

## Competition and Markets Authority

The Cabot  
25 Cabot Square  
London  
E14 4QZ

t +44 20 7332 5640  
e [info@preiskel.com](mailto:info@preiskel.com)  
[www.preiskel.com](http://www.preiskel.com)

By email only [prioritisation.consultation@cma.gov.uk](mailto:prioritisation.consultation@cma.gov.uk).

3 August 2023

Dear Sirs,

### RE: Revised Prioritisation Principles for the CMA – Consultation Response

We write regarding the July 6, 2023, Revised Prioritisation Principles for the CMA (“**Prioritisation Principles**”) on behalf of the Movement for an Open Web (“**MOW**”), a not-for-profit organisation that is seeking to secure an open and decentralised web.

Overall, we consider it critical that the CMA closely adheres to its statutory duty to ‘*promote competition, both within and outside the United Kingdom, for the benefit of consumers*’.<sup>1</sup>

The promotion of competition will create the greatest benefits to innovation, productivity and growth when focused on certain economic sectors. Those with high fixed costs, low variable costs, high network externalities and high entry barriers tend toward monopoly. As noted by the Report of the Digital Competition Expert Panel on ‘Unlocking digital competition’ (the “**Furman Report**”),<sup>2</sup> enforcement of interoperability and access to underlying components and open standards is vital for digital markets to be competitive.

We understand that the CMA has budgetary/resource constraints. The total CMA budget is in the region of £120mn and setting aside market reviews, the majority of the case budget appears to be spent on reviewing mergers (about 50 to 70 cases per annum) and enforcement action has historically been in single figures of cases in each year over the past 10 years.

Prioritisation of enforcement is likely to enable the CMA to most effectively discharge its statutory obligations. Most mergers do not occur in markets where there are high entry barriers. We suggest that a much closer look is taken toward balancing the budget between enforcement and a de-emphasis on investigating mergers in markets with lower entry barriers. Perhaps the total number of cases could still be in the range of 50 to 70 with 50% of the case budget being on enforcement cases.

<sup>1</sup> Enterprise and Regulatory Reform Act 2013, s25(3).

<sup>2</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).

We confine our observations to the first three considerations in the Prioritisation Principles that the CMA should make when prioritising its work, in the context of digital markets.

### **1.1. Strategic significance**

We support the CMA in reordering the principles so that ‘strategic significance’ is the first consideration.

Economic growth in the economy drives opportunity, jobs, and wealth creation. Growth is driven by innovation and markets foster innovation. This is well established. Innovative digital markets, or lack of them, affects all products bought and sold online.

The UK is currently facing a cost of living crisis, high inflation, and has experienced one of the lowest rates of economic growth in the G20.<sup>3</sup> These poor economic indicators may be affected by market power being exercised by a small number of companies. Lack of choice is at the centre of the issue and the heart of the problem is that for consumers to access websites, the platforms (Google, Apple, Amazon, and Facebook) control such access via their control of browsers and operating systems and limit or foreclose digital distribution outside their walled gardens.

To be clear, the platforms have become dominant distributors of valuable content – but users are seeking to access content, not access platforms. It is the control over content that contributes to the platforms’ market power. Now they have a position of control they add costs to all products via increased prices for advertising. Meanwhile, they advocate that “competition between platforms” is the way to secure competition, investment and economic growth. The argument is based on a false pretext. Each platform inhabits a different market or ecosystem. The promotion of competition thus needs to be the promotion of competition for products that users want to obtain over the open web. The CMA should focus on the breaking down of the restrictive practices that contribute to the walls of the platforms’ walled gardens. These were largely identified in the CMA’s Mobile ecosystems market study, save that the focus of enforcement needs to be on interoperability and open standards as suggested by the Furman Report, if innovation is to have the biggest economic impact.

The platforms monopolise the web, open web data and control digital search, app stores, marketplaces and advertising. Their control over browsers, interoperability interfaces and web data is the central issue for interoperability and hence competition from interoperable products that can then be supplied to end users.

If markets are to be competitive online, we need browsers to simply take customers to websites; enforcement of interoperability requires that browser owners should not embed additional applications and functionality into their browsers. As with the seminal Microsoft case, the owner of an operating system was required to unbundle the operating system from an application – the media player – for the reason that the operating system needed to be interoperable with all applications to support competition between applications without self-interested bias.

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<sup>3</sup> <https://www.oecd.org/newsroom/g20-gdp-growth-first-quarter-2023-oecd.htm>.

Similarly, the browser needs to be interoperable with all websites. Embedding non-browser functionality (such as payments functionality) into the browser threatens to reintegrate into the platform, functionality currently available from third parties and for which a competitive market could exist.

Unbundling of non-monopoly products means providing applications suppliers with a choice over functions they wish to offer.

Efficiency of provision should not be regarded as a justification for vertical integration. Applications are the source of innovation and competition that needs to be promoted.

The CMA needs to prevent the platforms from executing their strategy of blocking applications suppliers' ability to choose their business models. Apple, Facebook and Google are seeking to block applications from operating advertising-funded business models and encouraging them to adopt subscription models. This reduces consumer benefits in obtaining free products and enables the major platforms to monopolise online advertising.

If the UK is to be an attractive location for digital investment, the CMA needs to communicate its determination to promote innovation and secure competitive markets to venture capitalists and investors that have been harmed to date. This can be achieved if the 'strategic significance' of interoperability and innovation in digital markets is kept as a first order priority for the CMA.

## **1.2. Impact**

The Digital Markets, Competition and Consumers ("**DMCC**") Bill, was based on the Furman Report's observations about innovation, interoperability and open standards and is designed to improve the power of the CMA to intervene proportionately. Therefore, we believe that an impact assessment of the effect of the CMA's work (i.e. intervention on interoperability and open standards) should be prioritised.

If a clear focus on interoperability and open standards is maintained, online markets would become more competitive. Increased competition would benefit consumers and provide an avenue for more inclusive growth as suggested by Jason Furman. The approach would contribute to lower prices, improved quality, reduced inflation, increased growth and more job opportunities.

As a starting point we believe that innovation needs to be fostered at the lowest component level. In terms of the World Wide Web, the lowest component level takes the form of data sets that are made freely available by businesses that operate to the standard HTTP protocol.

In order to protect interoperability and for it to continue to act as the essential base layer for innovation to flourish, the CMA also needs to adopt a more interventionist approach in policing standard-setting organisations. This will prevent Big Tech 'capture' whereby a standards body becomes disproportionately represented by a dominant digital platform, which can upend 'unrestricted participation' and result in the platform 'stacking the deck' in its favour. Policed properly, standard setting will ensure that the playing field is level and innovation can take place unimpeded with all market players having equal access to web data.

### 1.3. Is the CMA best placed to act

When deciding whether the CMA is best placed to act, it must recognise that sector specific regulators have limited capacity and have limited experience of competition law enforcement. As the lead enforcer with the highest level of expertise, the CMA should recognise that it is the lead authority in competition law enforcement.

A further management issue is finding the relevant capacity and expertise that can help develop cases in specific industrial sectors. It should be recognised that the CMA has greater opportunity to obtain relevant evidence and outsource case development and case characterisation to external specialist evidence gathering businesses and law firms that both understand the law but, most importantly, also understand the industry and its dynamics, and where to find relevant evidence, given their insight and knowledge of technical language, custom and practice. External capacity is currently used (such as access to the bar) to finalise and present cases, but not so much to formulate them. The attendant difficulty is that well-presented cases can fall apart when the underlying facts and industry are improperly understood.

This will help the CMA in deciding whether there is merit in exercising its formal powers or conversely knowing whether more informal interventions are likely to be cost effective.

As the CMA needs to consult other competition authorities (e.g., in the G7), coordination of resources and capacity can be secured.

Going forward, the promotion of efficiency in supply chains will need to be reviewed to instead give further emphasis on the promotion of competition among suppliers to avoid dependency in international trade e.g., on lithium and semiconductor chips.<sup>4</sup> All CMA decisions will need to bear in mind this trade relations issue of supply chain dependencies, and other aspects of monopsony to a greater extent than perhaps has been the case in the past.

MOW is at the CMA's disposal should there be any questions related to our submission.

Yours faithfully,

**Preiskel & Co LLP**

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<sup>4</sup> See Ambassador Tai's remarks on how the pursuit of efficiency and low costs in trade policy led to vulnerable and high-risk supply chains: "*When efficiency and low cost are the only motivators, production moves outside our borders. It becomes increasingly consolidated in one economy—such as the PRC—which manipulates cost structures, controls key industries, and became a dominant supplier for many important goods and technologies.*" [Ambassador Katherine Tai's Remarks at the National Press Club on Supply Chain Resilience | United States Trade Representative \(ustr.gov\)](#).