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Consumer data rights and competition – Note by the United Kingdom

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This document reproduces a written contribution from the United Kingdom submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm

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United Kingdom

1. The Competition and Markets Authority (CMA) is the UK's independent competition and consumer protection authority with the responsibility to promote competition, both within and outside the UK, for the benefit of consumers. The CMA recognises the crucial role that consumer data plays in competitive digital markets, which is a key part of its Digital Strategy.[1]

2. In response to the specific topics for discussion at the roundtable on 12 June, the CMA makes the following observations. These are complex and important issues and we foresee the need for continued engagement with other authorities and stakeholders nationally and internationally.

1. Question 1: Use of consumer data and market failures

3. In July 2019, the CMA launched a market study into digital advertising and online platforms (Digital Advertising Market Study or Market Study). [2] The market study was focused on digital platforms which obtain material revenues from online advertising such as Google and Facebook and aimed to explore three main themes:

- The market power of online platforms in consumer-facing markets, including in search and social media
- Consumer control over data collection practices: Whether consumers have the knowledge, skills and desire to control how data about them is collected and used by the online platforms, and how far they are able to exercise such choice.
- Competition in the supply of digital advertising: The extent to which platforms' market power might distort competition in digital advertising, as well as concerns around transparency and conflicts of interest in the intermediation of advertising.

4. It was envisaged that the market study would consider areas where interventions might be appropriate to address any harms, including recommendations to Government for the development of an ex ante regime to regulate the activities of online platforms, as recommended by the Digital Competition Expert Panel (DCEP) which was led by Jason Furman and which published its report in March 2019.[3]

5. The CMA published the interim report of its findings on 18 December 2019 (**Interim report**). This contained a number of provisional recommendations upon which

[1] For background, see the Additional Notes.

[2] https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study. For the avoidance of doubt, this submission is not intended to reflect the final findings of the CMA. The CMA has produced an interim report with provisional views on which it has consulted. The CMA has not yet published its final report which may differ in material respects.

[3] https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel. Further detals

the CMA has consulted and received a number of responses.[4] The final report is due to published by 2 July 2020.[5]

6. The Interim Report found that Google and Facebook have enduring market power in digital advertising. The analysis identified a number of market characteristics which inhibit entry and expansion by rivals and undermine effective competition. These included network effects and economies of scale, consumer behaviour and the power of defaults, lack of transparency, vertical integration and conflicts of interest. Unequal access to consumer data was also a contributing feature.

7. The Interim Report found that consumer data was highly valuable for targeting digital advertising (particularly display advertising) and that Google and Facebook enjoy significant competitive advantages in both targeting and measuring the effectiveness of advertising because of their extensive access to such data. The source of this data advantage arose from their ability to collect data across different markets and sectors:

- in the case of Google, from user-facing services (such as search), from mobile devices, and from analytical technology placed on third-party sites and apps ('tags'),
- in the case of Facebook, from Facebook, Instagram and WhatsApp and from Facebook analytics technology placed on third-party sites.

8. As a result of this, it found that Google and Facebook were better able to demonstrate the effectiveness of using their platforms relative to others and that this was likely to create a barrier to entry for potential rivals.[6]

9. The Interim Report also identified the following potential issues which relate to consumers' rights:

- **Advantage of vertical integration**: that the vertically-integrated platforms may have a competitive advantage over smaller non-vertically-integrated publishers which may be facilitated by consent interfaces which smaller competitors cannot match.
- **Not sharing data with publishers and advertisers**: that data protection or privacy rights may be cited as a reason not to share data with third parties which would be beneficial to competition (for example to measure the effectiveness of advertising)
- **Browser restrictions on third party cookies:** that measures to restrict third party cookies (for example in Mozilla, Apple's Intelligent Tracking Prevention (ITP), or similar measures announced for Chromium) may disproportionately affect third party data collectors and the ability of publishers to generate revenues from digital advertising. Against this, however, such measures have been welcomed as improving consumer privacy protections.
- **Default search engine:** that the securing of default positions on browsers and devices by incumbent search engines, particularly Google, may also be a barrier to

[4] The CMA has published these responses on its website and is giving active consideration to these.

[5] https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf

[6] Consumer data used for targeting digital adverting was found to be highly valuable to advertisers and publishers. The ability to measure the effectiveness of advertising is therefore an important driver of advertisers' decisions on how to allocate expenditure across publishers and platform. However, in order to measure effectiveness, advertisers need to be able to track user actions online, which is done through analytical tools such as tags which is dominated by Google and Facebook. Google tags cover 90% of UK websites, and Facebook tags cover 50% of UK websites.

challenger search engines. The interim report provisionally recommended a requirement to offer choice screens to consumers on desktops and mobile so they can choose their default search engines on devices. This would also enable consumers to choose more privacy-enhancing browsers, if that is their preference.

- **Social media interoperability:** that various forms and degrees of greater interoperability as between Facebook and other social networks might facilitate greater competition (see further below).

1.1. Potential remedies to market failure

10. In response to these potential failures, the CMA has considered and consulted on potential remedies. These types of remedies may also potentially be adapted to apply to other digital platforms or markets.

1.2. Role of defaults

11. The default choices presented to consumers may tend towards the collection of consumer data to the benefit of the businesses collecting the data which may not reflect consumer preferences. There is a legitimate question about the role of defaults in this area, and whether they should better be set to promote different outcomes, for example 'opt in' or 'opt out' to different forms of data collection, or default services such as browsers.

1.3. Hierarchy of control mechanisms

12. Consent is an important, but not exclusive, gateway to fair and lawful processing under data protection law.[7] Consent as a form of control is also important for competitive markets in which consumers can discipline suppliers by not allowing data collection by suppliers whose practices they do not approve. Where consent is relied up, it must be freely given, specific, informed and unambiguous under the General Data Protection Regulation (GDPR). In practice, businesses often use 'notice and consent' mechanisms which are typically seen in privacy policies, cookie notices and terms and conditions. Firms may also use privacy dashboards and similar mechanisms.

13. In practice, consumers may suffer 'consent fatigue' when faced with so many choices. There is therefore a legitimate question how far we can realistically expect consumers to engage with these forms of granular choices, at least as demonstrated in current practices. There is a strong argument that current mechanisms do not sufficiently promote genuine choice to enable consumers to discipline the market.

1.4. Fairness by design

14. There is also a question about how choices in relation to data collection and use are presented. For example, consumers may be presented with choices which appear to benefit the data collector (for example the benefits of sharing data with a platform are highlighted but the risks are downplayed). Such practices raise the question whether there should be a 'fairness by design' obligation on businesses, the purpose of which would be to ensure that options presented to consumers are more balanced, promote consumer choice and avoid

[7] There are other gateways, notably contractual necessity and legitimate interests. The data protection regime acknowledges that consumers do not always need to give consent. For example, processing might be necessary for the purpose of a data controller's legitimate interests, such as the right of businesses to process personal data provided these interests are not overridden by the rights of the data subject.

exploitation of behavioural biases. This could enable consumers – at least those who wish to control the processing of data about them – to exercise more control over how data about them is collected and used.

15. The Online Platforms and Digital Advertising Market Study has considered how far consumers have appropriate transparency and control over data collection and use so that they have agency to choose suppliers which offer services they want. In its interim report, the CMA consulted on a number of recommendations to promote consumer choice, in particular:

- A rule that platforms should be required to give consumers an **option** to use their services without requiring in return the use of consumers' data for personalised advertising.
- **Changes to default settings for SMS platforms**, to require a **default 'opt in'** to personalised advertising rather than the current default opt-out.
- **A principle of 'fairness by design'** placing an ex ante obligation on platforms to design consent and privacy policies in a way that facilitates informed consumer choice, with additional obligations to trial and test choice architecture for SMS platforms.

16. An important feature of these proposed interventions is that they seek to recognise the heterogeneity of consumer privacy preferences given that concerns about data sharing are highly specific to individual context depending on a number of factors, including individual consumer preferences (i.e. different consumers will have different attitudes to privacy) and different types of personal information involved (i.e. there is a hierarchy of importance for different types of data).

17. These 'enhanced choice' measures have therefore been proposed to facilitate informed choice and greater control for those consumers who wish to engage, while providing greater protection for those who do not. This would appear to be well-aligned with data protection principles of user autonomy and control.

1.5. Interoperability and data mobility

18. The CMA strongly believes that data portability and interoperability interventions can be powerful levers to promote greater competition. This was recognised by the DCEP in their report. The DCEP highlighted personal data mobility; that is, allowing consumers to transfer or share relevant data between suppliers. In order to do this, the data needs to be in an interoperable format so it can be taken from one business and used by another as seamlessly as practically feasible. This can greatly help to open up competition and drive innovation, by enabling new providers to create innovative ancillary services which make use of this data to the customer's benefit. The CMA has experience of such remedies: it was instrumental to the development of the Open Banking regime which has promoted competition and innovation in personal banking through data mobility measures.

19. The Online Platforms and Digital Advertising Market study recognised the potential for data mobility remedies in social media. The Interim Report noted Facebook's powerful position in social media and has consulted on potential interoperability measures, including:

- whether Facebook should be required to interoperate specific features with existing competitors (such as the ability to post content across several platforms simultaneously);

- whether there should be limits on Facebook's ability to impose restrictions on competitors' use of the interoperable features and whether aspects of past API access should be restored to facilitate competition;
- whether any rules requiring greater interoperability should apply to Facebook alone or also to other social media platforms.

20. In its Interim Report, the CMA also foresees potential benefits from the development of other business practices or technologies in which data interoperability is a key feature, including privacy-enhancing technologies (PETs), Personal Information Management services (PIMS) and Personal Data Stores (PDS). These may offer consumers greater control over consumer data as an alternative to current business models.[8] The CMA is also further exploring the case for such remedies more broadly in digital markets through the work of the Digital Taskforce.[9]

1.6. Data access remedies

21. Data access remedies are also important for driving competition where access to data is necessary to enable effective competition, as noted in the background paper in relation to enforcement[10] and mergers[11].

22. In the Online Platforms and Digital Advertising Market Study, the Interim Report found that limited access to Google's click-and-query data may impede the ability of challenger search engines from competing in the search market. The CMA therefore also consulted on a recommendation that Google provide click and query data to rival search engines. One the one hand, this may improve consumer choice by providing data to improve the quality of rivals' search algorithms. (Rival search engines may also include those which market themselves as giving more control to consumers over data collection and use). On the other hand, it is also important to ensure that, insofar as the click and query data contain personal data, individuals' privacy rights are respected.

2. Question 2: What is the role for competition enforcement and policy

23. The purpose of competition policy generally is to drive competitive markets with the overall aim of increasing consumer welfare. The CMA sets out below some thoughts on how competition policy may interact with consumer rights to privacy and data protection under merger control and in competitive markets.

2.1. Merger control

24. In considering a merger, the CMA assesses whether it has resulted, or may be expected to result, in a substantial lessening of competition. Consumer rights may be relevant insofar as they relate to this question, for example the extent to which consumers

[8] See Appendix L to the Interim Report.

[9] For background, see the Additional Notes

[10] For example, to open up data sets in energy markets (paragraph 102 of the background paper citing action by Ofgem in the UK and the French Competition Authority).

[11] Where the availability of alternative sources of data is a relevant consideration (paragraphs 148ff. of the background note).

may be able to exercise data portability rights post-merger to prevent lock-in effects.[12] This may raise questions as to whether, in practice, consumers can and do exercise such rights.

25. Under the merger control regime, data assets may also be relevant to the competitive assessment and the CMA may consider data-related theories of harm.[13] Privacy and data protection rights may constitute an aspect of service quality on which firms can differentiate themselves from their competitors. In these circumstances, a reduction in privacy protection as a result of a merger may therefore be interpreted as a reduction in quality.

26. Under the merger control regime, however, the CMA can only address any impact on these rights to the extent that these are linked to competition concerns.[14] Public policy concerns in relation to privacy that do not relate to competition issues do not fall within the scope of the merger regime.

27. Privacy bodies have raised concerns that the current merger regime does not sufficiently take into account data protection and privacy rights, and that data protection authorities should have a parallel role to advise on the privacy impacts of mergers more generally.[15]

2.2. Markets

28. At a high level, in well-functioning and competitive markets, the supply and demand side complement each other in a self-reinforcing virtuous circle. On the supply side, businesses compete to offer consumers products which match consumers' needs and preferences. Competition rules constrain businesses from getting an unfair advantage through anti-competitive agreements, abusing a dominant position or exploiting their market power. On the demand side, informed consumers select those suppliers which best satisfy their existing – or future – demand as to matters they care about, including how consumer data is collected and used.

29. This 'virtuous circle' between supply and demand drives competition and innovation. It requires that regulation in areas outside competition – for example data protection and privacy – does not give a competitive advantage to one type of competitor (such as a well-resourced or powerful incumbent) over another (such as smaller and less well-resourced challengers).

[12] EC (2016), Sanofi / Google / DMI JV, https://ec.europa.eu/competition/mergers/cases/decisions/m7813_479_2.pdf

[13] Examples of recent merger cases in which data assets have been a relevant market feature include Amazon/Deliveroo (delivery data); Experian/ClearScore (credit data); Roche/Spark (clinical data); Google/Looker (advertising data). The importance of investigating data-related theories of harm was one of the findings of the Lear review of merger control (see Additional Notes) and the CMA has also included a question on the relevance of data assets in digital merger assessments as part of a call for information following the Lear report. This is an area that the CMA is considering as part of its updating of the Merger Assessment Guidelines.

[14] e.g. Microsoft/LinkedIn: *"privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor."* http://europa.eu/rapid/press-release_IP-16-4284_en.htm

[15] This was raised most recently by the European Data Protection Supervisor in December 2019, who has proposed that competition and privacy authorities could collaborate in the assessment of proposed mergers to avoid further concentration and degradation of choice and privacy (an idea first proposed in 2014).

30. If consumers care about privacy rights (which the evidence supports), we would expect firms to compete on the basis of protecting their privacy rights. If this is not shown in practice, there is a question what might be preventing this lack competition.

31. The Online Platforms and Digital Advertising Market Study considered the role of consumer data in digital advertising markets. It found that a number of market features were preventing the market from operating efficiently, including the ability of consumers to make effective choices over how their data is accessed and used. It identified a complex interaction between the two regimes which, in the view of the CMA, requires ongoing collaboration and discussion between competition and data protection authorities.

3. Question 3: what is the role for competition advocacy?

32. When businesses collect, access, use or share consumer data which is 'personal data' under data protection law, the fundamental rights of consumers as citizens come into play. This involves a number of obligations under the GDPR.

33. On one hand, these rights may strengthen consumers' ability to understand and control how data about them is collected and used, which may promote competitive outcomes. However, this effect is only achieved to the extent that consumers are genuinely empowered to drive pro-competitive outcomes.

34. Challengers may also need access to consumer data to compete. Consumers' data protection or privacy rights may, rightly or wrongly, be cited as a reason not to share data more widely. On the one hand, sharing data is intrinsically more 'risky' than not sharing it. On the other, the benefits of competition may not be sufficiently weighed when making this assessment.

35. Competition and data protection authorities need to cooperate in order to better understand the synergies between the regimes but also nature and extent of their respective concerns, and the potential trade-offs involved.

36. The CMA also sees an opportunity to discuss areas of common policy development such as the potential role for data mobility and interoperability in digital markets as an opportunity to promote both privacy and competition. This would build on its previous work in Open Banking and would complement the data portability measures in the GDPR.

37. The CMA and the ICO continue to work closely together on these issues, building on past collaboration in areas of common interest such as Open Banking remedies and consumer enforcement.

4. Additional Notes (background only)

4.1. The Digital Competition Expert Panel

38. In September 2018, the UK government appointed an expert panel, led by Jason Furman, to report on the potential opportunities and challenges that the emerging digital economy may pose for competition and pro-competition policy, and to make recommendations on any necessary changes .[16] The final report of the Digital Competition Expert Panel was published in March 2019 (DCEP Report).

[16] https://www.gov.uk/government/collections/digital-competition-expert-panel

39. The DCEP report identified a number of data-related concerns in digital markets, noting the importance of data to online platforms and that acquiring large amounts of customer data can give incumbent firms a "comparative advantage"[17] which can act as a barrier to entry or expansion when combined with other features (such as single homing). It noted that consumers often do not pay in monetary terms for services but with their data and that, "although accessing services for free may appear to be an attractive proposition, this zero-price may in fact be too high, as consumers could be extracting greater value in return for their data." It also noted that harm to privacy could be interpreted as an aspect of low quality caused by a lack of competition.

40. The DCEP proposed a number of reforms to effectively unlock competition in digital markets and protect consumers from harm. Alongside proposed changes to the merger control and antitrust enforcement regimes, it recommended the creation of a new pro-competitive ex-ante regulatory regime which would apply to the most powerful platforms and be overseen by a 'digital markets unit' (DMU). The recommendation was that the DMU should work with industry and stakeholders to establish a digital platform code of conduct, based on a set of core principles. The code would apply to conduct by digital platforms that have been designated as having a 'strategic market status'.

41. Among a range of other measures, the DCEP also highlighted three further data-related reforms to promote competition:

- First, personal data mobility: that is, allowing consumers to transfer or share their data between suppliers. In order to do this, the data needs to be in an interoperable or 'compatible' format – so it can be taken from one business and plugged straight into another, without needing to re-format it or convert it. This can greatly help to open up competition and drive innovation, by enabling new providers to create innovative ancillary services which make use of this data to the customer's benefit.
- Second, a focus on open standards, with the aim of interconnectivity between services. This can also be powerful in driving innovation as innovators can build new propositions which can interconnect and interface with all existing ones, rather than having to create different versions for different interfaces.
- And third, open data, that is requiring firms to provide access to large data sets they hold, where access to such large datasets acts as a significant barrier to entry, restricting competition, or access to this data could yield greater innovation in consumers' interests.

42. The CMA welcomed the DCEP report and indicated its willingness to undertake a market study into digital advertising subject to resource constraints.[18]

4.2. CMA Digital Strategy

43. At the same time as opening its market study, in July 2019, the CMA published its Digital Strategy.[19] This recognized the importance of the role of data in digital markets and

17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf P15

18 https://www.gov.uk/government/news/cma-welcomes-furman-review-recommendations

19 https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy

set out how the CMA planned to foster innovation while protecting consumers in the rapidly developing digital economy. The strategy covered:

- consumer and antitrust enforcement and merger assessment,
- the work of the CMA's Data, Technology, and Analytics Unit,
- how the CMA planned to adapt our mergers approach to digital markets,
- its market study on online platforms and digital advertising,
- considerations around a Digital Markets Unit and
- making best use of the CMA's enforcement tools

4.3. CMA review of merger control

44. In May 2019, external consultants Lear also published an independent study commissioned by the CMA to evaluate past merger decisions in the digital sector taken by the CMA's predecessor organisations, the Office of Fair Trading and the Competition Commission. [20] This included cases such as Facebook/Instagram and Google/Waze and other mergers in which data was an important component. The objective of the study was to review the theories of harm typically pursued by competition authorities in relation to these types of mergers and how these have been evaluated – as well as considering whether the decision the authority came to was reasonable, based on the evidence available at the time, and, given the market evolution following the merger, whether with the benefit of hindsight it has led to a detrimental outcome.

45. This led, in July 2019, to the CMA issuing a call for information to invite interested parties to provide views on aspects of the Merger Assessment Guidelines that should be supplemented or revised to provide up-to-date guidance on the CMA's approach to the assessment of mergers in digital markets.[21] Particular market features on which views were sought included the fact that users in certain digital markets pay for products or services through non-monetary means (such as provision of personal data) and the relevance of data assets for competition.

46. The CMA is currently in the process of revising its Merger Assessment Guidelines following this consultation.

4.4. Digital Taskforce

47. The Digital Taskforce (DTF) was established in March 2020 within the CMA to provide the government with further advice on the case for the recommendations of the DCEP, including the appropriate form, content and coverage of a potential code, how it might be enforced in practice and how it might interact with other measures currently under consideration in government. It is specifically tasked to consider the practical application of the potential pro-competitive measures set out by the DCEP, a number of which relate

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf

[21] https://www.gov.uk/government/consultations/call-for-information-digital-mergers

to the role of data in digital markets.[22] Its terms of reference include publishing a final report for the government in September 2020 that will contain:

- Advice on a potential methodology to designate digital platforms with 'Strategic Market Status' (SMS).
- Consideration of whether intervention to promote competition is justified in relation to platforms or platforms' activities that do not fall in scope of a potential definition for SMS, but in some other ways exhibit characteristics that may have adverse effects on competition.
- Advice on the *form* that a code of conduct to promote competition could take, including whether it is principles-based, outcome-based or rules-based; and its *scope* (whether the code could apply to platforms' relationships with businesses or also consumers; whether separate codes or detailed supporting guidance are needed for individual platforms or markets);
- In considering the form of a pro-competition code(s) of conduct, the taskforce will be mindful of interactions with other relevant regulations, such as the Platform to Business Regulations or a proposed code of conduct to address sustainable journalism (Cairncross code)
- Advice on the content of a code, drawing on insights from but going beyond the issues considered by the CMA's market study on online advertising
- Detailed advice on the associated powers and processes that would be needed to operate and enforce any potential code(s).
- Advice on whether there is a case for remedies relating to data access and interoperability outside of search and social media markets, and whether such remedies should be captured through a code(s) of conduct or through more specific additional powers
- Advice on whether additional supporting functions and associated powers are needed beyond those proposed by the DCEP may be needed to effectively promote competition in these markets.
- Advice on where a pro-competitive regime might interact with existing regulatory regimes, such as relationships between promoting competition and wider regulatory objectives, including but not limited to economic growth and innovation, privacy, data protection, and intellectual property rights.
- Advice on where international cooperation between a pro-competitive regime and other jurisdictions and multilateral fora would be most valuable or necessary, and how this cooperation can be achieved in practice.

48. The CMA's consideration of consumer rights falls within this broader context. This work is ongoing. Currently the DTF has been asked to report to the UK government by September 2020.

[22] https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3