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# The future of digital regulation

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Briefing paper and questions for discussion

Oxera roundtable event

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# 1 Overview

Oxera's discussion event on the future of digital regulation comes at a time of heightened focus on the wider impact that 'Big Technology' is having on society. Many of the issues presented by digital markets are unlike those that regulators have grappled with previously. A new range of commercial tools and approaches are being introduced, such as the data-driven personalisation of prices and product offerings, or zero-priced service offers that monetise user data for revenue. At the same time, established business models—such as advertising-funded free content or the matching of buyers and sellers for a commission—are being deployed on a scale that has never seen before.

Digital markets have undoubtedly offered substantial benefits to:

1. consumers, who access a range of valuable service and content at no (monetary) cost;
2. traditional businesses, which benefit from reduced costs and improved access to potential customers;
3. start-up businesses, such as small-scale online sellers or independent video producers, that can reach an audience and monetise their products.

However, along with these benefits come new concerns. Principal among these is the risk that network effects and scale economies—inherent to digital business models—result in the consolidation of market power and reduced contestability for digital markets.<sup>1</sup> Questions are also being asked about whether the 'price' paid by consumers in terms of foregone privacy is too high,<sup>2</sup> while competition authorities around the world are examining whether digital players are squeezing out competitors.<sup>3</sup> At the same time, content producers fear that the platforms they rely on to reach their audiences will keep an excessive share of the value created. Those platforms, meanwhile, are facing ever tougher calls to monitor the material being distributed over their services in order to prevent harmful content reaching vulnerable consumers.<sup>4</sup>

Against this backdrop, there is a growing consensus that policy and regulatory changes may be needed if society is to continue benefiting from vibrant digital markets. In the UK context, the Digital Competition Expert Panel has made six strategic recommendations, along with 20 supporting recommendations.<sup>5</sup>

The first of its strategic recommendations calls for the creation of a 'digital markets unit' (hereafter referred to as a 'digital regulator') tasked with securing competition, innovation and beneficial outcomes for consumers and

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<sup>1</sup> As noted, for example, by the Furman Review, or the European Commission's report on competition policy for the digital era. See Digital Competition Expert Panel (2019), 'Unlocking digital competition', March (hereafter referred to as the 'Furman Review'; European Commission (2019), 'Competition policy for the digital era'.

<sup>2</sup> Such as Scott-Morton et. al (2019), 'White Paper from The Stigler Center Committee for the Study of Digital Platforms - Market Structure and Antitrust Subcommittee', 15 May <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F>

<sup>3</sup> For example, the European Commission's Google Shopping and Android cases focus on foreclosure.

<sup>4</sup> See HM Government (2019), 'Online Harms White Paper', April, <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>.

<sup>5</sup> The Digital Competition Expert Panel (chaired by Professor Jason Furman), established by the Chancellor in September 2018, was asked to consider the potential challenges and opportunities the emerging digital economy may pose for competition and pro-competition policy. It reported its findings and recommendations in the Furman Review.

businesses.<sup>6</sup> This proposal by the Furman Review—which the UK Government has accepted and is now working to implement—is the main focus of Oxera’s roundtable discussion event.

In the Furman Review, the proposal to create a new digital regulator is primarily aimed at addressing a perceived enforcement gap with existing ex post competition policy rules. Several other reviews have been conducted on the impact of online platforms in other areas, such as:

- data protection and privacy;<sup>7</sup>
- intermediary liability in the context of online harms<sup>8</sup> and copyright violations;
- the impact on online platforms on journalism and democracy;<sup>9</sup>
- broader considerations regarding fairness and transparency.<sup>10</sup>

Therefore, throughout this briefing paper and at the discussion event, we will be considering how the Furman Review proposals interact (and may sometimes be in tension) with calls for new specialist regulators to deal with these different ‘pillars’ of the online platforms regulation debate.

The remainder of this report is structured as follows.

- In section 2, we outline the benefits and concerns that digital markets bring and highlight the tensions that exist between different social priorities.
- In section 3, we consider scope of regulation and the thresholds for regulatory intervention, focusing on Furman’s proposal to regulate digital firms with ‘strategic market status’;
- In section 4, we discuss what that intervention should look like.
- Finally, in section 5, we ask whether securing competition alone is enough to ensure the outcomes that we want as a society, or whether a digital regulator needs to do more.

Throughout the briefing paper, we have included a number of questions that will guide our discussion at the event, summarised in Box 1.1 below.

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<sup>6</sup> The Furman Review, p. 8.

<sup>7</sup> An area governed by the General Data Protection Regulation (GDPR) and enforced in the UK by the Information Commissioner’s Office (ICO).

<sup>8</sup> UK Government (2019), ‘Online Harms White Paper’, 26 June,

<https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>.

<sup>9</sup> See, for example, the Cairncross review of journalism: Cairncross (2019), ‘The Cairncross Review: A Sustainable Future for Journalism’, 12 February); and the House of Commons Digital, Culture, Media and Sport (DCMS) Committee report on disinformation and ‘fake news’ (House of Commons Digital, Culture, Media and Sport Committee (2019) ‘Disinformation and ‘fake news’: Final report’, Eighth Report of Session 2017–19, HC 1791, 18 February), ICO (2018), ‘Democracy disrupted? Personal information and political influence’, 11 July.

<sup>10</sup> For example, on 20 June 2019, the European Commission adopted EU Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

**Box 1.1**      **Questions for discussion****Session 1: Who and when**

*The scope of regulation and the threshold for intervention:*

- what does the concept of 'strategic market status', as mentioned in the Furman Review, mean? How is it different from existing thresholds?
- will this concept provide sufficient legal certainty for digital market participants?
- is there a need for a different standard to apply in digital markets, or would one or more of the existing standards in competition law or economic regulation be sufficient?
- should the standard of proof be different for ex ante regulation, compared with ex post competition enforcement?

**Session 2: What and how**

*The powers of the digital regulator and how it should use them:*

- what type of tools and remedies would the digital regulator have at its disposal?
- how should it decide which ones to use in different situations?
- what can we learn from the approach to regulation by sector-specific bodies, such as Ofcom and the Financial Conduct Authority (FCA)?
- is there an alternative way, such as the European Commission's platform-to-business regulation?

**Session 3: Is competition enough?**

*Towards a holistic approach to digital regulation:*

- what are the 'right' outcomes that we would like to see in digital markets, and is more competition always the right way to achieve these outcomes?
- what is the risk of unintended consequences arising from excessive or inappropriate regulation in digital markets?
- in light of this, what specific roles and objectives should the digital regulator have, and how should it interact with the existing regulators (Ofcom, FCA, ICO, CMA, etc.)?
- in five to 10 years' time, how will we judge if the digital regulator has been successful in fulfilling its duties?

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## 2 Digital markets: benefits and concerns

In the UK, Europe and around the world, consumers and businesses are increasingly reliant on digital technologies. For consumers, digital tools play an increasingly prevalent role in all aspects of daily life, including communicating, building relationships, searching for jobs, shopping, entertainment, travel, education, and personal finance—to name just a few. For businesses, online platforms provide new opportunities to connect with consumers on a global scale, but digital disruption also threatens traditional business models as new market gatekeepers are created and relationships with workers and customers are transformed.

In this section, we first provide a definition for digital markets, before discussing the benefits and concerns arising from the growth in these markets and highlighting the tensions that exist between different social priorities.

### 2.1 What are digital markets?

Furman adopts a broad definition for digital markets, encapsulating:

... areas where the intensive use of digital technology is central to the business models of the firms that operate primarily within them and where this raises challenges for competition.<sup>11</sup>

Within this, the review highlights three business areas of particular interest:

1. online platforms;
2. data accumulation;
3. digital advertising.

We briefly consider the key defining features of each below.

#### 2.1.1 The online platform business model

In its 2015 consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, the European Commission defines an online platform as:

... an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.<sup>12</sup>

This definition highlights the key economic principle of online platforms: that value is created by bringing together two (or more) distinct 'sides' of the market (e.g. buyers and sellers, users and developers, advertisers and consumers, etc.). As such, the value a user gets from a platform can depend (at least in part) on the number of other users on the platform. Furthermore, the value derived from the platform will often differ by user group, making it optimal for platforms to charge different prices to different sides of the market.

In practice, this often means consumers receive digital services for free (such as search tools, social media, communications, or content) in order to attract them to the platform. The platform then takes a share of the value created as it

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<sup>11</sup> The Furman Review, para. 1.26

<sup>12</sup> European Commission (2015), 'Consultation on Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy', 24 September, p. 5.

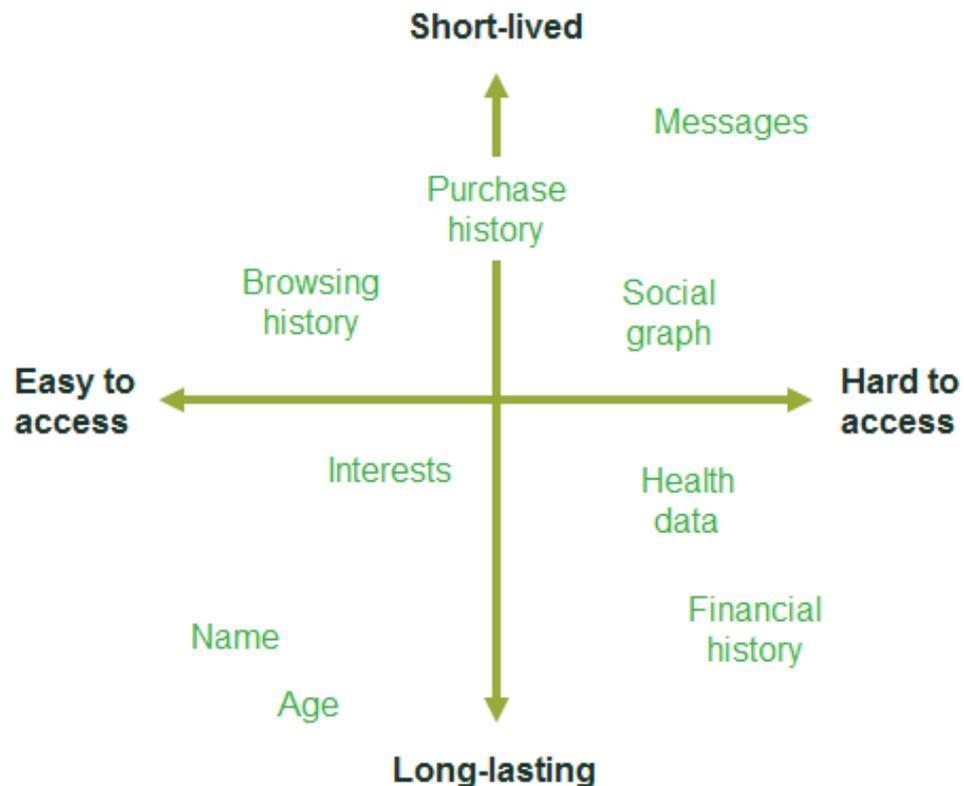
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matches these users with companies on the ‘other side’ of the market (such as suppliers or advertisers).

### 2.1.2 The value of data

In what might be considered an evolution to the simple matching of two sides in a market, many platforms now generate considerable value from insights derived out of the user data they accumulate in the course of their day-to-day operations. Platforms can monetise this data in a variety of ways, from selling general insights into trends and preferences of consumers, to offering highly-targeted advertising services across their platform. The data may also be used to gain a commercial advantage by informing product innovations, personalising goods and services, or differentiating prices. However, not all data is equally valuable. Persistent data that is easily obtained (such as name or date of birth) are generally of low value, while specific, real-time information (such as purchasing intentions) can be highly valuable and impossible to reproduce. See Figure 2.1 for examples of these characteristics across different user data.

Figure 2.1 Differing characteristics of selected user data



Source: Oxera.

Furthermore, while the consolidation of different types of data may provide a commercial advantage, Furman highlights that data is non-rivalrous by nature.<sup>13</sup> This means that its collection and use does not prevent a competitor doing the same—unless legal, technical or regulatory barriers are put in place.

<sup>13</sup> Furman Review, para. 1.41.

### 2.1.3 The critical role of digital advertising

Funding the provision of goods or services through advertising is not unique to digital markets. For decades, free-to-air TV channels have provided valuable content to consumers free of charge. In return, viewers implicitly agree to spend 20% of that time watching adverts.<sup>14</sup> What is unprecedented is the scale, scope and precision with which online platforms can deliver increasingly tailored advertising messages to consumers.

The technical improvements online platforms offer in the matching of the two ‘sides’ of the market has the potential to generate significant value for advertisers looking to maximise their returns to marketing. In 2017, digital advertising represented more than half of the UK’s £22.2bn total advertising spend.<sup>15</sup> Of this, 54% accrued to the major online advertising platforms—to Google for search adverts, and to Facebook for display ads.<sup>16</sup> At the same time, advertising accounted for the vast majority of the revenue earned by each of these firms (well over 90%).

It is not just platforms that depend on these advertising revenues. Ad funding plays a crucial role in the financing of creative content, including news and current affairs as well as art and entertainment, and ensuring that these producers receive a fair share of the proceeds for their work is critical to maintaining a healthy production ecosystem. However, the complex—often vertically integrated—digital advertising markets can create adverse incentives. For example, with platform algorithms designed to maximise advertising revenues by promoting the most engaging content, producers can find themselves incentivised to put popular ‘click-bait’ ahead of high-quality content. With online news sources playing an increasingly prominent role, this can have a knock-on effect on the state of public discourse and democracy.

## 2.2 How does society benefit from digital markets?

The reach of digital markets has grown enormously over the last decade, bringing a host of substantial benefits to consumers and businesses alike. This change is driven by a combination of increased computing power, advances in algorithms, availability of data and ubiquity of high-speed internet connections. With these tools, digital disruptors are reducing transaction costs by improving ‘matching’, leading to the opening of new markets and increasing opportunities in existing industries.

For example, online shopping and price comparison websites offer consumers increased convenience and an improved awareness of the options available when making purchases. It is estimated that Europeans save between 8 and 15 minutes per month due to the convenience of comparison websites, while the increased choice and awareness that these sites offer is thought to save them between €12 and €117 per year.<sup>17</sup> Furthermore, many digital services are offered at zero (monetary) cost to consumers. This includes productivity services, such as searching and email, as well as entertainment services, such as video sharing and social media.

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<sup>14</sup> The revised Audio Visual Media Services Directive (AVMSD) that regulates AV services in Europe stipulates that advertising slots must not exceed 20% of each 12-hour period between 6:00 and 18:00 and vice versa. Directive (EU) 2018/1808, Art.23.

<sup>15</sup> Plum (2019), ‘Online advertising in the UK’, for DCMS, January, Figure 3.2, p. 35.

<sup>16</sup> Furman Review, para. 1.50.

<sup>17</sup> Oxera (2015), ‘Benefits of online platforms’, prepared for Google, October, p. 32.

Europe's businesses also benefit from this growth in digital platforms, reporting easier access to wider markets and important insights from increased consumer feedback.<sup>18</sup> Targeted advertising and recommendation algorithms allow firms with innovative new products to find interested consumers, while global platforms allow niche product providers to reach a global market.

Finally, while the arrival of digital platforms has been disruptive for some producers, for others it has provided the opportunity to build relationships directly with customers and audiences to earn an increased income from their products, content or services.

### **2.3 What concerns have been raised?**

Along with these benefits, the scale and reach of digital businesses and online services have introduced a range of new concerns for society and government. The Furman Review focuses on issues of competition in digital markets—particularly the concentration and market power that results from 'tipping' into winner-takes-most outcomes. It highlights the role that key market features such as economies of scale and scope, network effects and behavioural biases play in cementing this market power. However, a number of recent mergers,<sup>19</sup> competition cases<sup>20</sup> and government-led investigations have raised a range of additional concerns. These can be grouped into four main areas:

1. competition;
2. liability (including copyright);
3. data and privacy;
4. fairness.

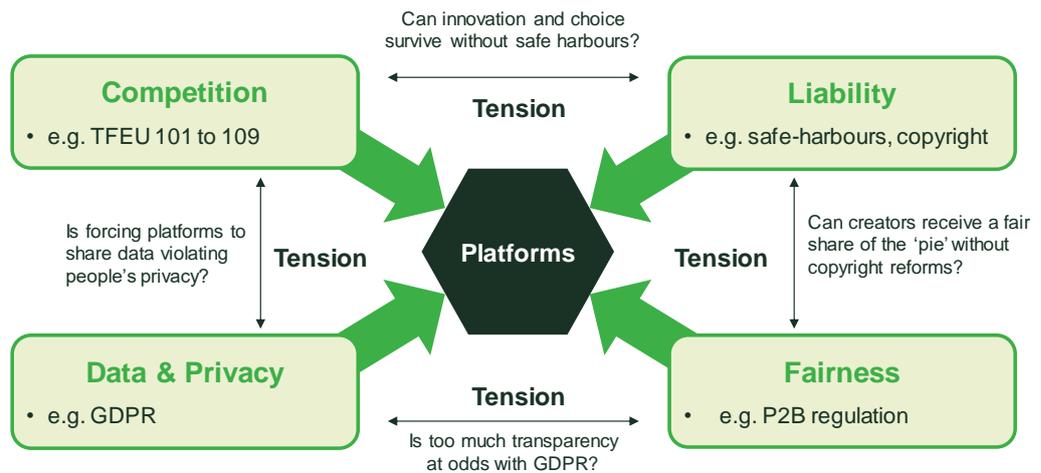
Some of these issues, such as ensuring fair treatment for platforms' business partners, have parallels with the concentration and market power concerns raised by Furman. However, as Figure 2.2 shows, there are also tensions between these additional areas of concern and existing (as well as proposed) provisions in competition law. We summarise the key issues and some of the resulting tensions between these areas of concern below.

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<sup>18</sup> Oxera (2015), 'Benefits of online platforms', prepared for Google, October, p. 38.

<sup>19</sup> Merger cases include: EC Case No. COMP/M.4731 – Google/DoubleClick in 2008; EC Case No. COMP/M.6281 – Microsoft/Skype in 2011; UK OFT, case ME/5525/12 in 2012; EC Case No. COMP/M.7217 – Facebook/WhatsApp in 2014; and EC Case No. COMP/M.8124 – Microsoft/LinkedIn in 2016.

<sup>20</sup> Antitrust cases include the various investigations against Google by the European Commission, starting in 2010 with Google Shopping, followed by Android in 2015 and AdSense in 2016; the formal investigation into Amazon's use of third-party seller data collected from its marketplace; and the decision by the Bundeskartellamt (BKartA) against Facebook for abusing its market power in social networks.

**Figure 2.2 Four pillars of digital regulation**

Source: Oxera

### 2.3.1 Competition theories of harm

Many cases and investigations have concluded that digital markets frequently feature strong network effects that encourage them to 'tip' toward a single dominant competitor, resulting in limited competition *in* the market. Meanwhile, economies of scale and scope—such as the frequently cited user data advantages—can result in a consolidation of that position, restricting the ability to compete *for* the market. This can mean that 'winning' firms enjoy a position of significant market power—which, in turn, could result in harm to consumers and the process of competition through practices such as leveraging, discrimination (in search results or the use of data), bundling and tying, or exclusive dealing.

Various remedies have been suggested to combat this consolidation and maintain contestability in these markets. For example, the sharing of data is a frequent recommendation (also made by Furman) that could serve to both reduce network effects and lock-in and facilitate the training of the algorithms that new entrants need in order to compete effectively. However, this introduces a tension with the privacy concerns also raised in the wider debate—with increased data sharing to facilitate competition potentially at odds with tighter personal data controls.

### 2.3.2 Liability issues

Similar tensions arise when considering the case of platform liability. While holding platforms liable for the content they host may facilitate the enforcement of intellectual property rights and indecent content controls, the increased regulatory burden and associated cost can act as a barrier to entry and dampen competition.

This may particularly be the case for smaller, niche services that cannot reach the scale required to absorb the liability risk and/or compliance costs. In these cases, the businesses and consumers benefiting from the reduced transaction costs these services would otherwise offer will remain unserved as a result.

### 2.3.3 Data protection and privacy concerns

Concerns have been raised about user's lack of choice when it comes to the use of their personal data. The network effects and resulting market power

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enjoyed by many online services (such as social networks or e-commerce marketplaces) mean that users generally face a ‘take-it or leave-it’ choice when it comes to terms of service and the use of their personal data.

Although these services are often provided for free to consumers, this does not automatically mean that consumers are not over-paying through other means—in particular, with their data. New laws, such as the EU General Data Protection Regulation of 2016 (GDPR) aim to strengthen consumer rights in relation to the collection and use of their data. However, users’ behavioural biases—such as simply accepting data protection terms at the end of a long registration process, or habitually clicking on user consent pop-ups without reading them—are limiting their effect.

#### **2.3.4 Fairness considerations**

With many online platforms increasingly playing a ‘gatekeeper’ role between businesses and their customers, a responsibility to act fairly and transparently is critical for effective competition throughout the value-chain.

For example, the audience for content creators or customers for online sellers often depends upon the position they are given by a platform’s ranking algorithms, which can depend upon a variety of factors (including payments, as well as quality and suitability). However, these ranking algorithms (and even the supplier’s inclusion on the platform) can often be changed without warning, and in some cases they are provided by vertically integrated players that are competing with the suppliers.

As we discuss further in section 4.3, the European Commission’s recent Platforms-to-Business (P2B) regulation aims to address many of these concerns by requiring online platforms to make their terms and conditions easily available. These terms and conditions must include explanations for ranking outcomes, descriptions of the type of data that businesses can access, and provide business with an opportunity for redress in the case of disputes. At the same time, by allowing platforms to maintain commercial freedom, the P2B regulation aims to avoid quashing the scale and scope benefits that efficient platforms can bring.

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### 3 Session 1: who and when? The scope of regulation and the threshold for intervention

#### Box 3.1 To discuss:

- What does the concept of 'strategic market status', as mentioned in the Furman Review, mean? How is it different from existing thresholds?
- Will this concept provide sufficient legal certainty for digital market participants?
- Is there a need for a different standard to apply in digital markets, or would one or more of the existing standards in competition law or economic regulation be sufficient?
- Should the standard of proof be different for ex ante regulation, compared with ex post competition enforcement?

The central recommendation in the Furman Review is the establishment of a new 'pro-competition digital Markets Unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses'.<sup>21</sup>

The panel seems to be primarily concerned with the lack of contestability in digital markets. It considers that neither the market by itself nor the existing regulatory tools are sufficient to fix this issue, so it aims to put in place a regime that can:

[...] design and effectively implement the functions that can increase the competitiveness and contestability of digital markets ex ante.<sup>22</sup>

The Furman Review anticipates that the successful implementation of the recommendations would lead to companies producing better outcomes for consumers, increased entry and growth of businesses and continued incentives to innovate. Specifically, the Furman Review considers that a pro-competition approach, together with the ex post rules already in place, could:

- incentivise entry by new and smaller digital businesses, who would be able to create new niches with a lower risk of being squeezed out of the market;
- increase predictability and provide certainty about the rules and standards that digital businesses must apply;
- spur innovation;
- benefit consumers through driving competition on quality, which could include aspects around privacy and treatment of personal data;
- lead to lower prices in markets where smaller firms are present (for example, through passed-on lower advertising costs).<sup>23</sup>

In section 5, we consider whether the premise that competition-focused objectives (as set out in Furman Review) are sufficient to ensure good outcomes for businesses and consumers, and how to navigate the tensions that may arise with other policy objectives.

In the remainder of this section, we take the above premise as given and start the discussion on when would ex ante regulatory intervention be justified. In

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<sup>21</sup> Furman Review, p. 8.

<sup>22</sup> Furman Review, p. 84.

<sup>23</sup> Furman Review, p. 56.

other words, what would the appropriate threshold be for regulatory intervention by the proposed digital regulator?

### **3.1 When should pro-competition regulation be imposed?**

Drawing a line to define which companies will be regulated is a complex exercise. A key element in that exercise is making sure that regardless of where the line is ultimately drawn, all firms have a reasonable degree of certainty about which side of the line they sit on. This requires a clear, well defined legal test that provides a ‘threshold’ for the point at which an operator in the market may be susceptible to ex ante regulatory obligations.

The Furman Review notes:

[A] key component of this system is to develop a clear legal test for the characteristics of a company’s market position above which regulatory powers are appropriate. This needs to be carefully designed to identify where companies operating platforms are in a position to exercise potentially enduring market power, without granting an excessively broad scope and bringing within the bounds of regulation those companies who are effectively constrained by the competitive market. Only a small number of companies should be within the definition of a well-defined test that matches the characteristics of the sector.<sup>24</sup>

These desired characteristics for a legal test seem sensible, but they do not offer sufficient clarity regarding where the threshold will stand. What timeframe should we consider when determining ‘enduring market power’? How can firms know whether they are ‘effectively constrained’ by the competitive market they operate in? Finally, how small is ‘a small number of companies’?

### **3.2 The proposed threshold: strategic market status**

The Furman Review’s proposed threshold for intervention is the concept of firms with ‘strategic market status’ (hereafter, ‘SMS’). However, it does not provide a precise definition for SMS. Instead, it calls for the government to consider this issue carefully and to consult before adopting one. Furman does outline some of the characteristics that firms with SMS would be expected to have, which include:

- enduring market power over a strategic bottleneck;
- the ability to control others’ market access;
- the ability to charge high fees;
- the ability to manipulate rankings or prominence;
- the ability to influence the reputation of others.

From the above, it would appear that Furman suggests looking into the origins of the market power and the conditions for its persistence to find out whether a firm has SMS.

The considerations to assess market power include aspects such as economies of scale and scope, data advantages for incumbents, network effects, limitations to switching and multi-homing and access to finance and

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<sup>24</sup> Furman Review, p. 81.

intangible capital. Digital markets are considered to be ‘unique’ in that they are more likely to feature all of the above characteristics combined.

Regarding the persistence of the dominance, the Furman Review suggests looking into whether firms compete *for* the market or *in* the market, whether firms have enjoyed their prominent position for a long period of time, their scale, the personalisation and value of user data, the importance of the ecosystem, and whether the firm carries out ‘strategic investments’ to pre-empt being side-lined by a disruptor (e.g. through what are being called ‘killer acquisitions’).

### 3.3 Do we need a new regulatory threshold?

Over many years, competition law and economic regulation have developed well-defined and legally tested thresholds for intervention. These include:

- the concept of dominance under Article 102 TFEU and Chapter II of the UK’s Competition Act;
- significant market power (SMP) in telecoms regulation;
- the concept of economic dependence that exists in the competition regimes of some European countries;
- the significant impediment to effective competition test (SIEC) from merger control;
- the adverse effects on competition (AEC) test from the UK market investigation regime.

Given that these thresholds have been developed over many decades of case law and legislation, it is worth considering carefully whether these standards are truly inadequate or unsuited for digital markets—and, if so, in what way. Below, we briefly discuss the key characteristics of the first three standards (dominance, SMP and economic dependence) and contrast them with the SMS standard proposed by Furman.

We note that we are explicitly leaving out from this discussion the SIEC and AEC tests because the Furman proposals appear to rule out an intervention threshold based on overall features or effects in a market, absent a link to a ‘strategic’ market position by one or more firms. Of course, the analysis underpinning these tests would still be relevant, in particular when assessing what form any intervention should take, targeted at a specific theory of harm. This is an issue we discuss in section 4 below.

#### 3.3.1 Dominance

Following the European Court of Justice (ECJ) in *Hoffman-La Roche*, dominance is generally considered to be:

[...] a position of economic strength, which enables an undertaking to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.<sup>25</sup>

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<sup>25</sup> Hoffmann-La Roche & Co. AG v Commission of the European Communities, Summary, para. 4.

Crucial in this definition is the existence of a ‘relevant market’ and the undertaking behaving independently of its competitors, customers and consumers. In practice, this has translated into the need to assess a range of criteria that collectively may indicate the existence of dominance.<sup>26</sup> Many of these criteria are factors that the Furman Review lists as considerations that may give rise to SMS. However, no direct link has been established between dominance and SMS in the Furman Review.

In terms of a specific example, when discussing Facebook and Google, the Furman Review notes that:

the dominance in digital advertising revenues is linked to the **dominance of these two companies in the attention market** (emphasis added).<sup>27</sup>

However, if this is intended to mean dominance in the strict competition law sense, a relevant ‘attention market’ must first be defined before assessing whether or not these firms held a position of *joint* dominance in that well-defined market.

### 3.3.2 Significant Market Power (SMP) in electronic communications

In 2002, the electronic communications services (telecoms) regulatory framework in Europe was reformed to align the analysis conducted by regulators with the process followed by competition authorities under competition law. Telecoms regulators have since been required to define relevant economic markets and identify whether one or more operators active in these markets hold SMP—a position equivalent to dominance under competition law. There are, however, a number of important differences between competition law and the *ex ante* telecoms framework.

One of the main differences is that while dominance is assessed *ex post* in competition cases, regulators assessing SMP must take a forward-looking perspective. Furthermore, under competition law, holding a position of dominance is not penalised—only abuses of dominance are deemed unlawful. However, under the telecoms regulatory framework, regulators are obliged to impose remedies on firms with SMP without requiring any anticompetitive effects or harm to consumers to be demonstrated; such harm is hypothesised to exist in the absence of remedies as a result of a firm’s SMP status.

This feature explains why only relevant markets that pass the three-criteria test are deemed susceptible to *ex ante* regulation. The three-criteria test assesses:

- the existence of high and non-transitory entry barriers;
- the absence of dynamic competition behind entry barriers;
- the insufficiency of EU competition law alone to address the identified market failure(s).

The Furman Review has suggested that the SMP framework would be a good starting point for SMS. However, just like the concept of dominance, a finding of SMP requires a well-defined relevant economic market, and a rigorous assessment of competition. Furthermore, regulation on more than one firm can only be imposed following a finding of joint SMP, which has its own set of tests based on standards defined in case law from the European courts.

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<sup>26</sup> For example, market shares, barriers to entry and expansion, economies of scale and scope, direct and indirect network effects, absence of countervailing buyer power, etc.

<sup>27</sup> Furman Review, para. 1.53.

Applying these principles to the Furman Review proposals and the specific case of digital advertising markets raises the question of whether there would need to be an equivalent concept of joint SMS—and, if so, what that would look like.

### 3.3.3 Economic dependence

Several EU member states, including Belgium, France, Germany and Italy have introduced the concept of abuse of economic dependency in their national competition laws. This category of abuse is aimed at protecting smaller firms from harm caused by the practices of larger trading partners who may not necessarily hold a dominant position in a relevant market.

To meet the threshold of economic dependency, the dependent company must not have a reasonable equivalent alternative trading partner available within a reasonable time and under reasonable conditions and costs, resulting in the larger trading partner being able to impose trading conditions that could not be imposed in normal market circumstances.

From an economic perspective, the concept of economic dependency has strong similarities with the concept of ‘essential or unavoidable trading partner’, which is a factor that would feature in an assessment of dominance under Article 102. In practice, however, the intention of legislators in these countries appears to have been to introduce a category of abuse that extends competition rules to situations of ‘relative dominance’ (i.e., a position of power relative to a trading partner) rather than ‘absolute dominance’ (i.e. a position of power across a relevant market as a whole).

It would appear that Furman has something similar in mind. Indeed, when discussing how to operationalise the concept of SMS, Furman recommends that the following concepts can play a useful role, due to the potential for platforms to act as a bottleneck:

economic dependence, **relative market power** and access to markets (emphasis added).<sup>28</sup>

The implication of this could be that rather than a small number of firms being caught by the SMS test, a threshold based on economic dependency might result in a relatively large number of firms being subject to (or worse, *unsure* whether they are subject to) ex ante regulation.

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<sup>28</sup> Furman Review, p. 81.

## 4 Session 2: what and how? The powers of the digital regulator and how it should use them

### Box 4.1 To discuss:

- What type of tools and remedies would the digital regulator have at its disposal?
- How should it decide which ones to use in different situations?
- What can we learn from the approach to regulation by sector-specific bodies, such as Ofcom and the Financial Conduct Authority (FCA)?
- Is there an alternative way, such as the European Commission's platform-to-business regulation?

Once the case for intervention has been made and the threshold for intervention defined, there are a number of different regulatory approaches that could be pursued depending on:

- what market failures or theory of harm the intervention aims to address;
- the objectives of the regulatory authority.

It is, therefore, important to have clarity on these questions *before* defining the intervention in order to ensure the most appropriate tools are chosen, with the fewest unintended consequences for the market.

In the remainder of this section we consider the different types of intervention that could be adopted and consider whether lessons can be learned from interventions in other sectors; before asking how digital markets should be regulated.

### 4.1 A spectrum of interventions

Alternative forms of regulation can be thought of as falling at some point on a spectrum, depending on how onerous the form of intervention is. This spectrum of regulatory approaches is illustrated in Figure 4.1 below.

At one end is a rigid price-and-quantity based utilities regulation. This might be necessary where competition is not actually possible or even desirable, such as when a market has the characteristics of a 'natural monopoly'. In which case, the natural monopoly may be implicitly accepted but with regulation used to proactively protect consumers from the principal harms that monopoly can bring (for example, specifying a regulated rate of *return* for the monopoly operator).

Similarly, in cases where there are monopoly providers of certain key inputs but the market as a whole could be competitive, interventions may focus on facilitating open and fair access to these 'essential facility' inputs to ensure competition downstream. For example, in telecoms networks, access regulation allows several operators to compete in downstream retail markets even if they do not own their own physical network upstream. By opening up the competitive bottleneck, this form of regulatory intervention has maintained competition downstream.

Alternatively, regulation may be more 'light-touch', taking the form of outcomes-based regulation such as that used in financial regulation. These interventions focus on key principles that firms must abide by, but without

necessarily prescribing how those principles should be met.<sup>29</sup> Firms then choose their own approach to ‘self-regulation’, under the threat of regulatory intervention if they cannot demonstrate compliance with the principles set.

Alternative light-touch approaches might include encouraging parties to agree to a code of conduct in which they all agree what is considered to be appropriate behaviour, setting clear rules and guidelines, and holding parties to account if they do not abide by the code. The code of conduct, however, might still include elements (or threats) of more onerous forms of regulation—such as access to essential bottlenecks—where such interventions would significantly improve competitive outcomes.

**Figure 4.1 A spectrum of regulatory approaches**



Source: Oxera.

## 4.2 Insights from other industries

The form of regulatory interventions imposed in other industries may provide some useful insights into the range of options available and provide some indications of what may or may not be appropriate for regulation of online platforms. Where lessons can be drawn from existing industries or policies, this could provide insight and inspiration for the regulation of digital markets. Box 4.2 below provides a brief summary of insights from four industries: telecoms, banking, insurance and broadcasting.

## 4.3 Insights from the EU Platforms-to-Business (P2B) regulation

The European Commission has already begun introducing what might be considered a light-touch approach to regulation for certain online platforms in its 2019 ‘Platforms-to-Business’ (P2B) Regulation.<sup>30</sup> The P2B Regulation focuses on the relationship between online platforms and their business users, promoting fairness and transparency for business users by altering the balance of power between them when negotiations over terms and conditions (T&Cs).

Overall, the aim of the proposal is to ensure that platforms provide appropriate transparency to business users and ensure that business users are able to claim redress from platforms if a platform is liable for a breach of the agreed terms and conditions. This is closer to the ‘outcomes based regulation’ end of the spectrum of interventions.

<sup>29</sup> Set out in PRIN 2.1 in the FCA’s Handbook.

<sup>30</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, 20 June 2019.

**Box 4.2 Insights from other industries****Telecoms**

Regulation can only be imposed in markets which are deemed 'susceptible to ex ante regulation'. These are markets which satisfy the following three criteria:

- they exhibit high and non-transitory barriers to entry;
- the market structure does not tend to an effective competitive outcome;
- reliance on competition law alone would be insufficient to adequately address the identified market failure(s).

Only for markets which pass these tests, regulators can proceed to assess whether there is one or more operators with 'significant market power' (SMP).

Historically, intervention in telecoms markets has typically focused on opening up access to bottlenecks. The intention is to open up more of the value chain to competition. More recently, the focus has shifted towards encouraging infrastructure-based competition and investment incentives in very high capacity networks. Additional measures to ensure interoperability and facilitate consumer switching (e.g. number portability) are also in place.

**Insurance**

The FCA encourages a culture of good conduct at every level of the financial services industry to make markets work well and to produce a fair deal for customers.

Firms are required to abide by key Principles and should have a 'Conduct Risk' framework in place that will promote and ensure good behaviour across the organisation to ensure there is no room for misconduct.

The exact details of this 'Conduct Risk' framework are not prescribed by the FCA, as a single regulator-approved approach will not suit every organisation. However, there is a threat of intervention and punishment if firms are unable to demonstrate how they are working towards meeting the objectives.

**Banking**

Recent interventions in the banking sector have led to the emergence of 'open banking'.

The open banking initiative intends to enable customers to share their financial data with third parties, enabling them to manage their accounts with multiple providers through a single digital 'app'.

By getting direct access to a customer's account, third-party providers are able to build innovative services on top of a bank's existing data and infrastructure.

The reforms that led to the delivery of open banking stem from a market investigation by the CMA and were introduced as a remedy to boost competition and innovation in the retail banking market.

Aspects of open banking may provide an initial template for data sharing to facilitate the opening up of markets to ensure contestability of new, innovative services.

**TV and broadcasting**

The Communications Act requires that Ofcom publishes a Broadcasting Code for television and radio, covering standards in programmes, sponsorship, product placement in television programmes, fairness and privacy.

This approach gives broadcasters a wide degree of scope to define their commercial terms and how they interact with customers and suppliers—but stipulates they must be able to demonstrate those actions conform with the spirit of the code.

The Communications Act also requires Ofcom to develop an Electronic Programme Guide (EPG) Code setting out the appropriate degree of prominence for public service broadcasting (PSB). As certain 'norms' develop (such as the placement of the five PSB channels at the top of the EPG) they can become formalised in revisions of the code, providing increased clarity as to the expected behaviours of market players.

A key difference between the P2B regulation and Furman's proposals is that the former applies to all platforms (above a minimum size), regardless of whether they are dominant or not. Reflecting this, the P2B interventions may be considered relatively light-touch, as they preserve contractual freedom for platforms to set their own T&Cs, allowing, for example, preferential treatment and other forms of discrimination, provided these practices are communicated in a clear and transparent manner.

Over time, member states are expected to develop the emerging best-practice into industry-wide codes of conduct that will govern the interactions between platforms and their business users.

#### 4.4 How should digital markets be regulated?

Given the range of regulatory approaches available, the introduction or revision of any regulation brings about a debate around the appropriate form and approach of the intervention. In the case of digital markets, the answers may depend critically on beliefs and understanding of how the market functions and the outcomes that are likely to prevail.

For example, if it is believed that the market has or will irreversibly 'tip' to leave only a small number of large, uncontested players, a utilities-style price and quantity regulation may be demanded.

In contrast, if it is believed that the market is generally functioning well and has demonstrated vigorous competition in the recent past, a more pro-competition approach may be adopted to ensure continued contestability while minimising the degree of intervention.

The Furman Review is calling for the latter market-led, pro-competition approach, expressing the view that:

[...] while they share some important characteristics with natural monopolies, it is too early to conclude that competition within and for digital markets cannot be achieved. Opening these markets up with pro-competition tools that tackle the features that can tip them to a single winner is needed to secure the benefits that effective competition can deliver.<sup>31</sup>

The above is consistent with primary focus of the Furman Review, which is to unlock digital competition by promoting effective competition in the interests of consumers and businesses, and to promote innovation in digital markets.<sup>32</sup> These would also be the primary objectives of the digital regulator.

To pursue these objectives, the key task of the digital regulator should, according to the Furman Review, be to work with industry and stakeholders to establish a digital platform **Code of Conduct**, based on a set of core principles that will be applied to the conduct of digital platforms designated as having strategic market status. For the business-facing side of platforms the Furman Review proposed that these principles could include:

- providing access to the platform on a fair, consistent and transparent basis;
- providing prominence, rankings and reviews on a fair, consistent and transparent basis;

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<sup>31</sup> Furman review, para. 2.5.

<sup>32</sup> Furman Review para. 2.113.

- not unfairly restricting or penalising the use of alternative platforms or routes to market.

While noting that facilitating the agreement of a Code of Conduct might be valuable in defining the boundaries of anticompetitive conduct in digital markets, the Furman Review is clear that:

a voluntary approach would be insufficient – businesses' natural incentives do not line up with delivering these functions.<sup>33</sup>

Therefore, the proposals suggest that such light-touch regulation alone may be insufficient, and that the roles, objectives and powers should be such that a digital regulator can set and enforce clear competition-enhancing rules *ex ante*.

In addition, it has been proposed that the digital regulator should:

- pursue **personal data mobility** and systems with open standards where these will deliver greater competition and innovation;<sup>34</sup>
- use **data openness** as a tool to promote competition, where it determines this is necessary and proportionate to achieve its aims;<sup>35</sup>
- conduct a statutory review of both the markets and the companies with strategic market status every three to five years.<sup>36</sup>

In devising these interventions, the digital regulator will need to ground its analysis on well-defined theories of harm. Given the different business models and markets in which platforms deemed to have SMS may operate in, not all principles and obligations will be equally relevant in every case.

Indeed, as recent antitrust cases have shown, theories of harm can be very diverse, and the appropriate remedies in each case would need to reflect this. For example, recent Antitrust cases by the Commission have considered issues around:

1. leveraging—finding platforms may use a dominant position in one market to favour their own (competitive) products in another market;
2. prominence—finding that the prioritisation of own content or services in search results can harm competition;
3. tying—finding that the forced distribution of certain (free) products alongside other (free) products can prevent effective competition;
4. exclusive dealing—finding that contracts requiring exclusivity over (free) products and services can prevent entry and competition;
5. the use of data—considering whether the collection of activity data by a vertically integrated platform/retailer can give it an unfair advantage over competing retailers.

Therefore, in devising interventions tailored to specific theories of harm, legislators may wish to consider whether the digital regulator should be required to meet an effects-based burden of proof, such as the 'adverse effects

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<sup>33</sup> Furman Review, p. 10.

<sup>34</sup> Furman Review, Recommended Action 2.

<sup>35</sup> Furman Review, Recommended Action 3.

<sup>36</sup> Furman Review, para. 2.115.

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on competition' (AEC) used by the CMA when carrying out market investigations.

Under the Enterprise Act (2002), an AEC is defined as:

any feature or combination of features of a relevant market prevents, [which] restricts or distorts competition in connections with the supply or acquisition of any goods or services.

In the event that an AEC is found, any remedies or interventions that follow would be designed so as to directly address the AEC in question. Indeed, it was precisely the market investigation by the CMA into the supply of personal current accounts and of banking services to small and medium-sized enterprises that resulted in the open banking initiative that inspired the data mobility and portability principles in the Furman Review.

However, a common complaint when it comes to interventions in digital markets is the time it takes for authorities to act. Conducting a fully fledged AEC as part of a market investigation is an onerous task, taking years to complete. While this provides an important hurdle to hold the regulators to account, the substantial lag can be particularly problematic in digital markets. With fast-moving trends and rapid innovations, markets can tip and opportunities can be lost before a regulatory or competition case is resolved.

Recognising this, the Furman Review calls for a more participative approach, allowing regulators to move quickly to resolve emerging issues. With the digital regulator overseeing a pre-defined set of 'SMS' operators, a simpler—yet still effects-based—test may allow for increased regulatory 'agility' while still providing a proportionate check on excessive intervention.

In this regard, we propose a possible new test that mirrors the significant lessening of competition (SLC) test considered in the merger contest, which we call the significant enhancement to competition (SEC) test. In the case of a merger, the CMA assesses whether the proposed change to the structure of the market leads to a SLC. Likewise, we suggest the digital regulator could be required to justify its interventions by demonstrating a *SEC*.

It remains to be discussed what 'significant' would mean in this context, and whether competition alone should be the goal for 'enhancement'. However, the principle of a positive-effect test could provide a starting point for enabling a more participative regulator while still preserving an appropriate balance of rights for SMS operators.

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## 5 Session 3: is competition enough? Towards a holistic approach to digital regulation

### Box 5.1 To discuss:

- What are the ‘right’ outcomes that we would like to see in digital markets, and is more competition always the right way to achieve these outcomes?
- What is the risk of unintended consequences arising from excessive or inappropriate regulation in digital markets?
- In light of this, what specific roles and objectives should the digital regulator have, and how should it interact with the existing regulators (Ofcom, FCA, ICO, CMA, etc.)?
- In five to 10 years’ time, how will we judge if the digital regulator has been successful in fulfilling its duties?

We began this briefing paper by highlighting the significant benefits that digital markets have delivered for consumers, as well as summarising the various concerns that have been raised about their impact on markets and society. The concentration of market power—the main focus of the Furman Review—is one of these concerns, but it is not the only one. The interaction of market power and competition policy with issues of liability for online harms, copyright violations, data protection, privacy and fairness of outcomes in digital markets is equally important in this debate.

With digital markets playing an ever more prominent role in everyday life, there is a growing expectation that online platforms will take responsibility to ensure good social outcomes and the protection of consumers. However, unless there is clear legal guidance stipulating the required and expected behaviour, these private businesses could be left to make subjective judgements over society’s competing priorities while facing stringent reprimands if their judgement is later deemed to be incorrect.

For example, a platform may make a judgement to refuse to run adverts from a particular business or organisation if it feels those adverts are harmful or misleading (e.g. promoting extremist views, or unrealistic investments). On the one hand, this behaviour is in keeping with the platforms’ implicit consumer protection obligation. On the other hand, the business or organisation in question may accuse the platform of abusing a dominant position in the market for online advertising by preventing them reaching their audience. Specific guidance is needed to ensure platforms fully understand their rights and responsibilities if we are to avoid the unintended consequence of increasing legal risk, chilling innovation and participation in digital markets.

The Furman report describes a variety of ways in which issues of market power can be addressed in online markets. However, while competition interventions will undoubtedly have benefits, there can also be costs in terms of proportionality and impacts on other market failures, such as privacy and online harms.

For example, it is not self-evident that more competition and contestability in a market will automatically lead to a holistic improvement in outcomes for consumers—particularly when concerns are centred around privacy and the use of personal data. Consumers’ behavioural biases in favour of tangible benefits (such as free or easy-to-use services) over increased privacy makes it plausible that greater competition could result in *worsened* privacy, as firms

compete more fiercely by seeking to offer ever greater tangible benefits through the monetisation of user data.

While promoting effective competition is clearly at the core of the proposed reforms, Furman also recognises that competition policy interventions, whether *ex ante* or *ex post*, interact with wider social questions that are the subject of ongoing policy reviews.<sup>37</sup> In other words, to ensure the ‘beneficial outcomes for consumers and businesses’ that the review envisages, there is an acknowledgment that further *ex ante* regulatory powers may be required. These may take the form of increased protections from online harms for consumers, new tools that ensure a fair share of value for content creators and provisions for transparency and fairness in dealings between large and small businesses, in addition to the codes of conduct that would apply to firms with SMS.

Indeed, it may be that these types of regulatory measures are better suited than competition policy to address a wide range of specific harms in a targeted way. For example, concerns have been raised around the proliferation of ‘click-bait’ content and excessive levels of advertising online. It is far from clear that this would be remedied by increased competition, as firms relying on similar funding models compete to attract both users and advertisers. As noted in section 2, this issue has been remedied in traditional broadcasting by stipulating a clear limit on the volume of advertising permitted on TV.

### **5.1 Consumer concerns**

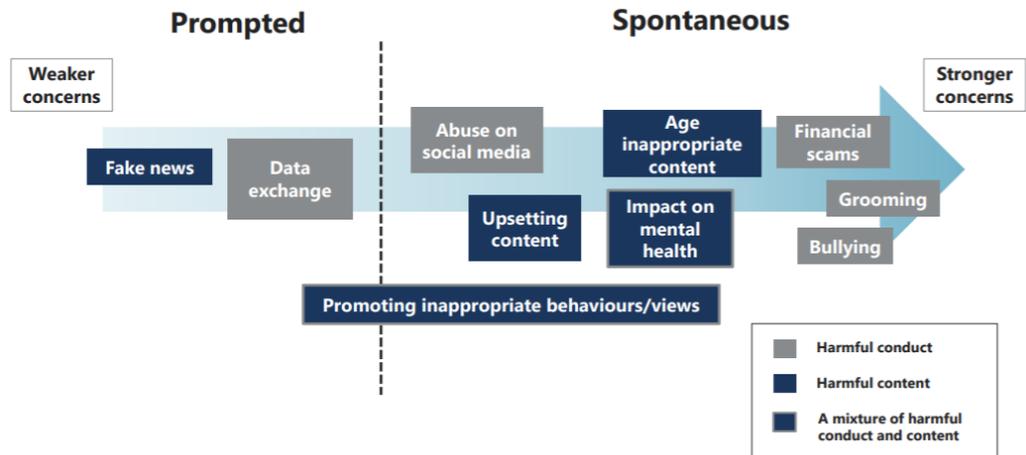
Effective competition is generally considered an important driver of quality and choice in markets. However, consumers are not inherently concerned by a lack of competition in digital markets *per se*; rather, they are concerned by the impact the available choices have on their overall welfare.

Ofcom’s research into online user experiences and attitudes to the internet describes the issues that consumers are most concerned about online (see Figure 5.1). The research highlights that consumers’ biggest concerns relate to interpersonal interactions and content that has negative effects on society. While increased competition and contestability may improve some of these outcomes, it could also worsen outcomes for consumers if increased competition in the market for attention leads to more content that exploits behavioural biases—such as fake news and clickbait content—with a negative impact on consumer outcomes.

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<sup>37</sup> Furman Review, paras 1.162–1.165.

**Figure 5.1 Ofcom summary of consumers' concerns about online harm**



Source: Ofcom (2019), '[Internet users' online experiences and attitudes](#)', July.

Similar research by the consumer group Which? sought to better understand consumers awareness of and attitudes toward the use of their personal data.<sup>38</sup> It found that both awareness and concern around data collection and usage varied widely, but that consumers were generally surprised by the lack of regulation over data usage by online firms.

Furthermore, the research found that concerns about data collection do *not* necessarily translate into action to *reduce* the amount of data collected about them—which, it is suggested, is the result of consumers' perceived lack of choice and control in this regard. However, consumers are also pragmatic about the collection of data if they have an understanding of the terms on which the data is collected and it is linked to tangible benefits for them. They are concerned only by the eventual *use* of the data and the impact it has on their lives, not the *collection* itself.<sup>39</sup>

## 5.2 The role of the ICO

As the UK's independent data regulator, the Information Commissioner's Office (ICO) has proactively evaluated the ways in which tech companies are using personal data—irrespective of the impact on competition or their position in the market. One of the main roles of the ICO is to enforce and apply the Data Protection Act (2018) and the EU GDPR. While they were traditionally very distinct areas of regulation, data protection, privacy and competition policy have started to interact much more frequently.

In 2018, the ICO published a report detailing the ways in which personal data has been used to influence political campaigning in the UK.<sup>40</sup> A key issue in the ICO's investigation was the use of personal data in conjunction with social media and other online platforms as a tool for 'micro-targeting' citizens with

<sup>38</sup> Which? (2018), 'Control, Alt or Delete? Consumer research on attitudes to data collection and use', June.

<sup>39</sup> See Oxera's related report for Which?, which outlines a range of benefits consumers that receive following the collection of their data (such as rapid innovation, increased choice and reduced prices): Oxera (2018), 'Consumer data in online markets', 5 June, <https://www.oxera.com/wp-content/uploads/2018/07/Oxera-Consumer-data-in-online-markets.pdf.pdf>.

<sup>40</sup> ICO (2018) 'Democracy Disrupted? Personal information and political influence', 11 July.

political messages. Following its investigation, the ICO recommended that the government should urgently introduce a statutory code of practice outlining the appropriate use of personal data. It also called for a review of regulatory gaps in relation to political advertising online.

In 2019, the ICO published its update report into the use of real-time-bidding in the 'ad-tech' industry.<sup>41</sup> While its investigations continue, the ICO's initial findings conclude that many aspects of the prevailing ad-tech approach are unlawful from a data protection perspective. In particular, both special and non-special category data are being processed without explicit user consent, the information that is shared with individuals about the use of their data is insufficiently clear, and detailed profiles of individuals are being shared among organisations in the advertising value chain without the individual's knowledge or consent.

Most recently, in a landmark case, the German Federal Cartel Office (Bundeskartellamt—BkartA) issued a decision in February 2019 finding that Facebook had abused a dominant position in social media by not complying with data protection rules (assigning data to Facebook users collected from third-party websites without the user's explicit consent). According to BKartA, this constituted an exploitative practice by a dominant company. A few weeks ago, however, a German regional court suspended this decision, stating that failing to comply with data protection standards did not in itself signify an abuse of dominance since the data gathered was replicable and that Facebook's terms of service did not prevent other firms from competing.

### 5.3 The online harms white paper

In 2019, HM Government launched a public consultation to introduce a ground-breaking 'duty of care' for online platforms, to be overseen by an independent regulator.<sup>42</sup> The government's white paper indicates a comprehensive range of harms that would fall within scope of the regulatory framework (e.g. sharing abusive or terrorist content, selling illegal goods, intimidation and under-age access to adult content), but explicitly *excludes* 'economic' harms to companies and organisations (such as piracy, fraud or competition infringements).

Rather than focusing on only the largest firms (those with 'strategic market status' or similar), the proposed scope would include all companies that allow users to share user-generated content or interact with each other online. The white paper acknowledges that this would encompass a very wide range of companies of all sizes, but proposes the regulator should take a 'risk-based and proportionate approach across this broad range of businesses'.

### 5.4 Weighing the varied impacts of an intervention

Currently, to block a merger, the CMA must conclude that there will—on the balance of probabilities—be a substantial lessening of competition. However, in the case of digital markets, theories of harm frequently rest on the loss of *potential* competition, increasing the degree of uncertainty that the harm would, in fact, materialise.

At the same time, tensions between competition and other societal priorities (as discussed in section 2.3) mean that over-enforcement can be just as

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<sup>41</sup> ICO (2019) 'Update report into adtech and real time bidding', 20 June.

<sup>42</sup> UK Government (2019), 'Online Harms White Paper', 26 June, <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>.

harmful as under-enforcement. If a single digital regulator is to be responsible for more than just competition, it needs to balance the effects of any proposed intervention to ensure the best outcomes for society as a whole. The ‘balance of harms’ test proposed in the Furman Review could provide a useful approach in this regard. Unlike the ‘balance of probabilities’ threshold (which asks whether a negative outcome is more likely than not to occur), a ‘balance of harms’ approach allows the weighing of the anticipated *magnitude* as well as likelihood of any harm.

As the Furman Review notes, this approach could, in principle, be extended further to factor in all costs and benefits of a proposed merger:

The magnitude and likelihood of potential benefits of the merger would also in principle be taken into account. To the extent that these will be passed through to consumers, and especially to the extent they involve enhancements to valuable innovation, these should be set against any harm from the merger.<sup>43</sup>

Building on this concept, a digital regulator which was entrusted with broader objectives in addition to promoting competition (such as privacy, consumer protection, online harms and/or fairness of outcomes), could rely on a similar ‘balance of harms’ test as proposed by Furman when assessing the impact of its regulatory interventions, but expanded to take into account these additional concerns in a holistic way.

However, this raises the question of whether a series of sector-specific regulators would be better placed than a broad-brush competition authority when it came to trading off market power concerns with other forms of market failure (e.g. quality journalism, user privacy, platform liability and inappropriate content, etc.). For example, the FCA already considers the implications for a wide range of market failures in financial services when exercising its competition powers.

### **5.5 Towards a holistic approach to digital regulation: is one super-regulator the answer?**

Even with a narrow remit of promoting competition, the digital regulator proposed by Furman would need to be granted sufficient powers to monitor, investigate and penalise non-compliance with any regulation imposed. For example, it will need powers to set and enforce its ‘competition-enhancing’ rules, and it has been argued that it should have powers to require participation in certain schemes (e.g. data mobility).

Such powers will need to be granted either in the case of the digital regulator being a wholly independent unit, or if the existing authority within which the digital regulator is set-up does not have the full range of powers it needs. While many of the existing regulatory bodies already have some of the remit needed to take action—and could start to play a role in pursuing the panel’s aims—there is currently no single body that has the full range of jurisdiction and powers necessary to ensure a ‘coherent, ongoing, engaged pro-competition policy approach across digital markets’.<sup>44</sup>

The ability of the digital regulator to act independently of already established regulators and organisations will depend in part on the powers granted to it and

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<sup>43</sup> The Furman Review, para. 3.91.

<sup>44</sup> Furman Review, para. 2.8.

on its governance arrangements. According to the Furman Review, the unit could be either:

- a wholly independent new unit established in law, giving maximum independence and focus on the issue, but needing sufficient organisational capacity to deliver its role;
- a new function and unit, supported by new primary powers, within either Ofcom or the CMA – both of which have strong organisational advantages and complementarities – drawing on their institutional expertise and already-established credibility;
- a legally independent subsidiary with its own board and CEO, within Ofcom or the CMA, and benefiting from their capacity.<sup>45</sup>

Furthermore, in addition to interacting with existing economic regulators (e.g. the CMA or Ofcom), the digital regulator will also need to consider how it interacts with other bodies currently tasked with monitoring other pillars of the digital regulation ecosystem (such as the ICO), as well as new ones that may be created to address other potential sources of harm.

The Furman Review sums up the challenge facing legislators when considering the appropriate form of the digital regulator with:

The role of the unit would have important links to functions and expert skills within the Competition and Markets Authority (CMA) and The Office of Communications (Ofcom). The unit could be an independent body linking to both, or it could be a function of either. Its role also links to other potential functions currently under consideration to tackle separate but related issues such as harmful online content, the relationship between digital platforms and the news media, and open data in regulated utilities. Finally, the unit would need a strong relationship with the Information Commissioner's Office, as the UK's data privacy regulator.<sup>46</sup>

It is crucial that there is clarity on how a new digital regulator should cooperate with existing and new organisations, what its jurisdiction will be and which interventions or powers will dominate. For example, some firms may find themselves subject to overlapping or even conflicting regulation if they fall within the remit of two or three different regulators with overlapping remits.

There must be clarity on the rules that will prevail and how the different regulators will work together to ensure their approaches are aligned. The CMA already shares concurrent competition powers with numerous sector regulators which coordinate their activities to promote stronger competition through the UK Competition Network (UKCN).<sup>47</sup> The same approach could be adopted for the new digital regulator—establishing a Memorandum of Understanding (MoU) with the CMA to designate the appropriate allocation of cases, pooling of skills and sharing of resources to maximise the effectiveness of both bodies.

In principle, a similar approach could be extended to overlaps between the digital regulator and other regulatory bodies, such as the ICO or Advertising Standards Board. In addition to coordination with UK authorities, given the cross-border nature of many of these digital platforms, there may also be a

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<sup>45</sup> Furman Review, p. 80.

<sup>46</sup> Furman Review, p. 10.

<sup>47</sup> Along with the CMA, existing members of the UKCN are: Civil Aviation Authority (CAA); Financial Conduct Authority (FCA); Gas and Electricity Markets Authority (Ofgem); Northern Ireland Authority for Utility Regulation (NIAUR); Office of Communications (Ofcom); Office of Rail and Road (ORR); Payment Systems Regulator (PSR); Water Services Regulatory Authority (Ofwat).

need for international cooperation of the new digital markets unit with regulators and competition authorities elsewhere.

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## A1 Further reading

- **The Furman Review:**  
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