

Appendix G: A modern competition and consumer regime for digital markets

Introduction

1. This appendix sets out our proposals for a modern competition and consumer regime that is able to effectively address concerns in digital markets. These proposals are based on evidence from the CMA's own work in relation to digital markets, together with inputs received throughout the taskforce process.
2. Given the dynamic nature of digital markets, we recognise that these proposals are unlikely to be an exhaustive solution for the long-term. Rather, we consider it is important the DMU is set up to take on a proactive role as a centre of expertise in relation to competition across digital markets, making it well-placed to advise on whether further reforms are needed in future.
3. In this appendix we consider:
 - the types of concerns which may arise in relation to digital firms (not just those with SMS status);
 - how the DMU could better identify such concerns at an earlier stage, through a proactive monitoring role; and
 - the tools which are needed to address these concerns.

Wider competition and consumer concerns in digital markets

4. Digital technologies have been a major driver of positive change across the economy. These technologies have expanded choice for consumers and allowed new businesses to emerge and to flourish. Digital technologies have enabled disruptive entry and a wide range of innovations to the benefit for customers.
5. However, as we have noted elsewhere in our advice, there are widely held concerns in relation to a broad range of digital markets. These concerns are not confined solely to a small number of the most powerful firms, and as such, not all will be addressed through our targeted proposals for an SMS regime. Here we focus in on four particular concerns which we consider interventions are most needed to address:
 - **Barriers to effective and informed consumer decision-making** – for example consumers being presented with too little, too much, incomplete

or misleading information. In addition, the use of defaults and user design to shape consumers' decision-making can in practice limit their ability to make effective decisions. This may sometimes relate to how firms use consumer data but may also relate to consumer decision-making more generally.

- **Activity or content which could lead to economic detriment for consumers and businesses** – for example when consumers are misled by fake reviews, online scams or counterfeit goods.
- **Barriers to customer switching and multi-homing** – for example where a lack of data portability may make it less likely a consumer or business will switch providers, as doing so may mean they lose their data (for example chat history, photos or tracked activities) or online reputation (for example ratings and reviews).
- **Coordination failures** – transformative innovation and emerging markets or business models may be held back by misaligned incentives for incumbents in terms of data access or the availability and use of open standards.

6. Below we elaborate on each of these concerns, explaining the particular relevance of each to digital markets.

Barriers to effective and informed customer decision-making

7. Effective and informed customer decision-making is crucial in driving effective competition. It enables consumers to select the products that are best suited to them, driving competition and providing incentives for firms to respond to customer preferences. However, consumers are often impeded from making effective and informed choices.
8. In some cases, customers may face barriers to effective and informed decision-making due to a lack of information.¹ In others, they may be presented with too much information. Information may also be misleading (by action or omission), hidden, or presented at the wrong time for effective decision-making (for example drip pricing). Consumers may also not understand the basis on which algorithms – which underpin many digital business models - present information to them. For example, a lack of information may make it difficult for consumers to understand whether the top

¹ That is, there is an information asymmetry.

search result on a marketplace or comparison site is an independent recommendation, a paid-for advertisement or a combination of the two.

9. Changes to the information with which consumers are provided may help them to make effective decisions. However, this is not always the solution. Some choices are complex and, in such circumstances, additional information may contribute to information overload, impairing rather than assisting effective choice. In such circumstances, customers may be able to make more effective decisions when presented with simpler choices where key information is highlighted. Similarly, customers are often time constrained and it may be inefficient for every customer to make an active decision regarding every possible choice. As a result, defaults have an important role in reducing the number of active choices a customer has to make.
10. The way in which choices are presented to customers and the defaults that are selected is referred to as 'choice architecture'. In many cases, firms may design their systems in ways which benefit consumers' interests (for example, through opt-ins or by making it easy for consumers to opt out). However, firms can also manipulate the way in which options are presented to nudge or push consumers towards certain choices which benefit the firm rather than the consumer.
11. The evidence which we have received and the CMA's wider work have provided the following non-exhaustive examples of the types of situations in which a firm's choice architecture can lead to consumer harm:
 - unnecessary or excessive **data collection** – for example when firms fail to offer customers a clear choice not to share their personal data which is used for non-operational purposes;
 - the adoption of **default settings** which favour firms' interests rather than those of consumers – including the use of privacy defaults which maximise rather than minimise data collection;²
 - the use of **subscription traps** – such as when inactive digital subscriptions are automatically renewed³; and

² CMA market study into online platforms and digital advertising, [Appendix Y: choice architecture and Fairness by Design](#) at paragraph 59 – this sets out examples of platforms setting defaults that are likely to benefit the platform, eg in Snapchat's 'Advert Preferences' section of a consumer's settings, consumers are opted in by default to being shown 'Audience-Based Ads', 'Activity-Based Ads', and 'Third-Party Ad Networks', while Twitter enables personalised ads for consumers using the platform for the first time by default. Consumers must visit Twitter's 'Personalization and data' settings and make an active choice to adjust these.

³ See, for example, the CMA's [investigation into anti-virus software](#).

- hindering or impeding **cancellation of accounts** – when it is more difficult to close an online account than it is to open one in the first place without a legitimate reason.
12. A recent report by the Behavioural Insights Team and the Centre for Data Ethics and Innovation⁴ found a range of design features and behavioural factors that limit people’s control over their privacy and personalisation settings in a wide range of online contexts, from social media sites to web browsers. These include the use of defaults, opaque language, inconvenient timing of prompts, and excessive friction to find relevant menus.
 13. This accorded with concerns identified in our market study relating to the practices of a range of market participants that consumers have too little control over the use of their data for personalised advertising. In the market study, the recommendation was to impose a choice requirement remedy and a Fairness by Design duty only on platforms with SMS in the first instance.⁵ This was on the basis that these are the platforms with market power, which hold the largest amount of consumer data, are used by the most consumers, and consumers find it most difficult to avoid using. The report envisaged that the DMU would review and refine the implementation of these measures and assess the impacts before considering potential wider application to non-SMS platforms.
 14. The impact of choice architecture is not restricted to data choices, however. As the examples above show, default settings and other design choices made by digital firms which control the consumer interface may mean consumers are unable to give effect to their preferences across a wide range of their interactions online.
 15. The use of manipulative choice architecture can be harmful in a range of ways. As well as limiting consumers’ ability to control use of their personal data, it can also lead customers to spend more money than they intended or to make otherwise unintended choices.⁶ Additionally, in the longer-term, the widespread use of manipulative choice architecture may undermine confidence in markets by generally reducing the faith customers place in the information presented to them.⁷

⁴ Behavioural Insights Team (2020), [Active Online Choices: Designing to Empower Users](#)

⁵ CMA's market study into online platforms and digital advertising, [final report](#), paragraph 8.79.

⁶ These issues were also an aspect of the CMA's recent investigation into a number of hotel booking sites (see [Online hotel booking case page](#)).

⁷ ie creating an adverse selection problem where customers are unable to identify helpful nudges and informative information from nudges and information intended to manipulate their actions.

16. While there is nothing ‘new’ about businesses wishing to persuade consumers to purchase their products (for example, the position of products in supermarket aisles), concerns regarding choice architecture appear particularly pressing in digital markets. Digital technologies increase the ease with which choice technologies can be adjusted and manipulated. These technologies also increase the ability of firms to conduct large scale testing to understand the effectiveness of different choice architecture decisions and to collect accurate data to assess the effectiveness of different alternatives. As explored later in this appendix, intervention is needed to better understand the impact of the design of choice architecture on consumers ability to exercise effective choice, and to support consumers in making effective choices.

Activity or content hosted on platforms which can lead to economic detriment for consumers and businesses

17. Digital technologies are particularly associated with ‘platform’ business models, such as online marketplaces and social media platforms, which provide a means by which users can access different sides of the platform. Activity or material hosted on such platforms which can result in economic detriment to consumers and businesses includes fake and misleading online reviews, scam advertisements (such as for high-risk financial schemes) and the sale of counterfeit goods.⁸ Such practices can damage consumer confidence online, undermine effective competition and damage businesses.
18. Joint Ofcom and ICO research⁹ into consumer experiences of and potential sources of online harms found that when asked about concerns in relation to using the internet, 42% of adults expressed concern in relation to scams and fraud online, with 22% having experienced a scam or fraud online. The CMA’s work on fake online reviews¹⁰ has demonstrated the economic harm such material can cause by undermining consumer trust in markets. For example, online reviews play a key role when customers buy products and services, with an estimated £23 billion of purchases a year potentially influenced by online reviews.¹¹
19. Fake reviews mislead consumers into making purchases that they might not otherwise have made: when consumers make a purchase based on positive

⁸ The infringement of intellectual property rights was also flagged as a significant concern in several of the responses to our call for information. Work to address online IP infringements is currently being taken forward by the Intellectual Property Office.

⁹ Ofcom (2020), [Internet users' experience of potential online harms: summary of survey research](#).

¹⁰ See fake and misleading online reviews trading [case page](#).

¹¹ CMA (2015), [Online reviews and endorsements: Report on the CMA’s call for information](#) at page 16. This analysis was based on the CMA’s consumer survey explained in section 3 of that report.

customer feedback or a celebrity/influencer product endorsement, they are likely to believe that the feedback is based on an individual's genuine experience of the product or service, rather than being based on payment or an inducement. The resulting purchase may lead to low customer satisfaction¹² and, given consumers' widespread reliance on online reviews when deciding to make a purchase,¹³ a significant erosion of consumer trust. Fake reviews also harm competition. Genuine reviews enhance and sharpen competition between suppliers. This benefits consumers who are able to compare products more critically, intensifying competitive pressures on the suppliers of the products to do better. This benefit to competition (and therefore consumers) is substantially eroded when the reviews turn out to be unreliable so that consumers no longer take them seriously.

20. Unlawful content also harms fair dealing businesses. For example, fake online reviews create an unequal playing field for businesses which comply with consumer law; and the sale of counterfeit goods, mostly of inferior quality to the genuine article, infringes the intellectual property rights of copyright/trademark owners and damages their brands.
21. Similar concerns have been raised by the Financial Conduct Authority in relation to investment frauds. In 2019/20, the FCA received 20,326 reports of firms offering financial services without FCA authorisation, such as investment frauds.¹⁴ The vast majority of the reports involved online activity. The FCA has seen a notable increase in the number of investment fraud victims aged 20-35 who were contacted via social media, highlighting that even those considered to be the most computer literate in society can fall victim to fraud. The FCA has issued almost double the number of alerts about suspected scams in the last year as it did in the whole of 2019 (over 1100 and 573 alerts respectively).¹⁵
22. The FCA has told us that social media companies and internet service providers often remove websites and social media accounts promoting investment frauds too late to prevent the public investing. These digital firms are overly dependent on the FCA reporting concerns about specific websites or social media accounts to them, before taking action. Often, within hours of them removing a fraudulent website or social media account, new ones appear to take their place. While the FCA does liaise with online platforms, social media companies, and internet service providers over the removal of

¹² Which? (2018), The facts about fake reviews. In a [survey](#) of more than 2,000 UK adults, 31% of respondents said that they had bought a product because of excellent customer scores and had been disappointed by it.

¹³ According to the same Which? survey, 97% of respondents said that they used online customer reviews when researching a product.

¹⁴ [FCA Annual Report and Accounts \(2019/2020\)](#) at page 19.

¹⁵ [FCA publications, warnings](#), 2020, 2019.

websites and social media accounts promoting investment frauds, it does not have the power to compel many of them to do so, as many operate from outside the UK.

23. Intervention is needed to address illegal or unlawful content, such as scam adverts and the sale of counterfeit goods, which can be economically harmful. As set out in more detail below, we consider that existing consumer laws need to be strengthened to address these concerns.

Barriers to switching and multi-homing

24. Effective competition in digital markets relies on customers being willing and able to switch to alternative providers where they have a better service, or to multi-home - using similar services provided by different providers simultaneously.
25. There are several features in digital markets which may prevent consumers and businesses from being able to switch between and multi-home across providers. These include:
 - **Loss of customer data** – a consumer may be less likely to switch between two competing apps if doing so leads to the loss of all of their historic data, for example chat history, photos or tracked activities.
 - **Loss of reputation** – a buyer or seller may be less likely to switch between two marketplaces if doing so leads to the loss of all of their historic reviews on which their reputation is based.
 - **Technical barriers** – a lack of interoperability between providers may make it harder for consumers to switch and multi-home, for example if users of an instant messaging app are ‘locked in’ to that app, because their contacts also use it, and they cannot message their contacts through an alternative messaging app.
26. The Furman Review highlighted the potential for personal data mobility and interoperability to promote competition by lowering switching costs and barriers to entry and expansion, thus enabling consumers to more easily compare services and move between providers.¹⁶ In markets where consumers could or would prefer multi-homing it could also facilitate this as there is less loss of services between sites. It might also reduce the effect of network effects as users would care less about what network they are on because they can interact with those on other networks. In many cases

¹⁶ Furman Review (2019), [Unlocking Digital Competition](#) – Recommended action 2.

intervention may be needed to overcome such barriers. We explore how such intervention could be better supported below.

Coordination failures

27. In some circumstances it would be beneficial for customers if market participants coordinated their actions. For example, coordination on standards for the world wide web has made it possible for webpages to be developed so they are compatible with a wide choice of browsers. Similarly, open standards enable emails to be sent and received between users with different email providers.¹⁷ Coordination on these common standards has allowed competition and innovation to thrive
28. Markets will often naturally self-correct to create common standards and beneficial coordination without the need for regulatory intervention.¹⁸ However, beneficial coordination may sometimes fail to arise where individual firms do not account for the benefits such coordination would provide customers, either in the short or long term, and/or do not have incentives to reach the same outcome (in fact, in many cases companies have strong incentives to build “moats” around their services to protect future revenues).
29. The Furman Review highlighted the potential for interoperability and systems with open standards to support ecosystems where direct service competition and innovation thrive as they enable innovators to build services which are compatible or interact with those that already exist.¹⁹ In many cases, intervention may be needed to identify where coordination is likely to result in benefits for consumers and businesses, and how coordination could best be achieved. We consider below how such intervention could be best supported.

Summary of wider concerns in digital markets

30. There are a variety of concerns relating to digital markets that extend beyond the SMS regime. In some cases, these issues themselves are fairly specific to digital markets, for example because digital technologies increase the ease with which activity or content which harms customers can be hosted on platforms or because digital technologies increase the ability of firms to create barriers to effective customer decision-making. In other cases, the way in which a concern manifests itself could be particular to digital markets, for example the importance of data mobility in affecting barriers to switching.

¹⁷ HTTP in the case of the web and SMTP and IMAP in the case of email.

¹⁸ For example, USB has emerged as an industry standard without regulatory intervention.

¹⁹ Furman Review (2019), [Unlocking Digital Competition](#) – Recommended actions 1 and 2.

31. Our recommended approach to identifying and addressing these concerns is twofold:
- To provide the DMU with information-gathering powers to enable it to better monitor digital markets to identify such concerns and provide the basis for swifter and more effective intervention; and
 - To strengthen competition and consumer protection laws to enable these concerns to be better addressed.

A proactive approach for digital markets

Recommendation 12: The government should provide the DMU with a duty to monitor digital markets to enable it to build a detailed understanding of how digital businesses operate, and to provide the basis for swifter action to drive competition and innovation and prevent harm.

32. In this section we set out:
- why we consider the DMU should take proactive steps to build its understanding of digital markets beyond those covered by the SMS regime;
 - how we consider the DMU should build this understanding, including the powers it would need;
 - what action we would expect the DMU to take when it considers intervention is necessary to address harms or to promote greater competition or innovation; and
 - the need for the DMU to work closely with other regulators and with the government in this work.

The need for a proactive approach

33. As set out in chapter 3 of the main advice, we recommend the DMU's duty should be to further the interests of consumers and citizens in digital markets by promoting competition and innovation. If the DMU is to fulfil that duty it will need to be able to spot and act swiftly to address market developments, activity or behaviour in digital markets which has the potential to cause harm. A DMU acting as a centre of expertise in digital markets would have a head-start in tackling these problems, getting to the root of the concern more quickly, and using its existing knowledge base to find solutions.

34. The DMU could also have an important role in proactively identifying opportunities for interventions to support greater competition and innovation, for example to remove regulation which acts as a barrier to innovation, by supporting interventions like personal data mobility which can overcome barriers to consumers switching or multi-homing, or by supporting coordination by firms to develop common standards which deliver benefits for consumers.

How the DMU would build-up information, knowledge and understanding

35. We propose the DMU should have a range of tools to enable it to build up information, knowledge and understanding of digital markets. These tools should include:
- engaging regularly with a diverse range of participants in digital markets;
 - undertaking research and gathering market intelligence; and
 - gathering information through calls for information and market studies, as well as through routine market monitoring.
36. As set out further below, the information the DMU gathers will also feed into its collaboration with other regulators, including through the Digital Regulation Cooperation Forum (DRCF).²⁰

Engaging regularly with a diverse range of participants

37. We would expect the DMU to run an active stakeholder management programme, meeting regularly with a diverse range of participants across digital markets on an ongoing basis. This should include those working in digital firms themselves: not just compliance teams but those responsible for the commercial areas of the business who can set out how products and services work, are designed and monetised. It should also include investors, academics, researchers, consultants and those who work closely with digital firms and can provide insights into key trends and developments. It should also include businesses and consumer groups representing users of digital firms and their representatives.
38. It will be essential that the DMU understands how digital markets are evolving and has access to expertise and technical knowledge from within digital firms to support this. One way of facilitating access to such expertise on an ongoing

²⁰ The [DRCF](#) comprises Ofcom, the ICO and the CMA and is working to deliver a step change in coordination and cooperation between regulators in digital markets.

basis could be for the DMU to establish a group of expert advisers or fellows who could support the DMU for short fixed periods when it is working on particular issues.

39. Another way of developing knowledge of market developments might be for the DMU to be a 'hub' for innovative businesses to showcase their products, and to raise concerns about regulatory barriers to development. This may draw on the experience of the FCA's Innovation Hub within financial services which provides a dedicated contact point for innovators and offers help to understand the regulatory framework and how it applies.²¹

Undertaking research and gathering market intelligence

40. We expect the DMU could have access to a wide range of research and market intelligence reports to better understand how digital markets are evolving. In addition, the DMU could undertake its own research, or partner with other organisations, academics or universities, to better understand the impact of new technologies on consumers' and citizens' interests.
41. We envisage that the DMU would make publicly available its research and studies (subject to legal protections on confidentiality and public interest) to inform better market practices and to inform further research or studies.

Gathering information through calls for information and market studies as well as routine market monitoring

42. We recommend that the DMU is able to gather information in relation to digital markets through calls for information and market studies under the Enterprise Act 2002. These could focus on particular themes or issues, such as structural, behavioural or technical issues at a firm, market or cross-market level. For example, a number of recent reports have highlighted the need for detailed evidence-based examinations of issues such as data sharing and access to data to develop policy frameworks,²² or to fully exploit the untapped potential of different forms of data.²³
43. Alongside being able to undertake market studies, we also recommend the DMU is able to proactively monitor digital markets on an ongoing basis. This is important because:

²¹ FCA, [Innovate and Innovation Hub](#).

²² [UK National Data Strategy](#) (Mission 1).

²³ Geospatial Commission and Cabinet Office (November 2020) – [Report: Enhancing the UK's Geospatial Ecosystem](#).

- market studies provide a snapshot of the operation of a particular market at a particular point in time, but do not allow for monitoring of the market on an ongoing basis; and
 - market studies are time-limited under statute and must be completed within 12 months, with decisions taken on whether intervention is necessary at fixed points.²⁴
44. We consider that such ‘one-off’ and time-limited examinations alone will not be sufficient to address the challenges and opportunities of digital markets. Examination of digital markets and practices are also needed outside time-limited market studies because:
- Markets and practices are dynamic, constantly evolving, and have rapid impact on consumers and businesses.
 - Common practices and technologies underpin business models across a range of different sectors. A time-limited market study on one sector is likely to contain material and analysis which could be valuable on an ongoing basis in another or market wide. For example, algorithmic targeting, which is central to several markets, raises different issues in different markets but is based on the same underlying technology and practices.
 - Potential remedies are likely to ‘overlap’ between sectors, for example methods of authentication which may underpin customer identification.
45. We recommend the DMU should have strong information gathering powers available to support its work, both in undertaking market studies and in monitoring digital markets.²⁵ Information gathering powers are necessary because:
- the practices of interest are often inherently complex, opaque, and automated, for example machine learning algorithms;
 - relevant information is unlikely to be in the public domain or offered voluntarily, for example the results of A/B testing, internal papers informing choice architecture, or decisions (automated or otherwise) to target particular types of consumer;

²⁴ [Section 131B\(4\) of the Enterprise Act 2002](#).

²⁵ This complements recommendation 15 of the Furman Review (2019), [Unlocking Digital Competition](#) which recommended sufficient and proportionate information-gathering powers for authorities responsible for enforcing competition and consumer law.

- the DMU will need full and accurate information to fully understand and consider issues and decide where action may be needed. This will ensure that it acts proportionately and swiftly in selecting sectors, firms, or practices for closer study or intervention;²⁶ and
 - by reducing the imbalance of information between digital businesses and regulators, the risk of errors is reduced.²⁷
46. We would envisage that the types of powers might include:
- businesses being required to go beyond supplying information or an explanation of documents to demonstrate how a particular technical process works, with ‘live’ examples;
 - given the dynamic environment, businesses being required to ‘version control’ their models, code and data for subsequent assessment; and
 - businesses being required to grant access to trained models, code and data in a useable format.
47. Information gathering powers, while available, should be used sparingly for the limited and specified purpose of monitoring digital markets. Use of these powers would need to be subject to safeguards to ensure appropriate use, for example by requiring the DMU to state the purpose for which it is used and that it is used only when necessary, on a proportionate and targeted basis.
48. For these purposes, as we discuss in Appendix B, we propose that ‘digital markets’ are interpreted widely to cover any situation where digital technologies are material to products and services provided.²⁸ Were there to be a dispute as to whether an activity was covered within the DMU’s remit, we would expect that matter to be passed to the CMA and/or the relevant sectoral regulator, to consider as part of its wider work across the economy.
49. We envisage that the DMU would make publicly available the results of its market studies and provide regular updates on its monitoring work (subject to

²⁶ For instance, it may be disproportionate to investigate a whole sector where information-gathering on a more focused issue or unfair practice within that market could allow the DMU to more effectively understand and assess issues.

²⁷ CERRE (2020), [Digital Markets Act: Making economic regulation of platforms fit for the digital age](#) at pages 19-20.

²⁸ As we discuss in Appendix B, the term ‘digital’ is used to refer to a wide range of technologies, such as the development of the Internet, improvements in computer processing power and advances in data storage and analytics capabilities. These technologies can be used by different firms to varying degrees so there is no bright-line definition of what is or is not a digital firm.

legal protections on confidentiality and public interest) to inform better market practices.

A flexible approach to regulation

50. If the DMU were to identify a need for intervention to further the interests of consumers or citizens in line with its statutory duty, it should have a range of possible approaches available to it. These should include:
- **Supporting industry initiatives to promote competition and innovation** - The DMU could work with industry with the aim of ensuring that industry initiatives drive competition and innovation in the interests of all market participants, for example in projects focused on interoperability and common standards.²⁹
 - **Supporting regulatory initiatives such as sandboxes** – Existing regulation may sometimes be an impediment to innovations which would benefit consumers and competition. Where, through its monitoring role, this has been identified, the DMU may consider whether a temporary suspension of the rules (where possible) or an amnesty on enforcement to enable an innovative proposition to be tested may be appropriate. This is generally known as a ‘regulatory sandbox’ and has been successfully introduced in the UK by a number of regulators in their area of responsibility.³⁰
 - **Publishing guidance and recommendations to industry** – The DMU may publish guidance and recommendations. This could help firms better design their products and services such that they support consumer and citizen interests.
 - **Putting advice or recommendations to government** – The DMU could put forward advice or recommendations to the government, for example by strengthening existing laws or introducing new ones. The DMU could also be well placed to support the government’s wider thinking, for example in relation to its National Data Strategy.³¹

²⁹ For example the [Data Transfer Project](#) launched in July 2018 by Google, Facebook, Microsoft and Twitter, to build a common framework with open source code that can connect any two online service providers, enabling a seamless, direct, user-initiated portability of data between the two firms. Apple has also subsequently joined the project.

³⁰ These include the FCA’s Regulatory Sandbox, Ofgem’s new Energy Regulation Sandbox and the ICO’s privacy Regulatory Sandbox.

³¹ [UK National Data Strategy](#) provides for the development of a policy framework setting the correct conditions for making data usable, accessible and available across the economy and identifying where greater data access and availability can support growth and innovation.

- **Identifying a matter for enforcement** - In the course of its work, the DMU may come across concerns which are likely to breach existing laws. Where potential breaches are in relation to competition or consumer protection law, these could be dealt with by the CMA, or by a concurrent regulator, or in the case of certain consumer protection breaches Trading Standards. In addition, potential breaches of data protection or e-privacy laws could be referred to the ICO.
- **Making or recommending a Market Investigation Reference (MIR)** – We consider that the DMU should be able to make or recommend (depending on the institutional design of the DMU) an MIR where it considers there are concerns in relation to competition or consumers in digital markets which require intervention to address. This would include where intervention is likely to be required in relation to non-SMS firms, or to non-designated activities of SMS firms.³²

Collaboration and co-ordination with other regulators and the government

51. In adopting a proactive approach to further the interests of consumers and citizens in digital markets by promoting competition and innovation, it will be crucial for the DMU to work closely with government and with other regulators.
52. Topics such as the growth of algorithmic decision-making, data ethics, cloud and cyber-security will be relevant to a number of regulators active in digital markets and the DMU will need to coordinate closely with them in its work in these areas. Furthermore, in considering the interests of consumers and citizens the DMU will have to consider a range of wider policy objectives such as privacy, media plurality, media literacy, online safety and security. It will be essential that the DMU works closely with other regulators, such as Ofcom and the ICO. The CMA, Ofcom and ICO have already established the DRCF to deliver a step change in coordination and cooperation between regulators in digital markets.³³
53. The DRCF is now working with government to consider the steps that should be taken to ensure adequate coordination, capability and clarity to address cross-cutting challenges and to ensure an integrated and efficient regulatory response across the digital regulation landscape.³⁴ As a part of this work, the DRCF will consider the challenges to effective coordination and the mechanisms that might be needed to address them (for example, duties to

³² As set out in Appendix D, the DMU could also make or recommend an MIR (depending on the institutional design of the DMU) to undertake full ownership separation remedies in relation to the designated activities of SMS firms.

³³ DRCF.

³⁴ [Government response to the CMA's market study into online platforms and digital advertising](#), November 2020.

consult, concurrency arrangements, MOUs, joint action plans or shared objectives). It is also expected to look at the existing information sharing arrangements between regulators and how these might be improved to facilitate cross-regulatory working.

54. The DMU will also need to work closely with the Intellectual Property Office (IPO) where patents and other intellectual property rights play an important role in promoting – or hindering - the development of competitive and innovative digital markets.³⁵
55. Furthermore, interventions involving data will need to be coherent with wider data policy initiatives across sectors and regimes. This may build on the strong links already developed between the CMA and the ICO in follow-up work to the market study, the taskforce itself and the creation of the DRCF. The DMU will need to work closely with government in its implementation of the National Data Strategy, especially the areas which relate to the effective functioning of digital markets. The DMU could also work closely with the Smart Data Working Group to explore the potential for smart data initiatives in digital markets.

Strengthening competition and consumer protection laws

Recommendation 13: The government should strengthen competition and consumer protection laws and processes to ensure they are better adapted for the digital age.

56. Alongside the SMS regime, it is essential the right powers are available across digital markets more widely to drive competition and innovation and address harm.
57. The CMA has already made the case publicly for modernisation of its own toolkit in its reform proposals which are set out below. We do not repeat all the reform proposals in this advice, but rather draw out those particularly relevant to digital markets, in particular proposed reforms to the markets regime.³⁶
58. We then go on to highlight some additional recommendations – identified as part of our work on the taskforce – which have the following intentions:

³⁵ Furman Review (2019), [Unlocking Digital Competition](#) – IP rights may promote competition by protecting innovation (paragraph 2.74). IP rights may also harm competition, for example through ‘patent thickets’ where a proliferation of patents raises barriers for new entrants (paragraph 4.21ff.)

³⁶ [Part 4 of the Enterprise Act 2002](#).

- addressing unlawful or illegal activity or content on digital platforms which could result in economic detriment to consumers and businesses;
- strengthening powers to enable effective consumer choice in digital markets, including by addressing instances where choice architecture leads to consumer harm; and
- strengthening enforcement of the Platform to Business Regulation.

The CMA's reform proposals

59. The CMA has been making the case publicly for modernisation of its own toolkit since February 2019, when it published proposals for a series of reforms to its competition, consumer protection, markets and mergers laws (referred to as the 'reform proposals').³⁷ The CMA's priority areas for reform are summarised in Box G.1 below.

Box G.1: The CMA's reform proposals

In February 2019, the CMA published a letter to the then Secretary of State for Business Energy and Industrial Strategy setting out proposals for a series of reforms to its competition, consumer protection, markets and mergers laws. Key proposals include:

- Clear duties and responsibilities on the CMA, including a duty to complete its work expeditiously, backed by new and improved powers to achieve this. It has identified several ways of speeding up the operation of the existing regimes, such as by streamlining certain procedures for Competition Act cases.
- Legislation to provide for civil fines for breach of consumer protection laws and to give direct decision-making powers to the CMA (and potentially other authorities) to enforce these laws. This would put consumer enforcement powers on the same footing as competition enforcement: responsive and robust enough to deter wrongdoing.
- A robust and proportionate appeals regime. It has proposed that the effectiveness of the current system of scrutiny of Competition Act decisions in the Competition Appeal Tribunal (CAT) be considered, including what might be achieved through reform of the procedural rules of the Competition Appeals Tribunal.

³⁷ [Letter from Lord Andrew Tyrie to the Secretary of State for Business Energy and Industrial Strategy](#), February 2019.

The CMA has been actively engaging with government on these issues since making its proposals for reform. We encourage the government to consult publicly on these necessary updates to the CMA's toolkit.

60. The economic and practical case for the CMA's proposed reforms of existing tools remains strong, and through the course of the work of the taskforce, it has become increasingly clear that many of these reforms will be vital to ensuring existing tools are adapted to address the challenges of the digital age.

Recommendation 13a: The government should pursue significant reforms to the markets regime to ensure it can be most effectively utilised to promote competition and innovation across digital markets, for example by pursuing measures like data mobility and interoperability.

61. We set out above that, as part of its monitoring role, the DMU could identify opportunities to support greater competition and innovation, for example where interventions like personal data mobility could be used to overcome barriers to consumers switching or multi-homing, or by supporting coordination by firms to develop common standards which deliver benefits for consumers. When the DMU identifies such an opportunity, it could make or recommend a Market Investigation Reference (depending on the institutional design of the DMU).
62. We have looked at whether such interventions in digital markets could be implemented through the markets regime, or whether new powers are needed. We consider that the markets regime is not designed to deliver ongoing interventions like data mobility and interoperability, although reforms might go some way to addressing some of these shortcomings. In particular:
- Market studies and market investigations are designed to be one-off exercises. Each intervention is based on a snapshot of the market at one point in time and as such, any remedies which flow from them will necessarily be limited to what can be specified at that time.³⁸ It is not well-positioned for meeting the challenges of rapidly changing markets.

³⁸ The CMA does not have the power to impose remedies under market studies but may make recommendations to government or others to take action.

- Under the markets regime it is difficult to re-open, review and amend remedies.³⁹ This is important due to the dynamic nature of digital markets and evolving technologies. Furthermore, the manner in which consumers interact with products and services may also change over time and it will be essential that remedies can be adapted to ensure they remain effective.
63. Some of the reforms put forward in the CMA's reform proposals would be likely to address, at least partially, some of these challenges, for example those to make it easier to review and amend remedies over time. These are set out below. However, we will continue to work with the government to consider the appropriate framework for implementing such market shaping measures, including through the government's work on Smart Data.⁴⁰
64. Key reforms of the markets regime that we consider are particularly relevant for digital markets are summarised here and expanded on below:
- enabling intervention through the making of market investigation references in relation to adverse effects on consumers, not just adverse effects on competition;
 - use of interim measures to allow for swifter action to address harm;
 - enabling more flexible review and adjustment of remedies to ensure they remain effective as markets evolve.
 - accepting enforceable undertakings to enable concerns to be addressed at an earlier stage; and
 - stronger fining powers to deter firms from breaching remedies agreed through a market investigation.

Addressing adverse effects on consumers

65. The two markets tools specified in the Enterprise Act are market studies and market investigations. The focus of these two markets tools is not aligned – while market studies are used to consider adverse effects on consumers, market investigations are limited only to competition concerns. As a result, the remedies that the CMA can introduce as part of a market investigation are also limited to addressing adverse effects on competition only. The CMA

³⁹ For example, in the context of the Open Banking remedy implemented through the markets regime, to update the set of data available through open banking would require the CMA to re-open the market investigation, not just run a consultation on the proportionality of the incremental change.

⁴⁰ Department for Business, Energy and Industrial Strategy, [Next steps for Smart Data](#), September 2020.

proposed that the scope of these two tools are brought into line, so that market investigations can also consider, and address through legally enforceable remedies, adverse effects on consumers (including but not limited to those arising from adverse effects on competition).

66. This change would be particularly important in the context of digital markets given the impact that practices of digital firms can have on wider elements of consumer welfare, for example, through choice architecture. Such practices may have an adverse effect on competition, but will almost always have an adverse effect on consumers insofar as they limit consumers ability to select products which meet their preferences.

Use of interim measures

67. As the markets regime stands, from the point at which a market study is initiated, it can be three years before remedies are ordered under a subsequent market investigation, and longer still before they are implemented. The CMA proposed it should have the ability to impose legally enforceable requirements on firms on an interim basis, pending the completion of a market investigation.
68. While this proposal is motivated by speed, it is consistent with rigorous analysis. Understanding the underlying causes of problems in markets, and devising appropriate remedies, takes time and rushing this process could have harmful unintended consequences. Yet when applied to many areas of the modern economy, such approaches and timeframes risk allowing irreversible damage to occur while the solutions are identified. This is because, in digital markets in particular, new markets are constantly emerging, business models can change rapidly, and consumer detriment can quickly develop. It is therefore important that the CMA has the ability to take swift action, on an interim basis, while the rigorous and evidence-based assessment is conducted, to stem the harm before it is too late.

More flexible remedies

69. The CMA can introduce remedies at the conclusion of a market investigation, but this is a one-off opportunity to intervene in a manner that will stand the test of time. If the remedy fails to have the desired impact or becomes outdated due to further developments in the market, the CMA cannot take further action without repeating the lengthy process of conducting a market investigation. The CMA has therefore proposed it should have more flexibility than this, with the ability to review remedies, evaluate their effectiveness, and then adjust or change them in markets where competition or consumer problems persist.

70. This is important when considering ongoing complex and potentially transformational remedies like data portability and interoperability that could be highly technical in nature and could affect a wide variety of stakeholders. These are not the type of remedies that can be agreed once and the CMA then walk away. Instead, they might be best developed iteratively, with initial trialing and further adaptation based on experience. Then as the market evolves, possibly as a direct result of the interventions themselves, the focus and design of the interventions must also evolve. These remedies can require substantial ongoing involvement and need to be frequently reviewed, evolving as technology and consumer needs change. This is not only in the interests of the CMA, for example by ensuring remedies remain effective, it is also in the interests of the firms, ensuring outdated regulatory requirements do not stymie their ability to innovate and evolve their products and services.
71. Without the ability to more flexibly review and update remedies arising from market investigations, the CMA will struggle to implement remedies of an ongoing nature like interoperability and data portability in an effective way. We therefore consider that this is a vital change which is required.

Accepting enforceable undertakings

72. The existing regime currently allows the CMA to accept binding undertakings from firms about their practice and conduct, for example at the end of a market study, in lieu of a full market investigation. However, the opportunities to accept such undertakings are limited, and the CMA's ability to enforce them is weak. The CMA therefore proposed that this element of the markets regime would be made more effective, first, by allowing the CMA to accept undertakings at any time (for instance before or during a market study); and second, by enabling the CMA to fine firms that breach such undertakings.
73. This increased flexibility to obtain such commitments from firms during markets work would enable the CMA to address concerns at an earlier stage than is possible today. In line with proposals for interim measures, this will speed up the CMA's ability to address harm, before it is too late. In digital markets that can move and evolve quickly, swift and decisive action can be vital.

Fining powers

74. Under the current markets regime, the powers available to the CMA to sanction firms that fail to comply with its legally binding remedies from a market investigation are extremely limited. In our reform proposals we recommended that the CMA should be able to impose fines on firms that fail

to comply with market investigation remedies, in line with the fining powers available to other regulators for failure to comply with regulatory requirements.

75. As we have explained elsewhere in our advice, it is essential that regulatory interventions can be enforceable, with a credible threat of sanction against any breach or illegal conduct. The ability to impose fines in such circumstances creates an important incentive to comply with the regime from the outset.

Recommendation 13b: The government should strengthen powers to tackle unlawful or illegal activity or content on digital platforms which could result in economic detriment to consumers and businesses.

76. As set out earlier in this appendix, unlawful and illegal activity or content hosted on platforms, like fake online reviews and scam ads, can result in economic detriment to consumers and businesses.
77. Existing consumer law provides a means to address some of the impact of unlawful or illegal content.⁴¹ However, current legislation does not, sufficiently clearly, set out the responsibilities that platforms have, to take effective measures to protect consumers from unfair business practices and to facilitate legal compliance by traders. The CMA's experience, through its consumer work involving business-to-consumer platforms, has highlighted the need for additional measures to ensure these platforms take proactive responsibility to ensure consumers are not harmed by content or activity that occurs on, or is facilitated through, the websites of these platforms.
78. These responsibilities should also apply to business-to-business platforms where businesses engage in conduct which ultimately harms consumers. Our enforcement work on fake and misleading online reviews has also shown the need for powers not only to address direct business to consumer practices but also to prevent the trading of online reviews, such as when they are bought, sold or arranged on a social media platform or online marketplace for posting on another website.⁴²
79. We consider that online platforms should be required to take appropriate steps on an ongoing basis to effectively tackle unlawful activity or content which could result in economic detriment to consumers and businesses when it occurs on, or is facilitated through, their platform. While there is no 'one size fits all' set of measures, we envisage that they would need to take proactive

⁴¹ See case pages relating to CMA's investigations into [secondary ticketing websites](#), [social media endorsements](#) and [online hotel booking](#).

⁴² CMA, [Fake and misleading online reviews trading](#).

measures to identify and, where appropriate, remove unlawful/illegal content and prevent its reappearance.

80. The sorts of measures we would expect businesses to undertake might include:
- using appropriate tools to identify unlawful content proactively, such as performing regular ‘sweeps’ of the platform for particular keywords using manual or automated means and implement other forms of proactive detection technology such as machine learning models;
 - introducing effective complaint mechanisms to enable individuals or businesses to easily and rapidly report unlawful content;
 - once made aware of potentially unlawful content (whether through third party notification or by its own proactive means), investigating promptly and removing any unlawful material without undue delay;
 - taking additional reasonable steps to identify and remove similar content;
 - proactively ensuring that its systems, policies and processes for the prevention, detection and removal of unlawful content remain effective, for example, through regular testing, reviewing and updating (including any automated detection technology and/or keywords used in ‘sweeps’);
 - applying appropriate sanctions to effectively deter unlawful content and/or activity, such as banning users, stopping users and content returning; and/or
 - implementing transparent decision-making over actions taken in response to reports of harm and create redress mechanisms to challenge content takedown.
81. Government could strengthen powers in this area through reforms of existing consumer protection law. For example, this could be facilitated through a new duty of care on firms, and/or through updates to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). This would complement the proposed new regime for harmful online content.⁴³
82. Given the significant economic detriment to consumers and businesses which can result from unlawful or illegal activity or content hosted on platforms we

⁴³ DCMS, [Online Harms White Paper](#) set out the intention to improve protections for users online through the introduction of a new duty of care on companies and an independent regulator responsible for overseeing this framework.

consider it of great importance that government takes swift action to address this issue.

Recommendation 13c: The government should take action to strengthen powers to enable effective consumer choice in digital markets, including by addressing instances where choice architecture leads to consumer harm.

83. As described in paragraph 7 above, effective and informed customer decision-making is crucial in driving effective competition. While consumers' ability to make decisions can be undermined as a result of misleading information, the way in which choices are presented to customers and the defaults that are selected – namely the choice architecture – can also have important implications for the ability of customers to make effective choices.
84. We consider that existing consumer protection law is not equipped to deal effectively with such concerns. The CPRs, which are an important tool in addressing unfair commercial practices, are strongly principles-based. Enforcement under the CPRs generally requires evidence that consumers' decision-making is affected by the practice in question, although some practices are prohibited in all circumstances. This has advantages of flexibility and adaptability. However, it may also lead to a lack of certainty for enforcers and traders in relation to their practices. Whilst precedent can be established through enforcement, the lack of clarity may lead to lengthy court disputes. Furthermore, any outcomes or remedies resulting from court enforcement may be argued to have limited read-across to other digital firms, since they will necessarily be case-specific.
85. In our view, a regime which imposes clear expectations on firms of how they are expected to behave in enabling effective consumer choice is likely to be more efficient and effective than existing enforcement approaches. We consider that a regime which provides greater clarity to firms in relation to their obligations would result in a greater impact on their practices than the existing regime. This would support longer-term cultural change not only within individual firms but market-wide by embedding and normalising beneficial practices which support effective consumer decision-making.
86. Several respondents to our call for information highlighted the need for action to safeguard effective consumer decision-making, in particular to increase consumer control over their data and complement data protection law.
87. One way to address the issue and promote effective consumer choice is through reforms to the consumer protection regime, for example by imposing a more explicit duty on firms to take reasonable and proportionate steps to reflect consumers' interests in the design of their products and services.

Further work is needed to consider the implementation and design of such a duty which would need to be appropriately framed to avoid unnecessary burdens or compliance costs.

88. A duty of care to enable more effective consumer choice would complement the 'Fairness by Design' duty proposed in the market study final report,⁴⁴ which focused on consumer choice in relation to the collection of data. Any such duty would also complement the existing data protection by design requirement under the GDPR, as well as the government's proposals for a safety by design framework within its Online Harms White Paper.⁴⁵
89. In addition, action could be considered to ban certain manipulative design practices, such as the use of subscription traps, by including them in the list of practices under the CPRs which are prohibited in all circumstances.

Recommendation 13d: The government should provide for stronger enforcement of the Platform to Business Regulation

90. In addition to enhanced protections for consumers, it is critical that business users are protected against practices by digital firms which may harm competition. The Platform to Business Regulation, which originated in the EU but became UK law in July 2020, provides a set of rules in relation to a wide range of consumer-facing online platforms, including search engines, social media sites, online marketplaces and app stores. The Regulation seeks to provide a targeted set of mandatory rules to ensure a fair, predictable, sustainable and trusted environment for the business users of such platforms. In particular, it focuses on providing business users with appropriate transparency and opportunities for redress:
 - It requires transparency for business users in areas such as terms and conditions, differentiated treatment, the parameters used for determining search rankings, restrictions on selling elsewhere and data use.
 - It imposes a legal requirement that providers must tell businesses the reasons for restricting or suspending and/or delisting at the time or before they are delisted, suspended or terminated from the service.

⁴⁴CMA [market study into online platforms and digital advertising](#) at paragraphs 8.123-8.151 and [Appendix Y: choice architecture and Fairness by Design](#).

⁴⁵ DCMS, [Online Harms White Paper](#). The DRCF is working to develop a 'by design' framework that would ensure that best practice, differing consumer interests and needs and regulatory compliance are 'built in' as online services are first conceived and developed. Government should have regard to these wider initiatives when considering what action to take.

- It also requires platforms (except for smallest platforms) to have complaints handling systems for business users and offer them mediation as a way to settle disputes out of court.
91. As part of our work, we have considered whether the Platform to Business Regulation is likely to be sufficient to address many of the concerns expressed by business users of platforms. In the responses we received to our call for information, stakeholders who expressed a view did not see the need for further changes to the substantive measures set out in the Regulation at this stage either because the protections are set at an appropriate level or because the Regulation itself is relatively new and it is too early to review its effectiveness.
 92. We believe that the substance of the Platform to Business Regulation, if enforced effectively, is likely to benefit business users who rely on online intermediaries and search engines and encourage greater competition. The requirement on platforms to be more transparent about their practices is a necessary first step to promoting greater competition. To the extent they have any meaningful choice as to the platform on which they offer their goods and services, this transparency could assist business users in making a more informed choice as to which platforms they choose to engage with, driving greater competition amongst platforms to improve their practices towards business users.
 93. In addition, although the Regulation is targeted primarily at business users, some of the requirements could increase transparency to a wider public audience, for example, requirements for greater transparency around the main parameters determining rankings. They could also promote well-functioning markets that ultimately benefit consumers. We believe that, by helping establish a higher level of basic transparency across digital platforms, the Regulation may empower businesses but may also help uncover business practices which are harmful to consumers and competition. Where this occurs, it is important that the substance of the Regulation (hence the related domestic enforcement regulations) is adequately enforced.
 94. The current enforcement model in the UK relies on a private action model whereby businesses or their representatives can bring cases to court. However, these businesses are likely to be in a weak position *vis a vis* the platforms. We therefore favour an enforcement model in which nominated enforcers, which may include the CMA, Ofcom and sectoral regulators as appropriate, have investigatory powers to detect breaches, and remedial

powers to ensure compliance, coordinating as necessary.⁴⁶ The DMU may also identify appropriate matters for investigation and enforcement. This would also complement the goal of ensuring that regulators are informed as far as possible about potential harmful conduct. Without this, we are concerned that there may be a lower possibility of detection of breaches and compliance.

95. The nominated enforcers should have the power to investigate and take action against breaches of the Regulation, using a strong set of powers and at their discretion. We would recommend that individual businesses and representative bodies continue to be able to take matters to court in parallel, and that the nominated enforcers should not have a compliance role in relation to individual complaints.

⁴⁶ The existing consumer protection enforcement regime operates on a similar model.