



July 31, 2020

***RE: The Digital Markets Taskforce Call for Information***

Thank you for providing this opportunity to contribute to the Taskforce's deliberations.

The [Electronic Frontier Foundation](#) (EFF) is a non-profit digital rights group based in San Francisco that advocates for online free expression, privacy rights, and innovation. EFF is supported by over 30,000 paying members worldwide, including over 700 within the United Kingdom. We have been involved in public impact litigation, advocacy, and policy development surrounding the Internet since our founding, and the Internet's first popular expansion, three decades ago.

Our work over the years has covered many of the key debates in the Internet's growth, including the challenges of copyright modernization and patent reform, the vital importance of protecting user privacy in a digital world, and developing the shape of network neutrality needed to foster an equitable and open Internet.

We also, in pursuit of a more secure and privacy-preserving Internet, have developed software and services ourselves. Our [Certbot](#) tool provides easy access to [Let's Encrypt](#), a free project we support that has allowed over 225 million websites to turn on the "https" lock and protect their users' data from unwanted surveillance. Our [Privacy Badger](#) browser plugin has been downloaded millions of times, and defends its users from third-party trackers on the Web -- including those used by [Google](#), Facebook, and Twitter.

Our experience in this work to protect the best of the Internet has shown us that its most transformative power almost always emerges not from concentrations of existing, incumbent power, but from its edges. Online innovation, growth, and freedom generally arise from the Internet's users -- including those creating new businesses and content -- rather than from some central core of overseers.

Today, for an increasing number of users, there *is* a powerful and static center to the Internet -- and it seems to be based a few miles away from our headquarters in San Francisco. It has come to seem that the [lifecycle of competition](#) online -- where new entrants displace the giants, only to be displaced in turn -- has seized up, leaving a few tech giants situated at the incontestable heights of the economy.

We applaud the government's decision to investigate this slowing in the pace of online innovation, and the increase in the concentration of the benefits of the Internet toward that undeserving center.

Our own research has supported in broad strokes the conclusions of the previous inputs into the Taskforce's work: that the best solutions to this problem cannot restrict themselves to [a traditional analysis of monopoly power and harms](#), but should take a view that extends across multiple markets, and includes non-price costs (including privacy harms), and the effective sabotage of more innovative competitors and business models through mergers, legal threats, and outdated primary legislation. We also agree with the general basket of remedies proposed by the Furman Report, including encouraging [interoperability, data portability](#) and close scrutiny of potential mergers and acquisitions, especially when large companies seek to buy up small, disruptive start-ups that could challenge their technological dominance.

### **Scope of a new approach**

#### **1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:**

- **The Furman Review refers to ‘significant market power,’ ‘strategic bottleneck,’ ‘gateway,’ ‘relative market power’ and ‘economic dependence’:**
  - **How should these terms be interpreted?**
  - **How do they relate to each other?**
  - **What role, if any, should each concept play in the SMS criteria?**
- **Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?**
- **What evidence could be used when assessing whether the criteria have been met?**

We will refrain from a detailed analysis of the Furman phraseology; however, we would suggest that one way to consider all of these terms, particularly if the government seeks to pursue the recommendation of specific “codes of conduct”, is under a general consideration of *user rights*.

“User,” in this case, is a deliberately broad term, and does not just apply to the direct customer of SMS firms. One of the oddities of the markets that the Taskforce must consider is that services are “used” by several different cohorts: those paying for services; those who are apparently using the services for free but who will have their behaviour tracked or deduced for later commercial use by the firm; and potential competitors, who often act as a user, or on behalf of a user, who wishes to interoperate with the incumbent.

One reliable source of innovation in the digital world consists of users who interact with online services in ways that the original service provider could never imagine. When this innovation matches the intent or business model of the original firm, the firm is able to reap the benefits. Twitter, for instance, has adopted such user-generated innovations as the hashtag and the “@” reply into its subsequent redesigns, to the point where it is hard

to imagine a service without them. The network effects and addictive quality of all the large platforms are fueled almost entirely not by content created by the firm itself, but by that produced by the aggregated interactions of its users.

New innovators and challengers to incumbents frequently arise when they are able to grow and benefit from these earlier services, before independently setting out on their own. Early Web browsers did not have many Web sites to visit, but were also able to access “[Gopherspace](#)”, a previous network of information resources. (Gopherspace itself was built from sources scavenged by its developers from even earlier digital sources). Google built its search engine by spidering the early Web, bootstrapping off this by-then independently rich source of data. Google Mail benefitted from the open protocols and networks of e-mail; Google was able to create its Google Contacts service in part from Gmail users’ collections of email addresses. Facebook accelerated the creation of its globe-spanning social graph by allowing users to easily import their [Google contact lists](#) – or it did, until Google sought to block them.

We make this point, because while it is tempting to cast pro-competition principles purely in terms of intra-company economics, or protecting fledgling firms from existing tech giants, those fledgling firms have to start somewhere. In practice, their creators often begin as users of incumbent services.

One way to measure significant market power, strategic bottleneck, and economic dependence, then, is to see how much a market actor can control or block its own users’ behaviour before they rebel. Antitrust scholar [Dina Srinivasan](#) has mapped Facebook’s decreasing care for its users’ privacy to its growing market power, and argued in the U.S. context that this points to a compelling [antitrust case against the company](#). Similarly, Google’s founders warned in their [seminal paper](#) of the dangers of distorting search result ranking with advertising; as their market dominance in the search and advertising markets has increased, they have progressively blurred the line between organic search results, [advertising](#), and [Google’s own products](#).

Users’ willingness to tolerate incumbent behavior that is clearly intended to frustrate their own intents – whether it is to move their data elsewhere, re-use it for purposes unsanctioned by the incumbent, or simply differentiate between a real search result and paid sales pitch – is a strong indicator of what we believe is “strategic market dominance”. Competitors to incumbents frequently originate as users of that service – or acting as an agent who is more aligned with the incumbents’ users’ preferences than the incumbent is prepared to be.

We believe that by examining what is permitted and what is forbidden, and by casting their Code of Conduct in a framing that protects the users’ rights, future regulators will be best able to protect both present consumer interests and the nurturing of future competitors and disrupters to the incumbent.

**2. What implications should follow when a firm is designated as having SMS? For example:**

- **Should a SMS designation enable remedies beyond a code of conduct to be deployed?**
- **Should SMS status apply to the corporate group as a whole?**
- **Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?**

One of the greatest challenges of oversight for digital service companies at the multi-billion dollar scale of Amazon, Apple, Google, Facebook, etc. is the opacity of data movement and purpose within them.

When the Electronic Frontier Foundation first expressed concern about Google's pervasive collection of user data in the company's early years, we asked Google representatives what possible need they might have for their ubiquitous (and at the time, permanent) hoarding of search queries. The most concrete reply given at that time was that it helped determine the real intent behind misspelled search queries. Since then, Google's widespread data collection has been used for everything from [predicting influenza outbreaks \(badly\)](#) to enabling the targeted delivery of political advertising. But these are only the publicly known purposes; Google's actions in its multiple markets, together with other tech giants, are driven by the data it collects, merges and re-purposes from those markets.

Not only is this use and re-use of data within these companies unpredictable and unseen; guarantees made to the public and to regulators to silo private data or use personal information for only a prescribed purpose are constantly broken. When Google purchased online advertising competitor DoubleClick in 2007, the company assured users in its Privacy Policy that "DoubleClick's ad-serving technology will be targeted based only on the non-personally-identifiable information." A decade later, that informal divide was [quietly \(and invisibly\) removed](#) and the data merged. During its acquisition of messaging tool WhatsApp, Facebook assured European Union regulators that it would be unable to reliably match its users' account details with that of WhatsApp's own customer base. Two years later, it announced plans to do just that, [prompting a €110 million fine](#).

We concentrate on the topic of personally identifiable data because of its importance to privacy and the upholding of the principles of data protection. However, it demonstrates a wider principle: a significant advantage in one market can be turned into a *generic* advantage that applies elsewhere, if that advantage can be used to provide a rich source of data about the platform users' behaviour in different markets.

Nowhere is that more true than in adtech. The development and evolution of online behavioral advertising over the past 25 years has had profound effects on the market. Behavioral data can be gathered from anywhere and used to target ads on any platform.

As a result, any new stream of personal data a company acquires can be leveraged to strengthen its behavioral advertising business everywhere. Mergers between the adtech giants and companies in seemingly different industries (for example, Google’s purchase of Fitbit) must be scrutinized through this lens.

It could be argued that WhatsApp had a commanding (but not dominant) lead in messaging users prior to the Facebook acquisition, and it could also be argued that the expected overlap between WhatsApp and Facebook users meant that numerical lead would not have directly transformed the messaging market as a result of the merger. But the WhatsApp data could, and was, usefully applied to all of Facebook’s markets.

This points to regulators viewing the effect of SMS in one market as having a consequent effect in even quite unrelated online or digital markets also occupied by the incumbent. It also points to a potential weakness in the ability of regulators to robustly monitor and punish cross-market data-flows.

We suggest that this may be best resolved by stronger enforcement of data protection law, and in particular its requirements that personal data be used only for specific, explicit purposes, and kept for no longer than necessary. We stress that it’s not good enough for companies to request blanket consent to use behavioral data gathered from many different products for advertising. We foresee an important role for the Information Commissioner’s office in assisting the Competition and Markets Authority in pursuing this objective.

**3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:**

- **What are the criteria that should define which activities fall within the remit of this regime?**
- **Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.**

Our experience is that large tech companies will often contend that their markets are fiercely contestable, and *theoretically* multi-homeable, but that their users simply choose not to move or switch. (For instance, Google has consistently insisted that other alternatives are “[one click away](#)”.) Both Google and Microsoft, in different eras, argued that their Web browsers had obtained dominance primarily through being simply better than the competition, rather than infinitely better-positioned for download and use. We would encourage the development of more objective methods to determine contestability and true multi-homeability as criteria. We would also stress that network effects and vertical integration often give incumbents an unfair leg up in “contestable” markets. The quality of Facebook’s product is largely dependent on content from its users, which competitors can’t replicate. Intra-operable integrations between different products under the same conglomerate may provide benefits to consumers that small competitors can’t match.

While perhaps prefiguring the remedies section, we'd also note that the government may have a broader power to weaken the moat around incontestable incumbents, and encourage multi-homeability by reducing the ability for large companies to legally threaten or block competitors through existing [computer-crime, copyright and contractual boilerplate](#).

One way to do this would be to explicitly indicate that terms of service that can be wielded in anti-competitive ways, such as prohibitions on usage or access by those offering or planning competing products or services, would be in scope for examination by the regulator. Other contractual restrictions, such as reverse-engineering bans, or a pattern of suing information security researchers or the providers of tools to analyse or track or alter an incumbent company's behaviour, could be used as indicators of a potential SMS.

**4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?**

EFF has written extensively on the implications of the pandemic in the digital space, and we encourage the Taskforce to consult our ebook, [EFF's Guide to Digital Rights and the Pandemic](#), on this topic.

A recurring pattern in digital technology that we fully expect to continue into the future is online service providers' frequent diversification into in-house content production, or tight cooperation with particular content providers of equal size and market concentration. Apple and Amazon's involvement in TV production, and Google's copyright-takedown agreements with major studios and record companies are examples of this pattern.

This expansion both works to cement a monopoly through exclusive agreements that deny others the ability to distribute the same content, and also moves the interests of the incumbent away from its user-creators.

To paint a future scenario that has one foot in the present: The creators who upload their work to Google's Youtube and Amazon's Twitch must currently use carefully licensed background music or risk [aggressive takedown and deletions](#) by the incumbents hosting them. The market power of these giant platforms allows them to negotiate the blanket use of some music for their users --- perhaps preferentially their own in-house content or close partners. But this arrangement also means that if those users ever wish to portably switch providers, the incumbent has an opportunity to claim a licensing violation and thus have that user's content removed from competing services.

We have seen this pattern – of incumbents creating platforms, and then expanding into businesses that compete with their own users – play out so often that we urge the Taskforce to consider special treatment of large content-providing partners or internal IP in their consideration of mergers, acquisitions and horizontal market expansion.

## **Remedies for addressing harm**

### **5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?**

We refer the Taskforce to our previous answers regarding the effect of large digital platforms on the dangerous aggregation and misuse of personal data.

There are genuine challenges in [squaring the circle of privacy and interoperability](#). However, the current pattern of large platforms asserting that the best way to protect privacy is for them to hold more tightly onto user data is a [potentially anti-competitive posture](#). We encourage the Taskforce to engage with all stakeholders to better understand the best ways to protect privacy in a pro-competitive manner – and be sceptical of solutions suggested by the platforms themselves.

### **6. In relation to the code of conduct:**

- **Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?**
- **To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of ‘Fair trading’, ‘Open choices’ and ‘Trust and transparency’, be able to tackle these effects? How, if at all, would they need to differ and why?**

Once again, we would emphasise that *user rights* is a powerful and positive framing for a code of conduct, given that it concretely connects corporate behaviour with an affected group--a group that can also include future competitors. We are happy to discuss this in more detail with the Taskforce.

### **7. Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?**

Yes, acquisitions by dominant firms should be more heavily scrutinized.

Investors in digital start-ups have traditionally envisaged two potential positive “exits”: liquidation of the investment via an initial public offering, or sale of the company to a well-funded, established player.

With the decline in successful IPOs and the rise of large incumbent tech giants, the acquisition path has served to dominate the future plans of many start-ups. This has a powerful anti-competitive result in that even aggressively disruptive competitors are amenable to buy-out by their larger rivals. It also limits the nature of companies that can obtain VC funding: a start-up that is compatible with an established player is more likely to receive funding than one directly antagonistic to its existence.

We encourage the Taskforce to consider this dynamic in considering its approach to merger and acquisition control.

Furthermore, we urge the Taskforce to consider the dynamics of new data flows created by mergers. The GDPR and emerging privacy regulations around the world place special restrictions on flows of personal data across company boundaries. While we believe this is a good thing for users overall, it incentivizes data-driven firms to bring as many sources of personal information “in-house” as possible. For example, Plaid, a financial technology company which facilitates data flows between banks and user-facing apps, was acquired earlier this year by Visa, which operates a massive behavioral advertising business based on user transaction data. This phenomenon is bad for users and bad for competition.

**8. What remedies are required to address the sources of market power held by digital platforms?**

- **What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?**
- **Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?**

**9. Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?**

- **Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?**
- **What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?**
- **What measures, if any, are needed to enable consumers to exert more control over use of their data?**
- **What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?**



The ACCESS Act in the United States describes one approach to regulatory intervention involving data access and interoperability, through primary legislation; [our analysis is included here](#).

Within that analysis, and as part of much of our ongoing research, we discuss what we believe to be one of the most powerful ways to deploy true interoperability in the service of increased competition and public benefit. We call this [adversarial interoperability or competitive compatibility](#).

We offer this as an approach that would avoid requiring continual structural interventions, but instead allow the market's own use of interoperability itself to act as a competitive pressure on companies.

We would also note that while we are strong believers in interoperability, especially adversarial interoperability, as a force to tackle market dominance, sometimes stronger medicine should be applied. After a market has “tipped”, it may be necessary to actively break-up dominant businesses. Such break-ups would require international co-ordination, and we would encourage the Taskforce to consult with other groups, particularly the relevant authorities at the Federal and State level in the United States. The difficulty of co-ordinating such regulatory steps should not preclude them from consideration.

### **Procedure and structure of a new pro-competition approach**

#### **10. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?**

We agree with all of these characteristics, and in particular emphasise that the aim should be to provide these attributes as a service to users and future competitors, rather than for the incumbents.

#### **11. What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?**

Our only request is that the framework commit to transparency and open formats for its consultations. The UK's Digital Service has been an exemplary platform for consultations in the past, and we hope that the UK will continue to lead in its clear and inclusive approach to government consultations.

#### **12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data**

**protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?**

We have previously noted in this document the importance of using data protection law to cast a light on (and discipline) platforms' internal use of personal data. We would re-iterate that any regulatory oversight of the Internet and digital services has often unexpected interactions with intellectual property regimes, computer security law (including [the Computer Misuse Act](#)), and the use and misuse of [terms of service](#). We would be happy to consult further with the Taskforce on these topics.

Yours faithfully,

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