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Handing regulators a blank cheque will make Britain a tech turn-off

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After harsh criticism of the Competition and Markets Authority's decision to stop Microsoft acquiring Activision Blizzard, one more measured remark really struck me. "I do think it's important all our regulators understand their wider responsibilities for economic growth," said Jeremy Hunt, the chancellor. Given that a core CMA mission is to foster competition to drive growth, that seemed a thinly veiled denunciation of its judgement.

As it approaches its tenth anniversary as Britain's competition regulator, more and more Tories and investors appear concerned at the CMA's direction. "When I recently sat down with major international businesses, complaint No 1 was not tax but the behaviour of our regulators," says Bim Afolami MP. Microsoft claimed the Activision decision had "shaken confidence" in Britain as a destination for tech investment; the Deliveroo founder Will Shu said recently that the CMA treated him like a criminal when Amazon invested in his business.

These companies have self-interested gripes. But competition experts have noted a marked shift in aggression from the CMA too. David Parker, of Frontier Economics, calculates that the CMA blocked only 30 per cent of mergers between 2013 and 2017 at the important stage where the regulator investigates whether a merger will or might result in a meaningful lessening of competition. That has since risen to 57 per cent, including controversial decisions involving non-British tech companies.

Indeed, the CMA appears to see itself as a world competition policeman. It blocked Meta from purchasing the gif repository Giphy, for example, in part on the highly speculative grounds that a bunch of animated images might some day become a significant competitor to Facebook for digital advertising. Meta was forced to sell Giphy at a $260 million loss, despite Amazon and TikTok making huge inroads into the digital advertising market anyway.

Microsoft was blocked from acquiring Activision, the producer of Call of Duty, over fears about the future of cloud gaming competition. The EU harboured similar concerns, but accepted Microsoft's commitments to maintaining open access to games — measures the European Commission thought actively enhanced competition relative to today. The CMA's rigid ideological preference for structural solutions — such as outright merger blockages — over these "behavioural remedies" has seen the UK adopt a less permissive landscape than even the EU.

Former insiders point to several factors explaining the CMA's direction. Intellectually, the shift has been driven by US research indicating increased business concentration and profit mark-ups across various sectors. Many have construed this as a sign that competition regulators were previously too lenient towards mergers. Coupled with American progressive vibes that looking at economic outcomes, like prices and output, is insufficient for assessing the harms of Big Tech's power, it means there's been a drumbeat for tighter merger rules and tougher enforcement on tech businesses worldwide.

A change of the CMA guard from 2017-18 was another factor. Between 2014-15 and 2016-17, the CMA's panel of members tasked with running merger and market inquiries remained essentially unchanged. During 2017-18, however, 24 members' terms expired and over the following two years 22 people were appointed. This rapid turnover brought a whole new cohort more amenable to the prevailing winds and with greater unified loyalty to the permanent CMA's desires.

The Conservative government's instability has contributed too. There have been seven secretaries of state for the business department that oversees the CMA since 2016, making a mockery of the hope for meaningful oversight or strategic direction. In the vacuum, the CMA sought more powers and the government went along with the zeitgeist, despite little evidence tech companies' conduct actually harms consumers. The largest step is the CMA's forthcoming digital markets unit (DMU), currently awaiting legislative approval.

The proposed regulatory body would initially ensnare only Google, Amazon, Apple, Meta and Microsoft. However, it would enable the CMA to micromanage them through bespoke company "code of conduct" regulations, with minimal government oversight. Recent criticisms of the CMA have made some Conservatives nervous about handing over such a "blank cheque" of regulatory powers as the Digital Markets, Competition, and Consumers Bill makes its way through parliament.

The bill would grant the CMA the power to levy fines of up to 10 per cent of a company's global turnover, to mandate data sharing, and to enforce business restructuring on the world's largest firms. Many Conservative MPs fear technologists will subsequently see Britain as a hindrance to, rather than an attractive market for, delivering their particular innovation. They're particularly wary of conferring upon the CMA the tripartite authority of being a "legislator, investigator and executioner", as one KC put it.

The concern among MPs has intensified as the proposed legislation stipulates that the DMU's decisions can be challenged solely through a judicial review, which focuses on the legality of the process rather than the decision's merits. "That sends a subtle but very important signal to companies and investors outside of this country," Afolami said in parliament.

The substance of the bill should be a worry too. Technology markets are dynamic. Few had heard of ChatGPT or the AI technologies six months ago, nor did older CMA analysis foresee the success of social media companies like TikTok. Yet the DMU would grant the CMA powers to structure markets according to its preconceptions of what competition should look like, potentially stifling the development of the complex, diverse ecosystems of products we see today.

If the UK demonstrated robust economic growth and political stability, and had reformed other constrictive regulations on housing and childcare, tech entrepreneurs might be assured that future governments would seamlessly course-correct if the DMU proved too intrusive. Without such evidence, these proposals contribute to the growing perception that economic regulation in the UK seeks to find reasons to stop things happening, rather than facilitating the innovations that spur progress.

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