

CMA response to government consultation

Modernising consumer markets green paper

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Summary

1. The CMA is the UK's primary competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries and enforcing competition and consumer law.
2. The CMA welcomes and supports the Government's approach outlined in the *Modernising Consumer Markets* Green Paper (the Green Paper) and is grateful for the opportunity to comment on the issues raised. We also welcome the ongoing work by the Department for Business, Energy and Industrial Strategy (BEIS) to ensure markets deliver for businesses, consumers and the economy.
3. The CMA's programme of work, as detailed in our Annual Plan,¹ is well-aligned with the areas identified in the Green Paper. Digital markets, data and vulnerable consumers are all current priorities for the CMA. We look forward to working closely with Government and regulatory colleagues to consider how digital and other consumer markets can be made to work well, and – in the context of the Government's review of the changes introduced by the Enterprise and Regulatory Reform Act 2013 – what changes might be made to the regime to ensure that it is equipped to deal with the challenges of the future and to capture the opportunities of the UK's Exit from the European Union.
4. The digital economy has brought significant benefits for consumers and the wider UK economy, increasing choice, lowering prices and driving new innovative consumer products and services. Governments, regulators and enforcers have the opportunity to foster further such benefits, and themselves to use data and digital tools to drive better consumer outcomes.
5. However – as in the 'offline' economy – the scope for harm to consumers and competition in online markets, particularly in new, unfamiliar market contexts, means that authorities must be ready to act where such harm has the potential to arise.
6. The CMA believes that open and effective competition between businesses, supported by the effective enforcement of existing competition and consumer protection laws, will generally result in the best outcomes for consumers and the economy. In well-functioning and competitive markets, businesses innovate and compete to attract customers, and consumers are able to make informed choices between different suppliers. This drives further competition and innovation in a 'virtuous circle'. We therefore welcome the Government's commitment to maintaining standards of consumer protection and open and fair trade following the UK's Exit from the EU.
7. The CMA also appreciates the importance of ensuring that consumers, including in particular vulnerable consumers, benefit in practice from such competitive

¹ <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2018-to-2019>

markets. This requires detailed, evidence-based assessments of particular markets and practices, and where markets are not working in the interests of consumers, identifying suitable remedies to address concerns.²

8. In this submission, we consider these issues further and suggest ways in which the competition and consumer regimes can better address consumer detriment in the economy, against the backdrop of ongoing digitalisation and the UK's imminent exit from the EU. In particular, we:

- (a) Explain the consumer and competitive benefits that can come from **better, more transparent and more understandable information for consumers and opportunities for them to switch supplier**, while noting that these alone may not always be wholly effective in preventing consumer harm or disadvantage to 'loyal' customers. (paragraphs 16 to 19)
- (b) Describe our **work focusing on addressing the needs of vulnerable people**, including research into the so-called 'poverty premium', with a report to be published later this year. (paragraphs 22 to 27)
- (c) Welcome the Government's consideration of how **data portability** can increase competition and help consumers gain better deals, and share relevant insights from our **recent work to introduce Open Banking** in the retail banking market. (paragraphs 28 to 29 and Annex 2, page 36)
- (d) Support, and look forward to participating in, the new **Consumer Forum**.
 - We welcome its focus on vulnerability, and hope that the findings of **our work in that area will inform the Forum's consideration of these issues**, and facilitate coordinated or collaborative approaches to dealing with any concerns identified.

Given the increasingly cross-border nature of consumer markets, we propose that **international co-operation, especially the efficacy of cross-border enforcement**, should also feature in the Forum's initial priorities. (paragraphs 84 to 87)

(e) Note

- That the UK's competition and consumer law frameworks have shown themselves **capable of adapting** to technological and other changes in markets, and highlight recent **CMA enforcement action in digital markets and investment in its 'digital expertise'**.
- That challenges remain, and merit further consideration to see **what changes may be needed** to enable more effective competition and

² For example, CMA recommended major reforms to the energy market following our investigation, which found that consumers were paying £1.4bn per year more than they would in a fully competitive market: <https://www.gov.uk/government/news/cma-publishes-final-energy-market-reforms>

consumer protection and trust in relation to, for example, **consumer to consumer transactions**. or markets where **prices are 'personalised' or set by complex, 'intelligent' algorithms**.
(paragraphs 59 to 64 and paragraphs 12 to 14 of Annex 3, page 38)

- (f) Welcome the introduction of civil fining powers for breaches of consumer protection legislation, and offer our support to the Government in considering the best structure and enforcement mechanisms for such powers. (paragraphs 54 to 58)
- (g) Consider that an existing Trading Standards body or bodies should be **awarded statutory status to improve co-ordination** of consumer law enforcement across the UK, and that there are good arguments for obliging traders to offer **Alternative Dispute Resolution to consumers in essential markets**. (paragraphs 73 to 83)
- (h) Believe that:
- the **Government's reforms to the competition framework** in 2014, combined with the CMA's ongoing work to make our processes more efficient and effective have helped to strengthen and streamline the regime; but that
 - **further reforms** could help to make the **end-to-end regime** – from initial evidence gathering to the outcome of any appeals – better able to tackle consumer detriment, in particular against a backdrop of **digitalisation** and **the UK's Exit from the EU**. (paragraphs 88 to 109)
- (i) Welcome the alignment between the **Government's strategic steer** and the CMA's own priority areas of focus, and – in line with this and the overall focus of the Green Paper – recommend the addition of an explicit reference in the Steer to the CMA's **consumer law enforcement**. (paragraphs 110 to 114)
9. The CMA looks forward, under our new Chairman, Lord Tyrie, to considering these issues and opportunities for beneficial change further with the Government.

Introduction

10. We have grouped our responses into four themes:
 - (a) Markets (including data, the digital economy and addressing the needs of vulnerable consumers)
 - (b) The 'landscape' for enforcing consumer protection law and its legal framework
 - (c) Competition (including the ERRA review)
 - (d) The Draft Strategic Steer
11. Within each theme, we have also provided answers to specific consultation questions relevant to that theme and pertinent to the CMA's work.
12. To aid comprehension, we have also provided more detailed views in four Annexes – on: The CMA's work in digital markets; Challenges of digital markets, Open Banking; and our views on Personalised Pricing.

Part 1: Markets (including data, the digital economy and addressing the needs of vulnerable consumers)

13. The CMA identified online markets and the digital economy as a priority area in the 2018/19 Annual Plan. The CMA has been active in using its powers in digital markets and sharing best practice with overseas enforcers. 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.
14. Digital markets are an ever-growing part of the economy.³ The growth of e-commerce has generated significant benefits for consumers, significantly expanding the range of goods and services available to them and stimulating innovation and economic growth. However, as is the case offline, certain market features or business practices can result in harm to competition and to consumers.
15. The CMA agrees with the Green Paper that effective competition – underpinned by the ability of consumers to compare and switch between suppliers – will usually lead to the best outcomes for consumers, but that this is predicated on consumers, especially vulnerable consumers, being able to benefit from innovative and competitive markets in practice. To this end, the CMA has initiated a programme of work (detailed further in paragraphs 22 to 27 below) to consider further the implications of the needs of such vulnerable consumers for competition and consumer welfare in both digital and ‘analogue’ markets.

Transparency and changing providers

16. How we, as consumers, use the data available to us to shop around and choose and change providers is an important factor in how we all make informed choices, whether in online or offline markets. The CMA considers in this regard that improving transparency is a fundamental part of ensuring that consumers have the information they need to make informed, effective choices, and to engage confidently in markets.⁴
17. However, we agree with the Green Paper that engaging consumers only by providing them with more information is not always wholly effective. We are continuing our work on the design of consumer-facing remedies to ensure that

³ By way of example, and as the Consumer Green Paper notes, UK consumers spent on average £1.2 billion online every week in 2017 and around one-fifth of UK retail sales were taking place online by the end of 2017. ONS, 22 March 2018, [Retail Sales Index internet sales](#).

⁴ Digital Comparison Tools (<https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>), Online Gambling (<https://www.gov.uk/government/news/cma-launches-enforcement-action-against-gambling-firms>) and Secondary Ticketing (<https://www.gov.uk/cma-cases/secondary-ticketing-websites>) are all examples of CMA action to tackle harm to consumers by improving transparency.

behavioural science is applied to target interventions where they can be most useful in helping consumers take informed decisions whilst avoiding information overload.⁵

18. We do not wish to see actively switching consumers deprived of the benefits of shopping around and switching.⁶ We are mindful of the unintended consequences of seeking to limit differentials in prices or otherwise to regulate price or product offerings, which can reduce the incentives on consumers to shop around, compare products and switch between suppliers – with the result that competitive pressures can be weakened, risking higher prices, poorer quality and less innovation across the board. Nevertheless, we recognise concerns about some of the implications of consumers who remain loyal to their existing supplier being materially and unreasonably disadvantaged, particularly when these are the less ‘internet-savvy’ and perhaps the most vulnerable consumers in society. A particular concern is that digitisation and the increasing availability of data may both enable greater targeting and opportunities for exploitation of these loyal customers by firms.
19. This issue, sometimes called the ‘loyalty penalty’, might be particularly important in some regulated markets in which the necessary competitive pressure is missing – for example the CMA has accepted fare caps in the remedy package of some rail franchise mergers, and introduced remedies in the energy sector intended enhance rival suppliers’ and Third Party Intermediaries (TPIs)’ ability to engage disengaged consumers.⁷
20. To guard against the exploitation of loyal customers more broadly, the CMA recently took action regarding auto-renewal of subscriptions in online dating services⁸ and secured commitments from some cloud storage providers so that consumers will not face unexpected price rises or changes to their storage levels.⁹
21. We look forward to working with the Government and regulators on consumer vulnerability and on further ways to safeguard consumers who remain loyal to their existing suppliers from being materially disadvantaged, including through the Consumer Forum introduced in the Green Paper.

Vulnerable consumers

⁵ <http://www.oecd.org/daf/competition/consumer-facing-remedies.htm>

⁶ Consumers are likely in most markets to find lower prices or improved quality options by looking at a wider range of suppliers, and businesses that know that customers can easily, and will, switch to other suppliers are more likely to work hard to keep or win those customers by offering better deals than their rivals do.

⁷ Following our proposal for an Ofgem-controlled database of disengaged customers to allow rival suppliers to prompt them to engage, Ofgem has conducted successful trials of this database. The trials resulted in a four-fold increase in switching rates amongst consumers who had been ‘stuck’ on the standard variable tariff for three or more years. https://www.ofgem.gov.uk/system/files/docs/2017/11/cm01_report_0.pdf

⁸ <https://www.gov.uk/cma-cases/online-dating-services>

⁹ <https://www.gov.uk/cma-cases/cloud-storage-consumer-compliance-review>

22. The issue of consumer vulnerability in is a key strategic priority for the CMA, whether in relation to online or offline, regulated or unregulated, markets. The CMA has prioritised a number of investigations, both in digital and more 'traditional' markets, where there is potential for detriment to (disproportionately) affect vulnerable consumers, for example Care Homes, online gambling, excessive pricing of medicines and our recently announced work on funerals.¹⁰
23. Looking ahead, and as set out in our Annual Plan 2018/19,¹¹ the CMA has said: 'In how we choose, and then how we go about, our work, we will take a particular interest in the needs of, and harm suffered by, vulnerable consumers. These are people who often stand to lose proportionately more when markets are not working well, or who may be the losers in a market that is otherwise working well for most consumers.'
24. To support this aim, we have established a programme of work focused on consumer vulnerability. In particular, we co-hosted a roundtable with Citizens Advice in May 2018 on consumer vulnerability in digital markets, which brought together around 40 stakeholders, including from Government Departments, regulators, consumer groups, tech bodies and business, to consider the challenges facing consumers online and the potential solutions.
25. A key part of our work on vulnerable consumers is research on the 'poverty premium'; that is whether, and when, customers with lower incomes may pay higher prices for certain goods and services than those with higher incomes.¹² To this end, we have commissioned external advice on the feasibility of developing a robust methodology for measuring the 'poverty premium'. This advice will seek to build on existing relevant research and datasets but we expect there will be a need for new data collection on prices paid by consumers in different markets.
26. Another aspect of our work is engaging with others to develop our understanding of vulnerable consumers. We are holding a set of roundtables with stakeholders which will explore different dimensions of consumer vulnerability and a symposium for July 2018.
27. We plan to publish a report later in 2018 setting out the findings from our work on vulnerable consumers. The findings will inform our future case selection, approach to research and analysis, and remedies development. We also hope our findings will inform the Consumer Forum's work on vulnerable consumers, which we welcome (see further paragraph 84 below), and will thus also be of

¹⁰ <https://www.gov.uk/government/news/cma-investigates-funerals-sector>

¹¹ <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2018-to-2019>

¹² For example, consumers with higher incomes may typically have access to a wider range of more competitively priced loan products than those on lower incomes. This 'poverty premium' may overlap with concerns outlined at paragraphs 22 to 27 above about 'loyal' customers being penalised, where a person's lower income makes them less able to switch suppliers (for example because there are additional costs or risks to them in switching, or they lack the financial or other means (e.g. internet access) to do so

benefit to the wider regulatory community and facilitate coordinated or collaborative approaches to dealing with any concerns identified.

Data portability

How can the Government support consumers and businesses to fully realise the benefits of data portability across the digital economy? (Q6)

28. Data portability offers significant potential to drive competition, not just in the regulated sectors, but across the economy. The coming into force of the GDPR, which includes provisions on data portability, provides a unique opportunity for the Government to consider how such portability can be used to drive competition and choice, while maintaining businesses' incentives to invest.
29. The CMA considers that its experience in introducing 'Open Banking' (the improved and secure sharing of data through applications to help customers switch accounts)¹³ following its market investigation into retail banking can offer some insights into how Government can support consumers and business in data portability:
- (a) Consumer trust in the data portability tools is essential. Under Open Banking, customers' data can only be shared with strictly regulated third parties. This means that customers can have confidence and trust in their own privacy and the security of their data. The Government is establishing the Centre for Data Ethics and Innovation and this might be one possibility of how Government can set the 'rules' for how consumer data is collected and stored, which in turn, might engender trust in tools relying on data portability.
 - (b) Open Banking operates on open, standard application programme interfaces (APIs).¹⁴ For portability to be effective, the information needs to be transferable between different components and applications, which requires some sort of standard allowing this exchange.
 - (c) The benefits of data portability need to be realised across all geographical regions in the UK. This means working closely with devolved nations and other stakeholders to manage network effects and market concentration, in order to ensure that any changes deliver improvements in practice as well as reducing the potential for any negative unintended consequences.

¹³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/544943/what-is-open-banking.pdf

¹⁴ These are a set of methods enabling communication between different pieces of software – shared building blocks that allow them to interact effectively.

This provides businesses with confidence, before any investment in new markets, that conditions in those markets will be favourable to growth.

How can we ensure that the vulnerable and disengaged benefit from data portability? (Q2)

In which regulated markets does consumer data portability have the most potential to improve consumer outcomes, and for what reasons? (Q1)

30. The Green Paper rightly highlights the need to ensure that the vulnerable and disengaged benefit from data portability. This is something that we have sought to address in our case work including our retail banking market investigation, digital comparison tools (DCTs) market study, and energy market investigation.
31. For example, following out retail banking investigation, we required banks to implement Open Banking. We believe that this will facilitate switching and enable the creation of new products and services to help consumers, including those that are vulnerable, benefit from data portability.¹⁵ This may include budgeting support (consumers' transaction data being used to populate budgeting tools and services), debt advice (transaction data being used to populate income and expenditure tools used by debt advisers), benefits eligibility (scope for third sector organisations to view transaction data to understand people's eligibility for benefits), access to credit/loan comparison using transaction data, and alternatives to overdrafts (Open Banking provides greater scope for third party lenders to offer alternatives).
32. Our Open Banking remedy is restricted to the provision of access to current accounts due to the scope of our market investigation. However, it is easy to see that this could be expanded to other payment accounts to include all account types covered by the Second Payment Services Directive (PSD2),¹⁶ such as savings. Indeed, the banks within scope of our Open Banking remedy have agreed with HM Treasury to expand Open Banking to these accounts over the course of the next 12+ months.
33. The concept of Open Banking can also potentially be expanded to other financial service products such as mortgages, investments and pensions. It is also possible to see the potential for the concept of the use of open, standard APIs to enable the sharing of data in a controlled and secure manner in other sectors. This would enable customers to share their data with alternative providers, to help ensure they get the best deals and stimulate innovation in the supply-side to develop new service and product offerings. The Australian Government has

¹⁵ One of the CMA's other actions was to fund this project to help promote innovation in new products: <https://www.nesta.org.uk/project/open-challenge/>

¹⁶ https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/payment-services/payment-services_en

set out its policy of Consumer Data Rights, which provides a general right to consumers to use and share their own data, following the example of the UK. This right has been initially applied in the financial services sector, with plans to extend it to the energy sector, the telecommunications sector and, ultimately, economy wide. We will work with other regulators, through the UK Regulators' Network (UKRN) and bilaterally, to ensure the benefits of portability can be captured.

How can we ensure these new services develop in a way which encourages new entrants rather than advantaging incumbent suppliers? (Q3)

34. The enforcement of competition laws has a key role to play in encouraging new entry. The CMA considers that effective competition creates the right environment for the development of new services and innovation. For example:
- (a) effective merger control can limit the scope for incumbents to acquire innovative start-ups and other rivals before they have had an opportunity to fully develop, so as to eliminate existing or future competition from those rivals or extend their power from one market into another.¹⁷
 - (b) effective enforcement against anti-competitive behaviour such as price parity clauses serves to reduce barriers to entry, facilitating competition against incumbents.
 - (c) intervening to ensure that consumers have the right information to make informed choices will again help to ensure competition against incumbents is effective.¹⁸
35. Where regulation exists or is introduced, regulators should ensure that these regulations do not inadvertently favour incumbents or large businesses, unnecessarily mandate or favour specific business models or impose disproportionate compliance costs on small businesses or new entrants who may be less capable of absorbing these new costs (potentially limiting innovation and productivity in the sector).

¹⁷ This is an issue on which there has been particular current focus and questions have been raised globally as to whether competition authorities' consideration of such mergers has had adequate regard to the advantage that incumbents enjoy or have been too optimistic about the prospect of new entrants disrupting the status quo. For its part, the CMA is actively engaging with these issues. While we do not currently see a need for fundamental changes to the law, we are considering closely how the CMA can most effectively assess the likely commercial and competitive impacts of such transactions, including, for example, whether greater use could be made of available data from analysts and other sources, so as to gain insights into investors' motivations for allocating a significant value to target companies.

¹⁸ For more information around reducing barriers to entry see examples in Annex 1 below.

What is the best way to publish performance data so that it incentivises firms to improve and can be used by consumers when taking decisions? Should firms also offer discounts or compensation for poor performance? (Q4)

36. We consider that publication of information about a range of information, especially in regulated markets, is a useful avenue to explore further to help consumers make informed decisions. It is vital to consider what information consumers actually need to make informed decisions. For example, performance data may be helpful in some markets (e.g. actual broadband speeds). Depending on the details of the market and the products, price differentials may be useful to consumers in signalling the existence of a 'loyalty penalty'. This may be particularly true where pricing is complicated and it is therefore difficult for consumers to make meaningful comparisons between different offers.
37. Clear information about performance can be important in enabling empowered consumers to make otherwise hard-to-assess purchasing or switching decisions. In principle, easily accessible, easily comparable, consistent and objective assessments of performance would be simple to use by consumers and by traders. Allowing firms to choose their own performance standards and how they publish that information would potentially broaden the risks that the information would not be useful to consumers and/or would not be easily comparable with competitor information. However, it is important to strike the right balance here as the establishment of a single mandatory 'standard' could potentially weaken some incentives to innovate.
38. One example where we have intervened to make easily accessible, easily comparable, consistent and objective performance data available is from our retail banking market investigation.
- We found that many consumers consider all banks to deliver similar levels of service, but there was a lack of comparable data to enable them to make well-informed comparisons.
 - To address this we required banks to publish service quality indicators showing the willingness of their customers to make recommendations about their different brands' personal and business current accounts.¹⁹

¹⁹ The core service quality metrics for personal current accounts are: to recommend to friends and family i) the brand, ii) the brand's online and mobile banking services, iii) the brand's branch services and iv) the brand's overdraft services. The core service quality metrics for business current accounts are: to recommend to other SMEs i) the brand, ii) the brand's relationship/account management iii) the brand's online and mobile banking services, iv) the brand's branch and business centre services and v) the brand's credit (overdraft and loan) services.

- The consumer research is under way, with the first results due to be published on 15 August. These will be updated every six months using twelve months of survey data.
- Further, we required the banks to make the underlying survey data available to third parties using open, standard APIs, so as to facilitate entry and the emergence of new product offerings.
- We believe this service quality information will be a valuable additional basis on which consumers can ensure that they are using the best banking products for their needs and it will stimulate banks to increase the levels of service they offer to their customers.

39. We believe that, in principle, firms should offer discounts, compensation or other redress for consumers suffering from poor performance. There is an existing framework in the Consumer Rights Act 2015 (which provides consumers with rights when they purchase goods, services and digital content as well as rights of action against unfair terms) and in the additional private rights of action added to the Consumer Protection from Unfair Trading Relations 2008 (the latter via the Consumer Protection (Amendment) Regulations 2014).²⁰

As technology continues to develop, how do we maintain the right balance between supporting innovation in data use in consumer markets while also preserving strong privacy rights? (Q7)

40. In our view, data portability and other innovations in data use are not necessarily antithetical to privacy. On the contrary, the consumer trust that comes from effective data protection is paramount if portability is to serve to drive effective competition. An example of supporting this confidence and striking the right balance can be found in the CMA's work on Online Dating, where we have secured undertakings to ensure that consumers are not misled about how their data is used.²¹
41. This complementarity is reflected also in the General Data Protection Regulation (GDPR), which provides not only for enhanced protection of data, but also increased consumer control over, and ability to 'port', their data. The ongoing implementation of the GDPR in the UK provides an important opportunity to ensuring that the potential opportunities of the GDPR for both consumers and businesses are maximised.
42. Consumers should have meaningful control over their data, which requires sufficient, clear information to enable informed choices, including on who they share this data with. We would support further work to provide consumers with a

²⁰ <http://www.legislation.gov.uk/ukxi/2014/870/contents/made>

²¹ <https://www.gov.uk/cma-cases/online-dating-services>

clear understanding of how their data will be used and by whom, and the relative benefits this will have for the consumer and for those using the data. This could build on past CMA work in this area, including its 2015 call for information on the Commercial Use of Consumer Data.²²

43. Maintaining the security of any data that is disclosed is also essential for avoiding the erosion of consumer trust.
44. More broadly, and as noted above, when considering how to maintain the right balance between innovation and privacy, Government should ensure that regulation does not inadvertently favour incumbents or large businesses, or impose disproportionate compliance costs on small businesses or new entrants who may be less able to absorb those costs. The CMA considers that innovation is most likely in a competitive environment with regulation that works with the grain of competition and supports new business models in exploiting the opportunities of the digital economy. We welcome the Green Paper's recognition of this challenge.

What challenges do digital markets pose for effective competition enforcement and what can be done to address them? (Q8)

45. In broad terms, UK competition laws provide a flexible, 'principles-based' and technology neutral framework, which has shown itself capable of adapting to changes and new challenges in markets. That is also true in relation to certain competition concerns arising in online markets.
46. In this context, the CMA can take, and has taken, effective action to promote competition in 'novel' markets and have invested in building our experience of digital enforcement. Further examples of this work and consideration of the challenges of digital markets for competition enforcement, is included in Annex 1. See also our submissions to the recent Organisation for Economic Development (OECD) e-commerce roundtable²³ and to the House of Lords Select Committee on regulation of the internet.²⁴
47. It is undoubtedly the case, however, that the nature of the online economy, and the business models and practices that it has fostered, may create or exacerbate challenges for the traditional application of certain competition tools and raise questions of which authorities need to be mindful. These may include, for example:

²² <https://www.gov.uk/government/consultations/commercial-use-of-consumer-data>

²³ [https://one.oecd.org/document/DAF/COMP/WD\(2018\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)53/en/pdf)

²⁴ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-committee/the-internet-to-regulate-or-not-to-regulate/written/83418.html>

- (a) How do established legal concepts, such as ‘agreement’ or ‘meeting of minds’, apply in a world of artificial intelligence and self-learning algorithms where collusion might occur spontaneously?²⁵
 - (b) How should authorities strike the balance between preserving the benefits that online sales channels offer to consumers – such as increased choice, improved convenience, and lower prices – and avoid risks that incentives to invest and innovate are undermined by free riding?
 - (c) How can authorities protect the benefits for consumers that personalisation of prices can bring while ensuring that such personalisation is not used to exploit or mislead consumers (particularly, those which are vulnerable or less price sensitive)?²⁶
 - (d) In fast-moving markets, how can competition authorities ensure that they take sufficiently swift action to prevent harm to competition / consumers, while at the same time exercising appropriate caution to ensure that their interventions do not ‘chill’ pro-competitive innovation or serve inadvertently to reinforce incumbency or existing business models?
48. The CMA is seeking to address these issues and expedite its information gathering and analysis, in particular by building its digital expertise (through, among other things, the creation of a Data and Digital Insights team) and deepening its understanding of digital and data markets. Further details can be found at Annex 3.
49. In this regard, we welcome the opportunity offered by the ERRA review to consider – as part of a wider review – what changes to the regime may be necessary or beneficial to ensure that it is best placed to respond to these digital economy challenges. See further Part IV below.
50. Finally, we note for completeness that competition law and competition authorities may not be best placed to address all the challenges created by the online economy or broader digitalisation: other means (regulatory or otherwise), or other bodies (such as data protection authorities or Government policymakers) may be necessary for, or more effective at, addressing specific concerns.

²⁵ See the UK submission to the OECD on algorithms and collusion (2017).

²⁶ In May 2013, the OFT published a report on personalised pricing, following a call for information: Personalised Pricing – Call for Information, May 2013, OFT1489. As part of this work, it undertook a review of the economic literature regarding the following research question: under what circumstances is online personalised pricing likely to cause economic harm to consumers? It published the report ‘The economics of online personalised pricing’, OFT1488. Also see more information on our more recent research below at Annex 4.

Part 2: Consumer protection law enforcement: 'landscape' and legal framework

51. The landscape reforms of 2013/14 gave the CMA a clear remit to promote competition for the benefit of consumers and to use both competition and consumer enforcement powers to this end. The focus of our consumer protection powers is to support competition and choice and to effect market-wide change where we identify issues that hinder a market from functioning well. We focus on strategic, national or international issues, particularly those of growing importance, and prioritise enforcement projects where:
- (a) there are systemic market issues;
 - (b) consumer protection supports competition - for example, where consumer choice is inhibited by misleading information, weakening the ability to make informed choices, or by constraints on shopping around such as unfair contract terms and/or 'subscription traps'; or
 - (c) our work can expect to achieve a wider impact, for example by developing the law or by having a deterrent effect across a sector or sectors.
52. In relation to unfair contract terms legislation, the CMA was given a role in policy development, provision of business guidance²⁷ and enforcement, and inherited the OFT's lead role with regard to international policy liaison. The 2013/14 reforms also gave TSS lead responsibility for enforcement for consumer protection legislation (other than unfair terms legislation) at local, regional and national level.
53. All of this means that the CMA prioritises the use of its consumer powers in order to deliver outcomes which raise compliance levels across markets, rather than tackling single trader issues that are unlikely to have such an effect.²⁸ The CMA also needs to share intelligence and work closely with partners in the consumer landscape who have lead responsibility for enforcement and advice, including National Trading Standards, Trading Standards Scotland, and the Department for the Economy in Northern Ireland, as well as consumer and business advice bodies. We believe that co-ordination has been improved through the Consumer Protection Partnership but there is still more to do.
54. Following recent work on the consumer landscape by BEIS and the National Audit Office, the CMA agrees that more needs to be done to ensure effective co-ordination and delivery. We believe that granting statutory status to an existing

²⁷ For example, see <https://www.gov.uk/government/publications/unfair-terms-explained-for-businesses-individual-guides>

²⁸ For more information on the CMA's consumer powers, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf

Trading Standards body or bodies would be a useful step forward in achieving this. See our answer to Question 16 below for more details.

55. We welcome the introduction of civil fining powers for breaches of consumer protection legislation. This will improve deterrence, help better align our competition and consumer enforcement, create consistency with the leading international enforcement agencies and helps consumer enforcers (including CMA and Trading Standards Services) to take robust and effective enforcement action to protect consumers, tackle unfair practices and improve functioning of markets.²⁹
56. We support the Government's proposal that these fines will be capped at 10% of the firm's worldwide turnover, the same upper limit as our competition fines. This will send a clear signal to traders that compliance with consumer law is a very serious matter and that there are no advantages to be gained by attempting to seek arbitrage through differentials in the regulatory landscape.
57. We note the Government's stated preference for a court-based fining system, and we understand that this would easily fit into the existing court-based system used for most consumer protection enforcement under Part 8 of the Enterprise Act 2002. We would be happy to discuss the details of this, as well as the advantages (notably the potential for enhanced deterrence as well as reduced burdens on the court system) of an administrative fining system. There may be merit in considering administrative fines in parallel with the improvements to the existing civil system, as we appreciate this option would require additional legislative change.
58. An administrative system is used by CMA in relation to our competition enforcement, as well as by other authorities enforcing consumer protection legislation, for example the Italian Autorità Garante della Concorrenza e del Mercato (AGCM) in relation to breaches of the Italian implementation of the Unfair Commercial Practices Directive (UCPD).³⁰ Such a system might also be of greater interest to sectoral regulators in so far as administrative fines may be more consistent with their existing licensing powers.³¹ To the extent this is the case, it may also have the additional benefit of encouraging the greater use of general consumer protection legislation in regulated sectors.

²⁹ For example by increased deterrence and/or the use of fines to remove unjustly obtained profits, thus restoring a level playing field to a particular market or sector.

³⁰ Legislative details can be found at: <http://www.agcm.it/en/consumer-protection/consumer-protection-legislation/1724-legislative-decree-no-146-of-2-august-2007.html>

This might also open up the option of such fines applying to misleading b2b practices such as those covered by the Business Protection from Misleading Marketing Regulations 2008, without the need to extend the existing consumer protection legislation to cover SMEs, for example.

Consumer-to-consumer transactions

Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence? (Q9)

59. Consumer-to-consumer transactions – say, for example, the resale of event tickets by consumers – may take place directly between individuals or, increasingly, through an intermediary such as an online platform.
60. In relation to the latter, the CMA believes it is important for consumers to know from whom they are buying (in particular whether from a consumer or a trader), especially to the extent to which this might affect the consumer's rights if the transaction goes wrong. Online platforms need to assume effective responsibility for ensuring that this information is provided clearly upfront.³²
61. For 'pure' consumer-to-consumer transactions, there is more room for debate. Most consumer protection legislation assumes an imbalance of power or information (or possibly both) between an individual consumer and a business, that therefore requires additional protections for the 'weaker' party, the consumer. Though there may be differences of expertise or resources between individual consumers, broadly speaking these imbalances may not exist, at least not to the same extent. Even so, it does not seem correct that there should be no recourse for consumers purchasing from other consumers if things go wrong, other than to seek damages or otherwise act under broader legal provisions.
62. One model worth considering for consumer-to-consumer transactions might be the existing business-to-business protections (for example in the Business Protection from Misleading Marketing Regulations 2008) which do afford some protection to traders, albeit not at the same level as consumers. For example, deceptive statements to businesses that lead them to make a decision are prohibited, but not the failure to disclose material information (misleading omissions) as per the business-to-consumer Consumer Protection from Unfair Trading Regulations 2008. Outright deception, especially as to the nature of the product being sold, would be caught. We would be happy to discuss this further if of interest.
63. Another possibility might be that a consumer offering products for sale could be bound by consumer protection law as if he or she were a trader, *unless* they have clearly (and correctly) disclosed that they are a consumer early in the process. This could have the benefit of encouraging more sellers to clarify their status, which would help consumers make informed decisions and also

³² Improved checking and disclosure of sellers that are traders has been a key element of the CMA's ongoing work with the secondary ticket platforms <https://www.gov.uk/government/news/secondary-ticketing-sites-pledge-overhaul>

potentially make it easier to prosecute rogue traders who have falsely and explicitly claimed to be consumers.

64. CMA would welcome the opportunity to discuss these matters further with BEIS officials and develop creative solutions in response to these challenges.

Personalised pricing

In what circumstances are personalised prices and search results being used? In which circumstances should it not be permitted? What evidence is there on harm to consumers? (Q10)

65. The CMA, and before it the OFT, have carried out research into this area – more details can be found in Annex 4 below.
66. As yet, we have discovered little firm evidence of harm being caused to consumers. However, in so far as this may be partly due to the difficulties of replicating real consumer experiences in theoretical testing, we would support further thinking and research in this area.
67. Personalised pricing can benefit consumers overall, depending on the circumstances. Personalised search results can also potentially benefit consumers. In both instances, such benefits are more likely when there is effective competition and meaningful choice in the market. By contrast, personalised pricing by a monopolist is very likely to be harmful to consumer welfare, particularly where the form of discrimination is relatively sophisticated.
68. In this regard, care must also be taken to ensure that the practice of personalisation does not cause consumers to lose trust in markets and to reduce their participation in the digital economy. Such erosion of trust is greater where consumers do not understand online pricing practices, or they suspect they are being ‘unfairly’ presented with higher prices than other people.
69. There is existing law which places some limits on potentially harmful personalised pricing. For example, personalised pricing may breach the Consumer Protection from Unfair Trading Regulations (CPRs) if the data was obtained unlawfully e.g. without valid, freely given, specific, informed and active consent as required by the General Data Protection Regulations (GDPR).

Terms and conditions

Should terms and conditions in some sectors be required to reach a given level of comprehension, such as measured by online testing? (Q11)

70. The CMA continues to develop its work on unfair contract terms, including enforcement and compliance work in relation to care homes, secondary tickets, online gambling, online dating and other matters. We also continue to develop our approach to compliance following the successful launch of a series of videos and short guides.
71. The CMA observes that consumer and business engagement with the understanding of contract terms is low.³³ This is a serious problem as consumers are typically assumed to have made a properly informed choice, which in many cases would necessitate familiarity with and understanding of the details of the terms and conditions. The CMA is working with BEIS colleagues on the development of trials for consumer accessibility of contract terms. The CMA is happy to share its experience in this area and looks forward to seeing the results of the consumer trials. We also note that the OECD has, and the European Commission are, carrying out research to inform recommendations on similar topics.³⁴
72. We would be interested to see more details of how the comprehension test might work in practice. We think that it is only likely to be useful to the extent that any such testing does effectively track the actual likelihood of engagement, interest and also that any changes enable consumers to make better decisions as a result of that information being provided about the terms.

Alternative Dispute Resolution (ADR) / Redress

How can we improve consumer awareness and take-up of ADR? (Q12)

What model of ADR provision would deliver the best experience for consumers? (Q13)

How could we incentivise more businesses to participate in ADR? (Q14)

Should there be an automatic right for consumers to access ADR in sectors with the highest levels of consumer harm? (Q15)

³³ <https://www.gov.uk/government/news/over-half-of-businesses-dont-know-unfair-contract-rules-well>

³⁴ https://read.oecd-ilibrary.org/science-and-technology/improving-online-disclosures-with-behavioural-insights_39026ff4-en#page4 and https://ec.europa.eu/info/policies/consumers/consumer-protection/evidence-based-consumer-policy_en

73. There appears to be evidence that the (mostly) voluntary regime for taking up ADR is not working – and evidence of consumer detriment.³⁵ The CMA has seen this in our work in several sectors, most recently the Legal Services market.³⁶ Incentives for traders to sign up voluntarily to redress schemes are very weak, whilst the costs of doing so can be high, partly for setting up but also if and/or when consumer claims succeeded. Consumers have existing rights (see paragraph 39 above) but these are not always clear to them. Even where these are clear, consumers do not always find them easy to exercise in practice because of the cost and complexity of resolving the problem through formal legal channels.
74. The CMA is also aware from our work that businesses’ understanding of consumer law is not always as good as it should be (see above paragraph 71). So, in general the CMA is supportive of strengthening the ADR regime. The CMA recognises that mandating ADR in all sectors would carry a heavy regulatory burden, especially regarding costs. Equally, however, delaying the roll-out of mandatory ADR until it is clear that there is a consumer need in a sector might also be ineffective (because by definition, it is too late by then).
75. There are various approaches that could be taken to addressing this, including:
- (a) Rather than rolling out mandatory ADR only once a clear need is identified, the Government could proceed on the basis that mandatory ADR will be rolled out except to sectors where there is a clear case and evidence that there is no need, for example where effective and strong consumer codes are already in place, where trade bodies are themselves effective in providing redress, or where the type or nature of transaction means that redress is less likely to be relevant;
 - (b) Adopt the ‘Swedish’ approach, under which the ADR body can hear the complaint (and rule on it), but its ruling is non-binding. This may have a ‘nudge’ effect on membership of the ADR scheme (by encouraging traders to take part on a voluntary basis) – it may also incentivise consumers to escalate disputes further e.g. to court as they may feel empowered with an independent assessment (albeit not in full sight of the facts);³⁷
 - (c) Stipulate that all traders have mandatory ADR membership in essential markets (the key issue then being which markets are considered to be ‘essential’ – we would be happy to discuss with the Government what

³⁵ For example, see

https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/316481/CMA_response.pdf

³⁶ <https://www.gov.uk/cma-cases/legal-services-market-study>

³⁷ One potential downside to this approach is how to fund the ADR body if membership is not mandatory.

these might be, based on our experience of investigating markets and of where consumer detriment is likely to be greatest).

76. While care must be taken not to undermine incentives to improve and innovate in ADR services, we believe that concerns can arise if multiple ADR schemes are permitted to exist in parallel in a sector: where the trader in practice has the choice of different schemes, he or she may choose the one with the lowest fees or the one that is prepared to treat its own customers poorly. Accordingly, where multiple ADR schemes do exist, there are good arguments to require that the choice of ADR is led by the *consumer*, not the trader, or that mechanisms are in place to prevent a ‘race to the bottom’ among schemes.

‘Landscape’ of enforcers of consumer protection law

What changes are needed to ensure local and national enforcers work together within an effective framework for protecting consumers? (Q16)

77. The creation of National Trading Standards (NTS) and Trading Standards Scotland (TSScot) has ensured that there is effective coordination and prioritisation of Trading Standards Services’ enforcement capacity at national and regional level. The Consumer Protection Partnership (CPP) has helped to establish greater coherence and consistency in the sharing of intelligence and prioritisation of joint activity at a national level. However, we recognise that none of these bodies has responsibility for ensuring effective prioritisation or coordination of the full range of local authority activity. Furthermore, neither Trading Standards body, nor the Chartered Trading Standards Institute (CTSI), has statutory status. This means that BEIS and other bodies are constrained in awarding statutory functions, which might help to solve a number of enforcement challenges. Additionally, a lack of a statutory body provides additional challenges in ensuring adequate accountability for national funding and national priorities.
78. We agree that – within the framework of the current consumer protection regime³⁸ – a strong national body or bodies³⁹ with responsibility for improving the coordination of enforcement undertaken by Trading Standards could help to address some of the problems in the consumer landscape (for example the potential lack of national accountability for national funding). Such a body would

³⁸ Significant changes were made to the structure of the consumer enforcement landscape in 2013. As such, we see merit in, at this stage, allowing those changes to bed-in further and to seek incremental changes, so that consumers and the economy can see the full benefits from those previous improvements (e.g. the Consumer Protection Partnership),

³⁹ Devolution of some aspects of consumer protection in Scotland would mean that an additional statutory body is likely to be necessary there. This would evidently necessitate effective co-ordination between two such bodies.

need to retain strong links to local authorities to ensure that individual local Trading Standards Services (TSS) can contribute fully and sign up to any national priorities that are agreed for the consumer landscape. It would therefore be useful for such a body to be given the appropriate levers and powers to be able to secure agreement and endorsement from local TSS.

79. This body or bodies should be given the necessary enforcement powers to ensure that they can take enforcement action on larger, more complex cases which local TSS do not have the capacity or risk appetite to take on (where these do not fall within the existing market-wide/impact on competition role of the CMA). Such a body should also be given a duty to develop and maintain the necessary expertise at a national level. Each local TSS may not have capacity to retain relevant specialist expertise themselves but they may ultimately need it to tackle harmful practices. For example, e-crime expertise for tackling business activity that is increasingly conducted online and across boundaries. A robust backstop arrangement is needed to ensure that there is collective capacity and resilience within the system to take on such cases.
80. Furthermore, it would be useful for this central body to be given a duty to consult with Consumer Protection Partnership partners when coordinating Trading Standards Services priorities and activities, to ensure that there is greater coherence between national, regional and local enforcement strategies and plans. This would mean establishing a clear framework as to where this central body would sit in relation to other bodies and how it would contribute or participate in existing UK consumer networks. Any newly created body would also need to be able to deploy the appropriate levers and incentives to ensure that all necessary local partners agree to deliver in accordance with agreed strategic priorities.
81. As part of the BIS review of Trading Standards in 2016 and the National Audit Office's 2015 review of the consumer landscape,⁴⁰ the CMA agreed with views that fewer, larger TSS delivery units could help preserve and develop TSS capability in the context of budget reductions and other pressures. We think pressures on budgets are likely to grow given potential additional enforcement responsibilities after EU exit.
82. More could be done to co-ordinate intelligence processes more effectively within the consumer landscape, building on the work of the NTS and TSScot's Intelligence Teams and linking more closely to the CPP's Knowledge Hub. A statutory body or bodies with powers or legal duties to co-ordinate intelligence could assist in identifying clearer enforcement priorities that could best be delivered at national, regional and/or local level, with which local TSS could more easily identify and deliver more effectively. Further incentives could come

⁴⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/420218/bis-15-139-the-impact-of-local-authority-trading-standards-in-challenging-times-r2.pdf

from additional funding that the national body might be able to deploy to support local enforcement within agreed strategic priority areas.

83. We would also like to point out that enabling and resourcing enforcers to take effective cross-border enforcement will be an increasingly crucial part of the consumer landscape. See our views in paragraph 86 below.

Consumer Forum

Do you agree with the initial areas of focus for the Consumer Forum? (Q17)

84. We support the proposal for the Consumer Forum to focus on vulnerable consumers in regulated markets as its main priority, alongside work on implementing the recommendations of the NAO's review, the development of greater clarity on Government/regulator interactions and the use of data. We look forward to playing an active role in the Forum.
85. The focus on vulnerability accords with our strategic priorities for 2018/19 which include taking a particular interest in the needs of, and harm suffered by, vulnerable consumers. And as described above, we have already started a programme of work on vulnerable consumers, to develop our understanding of the challenges vulnerable those consumers face and the potential solutions thereto.
86. Consumer markets are increasingly international and problems are not neatly confined to one country or one legal jurisdiction. Consequently, we propose that *international co-operation, especially the efficacy of cross-border enforcement*,⁴¹ should also feature in the new Consumer Forum's initial priorities. This would build on, and further support existing CMA work with international counterparts (both bilaterally and multilaterally through networks such as the International Consumer Protection Enforcement Network) to ensure, so far as is possible, consumers are protected when completing cross-border transactions
87. We consider that this could be included as a stand-alone additional priority or instead could be added as an element of any focus on either digital markets or vulnerable consumers.

⁴¹ More details of the CMA's views on cross-border enforcement can be found at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-consumer-protection-rights/written/70044.pdf>. The House of Lords' response and more details can be found here: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2015/brexit-consumer-protection-rights/>

Part 3: Competition (including the ERRA Review)

Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers? (Q18)

Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition? (Q19)

88. As the Green Paper notes, the reforms introduced since the Government's consultation in 2011 sought (in broad terms): (a) to strengthen the CMA's investigations and the robustness of its enforcement and investigations; and (b) to streamline its processes.⁴²

89. As detailed further below:

- The CMA considers that – alongside the procedural enhancements and investments it has itself made – the 2014 reforms have underpinned an increase in the efficacy and impact of its work resulting in direct benefits to consumers in excess of the CMA's target of £10 of benefit for each £1 spent, in each of the CMA's 4 full years of operation.⁴³
 - As the Green Paper notes, this has been seen in particular in relation to the CMA's competition enforcement, but applies equally across all its tools.
 - The UK's Exit from the EU provides an opportunity to enhance this impact, as the CMA investigates matters that would, under the current regime, be reserved to the European Commission, significantly increasing the CMA's caseload.
- In the 5 years April 2010 to March 2015, we (or our predecessor the Office of Fair Trading) opened an average of 6.8 competition enforcement cases a year. More recently, that level of activity has materially increased.

⁴² As an initial point, we note that the full or potential effect of certain changes introduced at that time has, necessarily, yet to be felt. For example, as the reforms to the cartel offence (i.e. removal of the need to prove dishonesty) applied only where the cartel conduct occurred after 2014, the CMA has not yet had the opportunity to pursue a prosecution under the new offence (its completed criminal investigations since 2014 have all applied the 'old' test for the offence).

⁴³ These figures do not fully capture the indirect benefits of the CMA's work, in particular the critical deterrent effects of an effective enforcement and merger regime. This is of particular relevance given the CMA's significant investment in its compliance activities and published materials as a means of helping businesses across the economy, or across specific sectors comply with the law and amplifying the effects of our enforcement

In April 2015 to March 2016, we opened 8; in April 2016 to March 2017 we opened 10; and in April 2017 to March 2018, we have opened another 10. On average, this means an increase over the past three years of over 35% in our competition enforcement activity compared with the previous five years.

- Nonetheless – given that expected increase in caseload, the changes in the economic landscape since 2014, and ongoing technological advances – we consider that certain further, legislative changes could build upon the 2014 reforms and their objectives, and ensure that the ‘end-to-end’ competition regime⁴⁴ remains able quickly and effectively to address possible harm to competition and consumers (whether online or offline). We look forward to discussing these with the Government as it progresses its review.
- In that regard, we welcome the Green Paper’s consideration of potential enhancements across the regime (that is, not merely those areas falling within the narrow scope of the statutory review). Such a holistic approach will help to ensure that all parts of the regime deliver for consumers and that the regime is able to evolve and adapt in line with new technological and market developments and challenges. Indeed, while care is needed to ensure stability through EU Exit, that event can equally be seen as providing a rationale for considering at this juncture whether more extensive reform might further enhance the regime’s ability to address consumer detriment, in all its forms, and to deter harmful business practices.

Strengthening the regime

90. A core outcome of the 2014 reforms was to embed the ‘enhanced administrative model’ for competition enforcement that had been introduced by the OFT in 2012, characterised in particular by the separation of decision making between the ‘investigation phase’ and the ‘decision phase’ of competition enforcement cases. We consider that this enhanced model has been effective in delivering enhanced transparency and confidence in the enforcement regime for parties. As noted above – and has been recognised by others⁴⁵ – this has been accompanied by a marked increase in the volume and timeliness of the CMA’s enforcement,⁴⁶ increasing the regime’s deterrent power.

⁴⁴ i.e. from initial intelligence gathering and investigation through to appeals brought in the Competition Appeals Tribunal and the UK courts.

⁴⁵ See e.g. Global Competition Review’s annual rankings of competition enforcement agencies (July 2017) which referred to the CMA being “visibly reinvigorated” and “[r]amping up the agency’s activity” which it considered to be “a big turnaround... from where they were 3 years ago.” The CMA was also recently awarded the GCR Award for Enforcement Agency of the Year (Europe), in recognition of its work across various tools.

⁴⁶ As evidenced by the data in Annex B of the Green Paper.

91. Moreover, that step change in the CMA's competition enforcement has been achieved without detriment to the CMA's use of its other functions. Indeed, during the same period, the CMA:
- (a) completed the two largest market investigations in the regime's history and three market studies, all in key areas of the economy;
 - (b) as described elsewhere in this response, undertaken several consumer enforcement investigations, focusing particularly on the online and digital markets which lie at the heart of the Green Paper;
 - (c) carried out an extensive programme of work to reduce burdens on business by assessing whether any existing merger and market remedies are no longer necessary.⁴⁷
92. This work, and the progress of the CMA's investigations more broadly, has been aided by a number of the reforms introduced in 2014. These include, for example, the ability to prevent pre-emptive action in merger investigations that could prejudice the CMA's investigation, to issue mandatory requests for information in Phase 1 merger cases, and to require individuals to answer questions as part of a CA98 investigation, each of which has served to ensure that the CMA is better able to take timely decisions, in possession of the full facts of a case.
93. Our case experience to date has nonetheless identified areas where the regime might still be further enhanced, particularly in the light of the expected increase in the CMA's case work post-EU Exit, and the importance (not least in the dynamic markets that characterise the digital economy) of being able to take prompt action to address potential harm to competition or consumers.⁴⁸
94. The replacement of the criminal sanctions for failing to comply with the CMA's investigations with civil sanctions, provides an example of this:
- This has been a very beneficial change, better enabling the CMA to take action more promptly and effectively to address parties' actions that impede or risk prejudice to a CMA investigation.⁴⁹
 - We are concerned, however, that the current caps on the amount of the fine (a £30,000 fixed penalty and £15,000 daily penalty) risks being too

⁴⁷ This has resulted in the removal or variation of 88 historic market or merger remedies since March 2012.

⁴⁸ The review may also provide the opportunity to bring forward other proposals suggested by the Government in its *Better Markets* consultation in 2016, including, for example the proposal to make the CMA a designated prosecutor for the purposes of entering into agreements with assisting offenders under sections 72 to 74 of the Serious Organised Crime and Police Act 2005 (SOCPA), in respect of prosecutions for the criminal cartel offence.

⁴⁹ For example, in April 2016 the CMA fined Pfizer £10,000 for failing to comply with a mandatory information request sent in a Competition Act investigation. Similarly, it has also imposed a penalty of £20,000 on Hungryhouse Holdings Limited in November 2017 for not complying with an equivalent information request sent in the course of the CMA's review of Hungryhouse's acquisition by Just Eat.co.uk Limited.

low to provide a truly credible deterrent to parties' attempts to delay or otherwise impede the CMA's investigation.

- Those maxima also put the UK significantly out of step with many other major competition jurisdictions: the European Commission, for example, is able to fine companies up to 1% of their turnover, and recently imposed a penalty under these powers of €110m on Facebook.
- Similarly, the 2014 reforms created something of an anomaly, in so far as the criminal offence of providing false or misleading information to the CMA was retained, reflecting the seriousness of the offence. A prohibition on providing false or misleading information is essential to the CMA's ability to make effective, well-reasoned and fair decisions. This could be significantly strengthened if the CMA also had the option of taking civil or administrative action, with sanctions, to prevent the provision of false or misleading information.
- Therefore, incremental reforms to these powers, to ensure consistency across them, and bring them more into line with those of equivalent bodies overseas,⁵⁰ could therefore have a significant effect in facilitating the progress of the CMA's investigations and deterring actions that seek to impede this.

95. As technologies continue to evolve, it will also be important to ensure that the CMA, and other enforcers, have the necessary legal powers and expertise to ensure that they are able to identify, obtain and rely on evidence relevant to their investigations, in whatever form it is held. Similarly, as cross-border trade affecting consumers develops, particularly trade by digital means, it is important that the CMA has the means to protect UK consumers affected by such trade, including effective reciprocal mechanisms allowing for cross-border co-operation on enforcement

96. To that end, and in the context of EU Exit, the CMA welcomes the Government's commitment to seek to ensure in negotiations that the CMA remains able to cooperate and share information with the European Commission and EU member state authorities.⁵¹

Streamlining processes

97. As noted above, the desire to streamline the competition regime and facilitate quicker decision making across the CMA's toolkit was a central objective of the 2014 reforms. We consider material progress has been made in this regard. As

⁵⁰ And, indeed, with the CMA's own powers where merger parties breach an interim enforcement order.

⁵¹ We also note that the so-called 'ECN+' directive is expected to enter into force later this year. We would encourage to use implementation of this directive into UK law as a further opportunity to ensure that there is clarity as to the CMA's investigative powers and its ability to take effective action against parties located overseas.

noted by the statistics in Annex B of the Green Paper, the CMA increased the rate and impact of our competition enforcement⁵², and the speed with which we review mergers, in particular in clearing less complex deals which do not pose a risk to competition.⁵³

98. While the two market investigations that the CMA has to date completed utilised the CMA's powers to extend the deadline for completion, the scale and scope of these two investigations was atypical. The CMA is confident that – particularly in the light of recent process reforms we have made – the significant majority of market investigations (including the CMA's ongoing investigation into investment consultancy services) will be capable of completion within the 18 month statutory timescale.
99. The 2014 reforms – including, for example, timescales for Phase 1 merger investigations and any associated offer of undertakings in lieu, and, in CA98 cases, to address a Statement of Objections to fewer than all the persons party to the unlawful agreement or conduct – have played a role in this streamlining and in increasing certainty for parties.⁵⁴ But the CMA has also sought, in parallel and within the bounds of the regime's current statutory framework, continuously to refine and evolve its processes to seek to ensure they operate as efficiently as possible and facilitate timely enforcement.⁵⁵
100. Again, however, our accumulated experience has identified challenges that cannot be addressed solely through internal process reform:
- The CMA's powers to make urgent interim measures directions in a competition law enforcement case, under the Competition Act prohibitions, are a case in point. The substantive threshold for making such a direction was lowered in 2014, and was a beneficial initial step to facilitating the use of such measures to avoid significant damage to a

⁵² CA98 cases opened in 2015/2016 – 8, 2016/2017 -11, 2017/18: 10 and since Apr 2018 – 1. For CA98 infringement decisions and fines, in 2015-16 – 3 (£46m), in 2016-17 – 9 (£100.1m) and in 2017-18 – 6 (£13.1m).

⁵³ The current average duration of phase 1 investigations overall is 34 working days, as compared to over 40 in the final years of the OFT, and [27 days for those cases in which a merger can be cleared without an issues letter being issued.

⁵⁴ This has been of particular benefit in cases in which an (often large) supplier has restricted resale prices across its retailer base, often under standard terms and conditions which retailers have limited freedom to negotiate if they wish to sell the supplier's product or utilise its service.

⁵⁵ See, for example, the CMA's current consultation on reforms to its procedural guidance for Competition Act Investigations, and the recent enhancements made to its mergers and markets processes. The link to the CMA merger inquiry outcome statistics is available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722440/Merger_inquiry_outcomes_june_2018.pdf.

The mergers orders and undertakings register includes orders and undertakings that are currently in force, have lapsed and have been released. It is available here:

<https://www.gov.uk/government/publications/mergers-orders-and-undertakings>

party or the public interest while the CMA's investigation is ongoing.⁵⁶ However, we have found that, in practice and despite the revised threshold, there remain various procedural steps mandated in legislation which can materially limit the ability of the CMA to act promptly, and which may go beyond what is necessary to ensure due process for the parties involved.

- Similar, unanticipated practical challenges have also arisen in our market studies work. At present, if the CMA is considering making a market investigation reference following a market study, the CMA Board (to which the power is reserved) must do so six months after having launched the study. Given the need to gather and carefully analyse evidence from external sources, forming such an early view carries risks (particularly given the potential impact of a reference on parties and public resources), and may warrant reconsideration.

101. We welcome the opportunity to discuss further with the Government these and related issues, and the possible means to address them.

102. As alluded to above, we consider that any review of the regime, and any reforms intended to streamline processes further, should look at the full 'end-to-end' process of a case, including any appellate phase, to consider how the system as a whole can best facilitate timely, pro-consumer outcomes in both large and small cases and avoid duplication across different 'phases', while maintaining necessary rigour and due process. We would be happy to discuss these and related issues further with BEIS as it progresses its review.

Regulated sectors: enhancing 'concurrency'

103. Enhancement of the concurrency regime was a key aim of the 2014 reforms, and – as the Green Paper notes – is relevant to the Government's broader consideration of how the regime is delivering and whether the CMA and other regulators have the tools they need to tackle anti-competitive behaviour and promote competition.

104. As documented in our 2018 concurrency report,⁵⁷ we consider that the concurrency regime is working well overall and that good progress has been made in promoting competition in the regulated sectors since the enhanced concurrency arrangements were introduced in 2014.

⁵⁶ And one which is now being considered by other competition authorities: see, in particular recent comments by Margrethe Vestager, the EU commissioner for competition:
<https://globalcompetitionreview.com/article/1169799/an-interview-with-margrethe-vestager>

⁵⁷ <https://www.gov.uk/Government/publications/competition-and-markets-authority-annual-concurrency-report-2018>

105. In particular, we consider that those arrangements have harnessed the complementary experience of the CMA in competition law enforcement cases⁵⁸ and the regulators' detailed knowledge of their sector, the primary benefit of a concurrency-based framework. However, the enhanced arrangements have equally helped to improve the effectiveness of competition enforcement in the regulated sectors, increased the likelihood of competition investigation prioritisation and driven both greater consistency throughout the regime and the overall promotion of competition in the regulated sectors.
106. Almost all the sector regulators have now opened a competition enforcement case since the start of the new concurrency regime.⁵⁹ There have been 14 new cases launched in the regulated sectors since 2014. The CMA and the regulators have, equally, worked together on various markets cases (which also fall within the scope of concurrency). We are aware that some stakeholders have suggested that there should be more CA98 cases in the regulated sectors. However, CMA work to understand what barriers and opportunities exist for competition investigations and whether action was necessary to increase the volume and effectiveness of CA98 enforcement in regulated sectors found the regulators to be generally keen to use their CA98 enforcement powers where appropriate. Nor did they appear to be defaulting to their regulatory powers where competition enforcement powers could be used.
107. That work also identified factors that might explain why even the increased number of the UK cases in the regulated sectors is lower than in some other EU jurisdictions. Prime among those was the fact that the regulatory framework and the structures of the regulators' sectors are such that sectoral problems tackled by competition law in other jurisdictions (e.g. access to the incumbent natural monopoly or vertical integration) are often not present, or at least not to the same degree, in the UK.
108. As importantly, there has also been a 'step change' in the breadth and depth of the relationships between the CMA and the sector regulators and an increase in cooperation since 2014:
- (a) Under its enhanced role, the CMA now manages the case allocation process and supports regulators' CA98 casework, including reviewing drafts of key documents such as draft statements of objections and decisions, and sharing best practice, innovations and expertise. The sharing of know-how and expertise has become increasingly two-way.

⁵⁸ Investigations into alleged anti-competitive agreement or abuses of a dominant position under the Competition Act 1998.

⁵⁹ Only the Northern Ireland Authority for Utility Regulation (NIAUR) and NHS Improvement (NHSI) have not yet run competition cases. However, NHSI was involved in the CMA's investigation into anti-competitive information exchange and pricing agreements within the private ophthalmology sector and provided two secondees to assist with technical aspects of the case.

- (b) Through its Sector Regulation Unit, the CMA provides a relationship management structure which has helped further develop strong working relations with all concurrent regulators. This has been underpinned by a marked increase since 2014 in inter-regulator secondments, which serve further to pool and transfer skills, expertise and human resources.⁶⁰
- (c) The UKCN, which the CMA chairs, also provides a valuable forum for the sharing of expertise and ensuring a consistent and high-quality approach to competition enforcement.
- (d) This cooperation has also resulted in effective collective working on discrete outputs, such as the publication in 2017 of an information note to assist businesses in the regulated sectors who may be considering applying for leniency.
- (e) In addition to cooperation on CA98 and markets cases, close cooperation has also occurred in relation to policy work and mergers work.

109. We expect the enhanced regime to further drive effective competition enforcement and positive cooperation between the CMA and regulators, and to help them individually and collectively to manage the challenges that will be created by the anticipated post-EU Exit increase in caseload.

⁶⁰ In 2017, the UKCN adopted a set of secondment principles, reflecting the importance of ensuring that regulators and the CMA have access to a broad range of skills and expertise as appropriate to assist in their competition work: <https://www.gov.uk/Government/publications/ukcn-secondment-principles>

Part 4: The Draft Strategic Steer

110. The CMA welcomes the latest draft Strategic Steer. The Steer represents a helpful and transparent dialogue between the elected Government and its independent competition and consumer authority. We will have regard to the Steer although all of our decisions are ultimately based on an assessment of how we can best work to the benefit of consumers, in line with our primary statutory duty.

Question 21 – Do you agree with the approach set out in the draft Strategic Steer to the CMA? Are there any other areas you think should be included?

111. We see a close and welcome fit between the draft Steer and our own plans; our strategic priorities in our 2018/19 Annual Plan include to:

- (a) maintain a focus on enforcement;
- (b) take a particular interest in the needs of, and harm suffered by, vulnerable consumers;
- (c) prioritise work in online and digital markets, paying particular attention to businesses that misuse technology to harm consumers, and
- (d) support economic growth and productivity.

112. As detailed earlier in this submission, in support of our strategic priorities, we have already begun a programme of work to develop our understanding of the challenges facing vulnerable consumers and the potential solutions thereto.

113. In line with the focus of the Green Paper itself, we suggest that the final Steer also includes an explicit reference to our *consumer protection enforcement responsibilities and powers*. Our powers to protect consumers from unfair trading practices and contract terms complement our powers to protect consumers from anti-competitive practices: both allow us to make positive changes across markets where consumers are losing out.

114. We also welcome the commitment from Government to implement the CMA's published recommendations (unless there are strong policy reasons not to) and to respond within a specific period.⁶¹

⁶¹ 'There will be a presumption that the Government will accept all the CMA's published recommendations unless there are strong policy reasons not to do so. The Government commits to responding to the CMA's recommendations within 90 days, clearly indicating the steps that it will take in response to recommendations or the reasons that it is unable to take forward recommendations.'

Annex 1 – CMA work on Digital Markets

1. Given the importance of digital markets to our economy, it is unsurprising that they are also central to the work of the CMA. The CMA has identified online markets and the digital economy as a priority area in its 2018/19 Annual Plan and it has been active in using its powers in these areas. We have listed below select examples of our pieces of work:
2. *Digital Comparison Tools market study*: In September 2017, the CMA completed a market study into Digital Comparison Tools (DCTs). DCTs, which include price comparison websites, are online platforms which enable consumers to compare products and prices and, in some cases, switch between products offered by competing suppliers. DCTs provide an excellent means to allow consumers to ‘shop around’, and thus increase competitive pressures on suppliers to the benefit of consumers (in price and quality). However, they need to operate fairly and not anti-competitively. To this end, the CMA developed a clear set of principles governing the conduct of platforms offering comparison services to ensure that they operate fairly: the ‘CARE’ Principles.⁶²
3. *Price parity clauses – competition enforcement*: The CMA has been investigating price parity clauses which require the provider of a product (e.g. a hotel or insurance product) to price that product via the retail outlet (e.g. an online booking platform or price comparison website) at a price that is as low or lower than competitors. Those clauses, while appearing to benefit consumers (e.g. by being labelled as “best price guarantees”), can soften competition between retail outlets and channels. This may reduce incentives for retail outlets to, for example, compete on commissions, to innovate or to enter the market, as any ‘discount offering’ would be automatically matched by others, making it less likely to result in increased sales.⁶³
4. In September 2017, as result of its market study into DCTs, the CMA launched an investigation into suspected anti-competitive agreements entered between a price comparison website and suppliers of *home insurance* which may have resulted in higher home insurance prices through the use of parity clauses.⁶⁴
5. In June 2017, the CMA accepted binding commitments from an *online auction services platform* to change practices which the CMA believed hindered competition from rival bidding platforms, including through the use of parity clauses.⁶⁵
6. In 2013, following investigations by the CMA’s predecessor, the Office of Fair Trading (OFT), and by the German Bundeskartellamt, Amazon agreed

⁶² <https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>

⁶³ <https://www.gov.uk/Government/news/cma-sets-out-changes-for-private-motor-insurance>

⁶⁴ <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>

⁶⁵ <https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices>

voluntarily to remove certain price parity clauses in its standard agreements with sellers on the *Amazon Marketplace*.⁶⁶

7. *Algorithm-facilitated price fixing – competition enforcement*: In August 2016, the CMA issued a formal decision that two online sellers of posters and frames on the Amazon Marketplace website had used automated repricing software to implement and police an agreement not to undercut each other's prices, contrary to the Competition Act 1998.⁶⁷
8. *Online reviews – consumer enforcement*: In August 2016, the CMA obtained undertakings from an online clothing retailer to be more transparent regarding its online reviews. Online reviews allow for informed choice, increasing competitive pressures on suppliers, to the benefit of consumers – but they need to be genuine and reliable. The suppression of negative reviews or publication of 'fake' reviews misleads consumers and may breach consumer protection law.⁶⁸
9. *Secondary Ticketing – consumer enforcement*: In April 2018, following a consumer law investigation, three online secondary ticket websites formally committed to ensuring that better information is given to consumers about tickets being resold on their platforms. The CMA has also notified a fourth website, viagogo, that it will take action through the courts unless they too commit to satisfactorily address the CMA's concerns.⁶⁹
10. *Online hotel booking and Online dating – consumer enforcement*: In October 2017, the CMA also opened consumer law investigations into online hotel booking platforms, and online dating. The online hotel booking investigation is requiring business to make changes, including to rankings which may be distorted by undisclosed commission, misleading price discounts and unlawful pressure selling.⁷⁰ The online dating investigation has secured changes to contracts and practices from a particular business.⁷¹

Remedies and solutions

11. Data and digital tools also have the potential to boost competition, and address market features that may have adverse effects on competition. To that end, the CMA has recently recommended or introduced numerous 'digital' remedies with a view to capturing the opportunities that technology can bring to markets, including in relation to DCTs, energy and banking (the latter is discussed in more detail in Annex 2).

⁶⁶ <https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices>

⁶⁷ <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>

⁶⁸ <https://www.gov.uk/Government/collections/online-reviews-and-endorsements-information-for-businesses>

⁶⁹ <https://www.gov.uk/cma-cases/secondary-ticketing-websites>

⁷⁰ <https://www.gov.uk/Government/news/cma-launches-enforcement-action-against-hotel-booking-sites>

⁷¹ <https://www.gov.uk/cma-cases/online-dating-services>

12. We have an open mind as to be ‘best’ type of remedies, which may not always be enforcement outcomes, depending on the circumstances and the evidence. As mentioned earlier in the document (paragraph 17, page 6), we have been working on consumer-facing remedies and have recently authored a paper and chaired an OECD roundtable on the subject.⁷²
13. In our DCTs market study,⁷³ we found many people do not use DCTs because they lack internet access but that DCTs can offer real benefits for consumers, including vulnerable people.
- These benefits include assisting people to make savings, or where they have mobility issues, or find it difficult to engage directly with many suppliers.
 - However, we found some DCTs appear not to be doing all they could or should to make their sites user-friendly, or to comply with discrimination and/or equality legislation.
 - We have sought to address this as part of our four high-level ‘CARE principles’ for how all DCTs should behave (they should treat people fairly, by being Clear, Accurate, Responsible and Easy to use (CARE)),⁷⁴ which includes that they should be easy to use and comply with all obligations under relevant equality law.
 - We also recommended DCTs and relevant consumer and charitable organisations work more closely on how to address vulnerable consumers’ needs, including by providing links to sources of additional help and support.
14. Our energy market investigation⁷⁵ remedies enhance rival suppliers and Third Party Intermediaries (TPIs)’ ability to engage disengaged consumers.
- We found many of these disengaged consumers are vulnerable, with certain demographic groups having a higher propensity to be on expensive Standard Variable Tariffs.⁷⁶
 - Following our remedy for an Ofgem-controlled database of disengaged customers to allow rival suppliers to prompt them to engage, Ofgem has

⁷² <http://www.oecd.org/daf/competition/consumer-facing-remedies.htm>

⁷³ <https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>

⁷⁴ <https://www.gov.uk/government/publications/digital-comparison-tools-summary-of-final-report/digital-comparison-tools-summary-of-final-report#how-to-improve-dcts-steps-for-companies-government-and-regulators>

⁷⁵ <https://www.gov.uk/cma-cases/energy-market-investigation>

⁷⁶ We found: 75% those on household incomes of less than £18k were on SVTs compared to 64% of those household incomes of more than £36k; 83% of those in social rented housing were on SVTs compared to 62% of home owners; 73% of those without qualifications were on SVTs compared to 65% who had received higher education; and 75% of those with disabilities were on SVTs compared to 66% without disabilities.

conducted successful trials of this database. The first trial,⁷⁷ which involved rival suppliers/Ofgem sending letters explaining how much customers could save by switching, resulted in a two-fold increase in switching and the second trial⁷⁸, where customers were prompted to use a digital app to check how much they could save and then switch, resulted in a four-fold increase in switching.

- In these examples, the medium of communication is traditional, but data sharing allows it to be targeted and relevant. Ofgem will now be rolling out a database and service that will help customers switch from autumn 2018.
15. In addition to the database, we also proposed bolstering the Midata programme to allow TPIs to make more effective use of customer data. We recommended to DECC several changes to the Midata programme that (subject to customer consent) would give PCWs and TPIs increased access to more customer data and, in so doing, enable them to monitor the market on behalf of their customers and advise them of savings.

⁷⁷ Details of the first Ofgem trial:

https://www.ofgem.gov.uk/system/files/docs/2017/11/small_scale_database_trial_slidepack_pdf.pdf

⁷⁸ Details of the second Ofgem trial can be found here:

https://www.ofgem.gov.uk/system/files/docs/2018/02/cyed_trial_early_findings_and_insight_redacted.pdf

Annex 2 – Open Banking

1. In August 2016 the CMA published its final report from its retail banking market investigation.⁷⁹ We put in place an extensive package of measures to address the competition problems we identified. A key pillar of our reforms is Open Banking which embraces the power of data and technological developments and has the potential to radically change the way that people and businesses manage their money and revolutionise how banks and other third parties compete to better serve customer needs.
2. One of the main problems we found in our investigation was that it was difficult for customers to understand how much their banking was costing them and customers were unable to easily compare products being offered by providers and work out what product and provider would be best for them. This is because bank charges are to a large degree personalised, based on how an account is used, complicated and opaque.
3. Open Banking, together with the introduction of the Second Payment Services Directive (PSD2) and the General Data Protection Regulations (GDPR) mean that customers are not only in control of their banking data, but they have the right and ability to share their transaction data in a controlled and secure manner with regulated third parties. A customer's data is now firmly in the customer's hands and is no longer seen as being owned by the bank.
4. Open Banking allows customers to share their data with regulated third parties using open, standard application programme interfaces (APIs). This provides a secure and safe way for customers to benefit from the emergence of new innovative products. These include tools that provide tailored comparisons of products and providers. Further, the availability of customer transaction data is stimulating supply-side developments, such as money management tools whereby customers can aggregate their different current accounts into a single place.
5. An example of further innovation enabled by Open Banking is the potential to unbundle overdrafts from current accounts. In this example a customer's current account can be 'topped up' by a third-party lender when the account is entering a negative balance and then the loan repaid (plus interest) when the account returns to balance.⁸⁰

⁷⁹ <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>

⁸⁰ Other innovations include the provision of credit scoring for customers with this credit files, by accessing transaction data and the provision of advice on other services such as utilities, based on expenditure.

Annex 3 – Challenges from digital markets

1. Notwithstanding the effective action that the CMA has been able to take, there remain certain questions or challenges as to the application of existing competition and consumer protection laws in the online economy, which arise from particular features of those markets.
2. Those challenges may be either substantive – that is, how existing laws should deal with those features, and their capacity to do so – or more practical, relating to the CMA’s ability to enforce those laws and address harm to competition and consumers in a timely and effective manner.
3. We consider such features below, namely:
 - a. the ‘borderless’ nature of digital markets;
 - b. the strong network effects²⁸ and tendency towards concentration of certain online platform markets;
 - c. the growing use of algorithms in pricing and decision making; and
 - d. the fluidity and potential pace of change and disruption in online markets.

a) Investigative and enforcement challenges in cross-border, digital markets.
4. A key challenge in tackling unlawful practices relate not to deficiencies in applicable legal principles, but rather to the practicalities of enforcement against multinational firms based overseas. This can present obstacles in relation to, for example: a) establishing the jurisdiction and law to be applied; b) obtaining the evidence necessary, in particular where this may be on servers located outside the UK, c) building sufficient technical understanding of how the business operates, and d) devising effective and proportionate remedies.
5. The inherently ‘cross-border’ nature of the internet and many online markets, and the increasing intersection of, for example, competition, consumer protection and data protection laws means that it may not be optimal (or even possible) to consider issues at a purely national level, or through a single ‘policy lens’. The CMA already works closely with counterpart agencies, in the UK and overseas, to promote the coherent development of law and policy (in particular through forums such as the OECD, UNCTAD, and European competition and consume networks). If further regulation is proposed, it will be important to fully consider the (potentially unintended) impact of such rules on cross-border trade, or on different policy objectives.

6. In respect of cross border consumer enforcement co-operation,⁸¹ the CMA considers it is important that four key elements are provided for:
 - a) A clear legal basis and mechanism for efficient bilateral and multilateral evidence sharing and alerts
 - b) The legal power to obtain evidence to assist overseas enforcers
 - c) The legal power to enforce to stop infringements and obtain remedies for consumers in a cross-border transaction
 - d) The legal ability and mechanism for UK and EU enforcers to work jointly to tackle regional wide issues and multinational companies.
7. As cross-border trade affecting consumers develops, particularly trade by digital means, both with EU Member States and countries outside the EU, it is important that UK enforcement authorities should have the means to protect UK consumers affected by such trade. This will include ensuring that effective reciprocal mechanisms allowing for cross-border co-operation on enforcement.
 - b) Network effects and market concentration*
8. As two-sided markets, online platforms may exhibit strong network effects and may, over time, tend towards increasing market concentration, and the predominance of one, or a small number of businesses. This is particularly so when users prefer to use only one platform. The increasingly interconnected, digital world, and in particular the role of data in this regard, may serve also to drive concentration in related markets, or at several levels of the distribution chain.
9. Network effects can mean that one platform or only a few platforms operating in a specific sector will benefit consumers. However, those same network effects, when combined with other practices (e.g. the ability of online platforms to maintain large data holdings and barriers to consumers “multi-homing” where consumers shop around by using two or more platforms) may lead to certain platforms obtaining significant market power (or even a dominant position under competition law). These features may also raise barriers to entry, making it difficult for new players to enter a market.
10. The holding of market power (or indeed a ‘dominant position’ under competition law) in a market is not necessarily a competition concern, where it is obtained or maintained by competitively legitimate means (for example greater efficiency or a superior product). However, such power could in certain situations be abused and used anti-competitively, for example to discriminate against competitors

⁸¹ More information can be found in the CMA’s response to the House of Lords <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-consumer-protection-rights/written/70044.pdf>

and/or raise prices above the competitive level, to favour the platform's own services or to gain leverage into separate, related markets.

11. As referred to above, competition enforcement can in principle address certain such practices (as in the European Commission's Google Shopping case)⁸². However, there remain a broader question whether the existing regulatory tools are sufficient to assess and address these concerns. Online markets have often seen cycles of disruption, with companies with strong competitive advantages being toppled by new, innovative entrants. Questions are being increasingly asked as to whether this remains the case, however – or at least, whether certain businesses have acquired a commercial power which makes them immune to the competitive pressures which competition laws are designed to foster.

c) The growing use of algorithms in pricing and decision making

12. The increasing prevalence and evolution of algorithmic pricing, including through machine learning and neural networks, raises questions whether the concepts of, for example, an anti-competitive 'agreement' in competition law remains sufficient to address all forms of harm. Under competition law, the prohibition on anti-competitive agreements (including cartels) is breached only if separate businesses reach some form of anti-competitive mutual understanding or co-operation: case law calls this a 'meeting of minds'. Purely unilateral conduct is not sufficient. However, as algorithms become more sophisticated, it is possible that deep-learning 'black box' algorithms may put in place strategies which have the same effect as a price fixing agreement, achieved spontaneously and without any form of contact or common understanding between separate businesses. There are questions as to whether such collusion is 'caught' by the UK or EU prohibitions and also as to the attribution of liability between the various parties engaged in its operation. The CMA, like other competition authorities around the world, is again keeping the issue under review given technological developments.
13. On the consumer 'side' of the platform, the use of 'black box' algorithms raises concerns about the transparency of the business practices of online platforms. This includes whether the existence and operation of prices determined through pricing algorithms is sufficiently explained to consumers under existing law when the prices are displayed. Certain transparency obligations arise under the laws relating to unfair commercial practices and unfair terms.⁸³ Disclosure requirements may also arise under related laws, such as the General Data Protection Regulations

⁸² http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

⁸³ For example, under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), for example, a failure of transparency must cause an actual or potential effect on the economic decision-making of the hypothetical 'average' consumer in order to constitute a breach.

14. The CMA strongly supports greater transparency where this may promote competition and innovation and improves consumer decision-making. Furthermore, it should be noted that:

- while critical, transparency alone is not always sufficient to effectively protect consumers. For example, transparency will not be sufficient where the practice is unlawful in itself, or the explanation would be too complicated for consumers to understand – comprehensibility is in many ways as important as transparency;⁸⁴
- conversely, while consumers may benefit from requirements that businesses provide a certain level of transparency as to the workings of their algorithms, requiring disclosure of the algorithm itself could reduce business incentives to invest in developing their proprietary algorithms and thus risk stifling innovation (and again could potentially confuse consumers);
- in any case, it is potentially crucial that regulators and enforcers are able to access, interrogate and understand algorithms in order to ensure that they do not, either by design or accident, breach competition, consumer or other legislation.

d) Fluidity and rapid change in online markets

15. The online economy has grown rapidly, and – notwithstanding concerns about the market power of certain companies, as described above – continues more broadly to evolve in new ways. This creates two particular challenges for the CMA's competition and consumer protection role:

- a. The CMA may be required to predict future market developments on the basis of incomplete existing knowledge. For example, as part of its assessment of a merger between two competing businesses, the CMA may need to predict possible changes to the competitive landscape which may arise from the merger and compare this to the likely situation without the merger. Such predictive assessment may be particularly challenging and uncertain in fast-moving, evolving markets, increasing the risk of interventions (or non-interventions) which in retrospect, may be shown to have resulted in or allowed a reduction of competition or in innovation (e.g., the ongoing concerns expressed by some analysts with the regulatory approval of Facebook's acquisition of Instagram in 2012). There may also be particular challenges in assessing mergers involving nascent platform

⁸⁴ Several recent decisions made in relation to unfair contract terms by the Court of Justice of the European Union make an explicit connection between transparency and comprehension, for example <http://curia.europa.eu/juris/document/document.jsf?docid=151524&doclang=EN> '...not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism... ..so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.'

which are yet to monetize their offer which will necessarily see low turnover as well as making it more difficult to predict the result.

- b. Fully investigating potential infringements of competition and consumer protection law to the rigorous evidential standards required by the courts takes time. In fast-moving and dynamic markets, there is a risk that, by the time an authority has completed its investigation, competitors may have already been forced out of the market, an incumbent's market power may have become further entrenched, or the market may have evolved such that remedies prohibiting the unlawful conduct are ineffective in addressing the competitive concerns in the market. Equally, there are risks that hasty interventions may inadvertently serve to chill innovation or further entrench incumbency.

1.

Annex 4 – CMA views on personalised pricing

1. The CMA, and its predecessor the OFT, have each investigated the prevalence and potential impact of personalised pricing and personalised search results.
2. Such personalisation refers to the practice where businesses use information that is observed, volunteered, inferred, or collected about individuals' behaviour or characteristics, to set different prices to different individuals or groups of consumers (personalised pricing), often based on what the business thinks consumers are willing to pay or to present different sets of products (or the same set of products but in a different order) to different individuals or groups of consumers (personalised search results)

Evidence on the extent of personalised pricing and search results

3. The [OFT in 2013] conducted some research following up complaints about alleged personalised pricing on certain websites. The OFT looked at the websites that were brought to its attention in a set of limited and specific tests, but did not find any evidence that would warrant further investigation. However, the OFT did find some evidence that online search results being determined by consumers' behaviour or characteristics (search discrimination).
4. Given the limited scope of the trial, we were only able to carry out simple static tests. We did not carry out more dynamic tests, for example for personalised pricing based on previous purchasing history or information about extended periods of browsing history (beyond simply the consumer's immediate route to website).
5. Furthermore, businesses that spoke to the Office of Fair Trading (OFT), as part of its 2012 Call for Information on personalised pricing,⁸⁵ expressed a concern about the potential adverse consumer reaction to actual or perceived invasions of consumers' privacy. To avoid negative consumer reactions, businesses may therefore be less likely to collect and using data about consumers in order to charge higher prices to those consumers (than they would otherwise have offered without such information), and instead would use information collected about consumers to offer those consumers discounts and other offers. In practice, however, this may simply mean that businesses wanting to price discriminate may set a higher default price, thus achieving the desired result of price discrimination,⁸⁶ while framing their actions in a way which avoids provoking negative consumer reactions.

⁸⁵ <http://webarchive.nationalarchives.gov.uk/20140402162153/http://oft.gov.uk/OFTwork/markets-work/othermarketwork/personalised-pricing/>

⁸⁶ Depending on the information available and the distribution of consumers' willingness-to-pay, the end result may even be the same as if businesses were to directly use information about consumers to set higher prices for those consumers.

6. Given the limitations of our existing research, and the ambiguous nature of certain differentiated pricing practices, we consider that further research could usefully be undertaken, focusing in particular on exploring whether more dynamic forms of personalised pricing can be observed in online markets in the UK.⁸⁷

Circumstances in which personalised pricing and personalised search results may give rise to concerns

7. Personalised pricing (and price discrimination generally) often means that there will be some consumers who gain relative to uniform pricing, and others who 'lose' or are 'harmed' relative to uniform pricing.
8. Personalised pricing is not necessarily harmful to consumers overall. It can benefit consumers overall if, for instance, a significant number of additional customers were able to buy a product at a cheaper price due to the relatively higher prices paid by a few others. Similarly, personalised search results can benefit consumers if retailers can customise offers and provide a more efficient and relevant shopping experience. This is more likely when there is effective competition in the market.
9. In contrast, personalised pricing by a monopolist is very likely to be harmful to consumer welfare overall, particularly where the form of discrimination is relatively sophisticated.
10. Similarly, in markets where competition is weak due to a general lack of switching, we may be concerned if firms are able to identify and offer lower prices only to a smaller group of more price sensitive customers (i.e. those who are more willing and able to switch), without needing to offer lower prices to a larger group of inactive customers, the overall effect of personalised pricing may be that consumers as a group end up paying more.
11. While personalised pricing with effective competition is often not harmful, it is more likely to be harmful where
 - (a) the form of discrimination is particularly complex or opaque to consumers,
 - (b) it is very costly for firms to implement and firms are likely to pass on these higher costs to consumers in the form of higher prices, or
 - (c) consumers lose trust in the market because of concerns about discrimination, and so reduce their participation in markets.

⁸⁷ The CMA is participating in the OECD Committee on Consumer Policy Advisory Group during 2018-2019. This has included contributing to the development of a lab experiment on personalised pricing to develop understanding in this area. It should be noted that the CMA recognises the challenges on designing remedies that have the intended effect on the market

12. These considerations apply equally to search discrimination, which exploits the fact that – as the CMA found in its review of online search behaviour⁸⁸ – consumers often compare fewer options than might be expected given the relatively low search costs (typically between two and three options for a given search), and consumers focus mostly on results at the top of the search results pages, and even more so when using mobile devices.
13. The OFT in 2012 found that consumers are themselves more likely to be concerned when: the fact that price discrimination is occurring is not transparent to consumers; price discrimination is not expected by consumers with respect to the context or the products that they are purchasing; and pricing is ever more personalised, approaching being specific to each individual.⁸⁹
14. We may be concerned if it is practically difficult for consumers to avoid personalisation based on their data, for example, where it is based on data that the consumer is obliged to provide, or on the equipment that the consumer is using to access the website. Furthermore, even if the overall benefit to consumers of price discrimination were positive, we may still be concerned if the group who were disadvantaged by price discrimination were considered vulnerable.
15. Given the potential benefits of personalisation where there is effective competition, it may be more effective to address the underlying causes of harm, such as lack of effective competition or barriers to switching, rather than to regulate the pricing setting behaviour of businesses. However, we remain concerned about a lack of transparency of business practices to consumers.

Relevant existing legislation and regulation

16. There is existing legislation and regulations which places some limits on potentially harmful personalised pricing.
17. Personalised pricing may breach the Consumer Protection from Unfair Trading Regulations (CPRs) if the data was obtained unlawfully e.g. without valid, freely given, specific, informed and active consent as required by the General Data Protection Regulations (GDPR).
18. A business may breach the CPRs by, for example, failing to tell consumers that information is being collected about them, and used commercially, where a privacy policy does not accurately represent the information actually being collected, or where information about a consumer is being used covertly to personalise a price for that consumer. The failure to provide this information could be a misleading omission, or fall below an acceptable standard of market practice.

⁸⁸ CMA (2017): 'Online search: Consumer and firm behaviour – A review of the existing literature'

⁸⁹ OFT, [Personalised Pricing](#)

19. Similarly, statements about price, such as special offers and discounts, could be misleading if the use of personalised pricing makes them untrue. For example, if an internet retailer were to make a claim that a price is discounted, when in fact it is higher than that paid by other consumers, this could be a misleading action under the CPRs.
20. Some price discrimination is illegal. For instance, the Equality Act 2010 prohibits, with a few exceptions, discrimination on the basis of protected characteristics such as age, disability, pregnancy, gender or sex related issues, marital status, race or religion. Also, the Provision of Services Regulations 2009 restrict discrimination between customers in the EU on the basis of their place of residence. It prevents online retailers from offering different terms for providing the same service to consumers on that basis that they live in different locations (either within the same country or in different countries), unless this can be justified objectively (such as on the basis of additional costs or due to the technical characteristics of the services).