



You Say You Want a Revolution in
Digital Merger Enforcement:
Evolution Shall Suffice, For Now
Merger Working Group Teleseminar on
Digital Mergers, October 1, 2019

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To say that much has been written about digital mergers would be an understatement.² Around the world, competition enforcers are evaluating how their competition laws can be best utilized—or improved—to address some of the analytical challenges involved in digital markets.

Last month, the ICN’s Merger Working Group held a teleseminar on digital mergers.³ Moderated by Professor Douglas Melamed of Stanford Law School, panelists from the European Commission (“EC”) Directorate-General for Competition (“DG COMP”), the U.K. Competition & Markets Authority (“CMA”), and the Australian Competition & Consumer Commission (“ACCC”) expressed their views regarding the evaluation of digital mergers and credited the importance of international engagement in improving their analytical methods.⁴ The panelists provided an overview of recent case studies and addressed some of the key findings from recently commissioned reports on merger review in digital markets. While competition enforcers on the panel largely agreed that current merger control laws and tools are fit for purpose, they agreed that there may be a need to evolve and augment potential theories of harm and take into account additional data and non-price criteria that are particularly relevant in digital mergers.

Eleonora Ocello and Marc Zedler, case handlers at DG COMP, provided an overview of EU competition law with respect to digital markets and presented the *Microsoft/LinkedIn* and *Apple/Shazam* investigations. As the focus in digital mergers often involve zero-price markets, DG COMP has placed less emphasis on market definition and market shares, stressing a more dynamic, case-by-case assessment and a greater focus on non-price effects (e.g., innovation, quality, and choice). In addition, DG COMP’s competitive effects analysis of data—the *sine qua non* of the digital economy—evaluates whether aggregating datasets results in increasing market power and raising entry barriers as well as whether the merged entity has the ability and incentive to engage in a foreclosure strategy regarding access to the data at issue. The DG COMP panelists also provided a partial summation of the European Commission Special Advisers Report, *Competition Policy for the Digital Era*,⁵ with respect to merger review. Ms. Ocello noted that EU competition law is generally fit for purpose in the digital era, but there is potential for refining theories of harm to address acquisitions by dominant platforms of potential competitors, including smaller companies in adjacent markets, through looking at the “technological space” or “user space” rather than the dominant company’s core market.⁶

Richard Romney, Director of Mergers at the CMA, focused his presentation on two recently commissioned reports in the United Kingdom. First, he provided an overview of the Furman Report’s key areas of examination as it relates to mergers in digital markets.⁷ The Furman Report concluded, *inter alia*, that there might be under-enforcement of digital mergers and that “killer acquisitions” may be occurring that require greater scrutiny. The Furman Report’s key recommendations include an increased prioritization of digital mergers, particularly focusing on harm to innovation and potential competition, and updating the Merger Assessment Guidelines in the context of the assessment of digital mergers, which is occurring now. The Lear Report,⁸ a CMA-commissioned independent review to evaluate past merger decisions in the digital sector, recommended that the CMA evolve its approach to merger counterfactuals and enrich the information relied upon when investigating digital mergers. The CMA has already begun implementing some of these recommendations in its casework (e.g., *Experian/ClearScore*, *TopCashback/Quidco*). Mr. Romney concluded by stating that, through the learnings from the Furman and Lear Reports, the CMA has determined that its merger control tools are largely fit for purpose. He also noted that there are areas of refinement—such as gathering a greater quantity of information, exploring all relevant theories of harm, accepting a higher degree of uncertainty in the counterfactuals—that do not require legislative change.

Joint General Manager of the Digital Platforms Branch at the ACCC, Morag Bond, presented the

key findings and recommendations of the ACCC's Digital Platforms Inquiry Final Report.⁹ The Commission conducted a broad, eighteen-month inquiry to evaluate, among other things, the impact of search engines, social media, and "other digital content aggregation content platforms" on the state of competition in media and advertising markets and its implications on journalistic content, media content creators, advertisers, and consumers. With respect to merger control, the Final Report made several key recommendations. Of particular relevance, the Report recommended legislation to incorporate new factors that address the likelihood that an acquisition may result in the removal of a potential competitor as well as factoring in "the nature and significance of assets, including data and technology, being acquired directly or through the body corporate." Second, the Report recommended requiring large digital platform companies to provide advance notice of potential acquisitions, as Australia has a voluntary notification regime. The legislation incorporating these new factors would not change the overall merger test requiring a substantial lessening of competition. It would serve, however, as an important signal to merging parties and courts that these factors are relevant to a merger assessment. Ms. Bond stressed the importance of the ACCC's extensive international engagement in the course of the Digital Platforms Inquiry, and that such engagement was critical to its findings and recommendations.

Professor Melamed concluded the panel with a few questions concerning how the proposed recommendations from the Digital Platforms Inquiry Final Report (ACCC), the Furman and Lear Reports (CMA), and the Special Advisers Report (DG COMP), might impact digital mergers going forward.

- From the ACCC's perspective, Ms. Bond stated that there will be closer scrutiny of vertical and conglomerate issues in digital mergers and, due to the Digital Platforms Inquiry, the ACCC now has a greater understanding of digital markets. In addition, Ms. Bond noted that additional potential theories of harm and the role of data will be taken into account, and the Commission has increased the range of data points to consider in its merger control regime.
- Mr. Romney stressed that the CMA has been scrutinizing digital markets for years, but they are evolving to become more sophisticated in their analysis of digital mergers. He indicated that the CMA may take into account more dynamic counterfactuals as well as consider a range of potential theories of harm that contemplate loss of potential competition and innovation as well as vertical and conglomerate concerns.
- DG COMP's Mr. Zedler stated that the Special Advisers Report was conducted by independent experts and neither necessarily reflects the views of DG COMP nor will the EC necessarily implement all of the Report's recommendations. Mr. Zedler emphasized the importance of a case-by-case analysis and noted that it is difficult to predict where, and to what extent, the EC's merger control regime will become stricter. Further, he noted that the manner in which DG COMP evaluates data in digital mergers has evolved, and the *Apple/Shazam* case represents how the EC has most recently evaluated data issues in a merger context. Mr. Zedler also commented that mergers involving data aggregation and dominant platforms acquiring smaller companies in adjacent markets will be of particular interest.

As the title of this article indicates, the panelists from the ACCC, CMA, and DG COMP acknowledge that their merger control assessments are evolving to take into account more pertinent competitive factors such as innovation and quality in digital markets as well as ensuring

that all potential theories of harm are evaluated and exhausted. In response to a suggestion that more arbitrary assessments will occur due to greater weight being placed on qualitative, non-price factors in digital markets, some panelists remarked that the necessity of establishing a well-reasoned substantial lessening of competition remains and must still be proven in—or can be appealed to—a court or tribunal.

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² For a selection of some of the relevant works referenced in this teleseminar, see Australian Competition & Consumer Commission, *Digital Platform Inquiry Final Report* (July 2019); *Autorité de la concurrence* and Bundeskartellamt, *Competition Law and Data* (May 2016); European Commission Special Advisers Report, *Competition Policy for the Digital Era* (April 2019); U.K.-Her Majesty's Treasury, *Report of the Digital Competition Expert Panel: Unlocking Digital Competition* (Furman Report) (March 2019); U.K.-CMA Lear Final Report, *Ex-Post Assessment of Merger Control Decisions in Digital Markets* (May 2019).

³ A recording of the teleseminar is available [here](#).

⁴ The views expressed by the panelists are personal and do not necessarily reflect the views of the European Commission Directorate-General for Competition, the U.K. Competition & Markets Authority, or the Australian Competition & Consumer Commission.

⁵ European Commission Special Advisers Report, *Competition Policy for the Digital Era* (April 2019).

⁶ As the case handlers explained, DG COMP's current framework for conglomerate mergers is not entirely fit for purpose in the digital era and therefore the Special Advisers Report proposes treating the target firm as a horizontal competitor in this to-be-determined "technological space."

⁷ U.K.-Her Majesty's Treasury, *Report of the Digital Competition Expert Panel: Unlocking Digital Competition* (Furman Report) (March 2019).

⁸ U.K.-CMA Lear Final Report, *Ex-Post Assessment of Merger Control Decisions in Digital Markets* (May 2019).

⁹ Australian Competition & Consumer Commission, *Digital Platform Inquiry Final Report* (July 2019).