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## Law & Economics Webinar

# Digital and UK Antitrust

**Webinar - 22 March 2021***

"The fact that digital markets are uncertain and complex should not prevent regulators from acting, as there are substantial risks associated with inaction."

Mike Walker

## Dame Vivien Rose

Dame Vivien Rose started by reflecting on the results of the initial ad-hoc poll on the question *"are UK antitrust in the digital sector fit for purpose?"* (39% No, 25% Yes, 35% Do not know). She believes that these answers, evenly balanced, illustrate a variety of sentiments that will be echoed in the panel.

## Mike Walker

Mike Walker began by recognising that digital platforms do provide great products and have proven particularly relevant in the context of COVID-induced lockdowns. However, this should not be considered as a get-out-of-jail-free card when it comes to antitrust infringements.

Regarding how competition policy approaches these platforms, four lessons should be kept in mind. The first is that antitrust tools so far have largely failed in tackling them. For instance, on digital advertising, where Google and Facebook generate most of their revenue, the CMA has observed that observable market power is likely to drive prices up. Google has also engaged in an envelopment strategy to create a protected ecosystem. Facebook has established a must-have platform (and also owns Instagram and WhatsApp) and therefore holds important market power over prices in online advertising. This market power is developed and maintained in part at least by exclusionary practices and acquisitions. The second lesson is that unilateral conduct cases are not enough to restrict the digital platforms' ability to excise market power. This is explained first by the slowness of the antitrust processes (e.g. *Google*

> See video and transcript on concurrences.com website (Conferences > 22 March 2021)

* Tanguy Laurioz for Concurrences drafted the present synthesis. The views and opinions expressed in this document do not necessarily represent those of the speakers' institution or clients.

*Shopping* case still on appeal 11 years after the case started). The fines do not constitute an efficient deterrent. The third lesson is that competition law so far has not managed to deal with the platforms' envelopment strategies, which allows them to prevent innovative market entrants from being successful. The fourth lesson is that competition policy and privacy regulation have to walk hand in hand.

These lessons imply that there is a need for regulation that would stop platforms from exploiting current market power, but also from enhancing market power by creating barriers for new competition. The long-term objective is to open up the markets to new competitors and innovation. The merger control regime also has a key role to play in preventing further entrenchment, though it seems to have failed so far. In the UK, the CMA has taken steps by establishing a Digital Markets Unit focused on firms with strategic market status ("SMS"). Fewer firms should end up with SMS under UK law than with gatekeeper status under the Digital Markets Act ("DMA") coming from the Commission. Firms with SMS will have three main obligations: respecting a bespoke code of conduct limiting their ability to exploit existing market power; accepting procompetitive interventions (e.g., data portability and access) to encourage new entry; and undergoing enhanced merger scrutiny. This last part is not part of the DMA proposal, and Dr. Walker believes that is an important weakness of the DMA proposals.

To conclude, whilst antitrust unilateral cases can be useful, they are not enough on their own. The fact that digital markets are uncertain and complex should not prevent regulators from acting, as there are substantial risks associated with inaction (markets tipping for instance). However, effective regulation has to be consistent across jurisdictions (US, EU, UK etc.).

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Designing a regime vertical case by vertical case is not a sustainable approach.”

Oliver Bethell

## Oliver Bethell

Oliver Bethell noted that three questions come up within Google regularly. These are "will we be able to continue to innovate in the UK?", "will we understand the UK new rules?" and "will the process be fair?". Mr. Bethell pointed out that he is optimistic in his responses.

Regarding the first question, Google considers the UK to be an important place for innovation. Whether it will be able to continue innovating will depend on the new rules. Specific rules are highly relevant in some areas; APIs, interoperability, data portability. However, in many cases, that kind of specificity will not be appropriate. Some of them may relate to self-preferencing. Some say that the same searches processes and methods should be applied to Google products and services as to others', but that would restrict Google's ability to deploy the information that it has. It would not, in the end, be workable. However, self-preferencing is a legitimate concern of the public and the agencies. Involving other people in the search's decisions could be a solution. Worked-out examples from the regulators also could help. In any case, designing a regime vertical case by vertical case is not a sustainable approach, and a principles-based framework will be welcome. Finally, it will provide an incentive to Google and the CMA to continue the discussion.

Regarding the second question, new principles will help to provide executives with a long-term plan on where they should be landing. Much will depend on the guidance that sits alongside these principles.

Regarding the last question, Mr. Bethell indicated that his internal response focuses on three points: process awareness of the executives (making them and the data available), consent to change and opportunity to be heard. Moving forward, Google will also have to navigate between privacy and competition law and could engage in co-designing launches with the ICO and the CMA. As part of a fair process, room should be left for experimentation and derogation when it comes to the remedies.

Finally, enforcement should always be used proportionately and predictably -this relates in particular to the "procompetitive intervention" and "merger review" parts of the framework. One of the proposed interventions is for Google to make search query data available to rivals, which raises strategic and privacy concerns internally. A new merger regime, that includes an important diminution of the blocking threshold, will impact the investments that Google will make. Checks and balances will have to be organised around these measures.

> See video and transcript on concurrences.com website (Conferences > 22 March 2021)

## Dame Vivien Rose

Dame Vivien Rose pointed out that the preceding remarks remind her of her experience representing Warner Music in the compact disc pricing investigation. Similar accusations were brought against big music operators that they were swallowing up successful independent labels. It seems however that founders of innovative businesses are not always interested in running big companies – instead they may rely on incentives to innovate in the form of exit buy-outs.

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## Matthew Levitt

Matthew Levitt stressed that competition law epitomises the difficult balance between regulation and economic principles. That is particularly relevant to issues that arise in the digital space. The CMA, the European Commissions and other authorities are struggling to find the right balance.

Regarding the code of conduct, it is true that the hardest part in dealing with digital cases seems not to be legal characterisation but rather process and remediation. Remedies come with challenges in terms of timeline and judicial control for instance. Therefore, prevention should be preferred over them. But Mr. Levitt notes that a high degree of discretion is provided to the future Digital Markets Units ("DMU") by the CMA's proposal, as the framework relies on broad principles tailored to specific SMS firms. Regarding procompetitive interventions, this prerogative seems to be potentially far-reaching in terms of data portability, interoperability etc. It even brings along the prerogative to impose full ownership separation -sometimes referred to as "unbundling". Regarding merger regime, the new system will likely make it more difficult to challenge the CMA's decisions.

In enforcing this new regime, consistency across jurisdictions should certainly be hoped for but the means to achieve it remain unclear. Substantial differences exist between the digital regulatory initiatives from the UK, the EU, France and Germany.

Turning to procedural issues, attribution of SMS to an operator should be the subject of an open and transparent process according to the CMA. However, important principles remain to be set out on issues such as access to file, opportunity to comment for the SMS candidate at various stages. In the enforcement of the proposed regime (in particular design of the code, compliance with this code, imposition of procompetitive interventions, remedies and penalties), procedural rights will have to be guaranteed. For comparison, the EU's DMA for instance, in its Article 30, provides for full recognition of defence rights of the gatekeeper. Even though the CMA has stated that remedies will be subject to potential appeal, it appears that this appeal will be on the basis of judicial review (limited to censure of error of law, disproportionality and irrationality) rather than full merits -of course, this constitutes a lighter burden for the authority. That ensures that the Competition Appeal Tribunal will not be able to substitute its views to that of the DMU and that any appeal would not be suspensory.

This limited judicial review seems to be questionable in light of the substantial remedies that the DMU will be able to impose on firms with SMS. This debate can be compared with the one that occurs in the EU where the General Court's standard of review has to be put in perspective with the Commission's fines that have been described as quasi-criminal. While examining DMA decisions, as well as Articles 101 and 102 TFEU infringements, the Court of Justice is provided with unlimited jurisdiction. It is interesting to reflect on recent remarks by AG Pitruzzella on the compatibility of the DMA with the Charter of Human Rights, in particular when it comes to freedom to conduct business and the right to property. Even though, following Brexit, the Charter of Human Rights no longer applies in the UK, the European Convention on Human Rights ("ECHR") still does. In Germany, the Digitalization Act has limited the possibility of appeal to one level, which also raised constitutional concerns.

In conclusion, the CMA's desire for speedy *ex ante* regulation is understandable. However, fundamental procedural rights should not be compromised.

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## Questions and answers

Following a question on interim measures and the opportunity to use them more, Dr. Walker expressed his doubts as to the fact that they can be enforced quickly enough to satisfy all stakeholders. Mr. Levitt added that even though appeals slow this process, it provides an opportunity to negotiate appropriate remedies. He also mentioned that the DMA seems to offer this kind of room for discussion on *ex ante* remedies -and Dame Rose indicated that companies in the EU should get prepared for these discussions. Mr. Bethell welcomed interim measures as interesting arrows in the quiver. Looking back on *Google Shopping*, he believes that one should not skim over the causes for delay in such cases. It started in 2010 on a very broad basis. From 2012 to 2014, remedies were discussed and the final decision was published in 2017.

On theories of harm based on consumer welfare loss, Mr. Bethell thinks that the standard has proven to be very versatile. Numerous challenges also arise from the tight interaction that privacy law and competition law have with each other. Mr. Levitt seconded this point, adding that even though privacy is now a relevant parameter of competition, competition law is not a relevant tool to address all problems (from privacy to environment). Dr. Walker believes that the first idea is well illustrated by the German *Facebook* case, in which a lack of competition led to a lack of privacy protection.

On the question of the prevention of free-riding from a regulatory perspective, Dame Rose thinks that this is a fundamental question in abuse of dominance control. To what extent can the regulator end up punishing efficiency by giving a leg up to competitors? Dr. Walker accepts that there is always a risk that regulators, such as the DMU, are captured by parts of the industry. Mr. Levitt warns against excessive intervention in the digital sector, which may prevent the UK's innovative firms from thriving. ■