

The CMA launches a new market study in a bid to keep pace with a fast-moving digital economy

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On 3 July 2019, the Competition & Markets Authority ('CMA') announced a new Digital Markets Strategy, which sets out the watchdog's new "road map" for policy development in a bid to keep pace with a rapidly developing digital marketplace. At the same time, and as part of its focus in this sector, the CMA announced that it was launching a market study into online platforms and digital marketing. The market study will investigate potential competition law concerns around the perceived market power of online platforms and the monetisation of consumer data. It arguably signals a more hawkish stance from the CMA in its approach to regulation in this area.

Background

The proliferation of online platforms over the past decade has embedded the use of these platforms into the everyday lives of many in the UK and, indeed, around the world. Concurrently, there has also been an exponential growth in digital advertising, as the same online platforms are able to monetise the vast swathes of data they collect from their users by selling advertising spaces and allowing companies to tailor their campaigns to target particular consumer groups.

There have been burgeoning concerns among regulators that the rate of policy change has been lagging behind the pace of development in the digital economy. In March 2019, the Furman Review in the UK recommended the creation of a so-called 'Digital Markets Unit' to promote competition and innovation, identifying a significant concentration in digital markets around the largest online platforms. In a similar vein, the EU Commission published findings in April 2019 that the general characteristics of digital markets are geared towards affording incumbents a strong competitive advantage and, by default, creating high barriers to entry.

The CMA's market study follows in the wake of these recent developments and accompanies the announcement of its new Digital Markets Strategy. The latter sets out the broad overview of the CMA's approach to protecting consumers in the digital economy, whilst ensuring robust and competitive digital markets. The CMA wish to ensure that the digital marketplace is working in the best interests of consumers and creates a 'level playing field' such that all manner of businesses (large and small, new entrants and incumbents) can compete purely on the merits of their offering to consumers and not purely as a result of an entrenched market position.

The anti-competitive concerns

Whilst both online platforms and digital advertising have doubtless resulted in wide-ranging benefits for consumers, there are also concerns that the enormous growth in both industries have given rise to two separate, but interlinked, anti-competitive concerns.

Firstly, the substantial market power of some of the largest of these online platforms may be harming competition, particularly by creating insuperable barriers to new entrants who may compete in the same market. Online platforms frequently have strong economies of scale and network effects which can cause markets to gravitate towards a single dominant provider. Moreover, the huge quantities of consumer data collected by these players can allow them to further entrench their position in the market through the ability to provide specifically tailored services that make the entry and expansion of competitors far more difficult. Though this is not anti-competitive in and of itself, the key risk to consumers in this respect is that they might be losing out on greater innovation and quality of services provided by these platforms, compared with a more competitive market.

The second concern, which is inherently linked to the first, is the issue around the processing of this personal data. As has been said, online platforms are able to monetise consumers' data by furnishing digital advertisers with the opportunity to efficiently target specific consumer groups and by selling digital advertising spaces. The CMA believe that consumers may not be aware of how their data is processed, handled, used and shared by and between online platforms and digital advertisers. At present, the system is highly opaque and may pose a risk to privacy and consumer protection standards.

The scope of the CMA's market study

The CMA has outlined that it will assess the anti-competitive concerns they have identified through three separate 'themes'.

The first of these relates to the perceived market power of online platforms in consumer-facing markets. Online platforms that derive revenue from digital marketing operate in two-sided markets: a consumer-facing market, which provides the relevant service to consumers in exchange for their data, and a business-facing market, which monetises the consumers' data by selling advertising space. The CMA intends to investigate whether online platforms do in fact enjoy substantial market power and, if they do, the extent to which such market power raises barriers to entry for potential competitors and creates a concentration in digital advertising. The CMA will also look to substantively assess what impact these two issues may have on consumers.

The second theme of the CMA's market study will be focused on the level of consumer control over online platforms' data protection practices. The CMA will look to determine to what extent consumers have sufficient knowledge, understanding and tools at their disposal with which to engage effectively with those platforms who make use of their data. The CMA will also make a determination as to whether online platforms are able to exploit any lack of consumer choice and understanding to extract their data.

The final theme relates to the competition in the supply of digital advertising in the UK. The CMA note the concern of some industry players that digital advertising suffers from a lack of transparency. On a global level, it is estimated that the firms which have hitherto derived the most revenue from digital advertising are dominated by the largest online platforms. As well as raising potential concerns for consumers, such a modus operandi also poses a risk to digital advertisers themselves as well. If these businesses feel compelled to channel their digital advertising almost exclusively through the largest online platforms, it raises questions as to whether they are truly achieving value for money. In turn, consumers may also suffer, as businesses facing higher advertising costs are likely to pass on these costs to consumers through increasing the prices of their goods and/or services. Broader issues, such as ad verification and fraud detection, will be also explored by the CMA in this context.

Potential remedies

Market studies can lead to a range of outcomes. The CMA may conclude that the market in question can be given a 'clean bill of health', where the concerns that led to the market study were not substantiated. Alternatively, if the CMA conclude that the market in question does have competition law concerns that need to be addressed, they have recourse to a number of options. These include a recommendation from the CMA

to the UK government to amend existing policies or implement new ones, making a market investigation reference (which is a longer and more in-depth review) or accepting commitments from parties specifically named in the market study which address the anti-competitive concerns identified.

The CMA note that, at present, their expectation is that any remedies they consider as a result of the market study are likely to revolve around recommendations to the UK government to implement legislative changes. Inter alia, the CMA considers it likely that, at this incipient stage of its market study, remedies will be required to encourage further competition in digital markets through greater data mobility, to further protect consumers vis-à-vis their personal data and to limit the ability of online platforms to exert market dominance. The CMA has also noted the potential for institutional reform via the creation of a new regulatory body with a specific mandate of regulating digital markets, something the Furman Review has already recommended.

Comments

The role of online platforms and targeted digital advertising has long been a hot topic for debate among regulatory authorities and politicians, particularly in Europe. In light of this, it is perhaps unsurprising that the CMA has chosen to launch such a market study. The UK is widely perceived to have one of the more progressive legal systems insofar as the digital economy is concerned. As such, the market study is a logical step from the CMA as it fits into the broader narrative that the UK is 'leading from the front' in terms of spearheading the legislative reforms needed to address an area of the economy which is constantly changing, especially as Brexit looms and the CMA wants to remain a leading anti-trust and consumer protection agency. The CMA has laid down its own 'battle lines' in what could be a looming confrontation between governments and competition authorities on the one side and large online platforms and digital advertisers on the other.

The CMA will publish its market study report no later than 2 July 2020.

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