

**Written evidence submitted by the Competition and Markets Authority to the Public Bill Committee for the Digital Markets, Competition and Consumers Bill**

1. Thank you for the opportunity to give oral evidence to the Committee hearing on 13 June on the Digital Markets, Competition and Consumers Bill. Below are further observations from the Competition and Market Authority (CMA) on some of the themes discussed at the evidence session.
2. The CMA's purpose is to help people, businesses, and the economy by promoting competitive markets and tackling unfair behaviour. By securing the open, competitive markets which are the foundation of a vibrant economy, we help ensure people benefit from lower prices, greater choice and higher quality goods and services and that all businesses, large and small, have the right conditions to invest, innovate and thrive.
3. However, markets do not stand still. In recent years, the Furman Review,<sup>1</sup> the Digital Markets Taskforce,<sup>2</sup> advice commissioned by the Government from Lord Tyrie<sup>3</sup> (then Chair of the CMA), and the National Audit Office review of consumer enforcement,<sup>4</sup> have all identified the need for reform to address competition and consumer issues, particularly in digital markets. To ensure we all continue to enjoy the benefits of an innovative economy which is genuinely open for business, and which puts consumers at its heart, our toolkit must adapt. In this submission we set out:
  - why this legislation is needed;
  - elements of the Bill we think are particularly important; and,
  - how the CMA is preparing for the new responsibilities proposed in the Bill.

**Why this legislation is needed**

*Supporting innovation, investment and growth in digital markets*

4. Digital markets bring many benefits to people and businesses. For people, they offer easier ways of keeping in touch, provide us with detailed information at our fingertips and offer quick access to a greater range of products and services. For businesses, these markets provide access to a wider range of customers, new business models and new tools to help them run more effectively.
5. However, digital markets also have characteristics that make them particularly vulnerable to competition problems. These include:

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<sup>1</sup> See: [Unlocking digital competition, Report of the Digital Competition Expert Panel \(2019\)](#)

<sup>2</sup> See: [Advice of the Digital Markets Taskforce \(2020\)](#)

<sup>3</sup> See: [Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy, \(2019\)](#)

<sup>4</sup> See: [Protecting consumers from scams, unfair trading and unsafe goods - National Audit Office \(NAO\) report \(2016\)](#)

- The fact that people value being on the same online platforms as each other, combined with economies of scale and scope, makes digital markets prone to “tipping”, where one or two platforms come to dominate and act as gatekeepers to a range of products and services.
  - The data gathered by large players can give them a powerful advantage over competitors – including in other related markets – meaning that market power can quickly spill over from one market to the next.
  - The unprecedented scale, scope and development speed of digital markets means that, when competition problems do arise, harms can spread quickly across the economy and become locked in.
6. Through our extensive work on digital markets, we have uncovered a range of resulting problems. For example, we have found that weak competition in mobile ecosystems acts as a brake on innovation and investment, causing consumers to miss out on improved products and potentially leaving small businesses facing unnecessary costs.<sup>5</sup> Although consumers want more control over their personal data, a lack of accessibility, clarity and balance in the information which platforms provide effectively inhibits consumers from making informed choices.<sup>6</sup> We have also found that weak competition in digital advertising markets could lead to higher prices which were likely to be passed through to consumers.<sup>7</sup>
7. While we continue to undertake significant work to tackle competition issues in digital markets, there are limits to what we can do with our current powers for three important reasons:
- The existing competition and consumer frameworks are primarily backwards looking, tackling harms after they have occurred.
  - In some areas, existing laws lack the specificity needed to address the particular and emerging concerns we see in digital markets.
  - Our current toolkit tends towards one-off remedies and protracted adversarial processes rather than the targeted, more participative and iterative approach required to address the issues we see in rapidly evolving markets.
8. The Bill will create a bespoke, targeted and flexible regime which maximises opportunities for innovation while enabling us to tackle problems in digital markets swiftly and efficiently. For the first time in the UK, the most powerful digital firms will be subject to a set of conduct requirements to address their market power and limit the potential for harm to consumers, other businesses, and ultimately the wider economy, by guiding

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<sup>5</sup> See: [CMA, Mobile Ecosystems Market Study \(2022\)](#)

<sup>6</sup> See: [CMA, Online Platforms and Digital Advertising Market Study \(2020\)](#)

<sup>7</sup> See: [CMA, Online Platforms and Digital Advertising Market Study \(2020\)](#)

their future behaviour. The focus on proportionality within the Bill, including limiting designation to specific activities, rather than to the whole firm, will help to maintain constructive working relationships with these companies. Because these obligations will be enforceable and subject to continuing oversight they will have a powerful impact, including incentivising smaller UK firms to pursue growth in the knowledge they will be competing on a level playing field.

### *Protecting consumers from unfair practices*

9. Effective consumer protection is a core component of a well-functioning economy. As consumers we all benefit from the ability to shop around to find the best deals. It's essential that the information that companies tell us about their products and services is true, and that if things do go wrong, we know we will be fairly dealt with. Actions taken by the CMA to tackle concerns about auto-renewing subscriptions, fake reviews and misleading online sales practices, as well as our programme of work to help contain rising cost of living pressures, are helping to maintain consumer trust and confidence when shopping in-store and online.
10. Weaknesses in the existing consumer protection regime can undermine consumer confidence and diminish the beneficial effects of competition. For example:
  - The CMA currently must go to court to obtain a finding that consumer protection law has been broken. This makes it hard for us to order firms to stop illegal behaviour and encourages firms to “game the system” through protracted legal disputes.
  - When we have been able to secure court judgments, the absence of fines mean that they have little deterrent effect. Even when we secure undertakings in lieu of court action these do not always hold because firms face few consequences for failure to comply.
  - There is no sanction where a trader provides false, incomplete or misleading information to the CMA.

The cumulative effect of these weaknesses has been that, for the minority of firms prepared to risk breaking the law, there has often been no business case in favour of compliance.

11. The consumer protection proposals in the Bill will provide us and other consumer enforcers such as Trading Standards with powers to deliver stronger outcomes for the public. The CMA will be directly empowered to decide when consumer laws have been broken. The potential to set fines at up to 10% of a company's global turnover will have a strong deterrent effect on firms. Further, our decisions will provide valuable guidance to fair dealing businesses about how they should behave. These powers put consumer protection law on a par with competition law, which should alter the incentives for traders to the benefit of consumers as well as the vast majority of businesses who currently play by the rules.

## *Supporting competitive markets*

12. Competitive markets promote innovation, productivity and growth. By helping to ensure that firms do not engage in anti-competitive behaviour, abuse powerful positions, or merge in circumstances which would foreclose markets, competition law can give confidence to all businesses, large and small, that they will have a genuine opportunity to reach consumers.
13. Lots has changed since the main UK competition legislation (the Competition Act 1998 and the Enterprise Act 2002) was introduced. Smartphones and AI weren't widely available and online commerce was in its infancy. The European Commission dealt with most of the large, international cases impacting the UK. Since our exit from the EU, the CMA is now responsible for all competition cases impacting the UK and as such we are increasingly dealing with anti-competitive activities and mergers carried out by very large, often global businesses. It is important that these companies face meaningful incentives to co-operate with our investigations. The current financial penalties they risk for not doing so are small compared to their financial resources. Additionally, evidence relevant to CMA investigations is often held on computer servers inside and outside of the UK. Staff increasingly work away from their offices and even outside of the UK. We need to ensure that our investigative powers fully keep pace with these changes.
14. The current rules don't fit well with this reality and make it harder for us to conduct prompt, flexible and effective competition investigations that deliver the positive impact for people, businesses and the wider economy swiftly. The revisions to the existing competition regime proposed in the Bill have been drafted with the modern high-tech and global business world in mind. They will help ensure that we can obtain the evidence we need as effectively and promptly as possible to stop unlawful conduct, whilst respecting parties' rights of defence. It will encourage compliance by increasing penalties for firms which obstruct our investigations, and it will also enable us to trial and vary alternative market remedies to limit the potential for harm to UK consumers.
15. Updating the merger jurisdictional thresholds will provide us with a more comprehensive and effective basis to review potentially harmful non-horizontal mergers as well as mergers involving a potential competitor. The mergers procedural changes will reduce the length and costs of specific reviews and will increase flexibility in the review process – ensuring that markets remain subject to open and effective competition and continue to attract and reward investment.

## **Key elements of the Bill**

16. The DMCC Bill represents the culmination of years of analysis, consultation and debate and carefully balances the interests of multiple different groups. It is for Parliament to decide the appropriate mix between new powers, existing arrangements and judicial oversight. We would like to highlight three aspects of the Bill we feel are important if the balance of the Bill is to be maintained:
  - **An appropriate appeals mechanism for digital markets:** The Bill proposes that CMA decisions across the regime should be subject to appeal on judicial

review. As we outlined in oral evidence to the Committee, the well-established judicial review model provides the opportunity for timely, robust and effective scrutiny of our decision making. Experience has shown that JR is far more than, as some have sought to portray it, a cursory or mere procedural check. It provides a robust and detailed review, both of procedures but also of analytical approach and evaluation of evidence.<sup>8</sup> Importantly, it takes the final decision as the starting point for review. In contrast, our experience of full-merits appeals is that parties seek to turn this into a full re-hearing of the entire case. This has important consequences:

- *Incentives to resolve or challenge*: judicial review strikes an important balance between providing for an effective route for legal challenge without incentivising parties to take an excessively adversarial approach. Conversely, our experience with full-merits appeals under competition law has shown that more expansive appeals processes can turn regulatory relationships into adversarial contests, disincentivise firms from reaching constructive outcomes at earlier stages, and unduly delay outcomes that benefit fair-dealing businesses and give redress to those harmed.
  - *Length of process*: A judicial review hearing in the Competition Appeal Tribunal typically lasts 3-6 days. In contrast, in our experience, hearings in a full-merits review can last several weeks. The lengthy court cases associated with full-merits appeals are expensive for both the CMA and the parties involved. And because of impact on incentives, the prospect of a full-merits review turns even the administrative phase of the CMA's investigation into a much more contested and lengthy process. This means that every action taken by the CMA will be longer and more complex, and overall that the CMA will be able to tackle fewer concerns at any point in time. The timely outcomes and redress that judicial review provides are particularly important for the fast-changing technological environment that the Bill is intended to cover.
- **A flexible and future-proofed approach to regulating digital markets**: The provisions concerning the designation of firms as having Strategic Market Status, and outlining how conduct requirements will be set, establish a regime that will be nimble and targeted. Some suggest that these provisions require narrowing and further specificity. We disagree. These provisions have been very carefully constructed and already will apply only to those firms with substantial and entrenched market power giving them a strategic position in a particular digital activity in the UK. These designations will be reviewed a minimum of every five years but can be removed earlier if market conditions change. Conduct requirements can only be set to achieve the objectives of fair dealing, open choices, or trust and transparency. This ensures the CMA will design interventions that are targeted at the problems demonstrated by the evidence. This approach gives enough flexibility to ensure that the rules will be effective

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<sup>8</sup> See for example [Meta Platforms, Inc. v Competition and Markets Authority](#) [2022] CAT 26, [Sabre Corporation v Competition and Markets Authority](#) [2021] CAT 11 and [JD Sports Fashion PLC v Competition and Markets Authority](#) [2020] CAT 24

and innovation-maximising across three levels: for firms that depend on online platforms to reach markets; for firms competing with online platforms; and within and between online platforms themselves.

- **Measures to combat unfair practices to protect consumers:** The development of online markets has shown how practices that harm consumers may quickly become widespread. The substantive consumer law amendments in the Bill, such as those to combat “subscription traps” by requiring traders to send reminder notices before automatic renewals, will help to reduce harm. Recognising it is for Parliament to decide the precise scope of these amendments, we stand ready to assist any further discussion as to whether these new rules could be strengthened further (and potentially simplified) by requiring an explicit opt-in to automatic renewal. We strongly support the proposed power for the Secretary of State to add to the existing list of banned practices at speed. We are ready to assist the Government in identifying other potentially harmful practices that should be banned outright.

### **How the CMA is preparing for potential changes to its regulatory duties in digital markets**

17. The legislative proposals set out in the Bill are substantial and wide-ranging. The CMA takes very seriously the responsibility that comes with these important functions that are so critical to people, businesses and the UK economy. We have established a programme of work on our operational readiness and have thought carefully about the specific mix of skills and experience we will need. We will build on our existing expertise while taking account of pressures on public finances and the need for enhanced public sector productivity. In particular:

- We have built a dedicated Data, Technology and Analytics (DaTA) unit, whose members are embedded with and contribute directly to case teams. This ensures we ask tech firms the right questions and that any remedies we propose, are practical and proportionate. Because tech does not stand still, the DaTA Unit also carries out research and horizon-scanning to ensure we remain up-to-speed on developments in the sector that have the potential to change the way business operates.
- We have ambitious plans to continue to build our presence outside London, including each of the nations of the UK, with a particular focus on Manchester. We are working to establish links with local universities and businesses, with the aim of tapping into a diverse and skilled talent pool and understanding what matters to businesses and people across the UK. We are already attracting talented people from a range of backgrounds.

18. To complement our growing in-house capability, we have appointed a group of external “Digital Experts”. These Experts, drawn from industry, academia and regulation, are providing advice across several specialisms, including strategic decision making and systems architecture in tech firms.

## **CMA accountability**

19. The CMA Board and Executive recognise that new responsibilities rightly come with the need for appropriate oversight and accountability. This should apply to the strategy that we set, the priorities that we choose and the work that we undertake.
20. Transparency and accountability is achieved in a number of ways including: publicly reporting on our work (for example through our Annual Plan and Annual Report); widespread formal and informal engagement with a range of external stakeholders; publication of guidance on how we exercise our powers; publication of individual case and investigation reports; judicial scrutiny of our decisions and reports; evaluation of specific interventions and wider reviews such as our State of Competition Report.
21. Critically, we are directly accountable to Parliament for the work that we do. The CMA's work covers a wide breadth and we regularly report to parliament and government about our projects. In the last year, CMA representatives have:
  - Gave evidence to the Business and Trade Select Committee on the work of the CMA, and kept the Committee regularly informed on corporate and strategic issues, as well as key projects;
  - Appeared before the Public Accounts Committee as part of its Inquiry 'Regulation After EU Exit';
  - Regularly updated the Digital, Culture, Media and Sport Committee on our digital markets related work and responded to its Influencer Culture inquiry report;
  - Submitted evidence to the Lords Environment and Climate Change Committee on sustainability and green claims;
  - Discussed our digital markets work with the Lords Communications and Digital Committee;
  - Kept both the Public Accounts Committee and Home Affairs Committee informed on the Motorola / Airwave Market Investigation;
  - Kept the Treasury Committee updated on all Open Banking (and other banking-related) announcements; and
  - Other Committees we have kept updated include the Health and Social Care Committee, for example on our IVF consumer focused work; the EFRA Committee on issues such as unit pricing and other things related to food prices; and the Levelling Up Committee on our leasehold investigation, and our housebuilding market study.
22. In the past year, we have undertaken an extensive programme of stakeholder engagement, including major investors, business and consumer bodies, metro mayors and APPGs. A key aim is to explain the CMA's work and priorities clearly while also giving stakeholders an opportunity to shape them. We continue to look for new ways to ensure firms large and small influence our work. We are building a new pipeline and insights team so that our focus remains squarely on the issues that matter to businesses. Our Board meets regularly across the UK specifically to ensure that we are accessible to, and hear from, stakeholders in each of the nations.

23. To help consumers, our “online rip-off tip-off” campaign is raising awareness about misleading sales tactics online, and providing people with practical advice so they can shop with confidence. We have also recently published consumer guidance to inform people of their rights and consumer law protections in connection with our work on leasehold housing, IVF, home energy efficiency and misleading green claims, the last of which is primarily for businesses.
24. To support businesses, we have published guidance on competition law and sustainability to help firms work together with confidence to achieve environmental objectives. Because awareness of the CMA helps business to stay on the right side of the law, in the last year we held over 40 compliance events. This includes events with public sector procurement teams to help them to detect bid rigging; and with businesses to help raise awareness of the law around misleading environmental claims.
25. The CMA has a strong track record, delivering annual savings of over £2bn to UK consumers. As the UK economy develops, this legislation will enable us to continue to support effective innovation and competition in the consumer interest across the economy, including more comprehensively in digital markets, one of the key potential areas of growth for the next decade. We take our accountability to Parliament extremely seriously and welcome more frequent and searching scrutiny about our work, the choices we make and the impact it has. We will take full account of the strategic steer from Government and ensure that competitive markets are preserved and promoted to support growth, innovation, productivity and the consumer interest across the economy. We are confident that we are well placed to take on the additional responsibilities and powers proposed in the Bill, which has the potential to set a model for positive and proportionate regulatory innovation.