competitor. Facebook's behaviour around sharing data across its ecosystem suggests that the Facebook/WhatsApp acquisition was not good for consumers.

Whatever you think about these specific cases, it is clear that many tech mergers have not been investigated to the extent needed for competition authorities to be properly satisfied that they were benign. There is undoubtedly a great deal of uncertainty around many acquisitions in the tech sector as to what they will lead to. However, in my view that uncertainty has often been used by competition authorities as a reason to do nothing. That does not seem to me to be the right answer.

If I had to identify three things that we should change in future they would be:

- Focus on the monetisation strategy of the merging parties. As Cristina Caffarra says, "follow the money"[6]. I think we are now doing this at the CMA.

- Be more comfortable with uncertainty and recognise that doing nothing, or having a default of clearing the merger, is not a neutral position. More generally, I think it is better to seek to be roughly right, than to be exactly wrong: doing nothing in the face of uncertainty is exactly wrong.

[6] Caffarra, C. 2019. "Follow the money: mapping issues with digital platforms into actionable theories of harm" *e-Competitions Special Issue: platforms*

- Think not only about the likelihood of efficiencies or harm, but also about the size of those efficiencies and harms. This is what underlies the Furman Review recommendation of moving to a "balance of harms" test.

What advice would you give to firms and practitioners to prepare for the UK's new pro-competitive regime for digital markets?

Don't panic.

First, as noted earlier, I think rather few firms will be designated as having SMS. On the basis of our work so far, I think that Google and Facebook both very likely have SMS. We have signalled that we will carry out analysis to see if Apple and Amazon have SMS. It may be that other firms, such as for instance Microsoft, are found to have SMS. But I really don't think it will be many firms.

Second, I think the regime should create opportunities for other firms to compete more successfully on a level playing field. I think this is particularly true for innovative firms. This should be an opportunity for many firms, not a threat.

Currently, many jurisdictions including the US, EU, UK, Austria and China are coming up with plans to regulate digital sectors. Do you see convergence on antitrust enforcement associated with digital platforms? Taking into consideration the global nature of many digital platforms, how important is coordination across jurisdictions regarding antitrust enforcement associated with digital platforms? What are the key factors for an effective multi-jurisdiction collaboration to address antitrust concerns for those multinational enterprises in the digital markets?

So, obviously, the digital platforms are global players and this means that regulatory consistency between the US, Europe and others is highly desirable. This is important both to protect consumers and to create greater consistency for the platforms. From what I observe, there is a great deal of communication and discussion of these issues between the various jurisdictions, at both working levels and at the most senior levels. This is clearly a good thing.

I'm going to take the opportunity to twist your question a bit, if I may? It is not just international cooperation that is important. Another important issue is the need for cooperation between the various regulatory bodies within a jurisdiction. I noted earlier that it is important that privacy policy and competition policy are not developed entirely independently. The same is true of policy around content regulation and online harms regulation. In the UK the Information Commissioner's Office (ICO) is responsible for privacy regulation; Ofcom, the telecoms and media regulator, is responsible for content and online harms regulation; and the CMA is responsible for competition and consumer policy. The Digital Regulation Cooperation Forum has been set up to ensure cooperation and strong working relations between these three bodies.[7] I think this sort of initiative is really important.

[7] The Financial Conduct Authority has also now joined the DRCF.

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