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Pro-competition Regulation in the Digital Economy: The United Kingdom's Digital Markets Unit

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Abstract

The United Kingdom, like many jurisdictions, is introducing more demanding ex ante regulation for the digital economy. Centered on the work of a Digital Markets Unit located within the existing copetition authority, the U.K. proposals are defined by an explicit commitment to "pro-competition" regulation. This article traces the evolution and emerging design of the forthcoming U.K. regime. It then explores the notion of pro-competition regulation in greater detail. While the concept increasingly transcends its domestic origins, this article argues that the balancing act between conventional competition law and traditional regulation that it reflects can be fully understood only when located within the distinctive circumstances of the wider U.K. regulatory landscape.

Keywords

digital economy, competition law, regulation, U.K. law, pro-competition

> [D]igital markets will only work well if they are supported with strong pro-competition policies that open up opportunities for innovation, and counter the forces that can lead to high concentration and a single winner.[1]

I. Introduction

Regulating the digital economy is the focal point of the most vigorous and prominent competition policy debates today. Although reasonable scholars and policymakers continue to debate the finer details of how best to do so, there is "growing consensus"[2] that more ought to be done, and that this should or must transcend conventional modes of competition enforcement. In the United Kingdom, this is reflected in ambitious plans to enact a sector-specific regulatory regime for the digital economy, to not only augment

1. *Unlocking Digital Competition. Report of the Digital Competition Expert Panel* (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, hereafter "Furman Report," at 5.
2. As argued by the U.K. Government in its *Response to the CMA's Market Study into Online Platforms and Digital Advertising* (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939008/government-response-to-cma-study.pdf, hereafter "Advertising Study Response," para. 5. The market study and the Government's actions in response are discussed further in Section III.

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but also exceed the existing competition law framework. Centered on the work of a Digital Markets Unit (DMU) located within the U.K. competition agency, the Competition and Markets Authority (CMA), the new regime is intended to "pro-actively shape the behavior of digital firms with significant and far-reaching market power, by making clear how they are expected to behave."[3] Although the United Kingdom is not unique in its plans to enact more demanding ex ante regulation of large digital firms, it was a notable early advocate of such an approach, premised on an explicit regulatory commitment to so-called pro-competition. This contribution explores the notion of pro-competition regulation, by locating the anticipated digital regime within the distinctive context of the United Kingdom's competition system and beyond, and by considering its potential to provide a more effective response to the perceived competition problems of digital markets.

The DMU and pro-competition regime have their origins in a 2019 report prepared by an independent Digital Competition Expert Panel (DCEP) for the U.K. Government, titled "Unlocking Digital Competition," but known colloquially as the Furman Report.[4] The Furman Report pitched its prescriptions as lying between two policy extremes: rejecting both the argument that effective competition is impossible in digital sectors (which would support a regulatory approach of overreaching the market mechanism through a category of utility-type regulation) and that existing levels of competition are perfectly adequate (so that no further regulatory intervention would be required).[5] The Furman Report's pro-competition proposals thus adopted the undergirding logic of conventional competition law—that it is preferable to support and enhance competition dynamics, rather than to supplant them with top-down regulation—but anticipated a rather more interventionist prospective approach. In doing so, it implicitly endorsed concerns about the effectiveness of "more economic" approaches to competition law,[6] while nonetheless reflecting well-established criticism of more static varieties of regulation—the latter being a particularly acute concern in the dynamic context of the digital economy. The object of this article is to gain a more nuanced understanding of how the concept of pro-competition is reflected within this regulatory balancing exercise, and what this means in practice for the digital economy.

The article is structured as follows. Section II sets the scene by examining the specific competition issues that arise within the digital economy, through the lens of the analysis of the Furman Report. Section III sketches the proposed structure and anticipated functions of the DMU, the finer details of which remain unsettled at the time of writing. Section IV explores more directly the notion of pro-competition regulation, assessing the proposals by comparison with both the current competition law and sector-specific regulatory frameworks within the United Kingdom. Section V concludes briefly.

II. Setting the Scene: The Distinctiveness of Digital Markets

It is a truism of contemporary competition policy that a well-functioning digital economy has the potential to deliver extraordinary benefits to consumers,[7] but that such advantages are unlikely to be

3. Department for Business, Energy and Industrial Strategy (BEIS) and Department for Digital, Culture, Media and Sport (DCMS), *A New Pro-competition Regime for Digital Markets*, CP 489 (July 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf, hereafter "Digital Markets Consultation," para. 17.
4. The Digital Competition Expert Panel (DCEP) was chaired by Professor Jason Furman, hence the report's better-known title.
5. Furman Report, at 2.
6. A useful discussion of the so-called more economic approach to competition law is Anne C. Witt, *The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?* 64 Antitrust Bull. 172 (2019); considering criticisms of this approach, see Pablo Ibáñez Colomo, *Whatever Happened to the "More Economics-Based Approach"?* 11 J. Eur. Compet. Law Pract. 473 (2020).
7. Furman Report, paras. 1.13–1.23, cited the provision of valuable services to consumers (often at no monetary cost), enhanced efficiency and growth within the U.K. and global economy, and greater innovation as benefits brought by the digital economy.

realized absent intervention to correct certain dysfunctional market dynamics. In short, the crux of the concern is that digital sectors tend inherently and inexorably toward concentration, resulting in market structures populated by only a handful of huge and powerful "Big Tech" giants. The particular features of digital markets have been explored comprehensively in a series of influential policy reports in recent years.[8] The Furman Report constituted the principal U.K. contribution to this lively debate and the springboard for the regulatory proposals that have followed. In this section, we outline briefly the market features highlighted in Chapter 1 of the Furman Report specifically, on the basis that the pro-competition regime that it has initiated is intended, it might be assumed, to address these concerns.

The terms of reference establishing the DCEP asked it "to consider the potential opportunities and challenges the emerging digital economy may pose for competition and pro-competition policy."[9] The Furman Report declined to define the digital economy as such but focused its attention on "areas where the intensive use of digital technology is central to the business models of the firms that operate primarily within them and where this raises challenges for competition."[10] It nonetheless identified online platforms as being "central" in this context.[11] This, moreover, implicated two frequent characteristics of online platform markets: zero-monetary upfront costs for consumers coupled with the centrality of big data within the business models utilized.[12]

Excessive concentration in digital markets was the key regulatory concern identified. The Report considered, in particular, problems of concentration in online search, social media, digital advertising, mobile operating system and app store, online marketplace, and high-technology consumer hardware markets.[13] Yet despite differences across sectors, the Report identified a more overarching problem of concentration within the digital economy as a whole, noting that "[w]here competition does exist in digital markets, this is frequently between a small subset of the five largest digital companies."[14] These are the so-called GAFAM: Google, Amazon, Facebook, Apple, and Microsoft.

The Furman Report then examined the causes of concentration in digital markets. It began by identifying three factors, which are well recognized as "key characteristics of the digital economy"[15]: economies of scale and scope, the central role of data and the advantage this provides to incumbents, and network effects.

First, economies of scale arise where there are high upfront costs to entering a market segment, coupled with low or near-zero costs to add additional users.[16] Although not unique to digital markets,

8. Prominent examples, besides the Furman Report, include European Commission, *Competition Policy for the Digital Era. A Report by Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer* (Apr. 4, 2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf, hereafter "Competition Policy for the Digital Era"; Stigler Committee on Digital Platforms. Final Report (Sep. 2019), https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms—committee-report—stigler-center.pdf; and German Federal Ministry for Economic Affairs and Energy, *A New Competition Framework for the Digital Economy. Report by the Commission "Competition Law 4.0"* (Sep. 2019), https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3. A useful summary of these and other reports can be found in Filippo Lancieri & Patricia Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 Stan. J. L. Bus. Fin. 65 (2021).
9. *Digital Competition Expert Panel: Terms of Reference* (Sep. 19, 2018), https://www.gov.uk/government/publications/digital-competition-expert-panel-terms-of-reference/digital-competition-expert-panel-terms-of-reference.
10. Furman Report, para. 1.26.
11. *Id*, para. 1.28.
12. *Id*, paras. 1.32–1.41.
13. *Id*, paras. 1.45–1.60.
14. *Id*, para. 1.61.
15. So described in Competition Policy for the Digital Era, at 2.
16. Furman Report, para. 1.68.

the extent to which they can be achieved in this context has been described as "extreme,"[17] thus providing incumbents with significant competitive advantages and facilitating concentration on a global scale.[18] Economies of scope arise where costs can be reduced, or product quality increased, by operating in multiple adjacent market segments.[19] The propensity of the digital economy to accommodate economies of scope is a key reason for the emergence of digital ecosystems, whereby the largest digital companies successfully provide a host of complementary products and services in addition to their core business activities.[20]

Second, the accumulation and use of data on consumer behavior is considered to constitute a particularly high barrier to entry into digital markets.[21] It permits incumbents, on one hand, to improve the quality of the products that they provide while, on the other hand, to achieve more effective monetization through, for example, targeted advertising strategies.[22] Access to commercially sensitive data may also facilitate self-preferencing strategies by vertically integrated incumbents.[23]

Finally, digital platform markets in particular see strong network effects, both direct and indirect, which make platforms more valuable to existing user and thus more attractive to prospective users as they grow.[24] These network effects are a key driver of the "winner-take-all" competitive dynamics that are considered characteristic of digital markets.

Beyond these central features, the Furman Report highlighted a number of additional aspects of digital markets that informed the DCEP's regulatory thinking. In markets where consumers might credibly prefer to multi-home, that is, use multiple services simultaneously, the Furman Report noted barriers to doing so, including loss of personal data, loss of reputation, anticompetitive terms, technical barriers, tying of services, and, most basically, consumer inertia.[25] Financing for new entrants may be especially difficult in certain digital segments, thus favoring large incumbents who can self-finance.[26] The Furman Report emphasized, moreover, the potentially detrimental *cumulative* effects of the identified features within digital markets.[27] It nonetheless acknowledged that the positions of significant market power that are often encountered are rarely *solely* attributable to bad behavior and/or the idiosyncrasies of digital markets, noting that the success of Big Tech giants like Amazon and Google can be attributed at least in part to the development of products that consumers value highly.[28]

Yet the *persistence* of market power in the digital economy is an acute concern from a competition policy perspective. While transient market power may constitute a legitimate reward for successful innovation, the current structure of the digital economy provides limited scope for new competition *for* the market going forward.[29] The Furman Report noted evidence of digital market power that has in fact persisted for a decade or more, the scale of dominance achieved by the tech giants today, the fact that product personalization premised on the exploitation of user data has become a central feature of many digital economy markets, the importance of ecosystems, and strategic investment by incumbent digital

17. Competition Policy for the Digital Era, at 2.
18. Furman Report, para. 1.69.
19. *Id*, para. 1.70.
20. See, for example, Frederic Jenny, *Competition Law and Digital Ecosystems: Learning to Walk before We Run*, 30 Ind. Corp. Change 1143 (2021).
21. Furman Report, paras. 1.72 & 1.79.
22. *Id*, para. 1.73.
23. *Id*, para. 1.78.
24. *Id*, paras. 1.80–1.81.
25. *Id*, para. 1.87.
26. *Id*, paras. 1.89–1.90.
27. *Id*, paras. 1.91–1.92.
28. *Id*, para. 1.93.
29. *Id*, para. 1.99.

operators to protect their market position and diminish opportunities for new entry.[30] The Furman Report thus concluded that "[t]he barriers to entry that exist in established digital platform markets mean that they cannot generally be considered freely contestable, and as such the largest incumbents' positions are not imminently under threat."[31]

Market power is, of course, the primary target of the conventional competition rules, and recent enforcement activity against Big Tech actors demonstrates that digital dominance can attract scrutiny from a unilateral conduct perspective.[32] Yet the Furman Report, like equivalent investigations elsewhere, emphasized the extent to which digital market power, particularly in the context of online platforms, can generate wider spillover effects.

> As these markets are frequently important routes to market, or gateways for other firms, such platforms are then able to act as a gatekeeper between businesses and their prospective customers. This gives the platforms three distinct forms of power: the ability to control access and charge high fees; the ability to manipulate rankings or prominence; and the ability to control reputations. A strong concern . . . is where a dominant platform has such a strategic market status, with buyers or sellers dependent on them in some form.[33]

It is the latter notion, of large digital undertakings that specifically hold *strategic market status* (SMS), which comprises the core of the pro-competition regime to be implemented by the DMU, as explored further below.

Finally, competition cases in the digital economy sometimes struggle to make the leap from demonstrating a distortion or absence of competition, to establishing concrete harm to consumers. The Furman Report acknowledged that concentrated markets may nonetheless generate efficient outcomes.[34] It argued, however, that efficiencies trump effective competition only where consumers "receive a sufficient share of the benefits."[35] The Furman Report then outlined potential consumer harms which, it implied, justify more robust regulatory intervention. These encompassed *direct* consumer impacts—in particular, misuse of consumer data and harm to privacy, construed as equivalent to reductions in product quality[36]—and *indirect* impacts, which follow from the harm inflicted upon competing firms, resulting in a less competitive innovative digital sector overall.[37] The Furman Report identified various mechanisms by which indirect harm might arise, all of which have been subject to competition enforcement to some extent in other antitrust jurisdictions: unfair terms for business users of platforms, unfair access to consumers through platforms, unfair restrictions on the use of alternative platforms, and anticompetitive merger activity.[38] While the Furman

30. *Id*, paras. 1.100–1.111.
31. *Id*, para. 1.112.
32. This includes a high-prolife trio of infringement decisions taken against Google by the European Commission (Cases AT.39740—Google Search (Shopping), Decision of June 27, 2017; AT.40099—Google Android, Decision of July 18, 2018; and AT.40411—Google Search (AdSense), Decision of Mar 20, 2019), and ongoing cases taken by the U.S. Department of Justice and Federal Trade Commission taken against Google (see DOJ Press Release 20-1124, *Justice Department Sues Monopolist Google for Violating Antitrust Laws* (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws) and Facebook (FTC Press Release, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization), respectively.
33. Furman Report, para. 1.117.
34. *Id*, para. 1.118.
35. *Id*.
36. *Id*, paras. 1.121–1.133.
37. *Id*, paras. 1.134–1.140.
38. *Id*, paras. 1.141–1.158.

Report stopped short of laying claim to actual consumer harm as a result, the strong implication was that disadvantageous outcomes for consumers were at least likely absent greater regulatory intervention in digital markets.[39]

III. "Pro-competition" for the Digital Economy: The DMU

Having made the case for beefed-up regulation within the digital economy, Chapter 2 of the Furman Report considered its optimal shape. Specifically, the Furman Report set out (fairly high-level) proposals for "pro-competition measures . . . [which] would actively build competition into digital markets upfront."[40] The term "pro-competition" was not, in fact, an independent choice of the DCEP: as noted, the terms of reference establishing the panel drew a distinction, from the outset, between "competition and pro-competition policy,"[41] albeit without elaborating upon the latter. In the Furman Report, as explained in greater detail in Section IV, the term denotes regulatory approaches that go beyond the classic ex post tort/crime structure of the traditional competition rules, yet which (at least purport to) make greater use of market forces than conventional utilities regulation. In this section, we outline the recommendations of the Furman Report with respect to this new pro-competition regime and explain how these are reflected in the developing regulatory framework.

The crux of the proposed pro-competition regime hinges on the creation of a "pro-competition digital markets unit, tasked with securing competition, innovation, and beneficial outcomes for consumers and businesses."[42] Although the Furman Report was agnostic as to its precise institutional form,[43] the DMU was envisaged as a sector-specific market supervisory agency for the digital economy, with two key distinguishing elements[44]: possessing regulatory powers that extend beyond the existing competition law regime, and providing a joined-up approach to digital market problems to replace the current fragmented treatment across several existing regulatory agencies.[45]

The Furman Report identified three specific strands to the DMU's anticipated regulatory powers, although the precise details were sketched in somewhat abstract terms. As explained in the preceding section, the Furman Report focused its attention on the particular policy concerns raised by large digital firms holding so-called SMS. Similarly, what is arguably its key recommendation—the development and implementation by the DMU of a digital platform code of conduct—is restricted in its application to the activities of firms having an ex ante designation of such SMS.[46] Three high-level principles to inform the code of conduct were identified, although the Report was explicit that these were "a first draft only," and likely "to evolve and be refined, and added to."[47] Intended specifically to protect *business users* of digital platforms, these undergirding principles are, first, the provision of *access* on a fair, consistent, and transparent basis; second, fair, consistent, and transparent *treatment* when using the platforms, that is, in terms of prominence, rankings, and reviews; and third, an absence of restrictions on *multi-homing* by business users.[48] Yet in contradistinction to the approach of the

39. *Id*, paras. 1.159–1.161.
40. *Id*, para. 2.3.
41. *Supra* note 9.
42. Furman Report, at 55, Strategic Recommendation A.
43. *Id*, para. 2.9.
44. *Id*, para. 2.8.
45. The Furman Report, para. 2.8, lists the United Kingdom's telecommunications regulator, the Office of Communications (Ofcom); its data protection supervisor, the Information Commissioner's Office; and the Competition and Markets Authority (CMA).
46. *Id*, para. 2.25.
47. *Id*, para. 2.39.
48. *Id*, para. 2.36 and Box 2.A.

European Union's (EU) Digital Markets Act (DMA), discussed below, the Furman Report did not anticipate a top-down determination of the precise requirements of the code by policymakers alone. Instead, it advocated for a co-regulation-type approach,[49] whereby these details would be set "collaboratively" by the DMU in tandem with industry representatives, consumer groups, and other stakeholders.[50] In addition, two further principal functions were foreseen for the DMU: facilitating greater personal data mobility and systems with open standards, and the pursuit of enhanced "data openness," that is., data sharing, by platforms.[51]

The recommendations of the Furman Report, published in March 2019, were immediately endorsed, "strongly," by the CMA, which supported the creation of the DMU and suggested that the CMA itself could have a "potential role" in its operation.[52] Specifically, the CMA accepted that conventional competition enforcement alone is "no longer enough" to ensure effective competition in digital markets. It argued, nonetheless, that any new ex ante regime should "complement, rather than replace, existing [antitrust] approaches."[53]

In July 2019, the CMA published a new Digital Markets Strategy,[54] reflecting both an enhanced commitment to tackling digital market problems and an acknowledgment of the particular enforcement "challenges"[55] that it faces in this area. The strategic aims articulated encompassed more or less the full spectrum of the CMA's then existing activities and beyond: from capacity building, to effective and efficient use of established competition tools, adaptation of those tools to the particular issues raised by digital economy market problems, the development of better digital-focused remedies, and even the potential need for additional regulation.[56] The Strategy was "refreshed" in February 2021: the revised document effectively restates the earlier aims, while updating the CMA's priority work schedule in light of the evolving regulatory landscape.[57]

In tandem with the Digital Markets Strategy, the CMA in July 2019 launched a market study into online platforms and digital advertising.[58] The need for such a review had been suggested by policymakers on various previous occasions.[59] It was also a central plank of the recommendations of the Furman Report. The latter identified a series of potential competition issues relating to the digital advertising sector, but concluded that proper consideration of these concerns fell outside the scope of the DCEP's review.[60] The final report of the Digital Advertising Study[61]—a slightly less

49. The concept of co-regulation is subject to varying definitions; a useful primer on its potential meaning(s) in the U.K. context is to be found in BEIS, Designing Self- and Co-regulation Initiatives: Evidence on Best Practices. A literature review, BEIS Research Paper Number 2019/025, Oct 2019.
50. Furman Report, para. 2.37.
51. *Id*, paras. 2.48–2.99.
52. Competition & Markets Authority, *The CMA's Response to the Digital Competition Expert Panel Final Report* (Mar. 21, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890013/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted_.pdf.
53. *Id*.
54. Competition & Markets Authority, *The CMA's Digital Markets Strategy* (July 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf.
55. *Id*, at 4.
56. *Id*, at 8.
57. Competition & Markets Authority, *The CMA's Digital Markets Strategy* (Feb. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf.
58. Competition & Markets Authority, *Market Study Notice. Online Platforms and Digital Advertising* (July 3, 2019), https://assets.publishing.service.gov.uk/media/5d1b28b2ed915d0bc413ba80/Market_Study_Notice.pdf.
59. Furman Report, para. 3.195.
60. *Id*, paras. 3.173–3.199.
61. Competition & Markets Authority, *Online Platforms and Digital Advertising. Market Study Final Report* (July 1, 2020), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study, hereafter "Digital Advertising Study."

comprehensive form of sector inquiry than the market investigation reference (MIR) procedure, considered further below—focused on the activities of the two largest online advertising providers in the United Kingdom, namely, Google and Facebook. Like the approach of the Furman Report, the Digital Advertising Study identified market features that inhibit effective competition in the search, social media, and digital advertising sectors, including network effects and economies of scale; the profound effects of default behavior by consumers, including its manipulation by incumbent platforms; unequal access to user data; a lack of transparency around decision making; and the centrality both of ecosystems and vertical integration. These generate entrenched market power for the incumbent platforms, the negative effects of which encompass a variety of consumer harms: from classic "antitrust" injuries such as higher prices, lower choice, and lower innovation, to wider societal damage to data privacy and media plurality.

Because these problems are "so wide ranging and self-reinforcing,"[62] the Digital Advertising Study concluded, as the Furman Report had done, that the CMA's existing powers are insufficient to address them. There is, rather, an "urgent case for significant new legislation."[63] Yet the CMA felt no need to reinvent the wheel in devising an alternative regulatory solution: instead, it endorsed the proposed pro-competition regulatory regime for online platforms, implemented through the DMU. This would comprise a binding code of conduct for platforms with SMS, as recommended by the Furman Report. Moreover, building upon proposals in the Furman Report for specific remedies regarding the DMU's suggested data mobility and data openness functions,[64] the Digital Advertising Study recommended that the DMU furthermore be empowered to introduce discrete "pro-competitive interventions" in distinct markets. These would aim at addressing "the sources of market power and other market failures . . . by tackling issues on both the demand and supply side of the markets."[65] It summarized the rationale for this two-pronged approach as follows:

> A key benefit of behavioral interventions (the first category) as enshrined in the code is that they allow for considerable flexibility in tackling problems as they arise, which is an important consideration in the rapidly-changing markets that we have reviewed. In contrast, the benefit of pro-competitive interventions (the second category) is that they provide for the possibility of solving problems at source, reducing the need for ongoing and costly regulatory controls and potentially in the long run leading to platforms no longer meeting the criteria for SMS designation.[66]

The Digital Advertising Study nonetheless acknowledged that the second category of regulatory interventions had the potential to "change the nature of competition in fundamental ways," and thus necessitated careful design and, in particular, "close attention to the potential costs and unintended consequences."[67] It then considered in detail the possible powers that might be given to the DMU across both first and second categories of regulation, recommending inter alia powers to restrict defaults and monetization, to mandate access to data and interoperability, to improve consumer choice over use of personal data, to impose "fairness by design" requirements, and, perhaps most contentiously, to implement ownership, operational, and/or data separation requirements for platforms.[68]

62. *Id*, at 5.
63. *Id*, para. 8.4.
64. *Supra* note 51.
65. Digital Advertising Study, para. 7.16.
66. *Id*, para. 7.17.
67. *Id*, para. 7.17.
68. *Id*, Chapter 8.

The outcome of any market study includes the possibility of a full-scale market investigation where significant competition problems have been identified and the CMA considers it appropriate to make use of the substantial remedial powers available following an MIR. The CMA took the view that the statutory test allowing for an MIR, governed by the Enterprise Act 2002, was probably met in the circumstances.[69] It chose not to exercise its discretion to make a reference, however, being influenced in particular by regulatory developments occurring in tandem with the market study. These included, most specifically, the fact that the U.K. Government in its March 2020 Budget accepted unconditionally all of the strategic recommendations of the Furman Report,[70] which included the creation of the DMU. To assist this, moreover, the Government established a Digital Markets Taskforce (DMT), led by the CMA working with other interested regulators, to advise on the design and implementation of the anticipated pro-competition regime.[71] This work was ongoing at the time of publication of the Digital Advertising Study; the DMT published its recommendations in December 2020 (hereafter "DMT Advice").[72]

Much of the DMT Advice corresponds broadly to the approaches of the Furman Report and findings of the Digital Advertising Study. Although it briefly reconsidered the benefits and challenges posed in competition terms by the growth of the digital economy,[73] the DMT took the view that "the case for an *ex ante* regime in digital markets has been made."[74] Again, the DMT placed the establishment of a specific regulatory agency, once more referred to as the DMU, at the crux of such a regime. Moreover, the DMT endorsed the approach of limiting application of the anticipated pro-competition framework merely to "the most powerful digital firms,"[75] adopting the Furman Report language of SMS as the appropriate benchmark.[76] The DMT was explicit that its "expectation is that only a small number of digital firms are likely to meet the SMS test."[77] Firms designated as holding SMS would be subject to a three-pronged set of regulatory measures: the code of conduct, the possibility of pro-competitive interventions, and more demanding merger control rules to enable closer scrutiny of transactions involving large digital actors. As the DMT Advice has informed, to a large extent, the subsequent public consultation on proposals for a new pro-competition regime for digital markets,[78] its specific details are considered below.

We thus come to present shape of the Government's proposals for digital markets. In November 2020, responding to the online advertising market study and pending the publication of the DMT Advice, the Government formally announced its plans to adopt a pro-competition regime, centered around a new regulatory agency, the DMU.[79] This agency was established on a non-statutory basis in

69. Digital Advertising Study, para. 9.30.
70. HM Treasury, *Budget 2020: Delivering on Our Promises to the British People*, HC 121 (Mar. 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/871799/Budget_2020_Web_Accessible_Complete.pdf, paras. 1.203 & 2.266.
71. *Digital Markets Taskforce: Terms of Reference* (Mar. 11, 2020), https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference–3.
72. Competition & Markets Authority, *A New Pro-competition Regime for Digital Markets. Advice of the Digital Markets Taskforce*, CMA 135 (Dec. 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf, hereafter "DMT Advice."
73. *Id*, Chapter 2.
74. *Id*, Overview, para. 23.
75. *Id*, para. 4.1.
76. *Id*, para. 4.7.
77. *Id*, para. 4.23.
78. Digital Markets Consultation, Executive Summary, para. 4.
79. Advertising Study Response.

April 2021.[80] The intention is to put it on a statutory footing in tandem with the legislation required for the regulatory regime itself, and to house the DMU within the CMA.[81] In its non-statutory "shadow"[82] guise, the DMU is entrusted with assisting in the design and creation of the anticipated pro-competition regime; as a statutory body, it will be responsible for its administration. In accepting the need for a new regulatory regime anchored in the work of the DMU, the Government committed to consult on "the form and function" of the latter.[83] A public consultation (hereafter "Digital Markets Consultation") ran from July to October 2021; at the time of writing, the Government is analyzing the feedback received and considering the final shape of its regulatory proposals.[84]

The Digital Markets Consultation takes as a given that a pro-competitive regime, administered by the DMU and focused on the activities of digital firms with SMS, is to be established; it is only the details of that regime that are open to comment. The Digital Markets Consultation opens with a set of practical questions regarding the funding of the DMU, its interaction with other regulators (a point considered further at the end of the next section), and, responding to a recommendation contained within the DMT Advice, the possibility of giving the DMU a wider market monitoring function over and above its enforcement role within the pro-competition regime.[85]

It then addresses the SMS concept which, as noted previously, is anticipated to act as threshold criterion for the regime. That is, the demanding requirements of the pro-competition framework will apply only where a firm has already been designated by the DMU as holding *significant market power* in relation to at least one relevant *activity*, which moreover provides it with a so-called *strategic position*.[86] This approach accords, broadly, with the recommendations of both the Furman Report and the DMT Advice.

To determine whether a relevant "activity" exists, the Digital Market Consultation proposes to eschew any formal market definition exercise as would be required, inter alia, in an abuse of dominance case taken under Chapter 2 of the Competition Act 1998.[87] It does so on the basis that market definition is both unnecessary and likely to introduce inefficiencies to the designation process[88]; the reluctance to embrace traditional market definition tools may also reflect concerns about their comparative ineffectiveness in the digital economy context.[89] The Digital Markets Consultation instead proposes to limit application of this threshold concept to "activities where digital technologies are a 'core component' of the products and services provided as part of that activity."[90] This is a rather more narrow definition than that advocated in the DMT Advice, which suggested that it should encompass "any situation where digital technologies are *material* to the products and services provided as part of the activity."[91] The DMT Advice argued that this would provide an "appropriate focus" on relevant digital market problems,

80. *Digital Markets Unit (Non-Statutory): Terms of Reference* (Apr. 7, 2021), https://www.gov.uk/government/publications/non-statutory-digital-markets-unit-terms-of-reference/digital-markets-unit-non-statutory-terms-of-reference.
81. *Id*.
82. DCMS and CMA Press Release, *New Watchdog to Boost Online Competition Launches* (Apr. 7, 2021), https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches–3.
83. Advertising Study Response, para. 22.
84. Updated information on the progress of the consultation should be made available on the consultation website, https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.
85. Digital Markets Consultation, paras. 33–48.
86. *Id*, para. 50.
87. See Section IV for further details of the United Kingdom's competition law framework.
88. Digital Markets Consultation, para. 54.
89. See, for example, the discussion in Competition Policy for the Digital Era, at 42–50.
90. Digital Markets Consultation, para. 59.
91. DMT Advice, para. 4.16 (emphasis added).

"without creating an inflexible regime."[92] The Digital Markets Consultation, however, raised concern that this somewhat vague and expansive definition might result in a regime that is both "too broad" and which provides "insufficient clarity for stakeholders."[93] Conversely, the Digital Markets Consultation rejects the superficially more precise and pertinent notion of "digital platform activities," on the basis that, despite frequent popular usage, it lacks a clear and settled definition, and could conceivably prove to be under-inclusive in practice.[94]

Yet the pro-competition regime, as discussed, is not intended to apply to any and all firms that use digital technologies as a core component of their business activities. Instead, the SMS concept, first introduced in the Furman Report, provides the key regulatory determinant. The Digital Markets Consultation follows the DMT Advice in proposing to ground the SMS concept in a finding of "substantial and entrenched market power in at least one [relevant] activity."[95] This means that the firm's market position "must be established and unlikely to change in the foreseeable future."[96] This, moreover, must provide the firm with a "strategic position," namely, "a position where the effects of its market power are likely to be particularly widespread or significant."[97] To determine whether such a position exists, the Digital Markets Consultation suggests four criteria that the DMU should consider,[98] which together provide a fairly comprehensive tour d'horizon of the competition policy concerns raised by digital platforms. These are whether the firm concerned has achieved very significant size or scale in the activity; whether it acts as a gateway, namely, as an important access point to consumers[99]; whether it can reinforce its market power in that activity or leverage it into other activities; and whether it can use the activity to determine the "rules of the game" within a relevant market segment. In this regard, the Digital Markets Consultation similarly follows the DMT Advice, with one exception: the latter suggested a fifth criterion, namely, whether the activity has "significant impacts on markets that may have broader social or cultural importance."[100] As explained later in this section, the Digital Markets Consultation has chosen to ground the pro-competition regime solely in competition-oriented considerations, even if it goes beyond the traditional format of competition law as such. The implications of this are considered in the following section.

The DMT Advice argued that the task of designating an entity as having SMS should be treated as "an expert regulatory judgment, both as to whether the criteria for designation are met and whether it is appropriate to designate a firm."[101] Consistent with this perspective, the suggested methodology set out in the Digital Markets Consultation rejects a "mechanistic approach" based on "quantitative thresholds."[102] Instead, it envisages a more context-specific "in the round"[103] assessment, making use of "a range of qualitative and quantitative evidence to ensure designation decisions are appropriate and justifiable."[104] This contrasts, most notably, with the proposed approach of the EU's DMA, which would

92. *Id*.
93. Digital Markets Consultation, para. 57.
94. *Id*, para. 58.
95. *Id*, para. 60, following the approach of the DMT Advice, para. 4.4.
96. Digital Markets Consultation, para. 65.
97. *Id*, para. 66, following the approach of the DMT Advice, para. 4.4.
98. Digital Markets Consultation, para. 68.
99. The "gatekeeper" concept is also the threshold criterion for application of the proposed European Union (EU)-level digital regulatory regime, the Digital Markets Act (DMA): see European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA) (COM(2020) 842 final), hereafter "DMA Proposal," Draft Chapter II.
100. DMT Advice, para. 4.19.
101. *Id*, para. 4.8.
102. Digital Markets Consultation, para. 72.
103. *Id*, para. 75.
104. *Id*, para. 71.

ground designation as a gatekeeper falling within the purview of the Act principally in a series of quantitative criteria.[105] In doing so, the Digital Markets Consultation rejects the notion, implicit in the DMA proposal, that the sheer size of a digital undertaking legitimates the imposing of significant restraints on its freedom of business action: that is, big is not *necessarily* bad from this viewpoint. It thus highlights the risk of "insufficiently nuanced"[106] outcomes where the designation assessment is conducted primarily by means of quantitative criteria that provide at best a rough proxy for SMS, echoing concerns that have been raised in respect of the approach of the DMA.[107] Yet the assertion that the holistic approach advocated in the Digital Markets Consultation is likely to prove less "burdensome"[108] than a wholly quantitative approach seems naïve. This is particularly the case insofar as it anticipates that the SMS designation process will look a lot like the CMA's market study/market investigation process—which, as discussed below, is hardly burden-free in its demands on the agency.

Nonetheless, though a quantitative approach is rejected, the Digital Markets Consultation follows the DMT Advice in suggesting factors that should inform how the DMU approaches the exercise of its expert regulatory judgment and, in particular, how it prioritizes designation assessments. Three criteria have been identified: the firm's revenue, the nature of the digital activity undertaken, and whether an existing regulatory regime is better placed to address the perceived harm.[109] The question of revenue, of course, *is* quantitative in nature: but both the DMT Advice and the Digital Markets Consultation are clear that revenue in this context serves only to identify prospective candidates for designation, rather than being determinative of the exercise itself.[110] In this regard, the DMT suggested a relevant figure of £1 billion in annual U.K. revenue, ideally complemented by annual global revenues in excess of £25 billion.[111] The Digital Markets Consultation, by contrast, leaves open the question of precisely how high a level of revenue should merit prioritization, asking instead whether a U.K.-focused or worldwide revenue approach would be more appropriate.[112] Interestingly, the DMT suggested that these prioritization rules should lie within the control of the DMU, taking the shape of formal guidance that could nonetheless be "updated as digital markets evolve."[113] The Digital Markets Consultation, conversely, anticipates legally binding (and thus, one presumes, rather less flexible) prioritization rules to which the DMU "must have regard" when deciding which undertakings to consider for designation and why.[114]

Finally, designation as a firm with SMS is not open-ended in nature. Again following the DMT Advice,[115] the Digital Markets Consultation suggests that it should last for five years before review.[116] This reflects the fact that, even within the highly dynamic context of the digital economy, the SMS concept implies that the firm concerned already has market power that is not merely substantial but also entrenched.[117] Nonetheless, it is anticipated that firms should be able to challenge an existing

105. Namely, the European Economic Area-wide annual turnover of the undertaking concerned or its market capitalization, coupled with the number of business and end users that it services: see DMA Proposal, Draft Article 3.
106. Digital Markets Consultation, para. 72.
107. See, for example, Pablo Ibáñez Colomo, *The Draft Digital Markets Act: A Legal and Institutional Analysis*, 12 J. Eur. Compet. Law Pract. 561 (2021).
108. Digital Markets Consultation, para. 72.
109. *Id*, para. 77, following the approach of the DMT Advice, para. 4.23.
110. *Id*.
111. DMT Advice, para. 4.23.
112. Digital Markets Consultation, para. 77.
113. DMT Advice, para. 4.24.
114. Digital Markets Consultation, para. 77.
115. DMT Advice, para. 4.28.
116. Digital Markets Consultation, para. 78.
117. DMT Advice, para. 4.28.

designation where a "material change" means that it "is no longer *appropriate*."[118] The Digital Markets Consultation is vague at this point, however, leaving it unclear whether a designated firm could simply appeal to the DMU's regulatory discretion on the basis of changed circumstances or instead would have to show that the statutory test for designation was no longer satisfied on the facts.

Designation is, of course, merely the start of the regulatory process. Once designated, firms with SMS will become subject to a legally binding ex ante code of conduct, intended "to manage the effects" of their market power.[119] As noted, the Digital Markets Consultation starts from the position that the case for such a regime in the digital context has already, definitively, been made, and the Government has accepted as much.[120] Moreover, as the DMT Advice recognized, the United Kingdom is far from unique here, with equivalent efforts in many jurisdictions worldwide. The extent to which this remarkable regulatory consensus will prove welfare-enhancing in the longer term remains to be seen. It is indisputable that many aspects of the digital economy—such as tax control, labor law, or responsibility for fake news or hate speech—are chronically (and many would argue, shamefully) under-regulated at present. Yet when it comes to the question of whether an ostensible pro-competition regime is likely to be beneficial in *competition* terms, the devil is very much in the detail. It is in this regard that the Digital Market Consultation is least prescriptive and arguably most ambivalent.

The current proposal envisages a code comprising of (a relatively small number of) high-level objectives, coupled with a series of more granular legally binding principles to direct firm behavior.[121] The Digital Market Consultation proposes three key objectives,[122] expressly taken from the CMA's digital advertising market study,[123] which also echo the guiding objectives identified in the Furman Report.[124] These are "fair trading" obligations, aimed at preventing the exploitation of users; "open choice" rules, to ensure that users can move freely between digital providers; and "trust and transparency" requirements, to assist users in making informed and effective choices.[125]

These objectives are then to be operationalized in the form of more detailed principles. The Digital Markets Consultation is eloquent and convincing in articulating what the optimal regulatory design would, ideally, entail. The specific behavioral requirements should be "evidence-driven and targeted, preventing harmful behavior without limiting positive or benign behavior"; offer "clarity and consistency" while "minimizing complexity and burden on stakeholders"; and be "flexible and forward-looking in order to adapt to digital markets . . . without dampening innovation."[126] Yet a cynic might argue that this concise account of regulatory best practice somewhat begs the question, insofar as the Digital Markets Consultation pays relatively little attention to the discrete principles to be implemented.[127] Instead, it concentrates on the prior question of the design of the regulatory framework, identifying three potential options.

The first option[128] would be for a highly differentiated regulatory regime, which is individually customized to the distinct characteristics and market circumstances of each designated firm. The

118. Digital Markets Consultation, para. 78 (emphasis added).
119. *Id*, para. 82.
120. *Id*, paras. 79–81.
121. *Id*, para. 81.
122. *Id*, para. 83.
123. Digital Advertising Study, paras. 7.74–7.89.
124. *Supra* note 48.
125. Digital Markets Consultation, para. 83.
126. *Id*, para. 85.
127. A series of "proposed principles" is displayed in Figure 4 of the Digital Markets Consultation. However, document makes no attempt to explain either the requirements of each principle or the regulatory rationale behind any of them.
128. Digital Markets Consultation, paras. 86–87.

mandatory rules would thus be unique to each firm and would be developed and updated by the DMU in consultation with stakeholders rather than set out in the underpinning legislation. The Digital Markets Consultation acknowledges that the closely tailored nature of the regime would be well placed to deliver regulatory obligations that are both effective and proportionate. Nonetheless, it queries the potential heterogeneity of the resulting regime, with implicit attendant concerns about its administrability.

The second option[129] is to mirror the proposed approach of the DMA, namely, to specify in the relevant legislation a set of binding (if necessarily somewhat abstract) rules to be applicable to *all* designated firms. The role of the DMU would thus be simply to enforce these rules against regulated actors. The principal benefits of this approach are clarity and simplicity, with the same clearly identified obligations applicable to all SMS firms. The downsides, according to the Digital Markets Consultation, would be an absence of specificity and thus an absence of clarity about the relevant regulatory obligations of each individual firm, the risk of over-regulation of certain firms, and a lack of flexibility in adapting the rules to changing market circumstances. There is also the rather critical question, linking back to the comparative absence of granular detail provided in the Digital Markets Consultation, of how such a universally applicable list of relevant rules can be developed in the first place. The DMA proposal seems to pluck its list of proscribed activities and mandatory obligations more or less from thin air, informed by prior antitrust enforcement practice yet divorcing the relevant theories of harm from either any finding of market dominance or cognizable consumer detriment.[130] This is about as far as possible from the collaborative mode of regulation originally envisaged by the Furman Report,[131] and does not seem particularly promising as a way to yield effective regulatory results.

Thus, the third option,[132] which is perhaps unsurprisingly the approach advocated by the Digital Markets Consultation, seeks to chart a middle course between the extreme individualism of the first option and the pretense of universality of the second. It would comprise a set of generally applicable high-level rules, set out in legislation, complemented by legally binding firm-specific requirements developed by the DMU as needed. The individualized rules would be tailored to the specific harms anticipated to result from the particular position of SMS as identified during the designation process. The Digital Markets Consultation argues that such an approach best marries the contrasting concerns of flexibility and clarity within the regulatory framework.

In this regard, the Digital Markets Consultation draws an explicit parallel to the Section 19a tool introduced in Germany in January 2021.[133] The amendment addresses very large digital firms that are held by the national competition authority, the Bundeskartellamt, to be of "paramount significance for competition across markets."[134] Following such a finding, the Bundeskartellamt is empowered to prohibit the firm concerned from engaging in any or all of seven specified practices, including

129. *Id*, paras. 88–89.

130. A rather idiosyncratic list of "concrete" examples and evidence for each of the proposed obligations in the DMA is provided in European Commission Staff Working Document, Impact Assessment Report accompanying the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (DMA) (SWD(2020) 364 final), Table 2, 53–60.

131. *Supra* note 50.

132. Digital Markets Consultation, para. 90.

133. The discussion here is based on Jens-Uwe Franck and Martin Peitz, *Digital Platforms and the New 19a Tool in the German Competition Act*, 12 J. Eur. Compet. Law Pract 513 (2021).

134. In Jan 2022, the Bundeskartellamt made its first finding of paramount market significance against Google: see Bundeskartellamt Press Release, *Alphabet/Google Subject to New Abuse Control Applicable to Large Digital Companies—Bundeskartellamt Determines "Paramount Significance across Markets"* (Jan. 5, 2022), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/05_01_2022_Google_19a.html.

self-preferencing, denial of interoperability or data portability, and the use of data to raise barriers to entry. The Section 19a tool thus enables the ex ante regulation of large platforms to "shut the stable door before the horse has bolted" in competition terms,[135] a standpoint that surely bears some resemblance to the pro-competition notion. Notably, the Section 19a tool has been described as "a testing ground for digital platform regulation," which will enable policymakers elsewhere to "watch and learn from the wanted and unwanted effects of the Bundeskartellamt's future 19a interventions."[136]

Implementation of the code, whatever the model adopted, is considered briefly in the Digital Markets Consultation. It is anticipated that the principles will apply only to a firm's designated activity, with one exception: the firm cannot make changes to non-designated activities that might serve to entrench its market power in the designated activity, unless that change generates "significant benefits."[137] The Digital Markets Consultation does not specify to whom the benefits must accrue, though purely private profits are surely unlikely to qualify. Where the code principles are established in legislation—Option 2 or 3—the Digital Markets Consultation suggests that a power should exist to amend these by secondary legislation, to avoid the problem of possible regulatory lag.[138] The DMU will also, it is anticipated, be empowered to issue (non-legally binding) guidance to firms to assist compliance with code requirements.[139] Enforcement of the code by the DMU would comprise both code orders, which mandate specific behavioral changes by regulated firms to remedy findings of breach, and interim code orders, which would enable the DMU to intervene temporarily where a breach is suspected but has not yet been formally established.[140] The proposed latter power links to a greater contemporary focus on the use of interim measures to preserve competition in the fast-moving digital economy.[141] The approach suggested in the Digital Markets Consultation is notably broad in scope. It would permit the DMU to introduce interim code orders merely on the basis that it "has reason to suspect" a code breach and which could be justified on a broad "public interest" basis.[142] Yet if the past experience of the U.K. competition framework is a good indication of the approach to implementation of the digital code of conduct, the flexibility suggested by the public interest standard is unlikely to lead to a flood of interim measures in practice.[143] Indeed, the very limited use made of interim measures in enforcement practice to date is currently the target of proposed reform efforts to the U.K. competition framework more generally.[144]

Pro-competitive interventions comprise the second prong of the pro-competition framework. These will be targeted at the "root causes"[145] of the substantial and entrenched market power identified initially

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135. Bundeskartellamt Press Release, *Amendment of the German Act against Restraints of Competition* (Jan. 19, 2021), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.
136. Franck and Peitz, *supra* note 133 at 526.
137. Digital Markets Consultation, para. 93.
138. *Id*, para. 95.
139. *Id*, paras. 96–97.
140. *Id*, paras. 99–101.
141. See, for example, Despoina Mantzari, *Interim Measures in EU Competition Cases: Origins, Evolution, and Implications for Digital Markets*, 11 J. Eur. Compet. Law Pract 487 (2020).
142. Digital Markets Consultation, para. 100.
143. The public interest rationale was provided for in Section 35 of the Competition Act 1998. As the recent public consultation on potential improvements to the U.K. competition framework makes clear, there has been a notable absence of interim measures decisions despite this provision: see BEIS, *Reforming Competition and Consumer Policy. Driving Growth and Delivering Competitive Markets that Work for Consumers*, CP 488 (July 2021), https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy, hereafter "Reforming Competition Policy Consultation," paras. 1.165–1.169.
144. *Id*.
145. Digital Markets Consultation, para. 102.

at the designation stage. The Digital Markets Consultation endorses the complementary relationship between the code of conduct and pro-competitive intervention powers foreseen in the digital advertising study: the former aimed at preventing the harmful behavior that can follow from the presence of market power, the latter at weakening its existence.[146] The current proposal follows the DMT Advice in allowing the DMU a "broad discretion" as to the choice of appropriate remedies, rather than constraining it to a predefined list of available measures.[147] The quite reasonable rationale is the ever-evolving nature of digital markets and thus potential digital market problem: the regulatory regime should not require a precommitment today to the tools necessary to meet the challenges of tomorrow's technology and business models.[148]

Yet the DMT Advice warned against empowering the DMU to impose full ownership separation on designated firms, expressly on the basis of the "significance" of such a remedy.[149] Instead, it argued that ownership (as opposed to operational or structural) separation should remain solely in the province of the CMA following a market investigation. Should the DMU consider ownership separation to be necessary, it would be required instead to refer or recommend the issue for market investigation.[150] This proposal is somewhat troubling: by limiting the ostensibly weightier remedy of full separation to the market investigation procedure, this arguably implies a greater likelihood of corner-cutting and unreliability in the DMU's decision making in comparison. This is despite the fact that the DMT acknowledged that pro-competitive interventions should be evidence-based, targeted, and proportionate,[151] and that CMA decision making under the market investigation procedure[152] is subject to the same judicial review standard that the DMT has advocated for DMU decision making.[153] The Digital Markets Consultation offers no view on whether full ownership separation should be available to the DMU, instead simply opening the question to respondents.[154]

The pro-competitive intervention power coincides with the market investigation tool in a further dimension, insofar as it is anticipated that the legal standard for action will be the same under both.[155] This requires the identification of an "adverse effect of competition" (AEC) stemming from current market features.[156] The Digital Markets Consultation has rejected the advice of the DMT to supplement the existing AEC standard with a reference to adverse effects on consumers in the alternative,[157] arguing that the notion of competition as utilized in the AEC standard is broad enough to already encompass consumer harm, "albeit through a competition lens."[158] The considerable overlap with the existing economy-wide market investigation power raises a fairly reasonable question about whether a sector-specific intervention power is really required; this point is considered in the next section.

The proposed pro-competition regime for digital markets comprises a third prong, namely, certain changes to the United Kingdom's merger control framework, which would apply specifically to digital firms designated as having SMS.[159] As merger control will remain within the remit of the merger

146. *Id*, para. 105; see also *supra* note 66.
147. Digital Markets Consultation, para. 112; endorsing the approach of the DMT Advice, para. 4.67.
148. Digital Markets Consultation, para. 113.
149. DMT Advice, para. 4.70.
150. *Id*, para. 4.71.
151. *Id*, para. 4.68.
152. Governed by Section 179(4) of the Enterprise Act 2002.
153. DMT Advice, paras. 4.114–4.117.
154. Digital Markets Consultation, para. 114.
155. *Id*, para. 115.
156. Governed, in the context of market investigations, by Section 134 of the Enterprise Act 2002.
157. DMT Advice, para. 4.76.
158. Digital Markets Consultation, para. 116.
159. *Id*, Part 7.

control division of the CMA rather than the DMU, these changes are largely beyond the scope of this article. Several brief observations can be made, however. The first is that the United Kingdom's existing merger regime is both voluntary and non-suspensory in nature, making it something of an international outlier considering the mandatory approach in many equivalent jurisdictions. The proposed changes would bridge this gap in the digital economy at least by imposing mandatory reporting requirements and, potentially, mandatory review obligations for a subset of transactions. The revisions also coincide with efforts to make more general amendments to the U.K. merger regime, with respect to both jurisdiction and procedures.[160]

Second, the focus on merger control aligns with a particular concern that mergers have been used strategically by large digital companies to harm competition in the digital economy. Yet these transactions have largely evaded scrutiny by virtue of the fact that jurisdiction typically rests on the merging parties' turnover rather than transaction value.[161] Moreover, the "substantial lessening of competition" (SLC) or equivalent standard applied in most jurisdictions including the United Kingdom may fail to account for the harm to potential competition that results,[162] as illustrated inter alia by an ex post assessment of U.K. merger practice in digital markets.[163] The Digital Market Consultation addresses this latter concern by proposing a lower threshold for intervention in SMS merger cases, from a balance-of-probabilities approach to instead demonstrating a "realistic prospect" that a SLC will arise from the transaction.[164]

Finally, one of the more intriguing aspects of the DMT Advice, from an antitrust perspective, was its wider view of the appropriate objectives of a regulatory regime that aims expressly to achieve pro-competition in digital markets. Specifically, the DMT Advice recommended that the new regime should seek "to further the interests of consumers *and citizens* in digital markets by promoting competition and innovation."[165] By differentiating citizens from consumers, and by recognizing both the need and scope within the proposed pro-competition framework to further the interests of each category, the DMT Advice reflects contemporary concern about the extent to which entrenched market power in the digital economy can have wider negative spillovers in noneconomic societal terms. In this regard, the DMT had emphasized that the pro-competition regime would be located within a broader shifting regulatory landscape for the digital economy, including the recommendations of the Cairncross Review into sustainable journalism in the United Kingdom[166] and forthcoming legislation to regulate online harms.[167]

The Digital Markets Consultation, however, has disregarded the proposed reference to citizen interests within the statutory duty of the DMU, arguing instead that the agency's objectives should be "as lean and as simple as possible."[168] In particular, it expressed concern that a duty to take account of

160. Reforming Competition Policy Consultation, paras. 1.89-1.128.
161. See, for example, Competition Policy for the Digital Era, Chapter 6, and Furman Report, Chapter 3.
162. See, for example, Organisation for Economic Cooperation and Development (OECD), *Concept of Potential Competition, OECD Competition Committee Discussion Paper* (2021), https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm.
163. Lear, *Ex-Post Assessment of Merger Control Decisions in Digital Markets. Final Report* (May 9, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.
164. Digital Markets Consultation, paras. 187–91.
165. *Id*, para. 3.3 (emphasis added).
166. *The Cairncross Review. A Sustainable Future for Journalism* (Feb. 12, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf.
167. A useful summary of this legislative process is John Woodhouse, *Regulating Online Harms*, House of Commons Library Research Briefing CBP 8473 (Dec. 31, 2021), https://researchbriefings.files.parliament.uk/documents/CBP-8743/CBP-8743.pdf.
168. Digital Markets Consultation, para. 31.

wider interests might detract from the DMU's principal focus of promoting competition in digital markets.[169] It nonetheless acknowledged that the concept of consumer benefit can itself be construed quite broadly.[170] It has thus asked respondents whether and to what extent the DMU should be empowered to engage with an (undefined) range of "wider policy issues that interact with competition in digital markets."[171]

IV: "Pro-competition" in Practice: Between Competition Law and Regulation

The preceding section traced the contours of the proposed pro-competition regime for digital markets in the United Kingdom. This penultimate section considers more closely the meaning of pro-competition regulation. Pro-competition is not an established term of art within either the U.K. regulatory landscape or in competition policy more generally. Moreover, its usage in the U.K. digital context pre-dates any decisions regarding the design of or even the need for a specific regulatory regime.[172] What is remarkable, nonetheless, is the extent to which the term has gained traction and prominence, now essentially serving as a shorthand for a new regulatory model pitched between conventional competition law and more traditional regulation. Moreover, while the United Kingdom is not alone in attempting to implement new forms of digital market regulation—for instance, two closely competing models, the EU's DMA and Germany's Section 19a tool, were discussed above[173]—the language of pro-competition appears to have escaped its origins to have wider resonance in this context.[174] Our starting point here is not that the pro-competition concept is particularly consequential in itself, nor that the proposed U.K. regime is unique in its aims or methods. Instead, by locating the pro-competition regime in the space between simple competition enforcement and more traditional regulation in the United Kingdom, our aim is to gain a deeper understanding of how such hybrid regulation is intended to operate—and to consider briefly the extent to which it is likely to succeed.

A few preliminary observations are necessary. Competition and pro-competition policy sound like synonyms—as like, for instance, flammable and inflammable—and, indeed, the purpose of the DMU, ultimately, is "to promote competition and competitive outcomes."[175] Yet the Furman Report was clear that pro-competition denotes "a new approach," distinct from the "core conventional competition tools."[176] In particular, pro-competition is intended to move beyond the focus of the latter on conduct and concentrations:

> To make competition effective [in digital markets] requires policy that . . . creates space for businesses to start, compete and grow alongside and around the big platforms. This can be achieved through a pro-competition approach that sets rules and standards to change how a digital market works and creates new opportunities for competition, innovation and consumer choice.[177]

169. *Id*.
170. *Id*, para. 32.
171. *Id*, Consultation question 1.
172. *Supra* note 41.
173. A more comprehensive comparative assessment of the three regimes can be found in Anne C. Witt, *Platform Regulation in Europe—Per se Rules to the Rescue?* J. Competition Law Econ. (forthcoming).
174. See, for example, Simonetta Vezzoso, *The Dawn of Pro-competition Data Regulation for Gatekeepers in the EU*, 17 Eur. Comp. J. 391 (2021) and Filippo Lancieri & Caio Mario S. Pereira Neto, *Designing Remedies for Digital Markets: The Interplay between Antitrust and Regulation*, J. Competition Law Econ. (forthcoming), at 2.
175. Digital Markets Consultation, para. 26.
176. Furman Report, at 8.
177. *Id*.

Yet the repeated emphasis, not merely on regulation but on *pro-competition* regulation for the digital economy, must surely be regarded as an attempt to distinguish the forthcoming regime from more classical, and from certain perspectives more inherently suspect, forms of market regulation. This perhaps explains the otherwise surprising enthusiasm of the current U.K. Government for a novel set of "burdens on business," being categorically committed elsewhere to rolling back the regulatory state.[178] (A more cynical explanation is this Government's unusual relationship with certain elements of the traditional media.[179]) Moreover, the United Kingdom is no stranger to innovation and originality in the regulatory sphere: as the Furman Report noted quite correctly, "the UK has led the way in developing frameworks of rules, structures and enforceable norms which have allowed competition to flourish where it otherwise would not."[180] Pro-competition is merely another development in this evolving regulatory landscape; what remains to be seen is how it can and should be distinguished from what has gone before.

A. "A New Approach": Pro-Competition beyond Conventional Competition Law

The first question is thus, if competition and pro-competition policy really are distinct, what are the differences? As noted, the Furman Report was clear that the regulatory framework it advocated was not an example of competition law as such. Indeed, beyond the pro-competition regime considered in its Chapter 2, the report recommended quite separately a series of changes to the existing competition framework in its Chapter 3. Even with these changes, however, the Furman Report took the view that competition law alone was insufficient to achieve the desired regulatory objectives for digital markets, and, moreover, that any attempt to modify the existing competition framework even further was inadvisable, insofar as this might "have unintended and undesirable side effects."[181]

The United Kingdom has had statutory competition rules since the mid-twentieth century.[182] With the Competition Act of 1998, it adopted a modernized framework that essentially replicates Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), in the guise of the Chapter I and II prohibitions. As of 2014, the CMA is the principal public competition enforcement agency. It has powers to find infringements of Chapters I and II, to pursue criminal proceedings against cartel behavior, to exercise merger control functions, and to conduct market studies and investigations which can culminate in wide-ranging remedies to address market features that adversely affect competition. The CMA is widely recognized as a world-leading competition agency, and the Furman Report

178. Reflected, most clearly and almost comically, in the progressive ramping up of the "One In, One Out" policy for regulatory rules, introduced in 2010, to a "One In, Two Out" approach in 2012, and "One In, Three Out" in 2015. A useful summary of these developments can be found on the Understanding Regulation Blog, https://www.regulation.org.uk/deregulation-regulatory_budgets.html.

179. For a critique of the relationship between the current Conservative Government and the United Kingdom's right-wing press, see Sara Badawi, *COVID-19 Has Exposed Britain's Client Journalism Problem*, Trib Mag, Jan 4, 2021, https://tribunemag.co.uk/2021/01/covid-19-has-exposed-britains-client-journalism-problem. Similar concerns have been raised in respect of digital regulation in other jurisdictions: see, for example, Reuters, *Australia Antitrust Boss Rejects Claim Big Tech Law Is a Favor for News Corp* (June 10, 2021), https://www.reuters.com/business/media-telecom/australia-antitrust-boss-rejects-claim-big-tech-law-is-favor-news-corp-2021-06-10/, and Axios, *Murdoch Empire Pushes Republicans to Back Tech Antitrust Bills* (June. 10, 2021), https://www.axios.com/murdoch-pushes-republicans-support-antitrust-bills-471e7868-4dd3-4b3b-a8af-62cf25582fe7.html.

180. Furman Report, para. 2.12.

181. *Id*, para. 2.2.

182. Restrictive Trade Practices Act 1956.

advocated for greater efforts to promote the U.K. competition framework, with the CMA at its heart, as a model for best practice in digital markets.[183]

Yet specifically as an antitrust enforcer, the CMA has faced criticism about the slowness of its decision making and the comparatively small number of cases that it pursues compared with equivalent-sized and -resourced peer agencies. A National Audit Office (NAO) review in 2016 suggested that an absence of statutory deadlines in antitrust cases, coupled with a fear of being overturned on appeal, may contribute to an excess of caution and delay in the CMA's decision-making processes.[184] It suggested, in particular, that the United Kingdom has a reputation as "the best jurisdiction in the world to defend a competition case."[185] Although the NAO failed to interrogate this claim, it is undoubtedly true that review courts in the United Kingdom engage in robust scrutiny and that commercial litigation costs are high. The attendant vulnerability to subsequent legal challenge may, according to the NAO, contribute to excessive "risk aversion" on the part of the CMA.[186] A 2019 government review of reforms introduced by the Enterprise and Regulation Reform Act 2013 (ERRA 2013) concluded that some improvement had been seen in terms of increasing the number and speed of competition cases pursued, but that, in substantive terms, any positive impact had been small.[187] The sloganeering report of the Penrose Review, published in February 2021, took a similar tack, calling generically for "faster, better competition decisions" to be taken by the CMA.[188]

There is, thus, a persistent skepticism of the nimbleness of the CMA as an antitrust enforcer. The concern is not that the U.K. authority lacks either the skills or capacity to successfully execute complex high-quality competition cases, but rather that it takes an excessively long time to do so and completes an unacceptably small number of investigations. This orthodoxy was repeated in the Furman Report. Despite framing at least the indirect consumer harms associated with digital platforms largely in terms of completed or ongoing antitrust cases,[189] the Furman Report was clear in its conclusion that "traditional competition law tools" were insufficient to address the identified competition issues.[190] Justifying this stance, it suggested, inter alia, that conventional competition law "moves too slowly."[191] While it might be argued that justice delayed is justice denied in any competition law context, such concerns may moreover be particularly acute in the digital economy, where innovation plays a central role, and where there is a long-standing fear that markets may move too quickly for competition authorities to fully get to grips with their underlying dynamics.

These concerns about the *speed* of the CMA's decision-making processes, as opposed to their credibility as such, also extend to a more unusual element of the United Kingdom's competition framework, namely, the MIR regime. Governed primarily by the Enterprise Act 2002, the MIR regime empowers the CMA to conduct wide-ranging sector reviews, to determine whether "any feature, or combination

183. Furman Report, at 16.
184. National Audit Office, *The UK Competition Regime. Report by the Comptroller and Auditor General* (Feb. 5, 2016; https://www.nao.org), https://www.nao.org.uk/wp-content/uploads/uk,2016/02/The-UK-Competition-regime.pdf/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf.
185. *Id*, para. 2.15.
186. *Id*.
187. Department for Business, Energy & Industrial Strategy, *Competition Law Review: Post Implementation Review of Statutory Changes in the Enterprise and Regulatory Reform Act 2013* (July 2019), https://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpgaod_20130024_en.pdf, hereafter "BEIS Review," at 3.
188. John Penrose MP, *Power to the People. Stronger Consumer Choice and Competition So Markets Work for People, Not the Other Way Around* (Feb. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf, at 58.
189. *Supra* notes 37 and 38.
190. Furman Report, para. 2.2.
191. *Id*, para. 2.8.

of features, of [any] relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom."[192] Where such an "adverse effect on competition"[193] is identified, a broad range of remedial powers are available, enabling the CMA to take action aimed at "remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers."[194] Crucially, although the remedies available under the MIR regime can be deployed against the market behavior and/or structure of a single undertaking,[195] the coercive powers of the regime are not targeted at reprehensible firm behavior as such. Instead, and in contrast to conventional competition law, the CMA nominally intervenes to fix *markets* that do not work well, rather than against illegal individual *behavior*.

Accordingly, the U.K. competition framework already provides for the possibility of proactive pro-competition intervention in markets that are perceived to not be working well, without any need to anchor such intervention in an identified antitrust violation.[196] Yet, although the interventionist power of the MIR regime extends beyond the parameters of the Chapter I and II prohibitions, it is subject to much the same rigor—and thus, a critic might argue, the same unwieldiness—in institutional terms. Investigations take up to two years to complete, with additional time to implement any required remedies, and this is before any potential legal challenge by affected parties. They are, moreover, normally preceded by a market study, which takes another year.[197] Both processes are highly resource-intensive from the CMA's perspective, with a concern that it is reluctant to open and complete a sufficient number of investigations as a result. Notably, when the European Commission suggested adopting a broadly similar tool to allow case-specific targeted intervention in digital markets beyond the confines of Articles 101 and 102 TFEU,[198] commentators highlighted the U.K. experience as evidence that such a "new competition tool" might prove less nimble and thus less effective than anticipated in practice.[199]

A second concern raised by the Furman Report about the use of competition enforcement to police digital markets is that any completed investigation "resolves only issues narrowly focused on a specific case." It thus typically fails to establish "clear and generalizable rules and principles to give businesses certainty about the boundaries of acceptable competition conduct."[200] This objection, which stems from competition law's tort/crime-structured character, is hardly unique to the United Kingdom as an antitrust jurisdiction. Moreover, and in particular in common law systems, it is arguably somewhat overblown, insofar as the existing decisional practice functions to more or less delimit the parameters of acceptable commercial behavior.

Yet, insofar as contemporary competition law is increasingly effects-based and thus context-specific, this introduces a greater degree of ex ante ambiguity as to whether a particular practice is likely to violate the rules on the facts. While many would argue that this makes for better enforcement through a reduced likelihood of socially harmful false-positive findings, it sacrifices the certainty and deterrent benefits of clear prohibitions. The anticipated approach of the DMA is thus instructive. It takes as its

192. Enterprise Act 2002, Section 134(1).
193. Enterprise Act 2002, Section 134(2).
194. Enterprise Act 2002, Section 134(4). See also the "duty to remedy" outlined in S.138.
195. See, for example, Competition Commission, BAA Airports Market Investigation. A report on the supply of airport services by BAA in the UK, Mar 19, 2009.
196. For instance, the Reforming Competition Policy Consultation, para. 1.54, describes the market investigation reference (MIR) procedure as comprising "powerful procompetitive tools."
197. *Id*, para. 1.52.
198. See European Commission Press Release, *Antitrust: Commission Consults Stakeholders on a Possible New Competition Tool* (June 2, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977.
199. See, for example, Amelia Fletcher, *Market Investigations for Digital Platforms: Panacea or Complement?* 12 J. Eur. Compet. Law Pract 44 (2021).
200. Furman Report, para. 2.8.

starting point a series of theories of harm derived from existing antitrust practice; yet divorces these from any need to demonstrate either existing market power (relying instead on the gatekeeper notion as a broad proxy) or resulting harm to competition or consumers.

Concerns about the essentially ad hoc nature of competition regulation may find even greater purchase in the context of the digital economy, to the extent that many of the problematic practices under scrutiny by competition enforcers today are essentially novel in nature. Accordingly, although the argument can often be made that a progressive development of the existing case law supports the conclusion that conduct breaches the competition rules, this point will not have been definitively established in advance. Take, for instance, the issue of self-preferencing. Although the European Commission in its infringement decision in *Google Search (Shopping)* insisted that such behavior constitutes a "well-established . . . form of abuse,"[201] Competition Commissioner Vestager later acknowledged that self-preferencing constitutes, at the very least, a "new example" within the established case law on leveraging.[202] The beauty of competition law is that, by virtue of its relatively open-textured wording and the underlying influence of economics, the rules can evolve to catch emerging forms of harmful business conduct that fall within its broad proscriptions. A case-by-case development can, moreover, ground abstract theories of harm in concrete examples of when and how such harm might materialize in practice. The downsides of this evolutionary process, however, are its contingent and ad hoc nature. To this extent, the Furman Report is correct that top-down ex ante regulation provides a more certain blueprint for digital markets going forward, even if it involves inevitable trade-offs.

Moreover, conduct-focused competition rules—in the United Kingdom, the Chapter I and II prohibitions—require, quite obviously, anticompetition *conduct* by the firm(s) concerned. It is trite law that Article 102 TFEU, and thus Chapter II,[203] do not prohibit dominance as such but merely abusive behavior by dominant undertakings.[204] While there are perfectly sensible competition policy reasons to reject a no-fault monopoly approach,[205] this does, however, create a lacuna where consumer harm stems from a mere absence of competition rather than the exploitation of market power. A similar problem arises in oligopolistic markets.[206] The proposed pro-competitive intervention power jettisons the antitrust conduct requirement, with liability hinging purely on the SMS concept coupled with the AEC test. The DMT Advice thus touts the potentially "transformational" nature of pro-competitive interventions, creating "new forms of competition."[207] In this regard, it is clearly intended to go beyond the scope of the current conduct-focused prohibitions.

Nonetheless, as discussed, the U.K. competition framework *already* incorporates a much more expansive, quasi-regulatory[208] tool, which similarly premises its remedial powers on the existence of market features that adversely affect competition.[209] Accordingly, the introduction of a sector-specific

201. Case AT.39740—Google Search (Shopping), Decision of June 27, 2017, para. 649.
202. Speech of Margrete Vestager, Competition and the digital economy, June 3, 2019.
203. Pursuant to Section 60 of the Competition Act 1998, U.K. courts were required to interpret Chapter II in a manner "consistent" to the Article 102 TFEU (Treaty on the Functioning of the European Union) case law. Although, post-Brexit, this obligation has been removed under the new Section 60A of the 1998 Act, the Chapter II jurisprudence has yet to diverge from the EU exemplar.
204. Case C-322/81 Michelin v Commission EU:C:1983:313, para. 10.
205. See, for example, Marina Lao, *No-Fault Digital Platform Monopolization*, 61 Wm. Mary L. Rev. 755 (2020).
206. Case C-89/85 Ahlström Osakeyhtiö and Others v Commission ("Woodpulp") EU:C:1993:120.
207. DMT Advice, para. 4.65.
208. A point developed further by the author previously in *Between competition Law and Regulation: Hybridized Approaches to Market Control*, 2 J. Antitrust. Enforc. 225 (2014), 235–42 in particular.
209. *Supra* note 156.

"new competition tool" is arguably rather less radical here than it would be in jurisdictions with a more conventional array of antitrust powers, such as the EU. The Furman Report accordingly acknowledged that, in principle, the existing MIR regime could provide the basis for greater pro-competition regulation of digital markets.[210] Yet it argued that the "largely static"[211] nature of any remedies that can be imposed meant that it was an inappropriate or at least inadequate vehicle by which to engage in the necessary "ongoing" supervision of the digital economy.[212]

> Relying on this model alone, under the powers currently available, is not sufficient in digital markets when technologies change but market power is durable. Specific rules imposed as a remedy following a market investigation may quickly go out of date. What is instead needed is an ongoing, dynamic counterparty to market participants, adjusting solutions in response to innovations and market dynamics.[213]

Interestingly, given the Furman Report's specific reference to "the powers currently available," the remedial powers of the CMA under the MIR regime are being reviewed at present in tandem with the public consultation on the digital markets regime. Specifically, the Government has proposed to introduce greater flexibility as to when remedies can be imposed[214] or binding commitments in lieu be accepted[215]; to allow for the use of interim measures at any stage during market studies and investigations[216]; and, crucially, to improve the versatility and effectiveness of remedies by, inter alia, requiring businesses to participate in implementation trials, and giving the CMA enhanced powers to monitor and where necessary vary existing remedies.[217] The proposals seem like positive steps toward achieving a more nimble, responsive set of market inquiry tools. Yet their possible introduction in parallel with a sector-specific regime for digital markets raises an obvious question: in that case, are the innovations of the latter designed to address limitations within the generalist competition framework that will no longer exist? Perhaps the clearest added value of a sector-specific framework in that instance is thus its shorter time frame[218]; yet when one factors in the time required for the initial designation exercise, even this advantage loses much of its edge.[219]

Finally, it is worth revisiting the disputed question of the anticipated goals of the pro-competition regime. It was explained above that, whereas the DMT recommended that the DMU be given a fairly expansive statutory duty to further the interests of "consumers and citizens," the Digital Markets Consultation has preferred a lean and simple focus on consumer interests alone.[220] Moreover, though fair trading is mooted as one of three high-level objectives of the code of conduct, fairness is not a distinct goal in and of itself for the regime.[221] The decision to limit the DMU's purpose to a conventional competition/consumer focus supports a conceptualization of pro-competition regulation as a

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210. Furman Report, para. 2.107.
211. *Id*, para. 2.108.
212. *Id*, para. 2.109.
213. *Id*, para. 2.109.
214. Reforming Competition Policy Consultation, paras. 1.58–1.67.
215. *Id*, paras. 1.73–1.75.
216. *Id*, paras. 1.68–1.72.
217. *Id*, paras. 1.76–1.88.
218. It is anticipated that pro-competitive interventions will be subject to either a nine- or twelfth-month statutory deadline: Digital Markets Consultation, para. 121.
219. A concern also raised by Liza Lovdahl Gormsen, *Competition Law and the Digital Economy in the UK and Beyond* in The UK Competition Regime: A Twenty-Year Retrospective 383 (Barry Rodger et al., eds., 2021).
220. *Supra* note 168.
221. Contrast, for instance, the DMA, which expressly pursues fairness as a stand-alone aim, which is argued to be "complementary to, but different from" the objectives of Articles 101 and 102 TFEU: see DMA Proposal, Draft Recital 10.

type of "competition law plus," which aims at the same sort of market benefits but goes beyond the confines of the established competition rules. Yet this approach is complicated by the fact that the emergence of Big Tech monopolies has prompted a somewhat existential reckoning *within* the discipline of competition law itself, as to its goals and limitations.[222] The Digital Markets Consultation thus, perhaps unavoidably, recognizes that "wider policy issues" may inform the DMU's decision making within the context of the pro-competition regime.[223]

B. Concurrency: Balancing Competition Law and Sector-Specific Regulation

Yet to properly appreciate the relationship between competition law and more interventionist market regulation in the United Kingdom, it is insufficient to consider the enforcement activities of the CMA alone. For decades, various sector regulators have exercised *concurrent* competition jurisdiction within their specific areas of regulatory control, alongside the dedicated competition agency.[224] Both the original rationale for the regime and its retention as a key pillar of the United Kingdom's competition framework despite little success in practice evince a peculiar commitment to competition as the optimal mode of economic regulation even in the face of enduring market failure. Understanding concurrency can thus help to shed further light on the meaning and intended role of pro-competition in the digital context.

The concurrency regime, which has seen limited replication elsewhere, has its origins in the Littlechild Report that preceded the privatization of British Telecom in the mid-1980s.[225] The report, which considered the optimal regulatory framework to supervise the privatized utility, worked from the assumption that telecommunications markets would inexorably open to the forces of competition over time. It thus concluded that the sector regulator to be created should be equipped not only with classic regulatory powers, like rate-making and imposing access obligations, but also with more competition-focused tools, on the basis that regulation was merely "holding the fort" until free competition arrived.[226] As more sectors were privatized and liberalized, this unusual framework of concurrent competition jurisdiction was similarly extended, including into regulated areas beyond the classic utilities markets. Today, nine sector regulators hold concurrent powers to enforce the Chapter I and II prohibitions within their regulatory spheres.[227] Moreover, the not-uncontentious decision to retain concurrency after the passage of the Competition Act 1998 means that sector regulators are now expected to perform law enforcement-type roles in regulated markets alongside their classic regulatory functions.

The United Kingdom's exceptional concurrency regime has not been a particular success. Previously, the competition authority tended to defer to regulators within their specific market segments, while regulators themselves tended to under-utilize their competition powers. The upshot was a chronic absence of competition enforcement in regulated markets. Legislative efforts were made within ERRA

222. A succinct summary of these somewhat fraught debates is Anne C. Witt, *Technocrats, Populists, Hipsters, and Romantics—Who Else Is Lurking in the Corners of the Bar?* CPI ANTITRUST CHRON, Nov 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492109.

223. *Supra* note 171.

224. The discussion in this subsection draws on previous work by this author, *Concurrency*, in *THE UK COMPETITION REGIME: A TWENTY-YEAR RETROSPECTIVE* (BARRY RODGER et al., eds., 2021) 255–281.

225. STEPHEN LITTLECHILD, *REGULATION OF BRITISH TELECOMMUNICATIONS' PROFITABILITY: REPORT TO THE SECRETARY OF STATE* (Department of Industry 1983).

226. *Id*, para. 4.11.

227. Civil Aviation Authority, Ofcom, Gas and Electricity Markets Authority, Financial Conduct Authority (FCA), Payment Systems Regulator, Office of Rail and Road, Water Services Regulation Authority, Northern Ireland Authority for Utility Regulation, and National Health Service (NHS) Improvement.

2013 to require sector regulators to make greater use of their competition powers, and there has been a measurable uptick in the level of competition enforcement in regulated markets by both regulators and the CMA. Yet the absolute number of antitrust cases taken in regulated sectors remains modest. The reasons for this are not fully understood. A 2019 government report suggested that it might be attributed, variously, to a comparative absence of antitrust issues arising in regulated markets, or to lingering preferences for regulatory solutions among regulators, or to a lack of resources or skills on their part to enforce the competition rules.[228]

Yet what is perhaps most remarkable about the United Kingdom's concurrency regime is that, despite consistent evidence that it has failed to live up to its promise in practice, there appears to be an unshakeable commitment to its retention, improvement, and indeed expansion. The orthodoxy is that competition and regulation are complementary rather than mutually exclusive phenomena.[229] Yet the notion that the latter merely "holds the fort" for the former remains prevalent, with efforts to speed along this process gathering steam after ERRA 2013 in particular. It is thus easier to appreciate the emphasis on pro-competition within the digital markets regime if one understands the enduring faith in the superiority of competition over regulation, in theory if not so successfully in practice, within the United Kingdom's broader market regulatory landscape.

The question whether to apply the concurrency framework to the incoming digital markets regime nonetheless marks an interesting point of disagreement between the DMT Advice and Digital Markets Consultation, which suggests slightly different approaches to the relationship between pro-competition and "ordinary" regulation. Strictly speaking, the question of concurrency in its conventional understanding is moot, insofar as the anticipated sector-specific regulator, the DMU, is to be located within the existing competition authority, the CMA.[230] Yet the DMT Advice recommended extending the *logic* of concurrency to the digital pro-competition regime, by giving relevant regulators[231] the ability to enforce the code of conduct and pro-competitive intervention powers within their regulated areas.[232] In doing so, it suggested that the DMU be given "primacy" over the regulators in the case of overlap,[233] and stressed the need for effective coordination mechanisms to aid coherence and avoid conflict.[234] The Digital Markets Consultation, however, has rejected such a "delivery role"[235] for regulators, on the basis that this may introduce inefficiency or undue complexity into the new regime.[236]

Each viewpoint offers a slightly different take on the notion of pro-competition regulation. Both set up a dichotomy between pro-competition regulation, on one hand, and the regulators' more traditional (*non*-competition?) tools, on the other. By seeking to empower regulators to apply the pro-competition regime directly, the DMT Advice inevitably invites comparison with the existing concurrency framework.[237] Since it then largely fails to elaborate on what it deems the "strong case" for concurrent jurisdiction, it seems reasonable to draw parallels to the competition law rationale: namely, the desire to

228. BEIS Review, at 49–50.
229. Competition and Markets Authority, Regulation and Competition: A Review of the Evidence (CMA111), Jan 2020, para. 2.2.
230. In this regard, and moreover coupled with its consumer protection functions, the CMA is beginning to resemble a "super-regulator": see Peter Alexiadis & Caio Mario da Silva Pereiro Neto, *Competing Architectures for Regulatory and Competition Law Governance, EUI Research Report* (2019), https://cadmus.eui.eu/handle/1814/63285;jsessionid=639AFC70B23C57B3961987647764D210, 28–33.
231. Specifically, Ofcom and FCA.
232. DMT Advice, para. 6.12.
233. *Id*, para. 6.14.
234. *Id*, para. 6.15.
235. Digital Markets Consultation, para. 42.
236. *Id*, para. 43.
237. DMT Advice, para. 6.15.

equip sector regulators with the supposedly most effective or appropriate tools for intervention. From this perspective, instruments of pro-competition regulation are to be preferred over more traditional regulatory mechanisms, even where the option of deferring to competition law alone is unavailable.

The Digital Markets Consultation similarly accepts the need for coordination between existing sector-specific regulation and the pro-competition regime,[238] yet it specifies no preference for the latter. Most obviously, when deciding whether to conduct the threshold SMS assessment, the approach advocated in the Digital Markets Consultation would permit the DMU to "deprioritise" designation of a firm, that is, exercise its discretion *not* to subject it to pro-competition regulation, on the basis that "an existing regulatory regime is better placed to address the harm."[239] Yet there is no suggestion that the latter is a suboptimal way to address competition problems in the digital economy. From this perspective, pro-competition is the desired outcome—but the overt pro-competition regime is not the only (nor necessarily the best) regulatory instrument available to achieve this goal.

V. Conclusion

The regulation of the digital economy is undergoing momentous changes at present, in the United Kingdom and elsewhere, from a competition perspective and beyond. While the finer details of the U.K. regime remain to be settled, it appears inevitable that more interventionist regulation is on its way, at least for the largest and most powerful platforms. Yet old habits die hard in a jurisdiction where the superiority of competition over regulation has long been a tenet of faith and a key organizing principle for policymakers. Accordingly, though the U.K. regime will involve a powerful display of public coercive power, the aim emphatically is not to replace market forces indefinitely but rather to foster (some might say force) these where they currently do not or cannot exist. Hence, *pro-competition* regulation, the United Kingdom's attempt to "lead the way"[240] in crafting an effective solution to what are inherently transnational market problems. While the language of pro-competition regulation increasingly appears to transcend its domestic origins,[241] this article has suggested that the balancing act between conventional competition law and traditional regulation that is reflected in the forthcoming regime can only be fully understood when located within the distinctive circumstances of the wider U.K. regulatory landscape. Whether an effective digital supervisory framework can be implemented of course remains to be seen: we are on the cusp of a grand experiment in new methods of regulation, applied to comparatively novel markets and business models—and targeting some of the most powerful companies on earth. With the United Kingdom's pro-competition regime entering an increasingly crowded regulatory arena, all is to play for.

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238. Digital Markets Consultation, paras. 35–44.
239. *Id*, para. 77.
240. DMT Advice, para. 7.4.
241. *Supra* note 174.