

CPI's Europe Column Presents:

Leave, Remain & Common Ground: Pragmatism in Dealing with Tech Giants

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In the last few years, a popular narrative is that the sky is falling: competition authorities have allowed too many mergers, digital markets are tipping, even with consumer benefits in terms of low prices or zero price and there are many harms to suppliers and indirect harms to consumers through loss of choice and privacy.

As a result, we have calls for greater and faster intervention in mergers and market activity, more political influence and less independence of decision-making.

This has fueled what I will call an antitrust LEAVE campaign, as in: leave the current relatively permissive approach, leave the consumer welfare standard, and Take Back Control from the titans.

This campaign is populist-led, with a disdain of experts and impatience at waiting for evidence before enforcing our laws.

Indeed, in this view, independent decision-making and economic analysis have allowed too much power in the hands of too few.



Leavers argue for:

- substantive changes to antitrust standards;
- reversing the burden of proof in mergers by large digital firms;
- more intervention focusing on structural harms relating to economic dependency;
- infusing competition law with such standards - Germany, France, Belgium, Austria, and Japan already do, and South Africa is moving that way; and
- structural remedies like price caps and market share caps or breakups.

Now there is some authority at the European level for enforcing competition law by looking at the competitive structure, and viewing competition as an institution, rather than a process. And there have been competition cases where intervention has been approved by the courts despite the theory of harm and the evidence not displaying any consumer welfare harm.

There is even some authority at the U.S. level: not so much MAGA (#makeantitrustgreatagain) as MAFA (#makeantitrustfairagain), that looks back at the pre-1970s case law and sees all manner of equity-based interventions including breakups, particularly where essential platforms were in one company's hands and it was self-preferencing and excluding rivals.

But rather than reach back into time, some jurisdictions are just going ahead and creating new rules where none have been before. We have seen one government enact laws to prevent digital companies from selling their own products on their own platforms, laws that actually

just protect a domestic rival. We have seen institutions that still lack merger control, bring injunctions to pause mergers pending review, but with no expertise on merger control within the authority.

These are not particularly welcome developments in terms of the rule of law and due process, or economic rationality - but the Leave campaign is about responsiveness, not analysis.



Unsurprisingly, there is another movement - to REMAIN. This is expert-led. It notes the many benefits of digital developments, for consumers and for small businesses, as well as the potential harms. It argues for a reasoned and, if any, incremental approach to developments.

Indeed, the campaign has one message, with two voices. The message is: there is no need to change anything substantive.

The first voice is that of the large tech firms and their many advisors, and they say: move along, there is nothing to look at here, competition is a click away. And by the way you should be grateful for all the innovation.

The second voice is of many competition authorities but with the same message: move along, there is nothing to look at here, antitrust and merger control are fit for purpose. Maintain evidence-led inquiries. Use existing leveraging theories, note past cases against pre-installation, against tying and against self-preferencing, and just do more of those cases. But do not do anything more radical, or you will jeopardize innovation incentives and investment for business, and tie up authorities and courts with endless appeals.

The enforcers at least do recognize they need to improve. They recognize that they have to get better at assessing harms to potential competition, particularly from so called "kill zone acquisitions." They have moved on from their renowned expertise at assessing static price effects to get better at understanding dynamic non-price effects. And on the procedural front, they need to develop their processes for requiring interim relief and frankly just act quicker when they can. They largely refuse to consider more substantive changes to their laws and approach, arguing that any suggestion that they need do anything more than get a bit better and a bit braver would be an admission that their current system is not fit for purpose, and would indeed risk the courts thwarting any acts of enforcement bravery or even an agency flexing its interpretation of its tests and powers. So, do nothing - but REMAIN expert-led, remain evidence-led, and remain removed from populist demands, even if that risks becoming irrelevant and legislated around by the Leavers.

Now, it is difficult to see how LEAVE and REMAIN can ever agree on anything. Is there another approach? Not a third way, not a middling compromise, but a true consensus based on the values of both, on which we can build a new "common ground"? (That after all was a phrase

Her Majesty Queen Elizabeth used earlier this year with respect to another distracting Leave and Remain faceoff.)

Common Ground: Pro-competitive Regulatory Codes of Conduct

Perhaps one approach is to question some of the current narratives. Chicken Little is not correct. The sky is not falling, the tech giants are not all run by creeps, and there are immeasurable benefits and other impacts from their offerings. Equally, while markets tip, they do tip again and again, and competition is often for the market. I do not have a Blackberry anymore, I have more than one social media account, I multi-bank, and when switching is relatively frictionless, I do so. That said, we cannot say all is well, and even a relatively technologically literate consumer can be subject to curated and behavioral prompts and biases. So we cannot be ostriches either, we cannot ignore the negative impacts from tech offerings, we do have evidence of actual ill-intent and of accidental harms that are a function of curated urgency and salience, and of distorted choice frameworks.

Yes, much of the conduct we are seeing is just “old wine in new bottles” and our traditional competition law analysis and narratives of leveraging and exclusion can handle many complaints. But it is not true that we should move along, that there is nothing to look at here. Clearly, competition is not truly a click away; clearly, data is not sunshine, not in a world of walled gardens; and clearly competition authorities should not be Chicken Little leaping at every shadow nor ostriches with their heads down in complete denial. Cases *are* slow, cases *are* few and far between, fines are huge and blunt, and authorities rarely offer any guidance to industry.

So, governments have to both get faster as well as take a longer view. So, we should implement the Remainer improvements, we should develop our analytical and procedural toolkit, and we should act quicker when we can.

But those are just tweaks. When a market tends towards one or only a few firms, policy interventions beyond standard competition policy are often required. And in the bigger picture, we do need to attend to the louder and broader concerns outside our church. One way of doing that would be to follow the call of Jean Tirole to build a progressive and participative regulatory regime in this area.

Can we build that common ground around a principled basis for *ex ante* procompetitive rulemaking? It is not much of a campaign slogan: “*What do we want? Common Ground! When do we want it? In due course!*” But it is quintessentially British.

One idea we explore in HM Treasury’s Furman Report, [Unlocking Digital Competition](#) is how we can set codes of practice: agreeing with industry acceptable norms of competitive conduct on how firms with “strategic market status” should act with respect to smaller firms and consumers who depend on them. This has a similar aim to antitrust enforcement. But given the challenges to antitrust in fast-moving markets where cases are always likely to take years to conclude, this pro-competition approach is to agree rules upfront with a more rapid system to resolve disputes. Personally, I would suggest a paper-based, time-limited arbitration mechanism with massive fines. But there are others.

A code could also include mandating interoperability between services: overcoming network effects which cause markets to “tip” by requiring systems to “talk” to each other using open, standardized formats. This will mean consumers can port their data between networks,

interact with users on other, similar networks, and smaller firms can plug their services into those of bigger ones. New business opportunities will open up that use, manage, and combine data made available. Consumers in turn will have new choices of digital services, with switching made much easier.

To build a common ground on an *ex ante* approach - we need a dialogue of all interested parties - and here in *Competition Policy International*, I hope we can continue the discussion, draw from the excellent suggestions already made in words (in Australia, in the EU, in the UK) and in deeds (in Germany and in France), and get past polarized debates and move to genuine and pragmatic solutions. If we do not, we could crash out of sensible antitrust enforcement altogether - which would not be a good deal for anyone. We need a backstop to prevent that. Engaging with the various tech companies, entrants, venture capital providers, officials, and consumer groups in debates on pragmatic ways forward appeals to the head, and may well appeal to the heart too if we can make it work!

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