EURIM DIGITAL POLICY ALLIANCE
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Digital Competition Policy Group
Submission

March 2020

Submission to CMA Interim Report – Recommendation for a Market Investigation

The Rt Hon Lord Andrew Tyrie,
Chair, Competition and Markets Authority
The Cabot
25 Cabot Square
London
E14 4QZ

Cc Will Hayter

24th March 2020

Dear Lord Tyrie,

Further to our letter to you of 7th February, and your response of 5th March 2020 we note that the government announced on 11 March a new "Task Force" to investigate and further report on a code of conduct for digital market players. In summary, our concern is that the Task Force and its report may delay your ability to enforce the law now, and we recommend that where action can be taken now, it should be.

The Task Force is set to produce a report in September 2020. Its remit covers a long list of critical questions that are currently unanswered[1]: the Task Force has also been asked to report on interactions with other relevant regulators and provide advice on six major areas from its scope and content through powers, processes and remedies, through to international coordination. We believe that ensuring the health of future digital markets for all stakeholders – including current and future businesses, current and future consumers and society – is a worthwhile goal for the Task Force. Our suggestions would contribute to strengthening the position of the Task Force and its successor organisations towards this goal.

The CMA has already identified key Adverse Effects on Competition (AEC's)[2] in its consultation on its Online Platforms and Digital Advertising Market Study Interim Report (the "**Report**"). The CMA already has the powers to address those issues, has identified potential remedies, and they could take action now; or defer to a code of conduct.

We see the case for action to address current issues, such as control over, and access to, data, which is a central issue to the health of all online markets. A Market Investigation addressing that central

[1] Such as the form of a code of conduct, whether it should be principles based, outcome based or rules based, and whether it could apply to platforms relationships with businesses or customers, and whether individual codes might be needed for individual platforms or markets.
[2] Para 7.8 of the Report

issue should not be delayed pending the report from the Task Force.

We also support the case for greater powers and the CMA's bid to take the lead in Digital Markets – being responsible for the Digital Markets Unit. Indeed, given the central position of the digital world to all markets, having a different body with competition powers dealing with digital matters would effectively deprive the CMA of its role and would be enormously costly, duplicative and unnecessary. The significance of digital business is unquestioned and we welcome the priority that this area is being given by government, particularly at the current time where increased dependence on digital resources are required.

While we see the case for a code and support a larger role for the CMA, this should not hold up the enforcement of current law to address current problems. In particular, the ongoing tragedy that is unfolding in online markets is well known and widely understood. The years to 2018/19 exposed the issues in a series of competition cases taken by the EU Commission[3], 2019 was a year of reports[4] following the EU Commission's competition decisions: these took 10 years to reach conclusion, and are now under appeal. The issues have also been thoroughly exposed in the CMA's Report, and in particular, the Annexes[5] provide detailed explanations of where current remedies either leave the position unchanged or address it insufficiently.

Those affected require urgent redress. The EU Commission's detailed investigations and formal decisions do not need to be repeated. **We see the case for swift action now in a Market Investigation that can resolve the unremedied position.** We also see the issue as one where the CMA can now step up and deliver remedies in the interests of UK consumers and businesses (as well as for those further afield), filling a gap in the proper enforcement of the law. We also see this as an opportunity for the CMA to lead the international community.[6]

Of particular note now, the entire economy is experiencing an economic shock. That shock is already having a significant impact on retail – with restaurants, bars, theatres and shops all affected. Online working and the switch to online and digital systems will be likely to disproportionately benefit the major platforms who the CMA has found to be abusing their market positions. In short, the current circumstances make it even more important that action is taken swiftly. Google and Facebook are the focus of the CMA market Report. Amazon needs to be closely scrutinised now.

Where we support the CMA's findings that can be addressed now, we identify them more specifically below in Annex 1.

In conclusion we would like to emphasise three key points:

1. There is a clear legal basis and a need for a targeted reference now. The creation of the Task Force should not be used as an excuse for delay.
2. A narrowly defined reference is more appropriate now as a means of addressing currently identified AECs than a generic code of conduct, especially as a generic code is designed operate in parallel with, and not to preclude, the application of current competition law.
3. We support the CMA becoming the Digital Market Unit and, in due course, a code of conduct could compliment the CMAs existing powers under future legislation.

[3] See for instance those canvassed in Res Publica's Report "Technopoly and what to do about it".
[4] Such as reports from the House of Lords, the EU, from Lear, and the Stigler Centre in addition to the CMA's Report.
[5] See for example pages 78 et seq of the Report and CMA findings in 3.87- 3.89 with references to remedy mechanisms currently adopted on page 245 et seq and Appendix J for specific interventions that would be feasible and would more fully address the breaches of the law already identified.
[6] See for example pages 78 et seq of the Report and CMA findings in 3.87- 3.89 with references to remedy mechanisms currently adopted on page 245 et seq and Appendix J for specific interventions that would be feasible and would more fully address the breaches of the law already identified.

We remain at your service and would be delighted to attend a meeting,

Yours sincerely,

Tim Cowen,
Industry Chair
DPA Digital Competition Policy Group

Annex 1

Prioritisation of access to data as the central issue to be addressed in a focused Market Investigation Reference.

Control over data is the main problem identified in two of the three AEC's found in the Report. These are found to arise from market power, conflicts of interest and lack of transparency, and the scale advantages in data and contracts and default payments.

We note that the CMA has made a finding (in paragraph 7.9), that, given the size and value of these individual markets, and the number of consumers affected by them, a market investigation "*would appear to be a proportionate response*". We agree.

Also, it we note the CMA in its Report also found that there are "*Potential Interventions to address sources of market power and promote competition*".[7] Again, we agree.

As a matter of practicality the CMA has also helpfully identified that "*Some of the potential interventions we discussed in the previous chapter could be implemented through the order making powers available to the CMA within a market investigation.*"[8] Key interventions that have been identified by the CMA could now be followed up in a targeted reference[9]. We again agree and see the identification of these matters as the examples[10] provided in para 7.10 that are realistic and appropriate uses of the CMA's current powers.

In making such a reference the CMA should also bear in mind that anticompetitive bundling, as found by the EU Commission in its Decisions, represents a continuing unremedied breach of EU and UK law and, in terms of the CMA's jurisdiction, the current unremedied practices have continuing adverse effects on competition and on consumers in the UK.

The EU Commission's Decisions make findings of anti-competitive behaviour that reflect the CMA's own findings. The CMA notes that remedies required by those Decisions have had little or no effect on the market in practice. Since it is the CMA's remit to address adverse effects on competition as comprehensively as possible,[11] and no other authorities are remedying the position, the CMA now has an opportunity to take a leadership position among competition authorities worldwide.

[7] Page 24 -26 of the Report
[8] Para 7.9 of the Report
[9] See page 24, specifically paras 79 & 80
[10] See 7.10 of the Report
[11] Under its Enterprise Act Jurisdiction

We recognise that addressing all the issues identified in the Report and all of its annexes could take some considerable time to resolve. However, there is nevertheless an opportunity for the CMA to prioritise and take a more surgical approach – solving the issues of control over data now. Addressing the central issue of control over data at the heart of the online ecosystem through a narrowly defined Market Investigation followed by specific remedies providing more open access to data for third parties would break the current "lock" over end- user data for the benefit of end-users and the online ecosystem more generally.

UK consumers, market participants and the economy would benefit enormously.

The CMA's Jurisdiction.

Starting with the end user and remedying the anti-competitive practices and restrictions on user control over data was canvassed in Annex E of the Report. A number of respondents to the enquiry- as well as the Furman Review - have suggested that it is a way forward and would be the mechanism through which much anti-competitive harm could be addressed. It is entirely within the CMA's jurisdiction for control over data to be addressed and prioritised.

The CMA is entitled[12] to make a reference when:

- The findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition; and
- A market investigation appears to be the appropriate and proportionate response, taking into account the scale of the suspected problem that a reference could resolve, the likely hood that remedies would be available, that undertakings in lieu of a reference could not resolve the issues, and there are no alternative powers currently existing that would be available, for example through sectoral regulation, to address the issues identified.

From the detailed work done by the CMA in its Report and the remedies outlined in the annexes to that report, the requirements for the CMA to exercise its jurisdiction have been more than met. We consider that such a reference is now needed, and further delay will allow long-standing and widely understood breaches of the law to continue to go unpunished. Allowing the current position to persist sends the wrong signal to law abiding business and society generally.

Scope for Remedies now, in addition to, and complimenting a Code of Conduct, in the future.

The CMA has identified a range of potential remedies to various problems identified and is considering whether a code of conduct may be the appropriate response, or a response that could compliment a narrowly focused reference.[13]

One significant point for the CMA to bear uppermost in mind is that the CMA's current powers to remedy competition problems identified in its market investigations are more extensive than the remedies available under other competition legislation or available to the EU Commission.[14] The EU, in particular, is legally limited to identifying and addressing specific infringements and remedying them. The EU operates under an entirely different regime, within a different timeframe, and subject

[12] Section 131 Enterprise Act 2002

[13] See in particular Appendices I to M of the Report

[14] Here we draw the CMA's attention to the fact that its legal duty is materially different from the position of the EU Commission under EU law, being concerned with the "**promotion of competition"**[14] as it requires action and remedies at a deeper level that that required of policy positions that merely seek to preserve consumer welfare.

to a different legal standard of judicial review.[15] By contrast, the CMA is required to adopt a remedy that is forward looking and can broadly look to address both established infringements and remedies to them, as well as matters mitigating or preventing the adverse effects on competition from arising in future. By contrast with other powers, the Market Investigation Regime allows the CMA to put in place remedies that are "as comprehensive as possible"[16] and has a broad discretion and wide-ranging powers.

It is unlikely that new legislation would afford the CMA more extensive powers than it has under current law, and unreasonable to presume that currently identified problems and remedies could be more effectively resolved under a new and different regime, which does not currently exist, and will depend on the outputs from the Task Force. That is not to say we oppose new powers if needed – but we see no case for holding up the enforcement of the law awaiting the outcome of what may or may not be feasible under a code of conduct.

Some respondents observed that interoperability and access remedies can now be applied by the CMA and would supplement the EU Commission Decisions. Remedies for known breaches could include:

- Unbundling or disaggregation where bundling has been found– allowing users to exercise meaningful choice - here choice screens were effective in past cases (such as Microsoft) and could be used to restore consumer choice again.
- Non-discrimination helps users to have choices and addresses discrimination of all forms, including product placement and the self-promotion of own products, and/or the suppression of competing alternatives.
- Must carry obligations – which have been widely used in telecommunications and broadcasting to increase user choice.
- Non-discrimination requires transparency of supply terms which can be achieved through obligations to reference published interface information and API standards.
- Standards to address technological incompatibility – standards can improve user experience and the quality of service so that platform players cannot use their bottleneck position to diminish the users' experience of competing alternatives.
- Standard terms and contracts for access can contain obligations so that the dominant company is required to offer upgrades to all at the same time and to supply technologically compatible products to all in different levels in the supply chain on notice on fair, reasonable and non-discriminatory basis.

The above are, in principle, examples of remedies "mirroring" the anti-competitive offence. A remedy under the CMA's powers can go further than just resolving the immediate problem. The legislation provides the CMA with powers to also remediate the effects and consequences of that problem in the market, and there is also scope for remedies to seek to provide relief to those harmed by many years of abuse.

Measuring interoperability and monitoring of self-preference and discrimination should, in principle be defined in terms of the outputs to downstream market providers. As with the well- known competition remedies originally put in place to resolve the access issue between BT and Openreach, transparency of inputs can be required to be supplied and published to access seekers for both product development, and monitoring and enforcement purposes, allowing third parties to enforce the law and alleviating the burden on the independent monitoring trustee (or equivalent).

[15] EU jurisdiction is unlikely to be an issue given the Government's Brexit timetable and the ineffectiveness of current EU remedies cannot be used as an argument for exclusive EU jurisdiction, nor would EU jurisdiction prevent a Market Investigation addressing issues in the market that are beyond the narrower scope of EU investigations and decisions.
[16] S 134 (4)

Market Investigation and remedies now, or code of conduct under future legislation? - or both?

We see the case for a code of conduct as having some potential as part of a long-term solution. However, we also consider that such an alternative is not reasonably or readily appropriate to meet the above key issues. In simple terms we see the use of the current law is likely to be swifter and more effective than use of legislation that has yet to be prepared.

A code will depend on the outputs and advice of the Task Force and new legislation. We have no guarantee when such legislation would be forthcoming, nor that it will, after being enacted, actually be applicable to the problems already identified. Nor will we know how key concepts such as "Strategic Market Status" will be defined in law, or found by and after due process to be applicable to the market players, with every likelihood any such finding could be appealed through the courts following such determination.

We have outlined above that the CMA has in fact established in its Report that it already has "reasonable grounds for suspecting" that one or more "features of the market"[17] prevents, restricts or distorts competition in the supply of goods or services in the UK. We also consider as a matter of proportionality that the CMA can have both a targeted reference and seek more extensive powers. A code of conduct could supersede any remedies adopted in the meantime, where appropriate.

Specific Observations on the Code of Conduct alternative: Prospective Timeframe and Issues with Application and Enforcement

As noted in 6.19 of the Report, the Furman review was concerned that existing UK and EU competition law operates on an ex-post basis and could not, therefore comprehensively address forward looking anticompetitive behaviour. The Furman Review proposed a pro-competitive code of conduct. The code would set out principles to govern the behaviour of platforms with Strategic Market Status (SMS) requiring them to act in a way that ensures that consumers and businesses dealing with them are fairly treated and vigorous competition can take place.

As a preliminary point, we consider that the Furman Review's criticisms are directed at the shortcomings of the day to day enforcement of competition law in the UK and EU generally, which can be described as an ex-post regime. As such, breaches of the law are investigated, found and remedied on a case by case basis under either Chapter I or II of the Competition Act. The Furman Review's criticisms of ex-post investigations were not, however, directed at forward looking competition law as exists under the Market Investigation regime.[18] The CMA's market studies, and investigation regime is forward looking it contains considerable ex ante features.

We see the case for a code of conduct nevertheless to have attractions[19] because:

- A code would allow action with relation to firms with established dominant positions. The positive duties of dominant firms (to ensure that competition is not distorted) exist but are not always clear.
- The formulation of those positive duties, and how they should apply to dominant on-line platforms, could be contained in the code and applied as a starting point for compliance by dominant firms.
- Current law on interim relief or interim measures exists to restrain anticipated breach or likely breach. This presupposes some degree of knowledge that breach is going to take place before it happens. However, dominant online platforms have a massive information

[17] EA 2002 s 131

[18] S 134 Enterprise Act 2002.

[19] See para 6.21 et seq of the Report

advantage. They hold all the information. In open markets, one party to a contract frequently has enough information about the conduct of the other to restrain breach before it takes place – and somewhere else to go if breach occurs. In online markets, smaller players operate at the mercy of the dominant platforms; they are dependent on them and have no alternative. Dominant platforms release nothing about their actions and do not have customer service desks to call. They are both the gatekeepers and the source of information about many day-to-day aspects of activity. This information advantage allows them to abuse their position and for it to go unchallenged. Third parties often have no information on which to prove their cases: and post action disclosure in private actions is inadequate to the task. A code, could, in accordance with the duties imposed at law on the dominant platforms, contain obligations to report forward looking action. In short, more can be done to prevent the car from crashing than to wait for the car to crash and then identify the cause of the crash.

- Actions that may be innocuous for a non-dominant firm – such as exclusivity agreements that help firms penetrate new markets and can be pro-competitive - could, if adopted by dominant firms, instead foreclose markets and distort competition. Exclusivity agreements are rife in the online world. Dominant platforms companies used them to penetrate the market. They have continued for years and now operate to foreclose rivals.
- When dealing with a firm whose market power means its existence affects the structure of the market, and its actions can, therefore, more easily distort markets – often in ways that are unappreciated. The current case-by-case position under the Competition Act, or the long process that is involved in a case by case EU investigation, could be complimented by a regulatory regime, with obligations of disclosure in advance of action. The ability of close monitoring and scrutiny of information could then take place, and continuous dialogue would help address such matters more swiftly.
- A code could then be helpful in changing behaviour much more rapidly - much will depend on whether the regulator to obtain information and nip in the bud the potential breach.
- A code overseen by an industry regulator could also benefit from the increased knowledge that an industry focus brings. It can be anticipated that consultation with other digital market players and the process of consultation would identify evidence and information that would better inform the regulatory body on a regular basis.
- Digital Markets are highly sophisticated, both technically and in terms of market structure. It would be beneficial to have a dedicated unit containing people with deep industry knowledge and experience of enforcement to enforce the code.
- Most importantly, as the code is concerned with swift enforcement, experience of how to enforce the law in technology markets and against the major platforms will also be critical and will be needed in the DMU along with the key skills or capabilities required in managing the unit.
- A code could be a valuable tool in improving transparency and hence trust in the market. The regulator enforcing the code could be given powers to audit and scrutinise the workings of opaque algorithms and to take initiative and investigate concerns around conflicts of interest or discriminatory treatment of some customers or market participants. This, as noted by the CMA, could potentially address the opacity and lack of trust which has developed in the markets it has reviewed.

CMA has recognised that a code of conduct would not preclude enforcement.

The CMA has anticipated that a code of conduct would not preclude competition law enforcement.[20] Likewise, in anticipation of new legislation being in place, current competition law should not be

[20] Para 6.25 of the Report

precluded by a new law before it has been created. Action under current law may, in due course be superseded or complimented by subsequent action under the new regime when, and if, it exists.

Time frames and current harms

The time horizon for a new regime to be created is a severe concern when the speed of change of the markets affected by current anticompetitive practices is considered. UK consumers and businesses will continue to be impacted in the meantime. Consumers will continue to suffer from lack of control over their data, lack of ability to control their privacy, and lack of choice of the rich variety of alternative products that exist but which are being foreclosed or obscured by the dominant players' anti-competitive practices.

Key dependencies will include when the Task Force will report and what it will say, then when and if the Government will propose and consult on the new regime. It has to be recognised that the process of developing new legislation in our Parliamentary system will provide opportunities for platform companies to use their extensive influencing and lobbying power. The proposals may be watered down and their intent blunted. Litigation to test the applicability of new concepts could also be expected from those whose business interests would be affected. The overall time scale for new legislation cannot be defined.

Enforcement and the need for coordination with other competition authorities

The CMA has identified a need to work with other competition authorities given the global nature of the technology ecosystems and organisations concerned. We consider that this is important but should not be used as an excuse for delay - especially where other bodies have already acted and imposed meaningless fines without much in the way of real market impact or a noticeable change to the behaviour of the platform players.

We consider that compliance by multinational companies with all laws involves them in working out which jurisdiction is likely to take the strictest approach to enforcement. If the UK were to be the strictest enforcer of competition law, then the UK could lead worldwide enforcement. This should be particularly attractive given the very well-established nature of non-compliance with the law, the undisputed dominance[21] of key players, and the continuing breach of the rules.

Also, criticism has been made of the lack of incentive toward compliance arising from the fines levied by the EU Commission. A more powerful incentive toward compliance than any fine can be found in a legally enforceable and published compliance order, as exists in the CMA's toolkit. That could be fashioned with an eye on enabling English Court actions for damages for breach and an "account of profits" for breach could be enshrined as part of a remedy.

Conclusions

We conclude with these additional key points:

1) There is a clear legal basis and a need for a targeted reference now. The creation of the Task Force should not be used as an excuse for delay.
2) A narrowly defined reference is more appropriate now as a means of addressing currently identified AECs than a generic code of conduct, especially since a generic code is designed to operate in parallel with, and not to preclude, the application of current competition law.
3) We support the CMA becoming the Digital Market Unit and, in due course, a code of conduct could be brought into compliment the CMAs existing powers under future legislation.

[21] Google in particular has not disputed its dominant position in any of its current appeals to the Court of Justice.