

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Competition Assessment in Light of Digitalisation: A Synthesis

4 June 2018

This document is submitted as background material for item 4 of the 65th meeting of Working Party No 2, to be held on 4 June 2018.

This document assesses potential areas of focus for competition assessment of regulations in light of digitalisation. The purpose is to identify fruitful priorities for such reviews at a time of major technical change.

The paper draws on findings from a survey conducted in the summer of 2017, initial survey analysis from the fall of 2017, a G20 discussion on competition and digitalisation in October 2017 and examples discussed at an OECD Workshop on Regulation and Competition in Light of Digitalisation on 31 January, 2018.

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1. Introduction

1. Competition assessment is the evaluation of the impact on competition of laws, regulations and policies and the design of regulations that are more favourable to beneficial market forces. The process selects a policy, screens it by means of criteria (embodied by the OECD's Competition Assessment Checklist),¹ and where a regulation is unduly restrictive, designs and selects alternative policies.

2. Competition assessment can lead to significant consumer benefits and positive macroeconomic outcomes by enhancing competitive markets. Competition incentivises businesses to attain higher efficiency and enhance their product and services. As a result, consumers enjoy better products, lower prices and wider options. An active competitive environment also has positive macroeconomic outcomes such as higher productivity and innovation.

3. Competition assessment is a flexible tool in the sense that new or existing regulations and policies can benefit from competition assessment, and it can be applied to specific rules or more broadly to sector regulation. Competition assessment can be a part of Regulatory Impact Analysis (RIA) to review regulations before they are put in place or can be used as an analytical framework for ex-post analysis of existing regulation.

4. The need for regulatory review is further reinforced by the digitalisation of the economy. Since digitalisation affects many sectors, review is more urgent than ever. Enterprises sales through electronic networks increased from 11% of their total turnover to 18% from 2007 to 2017.²

5. Digitalisation is moving fast. In the EU, for example, the number of consumers who made a purchase online in the last 3 months doubled in less than a decade.³ Regulators and other officials face a challenge to catch up because the *status quo* presents some regulatory risks. Firstly, current regulations, which were designed for traditional products and services, may not be appropriate for the digital economy because the pre-existing regulatory environment, designed for a different set of technical possibilities, may at times hinder development of new products and services. For instance, some existing regulation may have been introduced due to market failures resulting from information asymmetry; if the information asymmetry is reduced due to digitalisation, the market failure that underlay the original regulation may be changed. Secondly, there may be a regulatory "vacuum" in the face of the novelty of digital economy.⁴ Uncertainty created by the absence of regulation may discourage innovation. Lack of some type of regulations, such as safety and consumer protection, can restrain otherwise desirable new goods, services and business models.

¹ See www.oecd.org/daf/competition/assessment-toolkit.htm.

² See Eurostat <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tin00110&plugin=1> and more generally, the European Commission Final report on the e-commerce sector enquiry (COM(2017) 229 final) http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

³ See Eurostat http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_ec_ibuy&lang=en

⁴ The Canadian presentation in the 2018 Workshop expressed the view that regulation attenuates reputation and trust gaps which constitute barrier for new enterprises; therefore too little regulation is also not desirable for competition.

6. Reviewing new or existing regulation is not an easy task. While the regulators are challenged by the complexity and novelty of digitalisation, they have to balance various policy concerns. In this process they can be exposed to lobbying of incumbents who seek protection from new competitors. There is some likelihood of more intense lobbying from established interests than from potential entrants; in evaluating incumbent arguments, policymakers may wish to note that incumbents may not focus on full consumer impacts in designing their proposals, tending instead to be more focused, ultimately, on self-interest, while often arguing about more publicly acceptable concerns, such as reducing consumer risk.

7. In the context of new developments related to digital goods, services and business models, the OECD Competition Assessment Toolkit⁵ is being reviewed to ensure it provides appropriate guidance to address the many complex regulatory effects on competition in light of digitalisation.⁶ The digital transformation of economic activity merits regulatory review with a particular focus on competition impacts. An updated Competition Assessment Toolkit will help the officials to make the most out of this opportunity.

8. The process of updating the Competition Assessment Toolkit in light of digitalisation is now well under way. A survey and an analytical report based on the survey, focusing on sector-specific topics, have been completed. The current focus of the work is to move to more general principles for a competition-focused review of regulations, recognising that in the years to come, the primary sectors of activity and interest may well change, as a function of technological developments. This note integrates the sector findings with those of a recent G20 meeting on digitalisation and an OECD workshop on competitive regulation in a digital age to develop key points of focus in reviewing regulations, identifying, in general, the types of regulatory restrictions that are most prevalent. The final stage will be to revise the Competition Assessment Toolkit in light of feedback received from delegations, building on the findings from the survey.

9. Preliminary conclusions are:

- The OECD Competition Assessment Toolkit Methodology and its Competition Assessment Checklist remain relevant and mostly up to date; there may be a need to indicate more specifically in the checklist that physical presence requirements can be anti-competitive as well as changes to one of the guidance volume to better cover platforms, vertical restraints and e-commerce.
- The main types of restrictions are in (1) barriers to entry and (2) limitations on actions that a company can take.
- Prioritisation to limit digital-focused competition assessment review to specific sectors is valuable.
- Broad stakeholder consultation is needed when particular sector regulations are reviewed, particularly to ensure that potential entrants have an opportunity to express where regulatory restrictions are holding back their development, which can then be assessed in a balanced manner.
- To the extent that regulations may need to change more than once as digitalisation continues, consideration should be given to the appropriate legal form for

⁵ See www.oecd.org/daf/competition/assessment-toolkit.htm.

⁶ This review has been called for by the G20 Digital Ministerial in April 2017 as well as by the OECD Working Party on Competition and Regulation.

regulations to ensure that changing them is both feasible and not excessively burdensome for legislators.

2. Methodology

10. In order to understand how competition assessment performs regarding digital economy regulations, we have collected examples of such regulations. The main source of the input is the submissions to the Survey on Regulations Affecting the Digital Economy which was distributed on 27 July 2017 to the members and participants in the OECD Competition Committee, the competition authorities of G20 countries, and representatives of the business community, through the Business and Industry Advisory Committee to the OECD (BIAC). Thirty countries, the EU, BIAC and enterprises through BIAC submitted their contributions to the survey. A workshop on Regulation and Competition in the Light of Digitalisation, which was held on 31 January 2018, provided further input, with participation of 159 registered delegates both in person and by web connection.

11. This information has been enriched by desk research by the OECD Secretariat and by the material prepared for various Competition Committee sessions on the digital economy in the period 2015-2017.

12. The examples of regulation on digital economy have been classified by means of the Competition Assessment Checklist (CAC) categories. As mentioned above, the CAC is used in the early stage of competition assessment. It is a set of questions to screen regulations to identify potential competition restrictions. Composed of four main questions regarding supply- and demand-side restraints, it also includes sub-questions to add further precision to the types of competitive restrictions that may exist. Under the OECD approach, competition assessment should be continued to a full review if any of these questions are answered “yes”.

Box 1. Competition Assessment Checklist

Further competition assessment should be conducted if the proposal has any of the following four effects:

(A) Limits the number or range of suppliers

This is likely to be the case if the proposal:

1. Grants exclusive rights for a supplier to provide goods or services
2. Establishes a licence, permit or authorisation process as a requirement of operation
3. Limits the ability of some types of suppliers to provide a good or service
4. Significantly raises cost of entry or exit by a supplier
5. Creates a geographical barrier to the ability of companies to supply goods services or labour, or invest capital

(B) Limits the ability of suppliers to compete

This is likely to be the case if the proposal:

1. Limits sellers' ability to set the prices for goods or services
2. Limits freedom of suppliers to advertise or market their goods or services
3. Sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that some well-informed customers would choose
4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

(C) Reduces the incentive of suppliers to compete

This may be the case if the proposal:

1. Creates a self-regulatory or co-regulatory regime
2. Requires or encourages information on supplier outputs, prices, sales or costs to be published
3. Exempts the activity of a particular industry or group of suppliers from the operation of general competition law

(D) Limits the choices and information available to customers

This may be the case if the proposal:

1. Limits the ability of consumers to decide from whom they purchase
2. Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers

Fundamentally changes information required by buyers to shop effectively

3. Main Results

13. Based on the collected examples of digital economy regulation with a competition perspective, we can filter by the CAC. 92 of the examples were considered potentially restrictive to competition. 4 out of 92 regulations were related to more than one CAC questions.

Table 1. Distribution of regulations according to the CAC questions

CAC Questions	No. of Occurrences	%
A	5	5.4
A.2	9	9.8
A.3	15	16.3
A.4	15	16.3
A.5	6	6.5
B	1	1.1
B.1	5	5.4
B.2	2	2.2
B.3	7	7.6
B.4	14	15.2
C.1	1	1.1
C.2	1	1.1
D	4	4.3
D.1	1	1.1
D.3	2	2.2
Multiple (A.5-C.1, A-D.1, B.4-B.3, A.5-B.4)	4	4.3
Total	92	100

14. As Table 1 demonstrates, a large majority (more than 80%) of the restrictive regulations belong to the CAC categories of A (54.3%) and B (31.5%) which means they either limit the number or range of suppliers or the actions that suppliers can take when compete with each other.

15. Table 2 shows the sector distribution of all the regulations with potential of restrictive effect on competition. (A more detailed version of this table, showing breakdowns of sectors by type of competition restriction, is available in Annex A.) Table 2 finds that the transportation sector ranks first in terms of number of potentially restrictive regulations, coming up in each and every jurisdiction. Transportation regulations include examples for four main CAC questions. Transportation is followed by accommodation and pharmaceuticals. Additionally, 8 of 92 examples are horizontal regulations (consumer protection and data protection) which may affect many sectors.

16. The bulk of the restrictions included in the present analysis were identified by competition authorities. There is a possibility that competition authorities have been more active where new services challenge regulation more directly and where incumbents have resisted more. Presumably there are also some ‘less problematic’ sectors, where policy makers and businesses have co-operated to lift barriers. The type of restrictions we have found in retail and wholesale trade could be more common than shown by the survey, though possibly addressed without competition authority involvement, e.g. over physical location requirements.

Table 2. Distribution of CAC questions according to sectors

Sector	No. of Occurrences	%
Accommodation	17	18.5
Alcohol	1	1.1
Consumer Protection	6	6.5
Customs	4	4.4
Data Protection	2	2.2
E-commerce	3	3.3
Energy	1	1.1
FinTech	5	5.4
Food	1	1.1
Health	3	3.3
Meat	1	1.1
Media	3	3.3
Pharmaceuticals	12	13
Plant protection products	1	1.1
Promotions (prize draws)	1	1.1
Tourism	2	2.2
Transportation	29	31.5
Total	92	100

4. Types of regulations in special need of review

17. Two types of regulatory situations arose with high frequency: Entry barriers and cost-differentiating regulations. These two types of situations are further illustrated below.

4.1. Entry barriers.

18. When governments create entry barriers, they are effectively limiting the number of providers available to deliver a good or service. Such limitations often reduce supply

and create higher prices for consumers.⁷ The dividing line between a justified government requirement and an unjustified barrier can be a fine one, depending on the precise facts of the sector under analysis. The need to protect consumers is one leading argument for establishing government-enforced entry barriers. Therefore particular attention is often needed for the extent to which consumer safety and supposed prevention of fraud may unduly restrict competition.

4.1.1. Physical presence requirement and minimum scale requirements.

19. In a number of cases, we find that physical presence requirements exist, such as requirements for a driving school to have a physical office on the street with a minimum size of office for the manager. These types of requirements may, on the one hand, prevent “fly-by-night” operations. On the other hand, they may also at times be deemed excessive and can have a particularly strong effect to stop entry by new digitally-enabled businesses and can stop operation of sharing-economy businesses.

- **SME/microenterprise constraints.** Rules that establish a minimum scale for financial enterprises may prevent development of new and more competitive delivery options become available, for example for money transfers and currency exchanges which have historically had high margins.
- **Individual business constraints.** Increasingly, car rental may operate with one individual renting to another individual, by the intermediary of a platform, as personal cars are typically unused a high percentage of the time. Rules that establish a minimum size (in terms of number of vehicles owned by a car renting company) for any car rental enterprise may prevent development of the sharing economy. Note that there may be a difference between individuals performing activities (in a way that is unmonitored and without paying taxes) and small businesses that are paying taxes. Some governments may treat the two types of groups in different ways.

4.1.2. Definitions of enterprises that restrict small enterprises and the sharing economy.

20. When registration requirements (and tax and social contribution payments) have a minimum level of default size, very small enterprises may not make economic sense, due to the heavy cost of regulatory compliance. The cost of regulatory compliance in some industries, such as banking, can become so large as to be payable only by firms of a very large minimum size. Minimum efficient scale for digitally-enabled enterprises can be quite small.⁸ Establishing rules that require a large minimum efficient scale even for digital enterprises can mean that very few digital enterprises would reach such scale, effectively guaranteeing a strong position to the first movers while limiting opportunities for subsequent businesses.

⁷ An aggregate limitation on the number of licences is an example of an entry barrier. An economic study by the Spanish competition authority shows that quantitative restrictions on taxi and PVH licences result in lower availability, longer waiting times and higher prices. It was calculated that welfare loss was 324 million € in 2013. www.cnmec.es/file/107176/download.

⁸ In Switzerland, the Swiss Federal Banking Ordinance was amended to overcome such difficulties faced by FinTech companies; a regulatory sandbox was created. Below certain thresholds a banking licence is not required. www.lexology.com/library/detail.aspx?g=c03fbc7e-06f6-4db9-9ae0-013c23b72ed8

4.1.3. Local licensing rules and limited issuance of permits.

21. Local licensing rules and requirements for permits can serve as tools for regulation of the local economy. Licensing rules may vary substantially for competitive activities depending on the technical definition of services provided. Permit issuance, in particular, can serve as a hidden barrier to digitalised platforms, goods and services, to the extent that permits are withheld for reason of lack of local presence⁹ (as above) or for reasons of minimum years of operation (which may inherently be limited for a new business model).

22. The necessity of rigorous government oversight of some activities, such as hotel certification with a number of stars and extremely detailed criteria with regular inspections, may be open to review to the extent that consumers book hotels in advance over the internet by an application that allows them to see the hotel rooms, see average ratings and, if interested, read reviews of experience by actual users. To the extent that the previously existing information problem for consumers that led to the hotel rating system may have changed, authorisation regimes for distinguishing quality may no longer be needed in the same way or same extent. In short when the market failure (lack of information) is changed by digital provision of products, the regulatory response to the market failure may need modification as well.

4.2. Unequal regulatory costs.

23. Rules that lead to an unjustified and disparate regulatory cost burden for either traditional or digitally enabled companies. From a competition perspective, we can compare services that are provided by a type of company to see whether services compete. When there are unequal regulatory burdens, it may be worth considering revising the structure of regulation to ensure that one type of business does not face unjustifiably higher regulatory burdens than another.

24. Consider two examples, one illustrating the types of regulation that create a cost advantage to one service over another, and another designed to create equal regulatory costs. In the first, personal transport services by car may be provided by ride sourcing companies or traditional taxis. The licensing rules for traditional taxis may be much stricter than for ride sourcing companies, while ride sourcing companies in particular may have many part-time workers (which help to fill peak transport needs) and lower licensing requirements. In particular, accident insurance is an area in which costs may be unequal between traditional taxis and ride sourcing services.¹⁰ In some cases, ride sourcing service providers may either not have commercial personal transport insurance or may have less complete and generous insurance than taxi drivers. This may be considered a consumer safety question, particularly to the extent that insurance is not typically considered by consumers when choosing between services, but also becomes a question of competitive neutrality, to the extent that inferior insurance creates a substantial cost advantage to ride

⁹ For instance, in Greece “notification requirement for the trading of plant protection products also stands for the case of ecommerce sales. Therefore, the seller must also have a physical trading establishment/store, according to PD159/2013.” (OECD Competition Assessment Reviews: Greece (2017), p. 277) <http://www.oecd.org/daf/competition/assessment-toolkit.htm>

¹⁰ One submission to the FTC on insurance costs for ride-sourcing services is found in R Street Policy Study No. 48, “Blurred Lines: Insurance Challenges in the Ridesharing Market” October 2014, https://www.ftc.gov/system/files/documents/public_comments/2015/05/01717-96147.pdf.

sourcing services. Reducing insurance requirements to taxis could be an option, while seeking to encourage private solutions, for example with insurers able to offer coverage according to their own criteria (e.g., number of kilometres driven per year).

25. In the second example, the rules establishing financial products that can be used for deferred-tax retirement plans can raise costs for new products. Such rules may have positive lists for the types of products covered, and thus inherently require newer products to increase their costs and change their structure to be named on the list. The UK resolved this question for peer-to-peer lending products by updating the positive list for products that are eligible to be used in deferred-tax retirement savings plans, including peer-to-peer lending products.¹¹ Unequal regulatory costs are a particular risk as new product categories are created, and as a result regulators in particular will need to pay special attention to the ongoing appropriateness of their regulatory structures.

5. Guiding principles for reviewing and revising regulations in light of digitalisation

26. In light of the survey and prior work, we would suggest a number of principles to customise competition assessment reviews of regulation for the particular circumstances of greatest relevance in light of digitalisation. This approach does not address labour-related regulation, which can clearly also be important but which would be governed by different principles, but only product market regulation. The potential principles outlined in this document are intended to focus the competition assessment method on regulations that impact digital growth. Underlying these principles, policymakers need to recognise that predicting the future is particularly fraught with difficulty and as a result flexible solutions are desirable, as discovering a reasonable regulatory path forwards may require openness to new goods, services, processes and business models, as well as making sure that consumers can move their information from one provider to another, which may be important for the success of new business models.¹²

5.1. Breadth.

27. **Ensure that the breadth of regulations reviewed for impacts on digitalisation is sufficient to address a variety of restrictions that may be present in different laws.** The breadth of review of regulations, when considering digitalisation, will often need to be broad, i.e., across a sector and potentially including regulation that has broader effects that impact ancillary services for digitalisation. Rather than reviewing one regulation on its own, a proper digital competition assessment will be broad, therefore, and likely include a full variety of laws and regulations having impact on product requirements. For example, internet sale of products by households may depend very much on the consumer protection rules definition of a retailer and retailer guarantees.

¹¹ See, for example, Financial Times “UK peer-to-peer lenders plan to raise millions from ISAs” November 26, 2017, <https://www.ft.com/content/ab5a3934-d299-11e7-8c9a-d9c0a5c8d5c9>. In order to issue Individual Savings Accounts, commonly used for retirement, peer-to-peer lenders needed regulatory authorisation and inclusion among the category of products that were eligible for such accounts.

¹² See presentation of David Stallibras in 2018 Workshop “Digital platforms: challenges for competition advocacy”. <https://www.slideshare.net/OECD-DAF/regulation-and-competition-in-light-of-digitalisation-david-stallibrass-january-2018-oecd-workshop>.

5.2. Prioritisation.

28. **Prioritise key sectors for review in light of digitalisation and ensure that there is a live process for updating regulations to reflect technological change.**

Economies will need to prioritise those sectors that are most relevant for digitalisation review. Such a prioritisation may consider factors such as: natural strengths of the economy, areas where development and growth of digitalisation is falling behind peers.¹³ Prioritisation may also be over existing digital products or those that are, in some sense, completely prevented from operation as a result of regulation. It may be useful to establish a process for innovative, digital-oriented companies to request regulatory reviews where regulation appears to have a distortive competitive effect.

29. Sectors that are of particular interest at the moment, though the particular needs of a country are not necessarily the same, are:

- Transport and logistics
- Accommodation
- Finance
- Health and pharmaceuticals
- Platform regulations

5.3. Process for review.

30. **The process for review can begin by asking whether market failures that are at the origin of regulation have themselves changed prior to considering competitive implications of existing regulatory regimes.**

- Is there a market failure and, if so, has it changed?
- Are the set of possible regulatory responses to the market failure the same, or have the response options been altered by digitalisation?
- Do existing regulations in response to the current market failures unduly restrict competition? [start with applying Competition Assessment Checklist]
- Are new products and services unduly excluded by the regulatory structure or given undue advantages or disadvantages?
- What options exist for ensuring new products, services and business models are not unduly excluded nor given undue advantages?

5.4. Competition assessment method

31. **Apply the OECD's competition assessment checklist to regulations under review.**¹⁴ The competition assessment checklist is built around four main questions. Areas of key concern are regulations that:

¹³ For instance, in the 2018 Workshop, the Canadian presentation mentioned that a market study regarding FinTech was conducted because of its “importance to consumers and the economy”, a “perception that Canada lags its peers in FinTech adoption” and that stakeholders in Fintech were worthy of attention. The Norwegian competition authority focused on new taxi services, accommodation market and tax issues in Official Norwegian Report (NOU) 2017:4 on sharing economy because they found to be the most prominent areas in digital economy.

¹⁴ According to the Norwegian presentation at the 2018 Workshop, the Norwegian competition authority's approach used in the report on sharing economy was based on the competitive

- Limit the number or range of suppliers;
- Limit the actions that suppliers can take as they compete with each other;
- Reduce the incentives of suppliers to compete; and
- Limit the choices and information available to consumers.

The underlying rationale for these questions is to identify potential restrictions to competition. Whether the regulation provides an undue restriction is a further question that can be applied to the limited number of regulations that have a positive response. (For more details, see <http://www.oecd.org/daf/competition/assessment-toolkit.htm>) These four areas of concern are not specific to digital products and services but are the same general principles that can also be used for traditional products and services. While no update of the fundamental principles of the checklist appear needed, the importance of reviewing physical presence requirements may need to be inserted into the checklist. The first two questions appear the most likely to be relevant in digitalisation reviews.¹⁵

5.5. Competitive neutrality.

32. **Ensure that regulations are competitively neutral between digital and non-digital products, while ensuring appropriate consumer protections.** Regulations may at times give substantial and undeserved advantages to one type of company over another. In particular, regulations may have been established for traditional products and services, without taking into account actual and potential new innovations in products and business methods. Care should be taken to ensure that regulations are appropriate and focused on actual risks from different products, without unduly handicapping one compared to another and at the same time not assuming the same regulation should apply to all types of companies.

5.6. Physical presence, minimum scale and inspection rules.

33. **Particular focus is needed for rules that require physical storefronts and physical inspection of merchandise prior to purchase, as these inherently limit digital sales.** At times, regulations may require physical storefronts and pre-inspection of merchandise. Such rules can seriously handicap digital sales, including direct consumer-to-consumer sales. At the same time, consumers who have not had a chance to test a product in advance nor to review others assessment of such a product may need a chance to return the product should it not meet their requirements.

5.7. Stakeholders.

34. **Ensure that competition assessment of regulations appropriately considers views of stakeholders, including potential future stakeholders.** Current stakeholders,

neutrality principle and the competition assessment checklist. In the report, it is stated that “regulation should promote competition” (“i.e. by providing a level playing field (legal entities/private individuals and traditional/technology-driven industries)” and “technology neutrality”) and “should not hamper competition” by limiting the number or range of suppliers, limiting the ability of suppliers to compete, reducing the incentive of suppliers to compete and limiting the choices and information available to customers.

¹⁵ In the 2018 Workshop, examples in the Italian presentation were mostly of CAC categories A and B.

such as sector-specific associations, are typically dominated by traditional firms and may have rules that prevent non-traditional members selling competitive products from joining. So established associations may not always represent the full spectrum of views that are worth considering when seeking stakeholder input. Moreover, established associations and companies will tend to have many more resources available for lobbying, while new entrants will have less or no resources available. Great care should be taken by policymakers to ensure that stakeholders with a full variety of interests are reached and provide input.

5.8. Cross-border.

35. **Restrictions on cross-border competition need to be assessed.** These restrictions may at times be excessive while at other times they are insufficient. The assessment will depend on the evaluation of what is necessary for ensuring that appropriate products can be sold in comparable conditions -- considering all other rules -- to local ones, while also ensuring that national standards are followed and that illegal products are not made available. Co-operation may be needed across borders to ensure that common standards are applied and that common information is available to regulators.¹⁶

5.9. Standards.

36. **When rules are changed, due to restrictions of competition, it is better if they can be replaced by standards, that can evolve quickly, rather than new more fixed rules that create new interest groups.** It is important to realise that technological developments will be continuing and ongoing. While rules may be needed to ensure that property rights and risk responsibilities are allocated in light of new products, rules that establish requirements over how firms operate may be outdated with further technological developments. Therefore technologically neutral regulation is needed, which may best be done through standards that can change as technical possibilities change instead of rules (notably legislation) that, once established, create fixed interest groups to support them and that have bureaucratic inertia that makes quick updating difficult.

5.10. Regulatory Sandboxes.

37. **Be open to creating low burden regulatory regimes for small and new entrants, or regulatory “sandboxes”.**¹⁷ In sectors such as the financial sector, more open and experimental approaches towards new industries are being encouraged by regulatory approaches with lower requirements for small and potentially innovative firms. These approaches will increase the emergence and development of innovative

¹⁶ See presentation of David Stallibras in 2018 Workshop “Digital platforms: challenges for competition advocacy”. <https://www.slideshare.net/OECD-DAF/regulation-and-competition-in-light-of-digitalisation-david-stallibras-january-2018-oecd-workshop>.

¹⁷ See presentation of David Stallibras in 2018 Workshop “Digital platforms: challenges for competition advocacy”. <https://www.slideshare.net/OECD-DAF/regulation-and-competition-in-light-of-digitalisation-david-stallibras-january-2018-oecd-workshop> and presentation of Miguel de la Mano in 2018 Workshop, “The fintech challenge: an economic perspective” <https://www.slideshare.net/OECD-DAF/regulation-and-competition-in-light-of-digitalisation-miguel-de-la-mano-january-2018-oecd-workshop>.

technologies and business models, while maintaining the ongoing review of regulators that can be quickly adjusted should new risks arise.

6. Concluding remarks

38. The review of existing regulations in light of digitalisation is a high priority. Such reviews are not necessarily burdensome to perform and could play a key role in allowing nations to keep up with the frontier productivity levels. Flexibility may be particularly appropriate during such reviews, due to the unpredictability of the future.

39. The presence of digital options first raises the question of whether market failures are still the same as before and, if so, whether the regulations in place are still the optimal ones, taking into account digital options. Areas with particular need for review from a competition perspective include platform regulations, finance, transport and logistics, health (including pharmaceutical) and lodging. These are deemed particularly in need of review because these areas are those that, according to a 2017 survey by the OECD, witnessed the most substantial and frequent changes in regulation compared to others. This is not to say that other areas require no attention. It seems possible both that important areas may not have featured in the survey reporting and further that areas of high priority will evolve over time, which would suggest that a one-time review on a focused set of sub-sectors would be insufficient to grapple with the full tide of change that is coming.

40. To be forward-looking, it is important to recognise the need for continued monitoring of how market failures and regulations may need to evolve.¹⁸ In the UK, for example, there is a regular review of financial service regulations to assess whether regulations are fit for purpose. Such an ongoing review within a sector is of particular value when the sector is rapidly evolving.

41. Guidance to governments will consequently need to be updated, to take account of modern examples that may differ in type and focus from existing examples of competition assessment reviews. As a result, the OECD is revising its Competition Assessment Toolkit, in light of digitalisation, to ensure its continuing value and relevance. This update could take various forms, and could include:

- Adding examples of digitalisation-inspired review of regulations throughout the existing materials and adding new concepts related to platforms
- Creating a digitalisation-focused guide;
- Preparing a short, standalone set of principles that could guide governments in selecting areas for priority review and efficiently performing such reviews both by a process that includes feedback from “non-traditional” businesses and identification of the types of regulation that are particularly likely to prevent beneficial developments.

42. After selecting the options for moving forward, and with expeditious progress, the revised Competition Assessment Toolkit is expected to be available in the course of 2019, ready to help governments to address many of the regulatory challenges to competition that are posed by rapid digitalisation for goods, services and business models.

¹⁸ Information-based market failures, in particular, may increasingly be reduced, for example due to online customer evaluations of products and providers.

Annex A. Breakdown of distribution of CAC questions according to the sectors

Table below shows the distribution of all the regulations with potential of restrictive effect on competition to their respective sectors and under which CAC questions they are categorized.

Sector and CAC Question	No. of Occurrences
<i>Accommodation</i>	<i>17</i>
A	2
A.2	4
A.3	8
B.3	2
B.4	1
<i>Alcohol</i>	<i>1</i>
B.2	1
<i>Consumer Protection</i>	<i>6</i>
B.3	2
B.4	2
D	1
D.3	1
<i>Customs</i>	<i>4</i>
B.4	1
D	3
<i>Data Protection</i>	<i>2</i>
A.4	1
A.5	1
<i>E-commerce</i>	<i>3</i>
A.3	1
B	1
B.4	1
<i>Energy</i>	<i>1</i>
C.2	1
<i>FinTech</i>	<i>5</i>
A.4	3
B.3	1
D.3	1
<i>Food</i>	<i>1</i>
A.3	1
<i>Health</i>	<i>3</i>
A.4	1
A.4-C.1	1
B.2	1
<i>Meat</i>	<i>1</i>
B.4	1
<i>Media</i>	<i>3</i>
B.4	2
D.1	1
<i>Pharmaceuticals</i>	<i>12</i>
A.3	2
A.4	6
A.5	4

<i>Plant protection products</i>	<i>1</i>
B.4	1
<i>Promotions (prize draws)</i>	<i>1</i>
B.4	1
<i>Tourism</i>	<i>2</i>
B.1	2
<i>Transportation</i>	<i>29</i>
A	3
A-D.1	1
A.2	5
A.3	3
A.4	4
A.4-B.3	1
A.5	1
A.5-B.4	1
B.1	3
B.3	2
B.4	4
C.1	1
Total	92
