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Digital Competition Policy Working Group - Response

August 2020

Response to CMA Call for Inputs on the Digital Markets Taskforce on the Establishment of a Digital Markets Unit ("DMU") following the CMA Market Study into Online Platforms and Digital Advertising, Recommendations in the Final Report, and the Furman Review: Remedies

Executive Summary

This submission by the DPA** provides an outline of how remedies in practice can be effectively formulated to address the clear Adverse Effects on Competition ("AECs") identified by the CMA's Market Study on Online Platforms and Digital Advertising. The CMA proposed the creation of a Digital Markets Unit ("DMU") and recommended matters for it to address. In taking that work forward with the current CMA Call for Inputs, the DPA provides observations that are intended to support the CMA Task Force in its work and help the design of a system and remedies that are likely to work in practice.

This submission highlights organisational, legal, and economic principles that can be practically applied, taking into account factors associated with the 'abuse of dominance' for which the CMA has provided extensive evidence. In summary, the DPA sets out insights for a practical approach within the three areas:

I. Organisational challenges that can be addressed regarding the need for more rapid resolution of matters, and the need for a new entity such as the DMU.

A DMU is based not only on the need for new powers but also for specialist skills, separate budget and broader remit as recognised by the 2019 Unlocking Digital Competition report, known as the Furman Review. The Review recognised the importance of continued EU coordination, the EU Communication of May 2016 and the Regulation on fairness and transparency for online intermediation services whose principles also align with the forthcoming Digital Services Act Package. A DMU would necessarily focus more on these markets rather than the entire economy as covered by the CMA.

II. Legal design elements that are central to implementing remedies.

For this submission, remedies are not about imposing fines or compensation but producing measures that bring an infringement to an end – 'to stop...anticompetitive effects, prevent their recurrence and restore competition'. (OECD) This remedial approach is at the heart of this section, as are measures to restore the

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competitive process, identify and evidence likely adverse effects, and establish data ownership clearly in new legislation.

III. Economic design principles.

These consider online platforms and digital advertising as being a 'public good' while also acknowledging that it is difficult to exclude someone from benefiting from the data. This section supports the application of well-regarded design principles for common pool resource management to the use of data and access to online platforms. Additionally, an annex in this section draws attention to the extensive evidence of the abuse of market power that contradicts aims of competition law. Abuse in terms of access, balance and consistency are discussed as is the CMA economic theory that underpins the remedies approach. For ease of reference a CMA typology of data-related remedies is provided.

Introduction

The CMA asks initial questions relating to the definition of "Strategic Market Status"[1]. The CMA cross-refers to various concepts such as "gateway" and "bottleneck" and the Significant Market Power ("SMP") designation, initially contained in *ex ante* telecommunication regulation in 1998. We wish to draw the CMA's attention to the fact that SMP was, in 2002, redefined with reference to the competition law concept of dominance. That redefinition helped to avoid inconsistency in the application of regulatory and competition law interventions across the EU.[2]

We also see the case for adopting the approach taken in Germany's "Digitalization Act"[3] which is supported by France, Italy and Poland and which addresses issues such as data access and portability, cross market leveraging, and intermediation power. That law involves the imposition of obligations on "Undertakings of Paramount Significance for Competition" and prohibits conduct where undertakings have "Relative or Superior" market power. We appreciate that international coordination is important to the CMA and consider that there is likely to be action throughout the EU, and the UK should ensure that its future regime is consistent with the German position and more generally.[4]

The CMA consultation also asks whether the "Key Characteristics" of speed, flexibility, clarity, and legal certainty are the right ones for the new approach and what factors the taskforce should consider when assessing the design of the system.[5] These are fine characteristics but the important issue is how the DMU is organised and designed if the outcomes desired by the CMA are to be achieved.

On the remaining questions, the CMA requests input on the potential of a code to address the issues identified and the design and powers and procedures, and how the DMU might operate. We have divided our observations into three main areas:

(i) Organisational Design Principles;

(ii) Legal Design Principles; and

(iii) Economic Design Principles.

We include at Annex 1 details on continuing abuse of dominance and how Facebook and Google should now comply with the law and offer a range of choices of terms and conditions - introducing alternative T's and C's - reflecting the position that would otherwise exist in competitive markets.

[1] CMA call for information Digital Markets Taskforce 1 July 2020.p15.

[2] See OJ C165/6. Ii.7.2002. Commission guidance on the assessment of Significant Market Power. Para 5 sates: "*On all of these markets, NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive (7) as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 82 of the EC Treaty (8). The notion of dominance has been defined in the case-law of the Court of Justice as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. Therefore, under the new regulatory framework, in contrast with the 1998 framework, the Commission and the NRAs will rely on competition law principles and methodologies to define the markets to be regulated ex-ante and to assess whether undertakings have significant market power ('SMP') on those markets.*" The Commission has recently issued more up to date guidance on market definition in line with the most recent telecoms regulation which updates the CMA references in the consultation to the previous law.

[3] https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf. An (unofficial) English translation D'Kart, the Düsseldorf antitrust blog (www.d-kart.de), of key provisions can be found here: https://www.d-kart.de/wp-content/uploads/2020/02/GWB10-Engl-Translation-2020-02-21.pdf.

[4] In fact, the EU Commission's strategy of "shaping Europe's digital future" published on February 19, 2020 adopts this approach.

[5] CMA call for information Digital markets taskforce 1 July 2020 p 30.

I. Organisational Design Principles

The CMA has identified AECs[6], and made recommendations to address them via a DMU and code together with a list of interventions, some structural or semi-structural, and some that are behavioural. The "DMU system" that is proposed aims to address the issues swiftly. These are goals with which few could disagree. However, they raise significant unstated organisational challenges. We address key organisational matters before touching on legal issues and experience in Common Pool Resource economics that may be relevant to the design of an effective DMU system.

We have broken down our observations on organisation into (i) the need for speed; (ii) the need for a new organisation; and (iii) the broader remit for the DMU than the CMA:

- **The need for speed**. Achieving faster resolution of matters will be facilitated through:

    - **Anticipation and prevention.** The Enterprise Act requires the CMA and the DMU to remedy, monitor, and prevent anticompetitive actions from arising. Sparsely used in the past, interim relief powers are available. However real anticipation of market developments requires the organisation of early warning systems and the building of trusted relationships both with defendants and complainants and, beyond that, with market participants and representative bodies so that the authority has the knowledge with which to act before irreversible change takes place. Authorities need to use smarter and more targeted requests for information and documents in the early stages of the process. Managed effectively, many potential issues can be nipped in the bud – particularly if legal sanctions are significant and personal (such as contempt of court). Systems for intelligence gathering from financial markets and forward-looking statements made to shareholders and investors are standard sources of evidence for those dealing with enforcement action in private practice and need to be adopted by the DMU. Forward looking intelligence gathering techniques and management of corporate relationships are almost entirely absent in the more reactive world of competition authorities.

    - **New process of evaluating and testing remedies for their effects before accepting them.** The EU Article 9 process in the Google Shopping case is an example of where market testing showed that changes to SERPS proposed by Google to resolve the Commission's concerns were cosmetic at best. To avoid practically useless remedies, they should be tested for effectiveness before being accepted. New processes are needed that enable the authority to propose and test solutions in the market for their market effect in swiftly remedying the position. Defendants should be required to demonstrate and prove the effectiveness of proposed remedies within short timeframes before they are accepted and implemented.

    - **Confidentiality processes.** Input and evidence gathered from the platforms and those affected will need to be treated in confidence. The information asymmetry between dominant players and the rest of the industry is well known. Access to information will need to be protected from commercial misuse.

    - **New confidentiality protection and evaluation processes.** The current processes and procedures used by the CMA and the EU Commission are enormously time consuming. The balance of interests involved - protecting defendant interests and enabling access to the file

[6] CMA Interim Report Chapter 7.

by third parties, or not, or only supplying the "gist" of the evidence, or not, are cumbersome and the source of much delay in many current processes. Overclaiming confidentiality by defendants is also a common feature. New, faster and more effective processes are needed and will depend in turn on the scope of remit and responsibility and the extent of the discretion available to the DMU; its "margin of manoeuvre" in making decisions. The established High Court practice could be adopted which prevents parties from overclaiming confidentiality and holding up publication – by which operative decisions are reached and published based on confidential facts – followed by later publication of the full decisions with reasons and evidence after confidentiality redactions. The High Court practice enables a swifter decision- making process while respecting the rights of the defence and third parties.

- **Evidence.** Key areas for improvement that would speed up enforcement activity include authority practices in identifying sources of evidence, evidence gathering techniques, use of experts, use of expert tools, understanding evidence chains, appreciating the weight of evidence, use of technical, financial and other expert evidence (not just "economic" evidence).

- **Use of Expert witnesses.** The CMA's ways of working, its systems and processes, would be inadequate for swift enforcement as needed by the DMU. The same could be said about EU antitrust, owing much to the slow and deliberate processes in EU-wide administrative law, not specifically designed to meet the 21st century needs of enforcement action in digital markets. For example, use of external technical expert witnesses is commonplace in antitrust litigation and enforcement action, especially in digital markets. Use of expert witnesses saves time and speeds up understanding but, apart from economic expertise, is rarely used by competition authorities in enforcement action.

- **Use of external lawyers.** Competition authorities do not regularly use external lawyers and firms to build cases; only using barristers to deal with the cases the authorities have put together, as best they can. A strong case can be made for design and build of cases to be developed with more external help in the early stages such as case characterisation, evidence gathering, identification of sources of evidence etc., as well as evaluation of likely success.

- **Working closely with affected industry.** Much evidence will come from third parties and close working is vital but can raise many challenges where the industry is so concentrated (risk of retaliation, risk of bias in information provided, limitations of corroborative evidence etc.).

- **US processes for enforcement.** As a matter of legal culture, the English and the US courts have a common law history**.** Drawing on US processes through which evidence is gathered and verified in what is, in effect, prelitigation disclosure, is both effective and saves time and costs in the court process. Swift solutions can be achieved in merger control partly as a result of what is in effect the prelitigation disclosure process originally introduced by the US authorities, and now more widely used worldwide. For example, resolution of an authority's case is frequently resolved in the US through a court backed settlement process agreed between parties to a merger and the enforcement authority. Consideration should be given to use of such a process to enforce the law by the DMU; breach of which court order

ultimately provides the basis for a contempt of court case against the individuals involved, and is enforceable in the ordinary way in the court system internationally**.**

- **The need for a new organisation – the DMU.** The case for the DMU is only partly founded on the CMA's acceptance of the need for new powers. The case is also based on the Furman Review recommendations, which recognise the EU coordination and the EU Communication of May 2016[7] and Regulation on Fairness and transparency for online intermediation services[8] whose core principles are consistent, as they should be with the CMA Final Report, and the forthcoming Digital Services Act Package. The Furman report recognises a need for business consultation and participation, greater certainty and swifter resolution which requires ***specialist skills, a separate budget and a broader remit.***

    - **Focus.** The more familiar people are with a task the quicker they are at it. The title of the DMU improves the focus from the outset. A "Digital Markets Unit" should be more focused on digital markets – however broad and deep – than a Competition and Markets Authority covering the entire economy. However, people spending time in one area of the economy or industrial sector does not necessarily increase their expertise; focus on industry segment and forward-looking developments are also needed. Expertise is based on facts and evidence and experience. The risk is that an authority, even one focused on Digital Markets, that seeks to evidence every decision using consultation spends more time on historic information looking backwards at what has happened as a way of assessing the effects on the market in the future. This involves "driving through the rear-view mirror" and plagues regulators such as Ofcom. There is also a risk that the authority's attention can be distracted by lengthy submissions and lengthy consultation processes, providing much out of date and irrelevant information, with limited attention to a forward view of the market.

    - **Task and people management.** Enforcement tasks are varied and complex, and people's expertise is built over time. The CMA has spent a very small proportion of total man hours on enforcement in recent years and has, as a result, only limited task-based experience, expertise, and knowledge of enforcement and court action to address issues in digital markets. Recruitment into the DMU of people with relevant qualifications and experience in swift enforcement action, is vital. It is noted that the Furman Review found, referring to the CMA's own Annual Report and Accounts that: "***To date the CMA has brought only one abuse of dominance case in digital markets.***"[9]

    - **Responsibility, productivity, and team performance: organisational culture.** Multi-disciplinary expertise, large teams and project management techniques can slow down speedy decision making and blur responsibilities. Much greater use of external teams for all aspects of evidence gathering and enforcement action would enable the DMU to obtain the benefit of external lawyers and external expertise at a fraction of the costs of running the high fixed cost department of government. The current rates achieved by the CMA for external lawyers and experts are so cost effective that the DMU should be established to control and manage externals (with protected budgets) in order to take advantage of long term expertise that is available externally, and to help build enforcement capacity in the market.

[7] COM (2016) 288 final.
[8] Regulation (EU) on promoting fairness and transparency for business users of online intermediation services.
[9] Furman Review, para 3.116, page 103.

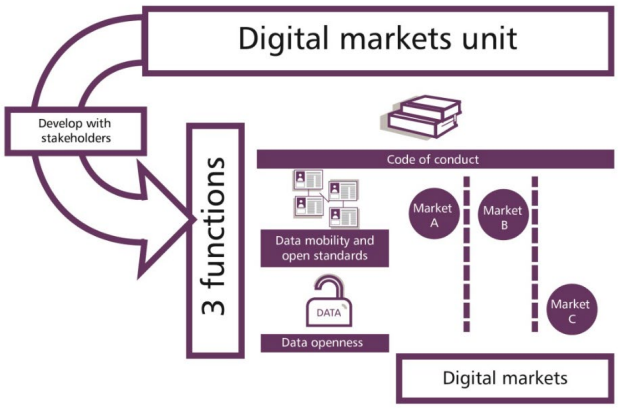
- **Measurement.** Productivity and success assessments need to be measured against market effects. Here the interaction between increasing team performance and speed can be more fully assessed when individual tasks are broken down and examined and managed in a way that is adapted to team psychology and modern management training techniques; but with the overall performance measured against whether the market is more or less effectively competitive after the intervention.

- **Management of Standards Bodies.** Both the CMA final report and the Furman Review recognised the competition issues that arise from standards and how they either promote open web-based solutions or can be manipulated to promote closed markets and walled gardens. At root, data ownership, data mobility, interoperability and access will only be facilitated over time if the systems for developing standards are open and effective in ensuring competitive outcomes. Organisationally, the current alphabet soup of standards bodies can fairly be described as collectively lacking in knowledge about competition law, in any jurisdiction, and to be unaware of the issues that they are dealing with and the effects and consequences of their activities[10]. The CMA and Furman Review correctly identify the issues; ensuring compliance, access and an open competitive web will require the DMU to build an organisation that has close relationships with technical standards bodies worldwide.

- **The broader remit.** The basis for the CMA Final Report is the Enterprise Act power to investigate entire markets. The remit for the DMU should be similar as it is being put in place in furtherance of the Recommendations of the CMA under the market investigation regime. As such at the least, the remit needs to be co-extensive with the market investigation remit and current legal powers of the CMA, on which it is based. Only then will it be able to fulfil, properly, its role as a remedy to the currently identified AECs. The Furman Review contended that a DMU would need to "*extend beyond the reach of existing competition law, clarifying situations and behaviours as unacceptable that may currently be unclear, or arguably legal.*[11] *It can give the digital markets unit the power to tackle a broader range of anti-competitive practices, by a set of firms identified as having a level of market power, than it would be reasonable for a competition authority to wield across all markets more generally.*" The CMA market investigation regime is defined as being there to address cross-market investigations and remedies, and that those remedies are "as comprehensive as possible", are also required.[12]

[10]Despite issues in the past and extensive coverage in the EU Commission Horizontal Guidelines.
[11]Furman Review para 2.45.
[12]EA 2002 s135 & 136.

Recommended action 6: Government should ensure the unit has the specialist skills, capabilities and funding needed to deliver its functions successfully.



The DPA supports the idea of a separate independent unit. It is clearly needed if it is to effectively tackle the issues arising and build the relationships needed to address data mobility, data openness, and standards that support an open, competitive web. However, boundary disputes, budgetary disputes, remit disputes, and lack of capability, specialist skills or dependency on others' priorities and timescales can be foreseen if the DMU is not set up with its own budget and powers, and a clear remit. In the past, the institutional frictions can lead to disputes but are just as likely to lead to lack of action and failure by one authority or another to take responsibility.

Suggestions that the unit might operate within or for another department appear to be misplaced and perhaps the better model would be a fully independent organisation, such as the Bank of England or National Infrastructure Commission, or modelled on Ofcom, each of which are fully independent although charged with a specific remit by government.

Ensuring operational and budgetary independence could be assured if the DMU were entrusted with fining powers and the ability to take action for compensation on behalf of government bodies affected,[13] coupled with the ability to obtain an account of profits from breach of the law.

Policing the tipping point

The ResPublica Report[14] which preceded the Furman Review raised the following questions that this section has sought to address but which also serve to reinforce the importance of these organisational issues:

i. *Management experience. Where heads of authorities have limited litigation experience, is it sensible to give them a mandate to take and manage litigation against the world's biggest companies which have unlimited budgets and the best lawyers money can buy?*

ii. *Processes and procedures adopted also typically mean that people are assembled to deal with specific transactions, investigations and issues rather than being organised into industry specific groups. The complexity of the modern economy demands greater knowledge through*

[13]For example, compensation for overcharging by abuse of dominance leading to overpayment by the NHS has to some extent been facilitated by the CMA's recent pharmaceutical cases against pay for delay practices. Such cases could be taken by the DMU as and enforcement action where government is the victim of the abuse.
[14]"*Technopoly" and what to do about it,* June 2019.

specialisation, measurement and monitoring of outcomes which would facilitate speed of understanding and more rapid decision making.

iii. *Timescales are measured in the time taken to achieve perfect administrative outcomes, rather than provide the response needed by markets in market defined timescales. Our authorities need to move at internet speed.*[15]

The ResPublica Report also recommended that**,** overall**, measurement of outcomes should be used to review the authorities' performance**. The authorities currently measure their activity in terms of cases taken, and books full of cases stand in silent testament to regulatory failure. Complex value for money assessments are made. None of these relate to beneficial effects in markets and positive outcomes in terms of competition.

We commend what has been discovered in other sectors dealing with the policing of the tipping point, from working through common pool resource management techniques:

> **Threshold management works.** More explicit use of thresholds in management is strongly associated with better outcomes.
>
> **Responsive monitoring is key**. Good outcomes are also associated with routine monitoring requirements in both retrospective and prospective cases.
>
> **Scale matters.** Smaller areas of targeted responsibility and threshold-based systems with close supervision are more likely to have good management outcomes.

II. Legal Design Principles

In a seminal article in 2009, the EU Commission's team that had investigated the Microsoft case co-authored an article on Remedies in EU antitrust law.[16] From the cases referenced there and further below, and OECD studies on access remedies and functional and structural separation, and practical experience, certain central legal design elements are required to ensure that remedies are effective, proportionate and workable. The CMA and DMU will need to be set up in a way that allows it to achieve the following:

1. **A remedy has to be remedial**.[17] To remedy a problem it has to heal the distortion in the markets. In EU Competition Law, under Regulation 1/2003, the purpose of a remedy is *to bring the infringement effectively to an end*. In UK competition law, remedies are also designed to be remedial.[18] Whether remedies for mergers that are found to be likely to substantially lessen competition or when market investigations reveal an adverse effect on competition, the CMA is charged under the Enterprise Act 2002 with the obligation of taking action " *for the purpose of remedying, mitigating or preventing"* the anticompetitive outcome "*or any adverse effect which has resulted, or may be expected to result"*

[15] "*Technopoly" and what to do about it,* June 2019.

[16] See Per Helstrom. Frank Maier Rigaud and Friedrich Wenzel- Bulst 76 Antitrust Law Journal No 1 2009. & 1 For a comprehensive account of antitrust remedies in Europe, see Philip Lowe & Frank Maier-Rigaud, Quo Vadis Antitrust Remedies, in 2007 FORDHAM COMPETITION L. INST. 597 (Barry E. Hawk ed., 2008); OECD, COMPETITION COMM., REMEDIES AND SANCTIONS IN ABUSE OF DOMINANCE CASES, DAF/COMP(2006)19 (May 15, 2007), available at http:// www.oecd.org/dataoecd/20/17/38623413.pdf.

[17] The Latin origin of the word remedy is remedium, derived from the term mederi (i.e., to heal). Similar to the idea that the punishment fits the crime: Cicero's De Legibus (On the Laws) in 106 BC.

[18] Under the EA02, the CMA may accept undertakings or impose orders (sections 82 and 84 of the EA02 (mergers) and sections 159 and 161 of the EA02 (markets)), and, where the conditions for a reference are met, the CMA may accept binding undertakings as an alternative to making a reference (section 73 of the EA02 (mergers) and section 154 of the EA02 (markets)). The CMA's different jurisdictions in competition law allow the CMA to seek different types of remedial action depending on and proportionate to the issue at hand. For example, Market Investigation's often lead to different and broader remedies than would be appropriate under merger control, both aim at remediation of the position. See CMA Merger Remedies guidelines CMA 87 December 2018. Also, CMA review of merger remedies.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/606680/understanding_past_merger_remedies_April_2017.pdf.

therefrom.[19] The CMA is also empowered to formally recommend action be taken by others to remedy the anticompetitive position or adverse effect on competition identified. A remedy is not about sanction or compensation. As the OECD suggests:[20] "*it may be useful to think of remedies as measures that aim to stop a defendant's conduct and its anticompetitive effects, prevent their recurrence, and restore competition*."

2. **"Remedy, Mitigate or Prevent."** Under UK law,[21] the remedy has to both remediate, and in so far as possible mitigate or prevent anticompetitive effects from arising.

3. **Anticipation and prevention is fast action.** Interim relief powers are available to UK regulators[22] and the CAT[23] and equivalent powers, with similarly low thresholds could be applicable to the DMU. Setting up processes to ensure the confidentiality of continuing information between the affected market participants and confidential "whistle blower" information systems will be important to create trust and confidence in market participants and to encourage those affected to bring forward their concerns and issues to the DMU. This will be especially important if the DMU is to act swiftly and address issues as they are arising. If effective, the DMU may be able to act to steer markets towards pro-competitive outcomes in a more collaborative approach with industry than in an adversarial one.

4. **A remedy has to restore the competitive process**. The quickest remedy is one that prevents the issue from arising. A simple approach often favoured by the EU commission is 'a cease and desist order' that accompanies a requirement that the defendant propose a remedy that works in a short period of time. Testing the proposed changes in advance of their being deployed, even over a short period is relatively easy in tech markets and should be preferred.[24]

5. **Effects, and likely effects need to be identified and evidenced.** However, the effects of the conduct that has operated in the market and caused anticompetitive consequences for others may continue for some time even after the action has taken place – and may cause harm long after the abusive act took place. The fact that many acts of the current platform players have been left unremedied for many years does not mean that their effects are not continuing. Bringing an offending act effectively to an end could be interpreted as a legal requirement imposing an element of restoration of the status quo ante and for the anticompetitive consequences to be undone.[25] The position is similar in the US.[26] This may be difficult to achieve for ongoing distortions, and legal boundaries to the exercise of prosecutorial discretion are needed to ensure that the DMU does not spend resources only on the latest shiny objects, new issues, or on matters that are of only historical concern or interest, but

[19]Technically, CMA Market Investigation remedies under the Enterprise Act 2002 are broader than merger remedies. For example, the wording of the statute at s135 includes reference to the additional "*or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition*".
[20]Supra OECD see also all reports on Abuse of dominance to date https://www.oecd.org/daf/competition/abuse-of-dominance-competition-roundtables.htm.
[21]S 134 EA 2002.
[22]See for example the recent Royal Mail court case concerning when preparatory acts and defendant actions are actionable – Royal Mail Plc v Office of Communications and Whistl UK Limited, [2019] CAT 27.
[23]See Rule 24, Competition Appeal Tribunal Rules 2015.
[24]The issues arising from the Google Article 9 process, where the market testing proved that Google's proposed solution only gave rise to cosmetic changes that were demonstrably ineffective need to be avoided in a short time frame.
[25]*See Case C-119/97P, Ufex v. Comm'n, 1999 E.C.R. I-1341, ¶¶ 93–94 ("the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community*, Ibid Helstrom and others
[26]The Assistant Attorney General who proposed the U.S. Department of Justice's settlement in United States v. Microsoft observed: "*An antitrust remedy . . . must stop the offending conduct, prevent its recurrence, and restore competition. Preventing recurrence must involve proactive steps to address conduct of similar nature. Restoration requires prospective relief to create lost competition and may involve actions to disadvantage the antitrust offender and/or favor its rivals*.

concentrates on matters that **promote competition**[27] both in the interest of current and future consumers and productive efficiency in digital markets in the UK.

6. **As comprehensive a solution as is reasonable and practicable.**[28] Whether for anticompetitive mergers or AECs identified in market investigations, the CMA is required 'in particular, [to] have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC (substantial lessening of competition test) and any adverse effects resulting from it'.

    a. **Effectiveness.** Addressing the competition issue requires an assessment of the impact of the remedy on the dynamic of competition in the markets concerned.[29] In these circumstances, impact can be tested by requiring the dominant platform to test and verify that the remedy works, either in a smaller geographic area or with relation to short period of time, before being rolled out generally.

    b. **Appropriate duration and timing.** It is common in antitrust remedies for there to be a time limit or sunset clause after which they are likely to have outlived their usefulness. However, in relation to the DMU such provision could be replaced with review periods for monitoring and checking on effective outcomes - rather than leaving the matter to hope and the effluxion of time**.**

    c. **Practicality.** The CMA notes that a practical remedy should be capable of effective implementation, monitoring and enforcement. With relation to platform competition it is noted that many affected wills be dependent on the platform in the future. Practicality also means that the DMU will need to act to avoid the risk of retaliation on market participants.

    d. **Risk assessment and proportionality.** Any remedy will have some degree of uncertainty as to outcome and the DMU needs to be empowered with sufficient scope of responsibility to make reasonable judgments in the public interest.

    e. **Proportionality of outcome.** It can be anticipated that reasonable justifications can be advanced for many of the actions taken by the platform operators whereby their interest and to some extent those of their consumers are benefitted by their actions, even though there are anticompetitive outcomes. In the present context, the principle of proportionality requires that the burden of proof be imposed on the defendant undertaking, to show they have brought the infringement to an end, but that does not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.[30] The DMU needs to bear in mind that proportionality as to competitive outcome in UK and EU law does not allow any objective justification to succeed and is a strict requirement, not limited to concepts such an short-term consumer benefits.

    f. **Proactivity.** Where several effective remedies are available, there is in principle a role for the infringing undertaking in selecting the appropriate remedy. And some practical benefit in allowing the platform to do so such that it selects something that it considers to be workable and is responsible for putting into effect. It is in order to comply with this principle that, in

[27] Not only short-term consumer welfare but the promotion of competition as required under the Enterprise Act see CMA market investigation guidelines.
[28] CMA Remedies Guidance, CMA 87 December 2018. 3.3. see Section 35 and 36 and 136 (6) EA 2002.
[29] See CMA Remedies guidance CMA 87 December 2018.
[30] Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, ¶ 1276.

certain cases, the EU Commission has invited the parties to put forward proposals for bringing an effective end to the infringement identified in the decision, or has presented alternative remedies in its initial assessment of the case. The DMU should be encouraged to be pro-active and both propose solutions and seek remedies from the platform player as the case and circumstances require, with a view to putting in place a solution swiftly.

g. **Equal treatment.** Some remedies are likely to involve "must carry" obligations and suggest that equality of treatment is needed for market participants. An example is the Browser choice screen remedy adopted by the EU Commission in the Microsoft case. Limiting the benefits only to complainants and not market participants generally would probably be inappropriate for a remedy that should be designed to address the issue as comprehensively as possible as is the case under the Enterprise Act.

h. **Legal certainty.** Any remedy must meet the requirements of the principle of legal certainty. Any remedy imposed must, therefore, be clear and precise so that the undertaking may know without ambiguity its rights and obligations.

i. **Transparency and third-party enforcement.** Unlike the more usual antitrust case which involves a point of intervention to address a point of failure, the DMU is intended to operate much as is the case for an industry regulator with the benefit of knowledge of the major players and parties affected and to work with them over time – overseeing the operation of a principles based regime. In such circumstances, the costs and burden of enforcement may be more readily shared with third parties, and the mechanisms adopted by the DMU to address the concerns should be developed with a view to obtaining support from affected industry and providing the necessary transparency to support third party redress, which cannot be addressed in remedies such as through compensation for past harms. The law recognises that private actions are to be supported and they are a mechanism for ensuring compliance and an incentive for platforms to comply with the law.

j. **Anti-avoidance and compliance.** Where an undertaking is provided or a change is made to behaviour that is found to infringe the law, the specific act can be addressed - but other acts that give rise to the same outcome may not be restrained. This is firstly an issue of drafting; if x is restrained and y is not, then y is permitted. Language in drafting undertakings such as "to the like effect" or to similar effect can be tried but is often found wanting and can be anticipated as creating unproductive cat vs mouse games. Linking enforcement action to compliance programs is one mechanism that can be taken to ensure that the decisions of an organisation are understood and acted upon by that organisation's employees, officers, contractors, subcontractors etc. Furthermore a lesson may be learned from the obligations imposed in financial services regulation under Sarbanes Oxley and equivalents through which individual officers of the company are required to put in place compliance regimes and obtain signoffs from the operational management to ensure that the reporting system is operating, under the ultimate responsibility of a senior board member or members, who, where non-compliance or substantive non-compliance is proved, would be subject to sanction. If the proposed system were subject to court order and contempt for non-compliance, the sanctions would be more likely to be effective than otherwise. Similarly, technological bypass or alternative technological solutions that bypass the intent of the enforcement action by adopting equivalent outcomes using different technologies can frustrate the intent of the

enforcer. A strict linkage of enforcement with compliance, backed by serious sanctions as described above, could also address this eventuality and change corporate behaviour.

7. **A remedy may be structural or behavioural.** In EU law, structural remedies can only be imposed where there is no equally effective behavioural remedy or where the equally effective behavioural remedy would be more burdensome for the undertaking concerned.[31] The effectiveness of remedies is noted by the CMA to depend on the way they operate to address the source of the competition issue. For example, restoring the process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of an anticompetitive merger, should be expected to address the adverse effects at source. Such remedies are regarded by the CMA in the merger context[32] normally to be preferable to measures that seek to regulate the ongoing behaviour of the merger parties (so-called behavioural remedies, such as price caps, supply commitments or restrictions on use of long-term contracts). The CMA considers that interventions to address the source of platform market power may be needed, and that may involve structural or quasi-structural interventions. While it is generally acknowledged that behavioural remedies are unlikely to deal with anticompetitive adverse effects as comprehensively as structural remedies, and may result in distortions when compared with a competitive market outcome, given the on-going nature of the DMU, risks inherent in behavioural remedies may be lessened in these circumstances. Effectiveness in terms of remedy outcome in addressing the competition problem thus governs the CMA's approach – and should be the main principle that governs the DMU.

8. **Establish data ownership clearly in the new law.** End users currently own their data, it can be processed and controlled by others in accordance with data protection laws, and the law recognises that individuals have information and knowledge that can be sold and licenced. Clarity about data ownership is nevertheless needed. However, controlling the use of data presupposes ownership, and clearly establishing and protecting ownership of data is a necessary first step for the UK. As stated in one influential report:

> "*In the face of monopoly or market power, where lack of choice means that data ownership is meaningless, we consider that safeguards need to be put in place to redress the balance of bargaining power to ensure that users have real sovereignty over their data. This may require regulation… Users can become assets of the major platforms. To address this issue, we consider that data ownership is more clearly established in law, so that end users can exert the primary driving force in the operation of competitive markets*."[33]

Much discussion has taken place about the status of information intermediaries as fiduciaries in their responsibility toward users. Where the data being transferred is only provided for limited purposes it is legally still the "property" owned by the end user. Depending on the type of transfer and purposes, there may already be a situation of fiduciary responsibility owed to the end user with respect to that person's data.

Moreover, under UK and EU law the dominant platform is required to operate under the duties imposed on it at law.[34] These include the usual responsibilities that can be expected in a fiduciary or trusted relationship – to

[31] See Reg 1 2003 article 7(1). According to recital 12 of Regulation 1/2003, changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.
[32] See 3.5. a) CMA 87 Remedies Guidance, December 2018.
[33] ResPublica: Technopoly and what to do about it 2019. Recommendation 10.
[34] Case 322/81 Michelin v Commission [1983] ECR 3461, para 57 – dominant companies have a special responsibility.

deal with the person's property from a position of an independent operator. However, they go much further as the obligations already imposed by the current law require, for example:

- Continuity of supply to a downstream player in a situation where refusal to supply would eliminate competition to a dominant's company's own downstream player.[35]

- Supply on non-discriminatory terms to downstream players and the dominant company's own downstream player, unless objectively justified to do otherwise.[36]

- Dominant companies not to use standard commercial practices in the market, where such practices would have a negative effect on competition.[37]

- Dominant companies to refrain from taking some steps which contribute to an improvement in production or distribution of goods but would have a negative effect on competition.[38]

- Dominant companies not to offer specific discounts only to marginal clients instead of extending them across the board.[39]

- Dominant companies not to align promotional prices with those of non-dominant competitors where this could harm competition.[40]

III. Economic Design Principles

Appendix T to the CMA Final Report refers to the basis for the CMA's economic analysis. The underlying theory refers to the classical two-part economic approach in assessing goods as being rivalrous and non-rivalrous. This is in accordance with established mid-20th century economic theory.[41]

Annex T Paragraph 6 reviews whether data is a non-rivalrous or public good and the extent to which data is also non-excludable (which means that it is difficult or infeasible to exclude someone from benefiting from data). In the context of online platforms and digital advertising, the relevant data is often highly excludable. Data owners are stripped of their rights, and platforms that are either data processors or controllers under data protection law can often choose whether to share it.

The CMA notes that the ability to control access to data is why firms which own first-party sources of data are very valuable. Data controlled by firms cannot easily be copied or accessed by others unless the data controller chooses to make it available, or there is some regulatory intervention to require access. It is recognised that access to and use of data can be an important source of competitive advantage for firms in developing user-facing services and providing effective advertising in the form of personalised ads that fund

[35]Cases 6/73 and 7/73 [1974] E.C.R – Commercial Solvents.
[36]Case IV/28.841 ABG/Oil Companies [1977] O.J. L 117.1. See also BBI/Boosey & Hawkes [1987] O.J. L286/36.
[37]Case C-310/93 P, BPB Industries and British Gypsum v Commission [1995] ECR I-865 and Cases T-191/98, T-212/98, T213-98 and T214/98, Atlantic Container Line v Commission [2003] ECR II-3275.
[38]Case C-344/98, Masterfoods v Ice Cream [2000] ECR I-11369.
[39]Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969.
[40]Case T-339/04 Wanadoo v Commission.
[41]As stated by Ostrom in her 2009 Nobel Prize essay: *Two Types of Goods In his classic definitional essay, Paul Samuelson (1954) divided goods into two types. Pure private goods are both excludable (individual a can be excluded from consuming private goods unless paid for) and rivalrous (whatever individual a consumes, no one else can consume). Public goods are both nonexcludable (impossible to keep those who have not paid for a good from consuming it) and nonrivalrous (whatever individual a consumes does not limit the consumption by others). this basic division was consistent with the dichotomy of the institutional world into private property exchanges in a market setting and government-owned property organized by a public hierarchy. The people of the world were viewed primarily as consumers or voters*.

these services. Differential access to data has implications for competition, market power, and the structure and concentration of these markets.

However, in thinking through the remedies that can be created and the design principles that could be applied to address the AECs identified by the CMA, the work done on common pool resources looks to be highly relevant and helpful. In her Nobel Prize lecture in 2009 Elinor Ostrom wrote:

> *"In light of further empirical and theoretical research, we proposed additional modifications to the classification of goods to identify fundamental differences that affect the incentives facing individuals (v. ostrom and e. ostrom 1977).*
>
> *1. replacing the term "rivalry of consumption" with "subtractability of use."*
>
> *2. conceptualizing subtractability of use and excludability to vary from low to high rather than characterizing them as either present or absent.*
>
> *3. overtly adding a very important fourth type of good – common-pool resources – that shares the attribute of subtractability with private goods and difficulty of exclusion with public goods (v. ostrom and e. ostrom 1977). forests, water systems, fisheries, and the global atmosphere are all common-pool resources of immense importance for the survival of humans on this earth.*
>
> *4. changing the name of a "club" good to a "toll" good, since many goods that share these characteristics are provided by small-scale public as well as private associations*.

Ostrom's work on the access to and use of common pool resources is highly relevant to the access to user data held by the major platforms.

Data may also be thought of as a common pool resource - it exists in a nascent state and needs to be discovered in some way in accordance with one process or another. Data can be identified, and gathered, through scientific enquiry and investigation and, in the off-line world, through examination of different sources of evidence such as financial accounts (for sales data concerning prices and traded volumes and values), trends data from multi firm sources of financial evidence (such as cross-firm sales data) or from evidence gathered directly from consumers or other economic actors in the form of surveys, or statistically significant samples and other market research techniques.

All of these offline world sources of evidence are indirect evidence of users' needs, wants and desires, and an entire industry of market research and market analysis is built on gathering, analysing and determining what the underlying data reveal about end users. The evidence gained from such sources, some of which are confidential to the firms concerned, are indirect indicators of demand, or evidence of past decisions that have been made about purchases that have been made. Direct evidence of needs wants and desires - encompassing the possibilities of users' potential interests on a forward-looking basis, would be more valuable.

In digital markets, users routinely provide digital platforms with this valuable forward-looking information. Searches and potential purchases are frequently tracked by websites in terms of, for example, search query data, wish list items or basket items that are returned to after initial investigation or from cookies and website visits where users have enabled follow up ads and push notifications.

Users' data is also taken from users by the dominant online platforms without their consent or on the pretext of being provided for one purpose and used for another.[42] Data gathered by the dominant platforms is then used by those platforms for the accumulation of value either for their own purposes or through trading it to businesses wishing to sell their products.

If thought of as a common pool resource, the approach adopted by the CMA, referenced extensively in Annex Y, would need to be modified. Instead of thinking about data as either rivalrous or non-rivalrous, the Ostrom approach allows it to be seen to be in categories 3 and 4 above.

As a consequence of seeing data as a common pool resource, the practical implications would include setting up a system for the use of data that respects the 8 principles that Ostrom identified and which have been successfully used in other industries for access to, and use of, the common pool resources.

Design principles for Common Pool Resource (CPR) institution: common sense for the management of the commons?

Elinor Ostrom won the Nobel Prize for economics for her work on common pool resources – "the commons". She identified eight "design principles" of stable local common pool resource management:

1. Clearly defined (clear definition of the contents of the common pool resource and effective exclusion of external un-entitled parties);

2. The appropriation and provision of common resources that are adapted to local conditions;

3. Collective-choice arrangements that allow most resource appropriators to participate in the decision-making process;

4. Effective monitoring by monitors who are part of or accountable to the appropriators;

5. A scale of graduated sanctions for resource appropriators who violate community rules;

6. Mechanisms of conflict resolution that are cheap and of easy access;

7. Self-determination of the community recognised by higher-level authorities; and

8. In the case of larger common-pool resources, organisation in the form of multiple layers of nested enterprises, with small local CPRs at the base level.

These principles have since been slightly modified and expanded to include a number of additional variables believed to affect the success of self-organised governance systems, including effective communication, internal trust and reciprocity, and the nature of the resource system as a whole. Ostrom and her many co-researchers developed a comprehensive "Social-Ecological Systems (SES) framework", within which much of the still-evolving theory of common-pool resources and collective self-governance is now located.

Examples and experience of policing the tipping point appear to be particularly appropriate and relevant to the position assessed by the CMA, with relation to analogous issues arising in policing tipping points in other situations. The team found that this thresholds-based approach to management tends to lead to better ecological outcomes and that applying a tipping point lens to a piece of work does not have to mean re-

[42] As noted in the CMA Final Report at Chapter 4.

inventing the wheel. In fact, analysis showed that all of the major US environmental laws already require, or provide scope for, the use of thresholds and other tipping point concepts.

The team also found that social and ecological tipping points are common in marine ecosystems, allowing them to derive core management principles that are broadly applicable to these systems. The potential for tipping points to profoundly affect the way a system works, as well as the benefits it delivers to people, puts a premium on quantifying critical thresholds and identifying early warning signs of impending change. Armed with this knowledge, managers can establish a precautionary buffer and identify management targets to stay sufficiently far away from an undesirable tipping point. The area outside of that buffer zone is the "safe operating space" for decision-making, within which decision-makers have options about what actions to take.

We commend these principles to the CMA task force as matters to be taken into account when designing its approach toward the use of data and access to online platforms.

Freedom of Information Act - please be advised that the DPA does not consider anything in this document to be confidential and we are content for it to be published by the CMA or made available in any response to a Freedom of Information request. We would ask that if referring to any part of it at any time to kindly attribute it to the DPA. A copy of this document will be published on our website at www.dpalliance.org.uk.

Annex 1. Abuse of Dominance

When a high level of market power is achieved, the abusers know that users have nowhere else to go. In those circumstances, abusers can not only restrict output/raise price/increase profits for access to their platforms and products, but also mine user data without constraint, exploiting user data and excluding rivals from that data. This is clearly illegal and in breach of the duties imposed at law on a dominant firm.[43]

The CMA has considerable evidence that Google and Facebook are already exploiting users and imposing unfair terms. The imposition of unfair and unreasonable terms and conditions is outlawed as a matter of competition law under Article 102 and Chapter II.

CMA proposals include an explicit access and interoperability remedy and a "fairness by design duty". It is critically important that this is seen to be a legal duty derived from the existing obligation imposed on a dominant firm under the existing law - or at least not a new non-coextensive legal duty imposed in circumstances where a new law replaces existing law. Reasons are many and varied:

- Current law continues to apply, and no case has been made for its amendment withdrawal or repeal.
- The CMA stands ready to take enforcement action in digital markets and the new law should not be used as a way of tying its hands under existing law.
- Current law can be enforced by third parties through the courts and those rights should continue to be preserved and protected.

The CMA appears to recognise the fact that current law is applicable, but the obligations that currently apply are not spelled out and, before introducing new ones, the extent of the current duties already imposed at law on dominant players should not be undermined. The CMA makes a series of statements where it recognises both market power and its abuse.

For example, the CMA states:

> *6.1 We set out in Chapters 3 to 5 the issues we have identified in relation to online platforms funded by digital advertising. We have significant concerns that Google and Facebook are not facing sufficient competition in consumer-facing services or in digital advertising markets.*
>
> *6.2 Consumers face harm as a result of this limited competition, either directly or indirectly – both now and over the longer term.*

Then:

> *7.76 The 'fair trading' objective would require the SMS platform to trade on fair and reasonable terms for services where they are an unavoidable trading partner as a result of their gateway market position. In effect, the fair trading objective is intended to address concerns around the potential for exploitative behaviour on the part of the SMS platform*.
>
> *Annex Y*
>
> *"103. Information asymmetries as well as the scale and persistence of market power in a few firms places individual consumers at a disadvantage compared with large online platforms and means that the situation is unlikely to be resolved without direct intervention."*[44]

The above statement recognises that consumers have limited bargaining power and are being **exploited** by online platforms that have a very strong bargaining position (market power). Without intervention by an authority or a court nothing is likely to change.

Furthermore, in the Final Report the CMA finds that: "6.26 *In a more competitive market, we would expect that it would be clear to consumers what data is collected about them and how it is used and, crucially, the*

[43] See Facebook v Bundeskartellamt in the German Federal Court of Justice.

[44] See also Y 210. However, we have found that the platforms' choice architectures are instead more likely to exacerbate biases – discouraging consumer engagement so that users are more likely to share their data. These include default settings and presentation of information and options that nudge consumers into sharing data. Consumer engagement with privacy controls is correspondingly low. 211. We think this results in consumers sharing more data than they might otherwise have decided to do, they may not receive a fair return for their data and more broadly may not have their data used for personalised advertising in a way that they are happy with.

consumer would have more control. We would then expect platforms to compete with one another to persuade consumers of the benefits of sharing their data or adopt different business models for more privacy-conscious consumers. Platforms may reward consumers for their data through their products and services, perhaps serving fewer ads or offering rewards or additional services."[45]

The CMA suggests that "take it or leave it terms and conditions" are the product of the lack of competitive constraints. They are abusive terms imposed on users by dominant companies. They are not tailored to users' requirements and are offered in circumstances where no choice of terms and conditions are available.

They do not even attempt to offer similarly situated consumers similar terms and conditions, they offer a universal "one size fits all" solution in contract irrespective of users' needs and are inherently discriminatory, unjustified and disproportionate.

Google and Facebook should now comply with the law and offer a range of alternative contracts and different terms and conditions to users or different classes of user for the use of their services.

Terms and conditions imposed by dominant firms are often one sided. They represent the inequality of bargaining power that exists between dominant firms, and consumers as a group each having a very weak bargaining position.[46] By contrast, contracts in competitive markets differentiate the product offering to meet customers' needs reflecting multiple business options and customer groups. Terms and conditions in competitive markets thus offer a choice and have been honed and shaped by the process of competition.

Contracts between customers and suppliers in competitive markets involve, by definition, a situation of a greater level of competition and more equal bargaining position. In such circumstances they can be expected to more fairly and reasonably allocate risk and reward between market participants. Transfers of rights or bundles or rights in competitive markets such as are involved in the transfer of the rights to use consumer data and information are subject to multiple and different mechanisms through which different competitors obtain value - with different categories of customer being treated differently by the suppliers that serve them.

Contracts that are delivered through competitive markets represent a fair balance between customer and supplier.[47] Competition law provides that where exploitative abuse is taking place, various forms of competitive benchmarking[48] are available, whether in the form of cost benchmarks or price benchmarks or profitability benchmarks,[49] and so in principle the same should apply to risk benchmarking and the benchmarking of contract terms and conditions.

As a solution to exploitation and the imposition of unfair terms and conditions, the CMA puts forward a number of alternatives that could be addressed under a code - but it should not be overlooked that each is likely to be an unjustifiable infringement of existing law. This calls for compliance in the short term given the existing duties imposed at law on dominant firms.

The CMA also calls up the means through which the DMU can obtain evidence of consumer preference in order to build differentiated offerings. However, it is vital for such exercise to be properly based on the sound foundation that evidence is not simply obtained that reflects the entirely distorted current market practice. Evidence of user preference has to be taken from the position that would apply in a competitive market - and benchmarked accordingly - not benchmarked against a reality which has suffered from many years of abuse. It is a cause of some concern that the CMA has not sufficiently recognised that each of the aspects of the duty is based on the findings that existing practices of the major platforms are examples of non-price-based abuse of market power.

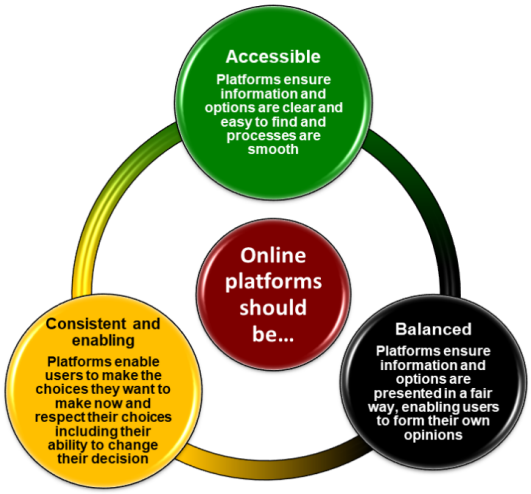
Exploitative abuse can consist in either price increases or other factors that allow the firm to increase its profits. Prices alone are not the basis on which firms offer their products in many online markets. Where data

[45]CMA Final Report, paragraph 6.26.
[46]This is recognised in much consumer protection legislation which seeks to even up the inequality of bargaining position by preventing the imposition of unreasonable or unfair terms – often by reference to terms and conditions that would apply in open competitive markets.
[47]See FR Table 7.1 and Appendix U for alternatives to the examples of abuse listed there.
[48]See for a recent review- Vikas Kathuria and Jure Globocnik Exclusionary conduct in data driven markets: limits of data sharing remedy Oxford Journal of Antitrust Enforcement, 2020, 0, 1–24 doi: 10.1093/jaenfo/jnz036.
[49]See E.g. Court of Appeal CMA vs Pfizer/Flynn March 2020 in relation to the types of cost benchmarking that is applicable under article 102/Chapter II w.r.t unfair or unreasonable terms in the Hoffman La Roche line of cases cited therein.

is important, abuse of market power can consist in the exploitation of user data or business data through the imposition of unfair or exploitative terms and conditions by platforms with market power.

The types of issue that form such abuse are described in the following diagram and listed in the below:

Figure Y.12 Fairness by Design – High Level Responsibilities



Source: CMA.

Access. The above is a diagram that could be used to elucidate the different forms of abuse: accessibility deriving from the current practices that promote inaccessibility and making the terms and conditions of contracts with end users unclear and inaccessible can be seen to be exploitative and discriminatory.

Balance. Making the terms unbalanced or one sided such that they do not reflect the terms and conditions that would apply in competitive markets can be viewed as exploitative and abusive, as can making user choices more difficult (which in many cases increases switching costs and rivals costs).

Consistency. The current terms and conditions persist in conditions of market power and are a one size fits all solution, inherently discriminatory since they recognise no differences in user types or demands.

Moreover, the current position involves the transfer of valuable user assets (data or, copyright in images) to the abuser in circumstances where there is little or no choice. In many ways this is a more extreme example of abuse of market power than increasing price. Where a monopolist increases the prices of its products, it increases its profits at the expense of the consumer. Where a monopolist, through misrepresentation, coercion, and confusion in a situation of dependency makes a condition of the use of the service the transfer of user property to the monopolist, it is a clear breach of the duty imposed on a dominant entity.

In Annex T the CMA outlines the economic theory that underpins its approach to remedies.

The CMA then concludes as outlined in the following table. We do not disagree that the below outcomes are desirable and consider that if the above actions are taken, the DMU would increase its prospects of success.

Box T.1: Typology of data-related remedies

1. **Increasing consumer control over the use of data**
   - Requiring consent for use of data (eg the intervention discussed in Appendix X that would require consumers to be given a choice over whether to receive personalised advertising).
   - Facilitating informed choice (such as the Fairness by Design duty assessed in Appendix Y, governing the use of choice architecture by SMS platforms).
   - Facilitating data mobility (eg through the use of PIMS, as discussed in Appendix Z in the context of digital advertising markets).
2. **Mandating interoperability**
   - Interoperability remedies in relation to social media functionality, discussed in Appendix W.
   - Restrictions on API deprecations through the Code, as assessed in Appendix U.
   - Potential standard setting interventions in digital advertising such as digital IDs and transaction ID, which are considered in Appendix Z.
3. **Mandating third-party access to data**
   - Click-and-query data remedy to overcome barriers to entry and expansion in search, as discussed in Appendix V.
   - Potential data access and transparency remedies in digital advertising, assessed in Appendix Z.
4. **Mandating data separation / data silos / restrictions on certain uses or sharing of data**
   - Potential interventions to address data advantages of large platforms through the creation of data silos, considered in Appendix Z.
5. **Allowing regulatory scrutiny and audit**
   - Applications across the issues discussed in Chapters 3 to 5, in particular through the Code (eg transparency of ad tech fees, regulatory scrutiny of auctions), as considered in Appendix U.