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WHITE PAPER

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UK Antitrust Authority Recommends New Regulations for Online Platforms

The UK Competition and Markets Authority ("CMA") Final Report in the Market Study into Online Platforms and Digital Advertising proposes the creation of a new regulatory authority and additional regulations to govern the conduct of online platforms funded by digital advertising, as well as specific market interventions. While some of the CMA proposals parallel the recommendations of other antitrust enforcers or nongovernmental entities, there is divergence. Given the international nature of many online platforms, there is a risk that market participants could face complex and conflicting obligations in different jurisdictions that result in unwieldy compliance, unintended consequences, or negation of the alleged benefits of the proposals.

In this *White Paper*, we describe the CMA's recommendations and its implications.

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INTRODUCTION

The CMA has recently issued its Final Report in the Market Study into Online Platforms and Digital Advertising ("Final Report"), which sets forth its findings and recommendations from its investigation of markets involving online platforms funded by digital advertising. In parallel, the CMA also is studying nonadvertising-funded platforms, and this work continues as part of the UK Digital Markets Taskforce, which has now also issued a Call for Information. The CMA's studies add to the growing number of antitrust authorities that have conducted similar investigations about how antitrust laws should be applied to online platforms and digital markets.[1]

Apart from modest changes to merger notification requirements (as described in our May 2017 Global Merger Control Update in Germany and Austria), most of the established antitrust enforcers around the world had until recently expressed the view that existing antitrust laws and economic theories were sufficiently flexible to address potential antitrust concerns raised in new sectors of the economy, such as tech and digital markets. However, there has been a shift in the tone and approach of certain antitrust enforcers to support new regulations in certain tech and digital markets.

The Final Report makes clear that the CMA is among the antitrust enforcers that support sector-specific regulation. According to the CMA, "there is a compelling case for the development of an ex ante regulatory regime to regulate the activities of online platforms funded by digital advertising." In the Final Report, the CMA proposes a series of regulations to address the issues it has identified.

THE CMA'S PROPOSAL

The core proposal is the introduction of a regulatory regime to oversee the activities of online platforms funded by digital advertising that would "encourage competition by overcoming barriers to entry and expansion, thus tackling sources of market power and promoting innovation." The proposed regulatory regime would include:

- An enforceable code of conduct for online platforms with "strategic market status" designed to mitigate the effects of their market power; and
- A range of "pro-competitive" interventions that could be imposed on a broader range of platforms, and which the CMA considers could address the sources of market power.

This regime would be overseen by a dedicated regulatory body which the CMA has referred to as the Digital Markets Unit ("DMU"), but no recommendation has been made as to whether this should be a new government agency or form part of an existing one. The DMU's toolkit of regulatory interventions would include the ability to:

- Require certain online platforms to provide click and query data to rivals;
- Implement interoperability requirements and/or increase access to certain platforms' APIs;
- Allow users to turn off personalized advertising on online platforms, without affecting their access to core functionality;
- Introduce a "fairness by design" obligation that would require platforms to design consent and privacy policies that facilitate informed consumer choice (to complement the GDPR "data protection by design" duty); and
- Separate aspects of the advertising businesses of large integrated platforms (ranging from accounting and management separation to a full divestiture of certain business units).

The CMA has indicated it is confident that the UK government is committed to adopting new regulations in this area. As a result, the CMA has decided not to launch a Market Investigation, which might lead to CMA-issued binding Orders. This echoes the position taken in its Interim Report, where it claimed that "one-off" interventions would not achieve the recommended regulatory framework in fast-evolving markets.

HOW DOES THE FINAL REPORT COMPARE TO OTHER PROPOSALS?

The CMA's proposal for a regulatory regime for online platforms adopts a number of features recommended in recent reports commissioned by the UK Government (known as the Furman Report), the Stigler Center for the Study of Economy and the State (based in the United States), and the Australian Competition & Consumer Commission ("ACCC") Digital

Platforms Inquiry. In particular, these reports recommend use of enforceable codes of conduct—or "baseline market rules," in the case of the Stigler Report—that would provide antitrust enforcers with regulatory oversight and mechanisms to manage compliance.

While there are broad similarities among the regulatory proposals, there is no consensus about the specific terms for codes of conduct, or to which online platforms they should apply. If implemented as currently proposed, online platforms, which by their nature are typically international in scope, could face differing and potentially conflicting obligations in different jurisdictions.

Notably, the CMA proposal (like the UK Furman Report) would not alter the existing burden of proof in antitrust conduct cases with respect to online platforms. If implemented as proposed, the new Digital Markets Unit will have the burden to show that the online platform violated the new rules. In contrast, the Stigler Report and the European Commission Report recommend a presumption of anticompetitive harm by "dominant" online platforms when they engage in certain types of conduct, where the platform would bear the burden to show its conduct is either not anticompetitive (Stigler Report) or net procompetitive (EC Report).

The CMA has chosen not to explore the issue of "killer acquisitions" in its Final Report.[2] A "killer acquisition" is generally considered to be one in which a dominant firm acquires smaller start-up rivals with the alleged intention of eliminating potential future competition. While it is far from clear that there is sufficient evidence to support concerns raised about "killer acquisitions," there have been suggestions that amendments to UK merger control regulations are necessary, including the UK Furman Report's recommendation to adopt a new "balance of harm" threshold that would consider both the scale and the likelihood of harm to competition and innovation. Similar recommendations have been made elsewhere. For example:

- The Stigler Report recommends a reversal in the burden of proof such that "dominant platforms" would be required to prove that the acquisition will not harm competition;
- The European Commission's Competition Policy for the Digital Era Report recommends adopting new theories of harm to produce a "heightened degree of control" of acquisitions by dominant platforms and/or ecosystems; and
- The ACCC Digital Platforms Inquiry recommends adoption of special mandatory merger notification rules for acquisitions by "large digital platforms".

The CMA's Final Report was released shortly after the European Commission announced consultations into potential expanded investigative and regulatory authority in the digital sector (as described in our recent *Alert*, "European Commission Considers Expanding Investigative and Regulatory Authority in Digital Sector").

GLOBAL REGULATION IS NOT A FOREGONE CONCLUSION

While there is a significant level of policy discussion on these issues, it is important to note that there is not a global consensus as to whether regulatory intervention is necessary, or what regulation is warranted. In particular, in a speech in February 2019, the Assistant Attorney General ("AAG") for the U.S. Department of Justice Antitrust Division ("DOJ") cautioned against "misplaced" and "extreme views" that would propose new rules to regulate online platforms and displace the long-standing global consensus "consumer welfare" standard in antitrust reviews.[3] In a nutshell, under the consumer welfare standard, antitrust enforcers intervene in markets or acquisitions only if the conduct harms consumers in a relevant market.

DOJ noted that the strategy of some online platforms to provide goods at a price of zero and make money somewhere can benefit consumers. For example, a zero-price strategy may bring goods and services to consumers who would be priced out, but instead are willing to "exchange data or attention in lieu of money to receive valuable services". DOJ also noted that zero-price strategies can lead to competition on quality and innovation that benefits consumers or that permits new entrants to break into markets.

DOJ also highlighted the challenges in determining whether an online platform has "market power" (i.e., the ability to raise prices above those that would be charged in a competitive market) and cautioned against "the temptation of defining markets with subjective definitions that shortcut rigorous analysis."

DOJ noted that digital platforms have grown, in part, because they provide innovative and disruptive services that consumers like. According to DOJ, antitrust enforcement should not concern itself with "how big the platform is, but whether what the platform is *doing* harms competition." Although DOJ agreed that concerns over privacy, notice and unauthorized use of data should be discussed, it discouraged the use of the antitrust laws to address policy issues that do not result in collusive or exclusionary conduct.

IMPLICATIONS OF THE FINAL REPORT FOR BUSINESS

While the obvious implications of the CMA's proposals are for online platforms funded by digital advertising, if implemented these regulations could have much broader consequences. Any business that engages with online platforms, whether as an advertiser, supplier, or competitor, may feel the effects of the proposed regulatory interventions.

However, regardless of whether businesses stand to benefit from stricter controls on online platforms or be the recipient of greater regulatory compliance burdens, it is unlikely to be in anyone's interests to have a wide variety of potentially conflicting requirements in different jurisdictions. While policy officials and antitrust authorities are engaging with their foreign counterparts to develop policy in this area, at this stage, it seems unlikely that they will adopt a harmonized approach. Depending on the circumstances of any divergence, and given the global nature of many online platforms, it may be that the "most restrictive" regime has outsized and extraterritorial effect on such platforms. Businesses potentially subject to these rules are likely best placed to identify instances when regulatory conflict among jurisdictions is likely to be most problematic.

With this in mind, given the myriad reviews into the digital and online sector in recent years, and the enthusiasm with which some jurisdictions are pursuing significant regulatory changes, it is important that industry participants ensure they have a global strategy that sets forth both the potential costs and opportunities available from proposed regulations and provides a cohesive narrative to underpin engagement with policy and regulatory authorities around the world.

It also is important for other large tech platforms with strong network effects and the businesses that operate within those ecosystems to monitor antitrust proposals related to online platforms. What happens in this sector may serve as a model for future attempts to "regulate" competition concerns in other sectors.

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ENDNOTES

1 Sector-specific reviews into online and digital markets have been conducted, or are ongoing, in a significant number of jurisdictions, including the United Kingdom, Germany, Netherlands, France, Spain, the European Commission, United States, Japan, and by multinational organizations including BRICS (which represents Brazil, Russia, India, China, and South Africa).

2 In response to the earlier Lear Report commissioned by the CMA and published in June 2019, CMA CEO Dr. Andrea Coscelli CBE endorsed an increased focus on potential killer acquisitions through the acceptance of more uncertainty in merger counterfactuals (by considering the potential for future developments over longer time periods and accepting more speculative evidence in relation to those developments) and using the value of a transaction as a screening tool. He indicated, however, that this could be achieved within the existing legislative framework.

3 Makan Delrahim, Assistant Attorney General for the U.S. Department of Justice Antitrust Division, Keynote Address at Silicon Flatirons Annual Technology Policy Conference at The University of Colorado Law School (Feb. 11, 2019). The AAG also referred to calls for no antitrust enforcement as "extreme."

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