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UK to create a 'Digital Markets Unit'

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On 10 June 2019, the outgoing UK Prime Minister confirmed that the UK government will move forward with a proposal for a new 'Digital Markets Unit'. In her [speech](#) at the launch of London Tech Week, Theresa May noted that the author of the report recommending establishment of such a body, Professor Jason Furman, will be charged with setting up the specialised unit and advising the government on its implementation.

Furman Report on digital markets

The Furman Report ('[Report](#)', published in March 2019) was far reaching in its proposals and, it would seem, inspired some of the views put forward by the Chair of the Competition and Markets Authority (CMA), Lord Tyrie – in a [letter](#) before publication of the Report and more recently in a [speech](#) and a subsequent appearance before the House of Lords. Overall the Report's panel of experts determined that the competition rules as they currently stand (antitrust/behavioural review and merger control/transactional review) are inadequate for dealing with the (often novel) concerns that arise in modern digital markets and that UK competition policy needs to be updated accordingly.

Notably, the Report concludes that large tech players face inadequate competition – with digital markets demonstrating high levels of concentration and tending to "tip" to a "winner" who takes most or all of the market. Combined with alleged under-enforcement in merger reviews (noting that five big tech players have made over 400 acquisitions in the last 10 years and implying that some of these deals should probably not have been allowed), start-ups and new entrants appear, in the panel's view, to face considerable challenges.

'Digital Markets Unit'

Amongst the specific proposals put forth in the Report to address some of these concerns is the creation of a new 'Digital Markets Unit'. This body would regulate platforms designated as having 'strategic market status' (a status that would also require such platforms to flag to the CMA all acquisitions they intend to make – regardless of whether the UK's jurisdictional thresholds for merger control are met). More specifically, the Report recommends that the Digital Markets Unit:

- establishes a digital platform 'code of conduct' for platforms that have been designated as having a 'strategic market status';
- pursues personal data mobility and systems with open standards where these will deliver greater innovation and competition;
- uses 'data openness' as a tool to encourage competition (where necessary and proportionate to achieve its aims);
- cooperates with a wide range of stakeholders but with powers to impose solutions and to monitor, investigate and sanction non-compliance;
- is empowered to impose measures where a company holds a 'strategic market status' – with enduring market power over a strategic bottleneck market; and

- is resourced with the capability, specialist skills and funding required to perform its functions successfully.

A [paper](#) published recently by the Department for Business, Energy and Industrial Strategy (BEIS) confirmed that UK government has "*carefully weighed up the evidence and agree with the Digital Competition Expert Panel that there is a strong case for establishing a pro-competition Digital Markets Unit, tasked with securing competition, innovation and beneficial outcomes for consumers and businesses in the digital economy*". The UK government will later this year provide its analysis of Furman's recommendations as part of a broader competition "green paper" which intends to stimulate discussion.

It remains to be seen what the Digital Markets Unit will look like in practice and what the scope of its role and powers will be. Crucially, the Report refrained from recommending whether it should sit within an existing regulator (ie the CMA or the Office of Communications – Ofcom), or as a new standalone regulator. The CMA has expressed disagreement with the latter approach on the basis that this would dilute existing pools of expertise. Amelia Fletcher, who co-authored the Report, recently suggested that the Digital Markets Unit could go hand-in-hand with a proposed Online Harms Regulator.

International focus

These discussions come amid a flurry of developments and commentary, both in the UK and abroad, focused on digital markets. Competition authorities globally are grappling with questions about whether current enforcement tools are adequate for dealing with the challenges posed by digital markets. In short, they are confronted with the issue of how best to harness the clear benefits of digitisation (pro-consumer innovation, etc) whilst, at the same time, curbing what some see as the development of 'ecosystems' in which (it is alleged) large tech players derive significant competitive advantage and secure positions that appear increasingly unassailable.

Prominent critics and reformers (such as Lord Tyrie and Senator Elizabeth Warren in the US) have, in particular, described a tendency towards more concentrated markets in which a small number of tech players dominate – citing, for example that five tech giants alone reportedly have a combined market cap in excess of US\$3.5 trillion (greater than the GDP of most advanced nations). It is their view that this level of concentration and corporate power (especially in dynamic tech markets which feature so prominently in modern life) not only has implications for properly functioning and competitive markets, but also for social cohesion and democracy.

The UK government itself acknowledges that the status quo might not be acceptable with the UK Chancellor, Phillip Hammond, recently suggesting that UK competition rules may no longer be “fit for purpose” in an age of increased digitisation. In his words, “the Furman review is really focused on the proposition that as the economy changes, the regulatory structures that we have in place have to change with them”.

Brexit and policy priorities

This development in thinking about digital markets in the UK would appear to run up against new realities caused by Brexit. For example, just as the UK will be looking to assure global companies that the UK remains "open for business" despite its potential departure from the world's largest trading bloc, it is also sending out messages that could potentially chill investment in a post-Brexit economy (for example, openly considering whether UK merger control should move from a voluntary to a mandatory regime). Furthermore, the funding required to meet the identified challenges posed by digitisation comes at a time when most (if not all) government departments will be requesting additional financing to deal with the fall-out from Brexit (especially in a 'no deal' scenario).

However (and despite the stark choices and complications brought about by Brexit as well as the inevitable strain on government resources), dealing with concerns about the operation of digital markets is clearly a UK government priority. Funds have apparently been earmarked for the creation of a Digital Markets Unit as well as the go-ahead for the CMA to undertake a 'market study' of the digital advertising market (as announced by Phillip Hammond in his Spring Statement).

Going forward – first step, merger control?

The UK government's interest in digital commerce is multifaceted and clearly covers a range of issues from consumer protection concerns to conduct covered by the UK's competition law provisions. That said, it appears that there may be an initial focus on the operation of the UK's merger control regime.

On 3 June 2019, the CMA published a commissioned [report](#) by Lear, an economic consultant firm, which reviewed past digital sector merger decisions taken by the UK's Office of Fair Trading and the Competition Commission (the UK competition authorities prior to the CMA). Publication of this report coincided with a [speech](#) on competition and the digital economy delivered by the CMA's Chief Executive, Andrea Coscelli, to the Organisation for Economic Cooperation and Development/G7 conference. Dr Coscelli's speech focused on the effectiveness of merger control in digital markets and emphasised that "evolution" rather than "revolution" was needed in terms of the tools used by the CMA in assessing mergers – noting that the Lear report shows "that there are incremental steps competition authorities can take to improve our ability to assess these mergers."

To this end, Dr Coscelli considered that that Lear did not uncover any fatal flaws or gaps in the existing UK regime and that the CMA's focus going forward should, therefore, be on taking effective action "using our existing powers and tools". It remains to be seen whether such effective action would include the somewhat radical and, for companies undertaking transactions, potentially worrying idea floated by Lear of using 'dawn raids' in a merger context to gather greater evidence regarding the merging parties' future plans and views of the market(s). Nevertheless, the mere discussion of the idea reflects regulators' desire to have as complete a picture as possible when making their assessments and, in turn, underscores the growing emphasis and focus on internal documents in merger reviews.

To better understand how the CMA might take effective action using "existing powers and tools", Dr Coscelli announced the launching of a '[Call for information on digital mergers](#)' with the intention of updating the CMA's [Merger Assessment Guidelines](#) (guidance which has not been updated since 2010 despite the substantial evolution and growth of digital markets). This consultation process is open until 12 July, with the expectation that input provided by stakeholders will help recalibrate the CMA's approach so that it is better able to assess and effectively deal with issues arising in digital markets.



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