

CMA Response to Data: A New Direction

1. The Competition and Markets Authority (CMA) is the UK's lead competition and consumer enforcement authority and works to promote competition for the benefit of consumers, both within and outside the UK. Since April this year, the CMA has also housed the Digital Markets Unit (DMU). The DMU has been established in shadow form pending legislation to create a new pro-competition regime with the intention of addressing the sources and economic harms that result from the exercise of market power of businesses with 'strategic market status' (SMS).¹
2. The CMA welcomes the opportunity to respond to the consultation on [data: a new direction](#). We focus in our response on those issues which relate to the CMA's role to promote competition in the interests of consumers. In doing so, we draw on wide experience in this area, including Open Banking², our market studies into [digital comparison tools](#), [online platforms and digital advertising \(Digital Advertising MS\)](#) and [mobile ecosystems](#), the work of the [Digital Regulation Cooperation Forum \(DRCF\)](#) including the [joint statement between the CMA and the ICO \(Joint Statement\)](#), the [antitrust investigation into Google's 'Privacy Sandbox' browser changes \(the Privacy Sandbox investigation\)](#), and under merger control.
3. The consultation response is structured in two sections: (1) headline submissions and, (2) responses to particular sets of questions.

Section 1: Headline submissions

4. We welcome that a key aim of the government's data strategy is to 'support vibrant competition and innovation to drive economic growth'. Data, including personal data, is an increasingly important component of modern digital economies and is a key enabler of increased competition. An effective, proportionate data protection framework can help drive strong competition in digital markets and play a key role in enabling businesses and consumers to share the benefits of the data economy.

¹ [Digital Markets Unit \(non-statutory\) - terms of reference - GOV.UK \(www.gov.uk\)](#)

² To address concerns raised by the [market investigation in the UK retail banking market](#), the CMA set out a wide-ranging package of remedies which paved the way for Open Banking, including a requirement on banks to implement an 'Open-Banking' standard and the creation of the [Open Banking Implementation Entity](#).

5. As set out in the ICO/CMA joint statement, there are important synergies between data protection and competition. In particular:
 - Meaningful user choice and control are fundamental both to robust data protection and effective competition. Where users can exercise genuine choice and providers compete on an equal footing to attract their custom, effective competition can enable stronger privacy protections, and weak competition can undermine those protections.
 - Clear regulation and standards to protect privacy can also support effective competition. With appropriate regulation, competitive pressures can be harnessed to drive innovations that protect and support users, such as the development of privacy-friendly technologies, clear, user-friendly controls, and the creation of tools that support increased user-led data mobility.
6. There are also potential tensions between data protection and competition. For example, these could arise where there is a risk of data protection law being incorrectly interpreted by large integrated digital businesses in a way that leads to negative outcomes in respect of competition, e.g. by unduly favouring large, integrated platforms over smaller, non-integrated suppliers.³
7. In January 2021, the CMA opened its Privacy Sandbox investigation into Google's proposals to remove third party cookies and other functionalities from its Chrome browser. This followed concerns that this conduct could distort competition by self-preferencing Google's own advertising products and services and cause advertising spend to become even more concentrated on Google's ecosystem at the expense of its competitors. The CMA and the ICO have been working collaboratively in their engagement with Google and other market participants to build a common understanding of Google's proposals, and to ensure that both privacy and competition concerns can be addressed as the proposals are developed in more detail. The CMA has been consulting on binding commitments offered by Google in respect of this behaviour.⁴
8. In future, it is important that the government's data protection approach seeks to mitigate these tensions, including by avoiding privacy being inappropriately used as a mask for anti-competitive behaviour.

³ For example, where transfers of personal data within a single corporate entity – such as a large platform – are treated differently from transfers between independently owned businesses even if these businesses are functionally equivalent to those of the platform and the data is processed on the same basis and according to the same standards (Joint Statement, paragraph 77).

⁴ [Investigation into Google's 'Privacy Sandbox' browser changes - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/investigation-into-google-s-privacy-sandbox-browser-changes)

9. Given these interactions between data protection and competition:
- We welcome the government's intention to enable greater access to data where this can drive stronger competition and innovation. Enabling greater access to data that can be used to improve a product or service can enhance choice and the user experience, and also allow new entrants and smaller players to challenge larger incumbents who would otherwise benefit from significant data advantages. Similarly, ensuring services can communicate freely with one another (ie making them interoperable) can facilitate integration of a wide range of products, services, and applications, for example allowing for cross-posting from one platform to another, or for connecting various devices produced by different firms.⁵
 - At the same time, it is important that consumers have confidence and trust in the data protection regime. Competition is likely to function better if consumers have control over their data and have confidence in how it will be used. Informed and empowered consumers can therefore select those suppliers which best satisfy their existing – or future – demand on matters they care about, including how consumer data is collected and used. Therefore, while we agree that there are benefits in making it easier for businesses to access data,⁶ it is also important that rules, for example around legitimate interest, are designed in a way that does not forfeit consumer control or undermine consumers' trust in the regime.
 - We support interventions to encourage third party intermediaries, which could play an important role in stimulating competition.
 - It is important that the data protection regime does not favour incumbents over entrants or smaller firms. For example, we agree with the government's proposals for addressing costs of compliance for small firms. And it is important that the government's data protection approach seeks to avoid privacy being used as a mask for anti-competitive behaviour or favouring incumbents.
 - Barriers to data access, use and sharing that stifle innovation and competition can also arise through M&A activity. As such, the merger control regime has an important role to play alongside the data protection regime in supporting vibrant competition and innovation in digital markets. The CMA has considered potential data-related harms in a number of its

⁵ Joint Statement para 14.

⁶ Such as the proposals relating to legitimate interests in section 1.4 and non -essential cookies in section 2.4.

recent merger decisions.⁷ The CMA and ICO continue to work together on the interaction between the two regimes as part of the DRCF [workplan](#) for 2021/22.⁸

- Finally, it is important that the overall regulatory regime is coherent and joined-up. In our view, the recent joint work between CMA and ICO across a range of issues under the framework of the DRCF is a good example of practical steps to ensure consistency in approach. We support the ICO having a duty to take account of competition, which will further enhance regulatory coherence.

Section 2: Responses to particular questions

10. In this section, we set out our response to particular questions.

Legitimate Interests (section 1.4 and questions 1.4.1 to 1.4.3)

11. We welcome the intention behind the proposals in paragraph 61 to reduce unnecessary burdens for the processing of personal data which is low risk and in line with user expectations. However, unless carefully managed, there is a risk that the creation of a ‘whitelist’ may be seen by consumers as undermining their data rights which may cause them to withdraw. The government may therefore wish to undertake testing, such as interpretation tests or consumer deliberative panels.⁹ It may also be necessary to set out clearly defined limitations or restrictions to processing, similar to the approach described in the consultation document at paragraph 199 (further conditions for data analytics).
12. We have particular concerns about the broad exemption to remove the need to undertake a balancing test when processing personal data for ‘business innovation purposes aimed at improving services for customers.’¹⁰ Individual consumers may have highly divergent views on what amounts to an ‘improved’ service.¹¹ Further, multi-sided platforms may have several sets of

⁷ For example [Google/Looker](#), [Amazon/Deliveroo](#), and [Facebook/Kustomer](#).

⁸ [Digital Regulation Cooperation Forum: Plan of work for 2021 to 2022 - GOV.UK \(www.gov.uk\)](#). These issues are also explored in the [CMA's note to the OECD on consumer rights and competition](#).

⁹ We set out in [Annex Y](#) of our final report on the Digital Advertising MS potential testing and trialling methods for data privacy choices for personalised advertising purposes. BEIS has subsequently [consulted](#) on providing powers to the DMU to institute this type of testing of consumer/demand side remedies.

¹⁰ Paragraph 61(h).

¹¹ Similar issues arise in paragraph 61(d): “Using audience measurement cookies or similar technologies to improve web pages that are frequently visited by service users.”

customers whose interests are not aligned. Incumbents with a significant data advantage may therefore seek to use this exception, for example:

- as part of a strategy to leverage their market power into new sectors and markets. This may undermine efforts to address market power concerns of SMS firms.
 - as a way to entrench existing competitive advantages. The Digital Advertising MS found that consumer data was a source of competitive advantage but that consumers often had little choice over its collection and use. It therefore recommended measures to increase consumer choice over data collection and use.¹² If this drafting were to be taken forward, it could run counter to these recommendations.
13. We also note the reference in section 1.4 to ‘cookies or similar technologies’ (and also in section 2.4). This is a broad description which may benefit from a tighter definition. This is a complex area, however ‘similar technologies’ could be interpreted as including a wide range of existing and future technologies beyond cookies that facilitate targeted advertising. In the Digital Advertising MS we discussed such practices and potential remedies the DMU could consider.
14. The relationship between these proposals and any pro-competitive interventions and code requirements introduced by the DMU under the proposed SMS regime would therefore need careful consideration.¹³ It would also be necessary to assess the risks of unintended consequences, for example to business incentives to invest in privacy-enhancing alternatives.

Public trust in data-driven systems (questions 1.5.18 to 1.5.20)

15. The consultation seeks views on how far the data protection regime adequately addresses profiling concerns involving the use of inferred data, such as from an analysis of biometric or physiological conditions (‘soft biometric data’). In our view, more needs to be done in this area.
16. In many business models, commercial value lies in the inferences drawn from an individual’s behaviour and the construction of a profile which can be targeted. Consumers currently have limited opportunities and rights readily to determine on what basis they are targeted. We note, for example, that subject

¹² Paragraphs 94ff. It recommended that digital advertising platforms with SMS should be required to offer a ‘choice remedy’ which puts consumers in control of what data is collected and how it is used and also a ‘Fairness by Design’ obligation.

¹³ For example, could the proposed exemption relating to first party cookies mean the DMU could not require SMS platforms to seek user consent for using their data (e.g. metadata trackers) if that was deemed necessary under the SMS regime?

access requests may not always reveal inferences made by data controllers (paragraph 108) and that this is viewed as proprietary data. However, in our view, this leads to significant information asymmetry between a business and its users.

17. It is important that consumers should be able to understand on what basis an automated decision has been made which affects them, even if that decision was not based on personal data but on inferences derived from various sources of information, and at a level below legal or similarly significant effects (LSSE). This would also improve trust in markets and reduce risks of discrimination or exploitation of biases. We note also that the current developments into privacy-enhancing technologies may result in the targeting of particular ‘cohorts’ of consumer profiles which minimise or avoid the processing of personal data.

Innovative Data Sharing Solutions (section 1.7; questions 1.7.1 to 1.7.2)

18. The government seeks views on the potential role of responsible data intermediaries to benefit society and promote economic growth, and the lawful grounds which may be relied upon, and the potential role of government-approved accreditation schemes.
19. We strongly agree that responsible data sharing can drive competition and innovation for the benefit of consumers and that data intermediaries have a potentially significant role, as shown by Open Banking. There is unlikely to be a ‘one size fits all’ model and we also agree with the government that different measures may be needed to support different data intermediaries in different sectors (paragraph 135).
20. Interoperability is particularly important in digital markets to counter the incumbency advantages arising from network effects.¹⁴ The ability to mandate interoperability remedies is also one of the key tools proposed for the DMU to govern the behaviour of particularly powerful firms and unlock competition in digital markets.¹⁵ Interoperability remedies have also been shown to address other forms of coordination failure,¹⁶ such as in Open Banking, where the existing market was not operating as competitively as it should.

¹⁴ For example, the Report of the Digital Competition Expert Panel (DCEP), [Unlocking Digital Competition](#) (2019), the reports of the Stigler Center (2019), [Committee on Digital Platforms Final Report](#), and the Special Advisors’ report for the European Commission. [Competition Policy for the digital era](#), a report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer (2019). (**Special Advisers Report**).

¹⁵ [Digital Markets Taskforce Advice](#) (DMT Advice) (December 2020)

¹⁶ Where it would be beneficial for customers if market participants coordinated their actions, but they do not do so (for example, on standards). DMT Advice at 2.12ff and [Appendix G](#).

21. We think that the role of government should be to support data intermediation remedies where the market will not achieve this on its own. Our experience is that implementing interoperability requires careful consideration of the specific circumstances involved, and also careful balancing of benefits and risks.¹⁷ Regulatory oversight is likely to be needed not only to establish the regime but also to monitor its ongoing operation, including compliance and enforcement mechanisms, as shown in Open Banking.
22. As regards the specific questions raised, we make the following points:
- We think that the government should seek to enable responsible data intermediaries where the market will not achieve this on its own. This is likely to involve a degree of market analysis, as was the case with Open Banking.
 - The implementation of data intermediation remedies in a given sector is likely to require detailed assessment, design and ongoing testing.
 - Specifically, we consider that there are certain components of a successful regime which are more likely to require regulatory or government intervention, for example accreditation schemes, compliance and enforcement mechanisms. We are conscious that superficially attractive mechanisms, such as the Data Transfer Project, on closer analysis may not achieve the policy objective of opening up greater competition.¹⁸
 - Consent is likely to be the most appropriate lawful ground for entry into the scheme in order to build public trust. However, mechanisms which involve granular consent at the level of each transaction are unlikely to be successful because of added frictions. We therefore consider that focus should be given to the establishment of consent frameworks or similar mechanisms which combine fully informed consent with ease of use.

Privacy and electronic communications (section 2.4; questions 2.4.1 to 2.4.8)

23. The consultation seeks views on the law relating to the placing of cookies on user's devices¹⁹ because consent is currently needed for non-essential cookies which are low risk and not intrusive of privacy,²⁰ and because consent

¹⁷ For example, the benefits of increased choice and competition must be balanced against the risks of dampening incentives to invest and in creating standardised functionality which stifles innovation.

¹⁸ [Appendix W: assessment of pro-competition interventions in social media \(publishing.service.gov.uk\)](#) at paragraph 31ff.

¹⁹ Under the Privacy and Electronic Communications Regulations 2003 (PECR).

²⁰ Such as 'analytics' cookies (also known as 'web audience measurement').

mechanisms are ineffective. As a consequence, businesses have difficulty obtaining audience measurement data to improve their sites and consumers also do not engage with privacy controls.

24. We agree that consumers often do not currently exercise effective choice. In making any changes, it will be important to balance access to data which may promote competition against appropriate limitations, safeguards and consumer controls. We agree that appropriate purpose limitation safeguards should be put in place, such as those set out in paragraph 199. Further considerations may include the scope of the technologies in question, the appropriate safeguards to ensure low privacy impact or low risk of harm, the need to maintain a robust compliance and enforcement regime, and appropriate testing or trialling to ensure alignment with consumer attitudes or behaviour.
25. We welcome cross-regulatory international collaboration on issues such as consent mechanisms, default settings or choice architecture which will empower consumers to make more effective choices.²¹ We caution, however, that such mechanisms should also not favour existing incumbents through design, or because parties can 'extract' consent through 'take it or leave it' contractual terms or the strength of existing first party relationships.²²

Reform of the ICO (section 5)

26. The DRCF has previously made recommendations to government to strengthen regulatory coherence and cooperation between digital regulators. We therefore welcome the proposed reform of the statutory objectives and duties of the ICO to support competition and innovation.²³ In particular, we support the following proposals:
 - the introduction of two new overarching objectives to uphold data rights and encourage trustworthy and responsible data use,
 - a new duty to have regard for economic growth and innovation when discharging its functions,
 - a new duty to have a regard to competition when exercising its functions, and

²¹ As called for by the ICO — [ICO to call on G7 countries to tackle cookie pop-ups challenge | ICO](#) (Sept 21).

²² We welcome that these proposals would not apply to privacy-intrusive practices such as invasive tracking, micro-targeting and real-time bidding which involves sharing information with third party advertisers (paragraph 202).

²³ [DRCF response to DCMS \(publishing.service.gov.uk\)](#).

- a new duty to cooperate and appropriately consult with other regulators, particularly the CMA, Ofcom and FCA, supported by enhanced information gateways.
27. These proposed statutory objectives and duties will help to ensure an appropriate balance between protecting data rights and promoting data-enabled competition.