Response to consultation on CMA's Pro-Competition Regime for Digital Markets

Introduction

This submission provides the company's response to the Competition and Markets Authority's consultation on its approach to the Pro-Competition Regime that will be run by the Digital Markets Unit (DMU).

As we have made clear in our previous submissions and in meeting with your team, we are highly supportive of the proposed approach, as we are of the Pro-Competition Regime more generally. Here we set out our general view on the proposals and make some minor comments on the CMA's approach, suggesting areas where greater clarity may be useful.

About the role of Online Travel Agents

OTAs offer consumers an incomparable ability to find the best value deal for them tailored to their own travel preferences and requirements, quickly. OTA's knowledge of diverse market cultures, consumer preferences, provision of payment methods and local languages make them a go to intermediary for foreign travellers and this is particularly beneficial for less well-known destinations.

OTAs also provide suppliers (including airlines, hotels, car rental, etc.) with access to a global market of travellers at no up-front cost. Suppliers get technological advice, lower marketing costs and higher visibility. For example, whereas suppliers invest around 6-9% of their revenue in sales and marketing, OTAs regularly spend 50% or more of their revenue on these activities, much of it with the largest online firms. This combination of attributes is particularly valuable for Europe's small independent travel service providers as it empowers them to compete effectively with the global chains.

Comments on the Pro-Competition Regime and the role of the DMU

We welcome the CMA's proposals. We view the work of the DMU as an essential intervention to ensure fair and open markets in the digital economy. We as a user of services provided by 'gatekeeper' platforms, have suffered as a result of the anticompetitive behaviour, particularly Google's self-preferencing of its own vertical travel search product and their use of their advertisers' proprietary data to develop these competing products.

The DMU through SMS designation and the development of Conduct Requirements (CRs) and Pro-Competition Interventions (PCIs), has the right approach to identifying and tackling these issues. Unfortunately, our experience has shown that competition investigations alone can be too slow and insufficient to prevent severe harm on the market caused by anticompetitive practices by a few very large platforms. Through this regime, genuinely dominant platforms can be held to account and practices which only serve to entrench their position and weaken competing services should be identified, prohibited and positive obligations can be imposed to change behaviour.

In particular we would like to commend the level of engagement with challenger firms envisaged as part of the proposals. We of course comply with any requests for information from the CMA as part of SMS investigations, and be constructive in suggesting appropriate and proportionate mitigations that can help strengthen competition and ultimately benefit consumers. The collaborative approach appears to be a key pillar of the CMA's plan at all stages of the process and will surely lead to better outcomes. We are also reassured to see the CMA is prepared to back up this new regime with meaningful penalties against non-compliance by SMS firms, which helps to address the inherent power imbalance between the most dominant digital companies and their smaller challengers.

We have some minor comments on various sections of the proposal, which are set out below. Most are requests for greater clarity on how processes would work in practice and we are reassured that in our discussions with CMA officials, they have indicated that your intended approach broadly aligns with our expectations. It would be helpful if these points can be incorporated into the final draft of the guidance.

1. Strategic Market Status investigations

It would be useful for the guidance to explain how the CMA will determine how a 'digital activity' will be defined as being the subject for a SMS investigation and state explicitly whether multiple digital activities can be looked at in respect of a potentially dominant firm at the same time.

We understand that the CMA will take a flexible approach and that if it makes practical sense, designation in respect of multiple digital activities (e.g. internet search and online advertising) can be investigated concurrently. We believe keeping this option open is important as in the case of some dominant firms, anti-competitive practices in search and online advertising are interlinked and it would be helpful to be able to gather evidence on this together.

2. Conduct Requirements

We would encourage the CMA to provide more detail about the "implementation period" that is mentioned once a CR has been confirmed. Our experience from the DMA in the EU is that the most substantive negotiations have been over how gatekeep firms will redesign their systems to ensure compliance with their obligations. For instance, in discussions happening currently over Google's self-preferencing of their travel search products, there has been a series of workshops involving challenger firms, Google and the European Commission to analyse mock-ups of the gatekeeper's proposed changes to their search page. In the CMA's proposed approach outlined in the consultation, there is a very collaborative approach to developing the Conduct Requirement itself, but then there seems to be little formal process to ensure the SMS firm's implementation plan will be compliant and it only mentions an expectation that the SMS firm will "engage" with relevant third parties who may be impacted by the CR.

We believe this section (3.63 in the guidance) should be strengthened, such that the default assumption should be that SMS firms will need to produce implementation plans

for how they will comply with a CR. Then, we would be grateful if the CMA would note how it will remain involved in the process between the SMS firm and relevant challenger firms. We believe there is a role for the regulator in gathering feedback from third parties on the SMS firm's plan and requesting any necessary changes from the SMS firm. Ultimately, an SMS firm should not implement their plan for compliance, until all objections from the CMA have been addressed. Without this process, we believe you risk SMS firms being immediately challenged by multiple third party firms for breaching CRs, which is the type of endless litigation that the Pro-Competition Regime is designed to avoid.

Finally, we note that there is no timeline stated for the process to develop CRs, whereas SMS investigations and PCI processes are designed to generally last 9 months. While we appreciate that one of the strengths of CRs is that they can be implemented quickly and flexibly, even being subject to regular revision as necessary. However, it may be helpful for expectation management to say that the CMA aims to have CRs in place along similar timelines to SMS investigations. This will also reassure challenger firms that if CR processes are run alongside SMS investigations, dominant firms will likely be subject to requirements shortly after designation.

3. Pro-Competition Interventions

It would be helpful if the guidance could describe how the CMA will determine whether anti-competitive behaviour should be addressed by a CR or a PCI. Currently, while PCIs appear to be more specific and can order SMS firms to take specific action (e.g. divest a subsidiary or develop a new technology, for instance for interoperation) it seems as though both tools can be used to address similar competition issues. Any clarity on when each type of measure will be deployed would be useful and help challenger firms provide the most relevant and helpful evidence for the CMA.

4. Enforcement of breaches

As mentioned above, we are reassured by the CMA's approach to enforcement. While we imagine this is the intention, it would be helpful to explicitly state that during an enforcement investigation the CMA also seek the views of other challenger companies who may have also experienced non-compliant behaviour from the SMS firm in question. This will ensure that the full impact of the potential breach is understood, and other firms have the opportunity to comment, even if they were not part of the initial complaint.