REFLECTIONS ON CONSUMER TRUST AND COMPETITION IN THE DIGITALIZED ECONOMY

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I. INTRODUCTION

Digitalization has disrupted traditional markets while bringing many benefits to consumers. Easier access to goods, services and information is stimulating commerce, boosting travel and facilitating communication. However, the use of data provided by consumers—whether in exchange for services or collected directly or indirectly by web services—is leading to growing concerns about consumer safety and privacy, on the one hand, and market entry and competition, on the other. One emerging issue is the need to bolster consumer trust in digital markets; and the way active and adequate competition policies can contribute to this. Of mounting concern is the fact that some markets are increasingly dominated by a single platform, partly owing to the intrinsic nature of digital markets where economies of scale and network effects are a vital factor. This dominance is coupled with the fact that users often have limited understanding of how their data are used, hampering transparency for consumers and businesses alike. While these concerns need addressing, policy makers are wary of clamping down on market players with regulation for fear of stifling innovation.

The global competition community is seeking ways to address this conundrum. On June 5, 2019, the G7 competition authorities released a joint statement, noting their common understanding on "Competition and the Digital Economy." The statement explains the benefits of the digital economy for innovation and growth,[2] and reaffirms the need for competition law enforcement to "[safeguard] trust in digital markets and [ensure] that the digital economy continues to deliver economic dynamism, competitive markets, consumer benefits, and incentives to innovate."[3]

Moreover, two recent European reports, namely the European Commission's Special Advisers' report on *Competition Policy for the Digital Era* (the "Crémer Report"[4]) and the UK's *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (the "Furman Report"[5]) (together, "the Reports") highlight some of the competition concerns in digital markets. The Reports identify a number of supply-side aspects common to digital platforms, which may restrict competition and market entry, such as network effects, economies of scale and scope, and the

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2 For example, digitalization has created new investment and business opportunities, offered new products, improved the quality of goods and services, and decreased costs. We note that various digital services such as price comparison tools specifically help to increase competition.

3 OECD, *Common Understanding of G7 Competition Authorities on Competition in the Digital Economy*, Paris, June 5, 2019, available at https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf.

4 J. Crémer et al, *Competition Policy for the Digital Era* (April 4, 2019), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

5 UK Digital Competition Expert Panel, *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (March 13, 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

control of consumer data. These features provide significant advantages to incumbents and are likely to assist in the attainment, entrenchment, and exploitation of market power. Such effects are amplified by demand-side considerations common to digital markets, such as consumer biases (risk aversion, the "endowment effect," anchoring, and so on),[6] which undermine switching or multi-homing, and lock in consumers.

Prevailing online business models, such as multi-sided platforms and zero-priced markets, have consequences for the application of competition law and policy. The Reports conclude that the existing competition framework remains broadly relevant, but that it can and should be adapted to meet the challenges from the digital economy, and to continue to encourage competition and innovation for the benefit of consumers. Close collaboration with consumer protection and privacy enforcement regulators will be essential, given the complementary role of privacy and consumer protection laws in addressing potential harms associated with digital platforms and promoting consumer trust in digital markets. This is a point also made by the OECD's Competition Committee, most recently in a roundtable discussion on financial technology ("FinTech").[7]

This article will consider some of the recommendations from the Furman and Crémer Reports designed to enhance competition law enforcement in digital markets, adding insights from ongoing OECD work on the digital economy. After a discussion of some of the key features of digital markets that require an adaptation of standard competition analysis, we consider the use of the prevailing "consumer welfare" standard. Next, we discuss demand-side considerations in digital markets, which can be a determining factor in entrenching the power of incumbents. Finally, we analyze two key issues highlighted by the Reports: the impact of data on competition, and digital mergers.

II. KEY FEATURES OF DIGITAL MARKETS

There are three key characteristics of the digital economy: extreme returns on scale, network externalities, and the role of data, which in combination have led to several highly concentrated markets, where it is difficult to dislodge incumbents. As with large-scale industries, there are significant advantages associated with size. The average variable cost of serving additional customers is very low, which provides an advantage to incumbents that have already incurred the necessary fixed costs and established themselves in the market. Thus, incumbents have a significant competitive advantage. Further, large economies of scope favor the development of so-called "ecosystems." This is reinforced by strong network externalities in these markets, which exist when participation on each side of a platform depends on participation on the other side. Such externalities can make it difficult for a new entrant to displace or even compete with an established incumbent. The Reports note that the extent of this incumbency advantage may be dependent on the degree to which multi-homing, data portability, and data interoperability are possible in a given market. Finally, the ability of large platforms to acquire and use data help them to obtain and maintain market power.

The Furman and Crémer Reports acknowledge that vigorous competition, where a large number of firms compete in a single market, will typically not be feasible in the digital economy. The specific features of the online economy tend to produce "winner takes most" markets (a tendency which itself forms part of the incentive to enter this sector). While, in the recent past, sustained market power was constrained by dynamic competition, which led to more rapid turnover, the Reports note that large dominant companies have become more entrenched in digital markets. In this light, the Reports acknowledge that more needs to be done to protect competition *for* the market, through both enforcement and proactive regulation. Competition authorities must prioritize gaining a better understanding of how digital markets work, in order to better adapt competition law concepts and methodologies to address specific issues in such markets.

6 OECD, *Use of behavioural insights in consumer policy*, OECD Science, Technology and Innovation Policy Papers (February 2, 2017), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2016)3/FINAL&docLanguage=En.

7 See OECD, *Digital disruption in financial markets*, June 5, 2019, available at http://www.oecd.org/daf/competition/digital-disruption-in-financial-markets.htm. Such cooperation is being initiated. For example, in 2019, the Italian Competition Authority ("AGCM") released a joint report with the Italian Data Protection and Communications Authorities.

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III. CONSUMER WELFARE STANDARD

The consumer welfare standard underpins the application of competition law in the EU. In other words, the overall goal of competition law should be to ensure that consumers benefit. Both the Furman and Crémer Reports stress that the consumer welfare standard remains appropriate, despite criticism by proponents of a more "structural" approach.[8] The Furman and Crémer Reports argue that the notion of "consumer welfare" encompasses all relevant consumers, including business users, and is not limited to end-consumers. This may be particularly relevant for competition in digital markets, where large marketplace platforms also serve businesses and act as "regulators" or "gatekeepers" for transactions. As such, businesses may be affected by a given platform's potentially anti-competitive practices, such as "self-preferencing," i.e. the practice of proposing one's own services or products before or on more advantageous terms than those of competitors.

Along with specific regulatory regimes that exist in some jurisdictions, competition law may be an appropriate framework to pursue certain forms of unfair business practices, including business-to-business conduct where "consumer protection laws typically do not apply." Likewise, "data privacy provisions often extend only to natural persons," as noted in the OECD *Implications for E-commerce* Background Note, as these tend to focus on final consumers.[9] In some cases, competition law enforcement, such as merger control, may therefore be appropriate. Secondly, the consumer welfare standard is not limited to price and quantity considerations. Any type of negative effect can be considered. In the digital economy, quality considerations such as service, innovation, and privacy may be more relevant as a measure of consumer welfare, especially in multi-sided platforms and zero-price markets.

The Furman Report stresses the importance of dynamic considerations and the possibility of using "some structural presumptions."[10] The Reports highlight some of the difficulties in applying the current tools to digital markets where quality is often the determinative factor.[11] The OECD also recognizes the difficulties in evaluating quality factors, noting the current lack of an agreed framework among enforcers.[12] As regards determining the existence of an abuse of dominance, the Crémer Report highlights possible changes to the standard of proof (in terms of likely error costs) and notes that it is difficult to calculate the expected impact on consumers. Both Reports discuss the possibility of moving away from requiring precise measurement of consumer harm, suggesting that practices that seek to reduce competitive pressure should be forbidden unless the dominant platform can demonstrate clear consumer welfare gains.

IV. DEMAND-SIDE CONSIDERATIONS

Another (and trickier) aspect of digital markets is the consumer response to the techniques employed by platforms. As highlighted by the OECD, this means that demand-side analysis is just as important as supply-side considerations.[13] The specific characteristics of digital markets influence consumer behavior, helping sustain and reinforce the market power of incumbent dominant platforms (see Box 1). The Crémer and Furman Reports also recognize the influence of consumer bias in entrenching incumbents' market power, and suggest the use of certain remedies, such as data portability and interoperability requirements (which facilitate switching), to help address consumer inertia.[14]

A. Behavioral Responses may Lock in Consumers

The UK's Consumer and Markets Authority ("CMA") and the OECD examined how demand-side behavior can be analyzed by identifying how consumers access, assess, and act on information, and noted that good market outcomes "depend on a functioning demand side."[15] In addition, when customers face challenges such as "barriers to accessing relevant information on price or quality, barriers to switching, barriers to search-

8 Furman Report, *supra* note 5, p. 87. Criticism of the consumer welfare standard has come mainly from the U.S.

9 OECD, *Implications for E-commerce, Secretariat Background Note*, p. 46, available at https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf.

10 Furman Report, *supra* note 5, p. 87.

11 For example, when defining the market, the SSNIP test is less relevant in zero price markets.

12 OECD, Policy Roundtables: *The role and measurement of quality in competition* analysis (2013).

13 See the roundtable discussion on the topic, available at http://www.oecd.org/daf/competition/consumer-facing-remedies.htm

14 We note that the Stigler Center (University of Chicago) report on digital platforms provides extensive discussion on consumer biases.

15 OECD, *Designing and Testing Effective Consumer Facing Remedies – Background Note by the UK CMA* (2018), p. 6.

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ing or comparing between suppliers or where they face barriers to understanding the choices on offer, suppliers may be able to exercise greater market power than they otherwise would."

Box 1. Examples of consumer behavioral biases[16]

Choice/information overload: When faced with either complex products or a bewildering array of choices, consumers can sometimes ignore possible choices, walk away from markets, or "choose not to choose". Consumers can also rely on relatively simple "rules of thumb" or "heuristics" to make decisions.

Default and status quo effect: Presenting one choice as the default option can induce consumers to choose that option. The power of default options is related to the status quo effect, where consumers have a strong tendency to keep using the default option, since the disadvantage of leaving it looms larger than any advantages of leaving.

Endowment effect: Consumers often demand much more to give up an object than they would be willing to pay to acquire it. The value of a good for consumers increases when it becomes a part of a consumer's endowment.

Anchoring: Consumers "anchor" decisions around information that they think is the most important. Consumers may fail to adjust their perception of the value of the offer sufficiently, even when additional information is provided to them, since they are hesitant to move far from the anchor point.

Framing: Consumers are influenced not only by the content of the information provided by suppliers but also by how the information is presented. Presenting an option in a certain way may induce consumers to evaluate their choices from a particular reference point.

Priming effect: When consumers are repeatedly exposed to certain objects, for example, through publicity, certain attributes can play an undue role in consumer decisions. Priming can influence preferences by making certain dimensions salient that would otherwise have been considered to be less important.

Overconfidence: Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome. For example, many drivers think that they are safer than the average person, and when consumers are told that 20% of customers will benefit from a particular product, they tend to expect that they will be part of that 20%.

Hyperbolic discounting / myopia: Consumers' perceived discount rates tend to rise steeply the shorter the time period being considered. This means that consumers tend to treat the present as if it were more important than other time periods. This explains outcomes such as low retirement savings in the absence of compulsion.

Time-inconsistency: While traditional economic models assume that consumers behave in a time-consistent way, i.e. that they are able to make decisions knowing their long-term interest and resist short-term actions that go against that, in reality, choices are not consistent across time periods. Consumers may face a conflict between short-term urges and long-term interests.

Fairness: Consumers are generally concerned that market transactions should be fair to other consumers and are often concerned about the conditions of supply (e.g., labor conditions, or use of environmental resources). This means that consumers are concerned not only about their own interests.

Social norms: Consumers are often guided by the values, actions, and expectations of a particular society or group. For example, when people are made aware of what others are doing, it can reinforce individuals' underlying motivations.

Source: Kahneman et al (1991), OECD (2006), OECD (2007), OECD (2010), UK OFT (2012a), McAuley (2013), Oxera (2013), Shafir (2008), Behavioural Insights Team (UK) (2014)

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Consumers in digital markets do not seem to display the rational utility-maximizing decision-making that is assumed in traditional economic models.[16] Consumers have biases such as the "present bias," which makes switching difficult (i.e. preferring what they already have rather than what they may get in future). In concrete terms, this means, for example, that consumers are more likely to shop on websites where they already have an account. Network effects also mean that users tend to stay on social networks where they already have a large number of contacts, rather than seeking out potentially better options (in terms of quality, price, or privacy protection, for instance). Behavioral aspects may lead to sub-optimal consumer outcomes and decrease consumer trust in platforms, while increasing the "stickiness" of the incumbent's market power.

Given the strength of network effects in digital markets, consumers are highly reliant on their peers to assess gains and losses. Digital market players may exploit this behavior through platform design.[17] It is therefore recommended that enforcers should also consider demand-side intervention and remedies. The OECD notes four main categories of potential demand-side remedies in this context: (i) disclosure remedies; (ii) "shopping-around" remedies; (iii) switching remedies; and (iv) outcome control remedies.

The OECD roundtable on *Designing and Testing Effective Consumer Facing Remedies* identified how trust is essential to the effectiveness of demand-side remedies, especially in data-driven markets. To ensure that customers are willing to share data with third parties—for instance in order to obtain better or more innovative products and services—they need to have sufficient trust in market rules and regulations, and in market participants.[18] Hence, the CMA's "Open Banking" remedies, for example, require customers to be prepared to provide account information to third-party intermediaries to be effective. This willingness in turn is influenced by whether customers feel their data is secure and whether they have control over its use.

Trust in institutions and data security is therefore of the utmost importance for the well-functioning of policies such as the UK's Open Banking initiative. However, such success also requires close cooperation not only between competition authorities, but also with data protection and consumer protection regulators. The next section will consider how the two Reports address data and merger issues that can prevent consumers from taking full advantage of digitalization.

V. NOTABLE RISKS IN DIGITAL MARKETS AND CONSUMER-FACING REMEDIES

A. Data Considerations

The Crémer Report acknowledges competing considerations when it comes to data.[19] Data are an input for the provision of services and can create efficiencies, enabling innovation and the improvement of services and products, for example through customization. The ability to obtain, store and use data is thus a key competitive factor. Lack of access to specific data can therefore be a barrier to entry for new entrants. The way such data are used can also be a source of mistrust for consumers in digital markets, raising consumer protection concerns based on obvious market information asymmetries.

In the EU, the enforcement of abuse of dominance rules (Article 102 TFEU) tends to target "exclusionary" conduct, focusing on the workability of the competitive process and indirect consumer harm. However, "exploitative" abuse of dominance cases, such as the German Facebook investigation, which looked at whether Facebook breached data protection provisions, suggest that data concerns could, potentially, be addressed by competition authorities as exploitative abuses.[20]

16 OECD, *Designing and Testing Effective Consumer Facing Remedies – Background Note by the UK CMA* (2018), p. 10

17 The OECD explains that platforms may directly or indirectly induce exclusivity, for example through contractual terms that prevent a user from participating on a platform if they participate on a competing platform (direct) or through price structures that make it unattractive for a user to multi-home (indirect) (see *Rethinking antitrust tools for multi-sided platforms*, OECD, 2018, pp. 114-115).

18 UK Background Note, *supra* note 17, pp. 39-40.

19 Crémer report, *supra* note 4, Chapter 5.

20 We note that Facebook recently won its appeal to the Higher Regional Court of Dusseldorf (August 2019) but that the German Cartel Office has said it will appeal this decision.

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In addition, as flagged by the Furman and Crémer Reports, issues relating to the use of algorithms (for instance to match competitors' prices), and individual price discrimination, require further attention and monitoring.[21] In the EU, privacy concerns have been addressed by regulatory responses such as the General Data Protection Regulation ("GDPR"), and consumer law continues to evolve to adapt to digital market concerns. As stressed by the Reports, this is an area where cooperation with privacy and consumer protection bodies is key. The OECD has highlighted that the goals of these agencies are often aligned in terms of consumer welfare, promotion of market trust, and consumer choice,[22] but that the pro-competitive effects of data should not be stifled by over-zealous policymaking.

To support competitive market structures, the Reports, especially the Furman Report, recommend that competition authorities engage in proactive regulation, as ex-post assessment is too slow and insufficient to effectively address competition issues in digital markets. One possibility is to use the essential facilities doctrine to facilitate data access. This is however not a point on which all jurisdictions have reached agreement.

The Reports emphasize how large platforms have accumulated valuable datasets, and discuss whether the scope of such data acquisition is now an insurmountable barrier to entry. The Furman Report proposes the creation of a "Digital Markets Unit" within the CMA. One of its proposed functions would be to promote "greater personal data mobility and systems with open standards where these tools will increase competition and consumer choice,"[23] in the mold of the UK's Open Banking initiative. Consumer control over user data favors trust and thus participation in the market. The Unit's other functions would include an agenda to secure open access to "non-personalized and anonymized data," and therefore encourage market entry and competition.

B. Merger Control in Digital Markets

Ensuring effective merger control in digital markets can help promote consumer trust, whether by blocking mergers or imposing (consumer facing) remedies where necessary.[24] Both the Crémer and Furman Reports encourage the prioritization and revision of merger control regimes in digital markets. The Reports raise the particular concern that potentially anti-competitive mergers whereby incumbents buy start-ups with promising technology or business models (so-called "killer acquisitions") will escape assessment or be cleared unconditionally because they fall below current merger notification thresholds.

There is also the specific concern of mergers motivated by access to or acquisition of so-called "Big Data," given its substantial value and its impact on a firm's ability to attain, sustain, and potentially abuse market power. Rival firms with their own datasets could otherwise act as a competitive constraint on dominant platforms or companies. The Reports discuss whether existing merger rules adequately capture potentially problematic transactions, and split their assessment of mergers into two key aspects, which we discuss below.

1. Identification of Mergers and Notification Thresholds

In the UK, there is no compulsory pre-merger notification process, and the Furman Report did not recommend any change to the voluntary regime generally. However, it did recommend that large digital platforms be required to notify intended acquisitions.[25] The Crémer Report makes no recommendation for a change to notification thresholds for mergers. However, it notes that certain jurisdictions, such as Austria and Germany, have already introduced notification thresholds based on transaction value, and proposes to monitor their effects.[26] Given the high monetary value of

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21 See, e.g. Furman Report, *supra* note 5, p. 23. See also, OECD, *Personalised Pricing in the Digital Era, Background Note by the Secretariat*, November 28, 2018 https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf.

22 OECD, *Big Data; bringing competition policy into the digital era (Executive Summary with Key Findings)*, p. 5 available at https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf.

23 Furman Report, *supra* note 5, p. 5.

24 An example of consumer facing remedies can be seen in the commitments by Microsoft to secure EU clearance for its acquisition of the professional social networking site, LinkedIn whereby, for a period of 5 years, Microsoft undertook to safeguard manufacturers' and distributors' choices as to whether or not to preinstall LinkedIn on Microsoft Windows, and to ensure that, if preinstalled, it could be removed by users. Such remedies can help address demand side concerns.

25 We note that this has also been recommended by the recent Australian Competition and Consumer Commission ("ACCC") Digital Platform Inquiry.

26 These provisions are applied in addition to existing turnover provisions, with a view to ensure that high value mergers concerning undertakings with high potential but low turnover are caught by the merger control regime.

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such acquisitions, such provisions will likely capture Big Data or technology mergers that would not otherwise meet turnover thresholds.[27] For example, Facebook's 2014 acquisition of WhatsApp had a transaction value of USD 21.8 billion, compared with WhatsApp's 2013 revenue of USD 10.2 billon.[28] The Crémer Report nonetheless stresses the importance of legal certainty and ensuring that an appropriate threshold is set, in order to ensure the proper functioning of the merger control regime, and to avoid unnecessary administrative and transaction costs.

2. Substantive Assessment

More importantly, in line with recent OECD work,[29] the Crémer and Furman Reports agree that assessment of digital mergers should also (and especially) consider non-price parameters, such as privacy protection and data. Further, the Reports suggest that competition authorities should take a more rigorous approach to harm to potential competition.[30]

While the Crémer Report does not recommend changing the EU's current significant impediment to effective competition ("SIEC") merger control test, it does recommend greater scrutiny of whether incumbents have an overall strategy to prevent competition (including in broader ecosystems). In particular, there is a need for the development of new theories of harm. It has been suggested that the burden of proof should be on merging parties to show that efficiency gains offset any adverse effects on competition, though without presuming that such mergers are anticompetitive.[31] The Furman Report went further and recommended reforming the standard of review, proposing a "balance of harms" approach, which would look not only at the likelihood of a merger leading to anticompetitive harm, but also its potential extent.

The CMA, in its Digital Markets Strategy, considers that the current UK merger control standards are still "fit for purpose."[32] That said, the CMA is currently reviewing its merger assessment guidelines,[33] and has recently undertaken an ex-post assessment of mergers in digital markets. A united position on whether substantive merger assessment tests need further amendment has yet to be agreed among EU competition authorities.

27 It is said that the German provisions would now capture the Facebook/WhatsApp merger (transaction value of USD19 billion), which although reviewed by the EU Commission, was not captured by the EU merger notification thresholds. As explained by the OECD, "such transaction thresholds could help enable competition authorities to identify pre-emptive acquisitions intended to displace potential disruptive innovators (some of which may be data-driven innovators)." See OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 2016, p. 20.

28 See Alison L. Deutsch, *WhatsApp: The Best Facebook Purchase Ever?*, Investopedia, June 25, 2019, available at https://www.investopedia.com/articles/investing/032515/whatsapp-best-facebook-purchase-ever.asp.

29 OECD, *Big Data: Bringing Competition Policy to the Digital Era*, 2016, p. 18.

30 Similarly, The ACCC Digital Platform Inquiry recommends reform to the Australian Competition and Consumer Act 2010 to explicitly allow the ACCC to consider: "(a) the likelihood that an acquisition would result in the removal of a potential competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition," when assessing the likely competitive effects of a merger.

31 Crémer Report, *supra* note 4, p. 124.

32 CMA, *The CMA's Digital Market Strategy*, July 2019, p. 9.

33 See, e.g. UK Government, *Call for Information: Digital Mergers*, available at https://www.gov.uk/government/consultations/call-for-information-digital-mergers.

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VI. CONCLUSION

Recent and on-going work on digitalization in the EU and by the OECD highlights the importance of understanding how digital markets work and their impact on the economy and consumers. This work is supported by ongoing market studies by competition authorities to improve the understanding of digital markets and identify appropriate policy responses.[34] In particular, there may be a benefit in carrying out competition assessments of laws and regulations to determine whether they unnecessarily restrict innovation and growth in digital markets.[35] While most competition agencies agree that there is no need to overhaul the existing competition framework, it is nonetheless clear that competition authorities should adapt their tests and tools to the challenges of digital markets and large platforms, and in particular consider alternative theories of harm. They also need to adapt their enforcement methodologies to include demand-side remedies, to help better protect consumers and build trust in digital markets. Finally, the sheer speed of developments means that competition authorities need to take a proactive approach, such as establishing specialised units and equipping themselves with the necessary digital tools. For instance, the essential facilities doctrine could be employed to allow new entrants to gain access to key data to support a competitive environment. Solid competition enforcement and pro-consumer policies could increase consumer trust, encouraging legitimate consumer market participation and increased innovation.

34 Enforcement action was initiated thanks to the EU Sector Inquiry into E-commerce (2017), conducted as part of the EU Digital Single Market Strategy. In July 2019, the UK announced that it would conduct a market study into Online Platforms and Digital Advertising.

35 The OECD is currently updating its Competition Assessment Toolkit to consider digital issues.

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