

Unlocking Digital Competition: Report of the Digital Competition Expert Panel -- Recommendations

The United Kingdom has an opportunity to seize the full potential of the digital sector, increasing the benefits for consumers and fostering an even more vibrant ecosystem for businesses. Competition should be at the heart of this strategy, leading companies to produce better outcomes for consumers, helping new companies enter and grow, and continuing to encourage existing companies to innovate.

Our central conclusion is that digital markets will only work well if they are supported with strong pro-competition policies that open up opportunities for innovation, and counter the forces that can lead to high concentration and a single winner. Solely relying on merger and antitrust enforcement can create delays and uncertainty that can be bad for large incumbents and small entrants alike. Neither is well designed for the intensive and ongoing work that needs to be done to facilitate competition and entry through making it easier for consumers to move and control their data, and for new digital businesses to interoperate with established platforms. An approach that uses these pro-competition tools can make it easier for new businesses to enter digital markets, give more predictability to all companies about the rules and standards that apply, spur innovation and provide consumers with higher quality and greater choice. This is why the Panel is recommending the establishment of a digital markets unit, given a remit to use tools and frameworks that will support greater competition and consumer choice in digital markets, and backed by new powers in legislation to ensure they are effective.

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Digital Competition Expert Panel (DCEP)

Description:

The Digital Competition Expert Panel was established in September 2018. Our terms of reference asked us to:

- consider the potential opportunities and challenges the emerging digital economy may pose for competition and pro-competition policy, and to make recommendations on any changes that may be needed. In particular, we were asked to examine:
- the impacts of the emergence of a small number of big players in digital markets such as social media, e-commerce, search, and online advertising
- appropriate approaches to mergers, takeovers and anticompetitive practices in digital markets
- opportunities to enhance competition, to increase business innovation and expand consumer choice
- how best to assess consumer impacts in ad-funded products and services that are ‘free’ to consumers

Stakeholder(s):

United Kingdom :

Many countries are considering policy changes in this area. The United Kingdom has the opportunity to lead by example, by helping to stimulate a global discussion that is based on the shared premise that competition is beneficial, competition is possible, but that we need to update our policies to protect and expand this competition for the sake of consumers and vibrant, dynamic economies.

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Chair, Digital Competition Expert Panel

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Secretary of State for Business, Energy and Industrial Strategy

Vision

Companies produce better outcomes for consumers.

Mission

To make recommendations on changes to competition and pro-competition policy to help unlock the opportunities of the digital economy.

Values

Competition: Competition should be at the heart of this strategy, leading companies to produce better outcomes for consumers, helping new companies enter and grow, and continuing to encourage existing companies to innovate.

Innovation

A. Digital Markets Unit

To sustain and promote effective competition in digital markets, government should establish and resource a pro-competition digital markets unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses.

Stakeholder(s)

Digital Markets Unit :

This unit would have three functions.

Functions to boost competition and choice -- The report describes three functions for the digital markets unit that will deliver more effective competition.

Action 1. Code of Conduct

The digital markets unit should work with industry and stakeholders to establish a digital platform code of conduct, based on a set of core principles.

First, agreeing and setting out upfront a code of conduct to complement antitrust enforcement with a clearer and more easily applied set of standards that define the boundaries of anti-competitive conduct in digital markets. Establishing such rules can give all businesses, including the large platforms, clarity on the rules, rather than relying on antitrust judgements that can be hard to apply beyond the specifics of an individual case. Where disputes do arise, a code of conduct can resolve them and enforce solutions more rapidly.

Stakeholder(s):

Digital Platforms :

The code would apply to conduct by digital platforms that have been designated as having a strategic market status.

Action 2. Personal Data

The digital markets unit should pursue personal data mobility and systems with open standards where these will deliver greater competition and innovation.

Second, the report describes a powerful set of tools that the digital markets unit should use to give consumers greater effective choice over their digital services, allowing new opportunities for competition where there are currently closed systems. Personal data mobility means agreeing common standards to give consumers greater control of their personal data so they can choose for it to be moved or shared between the digital platform currently holding it and alternative new services. By making this easy, consumers could, for example, move across to a new social network without losing what they have built up on a platform, manage through a single service what personal data they hold and share, or try out an innovative digital service that uses their information in a new way. Open Banking has shown the potential for data mobility to provide new opportunities to compete and innovate in this way. Similar competitive opportunities could be created through developing more systems based on open standards. Open standards lie behind the internet itself, email, and other services where innovation and competition have flourished on the basis of a common interoperating core. Data mobility and open standards are tools with great potential to secure greater competition. Where these solutions are not voluntarily agreed, deciding whether and how to require data mobility or open standards in a digital market will take engagement, expert skills, and careful analysis by the unit to decide when they will be proportionate and effective.

Action 3. Data Openness

The digital markets unit should use data openness as a tool to promote competition, where it determines this is necessary and proportionate to achieve its aims.

How to make the digital markets unit work — Chapter 2 also outlines the capabilities, powers and approach that would enable the digital markets unit to carry out its role effectively. 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. Government is best placed to reach a decision in the round on the best set of institutions to tackle these issues while avoiding a cluttered regulatory landscape for businesses. Whatever the institutional format, co-operation and consultation with business and other stakeholders will be essential. The unit will be most effective if its functions are designed and delivered through participation, balancing the interests of major platforms and newer and smaller tech companies to ultimately benefit the consumer, and translating this into codes and standards that can be understood and used. At the same time, it is clear that a voluntary approach would be insufficient – businesses' natural incentives do not line up with delivering these functions. So it will need new regulatory powers, beyond those currently in statute, to set solutions.

Stakeholder(s):

Competition and Markets Authority (CMA)

Information Commissioner's Office

Office of Communications (Ofcom)

Action 4. Monitoring, Investigation & Compliance

The digital markets unit should co-operate with a wide range of stakeholders in fulfilling its role, but with new powers available to impose solutions and to monitor, investigate and penalise non-compliance.

The review has also considered how to focus interventions by the digital markets unit and define where they can be imposed. The scope should be kept narrow, to minimise the burden of compliance on smaller businesses and in markets where competition will work effectively without intervention. It will also need to flex with time, as new digital markets arise and existing ones tip to a winner or diversify with new entrants. A good approach that combines these would be to define and periodically assess which companies hold a position of enduring market power, and limit mandatory solutions to these.

Stakeholder(s):

Digital Markets Unit

Action 5. Enforcement

To account for future technological change and market dynamics, the digital markets unit should be able to impose measures where a company holds a strategic market status – with enduring market power over a strategic bottleneck market.

Finally, it is clear that the digital markets unit will have a key role in the new economy. The opportunity is huge, but to succeed in boosting competition, market-driven innovation and consumer choice in complex and evolving markets will need significant resourcing, leadership, and technical, economic and behavioural expertise.

Action 6. Skills, Capabilities & Funding

Government should ensure the unit has the specialist skills, capabilities and funding needed to deliver its functions successfully.

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B. Mergers

Take more frequent and firmer action to challenge mergers.

Merger assessment in digital markets needs a reset. The CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary.

Action 7. Prioritisation

The CMA should further prioritise scrutiny of mergers in digital markets and closely consider harm to innovation and impacts on potential competition in its case selection and in its assessment of such cases.

The largest digital companies conduct a high volume of acquisitions. It is voluntary whether they notify the CMA of the merger. Requiring digital companies that hold a strategic market status to make the CMA aware of their intended acquisitions will allow the CMA to determine in a timely manner which cases warrant more detailed scrutiny.

Action 8. Strategic Markets

Digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions.

To assess mergers in digital markets and reach decisions in the best interests of consumers, competition authorities can draw upon the significant progress made in recent years in analysing factors particularly relevant to determining whether mergers in digital markets will benefit or damage competition and consumers. The report identifies a set of changes that should be made to the Merger Assessment Guidelines that determines how mergers are considered.

Stakeholder(s):

Digital Companies

Action 9. Guidelines

The CMA's Merger Assessment Guidelines should be updated to reflect the features and dynamics of modern digital markets, to improve effectiveness and address underenforcement in the sector.

These changes to how the CMA administers the merger regime as it stands are important. But no other competition authority internationally has had significantly greater success in identifying and preventing future harm to competition or consumers in digital markets. The review recommends a further, legislative change to the merger regime to provide a better and firmer legal basis for decision-making. At present, merger assessment only considers how likely a merger is to reduce competition. If a substantial lessening of competition is more likely than not to result, a merger may be blocked. Although in many situations this is a reasonable approach, it does not adequately allow the scale of any harm (or benefits) to be accounted for alongside their likelihood as they would be in economically sound cost-benefit analysis. For digital mergers, this can be a crucial gap. For example, take a large platform seeking to acquire a smaller tech company based on an attractive innovation that gives it a real chance of competing for consumers. For the sake of the example, assume that if the companies merge, there would only be a modest efficiency benefit. But if the smaller company would otherwise have become a serious and innovative competitor, the resulting competition would have generated far greater consumer benefits. The Panel is concerned that, under the system as it stands, the CMA could only block the merger if it considered the smaller company more likely than not to be able to succeed as a competitor. This is unduly cautious. The report recommends that assessment should be able to test whether a merger is expected to be on balance beneficial or harmful, taking into account the scale of impacts as well as their likelihood. This

change would move these merger decisions to a more economically rational basis, and allow big impacts with a credible and plausible prospect of occurring – critical in digital markets – to be taken properly into account.

Action 10. Harms

A change should be made to legislation to allow the CMA to use a ‘balance of harms’ approach which takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation.

Tackling anti-competitive conduct in digital markets — The second arm of competition policy is antitrust enforcement. The CMA and other competition authorities are tasked with protecting consumers and businesses from collusion and anti-competitive conduct. In particular, where a business dominates a market, a stronger set of legal standards apply to prevent that dominance being abused. Where digital markets are liable to tip to a single dominant company, this provides an important set of tools to protect competition. The tools and frameworks within existing antitrust law are appropriate – and where they have limitations, a pro-competition approach will provide better solutions. The key weaknesses of antitrust in digital markets are instead that it has been used very infrequently and cases have moved too slowly.

C. Enforcement

The CMA's enforcement tools against anticompetitive conduct should be updated and effectively used, to help them play their important role in protecting and promoting competition in the digital economy.

Looking back at past decisions provides a way for competition authorities to learn from experience. The CMA does so effectively with merger decisions. For abuse of dominance, however, there are few cases in digital markets to consider. Examining the evolution of markets where cases that were considered but not brought may, however, provide retrospective lessons to inform when and how abuse of dominance could be more effectively applied in future.

Action 11. Evaluations

The CMA should perform a retrospective evaluation of selected cases not brought and decisions not taken, where infringements were suspected or complaints received, to assess how markets have subsequently evolved and what impact this has had on consumer welfare.

Where antitrust cases may take years to resolve, the CMA can impose interim measures to restrain a suspected anti-competitive practice, if those affected by it would otherwise be significantly harmed. This is particularly important in digital markets, where cases are likely to be complex but markets can move fast and tip to a winner before a final decision is reached. The CMA has been given expanded powers in this area, but has not yet used them. Current CMA procedures and administrative rules make interim measures difficult to use. This should be addressed.

Action 12. Interim Measures

To facilitate greater and quicker use of interim measures to protect rivals against significant harm, the CMA's processes should be streamlined.

The ability for an affected company to appeal a decision or an interim measure is a vital safeguard of their rights, and a check on the quality of CMA decision-making. Appeals processes need to strike a balance between protecting those affected by any unjustified decision and ensuring that CMA powers can be exercised effectively to protect those who would be left exposed by underenforcement or undue delay. This is particularly important for digital markets. Cases may necessarily involve a degree of expert judgement as to the future effects of a practice, be particularly complex, and be addressing issues in markets where underenforcement or undue delay could cause irreversible harm to competition. The competition framework would be improved for digital markets by focusing appeals on testing the reasonableness of CMA judgement, that procedure has been appropriately followed, and that decisions are not based on material errors of fact or law – a standard more closely relating to that of judicial review. As a counterpart to this change, the CMA's structures for antitrust cases should enhance the role of the independent members of its decision-making panels, to safeguard decisions against the potential for executive overreach.

Action 13. Antitrust Cases

The review applied by the Competition Appeal Tribunal to antitrust cases, including interim measures, should be changed to more limited standards and grounds.

Stakeholder(s):

Competition Appeal Tribunal

Action 14. Structures

The government should introduce more independent CMA decision-making structures for antitrust enforcement cases, if appeal standards are changed.

Action 15. Information

The government should ensure those authorities responsible for enforcing competition and consumer law have sufficient and proportionate information gathering powers to enable them to carry out their functions in the digital economy.

Capabilities and focus to support digital competition — In order to carry out these vital functions, the CMA needs access to appropriate digital information. Where there are any gaps in current powers, they should be filled.

Action 16. Consumer Enforcement

The CMA should continue to prioritise consumer enforcement work in digital markets, and alert government to any areas where the law is insufficiently robust.

Similarly, the CMA has been active and effective in using its consumer law powers to protect consumers in digital markets. This can support competition aims and should be continued, with consideration given if there are gaps in current powers... There are more specific ways that digital technologies could negatively affect competition and consumers. There has been significant analysis and debate around whether there is increased potential for collusion where prices are set using algorithms. Digital markets could also support greater use of personalisation, in particular personalised pricing, where companies use their data-driven insights into consumers to set prices according to the individual's willingness to pay. Such personalisation can be beneficial, allowing companies to serve more customers and price fairly and efficiently, but in some cases it can be abused. At present, it is hard to predict whether greater use of algorithms will lead to algorithmic collusion or personalised pricing in future, and there is no evidence that harmful personalised pricing is widespread. But these are areas with potential to move fast, where it will be important to stay alert to potential harms.

D. AI & Machine Learning

The government, CMA and the Centre for Data Ethics and Innovation should continue to monitor how use of machine learning algorithms and artificial intelligence evolves to ensure it does not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.

Stakeholder(s)

Centre for Data Ethics and Innovation

Finally, the third chapter of the report discusses the operation of the digital advertising market. This is a key component of the digital market ecosystem, providing the revenue-generating side of many platforms. Digital advertising is increasingly driven by the use of consumers' personal data for targeting. This in turn drives the competitive advantage for platforms able to learn more about more users' identity, location and preferences. The market operates through a complex chain of advertising technology layers, where subsidiaries of the major platforms compete on opaque terms with third party businesses. This report joins the Cairncross Review and Digital, Culture, Media and Sport Committee in calling for the CMA to use its investigatory capabilities and powers to examine whether actors in these markets are operating appropriately to deliver effective competition and consumer benefit.

E. Advertising

The CMA should conduct a market study into the digital advertising market encompassing the entire value chain, using its investigatory powers to examine whether competition is working effectively and whether consumer harms are arising.

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F. International Engagement

Government should engage internationally on the recommendations it chooses to adopt from this review, encouraging closer cross-border co-operation between competition authorities in sharing best practice and developing a common approach to issues across international digital markets.

Action 17. Policy Tools

Government should promote the UK's existing competition policy tools, including its market studies and investigation powers, as flexible tools that other countries may benefit from adopting.

Action 18. Patents

The UK should use its voice internationally to prevent patent rights being extended into parts of the digital economy where they are not currently available.

Action 19. Monitoring

Government should support closer co-operation between national competition authorities in the monitoring of potential anti-competitive practices arising from new technologies and in developing remedies to cross-border digital mergers.

Stakeholder(s):

National Competition Authorities

Action 20. Data Standards

To ensure platforms and businesses have a simple landscape in which to operate, government should encourage countries to consider using pro-competition tools in digital markets.

As part of this work, government should work with industry to explore options for setting and managing common data standards.