



Computer & Communications
Industry Association
Tech Advocacy Since 1972

CCIA's Submission to the UK Government

Open consultation - a new pro-competition regime for digital markets

October 2021

Executive Summary

The Computer & Communications Industry Association (CCIA) welcomes the opportunity to respond to the UK Government's consultation on "a new pro-competition regime for digital markets".¹

In this submission CCIA provides its insights on the competitive dynamics of digital markets, and how they should inform regulatory frameworks. CCIA broadly supports a principles-based approach incorporating case-specific effects-based analysis and regulatory dialogue. CCIA further supports a merger control framework that encourages continued innovation and investment.

CCIA also offers its views on specific questions contained in the consultation.

In response to question 1 of the consultation, CCIA agrees that it would not be necessary to explicitly include innovation in the Digital Markets Unit's core duties.

In response to question 13 of the consultation, CCIA supports Option 1 with obligations tailored to the SMS firm's individual activities and the associated harms that have been substantiated.

In response to question 18 of the consultation, CCIA agrees that the existing "adverse effect on competition" test is sufficient and appropriate for the DMU to achieve its objectives.

In response to question 25 of the consultation, CCIA supports full merits review.

In response to question 27 of the consultation, CCIA identifies risks of an 'in advance' reporting requirement which could be ameliorated if made non-suspensory and subject to appropriate thresholds to target only transactions with a likelihood of competitive significance.

In response to question 28 of the consultation, CCIA identifies risks with a transaction value threshold that could be ameliorated with appropriately set thresholds and measures to avoid disproportionate delays.

In response to question 29 of the consultation, CCIA identifies risks with mandatory merger reviews of transactions that are unlikely to have competitive significance.

In response to question 30 of the consultation, CCIA identifies risks with amending the substantive test probability standard used during in-depth phase 2 investigations.

¹ GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#).

I. Introduction

1. The Computer & Communications Industry Association (CCIA) welcomes the opportunity to respond to the UK Government's consultation on "a new pro-competition regime for digital markets".²
2. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.³
3. CCIA remains committed to protecting and advancing the interests of our members, the industry as a whole, as well as society's beneficial interest in the positive contributions that digital technologies can make.
4. CCIA's members are leading innovators of what some refer to as the 'digital economy'. Many operate as digital intermediaries, efficiently connecting disparate sources of supply and demand and disintermediating traditional gatekeepers who have been slow to embrace digital distribution models. Due to the disruption that digital technologies have caused, some legacy incumbents have voiced concerns about increasing competitive pressure, and asked competition authorities to protect them against digital disruption by condemning conduct that is ultimately pro-competitive, innovative and beneficial to consumers.
5. CCIA understands that the purpose of this consultation is the latest step towards the establishment of a new regulatory regime for digital markets in the UK. CCIA agrees with the fact that several policy steps may be beneficial for the industry. Likewise, it also agrees with the fact that due to *"the complexity of innovation incentives, each proposed intervention should be subject to careful assessment before implementation and also that interventions should be subject to ex-post evaluations to maximise the learning and enable the identification of policies with unintended impacts."*⁴ CCIA submits that such measures should preserve incentives to innovate, invest, and vigorously compete on the merits.
6. CCIA has made several submissions to the CMA in recent years and has raised concerns regarding the increasingly worrying trend towards a less economic and less consumer welfare oriented competitive analysis of digitally enabled markets.⁵ In

² GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#).

³ Additional details on CCIA can be found here: <http://www.ccianet.org/>.

⁴ D. Deller *et al.* "Competition and Innovation in Digital Markets (BEIS Research Paper Number: 2021/040)" (HM Government, April 2021), available [here](#) ("DBEIS Paper"), pg. 8.

⁵ CCIA pointed out many of these concerns in its response to the consultation following publication of the CMA's Interim Report. CMA "Online platforms and digital advertising Market study interim report" (18 December 2019), available [here](#) ("Interim Report"); CCIA "Submission to the UK Competition & Markets Authority Online Platforms and Digital Advertising Market Interim Report - Consultation" (17 February 2020), available [here](#) ("CCIA's Response to the Interim Report"). CCIA subsequently provided a supplemental submission on the benefits of digital advertising. CCIA "Supplemental Submission to the UK

particular, CCIA has raised concerns⁶ regarding the analysis contained in the CMA's market study into online platforms and digital advertising final report (the "Market Study Report"),⁷ cited as one of the foundational studies for the Digital Markets Taskforce ("DMT")⁸. CCIA supports the additional work that has been done by the UK Government since, including the Research Paper on 'Competition and Innovation in Digital Markets' (hereinafter the "DBEIS Paper").

7. Below, CCIA offer insights on dynamic markets that are relevant for the work of the DMT and the Digital Market Unit ("DMU") (Section II), it explains its support for the principles-based approach to intervention endorsed by the CMA (Section III), it advocates for improved regulatory dialogue in that intervention (Section IV) and a thorough effects-based analysis (Section V). Furthermore, it underlines the objective and appropriate scope of proposals to promote competition and innovation regarding mergers (Section VI) before providing some final concluding remarks (Section VII).

II. Insight on Dynamic Markets

8. There are 31 questions that the Call for Information asks input on, from "*What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?*"⁹ to "*What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with SMS?*"¹⁰. To put these questions into context, CCIA offers below its industry insights on dynamic competition and the complexity of multi-sided markets and the broader digital economy.
9. Advances in computer and communications technologies have dramatically lowered costs, increased output and improved the quality of products and services in a wide variety of industries. Those who have embraced these technologies have seen success, while those who have been slow to adapt have not. This technological disruption has practically eliminated some industries.
10. Digital technologies are lowering transaction costs and opening up markets to global competition. Consumers also benefit from increased competition on the supply side of these markets, lower prices, higher quality products, and increased innovation. And suppliers benefit from the unprecedented scale, availability and reach that digital

Competition & Markets Authority Online Platforms and Digital Advertising Market Interim Report - Consultation" (12 May 2020), available [here](#) ("CCIA's Supplemental Submission").

⁶ CCIA "Submission to the UK Competition & Markets Authority - Digital Markets Taskforce - Call for Information" (12 August 2020), available [here](#).

⁷ CMA "Market study final report: Online platforms and digital advertising" (1 July 2020), available [here](#) ("Market Study Report").

⁸ CMA "Digital Markets Taskforce Call for Information" (1 July 2020), available [here](#), para. 2.19 ("A major component of the Taskforce's work will be considering how a procompetitive code of conduct for firms with SMS could work in practice. This would build on the case for a pro-competitive code of conduct as proposed by the Furman Review and explored further by the market study"). See also *Ibid.*, paras. 1.3, 1.27, 2.7, 2.50 and fn. 41.

⁹ GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#), question 1.

¹⁰ GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#), question 27.

intermediaries provide. This helps SMEs level the playing field, with dramatically expanded opportunities to reach customers and grow.

11. The DBEIS Paper acknowledges that the *“GAFAM firms have delivered exceptional breakthrough and disruptive innovations which have improved consumers’ lives, created thousands of jobs for employees and delivered considerable value to shareholders. Digital firms also have a reputation for disrupting existing markets, for example, the taxi and hotel markets, while price comparison websites have reduced search costs and improved switching in a variety of consumer markets. These disruptive innovations have intensified competition and increased consumer welfare.”*¹¹ These benefits have developed under the existing antitrust framework which focuses on consumer welfare and the efficient allocation of resources. There is a significant risk that departing from these standards will result in interventions that inadvertently reduce the pro-competitive benefits of the digital economy and ultimately reduce economic output.
12. CCIA supports the Government’s stated purpose for the Digital Markets unit, *“to promote competition (which includes promoting competitive outcomes) in digital markets for the benefit of consumers.”*¹² CCIA agrees with the Government that *“[t]he Digital Markets Unit should not simply promote rivalry between firms for its own sake, but pursue competition for the benefit of consumers.”* “Rivalry” is itself somewhat undefined, and as a goal could result in less competitive outcomes at the expense of consumers. This is particularly the case where enforcers have only a shallow understanding of the dynamic form of competition prevalent in the digital economy, and whereby they would base their decisions on simplistic industrial-era models based on market structure. Market structure has long fallen out of fashion as a basis for intervention, due to its harmful side-effects on competition. It should not be used as a shortcut today to avoid the complex task of building a world-class enforcer with a solid understanding of the digital economy. Similarly, a supplementary duty to have regard to innovation, absent a thorough understanding of how innovation occurs in different market contexts, will likely result in misguided overenforcement to the detriment of innovation.
13. Below, CCIA provides (a) an explanation of dynamic markets and dynamic competition, (b) why industrial-era tools, like market shares and structural analysis, are not fit for the digital age, (c) the many benefits that digital business models generate, (d) details on the error-cost framework and why it militates against risking overenforcement, and (e) suggestions on how to reduce error-costs when intervening in the digital economy.

A. Dynamic markets and dynamic competition

14. Digital markets are subject to what Austrian economist Joseph Schumpeter describes as the *“perennial gale of creative destruction.”*¹³ Unlike in more traditional markets,

¹¹ DBEIS Paper, available [here](#), pg. 12.

¹² GOV.UK “A new pro-competitive regime for digital markets” (July 2021), available [here](#), pg. 14.

¹³ J. A. Schumpeter “Capitalism, Socialism and Democracy” (3rd ed., 1962), pgs. 84-85 (“in capitalist reality as distinguished from its textbook picture, it is not [perfect] competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization . . . competition which commands a decisive cost or quality advantage and which strikes not

disruptive innovation is frequent and chaotic and redefines market boundaries.¹⁴ As recognised by the OECD, features of digitally enabled markets like network effects and low marginal cost “*make it easier for entrants offering a better service to displace incumbents quickly.*”¹⁵ This creates an added incentive for new entrants and incumbents alike to invest in disruptive technologies.¹⁶ The DBEIS Paper corroborates this, recognising that “*[d]igital markets have been associated with significant innovations over the past 25 years that have reshaped how we communicate, shop, socialise and do business.*”¹⁷

15. Compared to a static competition model, where firms compete for existing rents and supply close to perfect substitute products, in dynamic competition, firms compete for future rents. The firms rely on innovation to create new processes, products and services. This innovation-based rivalry results in product and business model differentiation. “*It is a type of competition animated not by firms that compete head-on with similar products, but by heterogeneous competitors, complementors, suppliers and customers, using innovation to bring forth new products and processes. Such competition improves long-term factor productivity, raises consumer welfare, and supports higher wages.*”¹⁸
16. The DBEIS Paper cites contestability as a key force influencing innovation,¹⁹ but appropriability is one as well. Firms need to know that they can appropriate the rewards of their calculated risks, that the billions invested in research and development will earn a profit if valuable. The ability to grow, to obtain some degree of market power, is the reward that incentivises the innovation that drives the digital economy. However, traditional industrial-era indicators of market power inaccurately suggest that market power in the digital economy is durable and entrenched, and that there is a lack of contestability. A more nuanced understanding of dynamic competition would suggest otherwise, and in particular, that “the threat of losing profitable business”²⁰ is ever-present. As Intel founder and former CEO Andy Grove wrote in 1996, in the digital economy “only the paranoid survive”.

at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives.”)

¹⁴ J. Ellig, D. Lin “A Taxonomy of Dynamic Competition Theories” (Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues, 2012), available [here](#); OECD “An Introduction to Online Platforms and Their Role in the Digital Transformation” (2019), available [here](#), pg. 24 (“disruptive innovations typically reduce the market shares of incumbent firms (e.g. the displacement of established mobile handset leader Nokia by Apple’s iPhone and smartphones using Google’s Android system”), in some cases causing them to exit the market (e.g. the disappearance of video rental chain Blockbuster following the disruptive entry of Netflix), or create new markets (e.g. television).”)

¹⁵ The Organisation for Economic Co-operation and Development (“OECD”) “An Introduction to Online Platforms and Their Role in the Digital Transformation” (2019), available [here](#), pg. 25.

¹⁶ J. L. Bower, C.M. Christensen “Disruptive Technologies: Catching the Wave” (Harvard Business Review, 1995), available [here](#).

¹⁷ DBEIS Paper, available [here](#), pg. 7.

¹⁸ N. Petit “Innovating Big Tech Firms and Competition Policy: Favoring Dynamic Over Static Competition” (19 August 2021), available [here](#), pg. 5.

¹⁹ DBEIS Paper, available [here](#), pg. 7 (“contestability, the ability of firms to enter a market and grow to challenge incumbent, is a key force influencing innovation.”)

²⁰ DBEIS Paper, available [here](#), pg. 7.

B. Market power and the existence of effective competition

17. As the Government correctly notes, “[t]he size and presence of ‘big’ digital firms is not inherently bad. In fact, the prospect of temporary market power can act as an important incentive to innovate and invest.”²¹ Therefore, and as recommended by the DBEIS Paper, “[t]here is a need to separate the effect of firm size from competition/dominance.”²² The following sections provide details on how industrial-era antitrust tools do not adequately separate firm size from competitive impact, and may risk punishing success instead of preventing harm.

i. Market shares do not accurately reflect competitive significance in the digital economy

18. Traditional antitrust assessment does not capture dynamic competition because it relies on market shares and rivalry as the primary indicator of effective competition. These traditional tools of antitrust assessment focus on strong hypotheses about the organization of economic activities that are based on industrial-era notions of competition.²³ In the industrial age, competition was driven by firms offering near perfect substitutes competing with each other to lower costs, which in turn would result in lower prices for consumers. In the digital economy firms compete primarily by increasing quality through innovation. This leads to a diversity of goods and services targeting different segments of demand.

19. Significant innovative milestones can shift demand entirely, redefining markets as Apple did with the modern smartphone. This dynamic, innovation-based competition to redefine markets is emblematic of the digital economy, and why claims of market power based solely on market shares should be considered skeptically. As stated in a recent study published by the European Commission, “[m]arket shares and the standard analytical frameworks used for calculating them should be given less weight in the analysis of dynamic and innovative industries. Because competition for the market can be as significant as the competition within a market, large market shares today may say little about the firm’s competitive position in the near future as there may be numerous potential entrants that traditional methods do not capture.”²⁴

²¹ GOV.UK “Open Consultation - a new pro-competition regime for digital markets” (20 July 2021), available [here](#), pg. 9.

²² D. Deller *et al.* “Competition and Innovation in Digital Markets (BEIS Research Paper Number: 2021/040)” (HM Government, April 2021), available [here](#), pg. 16.

²³ F. Jenny “Competition Law and Digital Ecosystems: Learning To Walk Before We Run” (SSRN, 9 September 2021), available [here](#), pg. 3 (“Hierarchical firms are supposed to operate on predefined markets for goods or services where they meet customers” and “those firms are considered to operate on markets where other firms are competing with them by offering substitutable products or services to those that they offer. Thus a market is the locus of competition.”).

²⁴ Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law” (European Commission, 11 Jun 2021), available [here](#), pg. 115.

20. Particularly where software is concerned, marginal costs tend to be low, and small players and potential entrants can quickly grow to overtake larger players if given the opportunity. Similarly, where market shares are high, the threat of losing market share compels platform operators to compete aggressively.²⁵ As a recent report by the European Commission Joint Research Centre noted, “[d]igital markets are characterized by fast innovation, that can rebalance leadership and facilitate entry. Most big players cannot be complacent and have to constantly strive to preserve their positions by preventing other firms from innovating faster.”²⁶ Accordingly, even firms with low market shares can competitively constrain large players and ensure pro-competitive outcomes. This is why there is increasing acknowledgement that market shares are not a good indicator of effective competition in the digital economy.²⁷

ii. Prevalence of supply-side substitution

21. The digital economy is built on software that is malleable and adaptable. In the industrial-era economy production was based on heavy machinery producing identical goods. With software, services can be customised and evolve rapidly over time. Programming code developed for one purpose may find use in other applications, and creating software to copy existing digital services is relatively easy. The ability for firms to program code that can substitute for existing digital services increases the number and the relative threat posed by potential entrants.

22. Supply-side substitution is an essential element of market definition and in assessing competitive constraints.²⁸ However, in traditional industrial-era competition, the threat of supply-side substitution exists only in specific and limited circumstances.²⁹ These limited circumstances are why, for most markets, “[t]he boundaries of the relevant product market are generally determined by reference to demand-side substitution alone.”³⁰

²⁵ UK Department for Business, Energy and Industrial Strategy Report “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 64 (“the threat of losing market share, and therefore diminishing the network effects that make the platform attractive, often compels platforms to either offer a competitive service (e.g. they are not able to introduce a charge for users) or innovate in order to maintain their competitive position.”)

²⁶ EC JRC Report “The Competitive Landscape of Online Platforms” (April 2017), available [here](#), pg. 7.

²⁷ J. Crémer et al. “Competition policy for the digital era” (European Commission, 20 May 2019), available [here](#), pg. 49 (“The concept of market share is often not a useful concept to measure market power (of course, descriptive statistics such as shares of customers or downloads are still useful, but they are hardly conclusive.”); European Commission “Commission staff Working document evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997” (12 July 2021), available [here](#), pg. 49 (“The evaluation results indicate, however, that the Notice does not provide comprehensive guidance on Commission practice regarding the metrics that can be used in digital markets, where the traditional volume and value metrics are not applicable or the best indicators.”)

²⁸ See OFT, “Market definition” (2004), available [here](#), para. 3.17, Commission notice, “on the definition of relevant market for the purposes Community competition law” (1997), available [here](#), paras. 20-23, OFT, “Merger Assessment Guidelines” (September 2010), available [here](#), paras. 5.2.17-5.2.19.

²⁹ European Commission “Support study accompanying the evaluation of the Commission Notice on the definition of the relevant market for the purposes of Community competition law” (1 Jun 2021), available [here](#), pg. 168.

³⁰ CMA “Merger Assessment Guidelines” (March 2021), available [here](#), para. 9.8.

However, in digitally enabled-markets, relying on industrial-era models fails to account for the real threat of rapid entry enabled by the inherent characteristics of software. As the UK Department for Business, Energy and Industrial Strategy previously recognised “[t]he extent to which new entrants not only enter the market but become among the largest players does seem distinctive.”³¹ This is the reason that famed Silicon Valley investor Marc Andreessen has said that “software is eating the world”.³² Narrow market definitions that do not account for the ease with which software-based substitutes can emerge are therefore prone to underappreciated competitive constraints.³³

C. Underappreciated Benefits of Platform Business Models

23. Digital intermediaries operate multi-sided markets where they organise and connect supply and demand. However, most modern-day digital intermediaries generate significant value over and above that offered by intermediation alone. They do this by playing active roles as aggregators and innovators.³⁴ By being aggregators, platforms help unlock scale economies for business while reducing transaction costs and increasing quality and trust for consumers. In their role as innovators, platforms add new features and services, thereby fostering innovation and dynamic competition both within and between ecosystems. Antitrust interventions that ignore these important benefits for business users and consumers risk favouring competitors over competitive outcomes.
24. As aggregators, platforms help unlock scale and scope economies for businesses, while reducing transaction costs and increasing quality, trust, and choice for consumers.³⁵ Through the tying and bundling of different services and features, platforms increase efficiency, improve quality, and lower transaction costs for consumers and business users. Platforms use ranking and prominence to promote quality and trust, improving consumer outcomes. By integrating their own first-party services, platforms can increase quality and stimulate competition. Platforms can also leverage data to provide users with better matches than they would otherwise find themselves. In these ways, platforms act as more than mere intermediaries, they are more akin to a digital butler, providing consumers and business users additional added value by simplifying and improving decision making processes. By facilitating these consumption decisions, platforms increase platform usage, this indirectly increasing the utility of the platform for other business users as well.

³¹ UK Department for Business, Energy and Industrial Strategy “Dynamic Competition in Online Platforms” (March 2017), available [here](#), pg. 53.

³² M. Andreessen “Why Software Is Eating the World” (August 2011), available [here](#) (“software programming tools and Internet-based services make it easy to launch new global software-powered start-ups in many industries — without the need to invest in new infrastructure and train new employees.”).

³³ See *also*, CCIA “Submission to the UK Competition & Markets Authority - Digital Markets Taskforce - Call for Information” (12 August 2020), available [here](#), pgs. 15-16.

³⁴ Oxera “How platforms create value for their users: implications for the Digital Markets Act” (12 May 2021), available [here](#) (“Oxera Report”).

³⁵ Oxera Report, available [here](#), pgs. 22-33.

25. As innovators, platforms spur dynamic competition both on the platform, and as between platforms and ecosystems.³⁶ Through the bundling of services, platforms lend the scale and scope economies to business users, making them more competitive against the broader market in which the platform competes. This is confirmed by the Government's recent survey of retailers' experience using digital platforms, which found that smaller retailers were more likely to use online intermediaries for a wide range of additional services, including processing financial transactions, sales data analytics, marketing and advertising services, distribution and logistics.³⁷ Platforms can also data to spur new innovations and meet unmet consumer needs. For example, by analysing search and order data from consumers, food delivery platforms can identify new restaurant opportunities, improving outcomes for consumers. Netflix has used similar data analysis to support billions of pounds of investment in self-produced content.
26. Unfortunately, these aspects of platform value creation are hardly accounted for in modern antitrust analysis which is based on industrial-era models of competition. Focuses on contestability and rivalry in the short term would likely come at the expense of these benefits, meaning less competitive outcomes for consumers and the digital economy more broadly.

D. Error-cost framework

27. Absent clear evidence of harm, limiting the value creating capabilities of large digital intermediaries would likely reduce the value creation capabilities of these firms, thus raising entry barriers for the business users who use them to compete with large incumbents, ultimately reducing consumer welfare.³⁸ Under the error-cost framework that underpins much of competition policy, it is understood that these new forms of competition are generally quite valuable. Consumers benefit most from new products and services.³⁹ It is further understood that the cost to deterring the introduction of these new goods and services, and of deterring investments on innovation (which are by their nature costly and risky), is high. There should therefore be a reluctance to intervene in markets on the basis of speculation as to potential long-term harm that is to be prevented.
28. In dynamic digital markets, where innovation-based competition to redefine market boundaries dominates, speculative interventions relying on industrial-era models of competition are most likely to result in false positives and overenforcement. These false

³⁶ Oxera Report, available [here](#), pgs. 34-45.

³⁷ HM Government "Retailers' Experience of Using Digital Platforms - BEIS Research Paper Number: 2021/039" (March 2021), available [here](#), pgs. 11-12.

³⁸ CCIA "Submission to the UK Competition & Markets Authority - Digital Markets Taskforce - Call for Information" (12 August 2020), available [here](#), pgs. 4-5.

³⁹ See e.g. F. LaFontaine et al. "Vertical Integration and Firm Boundaries: The Evidence" (45 J. Econ. Lit. , 2007), available [here](#), pg. 629; J. Cooper et al. "Vertical Antitrust Policy as a Problem of Inference" (23 Int'l J. Indus. Org., 2005) available [here](#), pg. 639; O. Williamson "Transaction-Cost Economics: The Governance of Contractual Relations" (22 J. L. & Econ., 1979), available [here](#), pg. 233; B. Klein et al. "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process" (21 J. L. & Econ., 1978), available [here](#), pg. 297; R. H. Coase "The Nature of the Firm" (4 Econometric, 1937), available [here](#), pg. 386.

positives risk imposing on private companies the burden of protecting and subsidising less efficient rivals. This is particularly the case due to the innovative business models deployed in digital markets, and the gap with economic analysis and understanding of these models.⁴⁰

29. As recommended in the BEIS Paper, “[w]hile there are calls for tighter competition policy/regulation for digital markets, policymakers need to be conscious of the risk of inappropriate interventions, which could harm innovation.”⁴¹ In particular, “[i]f a market is still at the stage of platforms competing aggressively ‘for’ the market, the risk of over-enforcement is likely to be larger than the risk of under-enforcement, and policymakers should be more cautious about intervening.”⁴² The BEIS Paper recognises this ongoing innovation-based competition for the market between large technology companies.⁴³ Any increased intervention in the digital economy should therefore account for the existing dynamic competition between firms, and attempt to reduce potential error-costs which could limit competitive outcomes.

E. Reducing Error-Costs

30. One of the main challenges of assessing innovation-based competition is uncertainty. Putting aside the long-running debate in innovation economist between Schumpeter and Arrow,⁴⁴ neither market players nor regulators know with certainty where innovation will occur or which innovations will succeed. This is further complicated in dynamic digital markets because many of the business models and innovations of multi-sided platforms are relatively recent and economists are still learning about how they create value.⁴⁵ As

⁴⁰ Frank H. Easterbrook “On Identifying Exclusionary Conduct” (61 NOTRE DAME L. REV. 972, 1986), pg. 975 (“[E]ntrepreneurs often flounder from one practice to another trying to find one that works. When they do, they may not know why it works, whether because of efficiency or exclusion. They know only that it works. If they know why it works, they may be unable to articulate the reason to their lawyers”); R. H. Coase “Industrial Organization: A Proposal for Research” (3 Policy Issues and Research Opportunities in Industrial Organization 59, 1972), pg. 67 (“[I]f an economist finds something . . . that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent.”).

⁴¹ DBEIS Paper, available [here](#), pg. 45.

⁴² DBEIS Paper, available [here](#), pg. 47.

⁴³ DBEIS Paper, available [here](#), pg. 21 (“(Evans, 2017) details the large number of cases where the GAFAM firms offer competing products. . . . it is erroneous to think that dominant players face no competitive threat. For example, Evans reports Bing vs Google in search, Chrome vs Safari vs Edge in browsers, Gmail vs Outlook in email, WhatsApp vs FaceTime vs Skype for video calls, and Siri vs Alexa in voice assistants. . . . between 2015 and 2020 GAFAM firms have increasingly diversified their revenue sources, with the share of their total revenue which ‘overlaps’ with other GAFAM firms rising from around 20% to around 40%.”)

⁴⁴ DBEIS Paper, available [here](#), pg. 12. See also, S. Winter “The logic of appropriability: From Schumpeter to Arrow to Teece” (2006), available [here](#).

⁴⁵ Oxera Report, available [here](#), pg. 1 (“There are a substantial number of studies and investigations that highlight a wide range of theories of harm that may arise in the digital economy. However, significantly less attention has been given to the theories of benefit and value creation relating to online platforms.”)

recognised by the DBEIS Paper, one of the challenges at hand “*is the limited empirical evidence from digital markets to assess key competition policy questions.*”⁴⁶

31. In an environment where there is limited evidence of consumer harm, and significant evidence of high rates of innovation and investment, regulatory interventions should not be based on the assumption that they will create even higher rates of innovation and prevent future harm. Such an approach should be carefully scrutinised and the assumption challenged.
32. As acknowledged by the DBEIS Paper, “*there is limited peer-reviewed empirical evidence from digital markets focussed specifically on the questions posed by BEIS. Hence, there is a clear case to pursue efforts to increase the evidence base in this area.*”⁴⁷ CCIA agrees with the DBEIS Paper recommendation to pursue efforts to increase the available evidence base.⁴⁸ CCIA also supports ex-post evaluations of previous interventions to evaluate the theories of harm in light of market conditions after the remedies were imposed.⁴⁹
33. In light of the above, CCIA submits that new regulatory frameworks in the digital economy should be principles-based, involve significant opportunities for dialogue between regulators and industry, and focus on the effects of intended interventions. By conducting effects-based assessments, and engaging in regulatory dialogue, the DMU will gain valuable insight and evidence on digital market dynamics relevant to its work. This will improve its regulatory capabilities over time and lead to better decision making, increasing its reliability and influence as a global authority.
34. To ensure the DMU’s assessments are based on evidence of actual effects, CCIA submits that it is necessary to ensure assessments have clearly defined and objective standards. Accordingly, and in light of the uncertainty around innovation economics, **in response to question 1 of the consultation**, CCIA agrees with the Government that it would not be “*necessary to explicitly include innovation in the Digital Markets Unit’s core duties*”.⁵⁰

III. Principles-based approach

This section relates to Questions 12 to 16 and the Government’s proposal for an enforceable code of conduct.

35. CCIA supports the principles-based approach embodied by the proposed code of conduct. Avoiding *per se*, catch-all, one-size-fits-all presumptions is key to preserving the benefits of dynamic competition in the digital economy. As the DBEIS Paper recognises “*[d]irect evidence from digital markets on the impacts of proposed regulatory interventions is currently limited because many proposed interventions are novel at a*

⁴⁶ DBEIS Paper, available [here](#), pg. 32.

⁴⁷ DBEIS Paper, available [here](#), pg. 7.

⁴⁸ DBEIS Paper, available [here](#), pg. 36.

⁴⁹ DBEIS Paper, available [here](#), pg. 8 (“implemented interventions should be subject to ex-post evaluations to maximise learning and enable the identification of policies with unintended impacts.”)

⁵⁰ GOV.UK “A new pro-competitive regime for digital markets” (July 2021), available [here](#), pg. 14.

*global level.*⁵¹ Rules-based or form-based approaches based on prior interventions picked from a handful of competition cases where the long-term effects are yet to be seen risks significant unintended consequences. This is particularly true in light of the unique market circumstances in which competition complaints have arising, and the untenable assumptions that would be required to apply those remedies out of context: multi-sided markets do not always “tip”, network effects are not necessarily an entry-barrier, and leveraging into adjacent markets is not inherently problematic.⁵²

36. As OECD Chairman Frederic Jenny recently recognised, “*the fact that in the digital sphere the business models of ecosystems are varied and that to a large extent they determine the competitive strategies of ecosystems means that there cannot be a one size fits all approach to competition law enforcement (or regulation) with respect to ecosystems.*”⁵³ Competition concerns may not be the same for all the competitors on the market, and in order to assess the competition concerns, competition authorities need to consider the dynamics of the business model of the competing players.⁵⁴ The attempts to complement competition law enforcement with *ex-ante* regulations may be problematic as some practices (for example, interoperability or data portability) may be pro-competitive or pro-efficiency in certain ecosystem environments but potentially harmful or reducing competition in other ecosystem environments.⁵⁵
37. Accordingly, and **in response to question 13 of the consultation**, CCIA supports Option 1 with obligations tailored to the SMS firm’s individual activities and the associated harms that have been substantiated.

IV. Effects-based analysis

This section relates to Questions 17 to 21 of the Government’s Consultation

38. Different jurisdictions have taken different approaches to competition law analysis, but one of the great successes of the last 40 years and sources of international convergence is the evidence-based, effects-based approach to competition enforcement focused on consumer welfare. Over time, the static and form-based approach of the Structure-Conduct-Performance paradigm has fallen out of favour due to its harmful effects on growth and economic efficiency, and has been replaced by the effects-based approach that draws on the latest economic thinking.⁵⁶ This effects-based approach involves a weighing of both anticompetitive and procompetitive effects, with presumptions only for the most egregious practices where experience and economic understanding have shown that redeeming benefits are unlikely.⁵⁷ An effects-based

⁵¹ DBEIS Paper, available [here](#), pg. 50.

⁵² CCIA “Submission to the UK Competition & Markets Authority - Digital Markets Taskforce - Call for Information” (12 August 2020), available [here](#), pgs. 16-18.

⁵³ F. Jenny “Competition Law and Digital Ecosystems: Learning To Walk Before We Run” (SSRN, 9 September 2021), available [here](#), pg. 11.

⁵⁴ *Ibid.*, pg. 12.

⁵⁵ *Id.*

⁵⁶ OECD “Abuse of Dominance in Digital Markets” (2020), available [here](#), pg. 9.

⁵⁷ OECD “Abuse of Dominance in Digital Markets” (2020), available [here](#), pg. 10.

approach is particularly focused on harms to the competitive process that will result in harms to consumers, in the form of lowered output, increased prices, or reduced quality.⁵⁸ In the absence of these anticompetitive effects, enforcers are rightfully skeptical of alleged harm to competitors that would cause only speculative future harm to consumers. This is to ensure that competition enforcement does not become a tool of discretionary enforcement used to pick winners and losers in a market.

39. CCIA agrees with the Government's proposal to focus ex-ante regulation where anticompetitive effects "*are likely to be particularly widespread or significant*".⁵⁹ In dynamic digital markets, departure from the effects-based approach would invite significant risk of unintended consequences.
40. CCIA also agrees with the recommendations of the DBEIS Paper, which emphasises that, due to the possibility of changing market circumstances, "*any proposed pro-competitive regulations should be subject to review at regular intervals, and firms subject to such codes should be able to apply for reassessment if significant market changes occur*."⁶⁰
41. Due to the importance of an effects-based assessment, CCIA also agrees with the Government's proposal "*to ensure that remedies are evidence-based, targeted, proportionate, and subject to appropriate legal safeguards*." as this will help ensure the effectiveness of remedies and minimise unintended consequences.⁶¹
42. Finally, CCIA agrees, **in response to question 18**, that the existing "adverse effect on competition" test is sufficient and appropriate for the DMU to achieve its objectives, while minimising the risk of overenforcement and unintended consequences.

V. Regulatory Dialogue

This section relates to Question 22 to 26 and the Government's proposed regulatory framework.

43. The benefits of an effects-based assessment are ultimately subject to the availability of evidence to the regulator and its willingness to assess the evidence objectively in order to achieve good regulatory outcomes. One of the main complaints raised about current competition enforcement is that it is overly confrontational and adversarial, with both sides wanting to "win", leading to extensive disputes between lawyers and economists fighting and ultimately continuing those battles in Court. This leads to information asymmetries, a less dynamic regulator, and a climate of suspicion and mistrust where

⁵⁸ OECD "Abuse of Dominance in Digital Markets" (2020), available [here](#), pg. 11.

⁵⁹ GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#), pg. 22 ("While substantial and entrenched market power should be necessary conditions for designation, our view is that they are not sufficient. To justify a firm's inclusion in the regime, we propose that a firm's substantial and entrenched market power must provide it with a "strategic position" – in other words, a position where the effects of its market power are likely to be particularly widespread or significant.")

⁶⁰ D. Deller *et al.* "Competition and Innovation in Digital Markets (BEIS Research Paper Number: 2021/040)" (HM Government, April 2021), available [here](#), pg. 14.

⁶¹ GOV.UK "Open Consultation - a new pro-competition regime for digital markets" (20 July 2021), available [here](#), pg. 36.

effects-based evidence is discounted. An ex-ante enforcement framework should be about engineers and government experts discussing how best to balance conflicting objectives and finding the right trade-offs between the many effects of different digital product designs. This has sometimes been called a “regulatory dialogue” or “participative antitrust”. With this dialogue, regulators can better tailor remedies to account for the various trade-offs inherent to their interventions, reducing the harms of over-regulation.

44. Nobel-winning economist Jean Tirole, who won the prize in 2014 for his work on multi-sided markets, advocated for incorporating the principle of regulatory dialogue into competition law.⁶² Regulatory dialogue is particularly important in multi-sided markets because of the careful balancing that must take place between the various interests.⁶³
45. There is an opportunity here for the DMU to become a world-class regulator by assessing and analysing evidence provided by digital platforms, as recommended in the DBEIS Paper.⁶⁴ SMS firms would have the incentive to engage in this dialogue as well because better industry rules that are consistently applied will give participants in the digital economy greater legal certainty.
46. However, dialogue at the enforcement stage alone is not sufficient. Regulatory enforcers can make mistakes even with extensive dialogue. CCIA therefore supports the Government’s suggestion that “[t]he rights of appeal against the Digital Markets Unit’s decisions will also constitute a critical part of a fair procedure.”⁶⁵ CCIA agrees with the Government that fair procedures and rights of defense will give “*business confidence that decisions will face an appropriate level of scrutiny and were taken via a fair process and on a proper interpretation of the law.*”⁶⁶
47. Accordingly, and **in response to question 25**, CCIA supports full merits review. Full merits review, especially in the early stages of the new regime, ensures the authority’s decision-making withstands scrutiny and that errors of assessment are addressed so that the authority can improve its interventions in the future. The absence of full merits review reduces the benefits of the principles-based framework and effects-based analysis, increasing the likelihood of errors and reintroducing the risk of overenforcement. The standard of review can be changed subsequently once the DMU has sufficient experience with its interventions and the markets concerned.

⁶² A. Schrage “A Nobel-winning economist’s guide to taming tech monopolies” (Quartz, 27 June 2018), available [here](#).

⁶³ P. Evans & A. Gawer, “The Rise of the Platform Enterprise: A Global Survey” (CGE, January 2016), available [here](#) (“A more integrated understanding of technology and business will be fundamental to the success of platform firms, or the success of platform business units within traditional firms. Where and how to design technological interfaces, how open or closed should they be, how to price them, who will the complementors be, how to govern the ecosystems, will become as fundamental and as routine to business strategy and management as the well-honed traditional questions of product segmentation, pricing of products, management of the supply chain, and how to design distribution channels.”)

⁶⁴ D. Deller *et al.* “Competition and Innovation in Digital Markets (BEIS Research Paper Number: 2021/040)” (HM Government, April 2021), available [here](#), pgs. 36-37.

⁶⁵ GOV.UK “Open Consultation - a new pro-competition regime for digital markets” (20 July 2021), available [here](#), pg. 42.

⁶⁶ GOV.UK “Open Consultation - a new pro-competition regime for digital markets” (20 July 2021), available [here](#), pg. 42.

VI. Mergers

This section relates to Questions 27-30 of the [Government Consultation document](#).

A. The Role of Mergers In the Digital Economy

48. Mergers and acquisitions (“M&A”) play a fundamental role in the digital economy. M&A serves as an exit opportunity for investors and for founders, and is an easier and more predictable route than an initial public offering (“IPO”),⁶⁷ which can sometimes be disappointing.⁶⁸ The Government acknowledges that the *“Large digital firms’ investment activity may also incentivise startups to enter the market, which could provide consumers with greater choice”* and *“the key role large digital firms play in the business ecosystem.”*⁶⁹ Nevertheless, the CMA has expressed concerns that acquisitions by large digital companies may be reducing incentives for market players to innovate.⁷⁰ These so-called “killer acquisitions” have attracted more attention than would be warranted by a fact-based review of M&A track records.⁷¹
49. CCIA submits that delaying or prohibiting mergers and acquisitions of small-scale start-ups in the digital economy, absent evidence of likely harm, could reduce future innovation and lead to worse outcomes for consumers. According to recent studies, most M&A by large technology companies actually benefits consumers and does not hamper competition.⁷² Since 2005, 72% of M&A spending by large technology companies created value for consumers.⁷³ 82% of the companies actually saw more competition afterwards.⁷⁴ M&A helps do this by helping smaller firms achieve scale and scope efficiencies, stimulating competition with rivals and lowering prices for end consumers.⁷⁵

⁶⁷ DBEIS Paper, available [here](#), pg. 29.

⁶⁸ Bloomberg “Deliveroo Sinks 31% in Setback to London Effort to Lure IPOs” (31 March 2021), available [here](#).

⁶⁹ GOV.UK “Open Consultation - a new pro-competition regime for digital markets” (20 July 2021), available [here](#), pg. 46.

⁷⁰ Digital Markets Task Force (CMA) “A new pro -competition regime for digital markets” (December 2020), available [here](#), para. 4.124.

⁷¹ D. Crawford & M. Schallehn “Regulate with Care: The Case for Big Tech M&A” (Bain & Company, 20 September 2021), available [here](#).

⁷² D. Crawford & M. Schallehn “Regulate with Care: The Case for Big Tech M&A” (Bain & Company, 20 September 2021), available [here](#) (“When the facts are reviewed, most big tech M&A spending actually benefits consumers and doesn’t hamper competition. That’s according to Bain’s analysis of all \$300 million-plus acquisitions, totaling more than \$150 billion, from 2005 to 2020 by the five US hyperscalers: Alphabet, Amazon, Apple, Facebook, and Microsoft”).

⁷³ D. Crawford & M. Schallehn “Regulate with Care: The Case for Big Tech M&A” (Bain & Company, 20 September 2021), available [here](#) (“Competitive intensity and investment pace also increased after the majority of those deals”).

⁷⁴ D. Crawford & M. Schallehn “Regulate with Care: The Case for Big Tech M&A” (Bain & Company, 20 September 2021), available [here](#).

⁷⁵ D. Crawford & M. Schallehn “Regulate with Care: The Case for Big Tech M&A” (Bain & Company, 20 September 2021), available [here](#) (“Amazon used its efficient supply chain and buying power to shrink Whole Foods’ price premium vs. conventional grocers, making healthy, fresh food more affordable for consumers”).

Also, it allows more people to access innovative products and services,⁷⁶ and frequently accelerates purchased companies' pace of innovation by providing resources and the breathing room to keep experimenting.⁷⁷ Data from almost 13,000 firms across 181 industry categories provides evidence that mergers and acquisitions have significant positive impacts on R&D activity by small firms.⁷⁸

50. A counterpoint to the view that acquisitions are a way to cut down on competition is that potential acquisitions are a *subsidy* to competitors and encourage innovation because the possibility of exit by acquisition creates investment incentives and lowers the cost of capital for new entrants. This facilitates and incentivises small-scale start-ups to invest in R&D, innovation and growth. The Government acknowledges that "*the prospect of being acquired by a dominant firm can encourage innovative entrants to invest in innovation.*"⁷⁹ Proposals to prohibit mergers overlook the many benefits that the current framework protects,⁸⁰ particularly incentivising and facilitating innovation and new start-up formation.
51. It bears reminding that the vast majority of start-ups fail. This is normal. Acquisitions of innovative start-ups are "exit" opportunities for both investors and founders.⁸¹ These kinds of exit opportunities mean that a founder, an engineer or programmer with particular skills, knows she can go start or join a new company without the opportunity-cost of failure because even if she fails, there is a good chance she can get "hired" through acquisition at a bigger firm (sometimes referred to as "acquihires").⁸² For

⁷⁶ D. Crawford & M. Schallehn "Regulate with Care: The Case for Big Tech M&A" (Bain & Company, 20 September 2021), available [here](#) ("Google catapulted YouTube onto an immense growth path that essentially created today's digital video streaming market. Since its 2006 acquisition, streaming video has grown hand-in-hand with YouTube, expanding from about 800 million monthly active users of YouTube in 2012 to around 2.3 billion in 2020").

⁷⁷ D. Crawford & M. Schallehn "Regulate with Care: The Case for Big Tech M&A" (Bain & Company, 20 September 2021), available [here](#) ("Facebook's WhatsApp acquisition freed the messaging service to focus on the consumer experience and relieved the pressure to become profitable before it was ready. Under the wing of its parent company, WhatsApp rapidly expanded the app and launched features such as end-to-end encryption, payments, and B2B services").

⁷⁸ G.M. Philips & A. Zhdanov "R&D and the Incentives from Merger and Acquisition Activity" (The Review of Financial Studies, January 2013), available [here](#), pgs. 34-78.

⁷⁹ D. Deller *et al.* "Competition and Innovation in Digital Markets (BEIS Research Paper Number: 2021/040)" (HM Government, April 2021), available [here](#), pg. 29.

⁸⁰ CCIA "Response to the CMA's consultation on Updates to the CMA's Merger Assessment Guidelines" (8 January 2020), available [here](#), pg. 7.

⁸¹ D. Sokol & G. Dushnitsky "Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investment That Fund It" (SSRN, 9 June 2021), available [here](#), pg 4 ("The ability to realize returns on their investment and effort, commonly referred to as "exit from entrepreneurial ventures," is important for both investors and founders. Without the ability to exit as well as having that ability reduced by having one major off-ramp closed off (i.e., acquisition), neither founders nor investors will be able to reap the gains of the appreciation in the valuation of the business. And without appropriate incentives to form new businesses (because the proposed legislation may foreclose many M&A exits), the incentives for founding and growing a business lessen. Increasing difficulty in entrepreneurial exits for founders and investors makes future investment in such ventures less likely, since founders and investors cannot reap the rewards of a timely exit at acceptable valuations. When certain potential acquirers can no longer make bids for such VC-backed startups and acquisitions dry up, the prospect of VCs making necessary returns on their investment decreases and limited partners are less willing to invest their money with VCs.").

⁸² Hiring a team that has already built a project together may deliver greater benefits than hiring engineers individually. Wharton School of Business "Startup Firm Acquisitions as a Human Resource Strategy for Innovation: The Acquire Phenomenon" (University of Pennsylvania, 2013), available [here](#), pg. 27.

example, the Silicon Valley Bank, a specialised investor in start-ups, found in 2016 that the goal for 56% of start-up founders was to be acquired⁸³, and they win a lot from being acquired.⁸⁴ This is why the majority of acquisitions in the tech sector are not due to the competitive significance of the target business, but the human talent of the founding team.⁸⁵ Furthermore evidence of this can be seen in that most acquisitions are of companies less than five years old.⁸⁶ If new rules increase the cost of failure by closing off exit opportunities, they will decrease the number of individuals willing to take that entrepreneurial risk, leading to less competitive markets overall.

i. Unnecessary Regulatory Burdens' Impact on Investment

52. The proposed mandatory and suspensory review of acquisitions by SMS firms and the lowering of the legal threshold for prohibiting such transactions could lead to reduced competition and innovation. If unproblematic transactions are prohibited based on speculative theories of future harm, society would lose the benefit of possible merger synergies that would otherwise be generated. Incentives for start-up formation would also be reduced. Such prohibitions would also reduce the purchase price of (failed) start-ups because fewer buyers will be available to them. If start-ups are less profitable as investments (due to less ability to sell), they will attract less investment. Acquisitions thereby create opportunities for entrepreneurial risk and the rise of new and innovative products. Acquisitions are an important source of investment capital. In the US, the acquisition of small companies provides around two-thirds of the capital for start-ups.⁸⁷
53. These same concerns exist even where unproblematic small-scale acquisitions are merely delayed (e.g. due to broad notification requirements). Some start-ups are in a precarious financial position at the time of seeking a market exit, and if an acquisition at an attractive price would get caught in unnecessarily extensive merger control procedures, those start-ups would then be forced to take a lower price from a non-tech buyer to remove these regulatory hurdles to the sale (lower prices reflecting the benefit of earlier closing to a non-tech buyer). This will decrease the amount of funding that is

⁸³ Silicon Valley Bank Press Release “Silicon Valley Bank Releases Startup Outlook 2016” (10 March 2016), available [here](#).

⁸⁴ D. Sokol & G. Dushnitsky “Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investment That Fund It” (SSRN, 9 June 2021), available [here](#), pg. 5 (“Smaller companies also win from being acquired. Such acquisitions allow VCs and founders to exit the opportunity at valuations of multiples of the investment. Given uncertainties in scaling up, exit through an acquisition allows the smaller firm a viable exit strategy that benefits both founders and investors.”).

⁸⁵ L. Wagman *et al.* “Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study” (Federal Trade Commission, September 2019, available [here](#), pg. 37 (“In more than 50% of the transactions for which the number of the target entity’s full-time non-sales employees that were hired by the acquirer was reported by respondents (68% of the transactions), the number of employees was between 1 and 10. In addition, the employee counts are positively correlated with the size of the transaction.”).

⁸⁶ L. Wagman *et al.* “Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study” (Federal Trade Commission, September 2019, available [here](#), pg. 24.

⁸⁷ ICLE “ICLE Final Report on the FTC Hearings on Competition & Consumer Protection in the 21st Century” (June 2019), available [here](#), pgs. 101-102.

available from investors because the lower purchase price of the (failed) start-up means less upside (greater risk and less reward).

ii. Unnecessary Regulatory Burdens' Cost to Consumers

54. In addition to promoting investment and entrepreneurship, M&A activity of small scale startups generates direct consumer benefits. For example, the acquirer develops the target's innovation and delivers it to a larger pool of users, synergies occur between the acquirer's and the target's innovation capabilities which leads to a better innovation outputs.⁸⁸ A recent economic analysis of policies targeting small-scale acquisitions found that they would reduce innovation and diversity of startups.⁸⁹
55. The DBEIS Paper identifies several examples of acquisitions in the digital sector that helped smaller companies scale, grow, and benefit consumers. One example cited in the report is Google's acquisition of Keyhole, a company developing a street-level map, where Google invested billions in improving and expanding the mapping coverage before offering it to consumers for free under what is now known as Google Maps, competing with, and today offering a free alternative to, the dominant map providers of the past like TomTom, TeleAtlas and Garmin.⁹⁰

iii. Implications for Merger Control

56. Even though a very limited set of acquisitions of small-scale startups may be problematic in exceptional circumstances, emphasis should be placed on establishing principles to separate problematic from non-problematic acquisitions in order to prevent over-blocking and the potential harms identified above. As the DBEIS Paper notes, *"only a subset of dominant platforms' acquisitions are likely to be problematic, and some acquisitions can boost innovation, an assessment of acquisitions by dominant platforms should occur on a case-by-case basis. A blanket ban on acquisitions by dominant platforms would not be justified by innovation concerns."*⁹¹ Regulators should work to ensure that merger control continues to enable value creating acquisitions.⁹²

⁸⁸ DBEIS Paper, available [here](#), pg. 27; L. Wagman *et al.* "Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study" (Federal Trade Commission, September 2019, available [here](#) (Only raised antitrust concerns related to the founders' commitment to work for the combined entity, which only further shows that these acquisitions are more about combining capabilities than shutting down a potential competitor).

⁸⁹ I. Letina, A. Schmutzler, R. Seibel "Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies" (University of Zurich, August 2020), available [here](#), pg. 14.

⁹⁰ DBEIS Paper, available [here](#), pg. 28.

⁹¹ DBEIS Paper, available [here](#), pg. 31.

⁹² D. Sokol & G. Dushnitsky "Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investment That Fund It" (SSRN, 9 June 2021), available [here](#), pg. 19 ("By limiting the number of companies that can make acquisitions through a proposed change in merger law, the proposed change limits the ability of new ventures to exit. It also potentially chills incentives for such firms to scale up because they may be punished for being too successful with such restrictions placed upon them. The tradeoffs for a change in merger laws in terms of reducing entrepreneurial exits do not merit such a change in law.").

57. Furthermore, mergers involving digitally enabled markets require careful assessment. In particular, the assessment of overlaps and competitive constraints that may impact the DMU's analysis requires updating to match the development of the digital economy.⁹³ With digital products and services, the boundaries of the market are blurred, and innovation often makes it difficult to understand where one market ends and where another one begins.⁹⁴ For example, within the context of online marketplaces, the Report of the Digital Competition Expert Panel "Unlocking Digital Competition" ("Furman Report") has emphasised the importance of *"potential competition, which the target company in an adjacent market may provide in the future, once their services develop."*⁹⁵ Similarly in the EU, the Crémer Report notes that *"it should be remembered that the importance of market definition, and the methodologies developed for identifying it, were built for standard goods and services. In the digital world, it is less clear that we can identify well-defined markets."*⁹⁶ The failure to properly assess market dynamics and competitive constraints could lead to both Type I and Type II errors in merger control assessment.⁹⁷

C. The Negative Impact of a Catch-All Notification Obligation

This section relates to consultation Question 27: What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with SMS?

58. An "in advance" reporting requirement for all transactions by firms with SMS risks imposing regulatory burdens that will reduce investment in the UK's start-up ecosystem. This could be ameliorated if the reporting requirement is non-suspensory, and

⁹³ CCIA "Response to the CMA's consultation on Updates to the CMA's Merger Assessment Guidelines" (8 January 2020), available [here](#), pg. 1.

⁹⁴ J. Furman "Unlocking Digital Competition" (March 2019), available [here](#) ("Furman Report"), pg. 24 ("While intuitively simple, arriving at an agreed market definition is a matter of serious consideration in competition casework. It is hard to be definitive on what is in or out of scope without detailed work.") Stigler Center "Committee on Digital Platforms, Final Report" (2019), available [here](#) ("Stigler Report"), pg. 91 ("Pinpointing the locus of competition and therefore the relevant market in which technology platforms compete can also be challenging because the markets are multisided and are often ones with which economists and lawyers have little experience. This complexity can make market definition another hurdle to effective enforcement. ... The problems are compounded by the facts that technologies surrounding the products' functions in digital markets are continually changing and changes in quality-adjusted prices are difficult to observe.").

⁹⁵ Furman Report, para. 3.81. See also Stigler Report, pgs. 31, 32 ("Market definition will vary according to what consumers are substituting between, whether there is competition on the platform between complements, or competition between platforms, or competition between a platform and potential or nascent competitors regarding possible future markets."), J. Crémer, Y.-A. de Montjoye, H. Schweitzer "Competition Policy for the Digital Era" (2019), available [here](#) ("Crémer Report") pg. 47 (finding that "market definition can be problematic when "a dynamic market environment leads to fluid, quickly-changing relationships of substitutability and possibly partial overlaps of varying significance between different services, sometimes combined with practices of multi-homing and/or changing perceptions of consumer needs.").

⁹⁶ J. Crémer et al. "Competition Policy for the digital era" (European Commission, 20 May 2019), available [here](#), pg. 46.

⁹⁷ CCIA "Response to the CMA's consultation on Updates to the CMA's Merger Assessment Guidelines" (8 January 2020), available [here](#), pg. 2.

particularly, as being considered by the Government, if **the reporting could happen a short time after** the completion of the transaction. We note however, that in either scenario, the CMA should review these notifications and decide whether to intervene on a fast-track procedure to ensure companies have the legal certainty to move forward in a timely fashion.

59. Furthermore, any suspensory reporting requirement should be limited in scope only to those transactions that are likely to result in competitive effects on digital markets by (for example) applying only to transactions relating to the designated SMS activity and by applying a reasonable transaction value threshold (as set out below)

D. The Risks of Introducing a Transaction Value Threshold

This section relates to consultation question 28: What are the benefits and risks of introducing a transaction value threshold, combined with a 'UK nexus' test, for firms designated with SMS?

60. A transaction value threshold, provided it is set at a reasonable level and does not catch acquisitions that are unlikely to have a competitive impact, could be designed so as not to delay unproblematic acquisitions. In such circumstances, the main risk would be increased legal costs and (as outlined above) the commercial / financial risks of delays to deal completion.

E. The Risks of Introducing Mandatory Merger Reviews

This section relates to consultation question 29: What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with SMS?

61. As outlined above, there is a risk that imposing regulatory burdens and reporting requirements will increase legal costs, increase uncertainty, and reduce investment in the UK's start-up ecosystem. This is because some buyers will become unsuitable due to timing concerns. Risks would be elevated if the subset is not drawn narrowly enough to exclude false positives.

F. The Risks of Lowering the Legal Standard for Merger Control Reviews

This section relates to consultation question 30: What are the benefits and risks, particularly with regard to innovation and investment, of amending the substantive test probability standard used during in-depth phase 2 investigations to enable increased intervention in harmful mergers involving firms with SMS?

62. As discussed above in Section II, digital markets are dynamic and innovation is difficult to predict. Merger control itself already veers into the realm of speculation, given its basis on a prognostication of the future effects of a transaction. Where innovative products and services are concerned, the risks are heightened. Lowering the substantive test probability standard would move even further away from a strictly evidence and

effects-based assessment towards more subjective and speculative decision making. This would reduce legal certainty and increase the risk of Type I and Type II errors.

VII. Conclusion

63. In highly differentiated, complex and dynamic digital markets, overly interventionist measures are likely to have unintended consequences. Absent clear proof of harm to consumers, regulators should be cautious, so as not to reduce the already substantial benefits that digital platform business models have brought for consumers and business users. As a global leader in innovation, the UK should avoid overregulation that could jeopardise its competitiveness.