# Open Rights Group response to CMA's call for information: Digital Task Force

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## 0. WHO WE ARE

**Open Rights Group (ORG)** is a UK-based digital campaigning organisation working to protect fundamental rights to privacy and free speech online. With over 3,000 active supporters, we are a grassroots organisation with local groups across the UK. We have worked on GDPR and other issues such as data retention, and were a party in the Watson case at the CJEU. Our current focus includes the free expression impacts of content moderation and 'online harms' regulatory proposals, alongside surveillance and encryption policy, the use of personal data in the COVID-19 pandemic, data protection enforcement, online advertising and the use of personal data by political parties. We are a member of European Digital Rights (EDRi).

## 1. ABOUT THIS SUBMISSION

We welcome the opportunity to contribute to the call for evidence launched by the Competition and Markets Authority (CMA), concerning the establishment of a new pro-competition regime for digital markets. In this submission, we:

- Discuss the proposals we read in the CMA online platforms and digital advertising market study. In particular, we explain why limiting interoperability to access and cross-posting functionalities does not go far enough, and would miss the objective of opening digital markets to competition.

- Stocktake our experience with complaints that involved the cooperation among a number of Regulatory Authorities. In particular, we explain why these experiences are important to inform the procedural aspects of the new pro-competition approach, and which solutions could be implemented to ensure that cases are timely dealt with.

In doing so, this submission answers to Question 8 and Question 11 of the Digital Markets Taskforce call for information. Open Rights Group does not consider any of the contents of this submission as confidential, and we are available for any follow up concerning this submission.

## 2. REMEDIES FOR ADDRESSING HARMS

### Question 8: What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?

While endorsing some forms of interoperability, the CMA does not recommend the implementation of content interoperability[1] (i.e. the ability to view and engage with contents hosted on other platforms and services), thus accepting the view that "such an intervention would dampen incentives to invest and innovate".[2] However this view is fundamentally flawed and, if accepted, would seriously undermine the functioning of a pro-competition regulatory regime for online platforms.

In the following paragraphs we cover why interoperability has defined computing and its potential to innovate. Later on, we move to seeing how existing digital monopolies are impairing users and companies abilities to interoperate with their services. Finally, we argue that interoperability does not come at the expenses of users' privacy, provided that proper enforcement of data protection law is ensured.

### 2.1 The case for interoperability

Interoperability and standardisation have always been the fundamental driver for innovation in the ICT sector, if not the very foundation of modern computing: in the 70s, manufacturers' ability to produce "IBM clones" unlocked the computer revolution,[3] by allowing computer companies to sell devices that could run the same software an IBM computer was running. In the 90s, standards such as HTTP, TCP/IP, TLS, HTML and emails allowed (and still allow) billions of machines to connect to the Internet and interact with one another,[4] setting the stage for the exponential growth the Internet economy has experienced. In 2000s, the social media sector made no exception: for instance, Facebook

1 CMA, *Market study and final report: online platforms and digital advertising*. p. 373 §8.66
2 Ibid, §8.65
3 EFF, *'IBM PC Compatible': How Adversarial Interoperability Saved PCs From Monopolization.* Retrieved at: https://www.eff.org/deeplinks/2019/08/ibm-pc-compatible-how-adversarial-interoperability-saved-pcs-monopolization
4 Internet Society, Policy Brief: Open Internet Standards. Retrieved at: https://www.internetsociety.org/policybriefs/openstandards/

could emerge and succeed thanks to a tool they developed, which allowed their users to view and engage with Myspace users.[5]

Without content interoperability Facebook would have faced an overwhelming network effect resulting from Myspace large user base.[6] In turn, this would have prevented them to compete with Myspace based on their ability to innovate and provide a better product. This example exposes the fundamental incompatibility between the view that interoperability would "dampen innovation" with the reality of digital markets: in the words of the developer of a popular social media platform, "People would use a social network based on smoke signals if everybody else was using it".[7] Allowing users of one platform to interoperate with users in another one is, thus, the only way to ensure that market players can compete on merit, functionality and innovation, rather than on users' inertia.

## 2.2 The case for adversarial interoperability

Online platforms have shown they are determined to negate the same opportunity that allowed them to emerge and thrive in the first place, with Facebook providing another, iconic example. When facing the competition of an emerging social media (Vine), Facebook reacted by degrading the interoperability of their own APIs.[8] In other instances, Facebook resorted to legal means to prevent emerging competitors from interoperating with their service[9] — preventing them to do the same thing that allowed Facebook to interoperate with Myspace.

It follows that, while mandated interoperability is undoubtedly a fundamental step in countering digital monopolies, limiting competitors' ability to interoperate with incumbents under the terms of the latter would expose them to significant risks, such as disruptive

5 "Adversarial interoperability converts market dominance from an unassailable asset to a liability. Once Facebook could give new users the ability to stay in touch with MySpace friends, then every message those Facebook users sent back to MySpace—with a footer advertising Facebook's superiority—became a recruiting tool for more Facebook users." From: https://www.eff.org/it/deeplinks/2019/06/adversarial-interoperability-reviving-elegant-weapon-more-civilized-age-slay

6 EFF, *SAMBA versus SMB: Adversarial Interoperability is Judo for Network Effects*. Retrieved at: https://www.eff.org/it/deeplinks/2019/07/samba-versus-smb-adversarial-interoperability-judo-network-effects

7 Sean Tilley, *One Mammoth of a Job: An Interview with Eugen Rochko of Mastodon*. Source: https://medium.com/we-distribute/one-mammoth-of-a-job-an-interview-with-eugen-rochko-of-mastodon-23b159d6796a

8 Wired, *Facebook Gets Passive-Aggressive About Blocking Vine*. Source: https://www.wired.com/2013/01/facebook-vine-policy/

9 EFF, *Facebook v. Power Ventures*. Source: https://www.eff.org/cases/facebook-v-power-ventures

changes in the APIs and degraded quality of standards.[10] This threat could be partially addressed in the code of conduct, by imposing a duty of fair play on incumbent platforms when managing or introducing changes to their APIs, standards, or the way their platform interacts with other services.

Furthermore, a new pro-competition framework should ensure that competitors can rely on adversarial interoperability[11] (i.e. they can interact in ways which are not meant or authorised by the companies who own the platform). This in particular could be promoted by obliging digital platforms not to unduly constrain adversarial interoperability, for instance by imposing unfair terms of service or abusing legal provisions (such as copyright or cybersecurity laws). We intend "abuse" as leveraging on legal provisions to discourage competitive behaviours which, for instance, do not infringe the right of the rights holder, or do not violate or endanger the security of an IT system.[12]

### 2.3 Interaction between interoperability and data protection

We do not foresee any of these measures turning into a privacy or data protection issue. Interoperability is a technical feature, and does not in itself allow competing platforms to use these data according to their own volition. In particular, the GDPR already provides that personal data must be processed according to a suitable legal basis, and not further processed for other purposes than the one this data was collected for. Further clarity could be provided by releasing a dedicated code of practice, which would be outlining duties and practices which services must comply with in order to plug into third-party services.

Finally, whilst we acknowledged that there are gaps in the enforcement of data protection laws, we find in this a reason to ensure strict and punctual enforcement of regulatory standards. On top of that, consumers are increasingly aware about data protection.[13] It follows that, within a competitive market, platforms will likely increase their privacy standards in order to attract new users, or avoid loosing existing ones.

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10 Stratechery, *Portability and Interoperability*. Source: https://stratechery.com/2019/portability-and-interoperability/

11 EFF, *Adversarial Interoperability*. Retrieved at: https://www.eff.org/it/deeplinks/2019/10/adversarial-interoperability

12 EFF, *A Cycle of Renewal, Broken: How Big Tech and Big Media Abuse Copyright Law to Slay Competition*. Retrieved at: https://www.eff.org/it/deeplinks/2019/08/cycle-renewal-broken-how-big-tech-and-big-media-abuse-copyright-law-slay

13 European Union Agency about Fundamental Rights, *Your Rights Matter: Data Protection and Privacy fundamental rights survey*. Retrieved at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-survey-data-protection-privacy_en.pdf

## 2.4 Recommendations

- The CMA should strengthen their reliance on interoperability to further their pro-competition approach to digital markets;
- A new pro-competition approach should
    - mandate baseline interoperable interfaces that allow competitors to engage with users and contents of SMS platforms;
    - protect competitors from behaviours which may limit their ability to interoperate in ways which are not approved or intended by the online platforms. This should include both technical changes to the interfaces regulating third-party access to a platform, as well as potential abuses of copyright or cybersecurity legal regimes.
- This new pro-competition approach should be supported by punctual and strict applications of existing regulatory frameworks, such as data protection. The application of data protection principles in the context of interoperable services should be clarified by a code of practice.

# 3. PROCEDURE AND STRUCTURE OF A NEW PRO-COMPETITION APPROACH

**What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?**

Open Rights Group is a digital rights organisations with significant experience in challenging illegal uses of personal data within the online advertising industry. As such, we were in the position to observe some issues about the way Regulatory Authorities cooperate in the course of investigations and enforcement of the GDPR.[14] This also includes a number of procedural deficiencies which have slown the enforcement of data protection laws across Europe.

14 See Open Rights Group, *Feedback to Data protection - report on the General Data Protection Regulation*. Retrieved at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12322-Report-on-the-application-of-the-General-Data-Protection-Regulation/F514203

We believe that the new pro-competition approach presents similar challenges to those we observed in the GDPR. Both regimes are meant to be implemented in the context of digital markets, against transnational companies which may have significant resources at their disposal, to slow down or challenge enforcement by Regulatory Authorities. Furthermore, both regimes are meant involve the cooperation of different Authorities.

As such, we explain below which procedural aspects Regulatory Authorities need to comply with, in order to ensure that their behaviour does not negatively impact on the timely handling of proceedings. Then, we discuss the safeguards that consumers and complainants should have, to ensure that their complaints can be successfully lodged and resolved.

### 3.1 Cooperation among regulatory authorities

The GDPR established a cooperation mechanisms, which Supervisory Authorities can use to handle complaints under their shared remit, conduct joint investigations, and agree on the final decision to adopt. All these aspects are likely to be relevant for the new pro-competition approach, which would see the CMA, the Information Commissioner's Office and Ofcom supervising and regulating markets where competition, data protection and information aspects are closely intertwined. Having this in mind, our experience and the recent two years review of the application of the GDPR highlighted a number of issues which are worth considering for this matter.

Regulatory Authorities may adopt a passive approach in handling cases. In the cooperation mechanism established by the GDPR, Supervisory Authorities which do not lead the handling of the case were provided with limited means to participate to it.[15] In particular, their involvement is formally required only for the adoption of the final decision, while their involvement in previous stages of the complaint depends on the attitude of both concerned and leading Supervisory Authorities. Furthermore, the Leading Authority does not have a clear deadline to produce a draft decision. In turn, this may leave the other Authorities involved with no option but to wait for the Leading Authority to produce a draft decision, as they are not otherwise allowed to intervene.

15 "So far only the first leg of the consistency mechanism has been used, namely the adoption of Board opinions." From: Commission Staff Working Document, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition -two years of application of the General Data Protection Regulation,* p. 8 Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0115&from=EN

Also, Authorities may find it difficult to efficiently track and exchange information needed to effectively cooperate.[16] These inefficiencies may be aggravated by different internal culture or approaches, slowing down communication and reducing incentive to cooperate.

Finally, Authorities may be hesitant to take action against well-resourced technology companies, which have significant resources at their disposal to raise legal challenges and obstruct their enforcement action. On the other hand, Supervisory Authorities have been found to be understaffed and without the financial means that are needed to face their new duties under the new regulatory framework, or assert their decisions in Courts. In particular, due consideration should be given to provide Authorities with technical personnel, to allow them to effectively investigate digital markets.[17]

## 3.2 Recommendations

- The Regulatory Authorities involved in the new pro-competition approach should have clear rules which outline their role, duties and responsibilities for the handling of cases and complaints. This should not be limited to the adoption of the final decision, but encompass all stages of the proceeding. An Authority should also have the means to compel another Authority to provide the inputs and take ownership when needed.

- Regulatory Authorities should be provided with an effective tool to ease the effective exchange of information during the course of their activities. This tool should be supported by clear engagement rules.

- Regulatory Authorities should be given appropriate resources to face the new role and responsibilities they would undertake due to the new pro-competition regime. Particular attention should be given to the need to assert their decisions against potential appeals. Also, Authorities will need to recruit new personnel, and increase their capacity to investigate complex digital systems.

16 "The main issues to be tackled in this context include differences in:[…] the approach to when to start the cooperation procedure, involve the concerned data protection authorities and communicate information to them." From: Commission Staff Working Document, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition -two years of application of the General Data Protection Regulation*, p. 9

17 See *Brave's 2020 report on the enforcement capacity of data protection authorities*. Retrieved at: https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf

### 3.3 Procedural safeguards for complainants

The GDPR gives to individuals the means to lodge a complaint to the competent Supervisory Authorities, and trigger their intervention. This is an important second line of defence, which prompts Regulatory Authorities to take actions against infringements that they may be reluctant or otherwise uninterested to investigate on their own. As such, we expect the new pro-competition approach to entail the right of the affected parties to lodge a complaint against firms with Strategic Market Status.

However, the GDPR only provides a generic duty for the Supervisory Authority to communicate and keep the complainant updated about the progress of their complaint. This sometimes resulted in poor standards of communication with complainants about the progress of their case, shortcomings which are sometimes exacerbated by inefficiencies in the way different Regulatory Authorities exchange information among themselves.[18] Furthermore, proceedings do not have a statutory time limit, a gap which in fact has prevented the effective enforcement of the law.[19] The issues outlined in the previous section about institutional cooperation can exacerbate such deficiencies. Regulatory bodies may be under-resourced to effectively deal with the cases which are lodged. In turn, this may make more convenient for the Authorities to buy time and frustrate the process.

Finally, the GDPR also provides for representative action mechanism, which allows organisations to represent collective interests without the mandate of the single individuals concerned. Unfortunately, Member States were also given discretion upon the implementation of this rule, which in turn saw many national legislators not implementing it. Representative actions which are independent from the mandate of a given individual are a precious tool in ensuring that the interests of the weaker party, such as consumers or disadvantaged groups, can be effectively protected. Individuals may not have the knowledge or the means to understand how their rights or interest are being violated by anti-competitive or otherwise abusive commercial practices. Furthermore, barriers to representative actions make it more difficult to hold monopolies or other powerful

18 See Commission Staff Working Document, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition -two years of application of the General Data Protection Regulation*, p. 9

See also: Multistakeholder Expert Group to support the application of Regulation (EU) 2016/679, *13 June 2019 Report*, p. 14. Retrieved at: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=31527

19 For instance, see NOYB, *Judicial Review against DPC over low procedure granted*. Source: https://noyb.eu/en/judicial-review-against-dpc-over-slow-procedure-granted

commercial actors to account, as obtaining a mandate from a large number of individuals may be a challenging *ex-ante* requirement to deal with.

### 3.4 Recommendations

- Complainants should have clear rights concerning the information they are entitled to receive regarding their proceeding, and the modalities by which such information must be provided.

- Proceedings should have clear timelines to decide upon a case and any enforcement action that may be necessary. Also, complainants or parties which are otherwise affected by the behaviour of SMS should be given the means to challenge the potential inaction of the Authorities involved, or the merit of their decision.

- The new pro-competition approach should establish representative mechanisms by which organisations can lodge complaints on behalf of consumers or an otherwise large number of individuals. Such mechanisms should also allow organisations to act without the mandate of the individuals concerned.

## 4. CONCLUSIONS

Open Rights Group welcomes the proposal for a new pro-competition approach to digital markets.

Interoperability defined modern computing, and has always been the driving force for innovation and competition on the Internet. Therefore, we believe that mandated interoperability would have the potential to bring competition back in digital sector, provided that this approach is pursued with determination. Furthermore, we warn the CMA against potential abuses of digital platforms, which could leverage on their control over their own services to reduce or degrade the ability of third parties to interoperate. It follows that adequate safeguards against such abuses should be put in place, and third-parties should be allowed to interoperate with an online platforms without the need to seek or obtain approval or authorisation.

Finally, we equally believe that effective and timely enforcement of this new regime will be a key factor for its success. As such, cooperation among different Regulatory Authorities should be regulated by clear engagement rules, and complainants should be able to receive timely updates and information regarding the handling of their proceedings. Finally, we believe that allowing organisations to represent consumers or other vulnerable groups.