



A response

to the invitation to comment on the Interim Report of the online platforms and digital advertising market study

OVERVIEW

The British Brands Group, a membership organisation representing brand suppliers of all sizes, welcomes the opportunity to present its views on CMA's Interim Report on its market study into online platforms and digital advertising. The digital channel is an important one for branded product suppliers to reach their consumers and members have experienced unfair practices in this channel, as in others.

The Group is a strong advocate of a code of practice to address concerns raised in the Furman Report, concerns that are broader in scope than digital advertising. A recommendation to Government for a broader-based remedy than is possible within the scope of this market study would therefore be appropriate.

1 INTRODUCTION

The British Brands Group is a membership organisation that provides the voice for the suppliers of branded products. It is passionately committed to a climate in the UK in which brands can deliver strong value and consumers enjoy wide, genuine choice. This involves competition that is both vigorous and fair. Our members vary in size and supply a range of branded goods. Two thirds of members are SMEs and the digital channel is important to many as a route to the consumer.

- 2 We are pleased to respond to the Competition and Market Authority's (CMA) Interim Report published on 18 December 2019 on its market study relating to online platforms and digital advertising (Interim Report).
- 3 Members have experienced unfair practices and procedures in digital markets and would welcome a code of conduct that addresses the concerns identified in the Furman Report which apply to digital sales as well as to digital advertising markets. The Group is of the view that these concerns cannot be adequately addressed by changes to the general competition law framework as those tools are slow, uncertain and, crucially, do not work effectively where there is an imbalance of market power in a continuing trading relationship.

- 4 We therefore wholeheartedly agree with the need for an enforceable code, as identified by the Furman report and endorsed by the CMA in the Interim Report. However, as the CMA anticipates might be the case in the Interim Report, we consider that issues to be addressed by a code are broader in scope than digital advertising. We therefore agree that it is more appropriate for there to be a recommendation to government to put in place a broader-based remedy than is possible by reference to the scope of the market study or would be possible following a market investigation reference.
- 5 Experiences in other sectors show that a specific, legally binding code, with appropriate investigation, enforcement and proactive engagement powers, can go some way to address the harms caused by an imbalance of market power.
- 6 Our experience of observing the introduction of codes to regulate the relationships between supermarkets and suppliers across many jurisdictions suggests that the establishment of the right enforcement framework to make a code effective is at least as important as the substantive content of the code itself.¹ A code could quickly become irrelevant without an infrastructure that encourages use of a code at a trading level, particularly in circumstances where businesses are fearful of reprisals from a critical trading partner.

7 EFFECTIVENESS OF CURRENT MECHANISMS

In its Interim Report, the CMA has recognised the difficulties of anti-trust enforcement and advocates a code of conduct to improve the online advertising market:

"where the range and complexity of issues are such that antitrust tools alone are not sufficient to resolve them. The code of conduct could work as an effective complement to competition law, addressing concerns that require rapid intervention to avoid lasting competitive harm and, for the firms captured by the code, providing increased certainty over what represents acceptable behaviour when interacting with users and competitors."

- 8 The standard competition framework is a slow and cumbersome tool in digital markets. A private action for abuse of dominance against a platform would meet significant hurdles: any complainant would need to precisely define and measure the relevant market(s) and to analyse consumer harms against the benefits that digital markets provide. We are not aware of any retailer or supplier attempting, much less successfully taking action against, a large digital gatekeeper.
- 9 Suppliers are reluctant to raise concerns, citing:
 - an apparent unwillingness by platforms to resolve issues.
 - the negative consequences of retaliation (which include delisting);
 - the length of time it takes to resolve disputes; and
 - a lack of clarity on what steps to take to seek solutions when problems arise.

A lack of clarity affects the platforms too and they may fear incurring greater costs than rival platforms if they are the first to improve current practices. A well-understood, mandatory regime can bring benefits to everyone by providing a transient, level playing field for all.

¹ See for example "What have we learnt from the regulation of unfair trading practices?" delivered at the 2019 Oxford Symposium: Trends in retail competition ([Link](#))

10 CODE OF CONDUCT

A code of conduct addressing commercial practices would not be precisely the same as one regulating online advertising but could usefully be amalgamated with a code of conduct governing digital advertising since many of the issues² (such as self-preferencing, unfair balance of power, lack of transparency, conflicts of interest) are similar to those that apply in other markets.

11 We agree with the comments set out in the Interim Report³ advocating the benefits of a code. The Group also agrees that the pace of change in digital markets is so fast that a code should take the form of flexible, high-level principles rather than detailed and prescriptive rules.⁴

12 An effective enforcement regime, such as that of the Groceries Code Adjudicator, overcomes a number of hurdles to effective enforcement through tools which include:

- a tailored, mandatory regime;
- proactive obligations on retailers bound by the code to report on their compliance and to monitor progress and continuous, proactive engagement by a dedicated regulator;
- an incentive for retailers to resolve problems with suppliers quickly and directly, without recourse to the regulator;
- the ability to collect information on a confidential basis to protect market participants from reprisal and then to initiate own initiative investigations; and
- the power to impose meaningful sanctions.

13 The Principles identified by the CMA in the context of digital advertising in the Interim Report are broad enough to address, at a high level, the issues that are raised in the context of platforms for online selling⁵ as well as for digital markets. However, the examples to illustrate those principles would need to be broadened to include some of the circumstances that arise in these markets.

14 The guidance and examples in a code should be informed by key principles familiar from other markets' regulatory regimes and should aim to cover the following, all of which can be regarded as illustrations of the Principles identified in the Interim Report:

- ensuring platform operators are not required to accede to unfair terms to use the platforms;
- transparency of terms so users can assess risk and plan;⁶
- transparency of processes, e.g. how algorithms present search results (without revealing commercially sensitive information), approvals to trade, price changes, suspension and termination;⁷

² as summarised in table 6.1 on page 241 of the Interim Report

³ in paragraph 6.22 of the Interim Report

⁴ Interim Report, paragraph 69

⁵ The table at Annex 1 also shows how the issues raised by the Case Studies relate to the CMA Principles.

⁶ As proposed in Article 3 (re general terms) and Article 6 (re ranking) of the proposal for the Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0238&from=EN>

- reasonable notice of key changes;
 - ensuring management of conflicts of interest for providers of platform services who also compete with their users, in particular to prevent undue discrimination against particular users;
 - fair, access to information/customer insight;
 - requirements for policies to deal with fair use of IP, recommendations etc to avoid distorting competition between suppliers (such as mandatory separation of data within businesses, prohibitions on self-preferencing); and
 - ensuring personal data mobility and open systems.
- 15 Excessive flexibility will create uncertainty and militate against use of the code. The Groceries Code has partially addressed this by presumptions as to the burden of proof so that questions such as whether a retailer has acted reasonably or has required a supplier to act in a particular way are for the retailer, not the supplier, to show. This strikes a sensible balance between commercial flexibility which benefits all parties and consumers and the risks of under enforcement/use of a code which is insufficiently clear or certain.
- 16 PROACTIVE REGULATION NOT NOVEL AND CAN BE PROPORTIONATE
- There are numerous models by which similar harms to those which arise in digital markets have been addressed proportionately to date, both reactively and proactively whether through undertakings, following a market investigation and/or through standalone legislation. For example:
- commitments entered into in the Google AdWords cases such as policies to be determined on objective, transparent and non-discriminatory grounds; advance disclosure of policy changes to policies to those who might be affected; published procedures for suspending accounts; and clarification of rules (commitments that go well beyond the remedy of specific competition law breaches);
 - undertakings from 25 price comparison sites, including to display the full cost of a room up front, after the CMA found that that searches were being influenced by factors other than those relevant to the consumer;⁸
 - the development of the Groceries Supply Code of Conduct to govern and address unfair trading practices between large groceries retailers and their suppliers. This includes, amongst other things, a 'principle of fair dealing' provision to deal with retrospective contract variations, requirements for unfair charges, delays in payment and inadequate notice;⁹
 - the development of the Pubs Code to promote fair and lawful dealing and increase rights for tied pub tenants to receive information, have their rent reviewed or, in certain circumstances, exit from a tie;¹⁰
 - the approach in regulated telecoms/utilities markets, which will be tailored to their circumstances, but where regulated companies are typically prohibited from engaging in undue discrimination and are expected to adopt a fair approach in engaging with others,

⁷ As proposed in Article 4 of the proposal for the Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0238&from=EN>

⁸ <https://www.gov.uk/government/news/major-overhaul-of-hotel-booking-sector-after-cma-action>

⁹ <https://www.gov.uk/government/organisations/groceries-code-adjudicator>

¹⁰ <https://www.legislation.gov.uk/uksi/2016/790/contents/made>

including fair procedures and fair information sharing; and

- measures taken in banking markets to facilitate innovation and choice through the use of Open Banking remedies, following the CMA Retail banking investigation.¹¹

17 ENFORCEMENT

Experiences in the regulation of unfair trading practices across the world provides ample evidence that a mandatory, properly enforceable regime can work. An independent enforcing body, with sufficient powers, who is empowered and able to interact with retailers and suppliers, will be key to the success of a binding code.

- 18 In the UK, the Grocery Code Adjudicator (GCA), who has the power to issue fines and launch investigations and an obligation to monitor progress through annual reports, has proved to be very effective in addressing supplier harms that were prevalent in the groceries market. The 'soft power' of the GCA is very significant. Without having adjudicated on a large number of cases or launched a large number of investigations, the GCA has had a significant impact on the behaviour of retailers who build the code into their everyday working practices.

- 19 Similar regimes have been introduced in Australia, Ireland, Spain, France, the Czech Republic and Hungary, but those with more limited enforcement powers have tended to be less effective in changing market conduct.

- 20 The experiences of these regulators point to some key qualities of an effective regime, including:

- the importance of direct enforcement, investigative powers and effective sanctions including fines and requirements to report publicly on compliance;
- the value of continuous engagement;
- confidentiality/supplier anonymity;
- the value of independence of the regulator; and
- the value of monitoring/reporting.

21 CONCLUSION

The Group is encouraged by the Interim Report and would like to see it expanded to encompass digital markets more broadly. There is a body of evidence pointing to the significant benefits of a legally binding code of conduct with appropriate investigation, enforcement and proactive engagement powers.

- 22 We would be very happy to provide further evidence of its members' experiences. If you have any queries about our response, please contact John Noble jn@britishbrandsgroup.org.uk

J A Noble

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¹¹ <https://www.openbanking.org.uk/about-us/>