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CMA Chief Executive advocates for "evolution, not revolution" following report evaluating past merger control decisions in digital markets

The attention of competition authorities across the globe has turned to digital markets, and the UK's Competition and Markets Authority (CMA) is no exception. On 3 June 2019 the CMA published an independent report that it had commissioned from Lear (an economics consultancy) evaluating past UK merger control decisions in the digital sector. The CMA's Chief Executive - Andrea Coscelli - announced the report, which identifies certain gaps in the assessment carried out in these merger cases, at the OECD/G7 conference. Reflecting on the report's findings and recommendations, Coscelli considers that current merger control tools "*are and remain, in the main, fit-for-purpose*". However, he acknowledges that there are "incremental steps" that the CMA can take to improve its ability to assess these mergers. We should be thinking "evolution, not revolution", he notes.

The CMA has therefore also published a call for information on its approach to digital mergers in anticipation of an update to its 2010 Merger Assessment Guidelines.

The report joins a number of other recent studies, including the Furman Review in the UK and the European Commission Digital Experts Report in the EU, which also made recommendations on how to adapt the competition framework to face the challenges posed by digital markets.

Objective of the study and main findings

The objective of the Lear study was threefold:

- review a subset of merger decisions in digital markets taken by the Office of Fair Trading (the predecessor to the CMA, along with the Competition Commission) to identify which "theories of harm" were typically pursued and how the relevant economic features of digital markets were taken into account when evaluating the mergers (question 1);[1]

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[1] The report examined the clearance decisions in *Facebook/Instagram, Google/Waze, Priceline/Kayak* and *Amazon/The Book Depository*.

- assess the UK cases and evaluate whether the decision was reasonable based on the evidence that was, or would reasonably have been, available at the time (question 2, or methodology assessment); and
- evaluate market evolution following the mergers to ascertain whether the merger led to a detrimental outcome (question 3, or market outcome assessment).

Before addressing these questions, the report discusses certain features of digital markets that create challenges for competition policy (i.e. the prevalence of network effects, markets for attention and big data). The report also notes that tech companies are remarkably active in mergers and acquisitions, with a particular interest in relatively young targets. The latter makes the development of the counterfactual (i.e. the evolution of the target in the absence of the merger) inherently complex.

On the first question, the report finds that the authorities have pursued both horizontal and vertical theories of harm.[2]

On the second and third questions, the report concludes that the evaluation of past decisions revealed certain gaps in the way the authorities have assessed the cases. For example:

- the authorities have not always framed the competition issues they were examining in a two-sided setting, focusing their attention on the user side of the market and sometimes failing to explore the way services provided by the merging parties were monetised; and
- in certain cases, the authorities dismissed potential theories of harm due to the uncertainty of related evidence.

However, the report also concludes that these gaps do not undermine the legitimacy of the decisions. They could be "*properly perceived today thanks to a better understanding of how digital markets work and the actual behaviour of some market players that was highly uncertain at the time the mergers were investigated*". The report could not identify clear competitive harm resulting from the gaps.

The report's recommendations

The report makes a number of recommendations in light of the issues that it identifies, including:

- **Improving the CMA's information-gathering powers** to enable it to predict the evolution of target companies more accurately, for instance by using dawn raids in merger investigations;
- **Undertaking a comprehensive market study** into the digital advertising sector to allow the CMA to gain the necessary knowledge for future enforcement activity;
- **Using the value of a transaction** undertaken by digital incumbents as a screening tool to identify those transactions that may warrant a more in-depth analysis;
- **Being willing to accept more uncertainty** in their assessment of the "counterfactual" and being prepared to test the boundaries of the legal tests;
- **Looking at all sides of a market jointly** as choices made by the platform on the various sides are interdependent; and

[2] An example of the former is a merger that combined two important innovators, or eliminated a firm with promising pipeline products. The authorities then evaluated whether the transaction could reduce the merged entity's incentive to innovate. An example of the latter is an assessment of "network effects". Given their potential to represent a barrier to entry or expansion, they could increase the likelihood of foreclosure, exacerbating the anti-competitive effects of the merged entity's exclusionary strategies.

- **Investigating business models and monetisation strategies** in the development of a theory of harm.

Coscelli's speech and the CMA's call for information

Coscelli used his speech at the OECD/G7 conference on competition and the digital economy to discuss the CMA's reaction to the report. Coscelli maintained that the CMA's current merger control tools "*are and remain, in the main, fit-for-purpose*". He pointed to the flexible jurisdiction test in the UK, which has allowed the CMA to consistently exert jurisdiction over transactions in the digital markets, as an example. He therefore recommended the "evolution, not revolution" of the CMA's merger assessment tools in relation to the digital economy, while acknowledging that there are "incremental steps" that the CMA can take to improve its ability to assess these mergers. It will also be necessary to continue to monitor this area - there might be a need to scrutinise acquisitions by particularly powerful companies more closely in the future.

With this in mind, the CMA launched a call for information for views on its Merger Assessment Guidelines in parallel with the report. The call asks whether the guidelines should be supplemented or revised to provide up-to-date guidance on the CMA's approach to mergers in the digital sector. The deadline for responses is 12 July 2019.

Next steps

The Lear report - coupled with the CMA's response and call for information - suggests that we may see some "evolutionary" changes to how the CMA scrutinises mergers in digital markets in the future. This measured approach is consistent with the CMA's response to some of the more far-reaching Furman Review recommendations, for example, the proposal to change the substantive test for assessing mergers by introducing a "balance of harms" approach, which the CMA is not in favour of. It also seems increasingly more likely that the CMA will follow the recommendation - of both the Lear report and the Furman Review - for a market study into digital advertising.

Related Slaughter and May publications

Recent Slaughter and May publications on competition policy in the digital age include:

- **Competition policy update required to tackle challenges of digital economy**
- **Just five years after it was created, does the CMA already need fundamental reform?**
- **CMA under pressure to investigate online advertising**

Other developments

Merger control

CMA fines AL-KO for missing deadlines to provide internal documents

On 28 May 2019 the CMA announced that it has fined AL-KO Kober Holdings Limited £15,000 for failing to provide information requested during the CMA's review of its proposed acquisition of Bankside Patterson Limited.

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Parties to a merger can be requested to provide internal documents either “informally” or “formally” under section 109 of the Enterprise Act 2002. On 12 March AL-KO produced almost 500 documents, over four months after the (already extended) section 109 deadline. On the same day it also produced a further 20 documents, one week after the relevant section 109 deadline.

Despite AL-KO’s submissions that the delay was due to “innocent and non-deliberate human error”, the CMA found that AL-KO had “no reasonable excuse” for failing to meet the deadlines. The CMA acknowledged the failure was negligent rather than intentional, but considered a penalty appropriate and proportionate given the importance of the documents to the investigation, and the fact AL-KO had repeatedly failed to respond adequately to such document requests.

The CMA has placed increasing importance on internal documents during merger control reviews. In December 2017 it **fined** Hungryhouse Holdings Limited for failing to provide documents requested under section 109 during its Phase II review of Hungryhouse’s acquisition by Just Eat plc. In January 2019 the CMA published **guidance** on internal document requests in merger investigations.

Antitrust

Ofgem fines Economy Energy, EGEL and Dyball Associates for Chapter I infringement

On 30 May 2019 the UK Office of Gas and Electricity Markets (Ofgem) **announced** that it has fined Economy Energy, E (Gas and Electricity) (EGEL) and Dyball Associates a total of £870,000 for entering into an anti-competitive agreement and/or concerted practice to share markets and/or allocate customers between Economy Energy and EGEL in relation to the supply of gas and electricity to domestic customers in Great Britain.

Ofgem found that from January to September 2016, energy suppliers Economy Energy and EGEL, including their sales agents, agreed that they would not actively target one another’s customers through face-to-face sales. The companies shared commercially sensitive details and strategic information on their current customers, including their meter point details.

Ofgem found that energy software and consultancy service Dyball Associates participated in the infringement as a facilitator, through designing, implementing and maintaining software which allowed for the sharing of customer meter point details, as well as the prevention of customers switching from Economy Energy to EGEL (and vice versa), whilst being aware of the actual conduct planned and/or put into effect by Economy and EGEL.

Ofgem fined EGEL £650,000 and Economy Energy £200,000 (the latter fine reflecting Economy Energy’s financial position, including that it is in administration). In addition, Ofgem fined Dyball Associates £20,000 for acting as a facilitator.

This is Ofgem’s first infringement decision under its concurrent competition powers with the CMA. As **indicated** by Anthony Pygram, Ofgem’s director of conduct and enforcement: “*This enforcement action sends a strong signal to suppliers that we will take action and penalise those who undermine competition and do not act fairly*”.

China’s antitrust regulator imposes fines for RPM and concrete cartel

There have been two significant fines imposed in China recently, both at the national and provincial level. On 5 June 2019 the State Administration for Market Regulation (SAMR) **announced** that it had fined Changan Ford Automobile, a joint venture between Changan Automobile and Ford, RMB 162.8 million (approximately £20.8 million) for resale price maintenance (RPM). It is understood that this investigation

has been ongoing for some time. On 29 May 2019 SAMR also announced that the Zhejiang Administration for Market Regulation (ZAMR) had imposed, on 8 May, fines on eight local concrete companies for cartel conduct in the Quzhou area of Zhejiang province. The concrete companies were fined a cumulative total of RMB 7.7 million (approximately £900,000).

In the RPM case, SAMR found that Changan Ford had restricted the minimum resale price of downstream vehicle dealers in the Chongqing area since 2013 by formulating price lists, entering into "price self-discipline" agreements, and restricting minimum prices for auto exhibits and online sales. This was found to amount to RPM, in violation of Article 14 of China's Anti-Monopoly Law (AML). SAMR imposed a penalty of 4 per cent of Changan Ford's turnover in Chongqing in the previous year. In contrast to previous RPM decisions in China in the automobile sector, SAMR in this case appears to have calculated the penalty by reference to total sales, rather than sales of the vehicles subject to the RPM.

Turning to the cartel case, the Quzhou Market Regulation Bureau received notice of a potential antitrust violation in August 2018 and reported this to ZAMR, a provincial branch of SAMR. During the investigation, carried out with SAMR's authorisation, ZAMR found that in April 2018 the companies formed a market sharing and price fixing "pact", which amounted to a cartel agreement that gave the companies absolute control over the local premixed concrete market. The cartel operated from May to July 2018.

Noting that the cartel affected only Quzhou and lasted for three months, ZAMR imposed on seven companies a fine of 1 per cent of their respective 2017 turnover. However, the company which drafted the pact in the first place was not fined, on the basis that it had not yet begun operating in 2017 so had zero turnover in that year. This reflects a strict application of Article 46 of the AML, which provides that the authority may impose a fine of 1 per cent to 10 per cent of the sales revenue made by the undertaking concerned in the relevant market from the previous year for monopolistic agreements that have been implemented. In this case, there was no such turnover from which to calculate a fine.

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