

# Competition policy update required to tackle challenges of digital economy

March 2019

So concluded the 150-page [report](#) of the Digital Competition Expert Panel, commissioned by Chancellor Philip Hammond in the autumn and published last week (Report). The Report, also known as the Furman Review after the Harvard professor and former chief economic adviser to President Obama who led the panel, finds that competition in digital markets is currently insufficient, but is nevertheless possible with the right policies.

To this end, the Report puts forward a number of proposals - aimed not only at updating existing competition tools, but also at establishing a forward-looking, pro-competition approach to encourage businesses *“to start, compete and grow alongside and around the big platforms”*.

## Digital markets unit

A central recommendation, in line with a recent House of Lords committee [report](#) is the establishment of a digital markets unit, backed by new regulatory powers. The unit would have three core pro-competition functions:

- *Code of conduct* - To complement antitrust enforcement - so often criticised for being too slow and unpredictable for fast-moving, highly complex tech markets - the digital markets unit should develop a code of conduct for digital platforms designated as having “strategic market status”,<sup>1</sup> to clarify *“the rules of the game”*. The Report does not set out in any detail the behaviour that would be proscribed by the code, nor how that behaviour would relate to traditional antitrust theories of harm - there is however some suggestion that the code could extend beyond the reach of existing competition law and possibly even prohibit conduct which is currently legal.
- *Personal data mobility and open standards* - Consumers should have greater control over their personal data, and be free to move it or share it between digital platforms *“at the click of a button”* (for example, moving from one social network to another, or trying out an innovative new service). Systems based on open standards should also be pursued where these would encourage competitive opportunities and innovation.
- *Data openness* - To tackle data barriers to entry, the digital markets unit should be able to require digital businesses to make their data available (in compliance with privacy legislation). The Report

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<sup>1</sup> No metric has been suggested for how to determine firms’ status, although the Report suggests it might be those who have enduring market power over a strategic bottleneck market.

considers this one of the more interventionist measures proposed, and cautions that careful consideration would be required before the digital markets unit employed such a tool.

## Merger control

The Report also recommends updates to the core competition tools. Recent debate in the sphere of merger control has focussed on so-called “killer acquisitions”.<sup>2</sup> In a departure from much of the commentary in this area, the Report declines to advocate the introduction of transaction value thresholds<sup>3</sup> or a blanket presumption against digital mergers. Instead, it recommends that the CMA “*take more frequent and firmer action*” in digital markets. In particular:

- *High priority* - The CMA should give higher priority to mergers in digital markets. The CMA will clearly have to balance this recommendation with the other considerable demands on its resources, given the anticipated increase in the CMA’s workload following Brexit and CMA Chairman Lord Tyrie’s recent [suggestion](#) that certain transactions be required to seek pre-closing approval.
- *Mandatory notification* - Tech companies designated as having “strategic market status” should be required to make the CMA aware of all intended acquisitions.
- *“Balance of harms” approach* - The Report proposes moving to a “balance of harms” approach, under which the CMA could take into account the scale as well as the likelihood of harm when deciding whether to prohibit a transaction.<sup>4</sup> What is not clear is how such an approach will make it easier to identify which mergers are anticompetitive. Moreover, in practice the CMA already can - and does - adopt such an approach under the existing framework.

## Antitrust

The key weakness of antitrust enforcement in digital markets is, according to the Report, its infrequent use and the length of time it takes for cases to reach a conclusion. The Report’s recommendations include:

- *Increased use of interim measures* - Whilst the CMA already has powers to impose interim measures, it rarely uses them. The interim measures process should therefore be streamlined to facilitate and encourage their use to restrain suspected anti-competitive practices.
- *Reform to appeals of antitrust cases* - Echoing Lord Tyrie’s [recommendations](#), the Report proposes that the standard of review applied by the Competition Appeal Tribunal to antitrust cases be more closely aligned with that of judicial review. In tandem with such a change, the CMA’s internal decision making structure for antitrust cases should be amended to guarantee sufficient independence.

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<sup>2</sup> Whereby large digital companies acquire smaller innovative companies in an attempt to eliminate a future rival, often avoiding scrutiny altogether (or, where subject to scrutiny, securing unconditional clearance).

<sup>3</sup> The Report does however consider that transaction value thresholds might be appropriate should it become apparent in future that certain (non-horizontal) mergers escape scrutiny due to meeting neither of the UK merger control thresholds.

<sup>4</sup> Transactions are currently blocked in the UK only if a substantial lessening of competition is more likely than not.

## Digital advertising

The Report joins the [Cairncross Review and Digital, Culture, Media and Sport Committee](#) (amongst others) in asking the CMA to investigate the digital advertising market. In particular, the Report finds that the structure of the market (where businesses are present at multiple points in the value chain and therefore able to grant preferential treatment to their own ad tech services), might lead to anti-competitive practices.

## Next steps

It remains to be seen whether and how these recommendations will be implemented. In any event, any changes will not be immediate - whilst some recommendations could be implemented within the existing legal framework, a number would require legislation.

More likely in the near future is that the CMA will announce a market study into digital advertising - Chancellor Philip Hammond has already added his [voice](#) to those calling for such a review. Nevertheless, the CMA has [reiterated previous comments](#) that *“its ability to launch new projects is heavily dependent on”* what happens with Brexit.



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