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The UK competition regime

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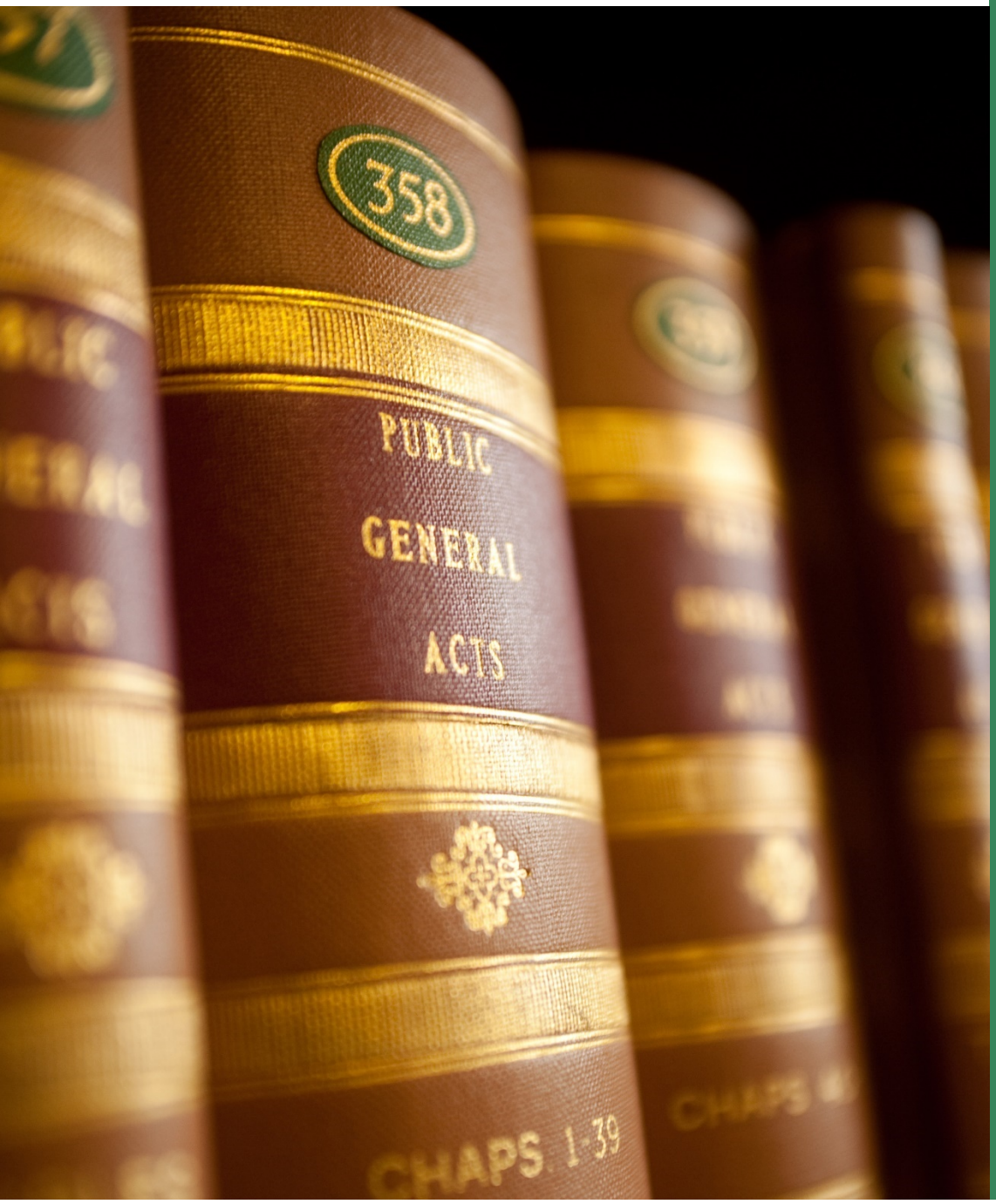

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Summary

Competition law seeks to **curb practices that undermine or restrict competition to the detriment of consumers**: the abuse of a dominant market position by a firm, anti-competitive agreements between firms, and mergers or takeovers which, if allowed, would result in a substantial lessening of competition.

In the UK, the responsibility for enforcing competition law lies with the **independent competition authority**, the Competition & Markets Authority (CMA). The legislative framework for the UK regime is established by the *Competition Act 1998* and the *Enterprise Act 2002*, as amended by the *Enterprise and Regulatory Reform Act 2013* which created the CMA. The Government has very limited powers to intervene in either the assessment of mergers or the investigation of markets.

As a consequence, in most cases, concerns about instances of anti-competitive behaviour or the implications of a merger should be referred directly to the CMA. Individuals can report issues relating to a market not working well, unfair terms in a contract, or any issues related to anti-competitive practices. The CMA has detailed guidance on its work regarding mergers, markets, and cartels & other anti-competitive behaviour. The individual sectoral regulators – Ofcom, Ofgem, FCA, etc – have concurrent powers to start inquiries in their respective fields – communications, gas & electricity, financial services, etc.

The prohibitions in UK law of the abuse of a dominant position and anti-competitive agreements are underpinned by **equivalent provisions in EU law** (specifically, Articles 101 & 102 of the Treaty). Where markets or mergers have an EU-wide dimension, the lead competition authority is the European Commission. Guidance on the scope of the Commission's responsibilities, and its ongoing work, is on its site.

In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked the CMA to come forward with proposals to better protect consumers in the digital economy and improve public trust in markets. In February 2019, CMA Chairman Lord Tyrie outlined his proposals to the Secretary of State in a letter. In a nutshell, the CMA wants to **act faster and more decisively on competition issues**, and it wants its **powers to protect consumers upgraded** to the same level as its competition powers.

Brexit raises a range of questions for the future of the UK competition regime, including whether to diverge from EU law and practice and what future co-operation with the European Commission and other European authorities would look like. There are also opportunities with respect to the UK recuperating the authority to investigate and decide the largest cases.

A global debate is taking place about the **dominance of tech giants in digital markets** and their ability to stifle competition. There are different views about what the right solution is, or if any is needed. Of those who favour action, some advocate new regulations while others call for 'breaking up' the tech giants. Whichever route is taken, these digital markets involve global companies often headquartered outside the UK. The solution is likely to require a high degree of engagement and co-operation with competition authorities around the world, and in particular the two major players, the US agencies and the European Commission.

1. Purpose and scope of competition law

Competition law seeks to curb practices that undermine competition. The law aims to protect and promote competition because that leads to new, better and cheaper products:

> Competition is … a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products because it provides the opportunity for successful firms to take business away from competitors, and poses the threat that firms will lose business to others if they do not compete successfully.[1]

A standard guide to the scope and application of competition law in the UK and across the EU gives a summary of the four main areas that the law is concerned with:

- **anti-competitive agreements**: agreements that have as their object or effect the restriction of competition are unlawful, unless they have some redeeming virtue such as the enhancement of economic efficiency. In particular agreements between competitors, for example to fix prices, to share markets or to restrict output – often referred to as horizontal agreements – are severely punished, and in some systems of law can even lead to the imprisonment of the individuals responsible for them. Agreements between firms at different levels of the market – known as vertical agreements – may also be struck down when they could be harmful to competition: an example would be where a supplier of goods instructs its retailers not to resell them at less than a certain price, a practice often referred to as resale price maintenance. As a general proposition, vertical agreements are much less likely to harm competition than horizontal ones.

- **abusive behaviour**: abusive behaviour by a monopolist, or by a dominant firm with substantial market power which enables it to behave as if it were a monopolist, can also be condemned by competition law. An example would be where a dominant firm reduces its prices to less than cost in order to drive a competitor out of the market or to deter a competitor from entering the market so that it can subsequently charge higher prices, a phenomenon known as predatory pricing.

- **mergers**: many systems of competition law enable a competition authority to investigate mergers between firms that could be harmful to the competitive process: clearly if one competitor were to acquire its main competitor the possibility exists that consumers would be deprived of choice and may have to pay higher prices as a result. Many systems of competition law provide that certain mergers cannot be completed until the approval of the relevant competition authority has been obtained.

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1 OFT/CC, *Merger Assessment Guidelines OFT1254/CC2*, September 2010 para 4.1.2

- **public restrictions of competition**: the State is often responsible for restrictions and distortions of competition, for example as a result of legislative measures, regulations, licensing rules or the provision of subsidies. Some systems of competition law give a role to competition authorities to scrutinise 'public' restrictions of competition and to play a 'competition advocacy' role by commenting on, and even recommending the removal of, such restrictions.[2]

The authors – Whish and Bailey – go on to examine several theories as to why competition should be a central goal for public policy, concluding that "competitive markets seem, on the whole, to deliver better outcomes than monopolistic ones, and there are demonstrable benefits for consumers".[3] The then Department for Business, Innovation & Skills noted in 2011 that "competition laws have become increasingly prevalent internationally as their value has been recognised: today some 112 jurisdictions have competition laws, with more proposing to adopt them in the new few years."[4]

However, Whish and Bailey observe that competition law has been used to further a variety of objectives by governments:

> Historically there has not been one single, unifying, policy that bound the development of EU and UK law together. In particular competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally. Because views and insights shift over a period of time, competition law is infused with tension.[5]

The authors identify several policy goals in this context:

- consumer protection – with some suggestion that the competition regime might prevent 'unfair' prices, be that for consumers or for producers;
- redistribution of economic power and wealth;
- the protection of home companies against international competition; and,
- the integration of the Single European Market, which has been so important in the context of the EU.

The legislative framework for the UK's competition regime is provided by the *Competition Act 1998* and the *Enterprise Act 2002*, as amended. (More details on the development of the law through these two central pieces of legislation are given in two Library papers, written when these provisions were introduced.[6]) The national competition regimes of European Union Member States operate within the context of the EU-

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2 Richard Whish & David Bailey, *Competition Law (7th edition)*, 2012 pp 2-3
3 *op.cit.* p18
4 BIS, *A Competition Regime for Growth: impact assessment*, March 2011 p10; in turn the department cite, Kovacic W., 'Dominance, duopoly and oligopoly: the United States and the development of global competition policy', *Global Competition Review*, December 2010 (Vol. 13 ISS 11).
5 *Competition Law (7th edition)*, 2012, p20
6 *Competition Bill [HL]*, Library Research paper 98/53, 28 April 1998 & *Enterprise Bill*, Library Research paper 02/21, 4 April 2002

wide regime: articles 101 and 102 of the Treaty on the Functioning of the European Union outlaw anti-competitive agreements and abuses of a dominant position when they may affect trade between member states.[7]

A detailed explanation of the law on mergers and takeovers, along with recent cases and developments, is covered in another briefing, Contested mergers and takeovers (SN05374). The rules on what assistance the public sector can give to businesses and industries belong to another body of law known as state aid, which is covered in another briefing, EU State Aid rules and WTO Subsidies Agreement (SN06775).

1.1 Benefits of competition

In its White Paper which preceded the introduction of the *Enterprise Act 2002*, the then Labour Government argued for the central importance of competition for ensuring that markets work effectively – to the benefit of consumers, producers and the economy as a whole:

> Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness.[8]

A similar argument was made in the consultation document which the Coalition Government published in March 2011, when it first proposed to reform the UK competition regime by merging the OFT and the CC:

> Competition is the lifeblood of a vibrant economy and fundamental to growth. Open and competitive markets:
>
> - make businesses more efficient and innovative;
> - help small businesses to grow and enter new markets;
> - drive lower prices and better products, services and choice for consumers;
> - enhance productivity and economic resilience.[9]

The Department's impact assessment published as part of the 2011 consultation discussed how some economists have tried to quantify these benefits. They found a strong evidence base showing that competition is effective in driving down prices and encouraging innovation, and some evidence that it increases productivity too:

> In the short term competition generates efficiency gains within firms by forcing firms to allocate resources more efficiently and putting downward pressure on costs. In the long term, competition generates dynamic benefits as the best performing

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7 *A Competition Regime for Growth* …, March 2011 pp17-18. For more detail on the EU's powers in this area see, HMG, *Review of the Balance of Competencies between the UK and the EU – competition and consumer policy*, July 2014.

8 Department for Trade & Industry, *A World Class Competition Regime*, Cm 5233, July 2001 para 1.1

9 *A Competition Regime for Growth*, March 2011 para 1.1

> firms expand, the worst performers exit and new firms enter the market, leading to increased aggregate productivity. […]
>
> Evidence on the impact of competition policy on productivity is limited, as no OECD country has operated without competition laws so the appropriate counterfactual is not available. Nevertheless the suggestion is that competition policy has a significant positive impact on total factor productivity. Empirical work suggests that there is a negative relationship between market power and productivity, with a 10% increase in price mark-ups resulting on average in a 1.3 to 1.6% loss in total factor productivity growth (Disney et. al, 2003[10] and Nickell, 1996[11]).[12]

In 2012 the Department cited more recent academic work to suggest that "good competition policy has a strong impact" on productivity, although the empirical literature is "still very limited". The relationship was found to be "particularly strong for specific aspects of competition policy related to its institutional set up and anti-trust activities (rather than merger control)."[13]

In the past, the competition authorities have produced some estimates of the financial benefits of the UK's regime to consumers – though, as noted in the Competition Commission's 2011 annual report, these are not precise numbers:

> Although some of the benefits flowing from our work are hard to quantify and attribute accurately, the CC aims to quantify where possible the direct financial benefits to consumers that we achieve. The CC and the OFT have estimated direct financial benefits to consumers of £465 million for the market investigation regime[14] and £127 million for mergers in 2010/11 (these are annual estimates averaged over the three-year period 2008/09 to 2010/11 and include the work done by both the OFT and the CC). In making these estimates, we recognize that our approach is partial in its scope and subject to considerable uncertainties in its application. At present we have no agreed methodology for estimating the benefits of our regulatory work.[15]

In June 2013 the OFT published estimates of consumers' savings from its own work,[16] which in turn were collated by the Department, which put the direct savings made by consumers from the regime at £598m in

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10 Disney, R., Haskel, J. and Heden, Y. (2003), 'Restructuring and Productivity Growth in UK Manufacturing', *Economic Journal*, Vol. 113.

11 Nickell, S.J. (1996), 'Competition and Corporate Performance', *Journal of Political Economy*, Vol. 104.

12 *A Competition Regime for Growth: impact assessment*, March 2011 p9

13 Buccirossi et al., (2011), *Competition policy and productivity growth: An empirical assessment*, Düsseldorf Institute for Competition Economics p29, p1. (This is cited in, BIS, *Growth, competition and the competition regime: response to consultation*, March 2012 p5, p21.)

14 The figure for the direct financial benefits to consumers from the market investigation regime is different from those presented in the OFT's *Positive Impact* report, for two reasons. First, the OFT's *Positive Impact 2010/2011* took into account all of the OFT's market studies, including those where referral to the CC was not a possible option. Secondly, the CC's estimates include also references made by the sectoral regulators.

15 *Competition Commission Annual Report and Accounts 2010/11*, HC 1098 7 July 2011 pp10-11

16 *Positive Impact 12/13*, OFT1493, June 2013

2012/13.[17] The Department published estimates in March 2015, which gave a similar estimate of these savings:

> The OFT and Competition Commission estimate that the competition regime produced direct benefits to consumers of around £575 million in 2013/14. This figure includes only direct financial savings to consumers and does not account for wider effects, such as any impact on productivity or the deterrence effect of the OFT and CC's work or the wider competition and consumer regime.
>
> The overall impact estimate is roughly the same as the £598 million in 2012/13. The indicator has fallen from £810m in 2011/12. This fall is the result of the high impact 2009/10 Groceries investigation dropping out of the three year rolling average. The estimated benefits of competition enforcement have risen slightly. Estimated merger benefits have stay roughly the same.[18]

During the proceedings of the *Enterprise and Regulatory Reform Bill*, several witnesses expressed considerable scepticism about these figures, though there was consensus that, even if the value of the competition regime could not be quantified, competition brought considerable benefits for the economy. As Professor of Regulation at the University of East Anglia Catherine Waddams said, "[the impact of competition on productivity] is something almost immeasurable, in terms of the whole nature of the productivity of the economy … [but] I think that there is no doubt that the historical evidence shows that vigorous competition policy does have those benefits."[19]

Subsequently in July 2015 the CMA published estimates that put annual direct benefits of £745m over the period 2012-15, putting ratio of benefits to cost at 12:1. The department suggested that although the estimates relied, in part, on assumptions, in their view the numbers were on the conservative side:

> Although necessarily relying in part on assumptions,[20] we regard our estimates of direct financial benefit as being on the conservative side. In general relatively cautious assumptions are applied to the estimates and they exclude estimates of benefits from a number of cases where the impact was difficult to quantity in a sufficiently robust manner. In addition the focus on direct financial benefits excludes many important wider impacts of the competition regime including, for example, the deterrence of anti-competitive mergers and other types of anti-competitive behaviour and the CMA's wider impact on productivity and growth.[21]

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17 The value of the consumer benefits of the competition regime, December 2013 p3
18 The value of the consumer benefits of the competition regime, March 2015 p4
19 PBC, 3rd sitting, 21 June 2012 cc106-7 Q243
20 Impact estimations are conducted immediately after cases are completed and are therefore based only on information available during the case and on assumptions regarding the expected impact of our interventions. On this basis the estimates are considered to be 'ex ante' evaluations.
21 *CMA impact assessment 2014 to 2015*, July 2015 para 1.5-6

In its survey of the competition regime published in early 2016, the National Audit Office noted that there remains "no measure of the competition regime's impact on growth or productivity".[22]

Further to the types of behaviour that competition law seeks to curb is the question of the mechanism by which it is enforced – in other words, who decides, and how?

> If there are to be competition authorities to decide on what is and what is not acceptable business behaviour, what type of institution should be asked to make these decisions (a court, a commission, an individual?); how should individuals be appointed to those institutions (by ministerial appointment, be election, by open competition?); and how should those institutions themselves be controlled (by judicial review, or by an appellate court?).[23]

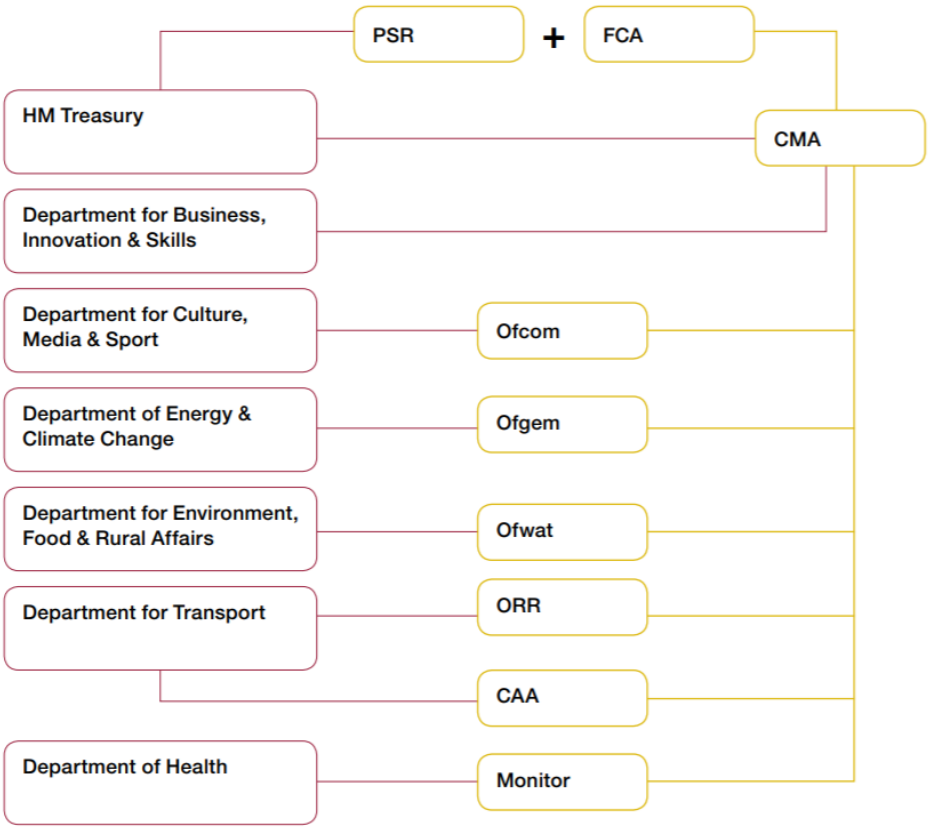
The institutional arrangements made in this country for enforcing competition law are addressed in the next section of this briefing.

22 *The UK competition regime*, HC737, February 2016 p7, p44
23 *Competition Law (7th edition)*, 2012, p24

2. The competition authorities

The principal authorities enforcing competition law in the UK are the Competition and Markets Authority (CMA) and the European Commission (EC). The CMA was established in April 2014 by merging the then Office of Fair Trading (OFT, responsible for antitrust enforcement and for the first phase of merger and market cases) and the Competition Commission (CC, responsible for second phase merger and market investigations). Sector regulators in energy (Ofgem), water (Ofwat), communications (Ofcom), financial services (FCA), payment systems (PSR), health services (NHS Improvement, previously Monitor), rail (ORR) and aviation (CAA) have concurrent powers and responsibilities. The Competition Appeal Tribunal (CAT), a specialised judicial body, hears appeals and decides certain cases involving competition or economic regulatory issues.

The diagram below shows the regulators together with their sponsor Department:[24]



[24] NAO, *The UK competition regime*, HC737, February 2016, p21. Appendix Three (pp50-51) has more details on the eight sector regulators and their responsibilities.

The European Commission has authority to investigate cases that may affect trade between Member States. Businesses can appeal against Commission decisions in the European Courts.[25]

2.1 How decisions are made

The *Enterprise Act 2002* introduced a major change in the way enforcement decisions are made: it gave the primary responsibility to the OFT and the CC, **removing the decision-making powers of Ministers**, save in certain exceptional cases which give rise to a matter of public interest:

> The *Enterprise Act 2002* brought about a significant change in the way that decisions on merger and market cases were made. Under the previous *Fair Trading Act* merger and monopoly regimes, the DGFT would advise the Secretary of State whether the conditions for a reference for in-depth investigation appeared to be satisfied. It was for the Secretary of State to decide, having regard to that advice, whether such a reference should be made.
>
> The function of the Monopolies and Mergers Commission/CC was to investigate the merger or market that had been referred to it and to report its findings to the Secretary of State, along with its recommendations for remedial measures. The final decision on what action should be taken was for the Secretary of State. The *Enterprise Act 2002* largely removed Ministers from the decision making process. The decision to refer mergers or markets is taken by the OFT. The CC then investigates and decides whether there is a competition problem. If it finds that there is, it decides on the appropriate remedial measures for any competition issues identified.[26]

In addition, the 2002 Act established that in the performance of their functions the OFT and the CC would be required to apply a **competition test** – so that, in deciding whether a proposed merger should be allowed to proceed, the authorities' assessment is based on whether the merger can be expected to lead to a **substantial lessening of competition**:

> The substantive test applied by the DGFT and then by the Monopolies and Mergers Commission/CC, under the Fair Trading Act regime was whether the merger operated against the "public interest". A public interest test also applied in monopoly cases.[27] In practice, successive Secretaries of State had applied the public interest test as a competition based test. The *Enterprise Act 2002* formalised this by making the substantive test a competition test.

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[25] *A Competition Regime for Growth …*, March 2011 pp17-18. For more detail on the EU's powers in this area see, HMG, *Review of the Balance of Competencies between the UK and the EU – competition and consumer policy*, July 2014.

[26] *A Competition Regime for Growth …*, March 2011 p125

[27] The *Fair Trading Act 1973* identified two types of monopoly that could be referred to the CC for in-depth investigation: scale monopolies where one party accounted for 25% or more of a relevant market; and complex monopolies, where a number of companies collectively accounted for 25% of more of a relevant market. The scale monopoly provisions were considered to be redundant once the Chapter II prohibition [now Article 102 of the Treaty], prohibiting abuse of dominance was introduced into UK legislation. The current market investigation regime was intended to address problem oligopolies, previously covered by the complex monopoly regime. In addition, the market investigation regime can also sweep up scale monopoly issues that are not capable of resolution by applying the Chapter II prohibition.

> As a result the substantive test in merger cases became whether the merger gives rise to a substantial lessening of competition within any market or markets in the UK for goods or services. The substantive test in market investigations became whether there are features of the relevant market that prevent, restrict or distort competition in any market for goods or services in the UK or a part of the UK.[28]

In practice, this focus on competition had been well-established before the 2002 Act. In a report on takeovers and mergers published in November 1991, the Trade and Industry Committee discussed the way mergers had been assessed during the 1980s:

> While the emphasis on competition as the main criterion comes from the *Fair Trading Act 1973*, competition was given more prominence in 1984 when the then Secretary of State for Trade and Industry, Mr Norman Tebbit, announced that 'references to the Monopolies & Mergers Commission (MMC)[29] would be made primarily, but not exclusively, on competition grounds, taking into account the international dimension of competition.' Since then only six out of 74 references have been made to the MMC on non-competition grounds. There have been only seven cases since 1976 where the MMC has found the merger to be against the public interest on non-competition grounds, and six of these occurred before 1984.[30]

Nevertheless, the requirement placed on the competition authorities to assess matters from this perspective – without regard to other matters of public concern – can be controversial. For example, in 2006 the Competition Commission began a major review of the UK groceries market in the wake of serious public concerns about the market power of the four leading supermarkets. At the outset of its enquiry, the CC felt it necessary to remind those making submissions of the statutory limits set to its assessment:

> The [Commission] is required to determine whether any feature, or combination of features, of the market prevents, restricts or distorts competition (under s134 of the 2002 Act). If this is so, there will be an 'adverse effect on competition', and we will seek to identify the detriment to consumers resulting from the adverse effect on competition (which might take the form of higher prices, less choice, lower quality of available products or lower innovation than if competition was working effectively). [...]
>
> But we must distinguish competition issues from other issues of public concern associated with grocery retailing which we have no power to investigate or resolve. Unless they affect competition, issues such as the environmental impact of the grocery supply chain, the composition of the high street and its impact on communities, rural land usage or employment conditions in overseas suppliers are not things we can decide on. These issues and public concern about them may interact with competition issues and provide background and context for our investigation, but our focus must be on the competition issues.[31]

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28 *op.cit.* pp125-6

29 The forerunner to the Competition Commission

30 Trade & Industry Committee, *Takeovers and mergers*, 27 November 1991, HC 90 of 1991-92 para 233. For more details see, Library Research paper 02/21 pp 38-41.

31 CC, *Groceries market investigation: Statement of issues*, June 2006 paras 4-5. Arguably these tensions remain, illustrated in debates over the power of the

As noted, in general, Ministers have no direct involvement in the competition regime – though they retain a residual role in the application of a public interest test in relation to market investigations, and, more substantively, the merger regime.[32] In the latter case, section 58 of the 2002 Act **allows the Secretary of State to intervene on grounds of national security, financial stability or media quality, plurality and standards**. A detailed explanation of the law on mergers and takeovers, along with recent cases and developments, is covered in another briefing, Contested mergers and takeovers (SN05374).

supermarkets, and how the government should respond to it; see, *Supermarkets: The Groceries Code Adjudicator*, Library standard note SN6124, 12 November 2015.

32 See Appendix 1 to *A Competition Regime for Growth* …, March 2011; in particular, pp132-135.

3. Reform of the competition regime

3.1 The NAO's 2016 review

In February 2016, the National Audit Office published a review of the UK competition regime, to consider early evidence of the CMA's performance and risks to achieving value for money. While it concluded that the regime as a whole was "more coherent" it raised concerns that there were "still too few successful enforcement cases, and business awareness of competition law could be improved," adding, "the regime has further to go to ensure that value for money is achieved."[33]

One striking finding in the report was that business **awareness** of the competition authorities and of competition law itself **is low**, and in the NAO's view, this may potentially harm compliance:

> In a CMA survey of UK industry conducted in late 2014,[34] only 23% of businesses felt they knew competition law well, compared to 45% who had never heard of competition law or did not know it at all well. As a new organisation, awareness of the CMA was also low; in 2014, the year when the CMA began operating fully, more than twice as many businesses believed the defunct Office of Fair Trading to be responsible for enforcing competition law than the CMA (75% versus 32%).
>
> The CMA is taking steps to improve awareness through, for example, advocacy work with both public and private sector bodies following enforcement cases.[35]

Looking at the three broad areas of the regime, the NAO found that the CMA faced big challenges to increase the number of enforcement decisions against **anti-competitive behaviour**:

> Successful high-profile enforcement action builds the credibility of a competition authority, clarifies the law and deters anti-competitive behaviour. The low caseflow we identified in 2010[36] has continued, with the Office of Fair Trading and the CMA making 24 decisions and the regulators just eight since 2010. The UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015 prices), compared to almost £1.4 billion of fines imposed by their German counterparts.
>
> The CMA faces significant barriers in increasing its flow of competition cases, although recent activity means it now has 12 ongoing cases. Its enforcement work is not mandatory, does not have statutory deadlines, and faces a stringent regime of judicial oversight. The CMA prosecuted its first criminal cartel case in 2015; one company director pleaded guilty to price fixing in advance of trial, while two others were acquitted.[37]

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33 NAO press notice, *The UK competition regime*, 5 February 2016
34 CMA, *UK businesses' understanding of competition law*, May 2015
35 *The UK competition regime*, HC737 pf 2015-16, February 2016
36 See, *Review of the UK's Competition Landscape*, March 2010 – specifically, Part Two "Enforcing the Competition Act".
37 HC737, February 2016 p9

Stakeholders interviewed as part of the inquiry "considered the low number of decisions a key failing of the UK competition regime so far". One reason they identified is that the CMA faces more difficult legal battles than many of its foreign counterparts:

> [M]any stakeholders and legal practitioners we spoke to think there are strong incentives for businesses to litigate if they lose a case, which can lead to risk aversion in the competition authorities. One stakeholder told us that the UK was the best jurisdiction in the world to defend a competition case; this was consistent with the views of several other interviewees.[38]

Turning to **mergers**, the NAO found that the approach taken by the CMA was innovative and effective.[39] Third, on **markets**, the CMA had placed a significant emphasis on investigations, with two high-profile inquiries, and this had implications for the regime as a whole:

> The CMA's ability to investigate an entire market can have big effects; for instance, a 2009 market investigation by the Competition Commission resulted in BAA selling Edinburgh, Stansted and Gatwick airports. The CMA is currently investing 16% of its front-line competition resources in two high-profile market investigations into energy and retail banking, and businesses are also incurring substantial unmeasured costs. There is major public and parliamentary interest, with a parliamentary hearing already dedicated to the retail banking inquiry. The ability of the CMA to present a credible market analysis and formulate effective remedies if appropriate will have a significant effect on its reputation.[40]

The report went on to make a number of recommendations for government, and for the CMA. In the former case the authors argued that the Government should "report regularly the full cost of the regime on a consistent basis", and "encourage greater flexibility of resourcing and a more coherent approach across the regime." In conjunction with the CMA, the authors suggested that the Department for Business, Innovation & Sills should "develop indicators of the competitive health of UK markets, such as their profitability and the level of entry and exit", to "help in assessing the success of the competition regime, and could also provide warning signs of emerging competition problems."[41]

Turning to the CMA, the authors argued that if case flow failed to increase significantly, it should "assess the fundamental reasons for low enforcement caseflow, and consider the case for removing any legislative or institutional barriers." More widely than this, the authors recommended that the CMA should increase its existing efforts to improvement awareness. Finally, the CMA and the regulators should "develop further their understanding of consumer behaviour to inform proposed remedies."[42]

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38 HC 737, February 2016 para 2.11-15
39 HC737, February 2016 p9
40 *ibid.*
41 HC737, February 2016 p11
42 HC737, February 2016 pp11-12

3.2 Government consultation on Modernising Consumer Markets

In April 2018, the Government published a consultation paper on *Modernising Consumer Markets*. The paper announced a number of consultations and reviews, with three overarching principles:

1 competition should be central to the Government's approach and the Government should always look to remove barriers to competition where they arise;

2 consumers should benefit from new technology and new business models, with competition and regulation working together in the consumer interest; and

3 consumers should be able to get redress when things go wrong and consumer rights are effectively enforced.

The paper also announced a statutory review of the competition powers (as required by the *Enterprise and Regulatory Reform Act 2013*), looking at:

- whether the 2014 reforms to the competition regime have helped to deliver competition in the UK economy for the benefit of consumers;
- whether the competition regime provides the CMA and regulators with the tools they currently need to tackle anti-competitive behaviour and promote competition;
- whether the competition regime is sufficiently equipped to manage emerging challenges.[43]

3.3 CMA's proposals

In its response to the Government (July 2018), the CMA argued that the competition regime should be reformed in order to better protect consumers:

> [We] believe that:
>
> - the Government's reforms to the competition framework in 2014, combined with the CMA's ongoing work to make our processes more efficient and effective have helped to strengthen and streamline the regime; but that
> - further reforms could help to make the end-to-end regime – from initial evidence gathering to the outcome of any appeals – better able to tackle consumer detriment, in particular against a backdrop of digitalisation and the UK's Exit from the EU.[44]

In August 2018, the Secretary of State for Business, Energy and Industrial Strategy asked the CMA to come forward with proposals to better protect consumers in the digital economy and improve public trust in markets.

In February 2019, CMA Chairman Lord Tyrie outlined his proposals to the Secretary of State in a letter. In a nutshell, the CMA wants to act

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43 BEIS, Modernising consumer markets: Consumer Green Paper, April 2018, p60
44 CMA, CMA response to Modernising consumer markets green paper, July 2018, p6

faster and more decisively on competition issues, and it wants its powers to protect consumers upgraded to the same level as its competition powers. The proposed reforms are summarised as follows:

> The proposals create new duties and responsibilities on the CMA to enable it better to respond to [the challenges of the digital economy and declining confidence in market competition]. This includes an overriding statutory duty to treat the interests of consumers as paramount. The new duties would be backed by strengthened tools and powers to facilitate earlier and more robust intervention to address consumer detriment, and to deter wrongdoing.
>
> It is also proposed that the CMA relinquish certain powers and functions, or its lead responsibility for them, including the review of certain decisions by economic regulators, and the prosecution of criminal cartels, enabling it to focus more effectively on its core responsibilities.
>
> Changes are recommended to merger control to help the CMA work effectively with international counterparts after Brexit.
>
> Consequential and supporting changes are proposed to the process of review of CMA decisions by the courts.[45]

There are eight strands:

1 An **overriding "consumer interest" duty**, binding on both the CMA and the courts.

2 A more effective regime for **market studies and investigations**: proposals include extending the scope of market investigations to cover consumer detriment issues and the ability to impose legally enforceable remedies on an interim basis.

3 **Enforcement of consumer protection law**: in contrast to its powers to enforce competition law, the CMA cannot itself enforce consumer protection law and fine businesses. It is proposed that the CMA should be given powers to do that, in line with its competition powers.

4 **Individual responsibility**: proposals include new fines and sanctions for individuals involved in serious competition law infringements.

5 **Whistleblowers and auditors**: proposals include better compensation for whistleblowers and a duty on auditors to report competition breaches to the CMA.

6 **Investigatory and information-gathering powers**: turnover-based fines are proposed for firms that do not comply with the CMA's requests or that provide false or misleading information, along with a general power to require information.

7 **Court review of CMA decisions**: changes are proposed to limit the scope of appeals and speed up the process.

8 **Merger control**: the CMA proposes to make the notification of mergers above a certain threshold mandatory, accompanied by a

[45] CMA, Summary of proposals from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy, 25 February 2019

"standstill obligation" to stop parties going ahead before receiving the CMA's approval.

All proposals are explained in detail in Lord Tyrie's letter to the Secretary of State.[46]

The CMA's strategy and policies for digital markets are covered in section 5 of this briefing.

[46] Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy, 21 February 2019

4. Brexit

Brexit raises a range of questions for the future of the UK competition regime, and poses some challenges to the work of the CMA. There are also opportunities with respect to the UK recuperating the authority to investigate and decide the largest cases, and some room to diverge from EU rules and practice. The sections below look at these issues and opportunities, including the CMA's increased workload, whether to diverge from EU law and practice, and future co-operation with the European Commission and other European competition authorities.

4.1 Bigger role for the CMA

At the end of the transition period or when the UK leaves the EU without a deal, the CMA becomes responsible for the competition cases currently dealt with by the European Commission (EC) because of their EU dimension. These tend to be the largest, most complex cases. At that point, the CMA will tackle all the anti-competitive practices that affect UK markets and consumers, not just the cases that the European Commission is not interested in.[47]

The CMA's responsibility for these cases implies a bigger international role for the authority:

> The UK's exit from the EU presents opportunities for the CMA to secure better outcomes for UK consumers as we expect to take on a bigger role on the world stage post-Exit. Ensuring that we are ready for the new arrangements and to take advantage of these opportunities continues to be an important priority for us.[48]

On the other hand, there are concerns that the CMA might lack resources to conduct the full range of its activities (e.g. market studies) or to investigate all cases that merit investigation. With respect to cases previously handled by the EC, the concern is that there might be an "enforcement gap" if the Authority is not able to carry out parallel investigations, or that these investigations will create duplication.[49]

In oral evidence, the CMA Chairman, Lord Tyrie, sought to reassure the Business Select Committee that the CMA's budget increase of £20 million should cover the regulator's needs post Brexit:

> **Mark Pawsey:** My question was going to be to what extent you will need additional resources to deal with these items in isolation, rather than as a member of the EU.
>
> **Lord Tyrie:** We have been given some extra money.
>
> **Mark Pawsey:** Could you give us an indication?
>
> **Lord Tyrie:** It is £20 million, and the £20 million has already been cut back from £22 million, but £20 million is fine. Thank you very much for asking about our resources. It is always a vexed issue

47 Competition and Markets Authority, Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond, 16 May 2018
48 CMA, Competition and Markets Authority Annual Plan 2019/20, 14 February 2019
49 Competition and Markets Authority, Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond, 16 May 2018

> with regulators. I want to tell you, though, that we are not asking for more money.
>
> **Mark Pawsey:** I was going to ask whether that additional resource met the additional demand for your work.
>
> **Lord Tyrie:** In a steady state post Brexit, with or without a deal, that will probably enable us to function to a level that would be acceptable to this Committee, Parliament and the public. If it is not, we will come back and say. This is uncharted territory; we cannot be absolutely sure. I want to convey, though, that the scale of the adjustment will be very large.[50]

In addition to more cases, the CMA will also receive a new function currently carried out by the European Commission: the monitoring and enforcing of state aid rules.[51] There is more information about state aid in our briefing, EU State Aid rules and WTO Subsidies Agreement (SN06775).

4.2 Divergence

As with many other areas of policy and regulation, the Brexit trade-off is one of flexibility versus clout. Dr Steve Unger, on the board of Ofcom, made that point in oral evidence to the Lords Select Committee on the European Union:

> There is a trade-off here, which is not ultimately for me to determine. I do a lot of work internationally, talking to countries outside Europe. They are very interested in what the UK has to say; we have a lot of influence. In talking to those countries, having greater flexibility as to our position can help, in some cases, reach agreement. On the other hand, when you talk to those same countries as part of a European delegation—I have had experience representing the 28 to other countries—you clearly have more clout.[52]

Current plans for the immediate future, including in the event of a no deal, are to remain aligned with EU case law.[53] In the longer term (for example, when the Brexit implementation period is over, if there is one), the extent of divergence may be limited by the terms of a UK/EU trade deal or economic partnership.

The law as it currently stands was modelled on the equivalent EU prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the European Union, and requires the UK regulators and courts to follow EU jurisprudence.[54] On the question of whether the UK should

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50 Business, Energy and Industrial Strategy Committee, Oral evidence: Work of the Competition and Markets Authority, HC 2246, Wednesday 5 June 2019, QQ30-32

51 CMA, Promoting competition and ensuring markets work well after Brexit, 4 March 2019

52 House of Lords European Union Committee, Internal Market Sub-Committee, Brexit: competition, Thursday 14 September 2017, Q15

53 CMA, Speech by Dr Michael Grenfell, UK Competition Law enforcement: the post-Brexit future, 11 June 2019

54 Section 60 of the *Competition Act 1998* ensures that "so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union".

cease to be constrained by EU Court judgements in the future, the CMA's Dr Grenfell took a nuanced view:

> Certainly, there are advantages in businesses being subject to competition laws that do not differ too radically from each other, particularly in the case of businesses that operate multi-nationally. But that is in any way the case – in most respects, competition law imposes the same requirements on businesses across the globe. […] Yet at the margins, there are issues on where there are legitimate differences – loyalty rebates, for instance, which have been the subject of intense economic and legal debate, or price discrimination.
>
> The question is whether, for those cases at the margins, we should be bound to some degree to follow EU Court judgments. There are arguments both ways. […]
>
> On the one hand, it is argued that yes, we should conform with EU jurisprudence – continue to conform with EU jurisprudence – because that will provide business with the consistency, predictability and stability they crave. It's what we've always done (for the past 18 years). EU countries are our nearest, and largest, trading partners, and so it is helpful to have the same competition laws that they have, applied and interpreted in pretty much the same way.
>
> But there are also powerful arguments against 'privileging' EU Court of Justice jurisprudence over all other international precedent and best practice, and over our own independent thinking. Again, we are talking not about the bulk of competition law (on which there is consensus across the globe – price collusion and bid-rigging are unlawful everywhere). As I've said we are talking only about those issues at the margins over which there is genuine and legitimate debate – fidelity rebates or price discrimination, for example. Once we are outside the EU, if the view of the UK competition authorities or courts is that the better view on one of these issues is X, why should they be constrained from applying X just because one particular foreign court, the EU Court of Justice, has case law which says Y, case law which might be outdated?[55]

The Political Declaration for the future relationship between the UK and the EU negotiated by Theresa May's Government hinted at maintaining a certain degree of alignment. However, it did not go into any detail beyond saying that "[t]he future relationship must ensure open and fair competition […] building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship".[56]

4.3 Co-operation and information sharing

To continue dealing with cross-border cases efficiently and effectively after Brexit, the CMA hopes to strike a co-operation agreement with the EC and the other member state agencies that includes sharing

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55 Competition and Markets Authority, Speech by Dr Michael Grenfell, A view from the CMA: Brexit and beyond, 16 May 2018

56 HM Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 25 November 2018

confidential information on cases. CMA General Counsel Sarah Cardell explained the depth and importance of the current arrangements:

> At the moment, under the European regulation, a very clear framework has been set up that enables the European Commission and member state authorities to share information, including confidential information, about cases. It enables us to work very closely together when co-ordinating investigations and assisting with each other's investigations. Those are all critical aspects to enable us to deliver going forward. […]
>
> On information sharing, it is particularly important to note that although there are a number of other co-operation agreements in place around the world […] there are not that many that replicate the sharing of confidential information on cases, particularly on the antitrust side.[57]

CMA CEO Andrea Coscelli said that the impact of losing co-operation and information sharing with European authorities after Brexit would be "very serious":

> For us, our main risk factor is no deal. On mergers, the parties usually have an interest in the different agencies co-operating with each other, so we would expect, the day after no deal, on most of the mergers, the parties to give us that kind of waiver for the confidentiality discussions. If you are defending a cartel investigation, your incentives are very much in a different place, so we think there will be a real gap on anti-trust.[58]

For these reasons, it is in the mutual interest of the EU and the UK to strike a formal co-operation agreement on competition matters after Brexit.[59] However, striking a note of caution, UCL's Centre for Law, Economics and Society remarked that "none of the existing international agreements comes close to the degree of cooperation possible and practiced within the ECN [European Competition Network]", and so "it would be unrealistic to believe that [the same degree of cooperation] can be accomplished".[60]

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57 House of Lords European Union Committee, Internal Market Sub-Committee, Brexit: competition, Oral evidence, Thursday 14 September 2017, Q3

58 Business, Energy and Industrial Strategy Committee, Oral evidence: Work of the Competition and Markets Authority, HC 2246, Wednesday 5 June 2019, Q36

59 House of Lords European Union Committee, Brexit: competition and State aid, 12th Report of Session 2017-19, 2 February 2018, para 168

60 Centre for Law, Economics and Society at UCL, Written evidence (CMP0032) to Lords European Union Committee, 15 September 2017, para 111

5. Digital markets

A global debate is taking place about the dominance of tech giants and their ability to stifle competition. To illustrate, Google captured an estimated 40% of spending on digital advertising in the UK in 2018, and Facebook 23%.[61] Together, that is three out of every five pounds of digital advertising captured by Facebook and Google. Amazon sold an estimated 89% of all e-books and accounted for 45% of all e-commerce in the US in 2018.[62]

There are different views about what the right solution is, or if any is needed. Of those who favour action, some advocate new regulations while others call for 'breaking up' the tech giants. Separating platforms from the other products and services sold by the company, or requiring the company to sell off an earlier acquisition, are some ways a company can be split up.

Whichever route is taken, these digital markets involve global companies often headquartered outside the UK. The solution is likely to require a high degree of engagement and co-operation with competition authorities around the world, and in particular the two major players, the US agencies (the Federal Trade Commission and the Department of Justice Antitrust Division) and the EC Directorate-General for Competition.

5.1 Potential remedies

There is a range of proposals that could mitigate or reduce the dominance and potentially abusive behaviour of the tech giants. The main ideas are introduced below.[63]

Break-up

A break-up means a company separates or sells part of its operations or products. For example, Facebook could sell Instagram or WhatsApp; Google could spin off YouTube; Amazon could split off its marketplace platform from its retail divisions that compete with other sellers. However, companies cannot be split up at will. A proper investigation must be carried out, and evidence must show that divestment is a proportionate remedy to the harm identified. The company can appeal the decision in the courts.

Utility regulation

This is an argument for regulating digital platforms for the same reasons that we regulate utilities: they are natural monopolies and virtually everyone depends on them one way or another. A key tool of utility regulation is to cap profits to a maximum rate of return.

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61 eMarketer Chart, UK Net Digital Ad Revenue Share by Company, February 2019
62 Bloomberg, The Enormous Numbers Behind Amazon's Market Reach, 27 March 2019
63 Adapted from: *The Economist*, The techlash against Amazon, Facebook and Google—and what they can do, 20 January 2018

Prevent new acquisitions

This is a call for competition authorities to challenge and block more acquisitions. One way this could be done is to lower the thresholds for intervention into proposed mergers and takeovers, and to take greater account of considerations beyond market share and impact on consumer prices.

Data portability and interoperability

Data portability seeks to let customers move their data elsewhere. The idea resembles how mobile-phone users can switch networks without losing their phone number.

Interoperability seeks to force companies to share their data with others. For example, people joining Instagram were initially able to discover all the people they followed on Twitter, thanks to a Twitter API that made that information available.

New dispute resolution bodies

This the creation of bodies to handle complaints quickly and fairly. For example, a seller who feels they have been unfairly demoted in Amazon's search results, or a newspaper that believes its ranking in Facebook's feeds is too low, could seek redress from these bodies. The bodies could be hosted by the company, but made up of external experts, or they could be entirely independent.

5.2 UK policy debate

In the UK, the Government commissioned Professor Jason Furman to look at this issue. The Digital Competition Expert Panel that he chaired reported in March 2019, Unlocking digital competition. The introduction alludes to a range of views about the state of digital competition, from those who believe that no action is needed to those who argue that digital platforms are natural monopolies, and takes a middle-ground position:

> Some people argue that digital platforms are natural monopolies where only a small number of firms can succeed, making competition impossible. The logical conclusion of that view is utility-like regulation of the type used for electricity distributors. Others believe there is already adequate competition and no policy changes are needed to maintain it. We disagree with both views, seeing greater competition among digital platforms as not only necessary but also possible – provided the right policies are in place.[64]

So, the Panel argued in favour of new rules that promote competition:

> […] the UK should take a forward-looking approach that creates and enforces a clear set of rules to limit anti-competitive actions by the most significant digital platforms while also reducing structural barriers that currently hinder effective competition. These rules should be based on generally agreed principles and

64 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p2

> developed into more specific codes of conduct with the participation of a wide range of stakeholders.[65]

To develop and enforce these rules, the Panel recommended setting up a new "digital markets unit" with three main functions:

9 To develop a code of competitive conduct, with the participation of stakeholders;

10 To enable greater personal data mobility and systems with open standards in order to increase competition and consumer choice;

11 To advance data openness where access to non-personal or anonymised data will tackle the key barrier to entry in a digital market, while protecting privacy.[66]

The Panel also had two strategic recommendations for the competition regime:

1 Updating merger policy so that the CMA can take more frequent and firmer action to challenge mergers that could reduce future levels of innovation and competition, taking better account of technological developments.

2 Faster and more targeted antitrust enforcement, by enabling more use of interim measures while a case is ongoing and by limiting the grounds for companies to appeal the CMA's decision in the courts.[67]

CMA response

The CMA has made the case for new and enhanced powers in their "far-reaching proposals" (February 2019) submitted to the Business Secretary (see CMA's proposals in this briefing). One of their aims is precisely to be able to act much faster, so that "within six or nine months, still within all the procedural guarantees for Amazon and everyone else, [we would like to be able] to take at least a preliminary decision on that matter".[68]

The CMA also commissioned work to look back at their past merger decisions in the UK digital sector, Ex-post Assessment of Merger Control Decisions in Digital Markets (9 May 2019), which, among other things, concluded that competition authorities ought to intervene more to stop big tech buying out their smaller rivals:

> There is a concern that merger policy has put too much weight on the risk of incorrect intervention (type I error) compared to the risk of incorrect clearance (type II error) when assessing mergers in the digital sector, leading to increased concentration in digital markets. The nature of competition in many digital markets may change the terms of the usual trade-off between type I and type II errors. Network effects often make the structure of digital markets quite concentrated and barriers to entry rather high. Big

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65 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p2
66 Digital Competition Expert Panel, Unlocking digital competition, March 2019, pp5-6
67 Digital Competition Expert Panel, Unlocking digital competition, March 2019, p6
68 Andrea Coscelli (CMA CEO) in: Business, Energy and Industrial Strategy Committee, Oral evidence: Work of the Competition and Markets Authority, HC 2246, Wednesday 5 June 2019, Q18

> data may contribute to such outcomes, to the extent that the data endowments enjoyed by incumbents provide a competitive advantage that makes it even more difficult to challenge them. The main mechanism left to discipline incumbents is that of competition for the market, i.e. that potential and actual entry mitigate the ability of incumbents to exert market power. This makes potential competitors even more valuable than they usually are in traditional markets. As a result, type II errors may be particularly costly. In other words, certain features of digital markets may justify some changes in the way mergers in the sector are typically assessed.[69]

Deals that the report looks at include Facebook's takeover of Instagram and Google's takeover of Waze, where the competition authority's decision "may have represented missed opportunities for the emergence of challengers to the market incumbents but have also likely resulted in efficiencies".[70]

On 3 July 2019, the CMA launched its Digital Markets Strategy, which sets out the authority's approach to protecting consumers in the digital economy while ensuring that digital markets remain competitive. The Strategy identified seven priorities for the CMA:

> Priority 1: Consumer and antitrust enforcement and merger assessment
>
> Priority 2: The work of our Data, Technology and Analytics (DaTA) unit
>
> Priority 3: Market study on online platforms and digital advertising
>
> Priority 4: Review our mergers approach to digital markets as necessary
>
> Priority 5: Policy work to consider a possible 'digital markets unit'
>
> Priority 6: Proposals to reform our enforcement tools
>
> Priority 7: International cooperation[71]

Under priority 3, the CMA also launched the Online platforms and digital advertising market study. The study assesses three potential sources of harm to consumers in connection with digital advertising:

- to what extent online platforms have market power in user-facing markets, and what impact this has on consumers
- whether consumers are able and willing to control how data about them is used and collected by online platforms
- whether competition in the digital advertising market may be distorted by any market power held by platforms.[72]

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69 Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, 9 May 2019, p iii
70 Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, 9 May 2019, p xiii
71 CMA, Digital Markets Strategy, July 2019, p3
72 CMA, Online platforms and digital advertising market study, 3 July 2019

5.3 International action

Several other competition authorities have also expressed concerns about digital markets in their respective jurisdictions, notably the European Commission, the Australian Competition and Consumer Commission, the French Autorité de la Concurrence, the German Bundeskartellamt and the Italian Autorità Garante della Concorrenza e del Mercato. The CMA summarised international work in this area in Annex B of their *Online platforms and digital advertising market study: Statement of Scope* (July 2019). Briefly:

- The French authority looked at competition in the online advertising sector in 2018 (Online advertising), and abusive data collection and processing in 2019.
- The Australian authority investigated the effects of digital search engines, social media platforms and other digital content aggregation platforms on competition in media and advertising services markets in 2017-2019 (Digital platforms inquiry).
- The German authority launched a sector inquiry into market conditions in online advertising sector in 2018. Separately, it found that Facebook abused its dominance through its data collection practices (Case summary).
- The Italian authority found that Facebook breached consumer law through its data collection practices in 2018 (Press release). In 2017, it launched a joint inquiry into big data together with the communications regulator and the personal data regulator, which reported in 2019 (Big data inquiry).

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