

Market Investigations for Digital Platforms: Panacea or Complement?

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KEYWORDS:

Antitrust, Competition Policy, Regulation Digital Markets, Market Investigations, Interoperability

BACKGROUND

There is a growing international consensus that standard competition law, while valuable, is inadequate for addressing the panoply of competition problems arising in digital platform markets. To address these concerns, the European Commission is currently considering the potential introduction of two new legal powers: a 'New Competition Tool' and an 'ex ante regulatory instrument for large online platforms'.¹

A key variant of the former is modelled on the UK's Market Investigation powers under the Enterprise Act 2002. These enable the UK Competition and Markets Authority (CMA) to identify and remedy situations in which there are 'features of a market' that create an 'adverse effect on competition'. This article reflects on recent UK experience to examine the pros and cons of Market Investigation tool and to assess its potential use in digital markets.

KEY FINDINGS

The Market Investigation tool has major positives, particularly concerning its ability to use a broad range of interventions to proactively promote competition. As such, it would be a valuable addition to the Commission's toolkit, in digital markets and more widely. However, it also has limitations, around the powers and resources available for monitoring, enforcing and revisiting these remedies over time.

As was concluded in the 2019 UK Unlocking Digital Competition report², this tool should therefore not be viewed as a full solution to digital platform issues. There is a clear additional role for introducing ex ante regulation for digital markets, as a complement to Market Investigations. The paper discusses interoperability as an example where the tools could valuably used alongside each other.

POLICY ISSUES

Lessons can be drawn from the UK experience of Market Investigations for the implementation of such a regime at EU level. For example, because the tool is potentially so powerful and flexible, it merits strong procedural checks and balances, to guard against confirmation bias or politicisation. At the same time, there is significant room for improvement within the current UK regime in relation to the powers around remedy flexibility and enforcement.

Nonetheless, the UK experience confirms that the New Competition Tool has the potential to be hugely helpful, both in the digital sphere and more widely, as a valuable complementary tool alongside new ex ante regulation.

¹ See: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977 and <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>.

² J. Furman, D. Coyle, A. Fletcher, D. McAuley and P. Marsden, *Unlocking Digital Competition*, 2019.

CCP Policy Brief

Working Paper 20-06

September 2020



SUGGESTED CITATION

Fletcher, A, (2020) Market Investigations for Digital Platforms: Panacea or Complement? CCP Working Paper 20-06

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