

## United Kingdom

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### 1 Introduction

This chapter analyses how the UK has, and is proposing to, use competition law and regulation to create holistic solutions in tackling the fast-moving competition issues in relation to digital networks, online platforms and Most Favoured Nation Clauses (“MFNs”).

The UK government is presently considering the introduction of a new legislative regime designed to regulate businesses which have attained a position of strategic market power within the digital economy. Two key reports have driven UK policy thinking in this area. These are:

- Unlocking Digital Competition, March 2019, (*the Furman Report*)<sup>1</sup> by an expert panel led by Harvard economist and former White House economic adviser, Jason Furman; and
- Competition and Markets Authority’s Online platforms and digital advertising Market study final report, July 2020, (*the Digital Report*).

These reports are considered, in detail, below. Following on from these reports, there have been a number of further developments of significance. A Digital Markets Taskforce was created in March 2020 to provide advice to inform the government’s decisions on how to promote competition in digital markets to the benefit of consumers and businesses.<sup>2</sup> It is led by the Competition and Markets Authority (“CMA”), with support from the telecoms regulator Ofcom, the Information Commissioners Office (“ICO”) and has also had substantial input from the Financial Conduct Authority (“FCA”). The Taskforce produced proposals for the new regulatory regime for digital markets in December 2020.

Subsequently, a Digital Markets Unit (“DMU”) was established within the framework of the CMA in April 2021. As explained below, for the time-being, the DMU is tasked with engaging in work to prepare for exercising powers under an envisaged legislative regime (not yet finalised) which will put this body on a statutory footing and confer additional (and potentially far-reaching) regulatory powers upon it. The precise scope of these powers is still under consideration at governmental level. Alongside these institutional

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<sup>1</sup> Digital Competition Expert Panel, Unlocking digital Competition, Report of the Digital Competition Expert Panel (‘Furman Report’) (March 2019), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf). Accessed 31 August 2021.

<sup>2</sup> *Digital Markets Taskforce: Terms of Reference*, available at: <https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3>. Accessed 31 August 2021.

developments, there have been a number of further announcements by the CMA, the Digital Markets Taskforce and central government, of significance for the regulation of the digital economy. These are considered below.

### **1.1 The Furman Report (2019)**

In the UK, the Furman Report has been seminal in the development of policy thinking on the regulation of the digital economy. The report found that many digital markets are global and dominated by one or two of the five largest digital companies: Amazon, Apple, Facebook, Google and Microsoft. While digital markets have brought enormous benefits, there are now heightened concerns about the advantages enjoyed by the largest companies, including economies of scale and scope, access to data, network effects, limited switching possibilities, access to finance and so on. The resulting barriers to entry mean that many digital platform markets are not freely contestable, and the incumbents have significant market power over users, resulting in user dependency, privacy and data security issues, lower levels of innovation, and potentially unfair treatment of customers.

The Furman Report recommended establishing a Code of Conduct for digital companies enjoying “strategic market status” (“SMS”), which would require a much greater degree of fairness, transparent and consistent behaviour by platforms towards consumers, business users and potential rivals, particularly as regards access and prominence of display, together with greater personal data mobility and the creation of open standards. This Code would be developed by a new Digital Markets Unit (DMU) based within the CMA. Although outside the scope of this national report, the Furman Report also recommended closer scrutiny of digital mergers, and the development of a new “balance of harms” test

### **1.2 The CMA’s Digital Report (2020)**

The CMA’s Digital Report, made under the market investigation powers of the Enterprise Act 2002 (EA 2002), has developed the Furman Report’s proposals in the light of more detailed information about the activities of Google and Facebook, which according to the CMA has reinforced the need for reform along the Furman Report’s lines.

The CMA found that Google had over 90% of the UK general search market and that Facebook generated over 50% of UK display advertising revenues. Both Google and Facebook benefitted from substantial network effects – in Google’s case particularly the scale of its click and query data, and in Facebook’s case its large network of connected users, raising significant barriers to potential rivals, subsequently reinforced in Google’s case by default agreements, for example where mobile phone suppliers agree that Google Search occupies the default search position on the device. In terms of personal data, the CMA found that many platforms do not give users the ability to control their data, or they offer privacy policies that are so complicated that most users most simply accept the default choice they are presented with. In addition, their unique and vast sources of data enable Google and Facebook to offer advertisers and media agencies options for targeting consumers which other platforms cannot match – Google’s mobile data even enables it to track users offline. Google and Facebook also interpret the GDPR favourably to themselves, according to the CMA.

The CMA also found that there was little transparency in the operation of online automated bidding for digital advertising inventory or in the opaque algorithms determining search results, as well as little ability for

advertisers or publishers to determine whether they were receiving value for money. Further concerns related to the potential for leverage into other areas afforded by “ecosystems” – in Google’s case, Chrome, Android, Double Click and YouTube, and Facebook with What’s App, Instagram and various other activities. Finally, the CMA identified potential concerns with vertical integration and conflicts of interests, where for example Google has a very strong position in advertising intermediation generally, in supply side platforms (SSPs), and in demand side platforms (DSPs), allowing Google to self-preference its own activities and reinforce its market power.

Against this background, the CMA came to the conclusion that Google and Facebook have such entrenched market power that a new pro-competition ex ante regulatory regime was needed for online platforms funded by digital advertising, thereby endorsing the findings of the Furman Report. As suggested by the Furman Report, this new regulatory regime would apply to platforms having SMS and comprise an enforceable Code of Conduct governing behaviour as well as pro-competitive interventions to promote competition. As to the Code of Conduct, each SMS would have its own code based around fair trading (to counter exploitative behaviour), open choices (to counter exclusionary behaviour), and trust and transparency (to ensure users are provided with sufficient information to make informed decisions). As to the pro-competitive interventions these should include powers to increase consumer control over data, to mandate interoperability and third-party access to data, and to mandate data separation where necessary. The CMA sees these powers, or some combination of them, as a toolkit to address such matters as the default positions enjoyed by Google on devices; allowing third party search engines better access to data and thus improve their algorithms; increasing consumers’ control over data and choice over what advertising they wish to receive; resolving conflicts of interests, if necessary through separating various vertically integrated functions; and mandating greater transparency and access to data in digital advertising markets, subject to GDPR requirements.

The CMA, like Furman, recommends legislation to implement these reforms and the establishment of a DMU to carry them out. The precise scope of these reforms has been further considered by the Digital Market Taskforce in a report published in December 2020 (discussed below).

Finally, it should be noted that the CMA’s Digital Report has highlighted certain aspects of the interface between antitrust law and data protection law (including the GDPR and its post-Brexit equivalent), including the use of over-complex terms and conditions to which users are effectively forced to adhere, and the (mis-) use of the GDPR to prevent sharing of certain data with potential rivals. Although hitherto antitrust issues have not figured prominently in relation to data protection, which is the separate responsibility of the ICO, the data protection/ antitrust interface is expected to come under closer scrutiny in the work of the DMU in which, as stated in Section 1.1, the CMA, the ICO and Ofcom are all represented. Looking to the future, the CMA may well challenge the use of data protection laws in ways which weaken competition.

## **2 UK’s approach towards the market power of social media networks and online platforms**

Unlike the Bundeskartellamt, there are no specific guidelines in the UK to assess the market power of social media networks and digital platforms. However, there is significant discussion on how to determine market power based on the way in which a network or platform operates.

The Furman Report looked at the market shares held by various digital platforms and noted that in December 2018, over 92% of UK online page views that originated from a search engine were estimated to come from Google,<sup>3</sup> and in terms of page views originating from social media sites, over 73% were from Facebook or Instagram. That said, the CMA noted that a number of other metrics such as level of concentration, user numbers, traffic generated, or time spent on each service could be assessed as possible metrics. For example, 33.5% of all UK e-commerce transactions went through Amazon in 2018,<sup>4</sup> it is a source of continuing debate as to what the relevant market definition is for online retail or marketplaces.

The Furman Report also looked in detail at barriers to entry that exist in digital platform markets and the high degree of control and influence that some firms have over both (i) the relationship between buyers and sellers; and (ii) the access that advertisers have to potential buyers. It noted that this gives platforms three distinct types of power, “the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations.”<sup>5</sup> As a result, a small number of companies have strategically important gateway positions, can control others’ market access and can wield significant bargaining power over their users. It is this which the Furman Report considered as market power.<sup>6</sup>

The CMA’s Digital Report took these considerations one step further and also used profitability analysis to assess the market power of digital platforms. It found that the global return on capital employed, for both Google and Facebook, has been well above any reasonable benchmarks for many years. It estimated that the cost of capital for both Google and Facebook in 2018 was around 9%, whereas their actual returns have been substantially higher, at least 40% for Google’s search. It concludes that this level of profit is indicative of these platforms’ ability to exploit market power.<sup>7</sup>

As already identified under Section 1.2, the CMA considered that the following factors may inhibit entry or expansion by an online platform’s rivals and undermine competition: (i) network effects and economies of scale; (ii) consumer behaviour and the power of defaults (i.e. default behaviour by consumers and the way in which choices are presented to consumers); (iii) unequal access to user data; (iv) problems relating to a lack of transparency; and (v) vertical integration and conflicts of interest.<sup>8</sup> Based on the Furman Report and the Digital Report, these are the main factors for reviewing market power of networks and platforms in the UK.

## **2.1 UK’s approach towards defining the term “platform” and other linked concepts**

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<sup>3</sup> Statcounter, GlobalStats data for UK search engine market share, available at: <https://gs.statcounter.com/search-engine-market-share/all/united-kingdom>. Accessed 20 April 2020.

<sup>4</sup> Plum Consulting report commissioned by DCMS, Online advertising in the UK (January 2019), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777996/Plum\\_DCMS\\_Online\\_Advertising\\_in\\_the\\_UK.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777996/Plum_DCMS_Online_Advertising_in_the_UK.pdf). Accessed 31 August 2021.

<sup>5</sup> K. Sabeel Rahman, Regulating informational infrastructure: Internet platforms as the new public utilities (July 2018), available at: <https://georgetownlawtechreview.org/regulating-informational-infrastructure-internet-platforms-as-the-new-public-utilities/GLTR-07-2018/>. Accessed 31 August 2021.

<sup>6</sup> Furman Report, para 1.161

<sup>7</sup> CMA, Online platforms and digital advertising Market study final report (‘Digital Report’) (July 2020), paras 2.77 – 2.81, available at [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf). Accessed 31 August 2021.

<sup>8</sup> Digital Report, para 21

The Terms of Reference<sup>9</sup> for the new Digital Markets Taskforce define digital platforms as online services that intermediate between different groups to buy, sell, share and exchange different goods and services, typically collecting and using vast amounts of data to deliver their services. The terms further cite the OECD definition<sup>10</sup> of online services, which is “a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet”. According to the terms, “[t]his includes, but is not limited to, e-commerce platforms, peer-to-peer platforms, social media networks and search engines, which have become an everyday part of modern life.”

The Furman Report and the Digital Report both note that online platforms facilitate interactions and transactions between users for no monetary cost. However, these platforms instead collect data from their users in return.

As outlined in the CMA’s Digital Report, integration of different services is also a key concept in the business model of online platforms because once such platforms have attracted customers by offering their core services for free, they then make money from another “side” of that same platform. In the case of Amazon, this money is made from the commission generated from retailers on its Marketplace, while the Apple App store, for example, derives revenue from the charges to app developers. Equally, there is no clear separation on search engines and social media sites between the services offered by the platform and the advertisements that the end user views, for which the platform generates revenue.<sup>11</sup>

The Digital Report also found that online marketplaces, such as Amazon and eBay, or price comparison sites, help consumers to search for certain types of information by way of “specialist search”, as well as offering their products for sale. From a consumer perspective, there are differences between general search and specialised search. General search engines help consumers with a wider range of queries including many that are not served by specialised providers, while specialised search provides functionality that allows consumers to compare listed products across multiple dimensions.<sup>12</sup>

Within the UK, there is unlikely to be a formal approach to distinguish between different types of platforms, or different functions within platforms: each situation will be judged on its own facts.

## **2.2 Can there be an antitrust ‘market’ for free digital services in the UK?**

Antitrust agencies generally attempt to analyse markets by assessing their effects on end prices, but free services make it difficult to define separate markets, determine market power or to assess the effects of a platform or transaction on competition.

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<sup>10</sup> Footnote 4, CMA, Digital markets taskforce: terms of reference.

<sup>11</sup> Digital Report, paras 2.3 and 2.4.

<sup>12</sup> Digital Report, paras 3.44 - 3.51.

It is well recognised, for example by the EC Digital Content and Digital Services Directive (2019),<sup>13</sup> that digital content and services are usually provided in exchange for personal data, rather than for money. However, the first question to consider is whether such services are, in fact, offered for free.<sup>14</sup>

Various international jurisdictions have accepted that a consumer's personal data, preferences and user-generated content can have an economic value and is a valid form of consideration in return for a service.<sup>15</sup> This is also the view of the CMA, which does not consider the use of online platforms as free services. The Digital Report notes that, "[a]lthough consumers do not pay money for these services, there is still an exchange that takes place between them and the platform. In exchange for searching the internet, watching videos, or communicating with friends, consumers provide their attention and data about themselves". The CMA notes that, "[t]he advertising-funded business model is not novel, nor is it inherently problematic from a competition perspective. Newspapers have been generating revenue in the UK through advertising for several hundred years. On television, ITV provided the first alternative to the BBC in 1955, when it began its ad-funded broadcasting. Similarly, commercial radio stations have been generating revenue through advertising in the UK ever since the market was liberalised in 1973."<sup>16</sup> The CMA notes that the apparently "free" services of search and social media are paid for by digital advertising, the cost of which was around BPD14 billion in the UK in 2019.

Indeed, some economists have in fact argued that, whilst online services appear to be free, the zero-price paid is in fact too high and consumers could be extracting a greater value in return for their data.<sup>17</sup>

The CMA noted in its response to the House of Lords consideration of the proposed EU's regulation of online platforms<sup>18</sup> that, whilst novel online business models may require existing legal and economic concepts to be applied in new contexts, these platforms do not create fundamentally different issues than those that have been addressed before (even where services are provided at no monetary cost).

### **3 Dominant Companies and Special Responsibility Status**

As discussed under Section 1, the CMA's Digital Report essentially confirmed the Furman conclusions that some major companies in digital markets have excessive market power and that a special pro-competitive regime for companies distinguished as having SMS is urgently needed.

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<sup>13</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (The Digital Contents Directive 2019/770), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=EN>. Accessed 31 August 2021.

<sup>14</sup> See recital 24 of the Digital Contents Directive 2019/770.

<sup>15</sup> CMA, Appendix A: The legal framework, Paragraph 68, available at: [https://assets.publishing.service.gov.uk/media/5df9ebf0e5274a0910cb6d7c/Appendix\\_A\\_The\\_legal\\_framework.pdf](https://assets.publishing.service.gov.uk/media/5df9ebf0e5274a0910cb6d7c/Appendix_A_The_legal_framework.pdf). Accessed 31 August 2021.

<sup>16</sup> Digital Report, paras 2.5 and 2.6

<sup>17</sup> See, for example, the discussion by Tim Harford, 'Treat social media like email and search engines', Financial Times, 27 April 2018.

<sup>18</sup> CMA, Select Committee on the European Union: Internal Market Sub Committee, CMA response to the call for evidence: Online Platforms and the EU Digital Single Market, 23 October 2015, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502607/Response\\_to\\_House\\_of\\_Lords\\_inquiry\\_on\\_online\\_platforms.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502607/Response_to_House_of_Lords_inquiry_on_online_platforms.pdf). Accessed 31 August 2021.

Essentially, the conclusion to be drawn from these Reports is that existing tools such as the “special responsibility of dominant companies” are inadequate to deal with the situation and further legislation is required. Many other countries have expressed similar concerns in relation to the power of online platforms. For example, in April 2020 the Australian Government directed the Australian Competition and Consumer Commission (ACCC) to develop a mandatory Code of Conduct to address bargaining power imbalances between digital platforms and media companies, in response to the ACCC’s Digital Platforms Inquiry final report.<sup>19</sup>

### 3.1 Policy Proposals in response to the CMA’s Digital Report

There have been a number of significant policy responses to the CMA’s Digital Report. In November 2020, the government published a formal response to the CMA’s recommendations (“**the Government Response**”).<sup>20</sup> A short time later, in December 2020, the Digital Markets Taskforce published its advice, at the request for government, on the design and implementation of a code of practice and the shape of a new pro-competition regime for digital markets in the UK.<sup>21</sup> This latter report is likely to be very influential as regards the shape of future legislative reform in the United Kingdom in this area.

#### 3.1.1 Government Response to CMA’s Digital Report

The Government Response essentially accepted the key recommendations in the CMA’s Digital Report and laid down a number of proposed next steps. The response accepts that the inherent features of digital markets described in the CMA’s Digital Report (such as network effects, economies of scale, barriers to entry and unequal access to data and financing) “means that they tend to tip in favour of a single incumbent”, and that this is “leading to higher prices for goods and services, less innovation, and less choice and control for consumers”.<sup>22</sup> As a result, the government also accepts that the UK’s “existing competition tools are not equipped to address the systematic harms associated with dominant platforms” in the digital advertising, general search and social media markets.<sup>23</sup> Based on this analysis, the government agrees that substantial legislative and regulatory reform is now needed.

As to what this reform entails, the response endorses the establishment of an enforceable Code of Conduct to govern the behaviour of platforms funded by digital advertising that are designated as having strategic market status.<sup>24</sup> The government has asked the Digital Markets Taskforce to provide further advice on the design and

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<sup>19</sup> The Hon Paul Fletcher MP, ACCC mandatory Code of Conduct to govern the commercial relationship between digital platforms and media companies (Media Release, 20 April 2020), available at: <https://minister.infrastructure.gov.au/fletcher/media-release/accc-mandatory-code-conduct-govern-commercial-relationship-between-digital-platforms-and-media-companies>. Accessed 31 August 2021.

<sup>20</sup> See Response to the CMA’s Market Study into Online Platforms and Digital Advertising, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939008/government-response-to-cma-study.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939008/government-response-to-cma-study.pdf). Accessed 31 August 2021.

<sup>21</sup> The Taskforce Report, and appendices, which contain further substantive analysis, are available here: <https://www.gov.uk/cma-cases/digital-markets-taskforce#taskforce-advice>. Accessed 31 August 2021.

<sup>22</sup> Government Response, para 14.

<sup>23</sup> Government Response, para 15.

<sup>24</sup> Although beyond the scope of this Chapter, the response observes that the code should also address the relationships between online platforms and news publishers, “in order to ensure the sustainability of high-quality journalism and news publishing” Government Response, para 17.

implementation of a Code of Conduct and, more broadly, on the approach which should be adopted in respect of firms having substantial and enduring market power and therefore designated with “Strategic Market Status”. This advice was provided by the Taskforce in December 2020 and is discussed further below.

Overall, the response accepts that the Code of Conduct must be mandatory and enforceable since, in the government’s view, an unenforceable regime, as exists in Australia, would be insufficient to deter anti-competitive behaviour.<sup>25</sup> The government also agrees as to the need for a Digital Markets Unit with the task of introducing, maintaining and enforcing the Code of Conduct and exercising a range of powers to undertake “pro-competitive” interventions in the market for digital services. The DMU was established provisionally in April 2021 (albeit merely to undertake preparatory work for the time-being pending the conferral of legislative powers).

The establishment of a Code of Conduct and the powers of the DMU to enforce this regime and the regime for pro-competitive interventions will require new legislation, which the government has undertaken to provide “as soon as parliamentary time allows”.<sup>26</sup> Draft legislation has not yet been published but is expected in the course of 2021. The government sees these legislative reforms as part of a broader agenda of regulating the digital economy, explaining that “a new pro-competition” regime will form a key part of this broader agenda, with other elements including measures to “boost innovation, build public trust through greater safety and security for users of digital tech, and promote a democratic, open society”. As part of this agenda, draft legislation in the form of the *Online Safety* bill has been introduced in Parliament, with the aim of “establish[ing] a new regulatory regime to address illegal and harmful content online, with the aim of preventing harm to individuals in the United Kingdom”, imposing duties of care on internet service providers.<sup>27</sup>

### 3.1.2 Further Advice from Digital Markets Taskforce

The Digital Markets Taskforce December 2020 Advice (“**the Taskforce Report**”) provides influential advice to government on a number of the key aspects of the newly envisaged regulatory regime, including: procedural and substantive aspects of the Strategic Market Status test; the purpose, form, content and powers associated with the code of practice for designated firms; arrangements for pro-competitive interventions in respect of designated firms; and recommendations on other important matters including merger control.

The Strategic Market Status designation is at the core of the proposed regime.<sup>28</sup> As regards this designation, the Taskforce recommends that this status should require a finding that a firm has “substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position in respect of that

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<sup>25</sup> Government Response, para 25.

<sup>26</sup> Government Response, para 22.

<sup>27</sup> Online Safety Bill, Explanatory Notes, para 1, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/985031/Explanatory\\_Notes\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985031/Explanatory_Notes_Accessible.pdf). Accessed 31 August 2021.

<sup>28</sup> The Taskforce does not recommend that a statutory duty be placed on the Digital Markets Unit to designate a firm some of whose activities meets the test. Instead, the report recommends that designation be a discretionary power, which would be challengeable by way of judicial review rather than a merits-based appeal. *See* Taskforce Report, paras 11 and 12 and § 4.114.



activity”.<sup>29</sup> The report defines a “digital activity” as “a group of products or services that can be considered together”, because they “can reasonably be described as having a similar function or can reasonably be described as fulfilling, in combination, a specific function”.<sup>30</sup> The report therefore proposes a flexible approach and deliberately eschews reliance on markets and detailed analysis for purpose of market definition. Indeed, the report observes that “[a]n activity could consist of products and services that would be identified as belonging to separate relevant markets under a traditional competition law approach”.<sup>31</sup> It is proposed that the Strategic Market Status designation would be assessed by reference to these specific activities (rather than all activities of the company as a whole) and the code of practice would then apply to these specific activities.<sup>32</sup>

The Taskforce recommends that the test focus on whether the power of the business in respect of specific digital activities is “entrenched”; in other words, that it is expected to “persist over time and is unlikely to be competed away in the short term”.<sup>33</sup> The report explains that whilst the temporary or transitory attainment of substantial market power is of less concern, once a firm’s position becomes entrenched, the likelihood of a rival emerging and taking a substantial share of the market is low. In such circumstances, it is likely that prices will be persistently higher, while quality, investment and innovation will be persistently lower than would otherwise be the case, to the long-term detriment of consumers. The report recommends that the assessment of market power should focus on direct evidence of market power, specifically evidence of substitutability, competitive rivalry and barriers to entry and expansion.

A further important distinguishing feature of the designation is that a firm has a “strategic position” as a result of its “entrenched and substantial” market power. It is explained that a “strategic position” in respect of an activity is one where the firm’s market power is particularly “widespread or significant”.<sup>34</sup> The report identifies various factors or indicia which may inform this assessment, including: the size and scale of the company; whether it represents an important “gateway” or access point to consumers; whether the firm has the ability to extend its market power from one activity into others; whether it has an “ecosystem” of products; whether the firm can use its market power to “determine the rules of the game”; and whether the firm has impacts on activities with broader social or cultural importance.<sup>35</sup>

Once the Strategic Market Status test is met, consistent with the Furman Report, the Taskforce recommends that the Digital Markets Unit should establish a legally enforceable Code of Conduct for the firm, in relation to its “designated activities”. It is proposed that a tailored code will be established for each firm by the Digital Markets Unit, specifically in respect of its designated digital activities.<sup>36</sup> As can be seen, the concept of “designated activities” is, therefore, of particular importance to the operation of the scheme. The report explains that the code will provide a set of *ex ante* principles for designated firms to follow, with the aim of

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<sup>29</sup> Appendix B § 56 , Taskforce Report. Appendix B describes the proposed Strategic Market Status test in detail. It is available here: [https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix\\_B\\_-\\_The\\_SMS\\_regime\\_-\\_designating\\_SMS\\_firms.pdf](https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix_B_-_The_SMS_regime_-_designating_SMS_firms.pdf). Accessed 31 August 2021.

<sup>30</sup> Appendix B, para 15.

<sup>31</sup> Appendix B, para 18.

<sup>32</sup> Appendix B, paras 13-20.

<sup>33</sup> Taskforce Report, paras 28-30.

<sup>34</sup> Taskforce Report, paras 4.18.

<sup>35</sup> Taskforce Report, para 4.19.

<sup>36</sup> Taskforce Report, paras 4.47-4.51.

preventing consumers and businesses from being exploited, and to prevent practices by the firm which could undermine fair competition.<sup>37</sup> It is envisaged that each code will provide objectives, principles and guidance. The objectives would be laid down by Parliament in legislation. The principles lay down a set of standards with which the firm must comply, while the guidance sets out information as to how the principles will be interpreted. This approach is adopted in favour of either rules-based or outcome-based regulation, each of which is seen to have drawbacks (inflexibility and over-prescription in the case of rules and undue ambiguity in the case of outcomes regulation).<sup>38</sup> This proposed model is, in part, informed by regulation by Ofgem and the FCA in the UK's energy and financial services sector, where principles and guidance are used to regulate enterprises.<sup>39</sup> The report recommends that the overarching objectives of the code should be fair trading, open choices for consumers, trust and transparency.<sup>40</sup> It is also recommended that the Digital Markets Unit be given the power to open formal investigations into a breach of the code and, in the event of breach, to impose substantial penalties with significant deterrent effect. It is proposed that a breach should be either deliberate or negligent,<sup>41</sup> and could result in a financial penalty of up to 10% of global turnover.<sup>42</sup>

As foreshadowed above, a new regime of “pro-competitive interventions” is also recommended. The Taskforce argues that pro-competitive interventions are an important tool to enable the Digital Markets Unit to intervene in markets to promote dynamic competition and innovation. It is envisaged that while the *Code of Conduct* will address concerns created by the strategic market power of certain forms, *the intervention regime* will address matters which have given rise to ineffective competition in the first place.<sup>43</sup> This regime is analogous to the Significant Market Power regime operated by Ofcom and other telecoms regulators in the EU which allows for proactive interventions to ensure greater competition in the field of communications.<sup>44</sup> The report gives the following examples of powers which it suggests should be available to the Digital Markets Unit by way of pro-competitive interventions: data-related interventions; interoperability and common standards; consumer choice and defaults interventions; obligations to provide access on fair and reasonable terms; and separation remedies.<sup>45</sup> Such interventions would also be subject to further principles including effectiveness and proportionality and should avoid wider effects on the designated firms business beyond designated activities.

Although beyond the scope of this chapter, it is worth noting that the Taskforce Report also recommended change in the field of merger control as regards companies with Strategic Market Status. In particular, a designated firm would be required to report all mergers (rather than simply reporting those where the transaction value or share of supply crosses a particular threshold). Affected transactions would be subject to a prohibition on completion of the transaction prior to regulatory approval. Finally (and importantly), the

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<sup>37</sup> Taskforce Report, para 4.33.

<sup>38</sup> Appendix C, paras 17-27.

<sup>39</sup> Appendix C, para C9.

<sup>40</sup> Taskforce Report, para 4.38.

<sup>41</sup> Taskforce Report, para 4.95.

<sup>42</sup> Taskforce Report, para 4.96.

<sup>43</sup> Taskforce Report, para 4.61.

<sup>44</sup> Taskforce Report, para 4.62.

<sup>45</sup> Appendix D, para 17.

report recommends that the current regime for merger intervention be lowered so that the CMA is permitted to intervene where there is a “realistic prospect” that a transaction will result in a substantial lessening of competition.<sup>46</sup>

Overall, the Taskforce Report is hugely detailed and contains a number of quite far-reaching recommendations. The government is presently considering the Digital Report with a view to drawing up a legislative framework for the work of the Digital Markets Unit. Draft legislation is still under consideration and, as yet, no draft bill has been published, but the government has committed to consult on a draft bill in 2021. In the meantime, in February 2021, the CMA published its *Digital Markets Strategy: 2021 Refresh*.<sup>47</sup> The strategy was updated in light of developments including the Taskforce Report. The strategy explains that a key priority for the CMA in the coming year is to work closely with Government to consider and operationalise the organisational design for the Digital Markets Unit, including its funding, governance and decision-making structures, and how it will interact with existing CMA functions (as well as dealing with practical matters such as staffing, skills, IT support and so forth). The CMA has also established a Data and Technology Analytics Unit. According to the CMA this unit has available to it sophisticated data engineering technology to facilitate its work monitoring and enforcing businesses which deliver services in digital markets.

#### **4 Digital Networks and Online Platforms: the Interaction Between Competition Law and Data Protection Regulation**

The behaviour of digital social network operators continues to be subject to scrutiny. Recently, the ICO has reviewed how advertisements across the internet are bought and sold.<sup>48</sup> The ICO’s findings were that, contrary to data protection law, information and sensitive personal data relating to consumers is regularly being used to serve adverts without the explicit consent of those consumers. The ICO did not single out any specific network operators but instead offered a grace period of six months during which the entire AdTech industry must reform its practice and make improvements to comply with the GDPR. After the grace period, the ICO will undertake a further industry review. The ICO’s probe appears to be having an impact in the UK, with companies such as Google and the Internet Advertising Bureau UK, the industry body for digital advertising, since committing to making changes to the way they use and share consumer data. However, the ICO had admitted there are still shortcomings and is continuing to investigate the industry.<sup>49</sup>

##### **4.1 Developing Tensions Between Data Protection and Competition Law**

The CMA’s Digital Report is concerned that, by virtue of their market power, large platforms such as Google and Facebook increasingly appear to be acting in a quasi-regulatory capacity in relation to data protection considerations, setting the rules around data sharing not just within their own ecosystems, but for other market

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<sup>46</sup> Taskforce Report, para 4.153.

<sup>47</sup> *Digital Markets Strategy: 2021 Refresh*, available at: <https://www.gov.uk/government/publications/competition-and-markets-authority-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh>. Accessed 31 August 2021.

<sup>48</sup> Information Commissioner’s Office, *Update Report into adtech and real time bidding*, 20 June 2019, available at: <https://ico.org.uk/media/about-the-ico/documents/2615156/adtech-real-time-bidding-report-201906-dl191220.pdf>. Accessed 31 August 2021.

<sup>49</sup> Simon McDougall, Information and Commissioner’s Office, *Blog: Adtech - the reform of real time bidding has started and will continue*, ICO News and Events, 17 January 2020, available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/01/blog-adtech-the-reform-of-real-time-bidding-has-started/>. Accessed 31 August 2021.

participants. It cites Google’s recent announcement that, with the support of the ICO, Google was phasing out support for third-party cookies on the Chrome browser, for data protection reasons. According to the CMA, this potentially restricts publishers’ ability to offer personalised advertising. While Google itself would still be able to use the insights it obtains from users’ activities on Google Search and YouTube to select personalised ads on Google’s properties, publishers, advertisers and intermediaries that are currently reliant on third-party data obtained via data management platforms and data brokers are likely to have less granular data with which to target personalised advertising.<sup>50</sup> The CMA’s concerns in this area are not yet resolved.<sup>51</sup> On 8 January 2021, the CMA announced that it was opening an investigation into Google’s “Privacy Sandbox” browser changes, by which it proposed to remove third party cookies and other functionalities from its Chrome browser. The investigation will assess whether the proposals could cause advertising spend to become even more concentrated on Google’s ecosystem at the expense of its competitors and whether this may constitute an abuse by Google of its market power.<sup>52</sup>

More generally, regulators in the UK are increasingly alive to the potential for tension between competition law and data protection principles in the context of digital markets. With this in mind, the CMA, ICO and Ofcom (which is the UK’s communications regulator) jointly established the Digital Regulation Cooperation Forum (“**DRCF**”) in July 2020. The DRCF’s role is broad, namely “to support cooperation and coordination between the CMA, the ICO and Ofcom on online regulatory matters”. In practical terms the regulators explain that through the forum they hope, *inter alia*, to “[c]ollaborate to advance a coherent regulatory approach”, “inform regulatory policy making” and “anticipate future developments”.<sup>53</sup> Whilst the underlying tensions (for example between competition law and data protection) will not easily be resolved, it is to be hoped that the existence of the forum will better enable each regulator to identify concerns falling within the specialist expertise of the other promptly and to provide a forum in which views can be exchanged and coordinated solutions discussed.

## **4.2 Personalised Digital Advertisements and Data Protection**

As indicated in Section 4.1, the CMA Digital Report is deeply concerned by large digital platforms’ collection of data from multiple applications and the use of this to generate (highly lucrative) personalised advertisements. The CMA finds that it is particularly important that platforms give consumers the opportunity, if they want it, to make informed choices about whether to allow their personal data to be used for advertising. Survey evidence is clear that consumers want to be able to control the use of their data and that they feel that they lack this control.<sup>54</sup> Some platforms do not allow consumers to turn off personalised advertising at all. For these consumers, there is no choice but to provide their personal data for advertising if they wish to use the service. Even where they are given a choice about the use of their data, consumers are only able to judge

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<sup>50</sup> Digital Report, paras 5.313 – 5.328

<sup>51</sup> See Digital Report, para 5.328 where the CMA points out that measures which enhance an aspect of consumer privacy in the near terms may have a negative impact on consumer welfare e.g. by concentrating personal data amongst fewer providers,

<sup>52</sup> See CMA Press Release, CMA to investigate Google’s ‘Privacy Sandbox’ browser changes, 8 January 2021 available at: <https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes>. Accessed 31 August 2021.

<sup>53</sup> See DCRF Launch Document, July 2020, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/896827/Digital\\_Regulation\\_Cooperation\\_Forum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896827/Digital_Regulation_Cooperation_Forum.pdf). Accessed 31 August 2021.

<sup>54</sup> Digital Report, para 4.228.

whether they are content to share their data if they are provided with clear and fairly presented information and options about the implications for them. Moreover, they can only truly make an informed choice if they can act on their preferences and withhold or share data as they wish.<sup>55</sup> The CMA concludes that the low levels of actual consumer engagement reflect to a great extent the limitations and choice architecture put in place by platforms. As a result, the CMA thinks that many consumers may use services and share more data than they might otherwise have decided to.<sup>56</sup>

The CMA (and the European Commission) have raised specific concerns regarding the collection and use of advertising data by Facebook. In June 2021, the CMA announced that it was opening an investigation under Chapter II of the Competition Act 1998 into whether Facebook has unfairly used the data gained from its advertising and single sign-on to benefit its own services.<sup>57</sup> The European Commission simultaneously launched an investigation into Facebook's use of data on the same date.<sup>58</sup>

It should also be noted that in applying data protection law, the ICO has forced WhatsApp not to share its users' data with its parent company, Facebook. In 2018 the ICO found that WhatsApp had no legal basis for the sharing of such data and, had it shared such, it would have acted unlawfully and in contravention of the first and second principles of the Data Protection Act. WhatsApp was therefore required to sign an undertaking to prevent it from sharing data with Facebook prior to the implementation of the GDPR in May 2018.<sup>59</sup>

### **4.3 The Increasing Overlap Between Competition Law and Data Protection**

Within the UK, the ICO is responsible for scrutinising compliance with both the UK Data Protection Act and the GDPR. Nevertheless, the CMA is increasingly carrying out work in this area from an antitrust perspective as described in Section 4.2.

The CMA's Digital Report found that some digital platforms do not give consumers any choice about the use of their data for personalised advertising. Where digital platforms do offer a choice to consumers, the way it is done is not transparent to consumers and has the effect of promoting the interests of the platform.<sup>60</sup>

The CMA is particularly concerned with how some digital platforms require consumers to agree to the use of their data as part of their initial use of the platform – in particular through the use of 'clickwrap' agreements and consent which does not provide sufficiently granular choices to consumers (i.e. inappropriately aggregating consumer consent).<sup>61</sup> It found that the use of clickwrap agreements and aggregated consent (i.e. the collection of data for use on multiple platforms) without the option of more granular controls is likely to

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<sup>55</sup> Digital Report, para 4.230.

<sup>56</sup> Digital Report para 4.234.

<sup>57</sup> CMA Press Release, 4 June 2021, available at: <https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data>. Accessed 31 August 2021.

<sup>58</sup> Commission Press Release, 4 June 2021, Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_2848](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848). Accessed 31 August 2021.

<sup>59</sup> See Information and Commissioner's Office, Blog: "A win for the data protection of UK consumers", ICO News and Events, 14 March 2018, available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/blog-a-win-for-the-data-protection-of-uk-consumers/>. Accessed 24 August 2020.

<sup>60</sup> Digital Report, paras 4.145 and 4.146.

<sup>61</sup> Digital Report, para 4.155.

mean that consumers do not engage in consideration of the terms they are signing up to when they register for a specific digital platform.<sup>62</sup>

The CMA's Digital Report has also proposed a 'Fairness by Design' obligation on digital platforms to maximise users' ability to make informed choices about the use of personal data and is planning to work with the ICO to ensure this complements the Data Protection by Design obligation under the GDPR.<sup>63</sup>

These and other recommendations will be taken forward by the Digital Markets Taskforce, expected to report in December 2020.<sup>64</sup>

#### **4.4 CMA's Treatment of General Terms and Conditions in Relation to Data Collection**

As discussed in Section 4.3, the CMA is concerned about digital platforms not allowing consumers to opt out of personalised advertising, forcing them to share considerable amounts of personal data as a condition of using the service.

The CMA Digital Report found that digital platforms default settings have a profound impact on the shape of competition in both search and social media. First, default settings play a very important role in influencing consumers' use of search engines, and second, default settings and the way in which choices are presented to consumers have a strong influence on the ability of platforms – particularly social media platforms – to collect data about their users, and the ability of users in turn to control the use of their data. In particular, Google's extensive default positions across devices and browsers, and in particular on almost all mobile devices in the UK, act as a barrier to expansion for other search engines. Second, the CMA notes that some digital platforms operate a take-it-or-leave-it model, where they do not give their users the ability to control their data. This is particularly prevalent across most social media platforms, including Facebook and Instagram, whose users are unable to turn off personalised advertising while continuing to use the service.<sup>65</sup>

Specifically, the CMA found that digital platforms' privacy terms and conditions were long and complicated, typically stretching to many thousands of words. It did not consider it is reasonable for platforms to expect consumers to have read and understood all of these, often complex, terms before signing up to use a service. Research has shown that very few consumers read privacy policies when signing up to an online service and the evidence gathered confirms this: for example, in a recent 28-day period, the average visit to the Google privacy page was just 47 seconds, with 85% of visits lasting less than 10 seconds. The upshot of this is that users understandably simply agree to the default choices they are presented with. These are set by the platforms, and it is hard to be confident that they will adequately balance users' preferences about the use of their personal data against the substantial benefits to the platform.<sup>66</sup>

The Daily Mail Group told the CMA that "while the GDPR inter alia aimed at placing some limits on the way digital platforms collect and process personal data, these platforms turned this regulation to their advantage".

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<sup>62</sup> Digital Report, para 4.167.

<sup>63</sup> Digital Report, paras 94-97.

<sup>64</sup> CMA, Digital markets taskforce: terms of reference.

<sup>65</sup> Digital Report, paras 31 to 36.

<sup>66</sup> Digital Report, paras 39 to 40.

The News Media Association submitted that publishers have struggled to resist attempts by global tech companies to force unfair terms on them. A further example of the imbalance of bargaining power, cited by several publishers, was the approach taken by Google to updating its terms and conditions shortly before the introduction of GDPR. Publishers consider that these changes were made in a non-negotiable way and that they had no choice but to accept this update to the T&Cs.<sup>67</sup>

## **5 CMA's Wide Competition and Consumer Protection Powers and Their Application to the Digital Economy**

The CMA's Market study into Online platforms and digital advertising, resulting in the Digital Report, gives the CMA very broad powers to investigate sectors of the economy that it considers may not be working competitively (CMA's markets regime). This regime in the model for the new Digital Tool, which the European Commission is proposing to adopt to tackle structural competition issue, principally in digital markets.<sup>68</sup>

The CMA's markets regime is divided into two phases:<sup>69</sup>

- *Phase 1 'market study'*: during this phase the CMA decides whether to refer a market for a Phase 2 'market investigation'.
- *Phase 2 'market investigation'*: this is a more detailed examination into whether there is an 'adverse effect on competition' (AEC) in the referred market(s).

In the case of the Digital Report, the CMA did not proceed to a full market investigation the CMA considered that these issues would need to be dealt with under primary legislation.

In relation to price comparison websites, the Private Motor Investigation referred to in Section 6 was a full market investigation and led to an order prohibiting wide MFNs in motor insurance.

Despite the shortcomings of market investigations, it is still the preferred mechanism for addressing digital markets in the UK, at the present stage. It is thought unlikely that limited competition law tools will be adequate for the task.

### **5.1 CMA's Consumer Protection Powers under Market Investigations**

The CMA also has wide powers: the sphere of consumer protection.<sup>70</sup> Specifically in relation to price comparison portals, apart from the specific investigations mentioned in paragraph below, the CMA's Digital Comparison Tools market study (2017) reported on number of aspects of Digital Comparison Tools (DCTs) from the consumer protection perspective, and made a number of recommendations to ensure that consumers were treated fairly. The CMA requires that price comparison websites be being Clear, Accurate, Responsible

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<sup>67</sup> Digital Report, paras 5.313 to 5.320.

<sup>68</sup> See European Commission, Press Release: "Antitrust: Commission consults stakeholders on a possible new competition tool", European Commission Press Corner, 2 June 2020, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_977](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977). Accessed 31 August 2021.

<sup>69</sup> Section 5 EA02.

<sup>70</sup> The Unfair Terms in Consumer Contracts Regulations 1999, The Consumer Protection from Unfair Trading Regulations 2008.

and Easy to use (CARE). Using its consumer powers, the CMA has taken a number of actions to enforce consumer standards, particularly banning misleading sales practices, for example in the hotel bookings sector<sup>71</sup> and ensuring the accurate quotation of charges and related matters in the car hire sector.<sup>72</sup>

The CMA has carried out market studies and investigations under the Competition Act 1998 (CA98) into the following digital sectors:

- *Online platforms and digital advertising market study* (the Digital Report).<sup>73</sup>
- *Retail banking market investigation*, which resulted in the introduction of ‘Open Banking’, the first major digital interoperability remedy in the world.<sup>74</sup>
- *Digital comparison tools market study*, which led in turn to both consumer and competition enforcement action.<sup>75</sup>
- *The ‘posters’ cartel between sellers on Amazon Marketplace* enacted through a pricing algorithm.<sup>76</sup>
- *Commitments from an online auction service provider* to change practices that may have prevented rivals from being able to compete effectively.<sup>77</sup>
- *Investigation into the use of ‘MFN’ clauses* by a price comparison website in relation to home insurance products.<sup>78</sup>

## 6 The UK’s Approach to MFNs

The legal framework for analysing MFNs in the UK has been the EA02 and CA98. The CMA also has wider consumer protection powers, under the Unfair Terms in Consumer Contracts Regulations 1999 and The Consumer Protection from Unfair Trading Regulations 2008.

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<sup>71</sup> CMA, Major overhaul of hotel booking sector after CMA action, Press Release, 13 September 2019, available at: <https://www.gov.uk/government/news/major-overhaul-of-hotel-booking-sector-after-cma-action>. Accessed 31 August 2021.

<sup>72</sup> CMA, Car hire sites to provide full costs upfront after CMA action, Press Release, 29 March 2018, available at: <https://www.gov.uk/government/news/car-hire-sites-to-provide-full-costs-upfront-after-cma-action>. Accessed 31 August 2021.

<sup>73</sup> CMA, Online platforms and digital advertising market study, Online Platforms and Digital Advertising Study, September 2020, last updated 01 July 2020, available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>. Accessed 31 August 2021.

<sup>74</sup> CMA, CMA paves the way for Open Banking revolution, Press Release, 9 August 2016, available at: <https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution>. Accessed 31 August 2021.

<sup>75</sup> Online Platforms and Digital Advertising Study.

<sup>76</sup> Online sales of posters and frames, CMA decision of 12 August 2016, Case 50233, available at: <https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf>. Accessed 31 August 2021.

<sup>77</sup> CMA case page, Auction services: anti-competitive practices, last updated 13 July 2017, available at: <https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices>. Accessed 31 August 2021.

<sup>78</sup> CMA case page, Price comparison website: use of most favoured nation clauses, available at: <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>. Accessed 30 August 2021. The CMA published a non-confidential infringement decision on 9 February 2021.



The CMA's Private Motor Insurance Market investigation (2014) concluded that 'wide MFNs'<sup>79</sup> in contracts between motor insurers and price comparison websites limited competition between comparison websites.<sup>80</sup> Consequently, in relation to private motor insurance the CMA prohibited providers of price comparison websites from entering 'wide MFNs', or equivalents, where comparison sites make more than 300,000 sales per year. However, it considered that 'narrow MFNs' were unlikely to have the same impact on competition as they allowed premiums to vary between different comparison sites.<sup>81</sup>

The CMA's DCT market study (2017) also found that 'wide MFNs' soften competition between digital comparison tools and competing channels by reducing incentives to compete on commission and to innovate.<sup>82</sup> The CMA also considered that 'narrow MFNs' could restrict competition in some circumstances; particularly clauses that are broader than necessary for achieving the claimed efficiency benefits, such as preventing free-riding, but the CMA has not to date taken any action in relation to narrow MFNs.<sup>83</sup>

On 19 November 2020, the UK CMA imposed a fine of £17.9 million on a price comparison website operator for imposing most favoured nation clauses (MFNs) in contracts with home insurers selling through the well-known website, [comparethemarket.com](http://comparethemarket.com).<sup>84</sup> This decision is presently subject to an appeal by BGL (Holdings) Ltd and others before the Competition Appeal Tribunal.

## 7 Conclusion

The UK has been at the forefront of proposals to regulate the digital economy. However, their proposed new regulatory regime for platforms having "strategic market status", borrows extensively from the EU's existing, *ex ante*, regulatory regime for electronic communications operators with Significant Market Power.<sup>85</sup> Whilst, thus far, the government has proven receptive to (and perhaps even welcoming of) the idea of regulatory reform of the digital economy, there are many competing demands for Parliamentary time and government attention. The government has committed formally to consult on legislation this year and to bring into force legislation when "Parliamentary time allows". However, it remains to be seen whether regulatory reform in this area will continue to be prioritised, given the complexity of the task at hand and the trade-offs involved in such reform. More broadly, there is also a real question as to whether (and, if so, how) the UK will seek to coordinate a new regulatory regime with that in the EU. With the UK having left the EU, there is likely to be

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<sup>79</sup> Wide MFNs specify that a supplier sets a price which is no higher than the price offered through its own website or through any other sales channel. Narrow MFNs specify that a supplier sets a price which is no higher than the price offered through its own website but does not stipulate conditions for sales via other channels.

<sup>80</sup> CMA, Private motor insurance market investigation Final Report, 24 September 2014, paras 59-60, available at: [https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf). Accessed 31 August 2021.

<sup>81</sup> CMA, Private motor insurance market investigation Final Report, 24 September 2014, paras 8.27-8.123, 12.3, 12.128, available at: [https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final\\_report.pdf](https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf). Accessed 31 August 2021.

<sup>82</sup> CMA Digital Comparison Tools Market Study, Final Report, 26 September 2017, para 4.91, available at: <https://assets.publishing.service.gov.uk/media/59c93546e5274a77468120d6/digital-comparison-tools-market-study-final-report.pdf>. Accessed 31 August 2021.

<sup>83</sup> *Ibid* 12, paras 4.99 – 4.10.

<sup>84</sup> The CMA's infringement decision, and information on its investigation, is available here: <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>. Accessed 31 August 2021.

<sup>85</sup> Regulatory framework for electronic communications, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l24216a&from=EN>. Accessed 31 August 2021.

increased legal divergence and regulatory competition between the UK and EU as the UK seeks to establish a distinct competition and regulatory identity, separate from that of its larger European neighbour. From a policy perspective, there is certainly potential for tension between robust regulation of businesses with substantial market power in the digital economy and providing an attractive environment for such businesses to invest and develop. Whether, in this context, there will be the political appetite for the kind of robust regulatory reform which the CMA and Digital Taskforce has proposed, remains to be seen.