

29 September 2021

CMA response to the government's consultation 'A new pro-competition regime for digital markets'

Summary

1. The Competition and Markets Authority (CMA) strongly supports the government's proposals to create a new pro-competition regime for digital markets. As we set out in the advice of the Digital Markets Taskforce,¹ digital markets bring enormous benefits to consumers, businesses, and the wider economy. However, competition in these markets is not working as it should. Some large and powerful digital firms are exhibiting signs of entrenched market power in digital markets, enabling them to stifle competition. This is leading to a worse deal for consumers and businesses and is inhibiting innovation and growth in the UK economy. The government's proposed package of reforms will provide the toolkit to address these problems and boost competition in digital markets, ensuring that UK consumers, businesses and workers can secure the full benefits of the digital economy. The focus on digital markets is growing in jurisdictions around the world: the UK will need to sustain the pace of reform if we are to maintain our global leadership on these issues.
2. The CMA, and the Digital Markets Unit (DMU - established within the CMA in non-statutory form in April 2021) has been providing advice to the government on the potential design of the new regime, and will continue to provide all practical support as the work on the regime progresses.

The case for change

3. Digital markets bring significant benefits to UK consumers and businesses, and play a critical role in driving growth and productivity in the UK economy. As noted in the government's Innovation Strategy 'Leading the future by creating it' and in the government's Digital Regulation Plan, healthy and competitive digital markets can boost innovation, rewarding firms who offer exciting new products and services

¹ CMA (2020) Advice of the Digital Markets Taskforce: <https://www.gov.uk/cma-cases/digital-markets-taskforce>

to consumers. Digital technologies contributed £151bn in UK output and accounted for 1.6 million UK jobs in 2019.^{2 3}

4. However, there is currently a lack of effective competition in digital markets. Powerful digital firms have built entrenched market power in certain key markets. Bolstered by strong network effects, control of valuable data flows and economies of scale, these firms are now in a position to frustrate competition and impose unnecessary costs on consumers, businesses and the wider economy, in the following ways:

- Consumers get a worse deal, experiencing higher prices, worse quality and less choice in digital markets.
- Businesses who rely on the major digital platforms to reach their customers face higher costs: for example, in the form of higher prices for online advertising. These costs for businesses ultimately get passed on to consumers.
- Start-ups who seek to enter digital markets face an unfair disadvantage. Large incumbents can erect barriers to entry, including by leveraging their strong position in one market into other markets. This makes it harder for innovative competitors to grow and compete, and means that consumers miss out on the exciting new products and services that these start-ups could bring.
- The UK economy as a whole becomes less innovative. If powerful firms are able to inhibit innovative competitors, and face reduced incentives to innovate themselves, the economy will become less dynamic and the jobs and growth potential of the UK's digital economy will not be met.

5. It is only by acting to boost competition that we can ensure that the full benefits of digital markets can be realised. Failure to act quickly to respond to these developments is likely to result in large digital firms further entrenching their market power and spreading that power into new markets, imposing ever-greater costs on consumers, businesses and the wider UK economy.

The government's proposals

6. We believe that the DMU, and the new pro-competition regime for digital markets set out in the government's consultation, provide the tools for addressing these

² DCMS economic estimates 2019: Gross Value Added (2020):

<https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-gross-value-added>

³ DCMS economic estimates 2019: Employment (2020): [DCMS Sectors Economic Estimates 2019: Employment - GOV.UK \(www.gov.uk\)](#)

problems. In particular we would highlight the following key aspects of the government's proposals:

- **The Strategic Market Status test** – we agree with the government's proposal that the regime should be focused on firms with substantial and entrenched market power in at least one activity for which digital technologies are a core component. The DMU will apply this test rigorously based on a range of qualitative and quantitative evidence, including analysis undertaken as part of previous CMA projects such as the Online Platforms and Digital Advertising market study. The DMU will consult transparently on its decisions to designate firms as having Strategic Market Status (SMS).
- **Codes of Conduct** will be important in setting out the upfront 'rules of the game' for SMS firms, with the objective of promoting fair trading, open choices and trust and transparency in digital markets. The Code will provide clarity on how the SMS firms should behave when dealing with consumers and businesses. Our view is that the aims of the Code can best be met by giving the DMU the power to devise legally binding obligations on firms, in line with the government's objectives for the regime, that can be tailored to the business models of each firm. This will provide certainty for firms on the requirements and enable the DMU to effectively enforce the rules. It is our view that attempting to include general Code requirements for all firms directly in legislation would not provide this certainty and could inhibit the enforceability of the rules.
- **Pro-competitive interventions.** While the Code of Conduct is needed to ensure SMS firms do not abuse their strong position in digital markets, it will not be sufficient on its own to deliver effective competition. Pro-competitive interventions will enable the DMU to tackle the root causes of SMS firms' entrenched market power. Remedies such as personal data mobility and interoperability between platforms will be essential to empowering consumers, removing barriers to entry and making it easier for innovative competitors to enter the market. Pro-competitive interventions will therefore be crucial for ensuring dynamic, innovative and competitive digital markets in the long-term.
- **A new SMS merger regime.** There are widely-held concerns about historic underenforcement against digital mergers in the UK and around the world.⁴ Between 2008 and 2018, the five largest digital firms made over 400

⁴ For example, see Stigler Center Committee on Digital Platforms (2019), Final Report: <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>

acquisitions globally. None of these were blocked by competition authorities.⁵ This process of consolidation has allowed large digital firms to develop entrenched market positions, which they can then leverage into adjacent markets. Over time these firms have built ‘ecosystems’ of complementary products and services, making it less likely that consumers will switch away to competitors. In many cases, these acquisitions take place behind closed doors, without the parties notifying the CMA. Even in cases where the CMA finds out about these deals, the targets may be at an early stage in their growth, making it difficult for the CMA to demonstrate under the current rules that the mergers will harm competition. The government’s proposed SMS merger regime will ensure that the CMA can give proper scrutiny to acquisitions involving SMS firms and, where they could pose a threat to competition, stop them. This will give start-ups a better chance to grow and compete in digital markets, enabling more innovation and better outcomes for consumers.

- **Funding of the regime** – to be effective it is essential that the DMU is appropriately and sustainably funded. In line with other UK regulatory regimes, we support the proposal in the government’s consultation that a levy funding model would be appropriate. We will work with the government on the detail of how such a levy could function in practice to provide robust enforcement of the regime while minimising costs as far as possible.
- **Working with other regulators** – A number of regulators – including the Information Commissioner’s Office (ICO), Ofcom and the Financial Conduct Authority (FCA) – play a vital role in digital markets. The DMU will need to work closely with these regulators to ensure approaches are effectively co-ordinated. This will require information-sharing and close joint-working between regulators. In some cases, regulators other than the DMU may be better placed to take forward action under the regime where it sits within the markets they regulate. More generally, the regime will be most effective and coherent if the DMU is able to take account of the views of other regulators when reaching its decisions.

7. Taken together, these reforms can provide the toolkit for boosting competition in digital markets, ensuring consumers and businesses get a good deal and providing a spur to innovation and growth in the UK economy.

⁵ Digital Competition Expert Panel (2019), Unlocking Digital Competition: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

8. The CMA also welcomes the government's separate consultation 'Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers', and have submitted a separate response to that consultation.⁶ Those wider reforms will update the competition and consumer regimes for the modern economy and ensure that they can effectively promote the interests of consumers in all markets.

Reforms to digital markets around the world

9. The consensus that digital markets are exhibiting a lack of effective competition is building among policy makers and competition authorities around the world. So, too, is the momentum behind efforts to address these problems. In the EU, the Commission submitted their proposal for a Digital Markets Act to the European Parliament at the end of 2020. In the US, 2021 has seen the proposal of a number of Bills designed to tackle the market power of large digital firms and improve competition in digital markets. In addition, in July 2021 President Biden issued an Executive Order on Promoting Competition in the American economy, which cited the market power of large internet platforms as a core problem to be addressed. Related reforms are being pursued and implemented in jurisdictions around the world, including in Germany, Australia, Japan and South Korea. We have also seen this appetite for reform through the UK's presidency of the G7, which has brought the importance of competition in digital markets front and centre of the global agenda. While the UK has been a leader in setting this agenda up to this point, we will need to maintain the pace to avoid falling behind.

Next steps

10. The CMA and the non-statutory DMU will continue to provide all practical support to the government in the development of the regime. Working with other key regulators such as Ofcom, the FCA and the ICO, the CMA and the DMU stand ready to take on the role of overseeing the regime, subject to the outcome of the consultation and to the passage of the necessary legislation. In the meantime, we will continue to develop our detailed analysis of digital markets and, where possible, will take action to improve competition and protect consumers using our existing tools.

⁶ [CMA \(2021\) Reforming Competition and Consumer Policy – Driving growth and delivering competitive markets that work for consumers: CMA Response to consultation](#)