

@Echelle event with Philip Marsden, co-author of *Unlocking Digital Competition*

The @Echelle event on *Unlocking Digital Competition*, a report to the UK's Competition and Markets Authority (CMA), with Philip Marsden, one of the report's five co-authors, took place on 5 September 2019 at the *Autorité de la concurrence*. Philip Marsden, Isabelle de Silva, President of the *Autorité de la concurrence*, and Henri Piffaut, Vice-President, participated in the discussion.

In his introduction Marsden recalled that the Digital Competition Expert Panel, under the direction of Jason Furman, was convened at the request of HM Treasury. Key questions that they asked: (1) What competition issues arise in the digital economy? (2) Can existing competition law cope with these challenges? (3) If not, how should it change? (4) Will this be enough, or will more be needed? (5) If so, what?

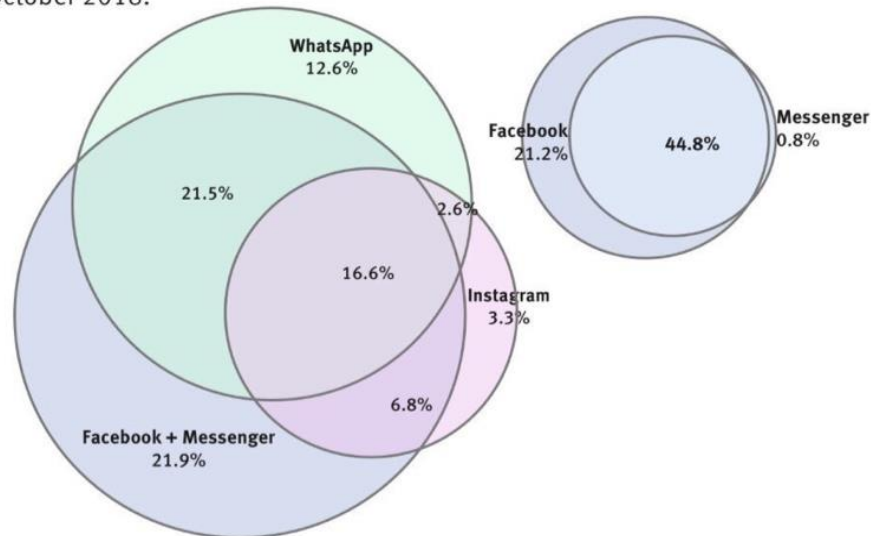
Marsden began by stressing **the substantial benefits of the digital economy for consumers** which include new categories of products and services at a cost that is often close to zero for the consumer. Price comparison tools allow more choice and therefore more competition. Suppliers have better access to markets. The advertising sector and users potentially benefit from better targeted advertising. The sector invests large amounts of money in research and development. Digital giants can be "co-regulators" because they also have an interest in addressing consumer concerns in their use of the digital economy.

However, the panel of experts noted that some platforms have acquired unprecedented economic influence that traditional market power measurement tools only partially reflect. This is due to certain **factors that are specific to the digital economy**:

- Digital markets are often subject to the phenomenon of "**market tipping**" ("**the winner takes it all**");
- The digital markets are **highly concentrated** around the five largest companies in the sector: Google, Facebook, Apple, Amazon and Microsoft. The causes are known: **network effects, strong economies of scale and benefits due to the availability of essential data on consumer behaviour**. This last characteristic is perceived as **the most important barrier to entry** by the authors;
- The **bias of users** who tend to be present on only one platform ("single homing") or to underestimate the risks in terms of privacy protection. This is illustrated by the following slide.

App Overlap

Facebook's internal analysis of overlapping usage of its apps among global internet users, as of early October 2018.



Note: Facebook estimates its family of apps reach about 85% of the global internet population.

Source: Internal Facebook Data

However, some practices are the result of **strategic firm behaviour**:

- **acquisitions of potential competitors or of key inputs**;
- moves to limit multi-homing by consumers (e.g., **most-favoured nation clause**);
- moves to limit multi-homing by suppliers/advertisers (e.g., **exclusivity clauses**);
- **self-preferencing** (e.g., Google Shopping);
- **tying and bundling** (e.g., Google Android);
- **“predatory innovation”**.

From a merger law perspective, the issue is whether competition authorities have not been “under-interventionist”. In the last decade, the five largest companies have made more than 400 acquisitions worldwide (including 250 in the last five years), sometimes at exceptionally high values, as illustrated by the following slide.

Table 1.A: Examples of high value acquisitions by large digital companies

Year	Acquirer	Company acquired	Transaction value (\$million)
2006	Google	YouTube	1,650
2007	Google	DoubleClick	3,100
2011	Microsoft	Skype Technologies	8,500
2011	Google	Motorola Mobility	12,500
2012	Facebook	Instagram	1,000
2012	Microsoft	Yammer	1,200
2013	Google	Waze	970
2014	Apple	Beats Electronics	3,000
2014	Google	Nest Labs	3,200
2014	Google	Deepmind Technologies	625
2014	Facebook	WhatsApp	19,000
2014	Facebook	Oculus	2,000
2016	Microsoft	LinkedIn	26,200
2017	Apple	Shazam	400
2018	Amazon	Ring	1,000

Source: IG Group¹⁰⁵

Most of these transactions were not examined or examined only in Phase 1. Only the Google/DoubleClick and Apple/Shazam transactions received Phase 2 scrutiny and only Microsoft/LinkedIn was subject to commitments in Phase 1. There is no prohibition.

The panel therefore recommended **a reset for merger control:**

- mergers in the digital field should be a priority for CMA;
- The CMA could adopt a new approach known as the “**balance of harms**” test that would take into account the magnitude of the risks to competition associated with the development probabilities of markets after the transaction.
- A review of the merger rules in the digital sector could be carried out, in particular by publishing new merger guidelines and by assessing the consumer welfare criterion over the long term and beyond short-term price effects.

In enforcing competition law, the report’s proposals include making greater use of interim measures, streamlining investigations within the CMA and changing the grounds for appeal to the Competition Appeal Tribunal (CAT).

However, it acknowledges that these measures will not be sufficient.

One of the main recommendations of the Report is therefore to **create a Digital Markets Unit** with three objectives:

- participative regulation of designated “Strategic Market Status” platforms;
- promotion of enhanced data portability and interoperability;
- promotion of data openness, for example, to facilitate the “training” of artificial intelligence algorithms.

Asked about the ongoing debates on the functioning of competition in the digital economy and in particular on the report submitted to the European Commission last April, Marsden noted the many lines of convergence, particularly on the functioning of competition in the markets of the digital economy. Noting the existence of much work on the subject, both in the European Commission and in Australia, Marsden stated that the time for action has come.

Given the magnitude of the challenges and the rapid developments in the digital economy, Marsden stressed the importance of a flexible approach based on a Digital Markets Unit, codes of conduct determined jointly with the stakeholders and the identification of companies of particular importance for specific issues raised by the digital economy. Marsden also confirmed that many platforms were interested in the Digital Markets Unit, particularly by the opportunity to participate in working on the criteria for determining companies with “strategic market status”, which is less than dominance. The objective is to define rules that are targeted with stakeholders. In this context, he gave the example of the code of conduct for food retailers in the United Kingdom.

Finally, he stressed that particular attention must be paid to the challenges of the cloud with a high concentration and the systemic risks raised by their significance for data retention.