

The CMA's response to the European Commission's call for contributions on 'Shaping competition policy in the era of digitisation'

Overview

1. The Competition and Markets Authority (CMA) is the UK's lead competition and consumer enforcement authority which works to promote competition for the benefit of consumers, both within and outside the UK. It is an independent, non-ministerial government department.
2. The CMA welcomes the appointment of the European Commission's panel of advisers to report on the future challenges of digitisation for competition policy and the opportunity to contribute to the panel's thinking.
3. The topics outlined for contributions serve as a fruitful basis for discussions, covering areas which are of significant interest to competition authorities such as the CMA.
4. Our contribution focuses specifically on two of the questions posed: the role of privacy in the competition assessment; and theories of harm in digital merger cases. Our views on many of the other questions posed, as well as information on the CMA's wider work on digital markets, are already well addressed in other published papers.¹
5. The CMA has taken an active role in relation to online markets. This reflects our broader strategic focus on the digital economy and ensuring that online markets work well for consumers and businesses. We take a multifaceted approach to promoting competition in the online economy, combining enforcement and investigations under various competition and consumer protection law powers with ongoing efforts to evaluate and deepen our understanding of, and expertise in, the dynamics of e-commerce, digital and data-driven markets.
6. Digitisation presents challenges for competition policy which merit further consideration. We are keen to contribute our experience and expertise to the

¹ See for example our [Response to the UK Government Consumer and Markets Green Paper](#), our [Response to the House of Lords Select Committee on Communications on Regulation of the Internet](#), and our [Response to the OECD on the Implications of E-commerce for Competition Policy](#).

Panel's work. In particular, we look forward to discussing these with the Panel and other competition authorities at the conference in January.

Competition, Data, Privacy and AI

In which ways should privacy concerns serve as an element of the competition assessment?

Overview

7. The use of consumer data can lead to important benefits for the consumer, for firms and for the economy. Firms can create more value for their customers by responding directly to customer feedback (explicitly through comments and implicitly through what they buy) to improve the services and products they offer as well as to make their operations more efficient. At its simplest, this transaction offers a potential 'win-win' scenario where consumers, firms and the economy benefit.
8. However, these benefits will only be realised if consumers continue to provide data and this should rely on them being able to trust the firms that collect and use it. Firms' collection and use of consumer data could support well-functioning markets. In particular, the regulation of the collection and use of data should ensure the protection of essential rights such as privacy.
9. For consumers to be able to exercise these rights, it needs to be clear to them the degree of privacy a good or service affords them. And as we explore further below, consumers being able to exercise choice on their preferred level of privacy is key to effective competition. An absence of competition over privacy may indicate data markets failing to deliver what consumers want. This may occur where the implicit price of data used by firms is unclear, and where consumers are unable or unwilling to drive competition and incentivise firms to improve the degree to which consumers' privacy is protected. These issues were explored in the CMA's report on the commercial use of consumer data.²
10. It is important to recognise upfront that there are some difficult trade-offs between a consumer's essential right to privacy and competitive markets which, as set out above, often function most effectively the more data there is available, including personal data. For example, when a consumer elects not to have a browser track their behaviour, they are exercising their essential right to privacy. However, this has implications for the browser who no longer has access to this data source to improve their products and services.

² See CMA: [The Commercial use of consumer data](#), June 2015.

11. In considering the possible approaches agencies could take to ensure consumers are able to effectively assess and exert control over their privacy as we do below, it is therefore important to recognise their possible wider implications.

The role of privacy in the competition assessment

12. The CMA's role is to promote competition in the interests of consumers. Key to effective competition is consumers' ability to drive competition between suppliers, that is to compare different products and services and choose the one which best suits their needs. When assessing products and services, consumers should be able to compare different elements of both price and quality effectively, including the degree of privacy protection afforded by a good or service.³

13. However, there can be challenges to consumers' ability to do this in digital markets, where the price the consumer is paying (which may not always be monetary), or elements of quality, are not always clear. For reasons discussed further below, consumers may find the degree of privacy afforded particularly difficult to assess.

14. Firms in the digital economy now collect enormous amounts of information about individuals – from personal information to browsing history and location data. The amount of information a consumer exchanges for use of a good or service, for example a website, search engine or social media platform, may be seen as an element of both its 'price' and/or its quality.

15. Consumers may attach different monetary or qualitative values to their data and its protection. Individual consumers will have different tolerances and attitudes to the exchange of personal data for services and these may change depending on context or circumstance. In addition, consumer preferences can sometimes appear to be paradoxically opposed, for example consumers will often say they are concerned with privacy whilst at the same time sharing a great deal of personal information online.

16. Without clarity on what data is being collected and how it is being used, consumers are unable to properly assess a good or service and whether it meets their varying needs.

17. In considering consumers' ability to assess the degree of privacy a good or service affords them, it is helpful to distinguish between two scenarios:

- a. where the degree of privacy provided is inherently unobservable; and

³ Privacy in this context refers to the control and use of information about an individual and specifically, the extent to which the individual to whom the information relates is able to control how that information is used.

- b. where unclear terms and conditions, including privacy policies obfuscate the degree of privacy provided.
18. In many situations, it may be near impossible for consumers to assess the degree of privacy they are being provided. For example, it may be impossible to properly assess the quality of the cyber-security and encryption measures taken by a firm which will ensure that private data is adequately protected.
19. In others, it may in principle be possible to assess the degree of privacy provided, but firms' obscure terms and conditions, including privacy policies may make it difficult. If terms and conditions are unclear or 'notice and consent' mechanisms are inadequate, then a consumer may be unable to make a properly informed decision and may provide their data being unaware what they are allowing firms to do with it and the implications of this. This may be particularly relevant in situations where it is difficult for consumers to assess the implications of forgoing their privacy. This could be because it is unrealistic to expect them to understand how the information could or will be used or they cannot envisage how it might be used in the future with subsequent technological change.
20. Privacy therefore plays a key role in the competitive assessment. Where consumers value their privacy, and can observe the degree to which it is protected, firms will have an incentive to compete by providing different levels of privacy in response to consumer preferences. However, particularly in digital markets, consumers may be unable to observe how much privacy a good or service affords them.
21. This is especially important given wider concerns around the accumulation of data by firms. Where consumers cannot assess and control the amount of information they are exchanging, firms are able to accumulate large amounts of individual customer data which they can monetise, for example through targeted advertising, or use to personalise goods and services. If consumers were better able to assess and exercise control over their privacy, this would likely impact the amount of individual customer data firms are able to collect. For example, those consumers who value privacy may choose to limit the amount of information they pass to firms and/or be more likely to use firms who afford them a high degree of privacy and data protection. The degree to which consumers can assess and exercise control over their privacy is therefore a key consideration in debates around the accumulation of data by firms.
22. There are challenges for agencies in considering how best to address concerns in this area and they must be careful to strike an appropriate balance. Whilst allowing the collection of individual consumer data may enable firms to use it to develop innovative products and services which meet consumer needs, consumer data must also be safeguarded and consumers protected from exploitative practices.

23. We have set out below our initial assessment of the possible approaches agencies could take to ensure consumers are able to effectively assess privacy and to deal with abuses by firms. These are presented with the aim of developing our thinking and aiding discussion, rather than as options which the CMA is necessarily considering at this stage. We have also limited our assessment to the issue at hand and have therefore not included approaches which address wider issues around privacy and/or the accumulation of data by firms.

24. First, agencies can take enforcement action against exploitative practices, using the most appropriate tool(s) to address the abuse identified. This could include using competition, consumer or data protection tools, in isolation or in parallel, depending on the practices observed.

- Competition – Where privacy constitutes a parameter over which firms compete, competition tools may potentially be used.⁴ This includes in merger control where agencies may consider actual or potential harms resulting from the merger, for example the potential for the merged firm to increase the amount of personal data they collect, or weaken existing privacy protections or controls around use of data.
- Consumer – Where the collection and use of consumer data by firms involves unfair commercial practices or the use of unfair terms, agencies may be able to take action using consumer powers.⁵ The CMA has existing strong consumer powers which we have used previously in relation to consumer data.⁶
- Data protection – Agencies can take action where concerns around privacy breach elements of data protection rules such as the General Data Protection Regulation (GDPR). It is essential that consumers can trust firms to handle their data safely, securely and in accordance with privacy and data protection laws. The GDPR requires firms to put in place appropriate technical and organisational measures to implement the data protection principles and safeguard individual rights – ‘data protection by design and by default.’ In the UK, the Information Commissioner’s Office is responsible for taking action in relation to breaches of data protection rules.

25. This raises wider questions around the extent to which such existing tools are fit-for-purpose and whether existing frameworks need to be amended to ensure

⁴ For example, in December 2017, the German competition authority, the [Bundeskartellamt](#), made a preliminary assessment that Facebook’s collection and use of data from third-party sources represented abuse of its dominant position in social networks in Germany. No final decision has yet been reached however.

⁵ See chapter 5 (particularly paragraphs 5.35ff.) of the CMA’s report into [the commercial use of consumer data](#) (footnote 10) for examples of how data collection practices may breach consumer protection law.

⁶ For example, [the undertakings given in online dating](#). These included giving consumers more control over their personal data on the relevant dating sites, and a commitment to comply with data protection law.

agencies are able to effectively enforce against practices which they consider are likely to have an adverse effect on competition or harm consumers.

26. The UK's existing competition and consumer law frameworks have shown themselves broadly capable of adapting to technological and other changes in markets. However, any further exploration of this issue may lead us to consider whether additional changes may be needed to enable more effective competition and consumer protection.

27. Alongside this, and on the basis that privacy can be observed and that, with sufficient high quality information, consumers can make an informed decision, agencies may consider introducing tools to help consumers properly compare the degree of privacy afforded by different goods and services and choose the one which best suits their needs, taking into account how much they value their privacy. Most of these tools rest on improving some element of transparency for consumers. This might include for example:

- Measures to ensure firms set out clearly, concisely and in simple and easy to understand language what information they require from consumers and what, if anything, the firm will do with it. Under existing UK consumer protection law, firms need to be transparent about practices where this will enable consumers to take informed transactional decisions about matters which they care about. At a minimum we already expect firms to be transparent with consumers about what data about them is being collected, who it is shared with, and the use to which it is put.
- Providing consumers with tools to easily identify those firms which afford them a higher or lower degree of privacy, for example through the development of standard metrics, a rating system or certified standard for products and services offering a minimum degree of privacy.
- Measures to give consumers the ability to exercise meaningful control over their data and how it is used, for example by improving consent options and/or by improving their ability to 'port' their data between providers, building on the existing requirements contained in GDPR.

28. Lastly, agencies may decide that it is unrealistic for all or some, particularly vulnerable consumers, to be able to make an assessment regarding their privacy in this way. In these circumstances, agencies may consider additional measures, working with wider government and data protection authorities as appropriate. This might include mandating consumers' right to a minimum standard of privacy, and/or requiring this as a default option – for example that consumers' data cannot be shared with third parties unless they explicitly 'opt-in.'

29. Privacy within the competitive assessment is an area we would welcome the panel's consideration of and believe there would be value in discussing with other competition agencies. In particular we would be interested in the panel's thoughts on the following questions:

- To what extent do consumers value privacy? Do they understand how their data is used currently? If they don't and it was explained to them, would they care or change their behaviour? As set out above, consumer preferences around privacy can sometimes appear paradoxically opposed.⁷
- How should regulators respond? Is it realistic to expect consumers to be able to drive competition in this area? What are the consumer and competition harms we need to enforce against? Are existing tools sufficient for agencies to be able to effectively enforce against such harms and other exploitative abuses? If not, what are the gaps?

Preserving Digital Innovation through Competition Policy

In digital merger cases, is there scope to apply theories of harm based on loss of innovation and/or loss of "potential competition" more often?

30. Mergers in digital markets can give rise to challenges for competition authorities in applying merger control rules. These may include, for example:

- Risks that mergers involving competitively significant e-commerce businesses may not be captured by jurisdictional thresholds (especially where they are only turnover-based)
- Traditional forms of substantive analysis, which may be focused on price effects, and thus may fail to capture other metrics of competition effectively, including quality and innovation (in particular where services are 'free', but are provided in exchange for a consumer's data, or are monetised in a related market (e.g. advertising)).
- Post-merger counterfactuals may be difficult to assess in markets which are very new or in which new online products and offerings may shortly be – or may already be – fundamentally and rapidly changing the dynamics of competition: in such instances, the past may not be a good guide to the future.

⁷ The consumer group Which? has explored these questions in its recent report '[Control Alt or Delete: The Future of Consumer Data](#).' It found that whilst consumers' attitudes to data are often pragmatic and they accept the need to share data in return for clear benefit, the reality of the data ecosystem, for example the fact that unknown companies 'profile' them, is an unpleasant surprise.

- Taking due account of network effects in multi-sided markets
 - The relevance of data in the competitive assessment (one or more of the merging parties may hold large customer data sets).
31. One key challenge is that, in considering the merger, competition authorities may be required to consider the possible future development paths of digital markets, for which there are unlikely to be precedent or historical data available. This may make it difficult to test dynamic theories of harm and as a result risks SLC decisions being wrong if dynamic effects, that is the long-run effects of the merger on elements such as future innovation and new entry, are under- or over-estimated.
32. The CMA believes this represents a very important challenge facing the competition authorities at present. In particular, the risks of under-enforcing where a merger leads to a reduction in product quality and/or innovation may be considered to be higher than the risks of over-enforcement. This is particularly likely to be the case in mergers where there is a small possibility of a large reduction in potential competition resulting from the merger ('low likelihood – high detriment') and for which it may be difficult to meet the legal tests that the merger results in a significant lessening of competition.⁸
33. Potential competition where a large established firm may acquire one of a group of relatively specialist or recent start-ups is an issue that arises regularly in technology markets and is likely to become a more familiar aspect of our assessment of merger cases. However, the counterfactual is complicated in these markets, because it can be hard to determine how much of the success of a small acquisition is due to resources and expertise of the acquirer rather than to innovations or growth which might have taken place absent the merger.
34. Second, there is a risk of not placing sufficient weight on dynamic effects simply because they are uncertain and more difficult to quantify. Given the importance of dynamic competition and innovation to consumer welfare, it is very important to take them into account.
35. The CMA has reviewed a number of mergers involving enterprises active in digital markets. In that regard, it is important to note two key aspects of the UK merger control regime: the jurisdiction thresholds; and the substantive assessment test.
36. The jurisdictional thresholds under UK merger control involve two alternative tests, such that jurisdiction is exercisable if either test is met: not only a turnover-based test, but also a test based on the parties' combined share of supply or purchase of at least 25%. The 'share of supply' test is not an economic 'market share' test –

⁸ For more on the legal test see paragraphs 36 and 37.

i.e. it can apply if there is an overlap and a combined 25% share of supply or purchase of any class of products (goods or services), even if that class of products does not constitute the relevant economic market; in practice, the test can be applied quite flexibly.⁹ As a result, the CMA (and its predecessor, the OFT) have been able to review significant mergers involving targets with limited UK revenues, for example, Google's purchase of Waze, or Facebook's acquisition of Instagram.

37. In relation to the substantive assessment of such mergers, the CMA applies the 'substantial lessening of competition' standard. The SLC test is applied in the UK in a broadly similar way to the 'significant impediment of effective competition' test used by the European Commission. The CMA's approach to assessing whether a merger results in an SLC is set out in its Merger Assessment Guidelines¹⁰, which state that

A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers.

38. In assessing mergers, the CMA will generally consider both evidence relating directly to the loss of rivalry and evidence relating to the likely effects of the merger.

39. The CMA will consider whether the merger leads to the loss of existing competition as well as the loss of *potential* competition – where the merger involves a potential entrant that could have increased competition or a firm that poses a realistic threat of entering the market and therefore imposes a competitive constraint.

40. The CMA will also consider the likely effects of the merger, considering both price and non-price effects, depending on the circumstances of the merger concerned and the markets affected. Non-price effects include impacts on innovation and new online entry in cases involving fast-moving and dynamic markets.¹¹

41. The CMA, and its predecessor the OFT, has considered several mergers in digital markets and considered theories of harm related to loss of potential competition. Examples include:

- Facebook/Instagram - In 2012 the OFT considered the merger of Facebook/Instagram and considered whether Instagram was perceived as a potential competitor to Facebook. It found that Instagram would not be

⁹ See [CMA 2: Mergers: Guidance on the CMA's jurisdiction and procedure](#).

¹⁰ See [CMA Merger Assessment Guidelines](#).

¹¹ For further detail on the CMA's assessment of non-price effects of mergers, see the [UK submission to the OECD \(2018\)](#).

particularly well placed to compete against Facebook in the short run. In addition, there were other firms that appeared to be presently able to compete against Facebook for brand advertising. It therefore concluded that there was no realistic prospect that the merger may result in a substantial lessening of competition in the supply of display advertising.¹²

- Google/Waze - In 2013 the OFT considered the Google/Waze merger and considered the extent to which Waze could represent a disruptive force in the market going forward and a growing competitive constraint on Google. Specifically, the OFT considered the extent to which the merger would remove the future rivalry between the parties thereby dampening the incentives of Google to innovate and improve product quality. The OFT concluded that the evidence was not determinative of Waze becoming a significant competitor in the UK or that it would be a disruptive force in the market.¹³

42. However, recently there has been criticism of competition authorities and competition policy both in the UK and internationally that there has been a perceived increase in concentration and lessening of competition in many markets in recent years. There has also been concern specifically about technology mergers that policy is not forward-looking enough to capture innovation or potential competition and that market features that are common in technology markets such as network effects and privacy are dealt with inadequately.

43. The CMA has commissioned an external research and evaluation project to look at approaches to assessing potential competition theories of harm and evaluating past merger decisions in the technology sector.

44. The aim of the project is to draw lessons from relevant economic theory and literature on technology markets, and from reviews of past technology merger decisions, in order to inform the CMA's assessment of the impact of potential competition and the likelihood that the potential would be realised in future technology merger cases. For example it may be that the competition agencies should have greater regard to firms' own internal reports and those of external analysts to better understand where the value in the merger stems from.

45. The research will begin in October 2018 and is due to conclude in the first half of 2019. We hope to be in a position to share some provisional early headline findings to feed into the panel's work.

¹² See the [OFT decision](#) on the acquisition by Facebook of Instagram, 2012.

¹³ See the [OFT decision](#) on the acquisition by Google of Waze, 2013.