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Competition policy with respect to Big Tech: what have we learned and how should we respond?

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1. Introduction

The starting point for any discussion around antitrust, regulation and Big Tech has to be the recognition that they make great products and provide great services that consumers love. There is a wealth of evidence that consumers and firms value the products of firms like Google, Amazon, Facebook, Apple and Microsoft very highly. The experience of consumers and firms during the pandemic has heightened this.

But: this is not a "get out of jail free" card when it comes to anti-competitive behaviour to protect and extend very substantial market (monopoly) power. Producing great products does not give you a free pass to exploit your market power to the disadvantage of consumers and the economy.

2. What have we learned in Europe?

I think we have learned at least five important lessons in Europe around the large digital platforms.

The first is that 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. There are a two main problems with relying solely on abuse of dominance provisions.

- It is too slow. The European Commission has run three cases against Google under its abuse of dominance powers. Google Shopping was started in November 2010. The Commission issued a decision in June 2017. This decision is now on appeal. Google Android was opened in April 2015, in response to a complaint in March 2013. The decision was issued in July 2018 and is still on appeal. The Commission's Google AdSense decision in 2019 related to anti-competitive behaviour starting in 2006. These

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timescales are too long for effective enforcement in any type of industry, let alone one which is as dynamic as some of these markets.

- It is primarily backward looking and you run the risk of playing wackamole. 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.[2] The other involves Apple and its app store.[3]

The second thing we have learnt is that the digital platforms very strong market positions are not likely to be self-correcting in the near future. 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 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". A good example of default bias is given by Google's deal with Apple for Google to be the default search engine on Apple devices. If consumers were not inert and prone to stick to defaults, then this deal would have no value to Google. However, Google pays very large sums for this default position: about £1.2bn in the UK alone in 2019. An example of firms using choice architecture to their benefit is requiring consumers to navigate a complex route to find information about the use of their data and the ability to change their settings, so that consumers are unlikely to change their preferences in ways adverse to the firms. 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. For instance, many firms want to use the same firm for advertising via search and via websites. Because Google has a very strong position in both search and in the adtech stack (more than 50% throughout the stack; 90% in places; significantly due to acquisitions such as DoubleClick), this makes it more attractive to firms. Its ownership of YouTube since 2006 further strengthens its position. So there are both efficiencies, but also

[2] "CMA to investigate Google's 'Privacy Sandbox' browser changes" CMA Press Release (8 January 2021).

[3] "CMA investigates Apple over suspected anti-competitive behaviour" CMA Press Release (4 March 2021).

raised impediments to competitors. The UK Competition and Markets Authority's (CMA) work in its Digital Advertising Market Study concluded that search advertising prices are higher as a result of Google's market power and hence prices to consumers for advertised products are likely to be higher.[4]

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 necessarily in conflict. It is that they need to be considered together.

A fifth point is less something that we have learned and more an observation. We are increasingly seeing that large areas of digital markets are dominated by GAFAM with very few other significant competitors. While the platforms' ecosystems are increasingly overlapping in some areas, this is not necessarily leading to strong competition. In some areas there appear to be fairly cosy duopolies, or agreements between GAFAM firms e.g between Apple and Google in search. To the extent that this interaction across a range of markets is a competitive concern, it is not one that existing antitrust seems well placed to deal with. If this concern is exacerbated by complementary acquisitions across the ecosystem, it is not clear that current merger control can help.

3. How are we responding in the UK and why

The UK is setting up a tech-specific regulator. This is called the Digital Markets Unit and will, initially at least, be set up inside the CMA, the competition authority. The CMA has provided recommendations as to how the regulatory regime should work.[5] These are largely based on the Furman Review and on our own work on the digital advertising market.

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.* This means that the firms have substantial entrenched market power in a digital activity and that 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

[4] "Online platforms and digital advertising market study: final report" CMA (1 July 2020).

[5] "A new pro-competition regime for digital markets: advice of the Digital Markets Taskforce" CMA (December 2020).

competed away in the foreseeable future. Second, that market power must have effects across a wide range of markets.

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.

The essence of the proposed regime is that SMS firms will face three sets of obligations.

- First, they will be subject to a firm-specific code of conduct. The aim of this is to restrict their ability to exploit their existing market power to the detriment of consumers. Our proposals here are based around three principles: fair trading; open choices; and trust and transparency. Fair trading relates to the need for SMS firms to treat users fairly and trade on reasonable commercial terms. Open choices mean that users do not face barriers to choosing freely and easily between services provided by SMS firms and other firms. Trust and transparency means that consumers are provided with clear and relevant information so that they can make informed choices about how they interact with the SMS firm.
- Second, they will face pro-competitive interventions designed to encourage new entry and innovation to challenge the SMS firm. Such interventions might include remedies around personal data mobility, interoperability and data access.
- Third, they will face enhanced merger scrutiny, to ensure that they cannot protect or enhance their market power via acquisitions.

It is very important to understand that this 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. There has long been a debate within the economics profession as to what drives innovation: monopoly or competition. This has often been characterised as Joseph Schumpeter (monopoly) against Kenneth Arrow (competition). 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.

We 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 adtech 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.[6]

Another important aspect of the UK approach is the cooperation between the various regulatory bodies. I noted above 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 (DRCF) has been set up to ensure cooperation and strong working relations between these three bodies. It recently (10 March 2021) published its Workplan for 2021/22.[7] This focuses on three priority areas:

1. Joint research into cross-cutting industry and technological developments (e.g. recent work on algorithms).
2. Developing joined-up regulatory approaches to ensure coherent regulation. One area of focus for this year will be the interaction between data protection and competition policy.
3. Building shared skills and capabilities (e.g. building cross-regulator specialist teams for particular issues).

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 before 2023 and so we should continue 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.

4. How do the UK proposals differ from the European Commission proposals?

The proposals discussed above are UK-specific proposals. The European Commission has also proposed new rules in its proposed Digital Markets Act.[8] The motivations for this proposal are largely similar to those in the UK (i.e. to restrict the exploitation of current market power and open up markets for new entrants) and the proposals are in many respects similar. However, there are also important differences that should be noted.

First, rather than focusing on firms with strategic market status, the EC proposals are based around the designation of some firms as "gatekeepers". This approach is more mechanical than

[6] Separately to our proposals around digital markets, we have also just updated our Merger Assessment Guidelines. These now cover some of the issues relevant to digital mergers (e.g. the treatment of uncertainty; the need to focus on monetisation strategies; the need to focus on long run dynamic theories of harm, rather than short term static ones).

[7] "Digital Regulation Cooperation Forum: plan of work fo r2021 to 2022" CMA (10 March 2021).

[8] "The Digital Markets Act: ensuring fair and open digital markets" European Commission (15 December 2020).

the proposed UK approach and will very likely capture significantly more firms. Thus under the DMA firms will be designated as gatekeepers if:

- They provide a core platform service that is an important gateway for business users to reach end users; and
- They have an EEA turnover over €6.5bn; a market capitalisation over €65bn; and
- they operate in at least 3 member states with more than 45m users and 10,000 business users.

In contrast, the UK approach will be based on specific analysis of each firm.

Second, the DMA specifies a list of dos and don'ts, which are largely based on theories of harm from past or current antitrust cases. Again, this differs from the UK approach of a bespoke code of conduct and pro-competition interventions for each SMS firm.

Third, the DMA proposals omit merger policy.

I prefer our approach as it is firm-specific and that seems right to account for the different business models, and hence sources of market power, of the various firms. For instance, Google and Facebook are largely advertising funded; Amazon is largely transaction funded; Apple is focused on device sales and its operating system/app store. Given these differences in business models, it seems reasonable to me to expect a bespoke regime to be better focused than a more general, mechanical regime.

That said, I should reiterate that I think the similarities between the UK and EC proposals outweigh the differences and time will tell which approach is most successful. I think this is good as it is in no one's interest to have substantial regulatory divergence within Europe (or across the Atlantic).

5. Dangers of over-intervention compared to under-intervention

The right answer to uncertainty and complexity is not inaction. A commonly heard argument is that these markets are fast moving and complicated and so regulators should not intervene as there is a significant risk of bad intervention. Allied to this is the argument that in these markets bad interventions might be particularly costly. I half agree with this argument. I agree that bad inventions can be very costly. But I think that a failure to intervene can be bad intervention. So I think it is not clear that this argument pushes us towards *less* regulation. There is risk in doing nothing, as well as risk in doing something, and choosing the status quo is not a neutral position.

Allied to this, the argument that these markets are complicated is a reason to favour expert regulators as opposed to general competition authorities doing relatively few cases.

6. Conclusions

- When it comes to dealing with the market power of the large digital platforms, abuse of dominance provisions are not enough.

- The entrenched market power of some of the most important platforms requires regulation to restrict their ability to exploit their market power and to enhance it by raising to barriers to new competition.
- This regulatory regime should open up these markets to new competitors. It is competition, not monopoly, that drives innovation and it is innovation that enhances consumer welfare.
- Merger control policy should be part of this regulatory regime. It has a key role to play in stopping existing incumbent platforms from further entrenching their market power.
- Competition policy in this area should not be developed independently of other regulatory interventions around issues such as privacy protection, online harms and content regulation.
- The future course of these markets is uncertain, but that is not an excuse for taking no action. Inaction is not a neutral choice.
- The digital platforms are global players. This means that regulatory consistency between the US, Europe and others is necessary, both to protect consumers and to create greater consistency for the platforms.