

SELECT COMMITTEE ON THE EUROPEAN UNION: INTERNAL MARKET SUB-COMMITTEE

CMA response to the call for evidence: Online Platforms and the EU Digital Single Market

Introduction

1. This response¹ has been prepared by the UK's Competition and Markets Authority (CMA) to assist the Committee's inquiry into the regulation of 'online platforms' in the EU. It explains the remit of the CMA, summarises the CMA's views regarding online platform regulation and addresses the questions in the Call for Evidence where the CMA has particular experience. Annex A provides further details of recent CMA work looking into how certain aspects of online platforms operate. Annex B summarises how dominance is assessed under EU and UK competition law.

CMA remit

2. The CMA acquired its powers on 1 April 2014,² bringing together the Competition Commission and the Office of Fair Trading (OFT) to become the UK's lead competition and consumer authority. Its responsibilities include:
 - investigating mergers which could restrict competition;
 - conducting market studies and investigations in markets where there may be competition and consumer problems;³
 - investigating potential breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions; and

¹ CMA representatives are appearing before the Committee to provide oral evidence on 12 October and 2 November 2015.

² Following its creation under the Enterprise and Regulatory Reform Act 2013. The establishment of the CMA was part of a major reform of the competition and consumer regime reflecting the Government's commitment to the proper functioning of markets and the wider economic growth agenda. For the purposes of this submission, reference to the CMA should be read as including its predecessor bodies where relevant.

³ Ongoing investigations are being carried out in the [banking](#) and [energy](#) sectors.

- enforcing consumer protection legislation in particular to tackle practices and market conditions that make it difficult for consumers to exercise choice.⁴
3. The CMA's aim is to make markets work well for consumers, businesses and the economy. It works to promote competition for the benefit of consumers, both within and outside the UK.⁵ The CMA strives for competitive, efficient and innovative markets where consumers are empowered and confident about making choices, and where businesses comply with competition and consumer laws without being overburdened by regulation.

Summary

4. Ensuring effective competition in online markets is a strategic priority for the CMA.⁶ This reflects the importance of ecommerce to the UK economy.⁷ The CMA has recently considered specific aspects to the operation of certain types of online platforms. Further detail of this work is provided in Annex A.
5. Online commerce has created numerous commercial opportunities and significant consumer benefits in terms of increased choice, lower costs and greater innovation. Digital markets offer many possibilities for new, innovative ways to meet consumer demand. Vast numbers of consumers are embracing the digital economy: the sheer mass of users responding to novel, creative online offerings reflects strong consumer preferences. Technology enables businesses to achieve scale very quickly where they are successful in matching consumer demand.
6. The speed at which technology is changing - and the rapid emergence of novel online business models - present challenges to the application of many existing and traditional regulatory frameworks. Issues relating to online platforms encompass many regulatory regimes, including intellectual property rights, taxation, employment, cybersecurity, consumer protection, competition and data protection.⁸ The CMA welcomes initiatives to ensure existing regulation is fit for the digital age. The Commission's Digital Single Market (DSM) agenda represents a significant opportunity to modernise aspects of the European regulatory regime to ensure online markets are operating well

⁴ Further information about the CMA is available on the [CMA's website](#).

⁵ In accordance with its primary duty under the Enterprise and Regulatory Reform Act 2013.

⁶ As set out in the [CMA's Strategic Assessment](#) (November 2014) and its Annual Plan 2015/2016, published in March 2015 available on www.gov.uk/cma.

⁷ Identified as the most internet dependent economy (Boston Consulting Group *The Internet Economy in the G-20*, March 2012. The report notes this equated to 8.3% of the UK's GDP based on 2010 data).

⁸ The importance of ensuring legal certainty regarding data is illustrated by this month's ruling of the European Court of Justice regarding the transatlantic Safe Harbour agreement in [Maximilian Schrems v Data Protection Commissioner](#) (Case C-362/14).

and are not subject to unnecessarily burdensome regulation which may stifle innovation or impede new entrants' ability to compete.

7. Consumer confidence and trust in online platforms is critical to the effective functioning of digital markets in order to foster their continued growth and drive further innovation. Online platforms must provide clear information on how they operate⁹, and what their responsibilities are, where such information is important for consumers to be able to make proactive and empowered choices. Consumers must also have adequate recourse to redress if things go wrong. In relation to the use of consumer data, the CMA considers that, as a general principle, consumers would benefit from more transparency, choice and control over what data is collected - and how it is used - for this part of the market to work better.¹⁰
8. Given the dynamic nature of digital markets, regulatory responses regarding online platforms should be proportionate and well-targeted, duly reflecting the diverse range of issues, businesses and specificities of the markets in question to ensure markets are working well. The CMA considers that overall the existing competition law framework can be used effectively and flexibly to tackle competition concerns if harm arises in a particular case. Authorities must remain vigilant to ensure appropriate enforcement is taken where such harm does arise. They must balance the need to move sufficiently quickly to terminate problematic behaviour (to ensure new entry and innovation are not stifled) against the risk of intervening too soon in fast-moving markets which may have the counterproductive effect of 'locking-in' a particular market structure, thus chilling innovation. While the existing consumer regulatory framework is also essentially able to tackle concerns, some specific improvements are possible around platform liability, clarifying responsibilities between the platform and the seller, and considering whether enforcers' powers are sufficiently robust to investigate efficiently and create deterrence.
9. In addition to competition and consumer enforcement tools, mechanisms such as the CMA's market studies and market investigation regimes may be used to address market-wide competition and consumer concerns and enable the CMA to take specific remedial action where appropriate, based on the evidence gathered.

⁹ For instance, the law requires consumers to be given 'material' information (information they require to make an informed transactional decision). Failure to do so could be a misleading omission contrary to Regulation 6 of the Consumer Protection from Unfair Trading Regulations 2008.

¹⁰ While the CMA does not enforce data protection legislation, it has considered consumer law and competition issues in relation to the use of data. Further detail regarding the CMA's recent work regarding data is provided in Annex A.

CMA responses to the questions in the Call for Evidence

10. No response has been provided for questions 5, 10 and 16, on which the CMA is not best placed to comment.

Section I: Online platforms, consumers, suppliers

Defining online platforms

Question 1: Do you agree with the Commission's definition of online platforms? What are the key common features of online platforms and how they operate? What are the main types of online platform? Are there significant differences between them?

11. The Commission's definition of 'online platform' set out in its questionnaire on platforms¹¹ refers to 'an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.'
12. The CMA agrees this definition broadly captures the principal online platforms insofar as – in essence – online platforms simply facilitate and connect different groups of users, ie provide a market place. But of course, the economic activities conducted on such platforms are not necessarily novel, nor do they only appear in online markets. Traditional market places, or shopping centres also do so. Moreover, while on-line platforms are often multisided, this does not raise novel features of market analysis. For instance newspapers operate in multisided markets. Some markets that are being classified as platforms are not that different from standard supply chains where a retailer 'intermediates' between wholesalers and customers.
13. As there are many different types of platforms, there is no 'one size fits all' definition. While many share the common feature of acting as intermediaries between other actors in the market, they may have quite different functions including: providing a **market place** where sellers and buyers can meet (such as peer to peer sites); providing **information** about sellers or buyers (such as review sites); and/or **facilitating** a transaction (such as payment intermediaries). Platforms may combine several functions and may themselves be active as a seller on their own platform. The ability of platforms to adjust rapidly how they operate is a key feature of online markets. For

¹¹ Footnote 4 in the Call for Evidence refers to the definition of platforms cited in the *A Digital Single Market Strategy for Europe – Analysis and Evidence* document. Since the Call for Evidence was issued, the Commission's [questionnaire on platforms](#) has been published (on 24 September 2015) in which the Commission sets out a definition of 'online platform'. It is this definition referred to in the response to Question 1.

instance, the introduction of a 'buy now' button on a search or review site may potentially significantly alter how an online platform is used.

14. The Commission's definition appears wide enough to capture platforms which do not involve a money-based 'market' in the traditional sense. Competition between platforms is not necessarily linked to their activities in the money economy. Wikipedia, for example, could be thought of as a platform that brings together those who want to disseminate knowledge with those who want to acquire knowledge, and no money changes hands between these parties. Nevertheless, a platform like this could compete with others (as Wikipedia does with Citizendium) and that competition could bring important consumer benefits.
15. Given the wide variety of business models and differing types of online platforms – as illustrated by the Commission's list of typical examples¹² - how those platforms function will necessarily be market and sector specific and will need to be considered on a case by case basis having regard to the evidence. That targeted, evidence-based approach applies not only to whether particular aspects of the operation of a platform give rise to apparent issues that might warrant political or regulatory intervention, but also to the laws under which, or means by which, those issues are best addressed.

Question 2: How and to what extent do online platforms shape and control the online environment and the experience of those using them?

16. Platforms increasingly operate in competitive markets where they compete with other online platforms. Not all are successful. Platforms are constrained by the need to meet customer preferences and maintain their reputation in the same way as other businesses and service providers.
17. Platforms are frequently monetised according to the transactions that take place through them or the number of visitors to their sites. As 'owners' of the interfaces through which users connect, platforms exercise a large degree of control over the online environment and the experience of their users and how users interact using the platform. For example, in some cases, online platforms may control the quality or price of the services provided through them; the information that users are permitted to display (and how it is displayed); the ranking of search results¹³; how offers are ranked; whether a

¹² The typical examples provided by the Commission in its questionnaire (see footnote 11 above) include platforms in general search; location based business directories or some maps; audio-visual and music; video sharing platforms; payment systems; app stores and collaborative economy platforms. Internet access providers fall outside the scope of the definition.

¹³ See [Price comparison websites: Trust, choice and consumer empowerment in online markets](#) (OFT1467).

seller is able to display their business address¹⁴; how the offer is described; the channels through which buyers and sellers can contact each other (eg preventing consumers and traders meeting off the platform); or how payments are made (eg platforms might conceal their costs or attract users by a low headline price, dripping additional charges). Platforms also have the capacity not to show, or else to demote, negative reviews, or to mislead potential users.

18. Where platforms operate in a competitive market, they are likely to use their control of the online environment and user experience to provide services that are useful to their customers. If they do not, or they attempt to mislead their customers in some way, platforms risk their customers using another platform instead.

Effects on consumers, suppliers (including SMEs) competitors and society

Question 3: What benefits have online platforms brought consumers and businesses that rely on platforms to sell to their goods and services, as well as the wider economy?

19. There are numerous benefits associated with online platforms from both a consumer and business perspective. Platforms facilitate economic growth by enabling sellers to access new markets and reach new customers (and often to do so at lower cost), buyers to access new products, and both buyers and sellers to make use of better quality information. Online, individuals and businesses have greater opportunities to create value from skills and assets. Platforms have fostered innovation, enabling many new opportunities for businesses – new and old – to deliver novel and creative ways to meet consumer demand. Access to greater information through online platforms has in some respects led to significant strides in consumer empowerment. For example, the ease with which consumers can share information about traders potentially reduces the problem of information asymmetry.¹⁵

Question 4: What problems, if any, do online platforms cause for you or others, and how can these be addressed?

20. How platforms operate may, in certain circumstances, give rise to potential concerns from a consumer protection and a competition perspective.

The report highlights that websites have innovated to improve their search functionality as a result of competition in the sector.

¹⁴ For example, see the CMA undertakings secured from [secondary ticket websites](#).

¹⁵ For example through reputational feedback mechanisms. There are [examples](#) of where social media has been used to bring pressure on a company regarding its terms and conditions.

21. From a competition viewpoint, concerns include:
- (a) features in an internet environment – notably powerful network effects, economies of scale, the role of intellectual property rights, and vertical integration – that have the potential to lead to competition concerns, including through online platforms acquiring market power. Network effects mean that there can be benefits to consumers to there being only a few, or possibly even one, platform in each sector. However, these features give platforms potential market power which may in certain situations be used to discriminate against competitors and/or raise prices above the competitive level. Network effects may also raise barriers to entry, making it difficult for new players to enter a market. Concerns may also arise where market power built up in one area is used anti-competitively to dominate another part of the sector or market.¹⁶ Market power is discussed further below (Question 7);
 - (b) attempts to frustrate new competitive challenge, eg through refusals to license or bans on selling through alternative channels; and
 - (c) online platforms seeking to lock in suppliers (eg through price parity requirements) and suppress inter-platform competition (eg through so-called ‘wide’ most favoured nation clauses).¹⁷ Annex A provides background information on recent work relating to restrictions in competition in the online distribution of goods.
22. From a consumer protection perspective, potential concerns¹⁸ include:
- things platforms do themselves which may be harmful in light of the large degree of control as to how consumers interact with traders using the platform (see Question 2 above);
 - how data is collected and used (see further Question 9 below);

¹⁶ For example the Commission is currently carrying out [investigations into Google](#) regarding alleged abuse of dominance. It is the Commission’s preliminary view that Google is abusing a dominant position, in breach of EU antitrust rules, by systematically favouring its own comparison shopping product in its general search results pages in the European Economic Area. The Commission is concerned that users do not necessarily see the most relevant results in response to queries, to the detriment of consumers and rival comparison shopping services, as well as stifling innovation. The Statement of Objections alleges that Google treats and has treated more favourably, in its general search results pages, Google’s own comparison shopping service ‘Google Shopping’ and its predecessor service ‘Google Product Search’ compared to rival comparison shopping services.

¹⁷ See the CMA’s recent [submission](#) to the OECD Hearing on Across Parity Platform agreements.

¹⁸ The potential for consumer detriment through a lack of clarity regarding the above points is an area of ongoing interest for the CMA. The Commission questionnaire on online platforms seeks views on some of these issues including questions concerning the transparency of online platforms, such as whether there should be more transparency in relation to information in response to a search query (in particular if the results are sponsored or not), and reputation systems. There is also a section of the questionnaire specifically addressing tackling illegal content online and the liability of online intermediaries, including the application in practice of Section IV of the E-commerce Directive.

- the lack of clarity and certainty as to the legal relationship between users, and the legal relationship between platforms and their users; this is key to ensuring consumers understand the respective responsibilities of the platform and different users when something goes wrong, for example when a purchased product does not arrive, when there are surprising charges imposed, or when rogue actors are using a platform. In particular:
 - the current definitions of ‘trader’ and ‘consumer’ may be in need of revision given the growth of the sharing economy facilitated by platforms¹⁹ so that sellers can have more certainty about when they need to comply with consumer protection law. Equally, it should always be clear to consumers using sharing economy platforms when they are contracting with another consumer and therefore enjoy fewer rights than if contracting with a business seller or the platform directly;
 - whether platforms must ensure that their business users are able to comply with consumer protection law;
 - whether platforms must comply with enforcement and other relevant requests to co-operate when there are allegations of malpractice by traders;
 - whether platforms should carry out some level of supervision of their users; and
 - whether it is appropriate to hold the platform to account for infringements by its business users.
23. Consumer protection needs will vary depending on the precise type of platform. For instance, the risks for a broker or intermediary platform will be different to those associated with an information provider. We also recognise that there may be particular concerns raised in markets where there are particularly vulnerable consumers.
24. Platforms should be responsible for their own activities and, where these could influence consumer decision-making, it is important the platform does not, and does not allow, its users to be misled by act or omission.²⁰

¹⁹ This problem is not unique to online platforms, but occurs wherever individuals seek to become economically active by selling to other individuals. However, given the scale of activity facilitated by platforms, the issue has become more prominent. It has recently been discussed by Citizens Advice in its paper [Peer Problems – An Assessment of the Consumer Experience of Online Marketplaces](#).

²⁰ For example, where a platform ranks results as a result of payments by traders, but does not make this clear, consumers could be misled into thinking the top results are most relevant when this is not the case.

25. **Overall** – and subject to greater clarity concerning the points noted above at paragraph 22 - the CMA considers existing enforcement tools should enable specific competition and consumer problems to be dealt with where there is evidence of harm.

Platforms as part of the Digital Single Market Strategy

Question 6: Is the European Commission right to be concerned about online platforms? Will other initiatives in the Digital Single Market Strategy have a positive or negative impact on online platforms?

26. The CMA is broadly supportive of the overarching ambitions behind the Commission's Digital Single Market (DSM) agenda, and welcomes initiatives to reduce unnecessary or disproportionate regulatory restrictions and increase transparency and consumer confidence online. The DSM agenda is an opportunity to ensure markets which have migrated on line are not subject to unnecessary regulation which might impede their competitiveness. As online platforms play a significant role in today's economy, the Commission's DSM strategy should serve to increase the evidence base concerning the application of existing regulatory frameworks to online platforms. This will assist in helping legislators, policymakers and enforcement agencies to identify any concerns and how such concerns might be addressed. On review of the evidence, there may be a need to regulate or deregulate specific activities or commercial practices; it is not sensible to generalise too much in advance. In some cases as an alternative to ex ante regulation, measures including guidance, industry led initiatives and existing ex post enforcement and other tools, may offer a more proportionate and targeted solution; it will depend on the concerns identified.²¹

²¹ The [e-commerce sector inquiry](#) currently being undertaken alongside the DSM strategy by the Commission's Competition Directorate is a good example of this approach in the competition law sphere. Through the sector inquiry, the Commission will gather data on the functioning of markets where e-commerce is most widespread (eg electronics, clothing and shoes), as well as digital content, so as to identify possible competition concerns and focusing particularly on potential barriers erected by companies to cross-border online trade in goods and services. To the extent that that evidence-gathering identifies specific concerns, it may then bring enforcement action to ensure compliance with EU competition rules.

Section 2: Competition, data, collaborative economy

Competition and dominance

Question 7: Is there evidence that some online platforms have excessive market power? Do they abuse this power? If so, how does this happen and how does it affect you or others?

27. Online platforms may potentially acquire market power²². Under certain specific circumstances including, for example, the presence of strong network effects and barriers to ‘multi-homing’ by customers, competition in digital markets can have a tendency toward ‘winner takes all’ competition for the market. But competition can still be subject to continual cycles of innovation, quite often of a ‘radical’ nature, where last year’s ‘winner’ can quickly become this year’s ‘nobody’; the potential for innovative offerings to disrupt markets means that while successful digital platforms may acquire significant market power, such market power may sometimes be transient in nature.²³ Competition authorities must carefully balance the need to address concerns regarding abuse of market power swiftly, with the need to ensure new entry and innovation is not deterred, recognising that in fast-moving markets market power may be quickly superseded by new entry and innovation. Intervening too soon could have the counterproductive effect of ‘locking-in’ a particular market structure and chilling innovation.
28. Whether specific online platforms have market power, or have been abusing such power, are issues which must be considered based on the evidence rather than in the abstract. UK and EC competition law imposes particular obligations on those undertakings which enjoy a ‘dominant position’ in a market, ie a position of economic strength which enables that undertaking to *prevent* effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.^{24, 25} It is unlawful for such undertakings to abuse their market power by acting anti-competitively in various ways, for example through the exclusion of as efficient competitors or

²² Businesses might acquire and hold market power for any number of competitively legitimate reasons, including superior business acumen, greater efficiency, consumer preference, strong positive reputation and superior functionality.

²³ [OECD Hearing on the Digital Economy](#) (2012). In terms of transience, it is interesting to note the recent observation that ‘*The average time a company spends on the Fortune 500 list has fallen from 70 years in the 1930s to about 15 years today*’ (Schumpeter: Capitalism and its discontents, *The Economist* October 3rd 2015).

²⁴ See for example, Case 27/76 *United Brands Company and United Brands Continental v Commission* [1978] ECR 207 at paragraph 65.

²⁵ Any such assessment of dominance necessitates a legally robust process of market definition, which will involve the identification of focal products or services and then going through a process of determining the scope of products or services that are interchangeable with the focal product or service. See, for example, the guideline *Market Definition* (OFT403), originally published by the OFT and now adopted by the CMA.

the exploitation of customers. Annex B provides further detail on how dominance is assessed under EU and UK competition law.

29. The existence of durable market power can be indicative of market structure that is less conducive to effective competition and in which certain commercial strategies (such as exclusivity or below-cost pricing strategies) can constitute abuse. Indications of market power are in general of more concern in practice in markets where, for example, (i) there are established dominant platforms over a sustained period of time and (ii) there are significant barriers to customers switching or multi-homing which can restrict competition from potential entrants or expansion by existing, smaller rivals. These barriers may include:
- Data – larger online platforms may have some competitive advantage due to the proprietary data to which they have access.²⁶ The same may be true of other online (or even offline) services. To the extent that such data is of central importance to the offering but inaccessible to competitors, it may confer a form of ‘unmatchable advantage’, making it hard for those competitors to compete.
 - Reputation – to the extent reputation²⁷ cannot be transferred between platforms, this can promote single homing and act as a barrier to switching.
 - Contractual restrictions – platforms may attempt to lock-in suppliers or suppress inter-platform competition through contractual restrictions.²⁸
 - Inertia – users may have limited abilities and/or incentives to switch, or may perceive the steps required to switch to be overly burdensome. As with other businesses, online platforms may make it harder for customers to switch, for instance by introducing friction, or additional consumer ‘effort’ in the transaction (such as requiring three phone calls rather than one).
30. An online platform in a dominant position will abuse that dominant position if it engages in activities hindering competition in the dominated market (or a

²⁶ Obligations for platforms to export data in certain circumstances are under consideration. The Commission questionnaire on platforms (see footnote 11 above), encompasses a number of questions relating to the free flow of personal and non-personal data *including* on data location restrictions; data access and transfer; regulatory constraints which may hold back the development of data markets in the EU; access to open data held by the public sector and private entities; access and reuse of scientific data; liability in relation to the free flow of data and the internet of things; open service platforms; personal data management systems; and cloud services.

²⁷ For example feedback, ratings and review profiles or ‘trust’ scores. There are regulatory challenges as to how to ensure portability of value-added data such as a reputation score on an online market place, particularly given the ambiguity as to who owns what data.

²⁸ Please refer to Annex A for examples of CMA investigations into such contractual restrictions (section a.)).

closely related market) or the growth of that competition. Competition for these purposes should be understood in relation to competitive parameters such as price, quality and innovation in relation to relevant online platforms and related services. For example, there might be competition concerns arising where a dominant platform seeks to restrict its customers from using competing platforms. This could mean that a potentially competing platform could not access a sufficient base of customers in order to be viable, even though its offering on price, quality, innovation or some other competitive parameter could be superior to the dominant platform.

31. The CMA considers the existing competition law framework is capable of being appropriately applied to online platforms. For example, the CMA recently used its powers to accept behavioural commitments offered by the businesses under investigation for the purpose of addressing competition concerns it had in relation to certain online platforms.²⁹
32. There are other tools which may be used to address market power in addition to the enforcement of the prohibition on abuse of dominance. For example, one of the priorities in merger control under the Enterprise Act 2002 is to prevent, where necessary, the creation of market power as a result of enterprises ceasing to be distinct. In addition, markets characterised by market power can be examined by the CMA under the market studies or market investigation reference regime under that Act. The ability for the CMA to carry out market studies or market investigations can also be important in enabling it to gather evidence in relation to markets where undertakings have market power, and to decide whether any remedial action should be taken in relation to competition problems in those markets.

Question 8: Online platforms often provide free services to consumers, operate in two- or multi-sided markets, and can operate in many different markets and across geographic borders. Is European competition law able adequately to address abuse by online platforms? What changes, if any, are required?

33. The CMA considers that the existing UK and EU competition law framework is capable of appropriately considering allegations of abuse of a dominant position by online platforms. Novel online business models may require existing legal and economic concepts to be applied in new contexts, and competition authorities need to remain vigilant to ensure that their practices and procedures are suitable for use in those online markets. However, the CMA's view is that online platforms do not create fundamentally different

²⁹ See the [Decision to accept commitments offered by epyx Limited and FleetCor Technologies, Inc.](#)

issues from a competition law perspective to those that have been addressed before.

34. Action to address such issues under competition law may involve a competition authority making a finding that the law has been infringed (and imposing a sanction), but can also be by other means. As noted above, the CMA took commitments in relation to an online platform using the existing competition law framework under the Competition Act 1998. The commitments removed, and in some other respects modified, potentially restrictive terms in contracts for the use of a network, offering clear opportunities for competitors to enter the market, in particular by making it easier for current customers to switch to rivals if they choose to.³⁰ Even where a competition authority concludes, as a result of its investigation, that there are no grounds for it to act in relation to the conduct in question, this can serve to clarify for other businesses the scope of lawful behaviour in particular market circumstances.
35. For enforcement to remain fully effective, competition authorities across Europe also need to keep the practices and processes they follow in taking such action under ongoing review, to ensure that they continue to be fit for purpose in the new, and often dynamic, online market contexts in which they need to be applied.
36. The international, even global, dimension of online platforms is an important consideration in safeguarding such effectiveness. The European Competition Network (ECN), of which the CMA is a member, presents an opportunity for effective coordination and cooperation between national competition authorities in the EU as well as with the European Commission. Competition authorities are now involved in bilateral international cooperation to an unprecedented degree. Fora such as the ECN, the International Competition Network and the OECD can help facilitate dialogue on important competition policy and enforcement issues, including in relation to online platforms. On the consumer side, the CMA currently holds the presidency of the International Consumer Protection and Enforcement Network (ICPEN)³¹ and collaborates with consumer enforcement counterparts through the mechanisms provided for in Regulation (EC) No 2006/2004 on Consumer Protection Cooperation (CPC). A recent example of international collaboration in practice is provided in Annex A, regarding children's online games (delivered in collaboration with

³⁰ See also CMA (September 2014), [CMA accepts commitments relating to platform services for the automotive sector](#).

³¹ ICPEN is a voluntary network of over 50 consumer protection law enforcement authorities from across the globe. Its mission is to protect consumers by encouraging and facilitating practical action to prevent cross border marketing malpractice. These actions include information sharing on market developments and regulatory best practice, as well as coordination and cooperation to tackle market problems.

CPC and ICPEN). Cooperation and mutual support between national authorities is important to ensure appropriate enforcement action is taken.

Collection and use of data

Question 9: What role do data play in the business model of online platforms? How are data gathered, stored and used by online platforms and what control and access do consumers have to data concerning them?

37. Collection and use of data about consumers is an important part of the online economy, which has led to benefits for consumers, including through better product development, more relevant advertising and personalised products. Data is often central to the activities of platforms, since so many of them are involved in matching disparate parties: if the platform does not know anything about the parties they are matching, they often cannot add value. That data can therefore also have commercial or competitive value, creating a market for data. That data market, together with advertising, has allowed consumers to access many services that are free in monetary terms, and provided an opportunity for them to receive financial returns from providing access to their data. Data analysis also allows traders to reduce their costs in terms of business processes, and the risks they undertake (eg insurance), savings which may be passed onto the consumer. These benefits must not be underestimated, and they benefit traders, consumers and the economy.³²
38. Please refer to Annex A for further detail regarding the CMA's recent report on the commercial use of consumer data. While the CMA found some positive developments regarding consumers' ability to control use of data, it also found consumer trust to be fragile and has welcomed industry and regulatory initiatives to increase transparency and consumer control. For the market for data to work well - and enable consumers and firms to share the benefits of using consumer data - the CMA considers there needs to be greater:
- transparency about what data is being collected, by whom and for what purpose, so that consumers can select the firm that best meets their preferences. The CMA report sets out how firms could help consumers become more active and informed, including suggesting simpler information about how data is used;

³² A recent [OECD report](#) discusses the potential of data-driven innovation to significantly enhance productivity, resource efficiency, economic competitiveness, and social well-being.

- choice about whether the data is collected or not – actual consent to the transaction; and
 - control over how the data is used subsequently - so that consumers can manage the data they are sharing and choose how much, if any, data to share.
39. Privacy policies and terms and conditions are long and complex. Further, it can be hard to opt-out of data collection, or to be aware what firms are collecting data. And the pressure on consumers is only set to increase. Developments such as the Internet of Things – like online devices we wear or carry and devices in the home or in our cars – will mean that data is collected and shared on a regular basis without the consumer having to make a conscious decision. This may test how far consumers will remain willing to provide data.

Question 11: Should online platforms have to explain the inferences of their data-driven algorithms, and should they be made accountable for them? If so, how?

40. There are circumstances where the result of an algorithm may be material information for consumers, namely information they need in order to take an informed decision about a transaction. In this case the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) require some level of disclosure. For example the OFT previously considered that where consumers' interactions with a website could lead to personalised pricing³³ (presumably as a result of an algorithm) this should be disclosed to avoid committing a misleading omission. Similarly, where an algorithm results in a display of results that is not what the consumer would otherwise expect (eg a paid for result comes before a relevant result), there is a need³⁴ for particular disclosure³⁵. Where the result of an algorithm is misleading, under the CPRs it is likely that the platform would be held responsible.³⁶

³³ The OFT [considered](#) business may breach CPRs by way of misleading actions/omissions or breach of professional diligence obligation, for example: by failing to tell consumers information is being collected and used commercially; where a privacy policy does not accurately represent the information being collected and where information is being used covertly to personalise a price.

³⁴ Failure to provide this disclosure could be a misleading omission contrary to regulation 6 of the CPRs.

³⁵ See, for example, the OFT report on price comparison websites (footnote 13 above), pages 13-16.

³⁶ Please refer to the response to Question 4 above.

Collaborative economy

Question 12: Can you describe the challenges that the collaborative economy brings? What possible solutions, regulatory or otherwise, do you propose?

41. In general, sharing economy platforms are capable of bringing significant benefits to consumers. The main concern is whether consumers realise that their rights vary depending on who they are contracting with, and what level of responsibility the platform should have. Overall, therefore, the challenges are those set out in the response to Question 4 above from a consumer protection viewpoint. Clarity as to respective responsibilities is needed in order that users can be confident of their rights and maintain trust in the market. With the fast development of new business models and technology it is important to keep enforcers' powers under review to ensure they are effective, and that there are sufficient penalties to deter traders from wrong doing.
42. From a broader regulatory perspective, an in-depth assessment of the existing regulatory frameworks is necessary to establish which requirements must apply to sharing economy business models. Technological advances may have made certain aspects of existing regulation less necessary. The successful emergence of collaborative business models alongside existing, 'traditional' business models could be seen to indicate potential scope to reduce existing regulatory burdens applicable in a specific market without adverse effects on competition or consumers to ensure a level playing field for new entrants and existing incumbents.

The current regulatory environment and possible interventions

Question 13: How are online platforms regulated at present? What are the main barriers to their growth in the UK and EU, compared to other countries?

43. There is not a specific regulatory 'package' applicable specifically or solely to platforms.³⁷ However, platforms are subject to many regulatory requirements. This includes the need to comply with competition law and general consumer protection laws that apply to all traders (some of the most significant being the CPRs, unfair terms legislation³⁸, and contractual rights³⁹), and which are generally the same or comparable throughout the EU. There are also specific

³⁷ As stated elsewhere in this response, the CMA considers that any 'one size fits all' which seeks to regulate all platforms is neither feasible nor appropriate, not least given the diversity of different platforms and function which they perform.

³⁸ Set out in Part 2 of the Consumer Rights Act 2015.

³⁹ Set out in Part 1 of the Consumer Rights Act and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

rules and laws that may impact on platforms depending on the sector in which they operate.

Question 14: Should online platforms be more transparent about how they work? If so, how?

44. As noted above in the response to Question 9, in specific relation to the use of data by online platforms and other businesses, the CMA considers that greater transparency would be beneficial. More broadly, the CPRs require a reasonably high degree of transparency already: information that consumers need to take informed decisions about transactions they might enter into must be disclosed clearly and accurately. In particular, the CPRs prohibit five types of practices: Misleading Actions (where information is false or deceptive); Misleading Omissions (where information the average consumer needs is left out, provided unclearly or is hard to find); Aggressive Practices (where the consumer is put under unfair pressure to make a decision); behaviour falling below the standard required by Professional Diligence (conduct that is contrary to the standard of care and skill to be expected, and which impairs the consumer's ability to take an informed decision); and 31 specific banned practices. All the prohibitions, except the 31 banned practices, apply where the conduct in question is likely to have an impact on consumer decision-making in relation to a product. This is a broad test, encompassing most decisions that a consumer would make while shopping and dealing with products they have bought. The Unfair Commercial Practices Directive, which the CPRs implement, is a full harmonisation directive, meaning that the UK cannot introduce legislation which is more prescriptive than the Directive, in the fields which are fully harmonised.

Question 15: What regulatory changes, if any, do you suggest in relation to online platforms? Why are they required and how would they work in practice? What would be the risks and benefits of these changes? Would the changes apply equally to all online platforms, regardless of type or size?

45. The emergence of novel online platforms and business models – quick to achieve significant scale⁴⁰ – has brought into sharp focus the appropriate level of regulation that ought to apply in the sectors affected and there have been

⁴⁰ The internet is a highly scalable platform that provides quick access to a potentially global customer base. The costs of reaching and adding additional users to an online platform are very low, making it possible to grow quickly and inexpensively. This is noted in the [OECD paper on disruptive innovation](#), prepared as part of the OECD Competition Committee [analysis of the impact of disruptive innovation](#). As recently observed: 'Globalisation and digitisation have speeded up the pace of creative destruction...Digital technology allows businesses to become huge in no time. Whatsapp, a mobile messaging platform, reached 500m users within five years of its launch' (Schumpeter: Capitalism and its discontents, The Economist October 3rd 2015).

calls to specifically regulate platforms.⁴¹ However as platforms are of quite different types, sizes and functions, it is clear there can be no one-size-fits-all solution; it is important not only to avoid discrimination between the conduct of activities on-line and off-line, but also to avoid the creation of new, disproportionate regulatory mechanisms which might serve to insulate incumbent on-line firms from dynamic competition that would otherwise benefit consumers. Where additional regulation is needed, alternatives to legislation should be duly considered, for instance guidance, industry led standards and initiatives such as kite marking⁴² may also on occasion be better equipped to respond flexibly to rapid changes in digital markets.

46. It is important regulation remains fit for purpose in the digital age and adapted if not.⁴³ Applying a competition lens helps ensure regulation reflects the dynamic nature of digital markets. The CMA's new [Competition Impact Assessment guidelines](#) set out how policymakers can assess the competitive impact of regulation.⁴⁴

It is imperative that the continued growth of new markets which may provide significant consumer benefits is not hampered by hasty regulatory responses regarding online platforms. Regulation must serve to maintain a level underlying playing field between incumbents and new businesses, and existing regulation may warrant amendment to take account of the way in which markets or consumer behaviours have evolved. Ensuring the right regulatory response will allow the digital economy to continue to grow at the pace witnessed over recent years, and enable it to reach its full economic potential.

⁴¹ As noted in the response to Question 13, online platforms do not operate in a regulatory vacuum and platforms are subject to many regulatory requirements specific to the sector in which they operate, for instance platforms that facilitate real estate, gambling and financial lending transactions.

⁴² For example as envisaged by [Sharing Economy UK](#).

⁴³ The Commission must continue its work under the Regulatory Fitness Programme, cutting red tape and removing unnecessary regulatory burdens. There have been calls for a 'digital test' to be introduced in the Impact Assessment. The CMA notes the [UK Business Challenger programme](#), which was initiated as part of the [red tape challenge](#), led to deregulatory measures to facilitate challenger business entry.

⁴⁴ The CMA has been given a strengthened duty to comment on forthcoming legislation from a competition perspective and will consider whether it is appropriate to use this power on a case by case basis.

Recent CMA work considering aspects of online platforms

The CMA's recent work has included the following (further details are provided below):

- investigations into restrictions of competition in the online distribution of goods including so called 'across platform parity agreements' and Most Favoured Nation clauses used by online platforms;⁴⁵
- reports on the Commercial Use of Consumer Data⁴⁶ and Online Reviews and Endorsements⁴⁷ following the CMA's Calls for Information;
- analysing, together with the Autorité de la Concurrence in France, competition issues around open and closed systems⁴⁸ and reporting our joint findings;
- in partnership with the EU Consumer Protection Network, taking enforcement action under our consumer protection powers, in relation to the role of app platforms and related operating systems to protect consumers from unauthorised in-app purchases and online or app-based games encouraging children to make purchases; and
- carrying out consumer law investigations into secondary ticket websites, group buying sites, price comparison sites, and affiliate marketing networks.

Restrictions in competition in the online distribution of goods including across platform parity agreements

1. The CMA receives a large volume of complaints relating to online distribution practices, including allegations of resale price maintenance (RPM), the use of internet minimum advertised pricing,⁴⁹ online sales bans and price parity and

⁴⁵ A typical price-parity agreement between a supplier and a platform contains clauses providing that the platform will maintain parity with the minimum prices set by the supplier, and a 'most favoured nation' clause, providing that the lowest price offered to the public via the supplier's own website, or via competing platforms, must also be made available to the platform entering into the agreement.

⁴⁶ CMA (June 2015), [Commercial use of Consumer Data \(CMA38\)](#).

⁴⁷ CMA (June 2015), [Online Reviews and Endorsements \(CMA41\)](#).

⁴⁸ 'Openness' in this context refers to the extent to which any firm can access and use the components of a platform or system (for example, services, data, or applications) in the providing their own services without incurring excessive costs. It is therefore closely related with the issues of interoperability and standardisation.

⁴⁹ In March 2014 the OFT issued [infringement decisions under the CA98](#) in connection with online sales and advertising restrictions in the mobility aids sector.

price relativity agreements. There have also been allegations of attempts by online platforms to lock in suppliers and suppress inter-platform competition.

2. Price parity and price relativity agreements have been the focus of a number of antitrust cases domestically and internationally.⁵⁰ Considerable attention has been directed at the use by providers of online platforms and marketplaces of so-called across-platform parity agreements, also referred to as 'retail-MFNs' (Most Favoured Nation clauses). Retail-MFN clauses enable the customer (typically a platform or reseller) to ensure that the retail prices (and/or other non-price retail terms) at which it offers a supplier's goods or services are no worse than those offered by other customers of that supplier.⁵¹ A retail-MFN clause effectively obliges the supplier to ensure that the retail price on its own sales channel and/or on other sales channels is not lower than the retail price offered by the party benefiting from the retail-MFN. Given the way in which they operate, retail-MFNs require the supplier to have some control over retail prices or discounting (or both) of the products it supplies thereby potentially eliminating retail price competition across multiple distribution channels.
3. In 2014, following an investigation into the functioning of the private motor insurance (PMI) market in the UK under its market investigation powers,⁵² the CMA found that, among other issues, many of the contracts between motor insurers and Price Comparison Websites (PCWs) contained 'wide' retail-MFN clauses (ie requiring parity both with other platforms and the insurer's own website) which gave rise to an adverse effect on competition through limiting price competition and innovation, and possibly restricting entry. To remedy its concerns, the CMA prohibited the use of the wide MFNs by PCWs in the PMI market (and – to ensure the effectiveness of that prohibition – also prohibited behaviours by large PCWs intended to have equivalent effect).⁵³

⁵⁰ Including investigations into hotel online booking: the CMA (among numerous international counterparts) has investigated suspected breaches of competition law relating to discounting restrictions in arrangements between [hotels and online travel agents](#). The CMA case is now closed. Details of the CMA's ongoing evaluation of pricing practices in the sector are available on the [CMA's webpages](#).

⁵¹ Typically, to ensure that it does not breach its contract with the platform/reseller, the supplier will 'police' such parity.

⁵² The CMA's market investigation powers involve an assessment of whether there is a feature or combination of features of a particular market in the UK that gives rise to an adverse effect on competition. Where the CMA finds that there is such an effect, it may put in place legally-binding remedies to remedy, mitigate or prevent the adverse effect or any associated customer detriment. Market investigations are distinct from the CMA's competition law enforcement, and do not involve a finding that competition law had been infringed.

⁵³ The CMA found that 'narrow MFNs' (defined as those covering price parity with the insurance provider's website only) adopted by PCWs in relation to private motor insurance did not give rise to an adverse effect on competition (and so were excluded from the scope of the CMA's prohibition).

4. The CMA work in this area is summarised in its [OECD paper](#).⁵⁴

Commercial use of personal data

5. The role of data in online platforms, and the understanding and control by consumers of the collection and use of such data were considered in more detail in the CMA's report on the commercial use of consumer data.⁵⁵ The CMA commissioned research into three specific sectors involving online platforms: motor insurance, clothing retail and games applications.⁵⁶ The CMA found that businesses, including platforms, generally collect and use (through a range of techniques) consumer data for a number of commercial purposes including analytics, cross-selling, targeted advertising, and the development of new services. In a competitive market, this may generate efficiencies with consumers benefitting from lower prices or higher quality services.
6. The collection and use of data was found by the CMA to be complex and widespread with markets evolving rapidly. The range of consumer information used commercially extends beyond basic transactional data historically captured by retailers. There has been a rapid growth in third party analysis of data to identify patterns and relationships for sale to other businesses.
7. 75% of consumers expressed concern about loss, use and inappropriate onward disclosure of their personal data. The CMA also found that consumers wanted more control over 'their' data. The CMA found a disconnect between consumers' stated concerns about the use of data about them, and their actual behaviour. For example, consumers do not actively engage with certain mechanisms, eg cookie notices. There may be a number of reasons for this, including ignorance about the fact that the data is being collected, a sense of impotence to do anything about it anyway, or the feeling that the product being 'paid for' with the data is too essential to opt out of. Consumer behaviour may suggest consumers value convenience over privacy in certain instances when using some online platforms.
8. Platforms are sometimes 'free'⁵⁷ at the point of use.⁵⁸ The CMA found that, in 'free at point of use' platforms, businesses typically use data to target

⁵⁴ Further information as to the OECD's analysis of across platform parity agreements including other country contributions are available [on the OECD's website](#). In 2015, the International Competition Network (ICN) published a [special project report](#) on online vertical restraints.

⁵⁵ CMA (2015), [The commercial use of consumer data: Report on the CMA's call for information](#).

⁵⁶ CMA (2015), [Commercial use of consumer data: factual review](#).

⁵⁷ Users in some instances 'pay' by allowing data to be collected about them and their activities. While this is not a cost to the user in monetary terms, there is a value transfer which the platform is often able to monetise.

⁵⁸ The CMA identified 3 principal models by which consumers may share data with businesses, including platforms: (a) when they engage in a direct financial transaction; (b) when they engage with 'free at point of use' platforms such as social networks, booking platforms, media platforms, search engines, price comparison

advertisements as the implicit 'price' for using the services. While, in theory, consumers should be able to discipline providers over the level of privacy or the extent to which data may be used, the CMA found that, in practice, consumers may find it difficult because of a lack of awareness that data may be used for this purpose and/or the value of the data to the platforms. As such, consumers have limited ability or incentives to discipline platforms to compete over privacy protection. Further, there is not always a direct contractual relationship between consumers and those with access to the data.

9. Consumers' personal data has become an increasingly valuable commodity to business. The CMA identified a number of positive developments in the industry, including self-regulatory initiatives, efforts to raise awareness of privacy controls and better tools to help consumers control the use of their data. However, the CMA found that consumer confidence appears to be fragile and there are concerns that future changes in how data may be collected and used (such as more passive collection via the Internet of Things) could test how far consumers are willing to continue to provide data. Further details are provided in the [CMA's report](#).

Online reviews and endorsements

10. The CMA also carried out a Call for Information regarding online reviews and endorsements. Trust mechanisms are key features of many online platforms' business models, for instance those in the 'sharing economy' where ratings and reviews act as a form of self-regulation⁵⁹. The CMA found that more than half of UK adults (54%) use online reviews before making purchases. While most buyers who used reviews and endorsements considered the product or service matched up to their expectations, the CMA found evidence of potentially misleading practices, such as fake reviews being posted on review sites, negative reviews not being published and businesses paying for endorsements without this being made clear to consumers. Further details can be found in the [CMA's report](#).

Open and closed systems

11. More generally, the CMA together with the Autorité de la Concurrence has examined the nature of the economics regarding open and closed systems.

websites, etc; and (c) in a variant of the above involving limited access without charge with payment for premium content.

⁵⁹ Through reputational feedback mechanisms: aggregating reviews can significantly diminish the problem of asymmetric information.

The report explains the principal features of open and closed systems. There are advantages associated with each type of system.

12. Ecosystem openness is good for competition as open systems generate efficiencies: (i) they maximise network effects; (ii) they maximise scale economies; (iii) they enable the system owner to commit not to renegotiate ex post the access fees with the component developers once the specific investments in the system have been incurred; and (iv) they enable the system owner to commit not to exploit the users who have joined the system, which increases incentives to join the system.
13. Closed systems also generate efficiencies: they (i) ensure compatibility between components; (ii) avoid free-riding; (iii) allow user coordination; and (iv) avoid the drawbacks of standardisation. Closure can be good for competition as closed systems increase inter-system competition (which can lead to fierce competition ‘for the market’) and they can lead to an increased incentive to innovate and to entry due to future profit expectations.
14. The [joint report](#) noted competition authorities may be legitimately concerned by the threat all consumers could be locked into a single unavoidable system, monopolising many markets, and considered that competition authorities could be willing to intervene to avoid ‘tipping’ or lock-in.

Platform liability issues

15. Examples of work where the issue of platform liability has arisen have included the OFT’s investigation into Groupon⁶⁰, CMA work with other EU partners looking into children’s apps on Google and Apple app platforms⁶¹. This led to certain improvements being agreed with Google Play and Apple as a result of the joint action on children’s apps. For example increased transparency about which ‘free’ apps contain in app purchases; ensuring consumers’ choice is not hindered, by preventing direct exhortations to children in apps they use; giving parents control over the payments that are made by changing the default settings for in app purchase authorisations. Both companies also committed to deal swiftly with problems if brought to their attention.

⁶⁰ OFT (2011), [Investigation into the trading practices of MyCityDeal Limited \(trading as Groupon UK\)](#).

⁶¹ See the CMA’s [children’s online games case page](#). The EU Consumer Protection Co-operation (CPC) network carried out joint action in order to secure changes to the operating systems of Google Play and iOS due to concerns about the effectiveness of payment authorisation controls for in app purchases.

16. The OFT/CMA has carried out investigations into secondary ticket websites⁶², and worked with international colleagues (ICPEN⁶³) looking into the role of facilitative players such as top level domain name registries in the context of the potential mis-selling of tickets for international sporting events.

⁶² See the CMA's [secondary ticketing websites case page](#).

⁶³ See paragraph 35 above for more detail on ICPEN.

Assessment of dominance under EU and UK Competition Law

1. This Annex briefly summarises certain principles regarding the assessment of dominance under EU and UK competition law, and which are of relevance to consideration of that concept in relation to online platforms
2. Section 18 of the Competition Act 1998 and its EU equivalent in Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse by undertakings of a dominant position on a market (Article 102 applies where the abuse affects trade between EU member states).
3. A dominant position in EU and UK competition law refers to a position of economic strength enjoyed by an undertaking which enables that undertaking to *prevent* effective competition being maintained on a relevant market, by affording that undertaking the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.⁶⁴
4. The scope of that relevant market is delineated through a process of market definition involving the identification of focal products or services and the scope of products or services that are interchangeable with that focal product or service. See, for example, the guideline Market Definition (OFT403), originally published by the OFT and now adopted by the CMA.
5. In assessing dominance, it is helpful to have regard to the European Commission's Guideline on Enforcement Priorities in Applying Article 82 of the EC Treaty [now Article 102 of the Treaty on the Functioning of the European Union] to Abusive Exclusionary Conduct by Dominant Undertakings⁶⁵ in which the European Commission considers that an undertaking that is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competition constraints and can thus generally be regarded as dominant.⁶⁶ The Commission suggests that 'increasing prices' in this context refers to the power to be able to maintain prices above the competitive level.⁶⁷ Very importantly for immediate purposes (and it is explained why below), the Commission's view in the guidelines is that price here is used as a 'shorthand' for how various parameters of competition – such as prices, output,

⁶⁴ See for example, Case 27/76 *United Brands Company and United Brands Continental v Commission* [1978] ECR 207 at paragraph 65.

⁶⁵ OJ 2009 C45/02.

⁶⁶ Paragraph 11 of the Commission guidelines.

⁶⁷ *Ibid.*

innovation, the variety or quality of goods or services – can be impacted to a dominant undertaking's benefit and to the detriment of consumers.

6. When assessing dominance, it will be necessary to consider the structure of competition in the market and factors such as the following competitive constraints in response to supra-competitive pricing by an undertaking:

- The current position of existing suppliers in the market – can customers simply move to existing competitors?
- The credible threat of expansion by existing suppliers or potential new entrants – can they simply expand or enter the market and win business away from the undertaking in question?
- Do the undertaking's customers have a sufficient degree of buying power?

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