

CMA RESPONSE TO THE DEPARTMENT FOR SCIENCE, INNOVATION AND TECHNOLOGY (DSIT) CONSULTATION ON OPEN COMMUNICATIONS: A SMART DATA SCHEME FOR THE UK TELECOMS MARKET

Background

- 1. The Competition and Markets Authority (CMA) is the UK's principal competition and consumer authority. It is an independent non-ministerial government department and its responsibilities include carrying out investigations into mergers and markets and enforcing competition and consumer law. The CMA helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour.¹
- 2. The CMA has a role in providing information and advice to government and public authorities.² The CMA's advice and recommendations are made with a view to ensuring that policy decisions take account of the impacts on competition and consumers.
- 3. Smart data schemes, when well-designed and targeted to an appropriate market, have the potential to promote competition and aid consumers in making more informed choices catered to their individual needs.³
- 4. The CMA has both required and recommended that smart data schemes be developed:
 - (a) Open Banking: Open Banking was initiated in 2017 as part of a package of remedies following the CMA's market investigation into retail banking services. The CMA ordered the nine largest current account providers in the UK to create and pay for an Open Banking Implementation Entity to agree, consult upon, implement, maintain and make widely available,

¹ The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers.

² Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, "on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law)."

³ The term consumer has been used throughout this response, noting that in some cases this will include business customers as well as personal customers.

without charge, open and common banking standards. Open Banking has since become a major success, spurring competition and innovation in financial services, and contributing to the growth of the UK's fintech sector.⁴

- *(b)* Road fuel: While real-time fuel prices are prominently displayed at forecourts, they are not provided by retailers online, and, in the absence of high-quality collated data, consumers face high search costs, having to drive around to find cheaper fuel. These search costs are a barrier to effective competition in the road fuel market. Following our 2023 market study into road fuel, we recommended that government implements an open data "fuel finder" scheme for prices in this sector. We recommended that this is placed on a statutory footing to compel retailers to share their prices.⁵
- 5. This response to Open Communications: a Smart Data scheme for the UK telecoms market consultation provides high-level reflections and learnings from the CMA's work on smart data. These findings are likely to apply across smart data schemes, drawing in particular on detailed implementation work for Open Banking. We encourage UK government to consider these points as it develops its Open Communications proposals. The CMA does not have telecoms-specific open data expertise and this response therefore does not comment on the value of smart data in telecoms sector, nor does it respond to the specific questions in the consultation.
- 6. The CMA is happy to engage further and discuss the contents of this response with UK government.

Smart data schemes and competition

- 7. There are at least two broad ways in which smart data can potentially promote competition:
 - (a) Promoting competition in the markets served by the firms making data available under the scheme.
 - (b) Promoting competition in other markets, including newly created markets.

Promoting competition in the markets served by the firms making data available under the scheme

⁴ See, for instance, The Open Banking Impact Report, October 2023

⁵ See, for instance, Road Fuel Market Study, July 2023

- 8. In these markets, making data available through a smart data scheme can allow consumers and third-party providers (TPPs) acting on their behalf to better access and assess the best deals. This can lead to an increase in consumer engagement and switching between providers. Actual increases in consumer switching, or a genuine increase in the threat of consumer switching, create pressure on firms to compete more vigorously to sustain or increase their market share.
- 9. The CMA's open data recommendation in the road fuel market study is an example of a measure to reduce existing high search costs to drive effective competition. Effective competition relies on consumers being able to compare accurately the price and quality of products. An open data scheme with real-time and easily accessible fuel prices helps consumers to find the lowest fuel prices, which, in turn, would have a moderating effect on retailers' behaviour who will have to compete harder to attract consumers.

Promoting competition in other markets, including newly created markets.

- 10. Data made available through smart data schemes may have value in other markets that incumbents have limited incentives to realise. Opening this data up may present wide-ranging opportunities for firms to develop value-creating and growth-generating services.
- 11. The availability of Open Banking data has, for example, led to innovative disruption in markets outside of current account services. For example:
 - accounting software providers use Open Banking to automatically classify transactions for tax and accounting purposes by utilising real-time access to business current accounts.
 - lenders use Open Banking data to make faster and better-informed decisions about credit to consumers and small businesses.
 - a range of apps have been developed that use Open Banking data to provide consumers and small businesses with financial insights and money management tools.

Building blocks of effective smart data schemes

12. Smart data schemes should reflect the specifics of the market they apply to and all schemes will differ in their exact design and operation. There are, however, design considerations and features that are likely to be important for the effectiveness of most smart data schemes. These include:

- (a) Regulatory foundations mandated participation, monitoring, and oversight.
- (b) Common and open data standards.
- *(c)* Data made available that reflects the dynamics of the market and minimises the risk to competition and consumers.
- (d) Funding model that reflects consumer interests.
- (e) Interoperability with other smart data schemes.
- *(f)* Effective representation of consumers and other end users in scheme administration.

Regulatory foundations – mandated participation, monitoring, and oversight

- 13. Often, the development of smart data schemes will not be in the commercial interests of incumbent firms: for example, they may expose such firms to greater competitive pressure by encouraging consumer switching; they may facilitate the market entry or expansion of firms that may compete directly or indirectly with existing firms; or they may require firms to make data freely available that would otherwise have commercial value. As a result, voluntary, industry-led smart data schemes, are at risk of not getting off the ground, or developing in ways that reflect the interests of incumbent firms, rather than consumers and the wider economy.⁶
- 14. It is therefore likely that some regulatory foundations will be required for an effective smart data scheme. Based on the CMA's experience of Open Banking this is likely to require, at a minimum:
 - *(a)* Mandated participation for firms representing a significant share of the overall market.
 - *(b)* Effective monitoring and oversight, to ensure that firms that are mandated to make data available do so to requisite standards of reliability and quality.
 - (c) Common and open data standards (discussed further below).

⁶ The consultation document notes that in 2020, telecoms highlighted their preference that time is given for voluntary industry-led open data schemes to be developed. No such schemes have since been developed in telecoms, and the CMA is not aware of any major open data initiatives that have emerged from voluntary, industry-led action.

15. The government plans to use the Data Protection and Digital Information Bill, currently going through Parliament, to provide the statutory basis to create a regulatory framework for Open Banking. Once created, this framework is intended to replace the CMA's oversight, and enable Open Banking to develop and expand over the longer term. The CMA welcomes this and considers that the Bill can also provide an effective basis to create, via secondary legislation, strong regulatory foundations for other smart data schemes.

Common and open data standards

- 16. The Open Communications consultation explores three options on data sharing: directly downloadable files, data portals and data sharing APIs.
- 17. Based on the CMA's experience of Open Banking, in order for smart data schemes to be effective they need to allow at consumers' consent third parties to access their data and provide them with services (including comparison and switching services). The ease of engagement with such services is likely to promote competition and improved consumer outcomes.⁷
- 18. The option in the consultation to provide consumers with their data through a downloadable file would require consumers to request, interpret and act on the data they receive.⁸ This is very unlikely to change the behaviour of consumers who are not already highly engaged and is therefore unlikely to deliver competition benefits through additional consumer switching. This option (or similar options) are also unlikely to promote competition in other markets, due to the limited facilitation of access for third parties. Data sharing APIs are therefore much more likely to promote competition (in either markets served by the firms making data available under the scheme or in new markets).⁹
- 19. Based on the CMA's experience of Open Banking, however, this needs to be underpinned by compelling or mandating all firms that fall within the scope of the scheme to have common data standards that must be applied. This enhances the ability of third parties to develop such services. These

⁷ See, for example, The Role of Demand-Side Remedies in Driving Effective Competition (Amelia Fletcher, Centre for Competition Policy University of East Anglia, 2016) for evidence on the impact on demand-side remedies and implications for remedy design. Para 4.19 covers 'lessons in designing switching remedies' and notes measures which reduce the 'hassle factor' involved in switching can be powerful.

⁸ DSIT consultation sharing options between a downloadable file or a common sharing API – page 11 Open communications: a smart data scheme for the UK telecoms market (publishing.service.gov.uk)

⁹ This does not preclude enabling consumer to directly access their data in addition to services provided by third parties. This may become with distinct benefits for example allowing individual consumers to seek help from friends, families or other organisations in understanding their existing situation.

standards might relate, for example, to data format, to security and authentication, and to the interface that provides access to the data.¹⁰

- 20. Common data standards reduce the costs to firms that provide services that use smart data schemes, including services that aid switching and comparison. Without common standards, providers of services using smart data schemes could face higher costs from dealing with a range of different, firm-specific standards and approaches. It may be more difficult and costly for such providers for example: to authenticate themselves; to access the data; to process and clean it; and to manage piecemeal changes made by firms that hold the data.¹¹ This could:
 - (a) Reduce the number or mix of services offered by third party businesses, reducing the overall effectiveness of the smart data scheme.
 - (b) Lead to services using smart data schemes to only work with data from a subset of firms. This could reduce the positive impact on competition in the market (for example if services focus only the largest players) and limit the potential for competition in other markets to be enhanced. Lack of common data standards could also enable any mandated firms to technically comply with the scheme while making it practically difficult for consumers or third-party service providers to access and use the data.
- 21. Technical expertise is likely to be required to develop and maintain open data standards in the telecoms sector, and to deliver other relevant services such as authentication and whitelisting. In the CMA's Open Banking remedy, this expertise has been provided through an Implementation Entity that the mandated banks were required to establish and fund.¹²

Data made available that reflects the dynamics of the market and minimises the risk to competition and consumers

- 22. The scope of the data is included within a smart data scheme is a critical element of its design. The decision on scope should reflect the nature of the market, the objectives of the scheme, and potential use cases.
- 23. While the CMA does not have a detailed understanding of the telecoms sector, there are some well-known features and practices that will require

¹⁰ The CMA's Open Banking remedy required mandated firms – through the implementation entity – to develop and implement an open API to enable access to the data that they were required to make available.
¹¹ Make use of open standards - GOV.UK (www.gov.uk)

¹² The purpose of the entity, as set out in the CMA's Retail Banking Market Investigation Order, is to "agree, consult upon, implement, maintain and make widely available, without charge open and common banking standards".

consideration in setting up an effective, pro-competitive smart data scheme (through either of the channels described in para 7):

- (a) Product bundling telecoms products are often bundled with other products (both telecoms and beyond) for example internet and television services. In setting the boundaries of an Open Communications scheme, consideration will need to be given as to what constitutes a meaningful information set for consumers.
- *(b)* Personalised and hidden pricing not all consumers pay the same price for the same telecoms services, and the suite of actual prices charged by firms may not be publicly available information (see for example the evidence on loyalty penalties), which may complicate what a meaningful information set is.¹³ This can be linked to product bundling.
- 24. Most smart data schemes will in practice facilitate some level of information exchange between businesses. This information exchange will need to be compliant with competition law.¹⁴

Funding model that reflects consumer interests

- 25. The consultation and Impact Assessment set out that there will be costs incurred in setting up, operating, and maintaining a smart data scheme.¹⁵ There are a mix of potential models to fund such a scheme. A key consideration in this context is the extent to which the costs are shared between holders of the data and users of the data.
- 26. Enabling users of the data (including other businesses) to participate in the scheme, and access the data, at no cost is likely to encourage greater use of that data by third parties to develop services for consumers. This may be particularly important where an objective of the scheme is to promote new and innovative services, including in markets beyond those that the smart data scheme applies to. In these cases, where potential viability of such services is uncertain until they have been tested, scheme participation and/or data-use charges may present a significant barrier to their development.
- 27. Where there are charges for scheme participation and or data access, consideration will need to be given to:

¹³ See, for instance, 'Loyalty penalty' super-complaint - GOV.UK (www.gov.uk)

¹⁴ See section 8 of the CMA's Guidance on Horizontal Agreements for more information about information exchange and competition law.

¹⁵ Noting that future funding models will be examined further in subsequent consultations

- (a) How the scheme practically changes the existing market dynamics, where existing firms are able to enter into arrangements on commercial terms to enable third-party services to be developed.
- (b) How the access charge is set, particularly noting that some firms may have an incentive to undermine the smart data scheme through high access charges or by using charging structures that protect them from increased competition.

Interoperability with other smart data schemes.

- 28. The UK government is looking to find ways to extend the benefits of smart data schemes to new sectors. As it does so there may be valuable services that could be provided to consumers that bring together data from multiple smart data schemes. The CMA encourages UK government, in designing any telecoms data scheme, and more widely, to make interoperability a key design consideration for smart data schemes.
- 29. Similarly, the dynamics of markets are likely to change over time and the frameworks of smart data schemes should have sufficient flexibility to adapt to those changes.

Effective representation of consumers and other end users in scheme administration

- 30. It will not necessarily be in the commercial interests of all businesses to have a smart data scheme that effectively delivers on its objectives to promote competition and improve outcomes for consumers and other end users (for example business users, or businesses looking to enter the market).
- 31. It is therefore essential that there is effective representation of the needs, perspectives and feedback of consumers and other end users through whatever administration model or models are used to develop, maintain, enforce and adapt the smart data scheme.

Competition and Markets Authority November 2023