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Dear Alex and Charles

Digital Competition Expert Panel recommendations – CMA view

On Wednesday 13 March the Government published the final report and recommendations from the expert panel, chaired by Professor Jason Furman, considering competition in the digital economy. This letter sets out the CMA's views on these recommendations, based on our experience of applying competition law in digital markets.

We strongly welcome the panel's report and are very supportive of their overall approach. Digitisation has brought positive change to people across the UK such as improved innovation and increased choice, but also new forms of consumer detriment. The CMA is at the forefront of tackling these issues, and the recommendations put forward by the panel are an important contribution to our work. We have set out our views on the individual recommendations in more detail in the Annex to this letter.

We hope you will take our views into account as you consider the report and formulate your response. We would welcome the opportunity to discuss with you and stand ready to provide further assistance where helpful.

Yours faithfully

Andrea Coscelli
Chief Executive

The CMA's response to the Digital Competition Expert Panel final report

The digital markets unit and associated regulatory functions

We welcome the panel's recommendations in relation to the new digital markets unit and associated regulatory functions (the code of conduct, personal data mobility, systems with open standards and data openness). It is becoming clear that enforcement action is no longer enough to address the wider concerns in online markets, and that ex-ante regulation in some form is likely to be required. In our view, this should complement, rather than replace, existing approaches.

We believe it is essential that any such regulation is informed by evidence so that it is well designed and targets the specific problems identified, to mitigate the risk of unintended consequences. Were we to undertake a market study in relation to digital advertising, the evidence and conclusions would likely be highly relevant in developing any such proposals further.

In the past, the CMA has used the tools available through its markets regime to put in place remedies similar to those ex-ante functions recommended by the panel. For example, the Competition Commission, (the CMA's predecessor), established the Groceries Supply Code of Practice, which sets out how grocery retailers should treat their suppliers, following a market investigation into the supply of groceries. More recently, the CMA used the markets regime to implement the Open Banking system, following its market investigation into the effectiveness of competition in retail banking.

The CMA's markets regime could be used to gain the evidence needed to establish the scale of the issues identified, and on this basis to develop clear recommendations for the new regulatory functions.

However, as the panel rightly recognises, the CMA's markets regime was not designed to provide the powers or capability to perform an *ongoing* role where it acts as a dynamic counterparty to market participants, adjusting solutions in response to innovations and market dynamics. These new regulatory functions will likely need to be established in statute with accompanying new legal powers.

The regulatory functions of the digital markets unit vary significantly in nature and need to be considered separately in order for each to be implemented effectively. In addition, those responsible for taking these functions on must be equipped with the right institutional expertise. In certain areas, this expertise might already reside in the current regulatory system, but in others it is likely that new skills will need to be developed. Our experience in implementing Open Banking has, for example, provided some valuable insights into what is needed to implement personal data mobility in practice.

The CMA already has much experience acting within digital markets and we are building our expertise in this area with the expansion of our Data, Technology and Analytics (DaTA) unit. We recognise the CMA could have a potential role in taking on some or all of these functions and are keen to engage with Government as you consider the recommendations further.

The merger control regime

We welcome the panel's appetite to pursue measures that would support our ability to act to prevent mergers in digital markets which could harm existing or potential future competition or innovation.

We acknowledge that there are challenges in considering mergers in digital markets. Post-merger counterfactuals can be difficult to assess in new and rapidly-evolving markets. This means that the competitive constraint posed by firms may not be captured by a 'snapshot' of their market position at any one time, and the historical evidence base may not be as well developed (or may not provide as much insight into likely future trends) as in more well-established markets. Similarly, some traditional forms of substantive analysis, focused on price effects, may fail to capture other metrics of competition effectively, including quality and innovation (in particular where services are 'free', but are provided in exchange for a consumer's data or are monetised in a related market).

We also acknowledge that decisions by our predecessor organisations did not, in some cases (such as Facebook's acquisition of Instagram), fully consider important evidence that could have provided greater insight into how the markets at issue were likely to evolve in future.

However, we believe that addressing these challenges does not require fundamental changes to the existing legislative regime at this stage. The UK regime has shown itself, including in a number of past cases involving fast-moving and dynamic markets, to be "fit for purpose" in capturing and effectively assessing a range of factors of competition, including product development and innovation, and a range of theories of harm – including potential and dynamic competition concerns.

We are increasingly active in scrutinising mergers in digital markets. We have undertaken a number of merger investigations in the digital sector, such as the Experian/Clearscore transaction which was recently abandoned following the CMA's provisional finding that the merger gave rise to significant competition concerns involving product development and innovation. We are currently undertaking a detailed phase 2 inquiry into PayPal's acquisition of iZettle in the financial payments sector.

In addition, we are already pursuing our own work to learn from our past experiences in considering digital mergers and to strengthen our ability to consider such mergers in the future. Last year we commissioned an external research and evaluation project

to look at approaches to assessing potential competition theories of harm and evaluating past merger decisions in the technology sector.

The aim of the project is to draw lessons from relevant economic theory and literature on technology markets, and from reviews of past technology merger decisions, in order to inform the CMA's forward-looking assessment of competition in future cases. The results of this project will be available in the next few weeks.

We believe that the CMA's more active approach, supported by some of the other measures proposed by the panel, will already go a long way to addressing the concerns the panel has identified.

We welcome the panel's recommendation that certain digital companies be required to make the CMA aware of all acquisitions. We already conduct extensive monitoring of non-notified mergers and this proposal should assist our efforts in this area.

In addition, we believe there is likely to be benefit in a review of the Merger Assessment Guidelines, so that these more clearly reflect our current thinking and practice in relation to digital markets (as well as any other broader updates which may be required). We agree that such a review, which would include extensive consultation with stakeholders, would also be a useful exercise in prompting a debate externally on merger assessment.

On the other hand, as noted above, we believe the existing UK legislative framework provides the scope to fully assess concerns raised by mergers in digital markets, and to take enforcement action where appropriate. We have therefore not identified any fundamental changes to the existing legislative regime that we believe would support us in our work in this sector at this stage. It is, of course, possible that, in light of the decisions we take and their possible review by the courts, we might need to revisit the legislative framework in future.

While we support the need for effective merger enforcement in digital markets, which underpins the panel's recommendation to introduce a new 'balance of harms' test, we believe there are practical challenges in applying this kind of test in a transparent and robust way and are worried about unintended consequences.

In addition, in our view, the test would also bring about a fundamental shift in merger policy. While the panel's report recognises that the new test would broaden the set of mergers which may be found problematic, our initial review suggests that the likely extent of this change should (notwithstanding the 'substantiality' threshold suggested by the panel) not be underestimated.

We would welcome the opportunity to discuss our concerns with you regarding this recommendation.

The CMA's enforcement tools

We broadly welcome the panel's recommendations in relation to the CMA's enforcement tools, many of which align with proposals in our recent letter regarding proposed reform of the competition and consumer protection regimes.¹

We are pleased that the panel has recognised the importance of interim orders. We consider these to be a key tool in enabling the CMA to intervene quickly to prevent significant harm to consumers and competitive markets. In our recent letter regarding proposed reform, we highlighted our appetite to streamline the processes we are required to follow in order to be able to ensure we can make full use of these powers and we are supportive of the panel making recommendations in this regard.

We also support the panel's recommendation regarding changing the standard of appeal for antitrust cases. As outlined in our recent letter regarding proposed reform, we believe this is important in ensuring the enforcement system functions effectively and delivers timely protection for consumers and competitive markets. This is particularly important in today's fast-moving markets, where there is a risk that, by the time appeal routes are exhausted, the harm will have become entrenched or the market will have 'tipped', rendering the competition authority's decision, even if upheld, ineffective and perpetuating harm.

Alongside the standard of appeal, we also believe the current appeal procedures (such as the emphasis on oral testimony and the admission of new evidence at the appeal stage) should be reviewed as they are particularly damaging to the CMA's ability to defend infringement decisions in fast-moving markets.

As regards the recommendation that, if appeal standards are changed, the government should introduce more independent CMA decision-making structures for antitrust enforcement cases, we think serious thought should be given to the pros and cons of this. Clearly it is important to have strong protections against confirmation bias, and our existing decision-making process for antitrust, with strong checks-and-balances including the "Case Decision Group" system, is designed to achieve this; it provides more independent checks-and-balances than equivalent systems in other jurisdictions, for example the EU system where there is no such separation of powers within the decision-making process at the European Commission, even though the appeal standards to the EU General Court are less stringent than those in the UK. We need to be careful that these internal checks-and-balances do not become so cumbersome that they impede the agile and swift tackling of anti-competitive practices, particularly in fast-moving digital markets (and even more so if, post-Brexit, the CMA

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf

will have to handle the larger antitrust cases that were previously reserved to the European Commission).

We are supportive of the panel's recommendation that the CMA undertake retrospective evaluation into antitrust cases it has not pursued. The CMA is committed to evaluating its work. As noted earlier in the letter, we already have evaluation work underway to better understand past merger decisions in digital markets. Last year we also commissioned work to evaluate the deterrent effect of CA98 cases and our follow-on compliance activities.² We intend to pursue this work in line with our overall approach to retrospective evaluation and will consider, in light of the UK's Exit from the EU, when we are likely to be able to undertake this work.

Lastly, we will continue to prioritise our consumer enforcement work in digital markets. This is an area where the CMA has been very active in recent years, having pursued cases in relation to hotel online booking, secondary ticketing websites, online endorsements, misleading online reviews, cloud storage and online dating. We identified a number of proposed improvements to the consumer protection regime in our recent letter regarding proposed reforms. We will continue to consider whether there are other areas of the consumer protection regime where we believe the law could be strengthened to help us protect consumers in digital markets.

Monitoring use of algorithms and strengthened information gathering powers

The CMA welcomes the panel's recommendation that it monitors how use of machine learning algorithms and artificial intelligence evolves to ensure it does not lead to anti-competitive activity or consumer detriment, in particular to vulnerable consumers.

This is an area the CMA is already investing heavily in. Last year we formed a new Data, Technology and Analytics (DaTA) unit. Part of the unit's work is to understand how firms are using data, what their machine learning and artificial intelligence algorithms are doing, the consequences of these algorithms and, ultimately, what actions authorities need to take.

We believe the CMA needs strengthened information gathering powers to enable it to deliver on this recommendation. The panel recommend that those bodies responsible for enforcing competition and consumer law have sufficient and proportionate information gathering powers to enable them to carry out their functions in the digital economy. We set out a number of areas where we believe our investigatory and information gathering powers could be improved in our recent letter regarding proposed reform to the competition and consumer protection regimes. As set out in

² <https://www.gov.uk/government/publications/evaluation-of-direct-impact-and-deterrent-effect-of-ca98-cases>

that letter, many of these proposals are particularly relevant in fast-moving digital markets.

In relation to the recommendation on algorithms specifically, a general information-gathering power, outside the context of a “formal” investigation, would better enable the CMA to monitor developments in the digital economy, including the growth in the use and sophistication of algorithms.

A market study into digital advertising

We are aware of the concerns which have been raised regarding the effectiveness of competition in the digital advertising market, not only by the Digital Competition Expert Panel but also in the Cairncross Review. The CMA is actively considering further work in this area, contingent on the outcome of EU Exit negotiations. A decision to undertake any such work is made by the CMA’s Board, taking into account a range of factors including the relative priority of the work and the likely resource implications.

The need for international co-operation

The inherently global nature of digital markets means that it is increasingly important to consider issues at an international level and to have effective frameworks for co-operation in place to facilitate this. The CMA is well placed to play a leading role in this debate and already actively contributes to discussions on these issues through the European Competition Network (ECN), the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN). We are keen to work alongside Government to support greater collaboration and co-operation between international authorities in relation to the digital economy.