



# Unlocking Digital Competition: A Perspective from the Furman Report

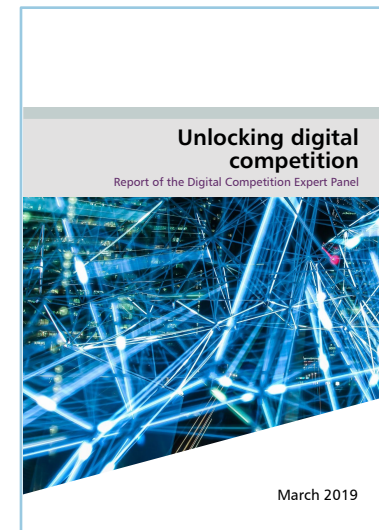
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Amelia Fletcher  
Centre for Competition Policy, UEA, UK  
Digital Competition Expert Panel

Disclaimer: These are not necessarily the views of any  
organisation with which I am associated!

# Background

- ❖ UK Digital Competition Expert Panel (DCEP), led by Jason Furman. Published March 2019 (after 6 months).
- ❖ Key questions:
  - What competition issues arise in the digital economy? Can existing competition law cope? If not, how should it change? Will this be enough, or will more be needed? If so what?
- ❖ Key recommendations for Government and CMA:
  - A new 'Digital Markets Unit'.
  - 'Reset' merger control and speed up antitrust cases.
  - Engage internationally to encourage a global approach.



# The case for 'leave well alone'

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- ❖ The digital platforms have brought huge benefits:
  - **For consumers:** high quality, free (or low price) services.
  - **For firms:** Enhanced access to global markets, targeted advertising, enhanced logistics.
  - **For competition:** Digital comparison tools enhance consumer choice, and also competition.
  - **For innovation:** High inhouse R&D. Plus potential to 'sell out' incentivises start-ups and attracts VC. Digital giants can bring to mass market quickly.
- ❖ There is intense competition to win markets, and tippy markets remain tippy.
- ❖ These markets are so dynamic and fast-moving that any attempt at intervention will be at best irrelevant and at worst create serious harm.

## On the other hand...

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- ❖ We see a number of digital markets:
  - Which have 'tipped' to being highly concentrated, seemingly long-term.
  - And where dominance has been (or risks being) extended into related markets.
- ❖ Creates serious risk of consumer harm:
  - **Direct:** e.g. Zero price may be too high. Payment via data or attention.
  - **Indirect:** e.g. High prices charged to business users likely to be passed on.
  - **More generally:** Embedded market power dampens all competitive incentives, including to innovate. (Eg Microsoft IE)
- ❖ We supported continued use of consumer welfare test, but with focus on long-term, multi-dimensional effects and allowing for pass-through.
- ❖ [NB Not covered: Risk of enhanced political power, Online harms, Resilience risk.]

# Key economic drivers

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- ❖ Some key drivers are inherent in the economics of these markets
  - **Economies of scale and scope:** which are strong and trans-global
  - **Network effects:** Absent multi-homing and interoperability, markets may tip.
  - **Data:** as a key input (as well as output), also exhibiting strong economies.
  - **Consumer behaviour/biases:** Eg Single-homing, weak privacy self-protection, default and status quo biases relevant.
- ❖ This is even before any 'strategic' firm behaviour!

# Potential strategic firm behaviour

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- ❖ Acquisitions of potential competitors or key inputs.
- ❖ Self-preferencing behaviour:
  - Eg Discriminatory access (eg Google shopping); tying and bundling (eg Google Android).
- ❖ Moves to limit multi-homing by users on one side or another.
  - Eg MFNs to limit shopping around by consumers; exclusivity clauses with suppliers/advertisers.
- ❖ Exploitative behaviour relating to bottleneck position, eg around rankings.
- ❖ 'Predatory innovation'.
- ❖ **Key question: Can competition law deal effectively with all of this?**

# Issues for merger law

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- ❖ Concern that merger control has been under-interventionist.
  - In last decade, Amazon, Apple, Facebook, Google and Microsoft have made over 400 acquisitions globally; 250 in last 5 years.
  - Valuations for some have been exceptionally high\*.
- ❖ Most have not been reviewed, or only reviewed at Phase 1.
  - Only Google/DoubleClick and Apple/Shazam received Phase 2 scrutiny.
  - Only Microsoft/LinkedIn was subject to remedies (Phase 1 commitments).
- ❖ Case-by-case retrospective assessment is difficult, due to non-observability of counterfactual. But clear evidence of under-investigation (see Lear report for CMA).
- ❖ Overall false negatives seem more likely than false positives! Further problem is uncertainty of future outcomes in such complex and dynamic markets.

Table 1.A: Examples of high value acquisitions by large digital companies

Year	Acquirer	Company acquired	Transaction value (\$million)
2006	Google	YouTube	1,650
2007	Google	DoubleClick	3,100
2011	Microsoft	Skype Technologies	8,500
2011	Google	Motorola Mobility	12,500
2012	Facebook	Instagram	1,000
2012	Microsoft	Yammer	1,200
2013	Google	Waze	970
2014	Apple	Beats Electronics	3,000
2014	Google	Nest Labs	3,200
2014	Google	Deepmind Technologies	625
2014	Facebook	WhatsApp	19,000
2014	Facebook	Oculus	2,000
2016	Microsoft	LinkedIn	26,200
2017	Apple	Shazam	400
2018	Amazon	Ring	1,000

Source: IG Group<sup>105</sup>



# Recommendations for merger law

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- ❖ **DCEP Proposal: CMA should prioritise scrutiny of digital mergers, with a focus on harm to innovation and potential competition**
- ❖ Jurisdictional issues - Eg if target has no turnover and no horizontal overlap? Not a problem for UK share of supply test, but could be elsewhere?
- ❖ Legal test - Given the uncertainty of future possibilities, can a balance of probabilities test cope?
  - **DCEP Proposal: Replace with wider 'Balance of harms' test.**
- ❖ Does application of merger control in digital platform markets need a reset?
  - **DCEP Proposal: Rewrite Merger Assessment Guidelines.**
  - Eg Increased focus on innovation effects and long-term welfare, on the counterfactual, and on acquisition value/deal documents.

# Recommendations for antitrust cases

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- ❖ Key problems identified: Deprioritisation of difficult cases and case length.
  - **DCEP Proposal: Retrospective analysis of cases/decisions not taken.**
  - **DCEP Proposal: Streamline process of interim measures.**
  - **DCEP Proposal: Change CAT appeal standard from ‘full merits’ to JR.**
- ❖ But unlikely to solve all problems:
  - Cases resource-intensive and lengthy: especially when complex and novel.
  - Partial nature of cases: Can’t address all issues arising. Have to prioritise.
  - Fines don’t create deterrence: But might higher fines be even worse?
  - Remedies too narrow, not forward-looking, hard to design, need monitoring.
  - Promotion of competition may go beyond limiting anti-competitive behaviour!

# Recommendation for a new 'Digital Markets Unit' with three objectives

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1. A code of conduct for designated 'Strategic Market Status' platforms. Based on core principles. Participative development required, but could include eg:
  - User access, prominence, rankings and reviews provided on a fair, consistent and transparent basis.
  - Users not unfairly restricted from, or penalised for, utilising alternative platforms or routes to market.
2. Promotion of enhanced data mobility and interoperability, via open standards, to facilitate switching and multi-homing.
  - (Potentially) stronger regulation of data controllers to increase consumer trust, enhance choice and facilitate entry by new players.
3. Promotion of data openness, eg to facilitate 'training' of potential new AI.

# What next?

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- ❖ UK Prime Minister committed to taking forward thinking on implementation.
- ❖ Some key issues:
  - Where to locate the 'Digital Market Unit'?
  - How to determine 'Strategic Market Status'?
  - What powers and sanctions are needed for the DMU to realistically act *ex ante* more quickly than *ex post* enforcement?
  - What might be good use cases for enhanced data mobility/interoperability or data openness interventions?
  - How best to ensure coordinated action across jurisdictions?
- ❖ In the meantime, CMA has commenced market study into digital advertising.



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*Comments/Discussion?*