

# **UK Competition and Markets Authority response to the European Commission’s consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy**

## **Introduction**

1. The Competition and Markets Authority (CMA) is the UK’s lead competition and consumer enforcement authority which works to promote competition for the benefit of consumers, both within and outside the UK.<sup>1</sup> We are an independent, non-ministerial government department.
2. The CMA fully supports the aims and ambitions underpinning the Commission’s digital single market (DSM) agenda, and welcomes the opportunity to respond to the consultation on platforms and the collaborative economy. Given the pivotal role of platforms in the digital economy, the CMA considers it is of vital importance that open and contestable markets enable competition to deliver greater consumer choice and spur further innovation. We therefore strongly support the focus on platforms in the Commission's DSM agenda.
3. Our response is by way of a written position paper setting out those issues where we have particular experience as a competition and consumer authority. The consultation raises a number of issues which fall outside our remit and we do not address these in our response. The paper first summarises the CMA’s overall views before addressing some of these issues in greater detail.
4. The paper mirrors the structure of the consultation and is set out as follows:
  - Section A: Social and economic role of online platforms
  - Section B: Tackling illegal content online and the liability of intermediaries
  - Section C: Data and cloud in digital ecosystems
  - Section D: The collaborative economy
5. The CMA has recently considered a number of aspects of online platforms in carrying out its competition, consumer and markets functions. Further details of

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<sup>1</sup> Further detail about the CMA can be found on [www.gov.uk/cma](http://www.gov.uk/cma)

our recent experience are set out in Annex A. Drawing on this experience, we submitted evidence to the House of Lords Internal Market Sub-Committee following its call for evidence on online platforms and the EU Digital Single Market agenda.<sup>2</sup> This paper sits alongside that evidence<sup>3</sup>.

## Summary of key points

- Online platforms are a key part of the digital economy and have brought very significant and numerous benefits to consumers;
- It is important that these benefits are not lost through hasty, inappropriate or disproportionate intervention;
- A 'one size fits all' regulatory response is not appropriate given the diversity of online platforms.
- The economic activities conducted on online platforms are not necessarily novel, nor do they only appear in online markets: the principal issues are familiar in offline markets;
- As such, existing competition and consumer law applies to online platforms as they do to other businesses both online and offline;

### *Competition*

- Competition problems are most likely to arise from market power but the market power of online platforms may be transitory and fragile;
- The merger regime and market tools may be used to address potential competition problems;
- More use could also be made of sectoral inquiries to enable better understanding of emerging competition problems in fast moving markets;

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<sup>2</sup> The evidence is available at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23391.html>

<sup>3</sup> We also draw upon the speech of the CMA's CEO Alex Chisholm on platform regulation given at the Bundesnetzagentur conference in Bonn on 27 October 2015, available at <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation> and to the evidence submitted by the CMA to Transport for London's private hire regulations proposals at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481450/CMA\\_response\\_to\\_TfL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481450/CMA_response_to_TfL.pdf)

- Competition enforcement should be targeted at specific harms based on a thorough analysis of the market;

### *Consumer*

- Online platforms have increased price transparency and enabled consumers more easily to compare the products and services of competing suppliers, thereby improving quality and choice;
- The existing consumer protection regime is substantially able to address consumer concerns, in particular under the UCPD and UTD;
- There is scope to offer more guidance to clarify the application of consumer law to online platforms;
- Enforcement action, if needed, should be tightly focused in the light of specific and evidenced harm;
- In some areas, the Commission may wish to explore if further improvements could be made, for example in relation to the definitions of trader and consumer, platform/third party liability issues; transparency (for example regarding data collection policies) and notice and take down procedures.

## **Section A: Social and economic role of online platforms**

*Definition of online platforms: Do you agree with the Commission's definition?*

6. We agree that the Commission's definition broadly captures that, in essence, online platforms facilitate and connect different groups of users. However, specific types of platforms have quite different roles, and raise different regulatory challenges, while still falling within this all-encompassing definition. For example they may<sup>4</sup>:
  - a. provide a **market place** where sellers and buyers can meet (such as peer to peer sites);
  - b. provide **information** about sellers or buyers (such as review sites);
  - c. **facilitate** a transaction (such as payment intermediaries).

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<sup>4</sup> Platforms may also combine several different functions and may themselves be active as a participant on their own platform.

7. The definition is not therefore helpful as the basis for specific regulation aimed at online platforms. A platform offering brokering services to consumers in a particular sector may present different issues, and different risks, from those of a search engine: the fact that they both fall within this definition does not assist in addressing the different problems they may present. For example, similar conduct by online platforms may give rise to different competition issues depending on the individual facts of the case, such as whether or not the platform enjoys market power or is itself a participant on the platform. Each case must be considered differently. In our view, it is also the case that many of the competition and consumer protection issues raised in the consultation are not novel or specific to online platforms but are manifestations of similar conduct which occurs offline, which is familiar to relevant authorities and the subject of existing procedures and case law.
8. For these reasons, we do not think that there should be new ex ante regulation which specifically targets online platforms on the basis of a 'one size fits all' definition of online platforms. In our view, action should be taken to address specific problems on the basis of a thorough analysis of detriment in actual markets. Our strong preference is therefore for targeted ex post enforcement using existing tools while recognising that changes could be made to expedite and improve effective action.

*Advantages of using online platforms*

9. Online platforms have brought significant benefits to consumers, businesses and the online economy. Benefits include that platforms have:
  - a. facilitated economic growth by enabling sellers to access new markets and reach new customers (and often to do so at lower cost);
  - b. fostered innovation, enabling many new opportunities for businesses – new and old - to deliver novel and creative ways to meet consumer demand;
  - c. enabled buyers to access a greater range of suppliers (and vice versa) and/or new products (combined with better price discovery because more information is available);
  - d. better matched willing buyers and sellers;

- e. reduced information asymmetry;<sup>5</sup>
  - f. enabled consumers better to compare substitutable products.
10. There is a significant risk that ex ante regulation applied broadly to online platforms may halt or impede these benefits in markets that are still rapidly evolving and may ossify emerging market structures. Online platforms operate in dynamic markets characterised by rapidly developing technology and new, sometimes disruptive, business models. Authorities should intervene in such markets with care in case these benefits are reduced or lost. In fact, instead of new regulation, in some cases deregulation may be more appropriate where competition is impeded by laws which were designed for a different age.

#### *Competition problems*

11. Competition problems may particularly arise from the market power held by online platforms. Online platforms may potentially acquire and hold market power for any number of competitively legitimate reasons, including superior business acumen, greater efficiency, consumer preference, strong positive reputation and superior product or service functionality. A combination of features, including strong network effects and barriers to ‘multi-homing’ by customers may make it more likely that the ‘winner takes all’. However, even in such cases, competition can still be subject to continual cycles of innovation, quite often of a ‘radical’ nature, where last year’s ‘winner’ can quickly become this year’s ‘nobody’: the potential for innovative offerings to disrupt markets means that while successful digital platforms may acquire significant market power, such market power may sometimes be fragile or transient in nature.
12. From a competition viewpoint, concerns involving online platforms include:
- a. market power built up in one area used anti-competitively to dominate another part of the sector or market;<sup>6</sup>
  - b. attempts to frustrate new competitive challenge, e.g. through refusals to license or bans on sellers on the platform selling through alternative, competing channels; and

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<sup>5</sup> There are examples of where social media has been used to bring pressure on a company regarding its terms and conditions: <http://musically.com/2015/08/21/daniel-ek-minecraft-notch-spotify-privacy-policy/>

<sup>6</sup> For example the Commission is currently carrying out investigations into Google regarding alleged abuse of dominance. ([http://europa.eu/rapid/press-release\\_MEMO-15-4781\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm))

c. online platforms seeking to lock in suppliers and suppress inter-platform competition (e.g. through contractual restrictions).<sup>7</sup>

13. Indications of market power are in general of more concern in markets where, for example, (i) there are established dominant platforms over a sustained period of time and (ii) there are significant barriers to customers switching or multi-homing which can restrict competition from potential entrants or expansion by existing, smaller rivals.

14. In the context of online platforms, these barriers may include:

- Data – larger online platforms may have some competitive advantage if there is proprietary data to which they have access.<sup>8</sup> To the extent such data is inaccessible to rivals, it may confer a form of ‘unmatchable advantage’, making it hard for competitors to compete although this depends on the facts of the particular case.
- Reputation – to the extent reputation<sup>9</sup> cannot be transferred between platforms, this can promote single homing and act as a barrier to switching.
- Contractual restrictions – platforms may attempt to lock-in suppliers or suppress inter-platform competition through contractual restrictions.<sup>10</sup>
- Inertia – users may have limited abilities or incentives to switch, or may perceive the steps required to switch to be overly burdensome. As with other businesses, online platforms may make it harder for customers to switch, for instance by introducing friction, or additional consumer ‘effort’ in the transaction.

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<sup>7</sup> Such restrictions may include so-called ‘wide’ most favoured nation clauses: see the CMA’s recent submission to the OECD Hearing on Across Parity Platform agreements ([http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2015\)66&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2015)66&doclanguage=en))

<sup>8</sup> This is not particular to online platforms. The same may be true of other online (or even offline) services.

<sup>9</sup> For example feedback, ratings and review profiles or ‘trust’ scores. There are regulatory challenges regarding portability of value-added data such as a reputation score on an online market place, particularly given the ambiguity as to who owns what data.

<sup>10</sup> Please refer to Annex A for examples of CMA investigations into such contractual restrictions (section a.)).

15. Where there is abuse of dominance, we consider that the existing competition law framework is capable of being appropriately applied to online platforms. For example, the CMA recently used its powers to accept behavioural commitments to address competition concerns in relation to certain online platforms.<sup>11</sup> Whether specific online platforms have market power, or have been abusing such power, are issues which must be considered based on an investigation of the material evidence on an individual basis.
16. There are other tools which may be used to address market power. For example, one of the priorities in merger control under the Enterprise Act 2002 is to prevent, where necessary, the creation of market power as a result of enterprises ceasing to be distinct.
17. In addition, such markets can be examined by the CMA under the market studies or market investigation reference regime under that Act.<sup>12</sup> The ability for the CMA to carry out market studies or market investigations can be important in enabling it to gather evidence in markets where undertakings have market power, and to decide whether any remedial action should be taken to address competition problems in those markets, without the need to identify an infringement of competition law. It was using market investigation powers that the CMA prohibited the use of the 'wide' most favoured nation clauses (MFNs) by price comparison websites (PCWs) in the private motor insurance (PMI) market (and – to ensure the effectiveness of that prohibition – also prohibited behaviours by large PCWs intended to have equivalent effect).<sup>13</sup> Sectoral inquiries conducted by the Commission, such as the e-commerce inquiry, perform a similar role. We consider that more use could be made of such inquiries in fast moving sectors.
18. In conclusion, as regards potential competition concerns, we consider that:
  - existing competition tools are sufficient;

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<sup>11</sup> See [https://assets.digital.cabinet-office.gov.uk/media/540f121f40f0b612d3000011/Decision\\_to\\_accept\\_commitments\\_relating\\_to\\_SMR\\_platforms..pdf](https://assets.digital.cabinet-office.gov.uk/media/540f121f40f0b612d3000011/Decision_to_accept_commitments_relating_to_SMR_platforms..pdf)

<sup>12</sup> The CMA's market investigation powers involve an assessment of whether there is a feature or combination of features of a particular market in the UK that gives rise to an adverse effect on competition. Where the CMA finds that there is such an effect, it may put in place legally-binding remedies to remedy, mitigate or prevent the adverse effect or any associated customer detriment. Market investigations are distinct from the CMA's competition law enforcement, and do not involve a finding that competition law had been infringed.

<sup>13</sup> See Annex A.

- ex ante regulation targeting online platforms also risks reducing or removing the considerable benefits which online platforms have brought;
- competition problems are likely to arise from market power but the market power of online platforms may be transitory and fragile;
- competition enforcement should be targeted at specific harms based on a thorough analysis of the market;
- the merger regime may also be used to address competition concerns;
- more use could be made of sectoral inquiries to enable better understanding of emerging competition problems.

### *Consumer problems*

19. From a consumer protection perspective, consumer problems may include:

- a. Circumstances in which consumers are unable to exercise effective choice. This may occur, for example, if a price comparison website displays prices which attract users by a low headline price to which additional charges are added ('drip pricing'). A search engine, without adequate disclosure, may rank search results based on commission received from a third party rather than its relevance. A review site may not show, or else demote, negative reviews. Such practices deprive consumers of choice and also distort competition: consumers who are not provided with material information to make economic decisions which affect them are not empowered to drive effective competition.
- b. Online platforms may employ terms of use which consumers do not engage with or understand, for example data collection and use policies. Without such engagement, consumers cannot choose between different platforms and drive competition on matters which may be important to them.
- c. Problems may arise from consumer uncertainty as to their legal rights. Consumer confidence and trust in online platforms requires a clear understanding of their rights as against the platform and/or its participants. This is critical to the effective functioning of digital markets, particularly in the collaborative economy, when consumers who contract with other consumers enjoy fewer rights than if contracting with a business seller or

the platform directly. If the respective roles and responsibilities of the platform and its users are unclear, this points to a need for greater clarity and legal certainty.

- d. Consumers in aggregate may also suffer detriment if enforcers cannot operate quickly and effectively to end unlawful conduct by business users of the platform. Although it is necessary to consider each case on an individual basis, an online platform may exercise a large degree of control of the traders which use it and is therefore in a strong position to bring potential infringements to an end. Consumer problems may arise if illegal conduct remains unchecked.
20. In our view, the existing consumer regulatory framework appears essentially able to tackle concerns, although we consider below that some detailed improvements are possible around platform liability, data collection and use, clarifying responsibilities between the platform and the seller, and considering whether enforcers' powers are sufficiently robust to investigate efficiently and create deterrence.
21. In broad terms, however, we note that online platforms have brought considerable benefits to consumers. While particular activities have the potential to operate unfairly in breach of consumer protection laws, problems should be assessed in the particular context in which they occur, based on a thorough understanding of the facts.

#### *Unfair Commercial Practices*

22. Online platforms, like any other businesses, are subject to the legal obligations not to act unfairly under the Unfair Commercial Practices Directive (UCPD). In broad terms, this requires a reasonably high degree of transparency to ensure that consumers are properly informed when making purchasing or other economic decisions. In our view, under this legislation, platforms are responsible for their own activities insofar as these could influence consumer decision-making and, to the extent that the conduct of business users of the platform relies on processes put in place by the platform, may extend to the conduct of business users of the platform as well. For example:
- a. Where a platform ranks search results as a result of payments by traders, but does not make this clear, consumers could be misled into thinking the

top results are most relevant when this is not the case. In our view, this would breach the UCPD (as implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2007 (CPRs)).<sup>14</sup>

- b. Where the result of an algorithm used by an online platform may be material information the average consumer needs in order to take an informed decision about a transaction, the UCPD requires some level of disclosure. The Office of Fair Trading (a predecessor of the CMA) considered that where consumers' interactions with a website could lead to personalised pricing<sup>15</sup> this should be disclosed to avoid a misleading omission.
- c. If an online platform does not enable traders to comply with their legal obligations, for example by enabling traders to indicate to buyers if they are a trader and, if so, displaying their business address, the platform is likely to breach the UCPD<sup>16</sup>.

### *Unfair Terms*

- 23. The Unfair Terms Directive (UTD) applies to business to consumer contracts between online platforms and their users, including privacy policies. In our view, the existing legal framework set out in the Unfair Terms Directive appears substantially capable of addressing most concerns. On 1 December 2015 the CMA launched a review of compliance with consumer law, including unfair terms law, in the cloud storage sector (particular issues regarding consumer data are considered below).

### *Improvements to the consumer protection regime*

- 24. In our view, the consumer protection framework appears substantially fit for purpose although we think there is scope to provide business and consumer guidance on its application to improve compliance. In particular, online

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<sup>14</sup> See Price comparison websites: Trust, choice and consumer empowerment in online markets (OFT1467) <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-protection/campaign11-12/price-comparison-websites/>

<sup>15</sup> The OFT considered business may breach CPRs by way of misleading actions/omissions or breach of professional diligence obligation, for example: by failing to tell consumers information is being collected and used commercially; where a privacy policy does not accurately represent the information being collected and where information is being used covertly to personalise a price. [http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared\\_offt/research/offt1488.pdf](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/research/offt1488.pdf)

<sup>16</sup> For example, see the CMA undertakings secured from secondary ticket websites: <https://www.gov.uk/cma-cases/secondary-ticketing-websites>

platforms should provide clear information on how they operate, and what their responsibilities are, so consumers can make informed choices.

25. As part of the Internal Market Strategy published on 28 October 2015, the Commission has said that where appropriate it 'will provide guidance as regards the application of existing EU law to the activities and sectors in which the new collaborative economy business models are used'. In our view, the focus of this guidance could be extended to include the application of existing laws to online platforms more generally.
26. We also consider that some improvements could be made to the consumer protection regime at the margins. These relate to the definitions of trader and consumer, use of consumer data, platform/third party liability issues and notice and take down procedures.

*Responsibilities of the seller (definitions of trader/consumer)*

27. What constitutes acting as a 'trader' or 'consumer' may be in need of clarification given the growth of the collaborative economy facilitated by platforms.<sup>17</sup> This would ensure that sellers can have more certainty about when they need to comply with consumer protection law. Equally, it should always be clear to consumers using collaborative economy platforms when they are contracting with another consumer (see paragraph 19c above).

*Data collection*

28. We welcome the introduction of the General Data Protection Regulation to establish clearly defined rules. In a markets context, in our work on the commercial use of consumer data, we identified a particular concern that the existing legal framework does not appear to drive competition over data collection and privacy practices which a significant proportion of consumers said they wanted (see further below).

*3rd party/platform liability*

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<sup>17</sup> This problem is not unique to online platforms, but occurs wherever individuals seek to become economically active by selling to other individuals. However, given the scale of activity facilitated by platforms, the issue has become more prominent. It has recently been discussed by Citizens Advice in its paper *Peer Problems – An Assessment of the Consumer Experience of Online Marketplaces* (<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20Publications/Peer%20Problems%20-%20Final.pdf>)

29. The business model - whereby the platform acts an intermediary between two or more sides – may present certain regulatory challenges in defining the respective roles and responsibilities of the platform and the participants.
30. In broad terms, at present, if an online platform enables its business users to comply with its legal obligations and some businesses fail to do so, consumers will not be able to exercise effective choice between competing businesses. It is not clear that the UCPD will always be able to address this issue and further avenues should be explored in the context of particular problems (for example the role of guidance, self-regulation or remedies directed at particular markets following market investigations).
31. In our view, any proposed action should be clearly focused on evidenced problems in particular sectors or markets.

*Notice and take down*

32. This is considered further below. In short, in the context of consumer protection action taken by authorities to protect consumers, our position is that, where the content is unlawful, and it is necessary and proportionate to remove it, more effective procedures may be put in place to ensure prompt removal of material by online platforms.
33. In conclusion, as regards potential consumer concerns, we consider that:
  - Online platforms have increased price transparency and enabled consumers more easily to compare the products and services of competing suppliers, thereby improving quality and choice;
  - the existing consumer protection regime is substantially able to address consumer concerns, in particular under the UCPD and UTD;
  - there is scope to offer more guidance to clarify the application of consumer law to online platforms;
  - enforcement action, if needed, should be tightly focused in the light of specific and evidenced harm;
  - In some areas, the Commission may wish to explore if further improvements could be made.

34. We set out below mainly factual responses to a number of specific questions raised by the Commission. These responses should be read in the context of our overarching comments above.

*Transparency of online platforms: should platforms be more transparent as regards their own activities and those of the traders that use them as to the categories of information below?*

35. In terms of the specific categories raised in the questionnaire, subject to our comments above, our response is broadly as follows:

- a. Information required by consumer law: yes
- b. Sponsored results: yes.
- c. Information as to who the actual supplier is: yes
- d. Information to discourage fake reviews: yes
- e. Additional information: yes. Where that information is necessary for consumers to make an informed choice.

36. Under category (d) above, we draw the attention of the Commission to our recent Online Reviews Report.<sup>18</sup>

37. Our view is that there may be considerable benefits for consumers from reputation, review and feedback systems operated by online platforms provided they are operated fairly and effectively. Such systems can expand the range of options and information available to consumers, thereby potentially reducing the problem of asymmetric information between producers and consumers.

38. Such systems may lower or even remove the need for regulation, allowing more scope for market competition to fix problems. It is, however, important that they are properly designed so that the review mechanism incentivises participants to provide useful, accurate and unbiased reviews. Conversely, fake reviews impede consumer choice and may breach the UCPD<sup>19</sup>.

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<sup>18</sup><https://www.gov.uk/government/consultations/online-reviews-and-endorsements>

<sup>19</sup>For example where businesses offer inducements to customers in return for writing positive reviews on review sites; write fake reviews about their own or other businesses' goods and services under the pretence of being a consumer, or fail to ensure that advertising and paid promotions are clearly identifiable to readers/viewers as paid-for content (whether the payment is financial or otherwise). See the report (pages 3-5):

*Reputation systems operated by platforms : are they reliable? What are the benefits and drawbacks?*

39. In the Online Reviews Report, in our consumer survey, we found that more than half of UK adults (54%) use online reviews before making purchases. While most buyers who used reviews and endorsements considered the product or service matched up to their expectations, we found evidence of potentially misleading practices, such as fake reviews being posted on review sites, negative reviews not being published and businesses paying for endorsements without this being made clear to consumers.
40. We found that consumers that use online reviews find them valuable. Across the six broad sectors that we looked at, we estimated that £23 billion a year of UK consumer spending is potentially influenced by online reviews. Consumers that use online reviews appear to trust them and they appear to be an important source of information for consumers' buying decisions. Further, most consumers said that the product or service purchased after reading reviews matched up to their expectations. (This finding should be interpreted with caution, however: even if consumers may be 'happy' with the product in question, reviews may alter their decision-making and, to the extent that they are fake, risk distorting the market. This was not assessed in the survey).
41. Estimates of the proportion of suspected fake reviews that are published on review sites vary widely. Several sites that publish reviews told us that they estimated the figure was around 1 to 2%. However, other sources suggest the proportion of fake reviews is much higher.<sup>35</sup> We did not attempt to estimate the scale of the problem. Given the clandestine nature of fake reviews, it would be almost impossible to arrive at a credible figure.
42. In the light of the findings, we were concerned about the potential for these practices to breach consumer law (in addition to causing detriment for both consumers and businesses). In order to help businesses and review sites to ensure that they are in compliance with the CPRs, we recommended a series of actions to improve compliance. This included that review sites should:
- a. be clear about how reviews are obtained and checked;
  - b. publish all reviews, even negative ones, provided they are genuine and lawful, and explain the circumstances in which reviews might not be

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/436238/Online\\_reviews\\_and\\_endorsements.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf)

published or might be edited (e.g. swearing, abusive language, or defamatory remarks);

- c. make sure that there is not an unreasonable delay before reviews are published;
- d. disclose commercial relationships with the businesses that appear on their site, and explain how this may affect the businesses' ratings and/or their ranking;
- e. clearly identify all advertising and paid promotions, including when reviews have been paid for; and have appropriate procedures in place to detect and remove fake reviews and act promptly in response to reports of suspected fake reviews.<sup>20</sup>

43. We also opened an investigation using our consumer enforcement powers into a number of companies in connection with the potential non-disclosure of paid endorsements.<sup>21</sup>

*Use of information by online platforms: do online platforms provide sufficient and accessible information with regard to the data they collect and when adapting dynamic pricing?*

44. Data is often central to the activities of platforms, since so many of them are involved in matching disparate parties: the more relevant information the platform has about the parties, the better it is able to provide a match which adds value to both parties.

45. We draw the attention of the Commission to our recent Commercial Use of Consumer Data report.<sup>22</sup> This reported the numerous benefits of data collection and use, for example use of data by an online business and third party advertisers has allowed consumers to access many services that are free in monetary terms, and provided an opportunity for them to receive financial returns from providing access to their data. Data analysis also allows traders to reduce their costs in terms of business processes, and the risks they undertake

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<sup>20</sup> We noted in the Online Reviews Report that businesses should therefore review their business models, processes and practices and consider, in consultation with legal advisers as appropriate, whether they need to make any changes in order to help them comply with the law. In addition, relevant trade associations and professional bodies should also review their codes of practice, training materials and guidance/advice to members.

<sup>21</sup> <https://www.gov.uk/cma-cases/online-endorsements-potential-non-disclosure>

<sup>22</sup> Further details are included at Annex A.

(e.g. insurance), savings which may be passed onto the consumer. This benefit traders, consumers and the economy.<sup>23</sup>

46. However, to maximise these benefits, consumers need to maintain trust in data markets. The report found consumer trust to be fragile. It found that consumers are not driving competition over privacy (see below in relation to personal data management systems) in contrast with evidence indicating high levels of concerns. The reasons behind this so-called 'privacy paradox' were unclear, and we must be wary of making false assumptions.<sup>24</sup>

47. The evidence presented in our report was that businesses are not always doing enough to provide sufficient and accessible information to empower consumers to drive market outcomes, although we were aware of a number of regulatory and self-regulatory initiatives to address these concerns. Particular features we identified in our report included both aspects of business conduct but also of the regulatory regime itself (see section C below).

48. Particular practices which did not empower consumers to understand data collection practices included:

- a. privacy policies and terms and conditions which are long and complex;
- b. it can be hard to opt-out of data collection, or to be aware of which firms are collecting data;
- c. cookie notices did not engage consumers in active choices.

### *Portability*

*Please share your general comments or ideas regarding the ability of consumers and traders to move from one platform to another?*

49. In some markets, data portability may be valuable to consumers in aiding them to make better switching decisions. In particular, there is potential for an easier switching process where consumers can engage intermediaries (such as price

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<sup>23</sup> A recent OECD report discusses the potential of data-driven innovation to significantly enhance productivity, resource efficiency, economic competitiveness, and social well-being (<http://www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>)

<sup>24</sup> See in particular paragraphs 4.113ff of the report.

comparison websites<sup>25</sup>) to help them understand their usage data for particular services and model whether alternatives could be cheaper. This may be aided by common formats for 'portable' data which enable meaningful comparison and allow intermediary services and/or competitors to use the data. To date, the CMA has identified measures to improve data portability and related intermediary services as amongst the potential remedies worth considering in a few markets where low levels of consumer switching (and some types of problem in the switching process) give rise to concern<sup>26</sup>.

50. However, regulatory requirements to mandate procedures to improve switching, including data portability, should only be introduced if an individual and detailed assessment of a particular market identifies a problem for which this is likely to be an effective remedy. Such measures may be useful in helping to increase competition in some markets where it appears that lack of switching is inhibiting competition. This may be particularly true of markets where there is evidence that complexity in understanding the costs of ongoing services discourages switching. In other markets, the potential benefits of data portability may be outweighed by considerations of encouraging investment and innovation in analysis and use of data by individual service providers or platforms.

51. In summary, we would only favour imposing remedies on platforms involving data portability if such action were targeted at specific switching problems which this could address.

*Access to data: have you experience problems accessing data held on platforms, including changing conditions etc.*

52. On 1 December 2015, we launched a review of compliance with consumer law in the cloud storage sector in the light of concerns raised about business to consumer practices involving restrictions of the type indicated in the consultation (such as access restrictions or unilateral variations).<sup>27</sup>

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<sup>25</sup> The CMA plans to undertake an analysis of price comparison websites during 2016 to ensure they are meeting their full potential in allowing consumers to compare and switch products. See the CMA's draft annual plan for 2016-17: <https://www.gov.uk/government/consultations/competition-and-markets-authority-annual-plan-2016-to-2017>

<sup>26</sup> See, for example, the current banking and energy market investigations, neither of which have yet reached their final decisions on remedies. Retail banking market investigation: <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>; Energy market investigation: <https://www.gov.uk/cma-cases/energy-market-investigation>

<sup>27</sup> <https://www.gov.uk/cma-cases/cloud-storage-consumer-compliance-review>

53. In our view such practices may breach consumer protection legislation although it is too soon to anticipate the outcome of the review (and we cannot assume that there have been breaches of the law). The review identifies existing consumer protection laws which may be relevant to cloud storage sector, in particular in relation to unfair terms,<sup>28</sup> unfair commercial practices<sup>29</sup> and pre-contract information requirements.<sup>30</sup>
54. The aim of the review is to find out whether cloud storage providers are complying with consumer protection law and, if not, how widespread particular practices are and whether consumers are being, or could be, harmed. It covers issues with pre-contract information for consumers, issues during contracts including changes to price and service and at the end of contracts, including what happens to consumer data.

## **Section B: Tackling illegal content online and the liability of intermediaries**

55. As an overarching comment, we repeat the observation above that any regulatory response should be tailored to meet a particular evidenced problem. This issue is large and complex, covering different areas of law, notably IP law and also human rights. If it is proposed to make changes to the regime, we note the significant body of European case law on this complex subject. Our response focuses on consumer protection issues such as the use of platforms to offer illegal goods and services or to make fraudulent or misleading offers.
56. In our experience, platforms may argue that they benefit from the hosting defence as regards content provided by third party businesses on their site. In particular, a platform may argue that the third party businesses (rather than the platform) are responsible for the content uploaded to the site and that the platform has no general monitoring obligation to ensure that the content (for example, products sold by online traders) is honest, legal, and represented fairly and accurately.

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<sup>28</sup> Under the Consumer Rights Act 2015. As outlined above this implements the Unfair Terms Directive Directive (93/13 EEC)

<sup>29</sup> Under the CPRs which, as noted above, implements the Unfair Commercial Practices Directive Directive 2005/29/EC.

<sup>30</sup> Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (which implement most of the provisions of the Consumer Rights Directive Directive 2011/83/EU)

57. However, in practice, our experience is that an online platform may exercise a large degree of actual, or potential control over the third party users of the site (on all sides of the platform), and may have a direct financial interest in the transactions that take place on the platform. For example, a platform may establish the form and content of how data is displayed on the platform, or operate a payment processing service, or receive commission. While the presentation of output on an online platform may, on a narrow interpretation, be the outcome of a "mere technical, automatic and passive nature"<sup>31</sup> the platform has designed the system in which those processes take place.
58. Our position therefore, as outlined above (paragraph 22), is that in many situations, platforms may actually be legally obliged to take responsibility for what is displayed on the platform. In our view, if platforms are to comply with existing legal obligations under the UCPD, they should ensure that businesses are not prevented from complying with their legal obligations. The Office of Fair Trading, a predecessor of the CMA, successfully secured undertakings from an affiliate marketing network for alleged breaches of the UCPD (as implemented by the CPRs) and obtained undertakings.<sup>32</sup> The undertakings required them to take sufficient steps within an agreed timescale to ensure that affiliates within the network, when promoting merchants' products, do not continue or repeat alleged infringements.
59. There may be scope for exploring further what steps can be taken to ensure that business users of platforms provide all relevant information. By way of example, while it seems likely that a property portal for estate agents may be in a position to mandate that their participants provide key information on the site (such as the length of a lease or service charges), estate agents may not always do so even though it is clearly relevant information for a prospective purchase. There may be scope for exploring further what steps can be taken in individual markets to ensure that business users of platforms provide all relevant information.
60. Aside from the question whether a platform is liable for unlawful content in principle, it is important in the context of consumer protection investigations that robust and clear systems are in place to enable enforcers to act swiftly to remove content and for platforms to assist enforcers' investigations, when put

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<sup>31</sup> Article 14 of the E-Commerce Directive.

<sup>32</sup> For example, the Office of Fair Trading obtained undertakings against MoreNiche: see <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/affiliate-marketing/>

on notice of illegal content. Similarly, where a user of a platform has not disclosed their identity publicly, or where the platform holds other relevant information needed for an investigation, enforcers have a legitimate interest in requesting that information from the platform, and procedures should be put in place such that it should be supplied rapidly.

61. At present, in our experience, there is insufficient clarity or consistency of procedure to expedite enforcement action when there are allegations of malpractice by traders. It would be beneficial to businesses and enforcers to develop clear and widely accepted mechanisms whereby online platforms may comply with enforcement and other relevant requests to cooperate, subject to necessary safeguards to ensure that their action is appropriate and proportionate. In our view, there may be scope to expedite notice and take down processes in the context of consumer protection measures, potentially exploring where models in other areas of such, such as intellectual property, may provide a suitable framework.

## **Section C: Data and cloud in digital ecosystems**

*What regulatory constraints hold back the development of data markets in Europe and how could the EU encourage the development of such markets?*

62. Below we draw upon the findings of the Commercial Use of Consumer Data Report. While privacy and data protection issues in the UK do not, as such, fall to the CMA (the Information Commissioner's Office (ICO) is the UK's data protection and privacy authority), we did consider the impact of business practices and regulations on markets involving data collection and use.
63. The report noted that, in some cases, the design of regulations themselves may lead to a lack of engagement by consumers. This was particularly the case with 'cookie notices' but there were also concerns that the existing 'notice and consent' method of obtaining consent was unlikely to remain fit for purpose in the light of new technologies such as the Internet of Things.
64. We identified some elements of how business' collection and use of consumer data could support well-functioning markets:
  - a. Consumers should know when and how their data is being collected and used and be able to decide whether and how to participate; and they should have access to information from firms about how they are collecting, storing

and using data, so that they can select the firm which best meets their preferences.

- b. Firms should compete on all issues that matter to consumers, including the provision of clear and useable controls that enable consumers to manage data-sharing.
  - c. Consumers and firms should share the benefits of using consumer data. Consumers may get a new or better service or lower prices because firms are becoming more efficient, or even trade their data for a direct financial reward. Firms may gain more sales or market share or become more profitable.
  - d. The regulation of the collection and use of data should ensure the protection of essential rights such as privacy. The market can help achieve this goal where regulations encourage competition and choice, allowing a 'race to the top' by firms to offer consumers better services.
  - e. Non-compliance with regulation should be tackled proportionately and effectively, so that firms and consumers can feel confident that the rules are being applied fairly.
65. Business practices will respond to the final outcome of the negotiations on the General Data Protection Regulation which will establish rules for fundamental rights of privacy and personal data which may have a significant impact, for example on consumer profiling.
66. It is premature to anticipate the outcome of such developments, but, from a markets perspective, we note that data, including personal data, may be important in both competition terms (for example as a source of market power) and from a consumer protection perspective (for example, where a breach of data protection law may be an unfair term). We noted in our report that existing consumer protection laws already apply to some of these practices which may be used to promote greater transparency using targeted enforcement, and that self-regulation may also have an important role to play.

#### *Access to open data*

67. The CMA considers the increasing availability of public sector information to be, generally speaking, a welcome development which has the potential to result in

significant benefits to consumers and the economy. The CMA recently commissioned Dot.Econ (an economic consultancy) to evaluate the Office of Fair Trading's 2006 market study of the commercial use of public information<sup>33</sup>. The evaluation<sup>34</sup> found that there had been a number of positive changes in the UK market and a substantial growth in the re-use of public sector information, but it also identified some residual problems. While some of the most valuable public sector information is already available, that is by no means all that could generate value for the wider economy. We therefore support the Commission's overall approach of doing more to open up public data for re-use.

68. The OFT's study identified a number of areas for improvement in how public sector information is made available for re-use and the extent to which this allowed businesses to compete with public sector information holders (PSIHs) in the supply of value-added products and services. Those with a near monopoly position from their public sector status when collecting information should be encouraged to make it available in a non-discriminatory way to avoid competition problems, but also to generate greater value for the UK and EU economies. Businesses that are able to use data collected by public sector monopolies and combine this with other information can create valuable products.

#### *Open service platforms*

#### *Advantages of open v closed systems*

69. The CMA together with the Autorité de la Concurrence has examined the nature of the economics regarding open and closed systems and issued a report. The report<sup>35</sup> explains the principal features of open and closed systems.
70. In broad terms it found openness is not necessarily always good for competition, nor are closed systems always bad. It found that there are advantages associated with each type of system which are summarised below:
- a. Ecosystem openness is good for competition as open systems generate efficiencies: (1) they maximise network effects, (2) they maximise scale economies, (3) they enable the system owner to commit not to renegotiate ex post the access fees with the component developers once the specific

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<sup>33</sup><http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/markets-work/public-information>

<sup>34</sup> <https://www.gov.uk/government/publications/commercial-use-of-public-information-evaluation-of-offt-market-study>

<sup>35</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387718/The\\_economics\\_of\\_open\\_and\\_closed\\_systems.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf)

investments in the system have been incurred and (4) they enable the system owner to commit not to exploit the users who have joined the system, which increases incentives to join the system.

- b. Closed systems also generate efficiencies: they (1) ensure compatibility between components (2) avoid free-riding (3) allow user coordination, and (4) avoid the drawbacks of standardisation. Closure can be good for competition as closed systems increase inter-system competition (which can lead to fierce competition ‘for the market’) and they can lead to an increased incentive to innovate and to entry due to future profit expectations.

71. The joint report noted competition authorities may be legitimately concerned by the threat all consumers could be locked into a single unavoidable system, monopolising many markets, and considered that competition authorities could be willing to intervene to avoid ‘tipping’ or lock-in:

*Personal data management systems: do you support an initiative promoting the development of personal data management systems?*

72. In our Commercial Use of Consumer Data report, we examined the current and future role of Personal Information Management Services (PIMS)<sup>36</sup>.
73. We support initiatives in which businesses compete with each other to provide to consumers the services and products which they want. In the context of PIMS, we observed that, although there are a number of providers of these services in the UK, usage is currently limited.
74. We noted there may be a number of reasons for this, including:
- a. The two-sided nature of PIMS makes growth challenging - the value of PIMS for consumers is dependent on the number of firms that make use of the data provided, and similarly, the value for firms is dependent on the number of consumers that provide data. In markets with such characteristics, it can take time for a new service to grow.
  - b. The risk-averse nature of consumers and trust in suppliers – consumers are likely to be relatively risk-averse in seeking to supply their data to a new intermediary. Establishing a reputation for trust will be important.

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<sup>36</sup> Paragraph 3.33ff.

- c. Lack of engagement with firms – some stakeholders told us that the lack of growth was due to firms not seeking to use PIMS, and therefore, with few firms signed up, the benefit and incentives for consumers to join would be low.
  - d. The need for clear standards of data holding and transmission. Without clear standards over the way in which data is transferred and used, such services may find it challenging to integrate with a significant number of firms that, at present, have control over how, and in what format, the data is stored.
  - e. Whether PIMS are necessary to resolve existing concerns – we heard from some stakeholders that the lack of growth in PIMS may be due to a lack of sufficient consumers perceiving a need for it.
75. The development of PIMS was not explored in detail in our report. In our view, it would be necessary to consider these issues further if seeking to promote such systems.

#### ***Section D: The Collaborative Economy***

76. Platforms in the collaborative economy (sometimes known as the sharing economy) are capable of bringing significant benefits to consumers. The collaborative economy opens up many new markets (and often at a lower cost), spurring innovative ways for businesses to match consumer demand. Vast numbers of individuals and businesses have embraced the collaborative economy and the continued growth potential of the sector is significant.
77. Many of the challenges referred to above apply to platforms in the collaborative economy. We reiterate, in particular, the need for platforms to provide clear information on how they operate and what their responsibilities are where such information is important for consumers to make proactive and empowered choices. If things go wrong through use of collaborative economy platforms, consumers must have adequate recourse to redress to ensure continued trust and confidence. We also refer to our views above regarding the use of online reviews and endorsements (an important feature of many collaborative economy platforms) and the need to clarify the concepts of trader and consumer where the boundaries in the collaborative economy are increasingly blurred (see paragraphs 39-43 and 19c and 27).

78. As part of the Internal Market Strategy published on 28 October 2015, the Commission has said that where appropriate it ‘will provide guidance as regards the application of existing EU law to the activities and sectors in which the new collaborative economy business models are used’. We fully support the Commission’s consideration of these issues and encourage the Commission to focus on the application of consumer protection law in this guidance. We would welcome greater clarity on the responsibilities of platforms and the legal position of parties so that users can be confident of their rights and maintain trust in the market.
79. From a broader regulatory perspective, an in-depth assessment of the existing regulatory frameworks is necessary to establish which requirements must also apply to novel business models. Technological advances may have made certain aspects of existing regulation less necessary for all market players. The successful emergence of collaborative business models alongside existing, ‘traditional’ business models could indicate potential scope to significantly reduce existing regulatory burdens applicable in a specific market without adverse effects on competition or consumers. In this regard we urge the Commission to continue to prioritise its Regulatory Fitness and Performance programme (REFIT) to make EU law simpler and to reduce unnecessary regulatory costs.
80. In the collaborative economy, deregulation may be necessary in many instances and, if specific reregulation is required, better regulation principles and applying a competition lens will help ensure it is well-targeted and proportionate so that its aims are achieved by the least restrictive means.<sup>37</sup> Unnecessary ex ante regulation of business models is liable to inadvertently reduce innovation incentives (a key competitive parameter) and so restrict competition. Alternatives to regulation should be duly consider where relevant including self-regulation and industry led initiatives. In the UK, a collaborative economy industry body, SEUK, has been set up and is considering a trust mark for responsible sharing practices. We also refer to the UK’s Business Challenger programme<sup>38</sup> which led to specific deregulatory measures in certain sectors in order to facilitate new entrants, including in the sharing economy.

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<sup>37</sup> <https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers>

<sup>38</sup> <https://www.gov.uk/government/news/government-to-launch-challenger-businesses-programme>

81. In December 2015 we responded to Transport for London's proposals<sup>39</sup> to change its private hire vehicle (PHV) regulations to address advancements in technology and the emergence of businesses such as Uber. We are concerned some of the changes proposed by TfL could affect entry, expansion or innovation in the PHV market and could lead to lower quality services and/or higher prices for consumers. We emphasise that competition should only be compromised by regulatory rules to the extent that doing so is absolutely necessary to achieve other policy objectives. Imposing excessive or unnecessary regulation would be to the overall detriment of consumers. Our response is available here: <https://www.gov.uk/government/publications/cmas-response-to-tfls-private-hire-regulations-proposals><sup>40</sup>
82. Consumers are best served by open, competitive, diverse and dynamic markets in which new business models seeking to match consumer demand are able to arise and thrive. To conclude, therefore, overall the CMA considers reducing unnecessary regulatory burdens on businesses wherever possible is the most important overarching ambition of the DSM agenda. Ensuring EU law is simple and easy to navigate for all businesses, while providing a predictable regulatory framework (relevant to both novel and established business models) will help create the right conditions for innovation to flourish and further promote economic growth through online platforms including those in the collaborative economy. This will help enable start-ups to scale up and benefit from the potential opportunities provided by the DSM.

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<sup>39</sup> <https://consultations.tfl.gov.uk/tph/private-hire-proposals>

<sup>40</sup> The CMA response was accompanied by an article published on 2 December 2015 in the Financial Times by the CMA's CEO, Alex Chisholm: <http://www.ft.com/cms/s/0/dc4a746a-953c-11e5-8389-7c9ccf83dceb.html>