

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The intersection between competition and data privacy – Note by the United Kingdom

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This document reproduces a written contribution from the United Kingdom submitted for Item 8 of the 143rd OECD Competition Committee meeting on 12-14 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm

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1. Introduction

1. The Competition and Markets Authority (CMA) is the UK's competition and consumer protection authority. The Information Commissioner's Office (ICO) is the UK's independent regulator for information rights (including data protection). We make this joint submission which sets out our approach and experience of addressing issues at the intersection of our regimes, and how we continue to closely collaborate to promote market outcomes which support strong and open competition and innovation and respect data subject rights.

2. The Digital Regulation Cooperation Forum (DRCF)¹ brings together four UK regulators, the CMA, the Office of Communications (Ofcom), the ICO and the Financial Conduct Authority (FCA) to deliver a coherent approach to digital regulation for the benefit of people and businesses online. It is a voluntary cooperation forum that facilitates engagement between the member regulators on digital policy areas of overlap and mutual interest. The key goals of the DRCF are to ensure digital regulation is co-ordinated between our member regulators so we can serve citizens and consumers better, reduce regulatory burdens for industry where appropriate, and enhance the global impact of the UK.

2. Joint statement in 2021

3. In May 2021, the CMA and ICO issued a joint statement setting out our shared views on the relationship between competition and data protection in the digital economy. The joint statement explains how we propose to enhance the synergies between our policy agendas, and how to address potential tensions.²

4. We noted strong synergies between the two regimes when individuals can exercise choice and control of their personal data, such that personal data is processed in accordance with their preferences, and when businesses have a clear and consistent understanding of data protection rules. We noted the importance of designing competition interventions which respect the data subjects' rights, and also noted risks that businesses may seek to exploit apparent tensions between the regimes by interpreting data protection law in a self-preferencing manner.³ We summarise these synergies and potential tensions in Table 1.

¹ www.gov.uk/government/collections/the-digital-regulation-cooperation-forum

² [Competition and data protection in digital markets joint statement \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³ For example with the potential effect of unduly favouring the business models of large, integrated platforms over smaller, non-integrated suppliers.

Table 1. Synergies and potential tensions

Synergy/tension	Impact	Joint areas of focus
Synergy: User choice and control over the collection and use of personal data.	<ul style="list-style-type: none"> Users have control over how their personal data is used to provide services; Providers compete on an equal footing to meet preferences; 'Privacy' can be a parameter of competition. 	<ul style="list-style-type: none"> Use of defaults; Design of online interfaces.
Synergy: Clear regulation and standards	<ul style="list-style-type: none"> Drives competitive pressure for responsible innovation which respects data subject rights. 	<ul style="list-style-type: none"> Joint position papers.
Tension: Data-related interventions which open up competition while respecting data subject rights	<ul style="list-style-type: none"> Interventions to level the playing field for data access. These depend on the features of the relevant market and a full understanding of the relevant context. Opening up access to data held by firms with market power can enable third parties to compete. This needs to be done in a way that respects data subjects' rights. Striking the appropriate balance will depend on the context and features of the relevant market. 	<ul style="list-style-type: none"> Data access or restriction remedies; Use of privacy enhancing technologies (PETs) or governance mechanisms.
Tension: Interpretation of data protection rules	<ul style="list-style-type: none"> Data protection rules may be interpreted in a way which distorts competition, e.g. unduly favouring the business models of large, integrated platforms over smaller, non-integrated suppliers. 	<ul style="list-style-type: none"> Case-by-case assessment, with consistent and appropriate application of competition and data protection law.

5. Over the last three years, the CMA and ICO have worked closely together to maximise synergies and address potential tensions. We provide more examples of this practical collaboration below.

3. Google Privacy Sandbox (GPS): 2021 - to date

6. In 2019, Google announced plans to deprecate third-party cookies in its Chrome browser, citing privacy concerns. In its place, Google proposed a series of application programming interfaces (APIs) that would be designed to allow some targeted advertising and measurement to continue, but in a more privacy-protecting way.

7. However, given Google's strong market position in digital advertising, the CMA was concerned that these changes could lead to an abuse of a dominant position, for example if Google was able to use data from Chrome to enable its advertising services to replicate third party cookies in a way that others would not be able to compete with.

8. The CMA opened a competition investigation in January 2021⁴. In February 2022⁵, Google agreed commitments with the CMA to address the competition concerns. In broad terms, in the testing and assessment phase before third party cookies are deprecated, the commitments cover the following areas:

⁴ [CMA to investigate Google's 'Privacy Sandbox' browser changes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes)

⁵ [CMA secures final Privacy Sandbox commitments from Google – Competition and Markets Authority \(blog.gov.uk\)](https://blog.gov.uk/cma-secures-final-privacy-sandbox-commitments-from-google/)

1. Greater transparency in the process of developing the Privacy Sandbox tools.
2. Establishing ‘Development and Implementation Criteria’ to guide Google's progress on the Privacy Sandbox proposals – taking account of impacts on competition, publishers, advertisers, users and privacy.
3. The CMA working with Google to assess the impacts and address concerns at the development stage.
4. A ‘standstill’ period before removal of third-party cookies, with an opportunity for the CMA to act if concerns are not addressed.
5. A formal role for the ICO in assessing privacy impacts.
6. Ongoing commitments by Google not to self-preference and not to share data between Chrome and Google Ads. In the post-deprecation phase, Google provides specific obligations to prevent data advantages and self-preferencing.⁶
9. These commitments required Google to work with the CMA to develop proposals which would take account of their impacts on competition, publishers, advertisers, users and privacy.
10. A formal role for the ICO is written into the commitments in two main ways:
 - Privacy is one of the design and implementation criteria to be assessed under the commitments.
 - The ICO has an explicit role to provide the CMA with advice on compliance with the applicable data protection regime (see paragraph 18 of the [Commitments](#) and paragraph 5.24(b) of the CMA's [decision to accept the Commitments](#)).
11. The involvement of the ICO as part of the process helps to ensure that both competition and data protection considerations are taken into account in the development of the Privacy Sandbox proposals.
12. As set out in quarterly reports published by the CMA,⁷ this collaboration has included:
 1. Joint discussions between the CMA, ICO and Google on the development of the Privacy Sandbox tools, analysing data protection impacts with a specific emphasis on user controls and assessing compliance with data protection legislation;
 2. Direct engagement between the ICO and Google in relation to data protection issues in the Google Privacy Sandbox;
 3. The ICO working with the CMA to assess privacy impacts as part of the wider assessment of the Privacy Sandbox tools;
13. The CMA and ICO will continue to collaborate in this way up to the point that Google deprecates third party cookies from Chrome, to ensure that Google has resolved any competition and data protection issues before this change is made. Google currently intends to deprecate third party cookies from Chrome in early 2025.

⁶The commitments are monitored by a Monitoring Trustee (ING Bank), supported by a Technical Expert (S-RM).

⁷[Investigation into Google's 'Privacy Sandbox' browser changes](#)

4. Joint Position paper on harmful design in digital markets (OCA): August 2023

14. The CMA and ICO have also collaborated closely to guide developers and businesses of all sizes to practices which drive synergies between the regimes. In August 2023, we published a joint position paper on potentially harmful online design practices involving the processing of personal data which may raise concerns for both the CMA and ICO.⁸

15. The purpose of this collaboration was to give firms greater clarity on OCA practices which may be a cause for concern across our regimes. It drew on existing guidance and publications of the two regulators, including a CMA discussion paper in 2022 on how digital design can harm competition and consumers⁹ and existing ICO published guidance.¹⁰ It also drew upon the CMA's market studies into online platforms and digital advertising¹¹ and mobile ecosystems¹² where these identified concerning OCA practices.

16. This paper fed into our respective organisation's strategic plans in this area, including the ICO's commitment in its ICO25 Strategic Plan to give people more meaningful control and improved confidence when participating in the digital society and economy,¹³ and the CMA's commitment in its annual plan¹⁴ to tackle misleading online practices through further consumer education and enforcement against practices such as misleading urgency and price reduction claims.¹⁵

17. The specific examples of OCA practices covered in the report are set out in Figure 1.

⁸ [Harmful-Design-in-Digital-Markets-ICO-CMA-joint-position-paper.pdf \(drcf.org.uk\)](#)

⁹ CMA discussion paper [Online Choice Architecture - How digital design can harm competition and consumers](#).

¹⁰ For example, [Privacy in the product design lifecycle](#); [Age appropriate design code \(or Children's Code\)](#) and [The Children's Code design guidance](#); and [Data protection by design and default](#).

¹¹ [Online platforms and digital advertising market study - GOV.UK \(www.gov.uk\)](#)

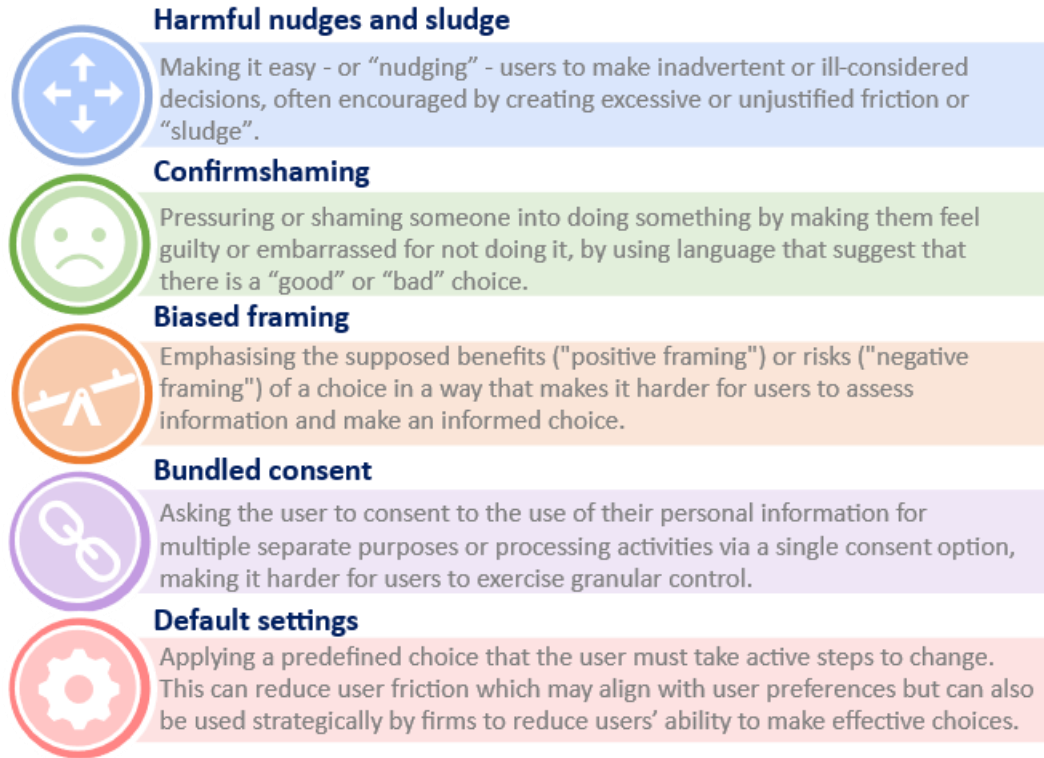
¹² [Mobile ecosystems market study - GOV.UK \(www.gov.uk\)](#)

¹³ [ICO25 Strategic Plan](#).

¹⁴ [CMA Annual Plan 2023 - 2024](#).

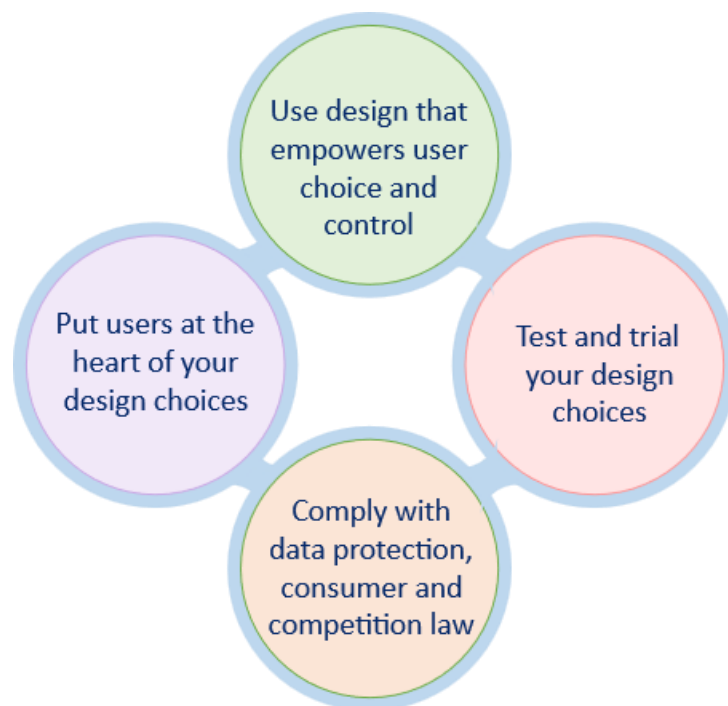
¹⁵ [CMA Online Choice Architecture Work](#) including the CMA's "[Online Rip-Off Tip-Off](#)" campaign for raising consumer awareness around harmful online practices.

Figure 1. Examples of potentially harmful digital design practices paper



18. The paper therefore provided steers on how different design choices could be used to encourage better privacy and competition outcomes. We set out our joint expectations which are summarised in Figure 2.

Figure 2. ICO and CMA expectations of businesses



19. By setting out these expectations, we aimed to assist firms that use OCA practices to comply with relevant laws and help shape user experience testing and research that informs these practices.

5. Foundation Models joint statement: 2023 and ongoing

20. In May 2023, the CMA launched an initial review of the market for AI foundation models (FMs).¹⁶ The purpose of this initial report was to understand how the use of FMs could evolve, the opportunities and risks for competition and consumer protection and what principles will best guide the development of these markets going forward.

21. The initial report was published in September 2023¹⁷ and an update report (with finalised principles) was published in April 2024.¹⁸ The CMA's work on FMs in the initial and update report has shown that data, which may include personal data, is a key input to FM development. The work is ongoing and the CMA will provide a further update in autumn 2024.

22. The ICO is also currently undertaking a series of consultations on its approach to generative AI.¹⁹

23. As part of our respective ongoing work, the CMA and ICO have committed to publish a joint statement on FMs. The ICO's consultation and the CMA's work done to date on FMs will feed into this statement, which is expected later in the year. The purpose of this statement will be to show how our respective regimes work together to support innovation and to guide the market to positive outcomes for businesses and consumers, while respecting the ICO and CMA's regulatory remits.

6. Changes in the regulatory landscape

24. There are currently legislative changes in progress in the UK which will affect both the CMA and the ICO:

- For the CMA, the Digital Markets Competition and Consumers (DMCC) Bill²⁰ will provide it with new, more effective tools to address barriers to competition and create positive outcomes for businesses, citizens and the economy.
- For the ICO, the Data Protection and Digital Information (DPDI) Bill²¹ is intended to update and simplify the UK's data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards²². It also

¹⁶ Foundation models are a particular type of artificial intelligence which include large language models and generative-AI.

¹⁷ [AI Foundation Models: Initial report - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118122/ai-foundation-models-initial-report.pdf)

¹⁸ [AI Foundation Models: initial review - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/120122/ai-foundation-models-initial-review.pdf)

¹⁹ [ICO consultation series on generative AI and data protection | ICO](https://ico.org.uk/consultations/default/1000)

²⁰ [Digital Markets, Competition and Consumers Bill - Parliamentary Bills - UK Parliament](https://www.parliament.uk/bills/2023-24/dmcc)

²¹ [Data Protection and Digital Information Bill - Parliamentary Bills - UK Parliament](https://www.parliament.uk/bills/2023-24/dpdi)

²² [Data Protection and Digital Information \(parliament.uk\)](https://www.parliament.uk/bills/2023-24/dpdi)

introduces new duties relevant to the intersection between competition and data protection.

25. We address these in turn below.

26. The DMCC Bill will give the CMA the power to designate firms as having Strategic Market Status (SMS) in relation to a digital activity. The CMA will then be able to set requirements for how these firms should conduct themselves in relation to that activity (conduct requirements). The CMA will also be able to investigate whether there are factors undermining competition that we could remedy through ‘Pro-Competition Interventions’ (PCIs).

27. The DMCC Bill furthermore brings major changes to consumer protection enforcement and several changes to substantive consumer law. Of particular relevance are that these changes will provide:

- A new direct enforcement model for consumer law breaches for the CMA. The CMA will be able to decide where consumer law has been breached;
- Improved consumer protection civil enforcement powers; and
- New powers to impose penalties for up to 10% of a firm’s global turnover.

28. Regulatory coordination is of central importance to the regulation of digital markets. The DMCC Bill creates means to facilitate coordination between the CMA (as the regulator responsible for the implementation of the digital markets regime) and those regulators whose remits and responsibilities will potentially be impacted by CMA’s exercise of its functions under the new regime (including the ICO).

29. The DMCC Bill places a duty on the CMA to consult with the regulators in specific circumstances before using its powers. This includes consultation with the ICO where the CMA proposes to exercise a regulatory digital markets function in a manner that the CMA considers is likely to have an effect on the ICO’s ability to exercise specific regulatory functions relating to data protection.

30. The DMCC Bill also extends existing provisions to enable the sharing of information between the CMA and the ICO where it facilitates the exercise of one of their respective statutory functions.

31. Turning to the ICO, the DPDI Bill aims to update and simplify the UK’s data protection framework with a view to reducing burdens on organisations while maintaining high data protection standards. The Bill aims to provide organisations with greater flexibility on how to comply with certain aspects of the data protection legislation, improve the clarity of the framework, and supports data sharing to help enable better services and to support growth²³.

32. In relation to the intersection of competition and data protection, the DPDI Bill introduces new secondary duties for the ICO to have regard to the desirability of promoting innovation and competition. This will bolster existing requirements in these areas, and also be accompanied by a requirement to publish a strategy in relation to these functions and to report on it.

33. The DPDI Bill also includes provisions in relation to consulting other regulators where relevant, including on issues of economic growth, innovation and competition,

²³ [Data Protection and Digital Information \(parliament.uk\)](https://www.parliament.uk)

broadly mirroring the duty to consult other regulators noted in the explanation of CMA duties above.

7. Conclusion

34. As this paper demonstrates, there are numerous intersections between competition and data privacy regulation on which the CMA and the ICO are collaborating to achieve beneficial outcomes for the public. In fast-moving digital markets, these intersections and synergies are likely to continue to grow, highlighting the importance of the continuing cooperation between the CMA and the ICO.