Michael Grenfell: Should competition authorities intervene in digital markets?

It is standard, even formulaic, for speakers at a conference to say what an honour it is to have been invited to speak there. But for me, at this ITIF / IEA conference, it is no mere platitude to say that.

Speaking at an event hosted by the Institute of Economics Affairs is, for me, a particular honour. Since I was a student in the early 1980s I have watched the work of the IEA with interest and admiration. I understood how in your early wilderness years you were a lonely, consistent, principled – and brave – voice for the economic and policy tenets you believed were good for our society. And then I saw how you were finally heeded and made the political weather, in this country and across the globe. Over the years I, like many others – whether or not they fully agreed with your analyses and your prescriptions – have learned a very great deal from you. It is an immense privilege to be able to make a small contribution to your deliberations today.

As for our co-hosts, ITIF – the Information Technology and Innovation Foundation – I'm afraid I didn't know you all those years ago when I was a student, for the simple reason that you weren't founded till 2006, a quarter of a century later. You bring a fresh perspective, based on studying the relation between public policy and new digital markets.

The fusion of the 2 organisations' specialisms – the IEA's tried and tested economic insights meeting ITIF's insights into the dynamics of the new world of tech – establishes, it seems to me, an excellent basis for our deliberations today, on the subject of competition and digital markets.

I am well aware that there is a widespread view in the tech sector, and perhaps among some here, that competition and antitrust authorities and agencies – including the UK's Competition and Markets Authority (CMA), where I work – are the big bad guys in this story. Like any kind of busybody state regulator – it is said – we interfere in the smooth functioning of markets. And as with all such interventions, we supposedly make things worse for digital markets. Instead of rewarding innovation, and giving incentives to more – on this narrative – the dead hand of bureaucratic interference stymies creativity, depriving the public of the transformational benefits that new tech has delivered and continues to deliver.

Let's start with some basics, and I apologise if what I'm about to say is a bit too obvious, but occasionally I think that, amidst the immense complexity of work in this sector, the obvious does bear repeating. So, to rehearse the basics in this area. The first point is that market competition is hugely beneficial to all in society. Businesses that face effective competition dare not raise prices, or cut down on quality standards, for fear of losing

customers to their competitors (and so losing money). So when businesses face effective competition, they have every incentive to keep prices low, to improve quality – and to innovate, so as to make prices more competitive through enhanced efficiency, and so as to be able offer ever-improving products and services. We all benefit as consumers from this process delivered by market competition. And because effective competition spurs businesses to increase efficiency, overall economic productivity improves, which in turn facilitates greater economic growth, and hence more job creation – so delivering enhanced economic well-being for society as a whole.

But the second basic point is that, just because these benefits are outcomes of a free and open competitive market, it doesn't follow that businesses should be wholly left to themselves. Adam Smith understood that businesses left to themselves can, and typically do, seek to protect themselves from competition. They might do it, for example, by choosing to collude rather than compete with each other. As Smith famously expressed it in The Wealth of Nations:

> People of the same trade seldom meet together… but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

Adam Smith, The Wealth of Nations, Book 1, Chapter X

And if they do that, competition is diminished or eradicated, and its benefits as we've described them – such as the downward pressure on prices, the upward pressure on quality, and the spur to innovation, that competition delivers – are likewise diminished or eradicated.

Another, no less dangerous, threat to competition arises where a business acquires market power or dominance in a market. This occurs where businesses either are monopolies or are so strong in a market that they are unconstrained in their commercial conduct by fear of losing customers to their competitors, and so – unlike businesses that face effective competition – those businesses with market power or dominance have far less incentive (and sometimes no incentive) to keep prices low, to keep quality high, to innovate. And that way competition and consumers lose out.

So what does all this mean for digital markets and the new economy? Let me say at once: my view – and I think the view of most competition authorities – is that the digital revolution and the emergence of online platforms is overwhelmingly a force for good. It helps competition, it innovates – and consumers benefit. Enormously so.

Let's take online shopping as an example. I appreciate that this is just one aspect of the multifaceted digital economy, but it is one which will perhaps be particularly familiar to most of us, for the simple reason that, as ordinary consumers, millions and millions of us make use of it in our day-to-day lives.

Here are a number of pro-competition, pro-consumer benefits that the

emergence of online shopping has delivered:

- First, at a basic practical level, it is really convenient to buy goods at the press of a button or the touch of a screen, from the warmth of one's home or (in a busy life) on a mobile service while travelling. And of course coronavirus lockdowns made that added convenience a near-necessity – there was almost no other way to buy many products.

- Second, they represent an alternative to traditional 'bricks-and-mortar' shopping. This is not to say that online shopping is necessarily better than going to a physical shop. Each has its advantages and disadvantages; for example, it is often easier to browse goods, and feel their quality, in a physical shop, not to mention the pleasure that a shopping trip can bring. But the fact that the 2 alternatives are available is in itself a good thing: the competitive advantage of each enables them to spur each other on to innovate (click-and-collect is an example) and so to make a better offering to the consumer.

- Third, the convenience relates not just to shopping, but to shopping around – that is, we as consumers more easily compare the offerings of competing suppliers, so as to find the best deal. Online, we can shop around at the press of a button or the touch of a screen, without having to walk for hours or to drive miles. And if it's easier for customers to shop around, the retailers (and the manufacturers who supply them) have to compete that much harder to retain customers – their customers are more choosy, less "captive". They therefore have to strive harder to keep prices competitive, and quality standards high.

- Another innovation of tech – price comparison websites – facilitate this. If it is easier for customers to compare prices, suppliers have to compete more keenly on price. So too for yet another innovation – online review sites – enabling customers to compare the quality of competing goods and services, and thereby forcing suppliers to compete more keenly on quality too.

So as a competition authority we see digital markets, the tech sector, online commerce and platforms, as essentially good for competition, good for choice, good for consumers, good for innovation, price and quality – and ultimately good for all our economic well-being.

But let's remember Adam Smith's warning. If businesses are completely left alone, anti-competitive practices can emerge, and these benefits of market competition will be lost. As competition authorities, we need to be vigilant on this. There is a balance to be struck: we should encourage and support tech, but at the same time we must beware that tech companies don't overreach in such a way that the benefits they bring are lost to the public.

And the fact is that many of the big online platforms have, or may have, or

risk acquiring, market power, where their commercial conduct is not sufficiently constrained by effective competition, allowing them more easily to exploit their customers. And then the temptation is – moreover – to use that market power to reinforce it still further, squeezing out current competitors and blocking the path for new entrants which are potential competitors offering new waves of innovation. If that happens, we as consumers – we as a society – risk losing the benefits of market competition I've described: lower prices, better quality, more choice, greater innovation.

So there are clear and major benefits, for consumers and society, from the tech revolution. And there are also clear and major risks for consumers and society if tech corporations acquire, entrench and exploit market power. The role of competition policy and competition law enforcement is to steer a course where, as a society, we capture the benefits and minimise the risks.

As for the point about competition interventions punishing innovation, let me say this. It is competition that drives innovation, not monopoly. Yes, businesses of course innovate in the hope of earning profits, and ideally monopoly profits! That is the Schumpeterian argument (Joseph Schumpeter, Capitalism, Socialism and Democracy, Harper & Brothers (New York), 1942). But they compete more strongly to be the successful innovator, and therefore innovate more, when they face effective competition. That is the Arrow argument (Kenneth Arrow, 'Economic Welfare and the Allocation of Resources to Invention' in The Rate and Direction of Inventive Activity: Economic and Social Factors, edited by the Universities-National Bureau Committee for Economic Research and the Committee on Economic Growth of the Social Science Research Councils, 609–26, Princeton University Press (Princeton), 1962.). So we are generally unconvinced by arguments that we should leave the tech giants with market power for fear if harming innovation. They will innovate more, and better, the more they face competition.

Let us apply this to the real world of digital markets, and talk about some specifics of what the Competition and Markets Authority (CMA) has been doing in these markets.

Last year, in July 2020, we published the report of our market study into online platforms and digital advertising. The market study had found that two major global tech companies, Google and Facebook (now Meta) – whose services so many of us use, and benefit from – currently have market power in search advertising and display advertising respectively and, in addition, that this is accentuated by the presence of each company at various levels of its advertising supply chain often known as the 'ad tech stack', essentially vertical integration. Our market study noted, among other findings, that these factors make it harder for rivals (and potential competitors) to compete against the two tech giants and that, as a result, those 2 corporations are able to impose exploitative pricing and terms and conditions on both ends of the advertising market that depend on them: publishers of content (for example, newspapers) displayed on the platforms and, at the other end, companies advertising their products on these platforms.

And these kinds of concern underlie some of the cases we are currently

investigating under the Competition Act prohibitions on anti-competitive agreements and conduct – cases where we suspect that anti-competitive practices, reinforcing market power, might be occurring. They furnish examples of where, for all the benefits that the digital platforms have brought to consumers, their position and their conduct might now be causing consumer detriment.

- One such phenomenon is where platforms use business customers' data to squeeze out competition – for example by copying products that they can then sell as their own or by gaining access to customer details to market directly to them. Without going into specifics, broadly this kind of issue – the suspected abuse of data obtained by a platform so as to gain a competitive advantage over business rivals – is the subject of an investigation we launched this June concerning Facebook, part of Meta, with the European Commission launching a parallel investigation.

- Another issue has been the announcement by Google that it proposes in effect to abolish third party cookies on Google by way of a 'Google Privacy Sandbox'. The aim is to limit the spread of personal data to others, and it can be seen as a response to demands for greater protection of personal privacy. But it carries the risk that the third parties which would lose access to data as a result are rivals in digital advertising dependent on Google which would thereby be placed at a competitive disadvantage in digital advertising, with a risk of reinforcing market power enjoyed by Google and distorting competition. So in January this year we launched a formal investigation under the Competition Act. Because this has involved taking into account both competition and privacy considerations, I am pleased to say that we have throughout liaised closely and productively with the UK's privacy regulator, the Information Commissioner. And Google has engaged constructively with us; as we have announced, Google is proposing commitments with a view to an agreed resolution to address the CMA's competition concerns. We are not there yet, but the CMA is certainly willing to explore this route.

- And a third is conduct by Apple in relation to iPhones, including specifically Apple requiring the suppliers of apps that appear on the iPhone to receive customers' payments exclusively through its own AppStore payment system, and prohibiting use of competing payment systems. This is a set of issues which other competition jurisdictions are looking at, including in the United States antitrust litigation brought by Epic Games (the developer of Fortnite) against Apple and in the EU an ongoing competition investigation by the European Commission.

In the cases I've mentioned, we have relied on the CMA's existing competition law powers. But because of the need to gather evidence and hear arguments from all interested parties, which is necessarily time-consuming, and because of the procedural rights that are – rightly – accorded to businesses under

investigation, applying traditional competition laws is often a slow process. As we all know, digital markets are, by their nature, fast-moving – so if we seek to protect competition by tackling anti-competitive practices in the traditional way, there is a significant risk that, by the time we have a decision (and by the time any appeals are exhausted), the damage to competition will already have been done, and market power will perhaps have been further entrenched.

To meet this concern, the Government – accepting the recommendations of the Furman Review which it commissioned and of the CMA's subsequent market study – is proposing a pro-competition regulatory regime to be implemented by a Digital Markets Unit within the CMA. This would set prescriptive rules for those platforms with particularly strong power in relevant markets – under a defined concept of 'strategic market status' – so that some of the risks to competition can be pre-empted ex ante.

It can't all be done by us at the CMA. Cooperation is needed nationally between public authorities with regulatory responsibility for digital markets, and last year the Digital Regulation Cooperation Forum was established, enabling us to work closely alongside other regulators with a strong interest in digital markets, including Ofcom, the Information Commissioner and the Financial Conduct Authority. Cooperation is also needed with fellow authorities internationally – the tech giants operate globally and we often need to tackle any abuses globally

I said earlier that this is about a balance between supporting tech and interfering when it overreaches. But actually that's not quite the right way to put it. As upholders of market competition, we welcome the innovation that the dynamic businesses in the tech sector have brought. They benefit consumers and the economy as a whole. We agree with those who warn that we need to be careful that our interventions don't weaken incentives to innovation. But it is precisely because we want to incentivise dynamic businesses and innovation that we are concerned about the risk that firms with market power behave in such a way as to reinforce that market power, creating barriers to new innovators entering the markets, and reducing or even removing the possibilities of and incentives for the kind of innovation that the tech revolution promises. And for this reason we will continue, with vigour, to address anti-competitive practices that threaten market competition and new entry by a fresh wave of dynamic innovators, and that threaten the benefits to consumers, to choice, to innovation, and to all of us in society that market competition – and digital markets in particular – can offer.

Dr Michael Grenfell is an Executive Director on the Board of the Competition and Markets Authority (CMA) – the UK's primary competition and consumer protection agency – where he is responsible for enforcement of competition and consumer protection laws. He joined the CMA in January 2014, where he was initially a Senior Director for competition in the regulated sectors, before moving to his current position in July 2015. Before he joined the CMA, he was a solicitor in private practice for 25 years, specialising in UK and EU competition law and sector regulation, including, from 1998 to 2013, as a Partner at the international law firm Norton Rose Fulbright. He has written

and broadcast widely on competition, regulatory and consumer issues, and was co-author of Coleman and Grenfell on The Competition Act 1998 (OUP). He has an M.A. in history and law from Cambridge University, and a Ph.D in political thought from the London School of Economics.

8-year ban for Glasgow director who failed to keep records

Rashid Munir, 42, also known as Mohammed Rashid Munir, from Glasgow, was a director of Yo Retail Ltd, which purported to trade from a business unit in Strathclyde Business Park. The business was wound up in May 2019 following a petition by a creditor, however it proved impossible for the liquidator to confirm what the business did, or the period it operated.

Rashid Munir failed to co-operate with either the liquidator or the Insolvency Service in its subsequent investigation, and no company accounting records were provided.

The company's last filed accounts showed assets totalling £763,139 but in the absence of the accounting records, neither the liquidator nor the Insolvency Service were able to establish what had become of these.

Only one company bank account could be identified, with Rashid Munir being the sole signatory. This was open for less than 3 months yet nearly £500,000 moved through it during that period. However, the lack of accounting records, together with Rashid Munir's failure to co-operate with enquiries, meant it was impossible to ascertain whether any of the deposits or withdrawals were for legitimate business income and expenditure.

As a result, by Order of the Lord Ordinary, Rashid Munir was disqualified for a period of 8 years, effective from 21 October 2021.

Rob Clarke, Chief Investigator of the Insolvency Service, said:

> Companies are under a legal duty to account for their income and expenditure and fulfilling that duty is a key component of the role of a director; there is no place in the corporate arena for those who neglect their responsibilities in this area.
>
> All too often the lack of records to explain transactions is used to cover up other, more serious misconduct and we cannot determine whether that was the case at Yo Retail, a fact which is reflected in the lengthy ban now in place.

Notes to editors

Rashid Munir, otherwise known as Mohammed Rashid Munir, is of Glasgow and his date of birth is November 1979.

Yo Retail Ltd company number – SC546065

Persons subject to a disqualification order are bound by a range of restrictions.

Further information about the work of the Insolvency Service, and how to complain about financial misconduct.

Contact Press Office

You can also follow the Insolvency Service on:

Latest REACT-1 study findings show rise in COVID-19 infection rates

Over 67,000 volunteers took part in the study in England to examine the levels of COVID-19 in the general population between 19 and 29 October.

The main findings from the interim report were as follows:

There were 1,021 positives from 67,208 swabs, giving a prevalence of 1.72%.

This represents the highest overall prevalence of REACT-1 since it began in May 2020. This is more than 2-fold higher than prevalence in the last report (9 to 27 September 2021), which was 0.83%.

The reproduction rate of the virus ('R') is estimated at 1.12.

The highest prevalence was found in South West at 2.18%, increasing almost 4-fold from round 14. Rates are up in every region over this period with the exception of Yorkshire and the Humber.

Highest prevalence was observed in those aged 5 to 12 years at 5.85% and those aged 13 to 17 years at 5.75%.

Prevalence for those aged 45 to 54 and 35 to 44 were the next highest, at 1.53% and 1.48% respectively.

For those aged 65 to 74 years, prevalence was 0.82%. At 75 years and over it was 0.67% – both representing increases of approximately 2-fold from the last report.

In larger households of 5 people or more the rate of infection was 3.68%, compared to 0.78% in single-person households.

Among people who were in contact with a confirmed COVID-19 case, prevalence was 10.1% compared with 0.83% among those without such contact.

The newest tranches of data indicate a recent dip in infections, coinciding with the current half-term school holiday. This mirrors the pattern recorded in 2020 when infections dipped at the same point in the school calendar (but rose again following half term).

A total of 126 positive samples have been sequenced to date, all of which were Delta variant. Of these, 13 (10.3%) were the AY.4.2 Delta sublineage which has been classified by the UK Health Security Agency (UKHSA) as a variant under investigation (VUI).

Dr Jenny Harries, Chief Executive of UKHSA, said:

> Although the number of hospitalisations and deaths remain lower than in previous peaks, these findings are a powerful reminder that the pandemic is far from over and remains a serious threat to health and wellbeing. This new data strongly reinforces the need for all eligible age groups to get vaccinated and to take mitigating measures such as wearing a face covering in crowded places and ensuring good ventilation indoors.
>
> This is particularly urgent for older people whose immunity may be waning given that several months have passed since they received their jabs. I strongly encourage everyone who is eligible for a third dose or a booster shot to come forward without delay.

Around 10% of the sequenced positive samples were Delta sublineage AY.4.2. in keeping with the national picture from UKHSA which has classified this as a VUI. UKHSA will continue to monitor the spread of this variant across the population and investigate the possible reasons for this increase.

Health and Social Care Secretary, Sajid Javid said:

> Today’s report sends an important message that we need to stay vigilant as we head into the winter months.
>
> Vaccines continue to be our first line of defence against this disease and it is crucial we all get jabbed to keep the virus at bay. Whether you have yet to receive your first dose, second dose or if you are eligible for your booster jab – the best thing you can do is get vaccinated to protect yourself and those around you.

Professor Paul Elliott, director of the REACT programme from Imperial’s School of Public Health, said:

> These very recent data show that infections are still very high, especially in school-aged children. We continue to find that households with children have higher prevalence of infection, indicating that children could be driving up infection rates by spreading the virus to others in their homes.
>
> The vaccination programme in children ages 12 and above should help control infection rates in children of secondary school age, helping to ensure their education does not suffer due to the impact of the pandemic.

Kelly Beaver, Managing Director, Public Affairs at Ipsos MORI said:

> This interim report shows the highest levels of prevalence that the REACT study has found at any point during the pandemic. This reinforces the need for continued vigilance and for people to take up the vaccine as well as the booster when offered to them. Thank you to all those who have voluntarily participated in the REACT research programme; they are playing an important part in supporting management of the pandemic.

The REACT-1 study was commissioned by the Department of Health and Social Care (DHSC) and is carried out by a world-class team of scientists, clinicians and researchers at Imperial College London, Imperial College Healthcare NHS Trust and Ipsos MORI.

UKHSA estimates that the vaccination programme in England has prevented hundreds of thousands of hospitalisations and deaths. It is easier than ever to get vaccinated, and the vaccination programme has been successful in weakening the link between infection, hospitalisation and deaths.

Changes affecting a small number of trade mark tribunal proceedings

News story

Changes are being made to address an issue which affects a very small number of trade mark tribunal proceedings.

Background

Trade mark owners can challenge a later filed trade mark that they think conflicts with their existing trade mark.

Before the end of the Brexit Transition Period, this challenge (by way of opposition or invalidation proceedings) could be based on an existing EU trade mark. When this happened, it was possible to counter challenge the EU mark by questioning its validity at the European Union Intellectual Property Office (EUIPO). This counter challenge could be based on the existence of an earlier UK trade mark.

Since the end of the Transition Period, existing EU trade marks may still be relied upon in certain pre-transition period proceedings in the UK. However, the EUIPO has now prevented counter challenges if they are based on earlier UK trade mark rights. In very rare cases, this means that an EU trade mark could be used to successfully oppose or invalidate a later UK trade mark in a potentially unfair way (because the EU mark may not itself have been valid).

The changes

To address this, a new route to counter challenge will be available at the IPO. This will ensure that applicants (and owners) of UK trade marks are able to counter challenge an earlier trade mark which is being used against them, by tying the enforceability of the EU mark to the outcome of any challenge (or registration process) to a comparable or re-filed mark deriving from the EU mark.

The change can only apply to IPO tribunal proceedings, based on an EU trade mark, that are

- oppositions and invalidations which were ongoing at the end of the transition period (on 31 December 2020), and are not yet concluded, or
- oppositions started after the end of the transition period, but only those made against trade mark applications filed before the end of the transition period, and not yet concluded

We expect the number of cases affected by this change to be low.

Action to take

The new route to counter challenge will be available in December 2021. In the meantime, affected parties may request a stay of any relevant tribunal proceedings. Detailed guidance will be made available through a tribunal practice notice at least three weeks before the changes apply.

Published 4 November 2021

CMA requires JD Sports to sell Footasylum

The Competition and Markets Authority (CMA) has found that the takeover could lead to a substantial reduction in competition and a worse deal for Footasylum's customers.

Over the course of its inquiry, the CMA found that JD Sports is by far and away the closest alternative for shoppers at Footasylum. The CMA expects this will continue to be the case even after taking into account the continued growth in online shopping, including on the websites and apps of brands such as Nike and adidas.

Fifty per cent of online shoppers surveyed by the CMA said they would go to JD Sports if they were unable to shop at Footasylum for clothing, while 43% said they would the make the switch if they could no longer buy footwear from Footasylum. These figures were substantially higher than for any other retailer. Another CMA survey of in-store shoppers showed similar results.

The CMA also found that, despite increased competition from firms like Nike and adidas, and the impact of Covid-19, Footasylum would remain in good financial health. With a total revenue for 2020/21 of £232 million, the retailer reported underlying profits (EBITDA) of £29.3 million for the year, up from £25.5 million in 2019/20 and £2m in 2018/19.

The merger means that Footasylum would no longer face competition from JD Sports so customers would have fewer options and could face higher prices, fewer discounts, and less choice of products in-store.

The CMA's view is that requiring JD Sports to sell Footasylum is the only way to address its competition concerns and protect consumers. It will oversee the sale and approve the purchaser, in order to ensure that Footasylum will be run as a fully independent competitor.

Footasylum was purchased by JD Sports in a deal announced in April 2019.

Both companies sell sports-related fashion – including clothing and footwear – in stores around the UK and online, through their respective apps and websites.

To inform today's decision, a group of independent CMA panel members considered a range of evidence from both companies, as well as their competitors, customers and suppliers. The panel also assessed internal and decision-making documents to gain detailed insights about the merger and conditions in the sports fashion market more generally.

Kip Meek, Chair of the CMA inquiry group, said:

> The UK boasts a thriving sports fashion market and today's decision reflects our commitment to keeping it that way. We strongly believe shoppers could suffer if Footasylum stopped having to compete with JD Sports. It is likely they would pay more for less choice, worse service and lower quality.
>
> The pandemic may have altered the way we shop but innovative businesses, driven by healthy competition, will rise to the challenge and successfully cater to changing tastes and habits. The evidence we have analysed shows that JD Sports and Footasylum are adapting well to market conditions and would continue to be profitable should the merger not go ahead.
>
> As separate, rival entities, these companies can continue to compete for shoppers online and as they return to the high street.

For more information, visit the JD Sports / Footasylum merger inquiry case page.

The CMA has a statutory objective to protect competition, which drives innovation and choice, and benefits consumers and businesses in the UK.

1. Following the CMA's final decision to block the merger in May 2020, JD Sports appealed to the Competition Appeal Tribunal, saying the CMA's assessment of the effects of the merger on competition was too broad and that the CMA had failed to gather enough information regarding the impact of the pandemic on the relevant markets and market players. While the CAT supported the way in which the CMA assessed the effects of the merger on consumers, it found it did not go far enough in its information gathering on the impact of Covid-19. As such, it remitted the deal back to the CMA. This means the CMA had to consider the deal again, focusing on the impact of coronavirus on the sports fashion sector.

2. On 2 September 2021, the CMA published its provisional finding on the

remittal. It again found that the completed acquisition by JD Sports of Footasylum gave rise to competition concerns.

3. The CMA is also investigating suspected anti-competitive behaviour in relation to the sale of Leicester City FC-branded products and merchandise. The allegation involves JD Sports. This case and the merger investigation have involved different staff teams and the merger was decided by an independent group. It has not been influenced by the Leicester City FC case.

4. Details of all case surveys, which were undertaken by an independent survey company, can be found on the JD Sports Fashion plc / Footasylum plc merger inquiry case page.

5. For media queries, please contact the press office via press@cma.gov.uk or on 020 3738 6460.