THE UK's "OTHER" BIG EXPERIMENT: REGULATING ONLINE PLATFORMS

***Cristina Caffarra*[1]**, *29 December 2019*

The UK is about to embark on a major natural experiment. No, not Brexit: ex ante regulation of dominant online platforms.

The CMA's Interim Report on *Online Platforms and Digital Advertising*,[2] published just before Christmas, is a clever and impressive document with much new evidence and analyses amassed over a brief period of time. It also needs to be understood in context. The CMA was under pressure for some time – from privacy advocates, commentators and opinion makers, as well as the publishing industry – to "do something" about dominant digital platforms. With Germany pursuing high-profile actions against Facebook, and France with enforcement cases against both Google and Facebook, there had been some clamour in the UK for the CMA to open a Market Investigation into *some* market important to these platforms. A "Market Investigation" is a powerful tool in the CMA's box, used sparingly in the past (energy, retail banking), but favoured by many because it gives the CMA latitude to explore all reasons why markets "do not to function well" (beyond specific competition law violations) and carries unusually broad powers of intervention, including breakups. Given the importance of digital advertising in terms of revenues and its relevance to multiple businesses, the "ad tech stack" (and related markets that feed into it) seemed a natural place to look.

The CMA had been reluctant to embark in an open-ended multiyear investigation without a clear exit strategy. The Furman Report,[3] and the Government's statement that it would actually implement the Furman recommendation of a "Digital Market Unit" in 2020, provided a path out. A Market *Study* is not a binding commitment for the CMA to do anything specific. The Interim Report ("IR") indeed already anticipates that its final output in June 2020 is not going to be a Market Investigation Reference, but a series of "recommendations" to Government for the yet-to-be-established Digital Market Unit ("DMU") to carry out. In effect, while the locus and composition of the DMU are all still to be determined, the CMA is diagnosing the problems and setting out a broad agenda, but passing the ball to a newly-founded industry regulator to get it done.

There is little time spent in the IR on the CMA's own ex-post conduct enforcement plans, though the agency is leading the way globally on the pursuit of acquisitions by tech giant, and anything that may look like a "killer acquisition". Learnings from the IR work will also surely inform current enforcement activities in mergers and conduct. But the main objective for the CMA is to positions itself as setting out the principles and workplan for an *ex ante regulatory regime* to apply to digital platforms in the UK. The IR acknowledges that ex ante regulation is a "complement" to ex post enforcement, but the focus is on regulation and the prevailing sentiment that as most of the problems that are identified fall short of competition violations, we need a different – regulatory – tool.

The IR's recommendations fall into two broad categories: one is the much-vaunted idea of a "code of conduct" for platforms to adhere to (a fashionable notion mentioned in a multiple recent international analyses of digital platforms). Then there are various "interventions" identified as potential ways of dealing with specific problems – ranging from "how to"-measures, to "cease and desist"-type actions and finally

1 Head of European Competition, CRA London/Brussels. Views are entirely personal and are not those of CRA, other CRA experts or any CRA clients.

2 *Online Platforms And Digital Advertising*, Market Study Interim Report, 19 December 2019, at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf

3 *Unlocking Digital Competition:* Report of the Digital Competition Expert Panel, March 2019, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

"separation" for situations where there appears to be the most egregious conflicts of interest. Both are to be pursued by the DMU/regulator, with the CMA's role as yet unclear (the scope and location of the DMU having yet to be decided). But the CMA is setting the agenda and the workplan.

It's a big deal. Some immediate reactions below.

The UK is subordinating antitrust enforcement to a big natural experiment in regulation

So here it is: the UK is taking the plunge in favour of regulation, and setting up a whole new regulatory infrastructure for digital giants. The view that "competition enforcement cannot deal with all of this" and "we need a specialist regulator" has been prevalent for some time. And of course there are fundamental issues that cannot be grappled with through competition enforcement alone – from consumer data rights, privacy issues and compensation for consumers' data performance, to concerns about incentive problems supporting disinformation.

Other oft-repeated limitations of competition enforcement – the need to fit into precedent boxes, the time it all takes, the failure of remedies – have less bite in my view: these are all fixable if we try. And indeed the other main European agencies are so far sticking to competition rules, but powering up the tool: Germany has a draft reform competition law bill in the works which will give special status to companies with digital market power, and empower the FCO to act quickly with injunction-like powers against these companies over multiple practices listed in an extensive catalogue of infringements; France's AdlC is coordinating closely with its privacy and communication agencies but still working off its antitrust powers, with enhanced use of injunctions and interim measures.

The UK is first in Europe (Australia started on this path earlier this year) to set off on an explicit regulatory experiment and articulate a detailed agenda. The motivation is that for many of the conducts that we worry about (as identified in the IR) a set of ex ante rules about what's acceptable and what's not is going to required. And for all consumer-facing issues, e.g. terms of engagement on data collection and use, privacy settings, this has to be the way to go. For intricate technical issues such as data mobility/interoperability and the interface with privacy concerns, a regulator with technical expertise is also obviously preferable.

When it comes however to concerns around conduct to preserve market power, extend it, or exploit businesses that rely on its home market for key inputs (such as traffic or visibility or exposure). *we have the antitrust tools, and we need to deploy them*. It would be disappointing if we defaulted to an ex ante regulatory solution out of a notion that competition tools are ossified and incapable of being usefully flexed and updated to current circumstances. Competition enforcement can be used imaginatively and coherently if we recognise that the fundamental concerns around the exercise of market power (exclusion, foreclosure, and exploitation) can be formulated appropriately in a world of network effects, data advantages and economies of scale and scope. Nothing concentrates business minds like the opening of formal competition investigations, with the potential for interim measures, injunctions, extensive information requests and the reputational effects that are associated with a live case. If we are placing a regulator in charge, it needs to be able to bring strong enforcement actions with equivalent powers, or refer to the competition agency. This is all to be played for, but it's going to be key to the design of the scope and powers of the DMU.

In practice this will mean company-specific regulation

We typically think of an "industry regulator" as an agency presiding over a bunch of companies with similar technologies and business models – Ofcom, Ofwat, Ofrail, Ofgem, financial regulators, grocery adjudicator, etc. And we think that one of the benefits of being a sectoral regulator is being able to deploy sectoral knowledge across multiple targets with commonalities – through "industry-wide rules" and codes of conduct.

Here, while ostensibly about "digital giants", the IR is focusing the DMU in effect on *ad-funded* businesses: only Google and Facebook are really in the firing line. This makes sense because it recognises that business models drive incentives very directly, and the deepest concerns we have at this point in this space are mostly about the way in which ad funding provides incentives to extract data from consumers, exploit them in ways that are not transparent, adopt conduct to leverage power in multiple domains and preserve their advantages over others by limiting and foreclosing their ability to collect or use data or tying services together.[4] Other digital platforms operating different business models barely get a mention in the IR (Amazon in passing, to the extent that it is increasingly using display advertising, but is also seen as "different" because ads are limited to vendors; Microsoft only gets in as challenger to Google in search, Apple is nowhere).

So, really this is only (for now) about Google and Facebook. And more than that: because only one of them is clearly dominant in each of the markets that are deemed problematic (Google in search advertising and open display advertising, Facebook in display advertising), and the concerns about their conduct in these markets are distinct, the "sectoral" regulator will have to be in practice a Google-regulator and a Facebook-regulator. There will be benefits in terms of familiarity with some common industry features, but there should be no mistake – this is going to be mostly *firm-specific regulation.*

What would a "code of conduct" look like?

The specificities of each business are also relevant to the feasibility and scope of the IR's proposal: for a "code of conduct" that the DMU would develop and enforce. The suggestion of a "code of conduct" (to apply to digital firms designated with "Strategic Market Status" (SMS) was in the Furman Report and has been bandied about quite a bit in the last year as a novel approach to policing digital giants and ensuring acceptable standards of conduct. What has made it so popular in policy circles is also a sentiment that it picks up a suggestion by Nobel prize winner Jean Tirole for a more "collaborative" and "participative" antitrust (an idea he expressed in an interview to *Quartz* last summer). While Tirole has never really made this concrete, his "oracle/guru" status has meant it has gained traction: as an exhortation that given the complexities of the digital sector, what's needed instead of enforcement is to cajole and coordinate the input and interests of multiple stakeholders, platforms and businesses relying on them, internet giants and their

4 See Caffarra, *Follow the Money,* Concurrences August 2019, at https://ecp.crai.com/wp-content/uploads/2019/09/e-Competitions-Special-Issue-Cristina-Caffarra.pdf

"dependants", to arrive at some form of consensus on what's acceptable conduct and what isn't. The IR is not yet discussing how the "code of conduct" would be in fact decided, but the notion of some "cooperation" in defining the rules is popular out there because of the implicit assumption that rules arrived at through this process – with some extended debate and engagement by the firms which are going to be subjected to them – are more likely to be adhered to and to work.

Concerns around this potential model to me are twofold. First, that because the digital businesses we worry about are so inherently different – even if one looks just at Google and Facebook – a code of conduct needs to be specific and cannot be of general application. What common rules would apply to both Google and Facebook? And if they are too general and broad, how can they *bite*? Second, and most importantly, there is a risk that the *process* for arriving at this code will become a protracted consensus-seeking iteration between sides, ultimately seeking buy-in from the firm to which it is to apply. Google has suddenly expressed favour for this idea on the conference circuit – and as such, we should be suspicious. How is this going to avoid regulatory capture, delay tactics, and procrastination? The IR just says the regulator will have the "power to set binding rules" but all to be seen how they will be arrived at.

So the formulation of a meaningful "code" is going to be tricky. The IR states it will most likely take the form of "principles that would define behaviour", plus some guidance as to how they would apply. Three general principles are suggested: ""Fair trading" (to apply to dealings between dominant platforms and businesses operating on them, and to the relationship with consumers on data and use of services); "Open Choices" (to remove conditionalities in the availability of services, e.g. tying and bundling, restrictions of interoperability); and "Trust and Transparency" (to mandate that more information on terms and *modi operandi* is given to both businesses and consumers dealing with the platform). The IR then attempts to make this a bit more concrete by giving "examples" for how these very general principles could be applied. For instance, under "Fair Trading" there is a suggestion that price and non-price terms set to customers should be "objectively justified", that consumer consents to data use and choices would be "designed fairly", and that "no unreasonable restrictions" should be placed on customers to use the services of rivals. Under "Open Choices", the examples include a prohibition of tying and of bundled discounts.

This is ambitious and sweeping – indeed the IR states the objective is to "govern and change the behaviour of platforms with SMS". It clearly goes even beyond what competition policy allows us to do – we don't require firms (even when dominant) to always show their price/non-price terms are "objectively justified" (it's a long-standing view that this is a pretty meaningless benchmark); nor do we prohibit all forms of bundle discounts unless they are exclusionary. Because we have indulged the notion of "type 1 errors" far too much and got ourselves in an underenforcement quagmire, I have sympathy with the position that in this sector one might want to set the bar higher and indeed not take too much time with effects-based analyses. But to articulate what's "fair" in general, what's open "enough", and what's transparent "enough" will be a major undertaking on which no one will agree. It is laudable but in order to work it seems to me one would need (at a minimum) to (a) define very clearly a timetable for these principles and examples to be established; (b) provide a clear statement that we know this goes beyond standard competition law benchmarks, but so be it because we are trying to overcome what we (the CMA/regulator) believe are limitations of competition law, and (c) no consensus-seeking approach to articulate the code, which would delay its coming into force by years. Like competition enforcement, regulation is not meant to be friendly and cosy.

The "interventions"

The second main strand of the recommendations expected to flow from the Market Study are prospective "interventions" to deal with the identified problems. These tend to be measures to deal with barriers to entry and expansion in multiple forms, including those erected by conduct. They are set out distinctly from the "code of conduct" presumably on the basis that they involve more complex interference and/or intrusion into the core business – although as mentioned, it is not clear that the general principles of the code of conduct would be any less intrusive when articulated in practice. The "interventions" also extend to separation measures in the case of the digital adtech, where the CMA identifies the most troubling conflicts of interest arising from Google's integration and presence on both sides of the intermediation.

The IR sets out "examples" of interventions for each of the markets where issues are found. For "general search", the "interventions" are intended to give a chance to other engines by (a) reducing Google's ability to secure default positions for Chrome and/or Search on mobile devices (in effect the CMA gives here a synopsis of the EC case and remedy saga in *Android*); and (b) improving others' search performance through various potential means of accessing Google's search queries and click data via periodic data feeds (a Microsoft proposal); as well as potentially providing competing search engines with search results from Google through syndication agreements. For "social media" (i.e. Facebook), the "interventions" concern potentially various forms of mandated "interoperability" – from broad platform-level interoperability to more selective interoperability over different functionalities. These could be complemented with measures to "improve personal data mobility" on the consumer side, to facilitate switching and multihoming (and therefore competition) – including measures to "put users in control of their data": concretely, enabling sharing of consumer data held by large platforms with third parties (e.g. publishers or financial institutions). There is emphasis however on the practicability of these solutions, and the potential for creating new concerns.

So far so (very) good, though not especially novel. The ideas were mostly in the Furman report, and the IR now puts forward analyses and evidence to back it all up. The hard questions for the next round (and the DMU) are implementability and privacy implications.

The most far-reaching potential set of "interventions" deals with concerns identified in relation to Google's position in the adtech stack. Here the IR is very explicit about the "conflict of interest between Google's role on the buy and sell sides of the open display market", which combines with "Google's ability to exploit a lack of transparency in costs and fees" and the potential for leveraging market power and foreclose rivals in intermediation. A number of potential "interventions" are foreseen e.g. to create greater transparency on fees and terms for both advertisers and publishers – expanding on the list of measures under "Transparency and trust" in the code of conduct (and taking in further dubious practices like the double auction that exploits complete lack of transparency to extract rents). But the centrepiece (and in truth, something the CMA could not leave out in the face of popular demand) are *separation interventions* (to various degrees of finality and depth) between portions of the vertical stack.

The CMA's assessment is that Google's presence on multiple sides of the market and incentive/ability to leverage may not be addressed short of severing certain links in the vertical chain. The specific "interventions" considered include most prominently hiving off (or introducing measures to independently operate) Google's publisher ad server and ad exchange, Google Ad Manager, from the rest of the vertical stack.[5] This is the (partial) "undoing of the DoubleClick merger" which is often mentioned as a "natural" remedy to reverse the 2008 integration of DoubleClick into Google – that has come to be regarded as a major pillar on which the current dominance is built (because it has enabled *inter alia* the tying and bundling of multiple functions, self-preferencing, restricting access to certain ad inventory, and creating preferential channels for access to data). An additional "separation" measure proposed is the separation of the DSP and SSP functions for all intermediaries (not just Google). Further, there is also a proposal to deal with Google's (and in fact Facebook's) data advantage through some form of separation of Google's advertising business from its data/ analytics business. For each case the IR lists the standard options of "full ownership separation", "operational separation", "functional separation", and goes through the usual cautions about loss of benefits of integration to be weighed carefully in the mix. Finally and in addition to these, the IR recognises the importance of access to inventory for entrants and rivals, and considers opening up to third parties the ability to sell YouTube's advertising inventory, instead of having to use only Google's own DSP to access it.

The CMA are signalling they would be prepared to support these intrusive measures, but also that it is hard for the UK to "go it alone" and *realistically* some form of international coordinated effort is necessary for these to be credibly pursued.

A bigger question: is the DMU going to become a "clearing house" for other state-level issues?

While the IR does not talk about it, and is focused on consumer and B2B issues, there is an elephant in the room. The undercurrent of discussions about the merits of regulation is that dominant online platforms – especially ad-funded – raise multiple and deep state-level issues: their access to data, their importance in security work, their importance in the political process, their imminent and systemic importance in financial stability – all of these mean we are going to be in a complex negotiation with these agents for a long time to come. The state will want to have to have a relatively coherent approach to them across agendas. But this may also mean some interests (like notions of economic efficiency, and competition rules) will likely need to be traded off to others. The state knows it will be in a complex repeat game: will the DMU have to make the trade offs? Or will it be subject to further political oversight and overrule?

Overall message?

The IR is a comprehensive and impressive document – the CMA gives a *tour d'horizon* of the issues with ad-based platforms, supported by significant original work and research carried out over a compressed period of time (just six months). It is remarkable for setting out a broad set of ambitious proposals, on which it is consulting and which will be no doubt whittled down and finessed in the Final Report.

Three final comments.

Can they make any of this happen? Every single one of Google's and Facebook's responses and contributions to the Study, as reported in the IR, appear weak and highly predictable: need to be very careful, unintended consequences, undermining innovation etc. In other words, *the usual stuff*. There will be massive resistance and procrastination and the DMU will need coercive powers (*not* consensus-seeking) to induce them to recognise – let alone subject themselves to – the code of conduct, and competition law-type powers for the investigations required to underpin any intervention. This is going to be a challenge in uncharted regulatory waters, for a regulator yet to be established and whose powers are not yet set. The IR talks about all this requiring primary legislation, so timing will not be short. There is also a clear appeal to other global agencies to align on interventions that would not be likely to get anywhere if pursued in the UK alone.

Will it work? No single set of interventions in an individual market will address the market power and privacy violations we worry about. There is need for ranking and prioritising of all interventions. Do we think that separating Ad Manager would deliver results and lessen the market power overall? It would help deal with the publisher/advertiser problem, but it is not going to be a global solution. Addressing data collection practices and data advantages, as well as forcing interoperability in multiple dimensions, seem a most immediate priority. Prohibiting conduct that amounts to tying, bundling and self preferencing is going to generate howls of pain among the competition law purists but so be it – I think it's okay to plead "special circumstances". Of course, this is true of competition enforcement generally: ex post action tends to be very specific to a market/ conduct and does not present global solutions. But it is clear that "doing adtech", "doing search" and "doing Android" separately is not going to be the answer. The difficulty (for *all* regulators and agencies worldwide at this point) will be to go beyond isolated piecemeal action and design a set of measures that have the potential to deal with a sprawling issue.

Who else will get into the spotlight? For now, ad-funded giants are getting all the attention. Amazon is given a warning to the extent that it is pivoting toward advertising, but does not appear to be an immediate target. Apple's trouble with app developers and its rules for in-app purchases do not seem an issue of priority for now in the UK (although they are in Brussels). Microsoft is seen mainly as a Google challenger in search and not as a data business – at least for now. That said, there will be effort to articulate the principles for a "code of conduct" as generally as possible, so they could be argued to be potentially applicable beyond Google and Facebook. And once in place, the DMU will try to look further.

Overall, if we are going "full on" down the regulatory path, we will need a big, multidisciplinary footprint combining different skills, and much international cooperation to deliver results. We need competition enforcement powers to remain sharp, and to coordinate across the globe. We need to guard against using the regulator to trade off too many national agendas. But even though we collectively "got here" quite late, the UK's ambitious announcement it plans to engage in a major natural experiment to regulate dominant online platforms, in the midst of the Brexit upheaval, is sending a strong signal.

5 Google Ad Manager incorporates the former DoubleClick For Publishers, DFP, and ad exchange function DoubleClick Ad Exchange,