COMPETITION LAW IN THE DIGITAL AGE

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CMA'S INTERIM REPORT ON ONLINE PLATFORMS AND DIGITAL ADVERTISING

The Competition and Markets Authority ("CMA") is conducting a market study into online platforms and the digital advertising market in the UK. The study is focused on three broad questions: (i) to what extent online platforms have market power in user-facing markets, and what impact this has on consumers; (ii) whether consumers are able and willing to control how data about them is used and collected by online platforms; and (iii) whether competition in the digital advertising market may be distorted by any market power held by platforms. The CMA published its interim report in December 2019 (see the full report here), setting out its initial findings, including the concerns the CMA has identified and the potential solutions for those concerns that it is considering.

The CMA's interim findings

The CMA estimates that around £13bn was spent on digital advertising in the UK in 2018. Search advertising comprised around half of these revenues, at around £6.4bn, and display advertising just over £5bn. The balance was made up of online classified advertising (comprising digital comparison tools and online marketplaces).

The CMA emphasises that, notwithstanding the strong position held by some platforms in digital advertising, 'big' is not necessarily 'bad' and for many years these platforms have brought very innovative and valuable products and services to the market. However, the CMA is concerned that there may be a lack of real competition in these markets, which in turn could lead to negative consequences for the people and businesses that use these services. For example, the CMA considers a number of characteristics of the digital advertising markets that may inhibit entry and expansion by rivals and undermine effective competition. The CMA states that this includes network effects and economies of scale, consumer behaviour and the power of defaults, unequal access to user data, problems relating to a lack of transparency, and vertical integration and conflicts of interest.

Overall, based on the work carried out so far, the CMA considers in its interim report that there is a strong argument for developing a pro-competitive regulatory regime to regulate the activities of online platforms funded by digital advertising.

Potential interventions

The CMA considers three broad categories of intervention in its interim report: (i) rules to govern the behaviour of platforms with market power; (ii) rules to give consumers greater control over data and to improve transparency; and (iii) interventions to address specific sources of market power and to promote competition (including data access, consumer default, interoperability and structural interventions). The CMA notes that some of the alternatives presented in the report are very significant interventions, the costs and benefits of which would need to be considered very carefully.

Enforceable code of conduct

The CMA's initial view is that an enforceable code of conduct may help address a number of concerns that it has identified in digital advertising markets. The CMA's initial view is that the code should take the form of high-level principles rather than detailed and prescriptive rules, and that the key provisions of the code could be summarised in the form of three overarching principles: 'fair trading'; 'open choices'; and 'trust and transparency'. An expert body would be required to enforce the provisions of the code.

Rules to improve transparency and give users greater control over data

One of the main problems that the CMA has identified in the study is the lack of transparency and asymmetry of information between platforms and their customers. The CMA states that this affects both individual consumers, who lack awareness of how their data is used and the ability to control it, and businesses, who often lack the requisite information to exercise choice effectively in digital advertising markets. The CMA has therefore considered potential interventions designed to improve transparency and address asymmetric information for both consumers and businesses, such as default 'opt-in' settings (rather than the current default 'opt-out') and allowing auditability and monitoring of algorithms by a regulator.

Potential interventions to address sources of market power and promote competition

The CMA has also considered a range of interventions to address the sources of market power that it has identified. These include, for example, requirements for platforms with market power to share data with rivals and allow interoperability of specific platform features with rival platforms.

Next steps

One of the tools available to the CMA is to make a market investigation reference, which would allow the CMA then to impose remedies if it concludes that there are features of a market that have an adverse effect on competition. However, the CMA's current view is that recommendations to government would be the best way forward, and is therefore consulting on not making a market investigation reference at this stage.

Comments on the report, including on the CMA's proposal not to make a market investigation reference, can be submitted by 12 February 2020. The final report is due in July 2020.

JOINT STUDY ON ALGORITHMS AND COMPETITION BY THE BUNDESKARTELLAMT AND FRENCH COMPETITION AUTHORITY

Algorithms are one of the most important technological drivers of digitalisation. They may enable companies to become more efficient and create innovative products, to the benefit of customers. At the same time, however, a debate has arisen as to whether algorithms may induce or facilitate anticompetitive practices. In this context, the German *Bundeskartellamt* and the French *Autorité de la concurrence* have conducted a joint study on algorithms and competition, the results of which were published on 6 November 2019 (see the full report here). The purpose of the study is to understand better how different types of algorithms, such as self-learning price algorithms, work and how these may affect competition. Focussing on three scenarios, the study indicates in which circumstances the use of algorithms may raise significant competition concerns:

Algorithms as facilitators of "traditional" anticompetitive practices
In this scenario, the algorithm supports a "traditional" anticompetitive practice resulting from prior contact between human beings. This doesn't raise specific novel legal issues as such. However, the study points out that authorities may still want to investigate the use of algorithms in such a scenario, as this may give them important insights into the effectiveness of the detected infringement, which may, for example, be a relevant factor when determining the amount of a fine.

Algorithm-driven collusion between competitors involving a third party
The second scenario covers situations where a third party (e.g., an external consultant or software developer) provides the same algorithm, or coordinated algorithms, to competitors. Although there is no direct communication or contact between the competitors in this scenario, they could nonetheless align their behaviour via algorithms. For example, the study notes that this scenario could give rise to illegal behaviour if competitors are aware that the algorithms they are using align their behaviour anti-competitively, or could at least reasonably have foreseen it (a so-called concerted practice). However, it is further noted that due to the variety of potential situations covered within this scenario, the assessment will always depend on the facts of each case.

Collusion induced by the parallel use of individual algorithms
In the third scenario, algorithms are unilaterally designed and implemented. Nonetheless, the fact that several or even all competitors rely on pricing algorithms might facilitate an alignment of their market behaviour (so-called tacit collusion). The study notes that, so far, there is still uncertainty as to whether, in this scenario, algorithms of themselves could result in this form of collusion. In addition, the study recalls that mere *parallel behaviour* is not prohibited under EU competition law and concludes that it is still too early to delineate which potential types of "algorithm communication" may amount to an illegal *coordination* between competitors.

Key Takeaway
The joint study is only one example of the general trend of competition authorities intensifying their efforts to detect potential restrictions of competition resulting from or supported by algorithms. Antitrust compliance of algorithms is becoming increasingly relevant for companies whose business models rely on such technology.

THE FRENCH COMPETITION AUTHORITY LAUNCHES ITS NEW DIGITAL UNIT

The French Competition Authority ("**FCA**") announced in its roadmap for 2020 that the digital sector is among its top priorities and that it will strengthen its enforcement in this sector. The FCA subsequently launched its specialised digital unit on 9 January 2020.

Strongly affecting the economy and the competitive dynamics, the digital revolution has radically changed the rules of competition, making them highly complex. According to Isabelle de Silva (President of the FCA), a dedicated digital unit is thus critical to increase the authority's understanding of the digital economy and to tackle new types of infringements implemented by digital players.

The digital unit will be responsible for developing in-depth expertise on all subjects related to the digital economy. It will provide support and contribute to the assessment of complex cases with a strong digital component, whether they involve mergers or investigations relating to compliance with competition law, for example, foreclosure through preferential referencing or collusion practices through algorithms.

The unit will focus on developing new investigation tools (conceptual framework, investigation methods) based on algorithms, big data and artificial intelligence, enabling the FCA to effectively detect anticompetitive behaviour.

It will also take part in the FCA's global thinking and sector inquiries on new issues related to digital development, along the lines of the reports already published on big data, online advertising or algorithms. The unit will thus be able to contribute to ongoing studies on payments, platforms and blockchain technologies or new commercial strategies implemented in the retail sector due to the influence of digital technologies.

Finally, the digital unit will work in close cooperation with industry regulators, relevant government departments and other competition authorities in Europe and internationally to develop convergent and consistent methods of analysis and intervention. It will also be responsible for developing exchanges with the academic community and research institutions specialising in digital topics.

The launch of a specialised digital unit by the FCA is in line with the increasing focus of the competition authorities around the world on the role of digital technologies on competition enforcement. Be it in the context of an M&A transaction or in the course of day-to-day business, digital companies should expect greater scrutiny from the competition authorities.

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CASE TRACKER: OVERVIEW OF PENDING AND RECENT RELEVANT ONLINE DISTRIBUTION CASES

Online sales bans:
restriction on selling products/services online

- (EU) Google
  (June 2017, Infringement decision)
- (EU) Guess
  (March 2019, Closure of Proceedings)
- (EU) Licensed merchandise
  (Opening of proceedings)
  Nike
  (March 2019, Press Release)
- (EU) Consumer electronics
  (December 2013 Inspections)
- (EU) Pioneer
  (October 2018, closure of   proceedings)
- (EU) Philips
  (October 2018, Closure of proceedings)
- (EU) Denon & Marantz
  (October 2018, Closure of Proceedings)
- (ES) Adidas (November 2018, opening of proceedings)
  - (ES) Adidas (November 2018, press release)
- (HU) NEW: Paradox Security
  (December 2019, Final decision)

Resale price maintenance:
obligation to use fixed or minimum resale prices

- (SL) Chicco toys
  (July 2019, Closure of proceedings)
- (UK) Fender
  (October 2019, Statement of Objections)
- (AT) Specialized
  (October 2019, Closure of proceedings)
- (UK) NEW: Fender
  (January 2020, Final decision)

MFNs/Price Parity Clauses:
guarantee to an online platform that supplier will treat the platform as favourably as the supplier's most-favoured-customer

Hotel bookings:
- (SE) booking.com
  (July 2018, Stockholm Patent andMarkets Court ruling)
- (EU) Holiday Pricing
  (February 2017, Opening of proceedings)
  - (EU) REWE/DER
    (August 2017, Opening of proceedings)
  - (EU) TUI
    (August 2017, Opening of proceedings)
  - (EU) Thomas Cook
    (August 2017, Opening of proceedings)
  - (EU) Kuoni
    (August 2017, Opening of proceedings)
  - (EU) Melia
    (August 2017, Opening of proceedings)
- (UK) CompareTheMarket
  (November 2018, Statement of objections)

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Exclusivity clauses:
preventing access to platforms by competitors

- (I) TicketOne
  (September 2018, Press release)
- (EU) Amadeus & Sabre
  (November 2018, Press release)
  - (EU) Amadeus (November 2018, Opening of proceedings)
  - (EU) Sabre (November 2018, Opening of proceedings)
- (SE) NEW: Bruce
  (December 2019, Interim decision)

Geo-blocking:
preventing online cross-border shoppers from purchasing consumer goods or accessing digital content services

- (EU) Pay-TV
  - (EU) Cross-border access to pay-TV
    (March 2019, Press Release)
  - (EU) Cross-border access to pay-TV
    (March 2019, Commitment decision)

- (EU) Video games
  (March 2016, Investigation)
  - (EU) Capcom
    (February 2017, Opening of proceedings)
  - (EU) Bandai Namco
    (February 2017, Opening of proceedings)
  - (EU) Focus Home
    (February 2017, Opening of proceedings)
  - (EU) Koch Media
    (February 2017, Opening of proceedings)
  - (EU) Zenimax
    (February 2017, Opening of proceedings)
  - (EU) Video Games
    (April 2019, Statement of Objections)

Third party platform ban:
restriction on using third-party online market places

- (NL) Size Zero
  (October 2018, Amsterdam Court Judgment)
- (F) Stihl
  (October 2018, Infringement decision)
- (UK) OnTheMarket
  (January 2019, Court of Appeal Judgment)

Unfair trading practices by online platform:
Use-of-platform clauses which are anticompetitive

- (FR) Google (UPDATE: December 2019, final decision)
- (EU) Amazon (July 2019, opening of proceedings)
- (D) Amazon (July 2019, Commitment decision)
- (AT) Amazon) (July 2019, Commitment decision)
- (D) Facebook (February 2019, final decision)
- (D) Facebook (August 2019, OLG Düsseldorf judgment)
- (IT) Amazon (April 2019, opening of proceedings)
- (NL) Apple (April 2019, Opening of Proceedings)

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