

# Competition in Digital Markets

IIC Chapter Meeting 29<sup>th</sup> April 2020

## Panel:

Mark Williams (moderator), BRG.

Simeon Thornton, CMA.

Tommaso Valletti, Imperial College Business School

Brian Williamson, Communications Chambers

Tania Van Den Brande, Ofcom

## Introduction- Mark Williams

Mark Williams set out the background to the meeting, noting the historical anti-trust cases of 40 years ago in the US, with AT&T, and 20 years ago with Microsoft. These featured many of the same issues as are now being faced in the case of multi-sided platforms. The last 10 years has seen high profile cases of digital competition investigations in the EU, firstly with Google and, more recently, Amazon. Ongoing antitrust investigations into 'big tech' in the US by the FTC and Department of Justice will shape the future of digital competition for many years to come.

A number of reports have attempted to plot a path for future digital market policy, including the OECD in 2018, and during 2019, the Crémer report from the EU, the ACCC in Australia and the Furman report in the UK. While different, the common themes include:

- The role of the digital economy in economic development
- The particular aspects of platforms that tip towards dominance
- The implications for downstream as well as digital markets
- The importance of data
- Balancing the protection of consumers in the short run with protecting them in the future through innovation
- Whether current policy and regulatory frameworks are 'fit for purpose'

The Furman report provides particular context for the debate; it recommended the establishment of a new regulatory body and introduced the concept of 'strategic market status' for the sector. It also proposed a code of conduct, greater interoperability and a more assertive approach to assessment and mergers in the digital space. The Competition and Markets Authority (CMA) began a market study into the 'online and digital advertising market' in 2019. It is also worth noting that these activities, while focused on economics and regulation, sit within a broader political context of issues of privacy, fake news, online harm, broadcasting and political influence.

## Simeon Thornton – interim CMA report

Presenting the [interim report](#), Simeon Thornton explained that the CMA's 'online and digital advertising market study' had come about due to widespread concerns, including:

- Conflicts of interest and the role of intermediaries
- Market characteristics, including economies of scale, network effects and asymmetries of information
- The role of a stronger ex-ante regulatory regime
- Data-related remedies, including data mobility, interoperability and access

The CMA's task was to investigate and propose remedies, and inform thinking on regulatory reform for platforms funded by digital advertising, specifically:

- Power in consumer-facing markets (search, social media)
- Consumer control over their data
- Effects on competition from lack of transparency, conflicts of interest and market power

### Issues

Facebook and Google both have very high Return on Capital (ROCE) vs the weighted average cost of capital (WACC). Google has a 90% share of search advertising, with barriers to entry including economies of scale, payments to be the default search engine and unrivalled access to data. Google also has a large share of intermediary services, including a 90% share of the publisher ad server. Facebook accounts for 75% of the time spent on social media, and a 40-50% share of display advertising. The CMA concluded that there were concerns over conflicts of interest, vertical integration lack of transparency and consumer control over their data, with long 'terms and conditions' statements and highly influential default settings.

### Potential interventions

The CMA is consulting on a code of conduct to govern the behaviour of platforms, on the basis that it enables more rapid intervention than an anti-trust approach and offers clarity to platforms of their expected behaviour. In a rapidly changing market rules can become rapidly redundant, and the approach is based on three broad principles:

- *Fair trading*: including pricing, terms, data-sharing and restrictions on customers. Concerns could be data gathering, data extraction, power versus publishers.
- *Open choices*: between platform's services and those of competitors. Issues include service bundling, unfair restrictions on competitors, undue prominence to own products.
- *Trust and transparency*: providing sufficient information and transparency in the operation of their services. Concerns include changes to core services (e.g. algorithms) without due notice, transparency in digital advertising, conflicts of interest and choice architecture that encourages consumers to share too much data.

Other, more specific interventions under consideration are;

- *Search*: third party access to click and query data, and mechanisms for determining default search engine on devices and browsers, and offering choice screens to consumers in their design.

- *Social media*: mandated interoperability over functionality such as cross-posting
- *Open display*: structural separation, such as the Google Ad server; more effective Ad verification and attribution
- *Consumer control*: choice over personalised advertising, ‘fairness by design’.

## Tommaso Valletti

Prof. Valletti began by disclosing that he had no vested interest in the subject in the form of payments or sponsorship, in contrast, he said, to many commentators who did.

Then and now...

He went on to describe the theoretical benefits from two-sided markets that were anticipated 20 years ago: multi-homing (connecting networks together), a choice of platforms, rational search, reduced transaction costs, greater access to information, a dynamic society and enhanced democracy. Instead, there is now greater consumer inertia and more biases, one search engine, one social media company, ‘first page’ search, and bundled ecosystems which are difficult to escape from. Regulators have put companies in boxes – infrastructure, media, telecoms etc. – and platforms have been able to navigate through grey areas and around the traditional boxes to break rules on taxes, privacy, politics and competition, creating effective monopolies.

### Regulatory under-enforcement

Google and Facebook business models have largely been based on ‘externalities’<sup>1</sup>, while Amazon’s digital marketplace enables it to act as ‘player and referee’ in providing the platform for selling its own products alongside others. Apple sells handsets, through which it promotes its own services, such as Apple Music, and charges fees to competing third parties, such as Spotify. Microsoft has avoided anti-trust issues, ‘learning its lesson’ from investigations 20 years ago.

Taken together the ‘GAFAM’<sup>2</sup> platforms have engaged in over 800 mergers since 2000, 98% of which were not investigated and none of which were blocked. There has been under-enforcement (of competition rules) globally. More intervention, according to Prof. Valletti, was essential. The UK cannot fight against global giants, and the only answer was a global response that is not possible in the current environment.

## Brian Williamson

Brian Williamson set out the contribution of digital platforms to the wider economy, pointing out that they had grown as a result of benefitting users. Considerations include:

- The way in which platforms solve problems by reducing information asymmetry between users. For example the Uber app is able to track users, unlike regulated services.
- Platforms have increased competition in markets as a whole – Airbnb/ hotels, social media / telecoms and media etc.
- Regulators have used regulation to impede competition and protect incumbents, for example Transport for London attempting to introduce a mandatory wait time for taxi platforms.

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<sup>1</sup> Activities that affect a third party not related to the transaction

<sup>2</sup> Google, Apple, Facebook, Amazon, Microsoft

- The Furman review did not consider the regulatory implications of the potential for digital platforms to increase competition throughout the rest of the economy.

### The code of conduct proposal

Agreeing a code of conduct presents a number of difficulties:

- It should be 'principles based' and not set a higher bar for digital players than for others. For example, just as Amazon sells its own goods alongside third parties, so do supermarkets.
- Requiring a non-targeted advertising offer for the same service could reduce the service for all, and require shortfalls in revenue to be made up elsewhere, e.g. from subscription
- Platforms frequently have to act quickly in order to stem exploits in security, fraud or disinformation, and notice requirements could result in an exploit being left open.

### Message interoperability

The questions raised around interoperability include:

- The need for definitions and frameworks result in homogeneity and can slow innovation. For example, Voice/SMS services are interoperable, but all of the innovation in the field has come from OTT providers.
- In practice, people communicate in different ways, and each piece of communication is appropriate in context. There is no evidence of demand to see LinkedIn posts in Snap.
- Many services exist within an ecosystem where innovation requires simultaneous, complementary changes that alter the boundaries of interoperability and require new APIs. Regulation would inhibit this.
- Hardware and software are often integrated in order to improve the user experience and support security. It may be difficult for an API to operate when, for example, encryption is used to link hardware to software, and there may be trade-offs between security and interoperability.

### Data portability

Brian Williamson pointed out that data portability was becoming much less of an issue. Most users are consuming 'current' data and news streams which are topical, and where there is no demand for porting. An original image may be processed for use on a platform, and is 'of the moment' rather than for any purpose. There are questions of ownership and privacy – whose permission is required? The emergence of the cloud means that less data is stored on a device in any case; for example most music is now streamed rather than downloaded. The experience of the solution applied to telecoms is a poor guide for regulating digital ecosystems, where an 'across-the-board' approach is not appropriate or likely to work. There are also institutional implications in deciding which body would be responsible for regulation.

### Tania Van Den Brande

Tania Van Den Brande considered competition in the context of online harms, and how competition contributes to issues of privacy and content. This includes harms from content, such as incitement to violence or promoting self-harm, and the quality of content, such as fake news and the impact on democratic institutions. Competition issues are normally thought of in terms of higher prices or lower quality, but can be contributory to harms. For example if a consumer has no alternative to

online news, then a platform will have limited incentive to filter out fake news and this can be considered an issue of quality.

#### Effective exercise of choice

A critical issue in considering harms is whether consumers have the ability to exercise their choice effectively: we need consumers to make decisions that reward platforms for realising good outcomes. We have learnt that consumers often don't have the information to make those decisions. For example, consumers may be biased as a result of platforms creating hurdles that require them to give up more information than is necessary. Similarly, with insufficient information, a consumer cannot 'punish' a platform responsible for presenting fake news.

There is a risk that the argument could be made that competition may exacerbate these broader harms. In order to avoid a 'race to the bottom', competition should not be 'second' and we should not conclude that less competition is better. Instead we need to explore levers other than competition to address these issues.

#### Synergies in regulation

It may be that the issues at the source of different harms might be quite similar. We have seen how consumers facing barriers to making good decisions is a competition issue. An example is 'default bias', where defaults favour incumbents and result in the protection of market power. Remedies designed to address this might include empowering consumers to make better decisions by ensuring they provide information in the right way at the right time. To the extent that this solves the problem, we may also learn that this provides remedies to other harms. Consumers can also be empowered by requiring platforms to create 'fairness by design': limiting the use of defaults constrains the sharing of data, addressing both competition concerns and, for example, privacy.

In some cases remedies designed to solve competition harms can also address content harms. For example, requiring data-sharing will reduce barriers to entry and promote competition, but can also be useful in training algorithms to identify harmful content and enable faster responses.

Finally, at a time when there is so much data available, there is an opportunity for regulators to use that data to inform decision-making and sharing knowledge in, for example, measuring evidencing harm, but also in testing remedies. Realising these synergies will require better co-ordination between regulators in the UK and internationally.

## Questions

*Given the move towards and ex-ante regulation, is the 'significant market power' framework, and concepts of strategic market status and code of conduct, fit for purpose? How can a code be specific enough to be workable, but broad enough to encompass the range of issues?*

*Tommaso Valletti*

Currently solutions are aimed at selective companies with huge market power. There is a tendency to overgeneralise problems (the comparison of Amazon's and supermarkets' own products would apply only if there was one supermarket in one country gathering data on competitors' products and then launching their own). In the case of Facebook and Google, there is the example from telecoms of using ex-ante regulation which resulted in generally good outcomes when compared with the rest of the world. Previous ex-ante criteria could be updated for the purpose. There are good externalities: being connected and able to communicate have economic benefits. However,

externalisation should not be firm-specific. For the code of conduct, there is no point in working with industry; there is an illusion of co-operation, and then 'mostly nothing happens'.

*Simeon Thornton*

To be effective, a code would need to draw on the expertise of market participants, but in end it couldn't be voluntary code; regulatory enforcement would be required. There is no question of a 'one size fits all' solution. The code of conduct would be 'high level', (and could differ by platform) and would require expert implementation. It would have to take account of the specificity of markets in order to be meaningful.

Although the current investigation concerned Google and Facebook, the CMA was setting up a taskforce to consider broader application.

*Is there a model for interoperability that could be applied, and how would it be limited?*

*Simeon Thornton*

There is a recognition that broad content interoperability could result in homogenisation and a lack of innovation. The report recognised certain elements of interoperability – such as cross-posting – that could be quite helpful for competition. It was important to balance the potential positives to competition with the potential negatives to innovation. The balance should not be locked in now.

*Tania Van Den Brande*

There has to be precision in the outcome desired from the intervention. Interoperability is mostly about limiting market power, and if that is the objective then it should be clear. But the aim of reducing harm had also to consider the impact on innovation and investment. There is a tension between specificity and longevity. The intervention has to remain relevant, otherwise it could be undermined over time. As sectors evolve, regulators could decide to remove the intervention altogether.