

## medConfidential response to the CMA [call for information on algorithms and competition](#)

medConfidential is an independent non-partisan organisation campaigning for confidentiality and consent in health and social care, which seeks to ensure that every flow of data into, across and out of the NHS and care system is *consensual, safe, and transparent*.

Founded in January 2013, medConfidential works with patients and medics, service users and care professionals; draws advice from a network of experts in the fields of health informatics, computer security, law/ethics and privacy; and believes there need be no conflict between good research, good ethics and good medical care. We also engage with data use across Government, as to a first approximation, the data that institutions of state want to copy most is your medical record.

### **1. Are the potential harms set out in the review paper the right ones to focus on for our algorithms programme? Are there others that we have not covered that deserve attention?**

We have a consolidated response to this question with others below.

### **4 Are there specific examples that we should investigate further to consider whether they are particularly harmful and potentially breaching consumer or competition law?**

Yes. We have a consolidated response to this question with others below.

### **5 Are there any examples of techniques that we should be aware of or that we should consider beyond those that we've outlined?**

Yes. We have a consolidated response to this question with others below.

### **7 Is the role of regulators in addressing the harms we set out in the paper feasible, effective and proportionate?**

Yes.

### **8 Are there other ideas or approaches that we should consider as part of our role?**

We have a consolidated response to this question with others below.

## Consolidated answer to questions 1, 4, 5 and 8:

The CMA recognises that markets can cause harm, and works to mitigate those harms, with the CMA website saying:<sup>1</sup>

*We work to promote competition for the benefit of consumers, both within and outside the UK. We have staff in London, Edinburgh, Belfast and Cardiff.*

*Competition is good for consumers and businesses. It means that people get better products at lower prices, and it helps ensure the most consumer-focused and innovative businesses are the ones that succeed.*

*...we encourage government and other regulators to use competition effectively on behalf of consumers.*

These statements also all apply to the markets around algorithms – and data / AI more widely – that is, where one organisation purchases the use of an algorithm / AI from another. There may be some exchange of data but, in practice, that decision resides with data controllers not data processors.

The existing rules of conduct and processes around competition and markets continue to apply to those who are regulated by CMA, just as existing rules of conduct and processes in public bodies apply to algorithms used by those public bodies. Public bodies are required to know, and – if asked – to justify why they use particular information in making a decision; those legal obligations do not fall away if the decision was automated, or if an algorithm was used.<sup>2</sup> This perspective is underexplored in the CMA paper.<sup>3</sup>

The consultation is also somewhat lacking in how the CMA will *enforce* competition and ensure *informed* markets in algorithms and AI. In that context, we suggest that the CMA's work should explore and explain:

- What does an 'informed purchase' mean in the context of purchasing an algorithm?
- Can a cartel of silence around (e.g. development or training) methods undermine a fair market?
- Large entities can and will have a requirement to share certain information with purchasers as part of procurement rules, especially in highly regulated areas, but:
  - What will ensure that competitive, honest companies can *show* how they followed various guidelines,<sup>4</sup> and aren't undercut by others which take shortcuts?
  - How should entities show how datasets represent and mitigate bias, given many of the largest earlier adopters and most stretched claims will be those with the least evidence and the least consideration?

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<sup>1</sup> <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>

<sup>2</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3226913](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226913) and other papers by the same author

<sup>3</sup> We do not cover what the analogy should be here, but recommend that work to others.

<sup>4</sup> <https://medconfidential.org/2020/analysis-and-inputs-reporting/>

- What will disincentivise companies or prevent them from basing their business model on datasets if they can reasonably expect no-one will ever check that those datasets were acquired legitimately? <sup>5</sup>

To draw an analogy with buying a house, where the house seller is required to share an energy efficiency certificate. What is the equivalent certificate of governance that shows that an algorithm / AI is not effectively 'trafficking in stolen goods' (i.e. data) or profiting from the proceeds of crime, and that provides evidence that all steps throughout development have been handled with legitimacy and integrity?

Any market in which only some actors follow the rules and others do not will be undermined.

**In practice, the CMA should establish an expectation that all procurements of AI and/or algorithms require the disclosure of standardised information about how the algorithm was developed or the AI was trained, as well as the outputs of checks for known biases or equalities issues.** These rules should be set up so as to encourage and facilitate a 'race to the top', increasing the benefit across markets of more detailed disclosure about processes.

From medConfidential's experiences in and around health, such an approach would likely enable an increased number of SMEs to operate within a market – as such companies are more likely to be closer to the data and algorithm training that was used, and therefore in a better position to know the details of the processes behind their products. Knowing the details is not necessarily something that larger entities are able to do well.<sup>6</sup>

In terms of procurement, the experiences of the vaccine taskforce, and why they took the decisions they took, is likely to be vital context of what can happen.<sup>7</sup>

The CMA intervenes in markets to ensure fair competition; the same is absolutely necessary in the market for algorithms and AI. The use of procurement processes and the purchasing power of regulated entities to set the standards for others could provide strong levers, especially in an emerging market.

The CMA should create an expectation that any market where detailed disclosure about processes is *not* the norm may indicate that actors within such markets are using data or algorithms that may not be lawful, ethical, or support consumer and human rights.

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February 2021  
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<sup>5</sup> [https://www.whatdotheyknow.com/request/ai\\_agreements\\_with\\_orthai](https://www.whatdotheyknow.com/request/ai_agreements_with_orthai)

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<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2017/07/royal-free-google-deepmind-trial-failed-to-comply-with-data-protection-law/>

<sup>7</sup> <https://www.spectator.co.uk/article/secrets-of-the-vaccine-taskforces-success>