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The Evolving Concept of Market Power in the Digital Economy – Note by the United Kingdom

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>

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1. Introduction

1. The UK Competition and Markets Authority (CMA) welcomes the opportunity to contribute to the OECD's Roundtable on "the evolving concept of market power in the digital economy".
2. Market power has always been a core component of competition assessments. The same is true when assessing digital markets. The OECD raises several questions around the concept, competition analysis and legislative frameworks surrounding market power in digital markets. One key question asked is whether digitalisation means a new concept of market power is needed.
3. This paper sets out the CMA's approach, experience and future proposals when considering the assessment of market power in digital markets. In summary, while we do not think a new concept of market power is needed, we recognise there are certain market features that are common in digital markets and this is reflected in our approach by placing more emphasis on certain considerations, analysis, and evidence. We also believe our current tools sometimes struggle to deal effectively with digital markets and as such recommended the introduction of a new ex ante regulatory regime to proactively shape the behaviour of particularly powerful digital firms and to prevent consumer harm from arising.
4. The paper is structured as follows:
 - Section 2 describes the features that drive market power in digital markets
 - Section 3 discusses the CMA's current approach to digital markets including examples of challenges we have faced in assessing market power
 - Section 4 describes the CMA's Digital Markets Taskforce recommendation of a new regulatory regime for the most powerful digital firms, including why it is needed and the role of market power.
 - Section 5 sets out our overall conclusion.

2. Features driving market power in digital markets

5. Market power implies that a firm is able to influence outcomes in the market to some extent. While this is often thought of in the context of raising prices, influencing outcomes could also relate to quality, service, business models and innovation, among others, and as such is relevant even where consumers face a zero price.
6. Market power arises where customers have poor alternatives to the product or service offered by a firm and as result the firm does not face as effective competitive pressure as it would if there were better alternatives. Therefore, an assessment of market power is ultimately an assessment of the quality of the alternatives available to a customer.
7. There is an increasing body of evidence that market power and the resulting lack of effective competition in some digital markets is driven by specific market features in these markets, that lead to entrenched market power and inhibit the ability of rivals to enter and expand. These market features include:

- **Network effects** – network effects occur when the value of a service to its users increases as the total number of users increases. While sometimes a natural feature of the market, network effects can also be the result of technological design decisions. Network effects are very common in (albeit not exclusive to) multi-sided platform settings, particularly indirect network effects arising when the value to a customer group on one side increases with the size of the customer group on the other. Multi-sided platforms are a widespread business model in digital markets.
 - **Economies of scale** – Economies of scale arise where average costs decrease with increasing scale. These features mean that once a firm reaches a certain size, it can be extremely difficult for smaller new entrants to challenge it effectively.
 - **Consumer decision making and the power of defaults** – rapid increases in the availability of information and services online, coupled with a reduced tolerance for delays, has encouraged ‘default behaviour’ on the part of consumers – a propensity to avoid wasting time by immediately accepting whatever default option is presented.¹
 - **Unequal access to user data** – data about users is highly valuable for developing and providing digital services, such as targeting advertising and personalised timelines with relevant suggested content. The scale of data available to powerful digital firms acts as a competitive advantage, while creating a barrier to entry and expansion to smaller potential rivals.
 - **Lack of transparency** – a common attribute amongst the large online platforms is that they rely on sophisticated algorithms to make a large volume of decisions in real-time. One of the consequences of this reliance on ‘black box’ decision-making is that consumers and businesses that interact with them find it difficult to understand or challenge how decisions are made and may find it harder to exercise choice effectively.
 - **The importance of ecosystems** – the companies behind the most powerful digital firms have built large ‘ecosystems’ of complementary products and services around their core service. While this type of integration can deliver efficiency savings and improve the consumer experience overall, it can also insulate these core services from competition, making it harder for rivals to compete.
 - **Vertical integration, and resultant conflicts of interest** – the large digital firms are increasingly present at multiple stages of the supply chains in which they operate. This can give rise to conflicts of interest, and the potential to use their power in their main activity to undermine competition in other stages of the chain.
8. Many of the above characteristics are not intrinsically ‘digital’ or new features. Indeed, some of these may well be present in non-digital or ‘traditional’ markets. However, the strength of these features and that many are present simultaneously suggests they play a greater role in driving market power in digital markets than in many traditional markets.

¹ CMA market study into online platforms and digital advertising, [Appendix L: summary of research on consumers’ attitudes and behaviour](#).

3. CMA's current approach to digital markets

3.1. The CMA's current tools and approach

9. The CMA has looked at a number of 'digital' cases recently across various tools. These include a market study into online platforms and digital advertising,² on-going market studies into mobile ecosystems³ and music streaming⁴ and various mergers involving firms active in the digital space, including Facebook (now Meta)/Giphy,⁵ Facebook/Kustomer,⁶ Amazon/Deliveroo,⁷ Google/Looker,⁸ Microsoft/Nuance⁹ Sabre/Farelogix,¹⁰ viagogo/StubHub,¹¹ Taboola/Outbrain¹² and Visa/Plaid.¹³ The CMA has also launched a number of digital competition act cases recently (under both Chapter I and Chapter II of the Competition Act)¹⁴ involving Google,¹⁵ Meta,¹⁶ and Apple.¹⁷ Finally, the CMA has also launched consumer enforcement cases into fake and misleading online reviews¹⁸ and social media endorsements.¹⁹

10. While market power is an important part of the assessment in many cases, our approach to assessing market power is also guided by the investigation tool and legislative framework surrounding it.

11. For instance, in 2021, the CMA published an updated version of its Merger Assessment Guidelines (MAGs).²⁰ The MAGs set out the substantive approach of the CMA to its analysis when investigating mergers. In updating the guidelines, we recognised that

² [Online platforms and digital advertising market study - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/online-platforms-and-digital-advertising-market-study).

³ [Mobile ecosystems market study - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/mobile-ecosystems-market-study).

⁴ [Music and streaming market study - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/music-and-streaming-market-study).

⁵ [Facebook, Inc \(now Meta Platforms, Inc\) / Giphy, Inc merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/facebook-inc-now-meta-platforms-inc-giphy-inc-merger-inquiry).

⁶ [Facebook, Inc. / Kustomer, Inc. - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/facebook-inc-kustomer-inc).

⁷ [Amazon / Deliveroo merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/amazon-deliveroo-merger-inquiry).

⁸ [Google LLC / Looker Data Sciences, Inc merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/google-llc-looker-data-sciences-inc-merger-inquiry).

⁹ [Microsoft Corporation / Nuance Communications, Inc. merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/microsoft-corporation-nuance-communications-inc-merger-inquiry).

¹⁰ [Sabre / Farelogix merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/sabre-farelogix-merger-inquiry).

¹¹ [viagogo / StubHub merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/viagogo-stubhub-merger-inquiry).

¹² [Taboola / Outbrain merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/taboola-outbrain-merger-inquiry).

¹³ [Visa International Service Association / Plaid Inc. merger inquiry - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/visa-international-service-association-plaid-inc-merger-inquiry).

¹⁴ Ie both cases involving agreements and cases on abusing a dominant position.

¹⁵ See [CMA investigates Google and Meta over ad tech concerns - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/cma-investigates-google-and-meta-over-ad-tech-concerns), [CMA to investigate Google's 'Privacy Sandbox' browser changes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/cma-to-investigate-google-s-privacy-sandbox-browser-changes) and [Investigation into suspected anti-competitive conduct by Google in ad tech](https://www.gov.uk/government/research-publications/investigation-into-suspected-anti-competitive-conduct-by-google-in-ad-tech).

¹⁶ [Investigation into Meta's \(formerly Facebook\) use of data - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/investigation-into-meta-s-formerly-facebook-use-of-data).

¹⁷ [CMA investigates Apple over suspected anti-competitive behaviour - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/cma-investigates-apple-over-suspected-anti-competitive-behaviour).

¹⁸ [CMA to investigate Amazon and Google over fake reviews - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/cma-to-investigate-amazon-and-google-over-fake-reviews).

¹⁹ [Social Media Endorsements - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-publications/social-media-endorsements).

²⁰ CMA (2021), [Merger Assessment Guidelines](https://www.gov.uk/government/research-publications/cma-merger-assessment-guidelines).

there had been significant changes both in the UK economy and in the types of mergers the CMA reviews since the previous guidelines were published in 2010. In particular, we recognised the significant effect digital technologies have had on many markets, and on the way that businesses compete. The updates to the guidelines reflected our recent experience and case law, reviews of our work and recommendations made in expert reports about our approach to cases in digital markets. While there have been significant changes in markets over the past several years, the economic principles that are relevant to the assessment of mergers have not changed. The CMA's updates to its guidelines do not reflect the introduction of new theories of harm or economic principles, but rather developments in the application of existing theories of harm and economic principles, including in digital markets.

12. The CMA's assessment of mergers focuses on changes in the competitive constraints on the merging firms that result from the transaction. Where one or both of the merging firms have market power, that can make it more likely that a merger will result in a substantial lessening of competition. The CMA's assessment of mergers does not, however, depend on a finding of market power. The same factors that the CMA considers in assessing the effect of a merger on competitive constraints would be relevant to an assessment of market power.

13. Some of the changes to the MAGs that may be of particular relevance in thinking about assessment of digital mergers include (a) the approach to assessing dynamic and potential competition; (b) placing less emphasis on market definition; and (c) the approach to assessing network effects and two-sided platforms.

3.1.1. *Dynamic competition*

14. When assessing dynamic competition, we recognise that firms' current actions (including investment and innovation) can be based on rivals' potential to 'steal business' in the future through entry or expansion. As such, less weight may be put on any assessment of current market power – particularly of the target firm – as it may not reflect future market power. Similarly, when assessing the constraint from market entry, this should not be looked at as something to which incumbents will react only once it happens, as the mere threat may already constrain market participants and push them to invest to avoid losing business in the future. This is not unique to digital markets but may be more common than in many other markets. For example, in the MAGs we state:

- *Losses of dynamic competition are more relevant when the investments involved in entering or expanding represent an important part of the competitive process, in industries where the process of entering markets takes place over a long period of time and involves significant costs or risks, or where key aspects of the competitive offering are set during the investment phase rather than flexed on an ongoing basis. Examples might include digital platforms, where the costs and time required to build up a significant user base and achieve network efficiencies might involve years of losses (with ongoing uncertainty about whether the platform would eventually be successful), or pharmaceutical mergers where investments in new products might involve years of investment in products that may never come to fruition.²¹*

²¹ CMA [Merger Assessment Guidelines](#) paragraph 5.4.

3.1.2. Market definition

15. Our MAGs also recognise that a static market definition may not be necessary to make a competitive assessment. It may be particularly important to focus on the constraints faced by the merging parties rather than on formal market definition in fast moving markets:

- *While market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger firms' behaviour, captures the competitive dynamics more fully than formal market definition. Consequently, while the appropriate approach will reflect the circumstances in each case, the CMA anticipates that in future, merger assessments will place more emphasis on the competitive assessment as opposed to static market definition.²²*
- *There may be no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition (including, for example, descriptions of the precise boundaries of the relevant markets and bright-line determinations of whether particular products or services fall within the relevant market). The CMA may take a simple approach to defining the market – for example, by describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects.²³*

16. In recent digital market studies, the CMA has not formally defined a market. This is in common with the standard approach in CMA market studies, which do not seek to establish whether a firm has dominance in a defined market but are focussed on assessing the range of competitive constraints applying to firms, and how these could be strengthened. In a market study, the CMA considers 'the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the United Kingdom has or may have effects adverse to the interests of consumers.'²⁴

17. The CMA's Digital Markets Taskforce made similar recommendations in relation to its proposed ex ante regulatory regime and the Digital Markets Unit (DMU) (see more detail from paragraph 48):

- *Formally defining the relevant market involves drawing arbitrary bright lines indicating which products are 'in' and which products are 'out'. Attempting to draw such bright lines is often unnecessary. The relevant evidence can be analysed and interpreted without having formally defined a relevant market. For example, internal documents discussing competitors, views from customers or competitors on substitutes and evidence of customer switching can be analysed without having defined the relevant market. Market shares can also be calculated on multiple different bases and interpreted without concluding on market definition.²⁵*
- *Drawing such bright lines also adds unnecessary complexity. For instance, it can create unnecessary duplication and inefficiency as the same evidence is considered*

²² CMA [Merger Assessment Guidelines](#) paragraph 9.2.

²³ CMA [Merger Assessment Guidelines](#) paragraph 9.5.

²⁴ Enterprise Act 2002, section 130A(2).

²⁵ See [Appendix B](#) to the Advice of the CMA's Digital Markets Taskforce, paragraph 33.

twice: once when defining the relevant market and a second time when assessing the position of a firm within that market. Similarly, it can lead to questions being formulated in abstract and indirect ways that are poorly related to the available evidence. Finally, formal market definition also encourages a narrow approach in which each product or service is allocated to a specific market making it difficult to consider important interactions within an ecosystem of products. This makes formal market definition particularly ill-suited to digital markets where firms may have developed complex ecosystems of interrelated products.²⁶

18. This contrasts with CMA enforcement cases where we are required to formally define a market and establishing dominance in a specific market is often an essential component of any assessment.

3.1.3. Network effects and two-sided platforms

19. In addition, our revised MAGs include a section on how the presence of network effects and the risk of tipping may influence the CMA's competitive assessment of two-sided platforms. In particular, network effects mean that mergers among platforms are more likely to give rise to competition concerns because network effects mean that:²⁷

- **Mergers are more likely to induce a tipping effect.** Mergers may harm customers if they accelerate the market towards tipping, whereas customers would have benefited from a longer period of competition between platforms vying to be the 'winning platform' prior to tipping occurring. Mergers may also award network effects to a platform with lower relative merit, and cause demand to 'tip' to that weaker platform.
- **Platform mergers are more likely to have a strong effect on incentives.** Lost sales are more significant in the presence of network effects because in addition to the profits lost directly on those lost sales, the platform may also lose further profits as their platform becomes less attractive and additional customers switch away. The platform may also suffer a reduction in the chance that demand will 'tip' to their platform. The recapture of sales between two merging platforms may therefore have a more substantial impact on the incentive to raise prices or reduce quality, range, service levels or innovation.
- **Larger platforms are more likely to exert a strong constraint on rivals.** Where network effects are important, larger platforms with more significant network effects may represent a more attractive option for users.
- **Barriers to entry are likely to be high.** Barriers to entry may also be increasing for each successive entrant: as the pool of available users shrinks, the cost of building sufficient network efficiencies to compete may rise. Moreover, incumbent platform operators that have market power derived from network effects may be able to amplify their effect, for example by limiting interoperability with rival platforms. Multi-homing by users of platforms may increase the ability of new entrants to acquire customers and build up network effects, but existing network effects may nevertheless still represent a barrier to doing so.

20. The sections of the MAGs set out above show how our processes and assessments have adapted to digital markets and the way we look at market power within them,

²⁶ See [Appendix B](#) to the Advice of the CMA's Digital Markets Taskforce, paragraph 34.

²⁷ CMA [Merger Assessment Guidelines](#) paragraph 4.25

including how we assess market features which are typical of digital markets, placing more emphasis on dynamic considerations and, in many cases, less on market definition.

3.2. Challenges in assessing market power and competitive dynamics in digital markets

21. There have been several cases over the past few years which required us to assess market power and competitive dynamics in complex technology markets undergoing significant innovation and change and where the digital nature of the industry played a role in our assessment. As explained above, these included mergers, market studies and enforcement cases.²⁸

22. When assessing market power and competitive dynamics as part of these ‘digital cases’, we have given particular consideration to the features driving market power in digital markets described above and (where appropriate) applied the concepts included in the revised MAGs, including on market definition, two-sided platforms and potential competition. Furthermore, during these cases, the parties involved have challenged our assessment of competitive constraints, market power and market definition by referring, at least to some extent, to the digital nature of the industry, including prices of goods and services, investments in innovation, barriers to entry and in particular the significance of network effects and multihoming. We set out some examples of these cases and refer to our assessment and to some parties’ arguments in the paragraphs below.

3.2.1. Market definition and dynamic competition

23. On the Sabre/Farelogix merger we focussed on competitive dynamics and constraints, more than on a formalistic market definition. Our assessment of the merger focussed on the supply of two types of technology solutions to airlines. Firstly, distribution solutions, which allow airlines to transmit flight content (ie flight fare, availability and schedule) to passengers through travel agents and, secondly, merchandising solutions, which allow airlines to sell complementary services to the flight (eg luggage, preferred seat, meal options, wi-fi onboard, etc). We found that Farelogix, albeit offering a product that was not technically ‘two-sided’ – as it was provided to airlines only – was perceived as a competitive threat in the supply of distribution solutions to airlines by Sabre, an established intermediary connecting airlines with travel agents.²⁹ In contrast we note that the Delaware District Court in the US relied on the American Express precedent to hold that ‘as a matter of antitrust law, Sabre and Farelogix do not compete in a relevant market’ given Sabre is a two-sided platform facilitating transactions between airlines and travel agencies while Farelogix is not, as it only interacts with airlines, and ‘only two-sided platforms can compete with a two-sided platform for transactions’.³⁰

24. In the same case, we considered potential competition and looked at innovation in terms of the current process of rivalry through investment decisions, and at the threat of entry as already affecting the current competitive process. As a result, we found that Sabre,

²⁸ For some examples, see [The CMA's Digital Markets Strategy: February 2021 refresh - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/104242/cma-digital-markets-strategy-february-2021-refresh.pdf).

²⁹ In particular, we recognised that Farelogix’s current market share was much smaller than Sabre’s in the supply of distribution solutions. However, we considered that the importance of the competitive constraint imposed by Farelogix was better demonstrated by its role in driving the Global Distribution Systems (GDSs) – among which Sabre – to enhance their offering to airlines. See paragraphs 83-84, [Sabre/Farelogix Final Report](#).

³⁰ See [Delaware District Court Opinion](#), page 69.

albeit not a significant competitor in the supply of merchandising solutions to airlines at the time, would develop a credible solution and become significant in the next 3-5 years and was already exerting a competitive constraint on Farelogix, meaning that its current share of the market was not reflective of its competitive strength, which is often the case in markets undergoing significant transformation.

25. In other cases, we have considered the rate of change in the market when approaching market definition. For instance, in PayPal/iZettle, in looking at a nascent market for the supply of omni-channel payment services to smaller merchants, we considered how that market might develop in the near future, rather than focusing solely on existing products and services.³¹

26. In the Online Platforms and Digital Advertising market study, we did not carry out a formal market definition assessment but instead looked at competitive constraints across the sector and focussed on observing direct indicators of market power and barriers to entry and expansion. In this respect, we disagreed with Facebook (now Meta) that a structured market definition exercise was a necessary step to identifying whether it had market power and considered that the key question was the extent to which its behaviour was constrained by other providers.

27. In the Facebook (now Meta)/Giphy³² merger we noted the issues with a formal market definition exercise, in particular using the hypothetical monopolist test (HMT). Since social media services are provided at zero monetary price to users, we were unable to observe user switching in response to changes in relative price. In principle, users could switch in response to worsening of non-price aspects of the service, such as amount of advertising served to users, but in order to gauge the ability and willingness of consumers to switch in response to small but significant changes in relative quality, in a manner similar to the HMT, one would need an objective measure of such changes in quality. We concluded that in practice, the impact of changes in platform features on user experience is subjective, and therefore were of the view that there is no appropriate way of applying the HMT to this market as a robust empirical test. For these reasons we did not think the HMT referred to by the Parties was either practicable or informative in this case.³³ While this is an issue that can arise in any market with zero prices, zero pricing is fairly uncommon in non-digital markets.

3.2.2. *Multi-sidedness and network effects*

28. Parties have questioned the extent that market power can arise when customers are not charged on one side of the market. In the Meta/Giphy merger the Parties submitted that, since ‘Facebook offers its service to users for free, in common with other attention platforms, it is pricing at the competitive level’, and this indicates it has no market power.³⁴ They also submitted that GIPHY offers its GIFs for free and that API partners (platforms

³¹ [PayPal/iZettle Final Report](#), para 6.52.

³² The Meta/Giphy decision is currently under appeal at the UK Competition Appeal Tribunal (CAT).

³³ [Meta/Giphy Final Report](#) paragraph 5.111.

³⁴ The Parties also submitted that high market share is not a sufficient basis on which to conclude the existence of market power, and that it is necessary to consider whether the firm in question has been able to sustain prices above competitive levels or restrict output or quality below competitive levels.

such as social media and messaging apps that allow their users to access GIPHY's GIFs through an interface) can easily switch to other providers.³⁵

29. However, in our final report we noted that the nature of two-sided markets is such that a provider may offer its services below cost, or free of charge, to one side of the market while monetising the other side. This in itself is not informative of whether the provider has market power in one or both sides of the market. While Facebook does not charge users directly for access to its platforms, it earns a positive return through revenues from advertisers, who seek as large an audience as possible. Furthermore, we recognised that market power can be exercised through non price parameters such as quality, range, service, and innovation.³⁶ In addition, whilst Facebook's social media services are provided at zero monetary price, it is plausible that the price charged in more competitive circumstances would be negative, with consumers rewarded for their engagement with the service because of the user-level data they provide in so doing.³⁷

30. Parties have also questioned the extent that market power is needed on both sides of the platform to provide a concern. In the Experian/ClearScore merger³⁸ the CMA provisionally found that direct competitive rivalry between the Parties was more focused on the consumer side of the market, reflecting the similarity of their approaches in using free credit checking tools (CCTs) to attract users to their credit-comparison platforms (CCPs). In contrast, the CMA provisionally found that Experian and ClearScore were not particularly close competitors on the lender side of the market. The Parties submitted that the two-sided nature of CCPs meant that they would have no incentive to deteriorate the quality of their offering, since consumers would switch to other CCPs or channels with associated loss of revenues from lenders. The CMA recognised that, ultimately, comparison platforms seek a wide consumer user base to attract lenders to the other side of the platform (which is where they derive their revenue). However, it provisionally concluded³⁹ that the two-sided nature of the platform did not preclude the Parties from competing less vigorously on the user side of the platform as a result of the merger.⁴⁰

31. As part of the Online Platforms and Digital Advertising market study, we were challenged on the extent of barriers to entry and expansion (particularly network effects) in social media and told that these were 'low' due to the fact that network effects only affect users' behaviour to a limited extent and no minimum scale was required for entrants to

³⁵ Meta/Giphy Final Report paragraph 5.87.

³⁶ In the Online Platforms and Digital Advertising market study the CMA found that consumers could face a range of potential direct impacts from a lack of competition in social media, including reduced innovation and choice, excessive extraction of data, and low quality of service.

³⁷ Meta/Giphy Final Report paragraph 5.149 to 5.150.

³⁸ Both Experian and ClearScore give registered users of their websites and mobile apps free access to personal credit scores. The CMA categorised products that provide credit scores, reports and related information as credit-checking tools (CCTs). Once customers have signed-up to the Parties' CCTs, they can be matched to personal offers for credit products – mostly credit cards and personal loans – from a range of third-party providers. The CMA referred to these as credit-comparison platforms (CCPs). CCPs are two-sided markets: the product is provided for free to users; and revenue is generated through commissions that are paid by financial-product providers. See [Recent developments at the CMA:2018-2019](#), Review of Industrial Organisation.

³⁹ The Parties subsequently abandoned the merger.

⁴⁰ See [Recent developments at the CMA:2018-2019](#), Review of Industrial Organisation.

compete effectively.⁴¹ However, we instead found social media platforms to be characterised by strong network effects and that this led to substantial barriers to expansion which indeed prevented smaller competitors from imposing a strong constraint on Facebook. Moreover, while there were some examples of successful entry, these had only been by platforms which responded to network effects by differentiating themselves and building different types of services and consumer networks, rather than networks that competed more directly with Facebook's.⁴² As a result, we considered it unlikely that these would be able to replace Facebook's services entirely.⁴³ This illustrates common struggles to expand in the presence of strong network effects as well as to compete effectively with a firm offering a wide range of services and providing access to an extensive user base.

3.2.3. *Relevance of multi-homing to assess market power*

32. Multi-homing, meaning the usage of multiple platform services by either side of a multi-sided platform, is a crucial factor in considering whether such platform has market power as it speaks to the extent to which users consider these services as substitutes (and thus use either one or the other) or as complementary (and thus use both).⁴⁴ In some cases detailed evidence might be available that allows us to assess the extent of multi-homing between different digital services. For instance, in the CompareTheMarket investigation,⁴⁵ we were able to use insurance quotes obtained from price comparison websites (PCWs) and identify those who went through the process of obtaining a home insurance quote from more than one of the sites.

33. There have been other cases where multi-homing analysis has played a crucial role in our competitive assessment. For example, on JustEat/Hungry House we used multi-homing analysis to assess the extent to which the providers' offerings were overlapping on either the restaurants or the consumers side and the nature of competition among them.⁴⁶ Given extensive multi-homing on the restaurants' side and single homing on the consumers' side, we found that the parties' competitive efforts were focussed on attracting consumers. Further, despite the parties being close substitutes, the lack of horizontal

⁴¹ In particular, Facebook argued that network effects tend to be 'localised' in scope, meaning that consumers are only concerned about the presence of their own social circles on an online platform and not of the size of a platform's global user base. See [Facebook's response to Interim Report](#), paragraph 3.17(c).

⁴² These include TikTok, which has grown since the Online Platforms and Digital Advertising market study. As noted in Meta/Giphy, from early 2020 TikTok grew from 10% share of user time spent in the UK to 12% in Q1 2021 (see paragraphs 5.136 to 5.138). TikTok is especially popular with certain demographics: TikTok's share was 34% amongst 18 to 24 year olds (see paragraph 5.143 of Meta/Giphy Final Report).

⁴³ In particular, we noted that there had not been successful entry in the last 10 years by a direct competitor with a comparable set of services to those provided by Facebook, with Google's attempt having failed. See paragraph 3.254, [Online Platforms and Digital Advertising market study – Final Report](#).

⁴⁴ For instance, if a restaurant is present on more than one food delivery platform, that restaurant is said to be 'multi-homing'; if a consumer uses more than one social media platform, they are multi-homing across those.

⁴⁵ See [Non-confidential infringement decision \(publishing.service.gov.uk\)](#).

⁴⁶ In the same case we have been mindful of two-sidedness and network effects when dealing with market definition. In particular, we looked at the two market sides together when approaching market definition given transactions would involve both at the same time.

differentiation and the much larger size of Just Eat’s platform in the presence of network effects meant that Hungryhouse struggled to impose a significant competitive constraint on Just Eat.⁴⁷

34. However, on multi-homing analysis, we note that it can be difficult if the data available is not granular enough to allow a proper assessment of the extent, and therefore the implication for competition, of multi-homing. For example, with data only on website visits, it may not be possible to understand the timing and actual purpose of visits to potential rival websites.⁴⁸ Similarly, only knowing whether a consumer accesses more than one platform within a calendar month does not allow us to assess consumers’ intensity of use. In these cases, data may need to be complemented with either information from the market participants, for instance on the time users spend on each of their platform or on the actions they have taken there, or with data sourced from third party providers.⁴⁹

3.2.4. Large digital players and their incentives

35. While understanding how a company’s business model works is important in any market to understand how it drives such company’s incentives and behaviour, this is particularly important in digital markets where large players providing complex ecosystems compete with each other.

36. When dealing with such players, we have been mindful of the interrelationships among the products and services they provide and the resulting incentives. For instance, as part of the Mobile Ecosystems market study, we have heard from Google that it provides the Android operating system for free and on an open-source basis to manufacturers or alternative operating system providers who want to license it and that this has lowered barriers in the supply of mobile operating systems.⁵⁰ At the same time, Google makes payments to manufacturers to secure pre-installation and (in some cases) default positions for its services, including its search service, and has told us that such payments enable manufacturers to innovate and facilitate lower device prices.^{51, 52}

⁴⁷ In the decision we noted that Deliveroo had been exerting a stronger constraint on Just Eat than Hungryhouse in the period since April 2015 and that this constraint was likely to grow as ordering and logistics specialists such as Deliveroo and Uber Eats expanded their geographic reach, restaurant coverage and consumer numbers. See paragraph 7.2, [Just Eat/Hungryhouse – Final Report](#).

⁴⁸ Taking PCWs as an example – in the UK they often provide comparison services across multiple products (eg different insurance products, energy products, telecom products) and unless the data is granular enough it may not be possible based on data on website visits to understand if a user visiting the websites of two PCWs actually used both PCWs to compare the same product or different products.

⁴⁹ For instance, as detailed above, in the CompareTheMarket investigation we could use data on consumers who went through the process of obtaining a home insurance quote while on the Online Platforms and Digital Advertising Market study, we relied on both data from market participants and third-party providers on time spent on each platform. See [Non-confidential infringement decision \(publishing.service.gov.uk\)](#) and [Appendix C: market outcomes](#) to Online Platforms and Digital Advertising Market study.

⁵⁰ See [Google’s response to Interim Report](#), paragraphs 23-30.

⁵¹ See [Mobile ecosystems Interim Report](#), paragraph 3.159.

⁵² As part of the same market study, Apple told us that our analysis should consider the links among its various business areas. In particular, it told us that the commission it charges in relation to apps, in-app payments and subscriptions generates an incremental revenue flow which gives it an

37. While we recognised that the availability of Android on an open-source basis may facilitate entry for manufacturers willing to license it,⁵³ we provisionally considered Google's agreements with manufacturers to ensure that its version of Android (the Google compatible version) is used on many Android devices and that many of its apps (including its own app store, search engine and browser) are pre-installed and/or prominently placed in a large proportion of Android devices. We also considered these agreements to ultimately reinforce Google's position in search advertising, through which it generates most of its revenue.⁵⁴ This illustrates that to assess Google's strength in the various business areas in which it is active, one needs to be mindful of the products and services it provides in the whole ecosystem and where it gets its revenue from.

38. Another argument we have heard frequently from incumbents in fast-changing digital markets is that, given the nature of the market they operate in, they have an incentive to continuously invest in innovative products to stay relevant and avoid being displaced by new entrants. For instance, as part of the Online Platforms and Digital Advertising market study, we heard from the parties involved that their substantial and continuous investment in innovation to improve services and remain competitive explained their success in the market or illustrated a lack of market power.⁵⁵ However, we considered that the limited competitive constraints they faced from rivals and the significant barriers to competitive entry and expansion meant that they faced less pressure to innovate than they would if these barriers were addressed.

39. The negative impact on innovation from ineffective competition, particularly in markets consistently undergoing significant innovation can be a great source of consumer harm, even though it may be difficult to quantify.⁵⁶ Given that it is the threat of being overtaken by rivals that provides the spur to companies to innovate and produce new products, the more companies are insulated from this threat, the more consumers will suffer from reduced innovation and choice in the future.

40. Conceptually, other issues could arise as the number of 'digital cases' we assess grows. These include challenges in gathering informative evidence on consumers' online behaviour or on companies' rate of innovation in the counterfactual, difficulties in assessing market power in vertically integrated settings with many interrelated products and services, and challenges in performing forward looking analyses and/or trading-off short term gains to consumers with longer-term effects on competition. While we consider these challenges not to be specific to digital settings and to potentially arise even in more

incentive to lower the price and increase the quality of its devices. See [Mobile ecosystems Interim Report](#), paragraph 4.189.

⁵³ See [Mobile ecosystems Interim Report](#), paragraphs 3.133-3.153.

⁵⁴ See [Appendix E: Google's agreements with device manufacturers and app developers](#) to Mobile ecosystems Interim Report.

⁵⁵ See [Facebook's response to Interim Report](#), paragraph 3.17(d).and [Google's response to Interim Report](#), paragraphs 6-7.

⁵⁶ For example, in the Interim Report of our Mobile Ecosystems market study, we stated that barriers to competition (particularly from third parties) risk holding back innovation in digital markets. For example, certain types of service may not be available to users (such as cloud gaming services on iOS devices), or certain developments in technology may be held up where Apple or Google do not have a clear incentive to promote these (such as web apps on iOS devices). See [Mobile Ecosystems – Interim Report](#), paragraph 11.

traditional markets, we have encountered them more often when dealing with digital cases over the past few years.

41. In summary, we have extensively used (and plan to continue to use) our existing tools effectively and efficiently to address problems in digital markets. In doing so, we have adapted our guidance to reflect our approach to market power and competitive dynamics in digital settings to reflect a number of market features driving market power and competition in digital markets, and to ensure that our assessment reflects business models and competitive interactions in these digital markets.

42. At the same time, we have encountered some challenges from firms on our market power assessment which related, to some extent, to the digital nature of the industry. However, we consider that those challenges are not intrinsically different from those which could arise in more traditional markets and, more importantly, that the concept of market power itself does not change when assessing it in a digital setting, provided that the specific market features, business models and competitive interactions are taken into appropriate consideration.

4. Recommendation on a future approach

4.1. Do we need different tools to investigate competition issues in digital markets?

43. As recognised in the Furman Review, in various recent CMA publications and in other prominent reports,⁵⁷ the market features described above mean that a small number of digital firms have been able to develop particularly strong and entrenched market positions, and existing competition laws are not, by themselves, sufficient to address the challenges brought about by digital markets.

44. The CMA's existing tools have intrinsic limitations in dealing effectively with the fast-changing nature of digital markets and the complex, wide-ranging and rapidly evolving issues within them. In addition, the most powerful digital firms have such entrenched market power that existing laws, which allow enforcement against individual practices and concerns, are not sufficient to protect competition. In particular:

- First, antitrust enforcement tends to be backward-looking and to require a specific finding of law-breaking, so ongoing intervention or pre-emptive action is not usually possible.
- Second, both antitrust and markets tools can take considerable time to identify the problem, evidence it, and design and implement remedies and even then, lengthy appeals can follow.
- Third, under both antitrust and markets tools, the analysis of the problem is based on a one-off assessment at a specific point in time. This implies that any remedy imposed in a fast-changing market may soon become out of date and cannot be monitored and revised in line with market changes. Further, this also means that the remedy cannot consider any new issues that may arise.

⁵⁷ For example: Stigler Center (2019), [Committee on Digital Platforms Final Report](#); Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019), [Competition for the digital era, final report for the European Commission](#) (2019). See also [Online platforms and digital advertising market study – Final report](#) (2020) and [Advice of the CMA's Digital Markets Taskforce](#) (2020).

- Fourth, enforcement cases in particular must be narrowly focussed, which means the resulting remedies are also narrowly focussed and cannot be used to implement market-wide changes.
- Fifth, the typically high degree of complexity and the interconnectedness of products and services in these markets may require judgement by an expert regulator or authority to ensure costs and benefits of interventions are traded-off effectively and to avoid unintended consequences, including on innovation.

45. The above limitations make traditional tools less effective for dealing with the significant speed of change and technological advancements of digital markets, where problems and harms are a moving target and remedies can quickly be out of date. As a result, it is likely that an effective remedy development in these markets will require testing and refinement over time, whereas under existing tools remedies cannot be revised to deal with new problems without re-opening the entirety of the case or investigation.

46. Further, given the propensity for digital markets to tip, and the challenges of restoring competition once they do, retrospective action may often come too late. And while it can be argued that even a narrow enforcement action will have a deterrent effect on future behaviour, this will be weakened if digital firms see that by the time remedies are imposed, markets can ‘tip’ or be ‘won’.

47. Therefore, tackling the issues arising in digital markets, including the challenges that the market features described above entail, requires an ongoing focus, and the ability to monitor and amend interventions as required. An *ex-ante* regulatory approach is thus needed to proactively shape the behaviour of particularly powerful digital firms and to prevent harm arising.

48. As a result, in December 2020 the CMA’s Digital Markets Taskforce,⁵⁸ commissioned by the government and led by the CMA, proposed an *ex-ante* regulatory regime to address the market power of the most powerful digital firms focussed on proactively preventing harm.

49. In July 2021 the Government consulted on the proposals put forward in the CMA’s Digital Markets Taskforce advice and, in May 2022, the government published its response to this consultation, explaining how it will empower the regime to proactively shape the behaviour of the most powerful technology firms with Strategic Market Status (SMS).⁵⁹ Four days later, during the State Opening of Parliament, the Queen’s Speech announced the government’s plans to publish a Draft Digital Markets, Competition and Consumer Bill which would cover powers for the Digital Markets Unit (DMU) to regulate SMS firms and make pro-competitive interventions.⁶⁰

50. In this section we elaborate on the proposals put forward by the CMA’s Digital Markets Taskforce, in particular those relating to SMS designation. In its response to the consultation, Government confirmed its intention to proceed with large parts of these proposals. The specific content of the Draft Bill is yet to be published, and will be subject

⁵⁸ The CMA’s Digital Markets Taskforce was commissioned by the UK government in March 2020, after it responded to the Furman Review accepting all its six strategic recommendations. See [Digital Markets Taskforce](#) and [Budget 2020 – GOV.UK](#).

⁵⁹ See [A new pro-competition regime for digital markets - government response to consultation - GOV.UK \(www.gov.uk\)](#).

⁶⁰ See [Queen’s Speech 2022 - GOV.UK \(www.gov.uk\)](#). The Draft Bill will also cover new consumer protections (including subscription traps, fake reviews and savings clubs) and a reform of CMA’s consumer powers.

to changes through the Parliamentary process. Therefore, the proposals put forward in the CMA's Digital Markets Taskforce advice represent a starting position for the UK regime that is still evolving.

51. Firstly, the entry point to the regime proposed in the CMA's Digital Markets Taskforce advice is an assessment of whether a firm has 'strategic market status' (SMS). This should be an evidence-based economic assessment as to whether a firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position (meaning the effects of its market power are likely to be particularly widespread and/or significant).

52. Those firms that are designated with SMS should be subject to the following three pillars of the regime:

- **Enforceable conduct requirements** that set out clearly how an SMS firm is expected to behave in relation to the activity motivating its SMS designation. The aim of these requirements is to manage the effects of market power, for example by preventing practices which exploit consumers and businesses or exclude innovative competitors.
- **Pro-competitive interventions** like personal data mobility, interoperability and data access which can be used to address the factors which are the source of an SMS firm's market power in a particular activity. These interventions seek to drive longer-term dynamic changes in these activities, opening up opportunities for greater competition and innovation.
- **SMS merger rules** to ensure closer scrutiny of transactions involving SMS firms, given the particular risks and potential consumer harm arising from these transactions.

53. As further discussed below, an assessment of market power plays a crucial role in defining what firms would be subject to the regime.

54. As part of the same proposal, the CMA's Digital Markets Taskforce recommended that the government establish a Digital Markets Unit (DMU) and that this should be a centre of expertise for digital markets and oversee the regulatory framework and the application of the SMS test.

4.2. Is a new notion of market power needed?

55. As mentioned above, the proposal of the CMA's Digital Markets Taskforce for a new regulatory regime included a test to identify firms to which such regime would be applied, namely firms with SMS. The recommended content of the SMS test is that it should require a finding that the firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position.

56. As explained in the CMA's Digital Markets Taskforce's advice, we consider that the SMS test will ensure that the SMS regime only applies where the evidence supports its application, meaning that it is justified. Additionally, it will be sufficiently flexible so that the regime is, as far as possible, futureproof while also providing appropriate clarity (when accompanied by guidance) to firms as to the scope of the regime and the evidence which could inform an SMS designation assessment.⁶¹

⁶¹ See [Appendix B](#) to the Advice of the CMA's Digital Markets Taskforce advice.

57. In designing the SMS test, we considered what elements it should include and in particular what the role of a market power assessment should be within it. In summary, we considered that an assessment of market power would be crucial for the regime to be justified and well evidenced. This was because, in the absence of substantial market power, there would be no reason to intervene as customers would have adequate choices, and outcomes for consumers could be expected to be good. We also indicated that the market power should be entrenched, meaning that it was likely to persist. We considered that there was no need for a new notion of market power specifically for the digital space, but its application would need to be different to ‘traditional’ approaches which involve formal market definition.

58. We also considered that an assessment of market power alone would not be adequate for a finding of SMS, as the concerns motivating the case for a new pro-competition regime extend beyond a concern that a firm might have substantial, entrenched market power. Instead, the case for a new regime is motivated by concerns that in certain circumstances the effects of a firm’s market power can be particularly widespread or significant and it is such circumstances that are crucial in contributing to a firm having a ‘strategic position’.

59. Therefore, we recommended that the test consider whether the *effects* of a firm’s market power were likely to be particularly widespread or significant. We identified some examples of where this might occur. These include where the firm has achieved very significant size or scale, is an important access point to customers or input for a diverse range of other businesses, can extend its market power into a range of other activities and/or has developed an ‘ecosystem’ of products which protects its market power and can determine the ‘rules of the game’ within it.

60. These factors are varied, and their precise relevance is likely to differ from case to case. Additionally, new factors could emerge over time as existing business models evolve and new businesses emerge. As a result of this variety, we considered that it would be important that a degree of flexibility is retained to future-proof the regime and did not propose that a ‘strategic position’ is precisely defined in the statutory test.

4.3. The role of market power in the SMS test

61. Market power assessments are common in competition law and in *ex ante* regulation.⁶² They involve an assessment of both the existing competition and the potential competitive constraints faced by a firm, including those arising from potential entry.⁶³

62. Assessing market power forms an integral part of our recommended SMS test. This is because, on the one hand, we considered many of the concerns motivating the introduction of the SMS regime, and similar regimes in other jurisdictions, to arise from instances where a firm has substantial, entrenched market power.⁶⁴ On the other, a requirement to assess market power was consistently emphasised by stakeholders during the course of our work to design the new regime.

⁶² For example, they are an important component of the CMA’s mergers and competition enforcement cases and many markets cases as well as of the activity of UK regulators such as Ofcom.

⁶³ As such, an assessment of whether a customer has countervailing buyer power is part of an assessment of market power.

⁶⁴ For instance, Furman Review (2019), [Unlocking Digital Competition](#), page 10, paragraphs 1.95-1.117 and 2.10 and Stigler Center (2019), [Committee on Digital Platforms Final Report](#), page 35 and 105. See also Germany’s [10th amendment to the German Competition Act](#).

63. Substantial market power arises when users of a firm’s product or service lack good alternatives to that product or service and there is a limited threat of entry or expansion by other suppliers. This allows the firm to increase prices or reduce quality and innovation, since a significant number of users are unwilling or unable to switch away to competing products or services. As a result, substantial market power can lead to immediate harm to consumers by allowing firms to charge higher prices and offer lower quality than if there was greater competition. Substantial market power can also lead to longer-term harm to consumers where it leads to less innovation than there would be if there was greater competition.

64. The potential to obtain a position of market power, to raise prices and to earn substantial profits provides a strong incentive for firms to invest and to innovate. Therefore, the temporary attainment of market power is necessary to provide incentives to innovate and to invest. It is a natural and beneficial aspect of competition and it would be inappropriate to introduce the SMS regime to address transitory instances of substantial market power.

65. However, there are significant concerns about instances in which market power has become entrenched, meaning that the firm’s market power is expected to persist over time and is unlikely to be competed away in the short term. This is because the incentives to continue investing and innovating and to offer lower prices arise because of the fear a firm might lose its position to a rival if it does not do so. Therefore, once a firm’s position becomes entrenched and there is little prospect of competitive entry, it is likely that prices will be persistently higher, and quality, investment and innovation will be persistently lower than would otherwise be the case, to the long-term detriment of consumers.

66. In our view, any test without a market power assessment would be overly simplistic and would fail to ensure that SMS designations are evidence-based and well-directed towards cases where harm is most likely to arise – ie cases in which a firm has, at a minimum, substantial, entrenched market power.

4.3.1. SMS in an ‘activity’ rather than in a market

67. As explained above, formally defining the relevant market involves drawing arbitrary bright-lines indicating which products are ‘in’ and which products are ‘out’ and attempting to draw such bright-lines is often unnecessary or even unhelpful, particularly in the context of digital markets. This is due to a number of factors, including multi-sidedness and the resulting competitive dynamics, complexity of business models and frequent high degree of interconnectedness of products and services provided by large digital players.

68. As a result of the above, for the SMS assessment, we proposed not to perform a market definition exercise but to assess market power in an ‘activity’ instead.⁶⁵ First, we noted that any potential SMS firm will be engaged in a range of activities, offering a wide variety of different products and services, some with very different uses and functionality and that the concerns motivating any SMS designation would likely relate to a certain activity or to a small number of them. This meant that it would be inappropriate (and impractical) for the SMS assessment to involve a detailed assessment of every part of a firm.

69. Therefore, we recommended that the SMS assessment should focus on an activity, defined as a specific set of products and services which can reasonably be described as having a similar function or as fulfilling, in combination, a specific function. As such, this

⁶⁵ This also helped us considering how to identify the boundary of the new regulatory regime, meaning which areas within the SMS firm should the conduct requirements apply to.

approach is consistent with the CMA's approach in market studies, where it is not necessary to undertake a formal assessment of the relevant market and would allow greater flexibility to deal with features such as multi-sidedness and complex ecosystems. Consistent with this, when assessing SMS, we considered that the DMU should focus on direct evidence of market power, specifically evidence of substitutability, competitive rivalry and barriers to entry and expansion.

4.3.2. The role of terms such as 'gatekeepers' and others

70. When discussing the concerns motivating our proposal and similar ones, a wide variety of terms such as 'bottlenecks' and 'gatekeepers' were referred to by various authors.⁶⁶ We further note that political agreement has been reached at the European level on the Digital Markets Act (DMA) which includes rules to be applied to 'large platforms acting as gatekeepers'.⁶⁷

71. When considering whether such terms should form part of the statutory test, we found that, first, stakeholders interpret them in a variety of different ways and their meanings are unclear. For example, at a minimum, the term 'gatekeeper' refers to a situation where a firm provides access to customers for other businesses, meaning that the firm is an intermediary.⁶⁸ This means that incorporating the term 'gatekeeper' would implicitly limit the scope of the SMS regime to intermediaries while we have received no evidence indicating that this would be appropriate and do not consider the issues the regime is intended to address are unique to firms that can be described as intermediaries.

72. Second, in most cases these terms describe situations in which a firm has market power or where the effects of that market power are particularly significant for users.⁶⁹ As such, we consider them to be incorporated into our recommended SMS test either as part of an assessment of market power and/or a factor contributing to whether a firm has obtained a strategic position. This means that evidence that a firm's users are 'dependent' or that the firm is a 'gatekeeper' or 'bottleneck' would be evidence to support a finding that a firm has SMS.

73. As a result, while closely related to the concept of market power, we did not consider it necessary to introduce terms such as gatekeeper or dependence into the statutory test in their own right as they would either entail the risk of confining the SMS regime to intermediaries only, which does not reflect where concerns may arise, or be already incorporated in a market power or strategic position assessment and thus run the risk of causing unnecessary repetition.

⁶⁶ See for instance: Alexiadis, de Streel (2020), [Designing an EU Intervention Standard for Digital Platforms](#); Padilla, Perkins and Piccolo (2020), [Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms](#); Prat, Valletti (2019), [Attention Oligopoly](#); Furman Review (2019), [Unlocking Digital Competition](#), paragraph 2.117.

⁶⁷ [Deal on Digital Markets Act: EU rules to ensure fair competition and more choice for users](#).

⁶⁸ For example, this appears to be the sense in which the term gatekeeper is used at paragraph 2.10 of Furman Review (2019), [Unlocking Digital Competition](#).

⁶⁹ For example, Alexiadis, de Streel (2020), [Designing an EU Intervention Standard for Digital Platforms](#) describes dependence as a situation where a user 'has insufficient and unacceptable means of switching to other providers' (page 16) and the Stigler Center (2019), [Committee on Digital Platforms Final Report](#) (page 105) defined a bottleneck as 'where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly'.

74. When designing the SMS test, we also noted that, in discussing the concerns motivating the SMS regime and similar proposals, the term ‘platform’ is often used. However, while widely used, it is clear that there are a variety of different definitions for it. Some of these simply describe an intermediary, which would be satisfied by a wide range of businesses and thus provide limited clarity on the scope of the regime. Others are either vague or related to factors that are not readily measurable, such as the significance of network effects or the degree of control a firm has over the interactions between users. Therefore, we considered that the term ‘platform’ would not be helpful in providing clarity on the scope of the regime and thus was not suitable for use in a legal test.

75. In conclusion, when proposing a new ex ante regulatory regime for the most powerful digital firms we considered how to best design a test that would justify such a regime and identify the firms to be subject to it. We considered that a market power assessment, in particular substantial and entrenched market power, meaning market power that is expected to persist over time and unlikely to be competed away in the short term, should form an integral part of such test. We also proposed to complement this with a consideration of whether the effects of this market power are likely to be particularly widespread and/or significant (which we described as conferring a ‘strategic position’ on the firm), by looking at a range of factors, including but not limited to size or scale or whether the firm is an access point for a range of other businesses.

5. Conclusions

76. Assessing market power is central to our cases, including cases involving digital markets. Over the past few years, we have adapted our approach to deal effectively with digital markets and revised our guidance to reflect such approach, and have been mindful of specific market features, business models and competitive interactions which are typical to those.

77. In dealing with digital cases, we have not found that a new notion of market power was needed specifically for the digital space or for it to be able to capture our concerns in digital markets. However, given the prevalence of certain features in digital markets, we focussed on certain types of evidence or analyses as most informative for our assessment.

78. For instance, from a process perspective, we have revised our guidance to reflect the way we conduct assessments. This includes placing less emphasis on a formalistic market definition exercise, which may be more difficult to perform and less informative in digital markets for reasons including complex ecosystems with interrelated products and services, zero prices and very fast pace of changes. At the same time, we have placed more emphasis on dynamic constraints and considered innovation as the current process of rivalry through investment decisions and incorporated the threat of entry when determining current competitive constraints.

79. Further, we have considered characteristics like multi-sidedness, network effects and any resulting tipping dynamics in performing our assessments. For example, we have performed multi-homing analysis to assess the extent to which the market participants’ offerings were overlapping and we looked at the extent of network effects to inform our assessment of barriers to entry.

80. As detailed above, our current tools struggle to deal effectively with digital markets for various reasons including their speed of change, complex nature and tendency to tip in favour of a few industry participants which then become difficult to displace. Therefore, we recommended the introduction of a new ex ante regulatory regime to proactively shape the behaviour of particularly powerful digital firms and to prevent consumer harm from

arising. As part of our recommendation, we proposed a test to identify what firms should be subject to this new regime which includes, as an integral part, a market power assessment, which we consider both capable of capturing our concerns in digital markets and crucial for the new regime to be justified.