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**Citation:** Kalintiri, A. and Stones, R. ORCID: 0000-0003-4422-181X (2019). FIDE Congress 2020 - EU Competition Law and the Digital Economy: United Kingdom Report (City Law School (CLS) Research Paper No. 2019/06). London, UK: The City Law School.

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*City Law School Research Paper 2019/06*

FIDE Congress 2020 - EU Competition Law and the Digital Economy:  
United Kingdom Report

Andriani Kalintiri and Ryan Stones

13<sup>th</sup> October 2019

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# FIDE Congress 2020 – EU Competition Law and the Digital Economy: United Kingdom Report\*

Andriani Kalintiri\*\* and Ryan Stones\*\*\*

## Abstract

This report was prepared for the 29th biennial Congress of the International Federation of European Law (FIDE) to be held in The Hague in May 2020. It is the national report for the United Kingdom in response to Topic 3 of the 2020 FIDE Congress, titled ‘EU Competition Law and the Digital Economy’. This report offers an overview of UK competition enforcement in digital economy markets by answering twelve questions organised into four sections. Part A summarises key UK antitrust and merger decisions, agency publications, priorities and goals of enforcement in digital economy markets. Part B focuses upon the definition of markets and conceptualisation of market power by UK authorities in digital economy cases in light of their challenges and particularities. Part C offers a detailed overview of the issues underpinning UK antitrust and merger scrutiny in this field: the types of conduct investigated, relevant factors and concepts, theories of harm, efficiency justifications and remedies in digital economy cases. Finally, Part D identifies the potential for incoherent enforcement in this field from two different sources: the overlap between UK competition law and ex ante regulatory regimes (e.g. consumer protection, data protection); and the overlap between the powers of various UK competition decision-makers (e.g. sectoral regulators, the Competition Appeal Tribunal, and the courts).

**Keywords:** competition, digital economy, antitrust, mergers

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\* This is the report initially submitted to FIDE. The final version published by FIDE may differ.

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## A. Competition Policy in the Digital Economy: Shift in Focus?

### Question 1

*What are the main cases dealing with the digital economy (focusing on digital businesses or on the competition between digital businesses and incumbent operators) initiated and completed by your competition authority?*

- In those cases, have any competition issues been identified which are specific to the digital economy and therefore warrant a particular focus on the digital economy in your jurisdiction?*
- Are other cases currently under investigation? If so, could you give a brief summary of the status of these investigations?*

Digital markets have been the focus of both antitrust and merger enforcement action by the Competition and Markets Authority (CMA) and its predecessors, the Office of Fair Trading (OFT) and the Competition Commission (CC).<sup>1</sup>

The main antitrust cases dealing with the digital economy completed by the authority are listed in Table 1.<sup>2</sup> The majority concerned online resale price maintenance (RPM), but the CMA has also considered: online sales bans; the use of ‘most favoured nation’ (MFN) clauses; advertising restrictions; and algorithmic collusion.

Year	Case	Issue	Outcome
2019	Digital pianos and digital keyboards <sup>3</sup>	Online RPM	Infringement
2017	Sports equipment sector <sup>4</sup>	Online sales ban	Infringement
	Live online auction platform services <sup>5</sup>	Exclusivity, MFN clauses, advertising restrictions	Commitments
	Light fittings <sup>6</sup>	Online RPM	Infringement
2016	Online sales of posters and frames <sup>7</sup>	Algorithmic collusion	Infringement
	Commercial refrigeration <sup>8</sup>	Online RPM	Infringement
	Bathroom fittings <sup>9</sup>	Online RPM	Infringement

<sup>1</sup> On 1 April 2014 the functions of the CC and the OFT were transferred to the CMA in accordance with the Enterprise and Regulatory Reform Act 2013 (ERRA13). Unless otherwise indicated, references to the CMA must also be understood as including its predecessors, as appropriate.

<sup>2</sup> As at 13 October 2019.

<sup>3</sup> <https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-2>.

<sup>4</sup> <https://www.gov.uk/cma-cases/sports-equipment-sector-anti-competitive-practices#infringement-decision>.

<sup>5</sup> <https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices>.

<sup>6</sup> <https://www.gov.uk/cma-cases/light-fittings-sector-anti-competitive-practices#settlement-and-infringement-decision>.

<sup>7</sup> <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>.

<sup>8</sup> <https://www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices#settlement-and-infringement-decision>.

<sup>9</sup> <https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices#infringement-decision>.

<b>2014</b>	Mobility aids - Pride <sup>10</sup>	Online RPM	Infringement
<b>2013</b>	Mobility aids - Roma <sup>11</sup>	Online sales and price advertising ban	Infringement

*Table 1: Digital economy antitrust cases completed by the CMA*

Several antitrust investigations relating to the digital economy were closed on administrative priority grounds. As Table 2 shows, these involved: online price advertising restrictions; digital comparison tools; MFN clauses; and interchange fees for card payments.

<b>Year</b>	<b>Case</b>	<b>Issue</b>
<b>2017</b>	Mobility scooters <sup>12</sup>	Online price advertising restrictions
<b>2016</b>	Energy price comparison websites <sup>13</sup>	Digital comparison tools
<b>2015</b>	Hotel online booking <sup>14</sup>	RPM/MFN clauses
	MasterCard and Visa <sup>15</sup>	Interchange fees for card payments
<b>2013</b>	Amazon <sup>16</sup>	MFN policy
<b>2011</b>	eBooks <sup>17</sup>	MFN clauses

*Table 2: Digital economy antitrust cases closed by the CMA on administrative priority grounds*

Furthermore, the CMA has investigated several digital economy mergers; Table 3 provides an indicative list.<sup>18</sup> These cases considered a variety of issues, such as payment services, cashback websites, credit comparison platforms (CCP) and credit checking tools

<sup>10</sup><https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector>.

<sup>11</sup><https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector>.

<sup>12</sup><https://www.gov.uk/cma-cases/medical-equipment-anti-competitive-practices>. The case was closed after the restrictions in question came to an end.

<sup>13</sup><https://www.gov.uk/cma-cases/energy-price-comparison-websites-suspected-anti-competitive-agreements>. The CMA decided the case was no longer an administrative priority, noting the implementation of the remedies from the Energy Market investigation and its market study into digital comparison tools.

<sup>14</sup><https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation>. The OFT concluded a commitment decision which was subsequently annulled by the Competition Appeal Tribunal (CAT) (*Skyscanner v CMA* [2014] CAT 16). The investigation was reopened and then closed on administrative priority grounds, given developments in the hotel online booking sector regarding MFN clauses.

<sup>15</sup><https://www.gov.uk/cma-cases/investigation-into-interchange-fees-mastercard-visa-mifs>. This case was no longer a CMA priority upon the entry into force of Regulation 2015/751 on interchange fees for card-based payment transactions.

<sup>16</sup><https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices>. The case was closed when Amazon ended its MFN policy.

<sup>17</sup><https://www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers>. The case was investigated by the European Commission (COMP/39847, *Ebooks*).

<sup>18</sup> Cases where the jurisdictional requirements were not satisfied were not included (e.g. *MoneySupermarket/MoneySaving Expert* (<https://www.gov.uk/cma-cases/moneysupermarket-moneysavingexpert>); *Expedia/Trivago* (<https://www.gov.uk/cma-cases/expedia-inc-trivago-gmbh>)).

(CCT), online food and travel platforms, digital comparison tools and online gambling. The majority were cleared in Phase 1, while a few were cleared or cancelled in Phase 2.

Year	Case	Market/Sector	Outcome
2019	PayPal/iZettle <sup>19</sup>	Offline and omni-channel payment services	Phase 2 Clearance
	TopCashBack/Quidco <sup>20</sup>	Cashback websites	Phase 2 Cancellation
	Experian/ClearScore <sup>21</sup>	CCPs and CCTs	Phase 2 Cancellation
	eBay/Motors.co.uk <sup>22</sup>	Online-classified vehicle advertising	Phase 1 Clearance
2018	Nielsen/AdIntel <sup>23</sup>	Advertising intelligence	Phase 2 Clearance
	Moneysupermarket.com/Decision Technologies <sup>24</sup>	Digital comparison tools	Phase 1 Clearance
	ATG Media Holdings/Lottissimo <sup>25</sup>	Live online bidding auction platform services	Phase 1 Clearance
	Stars UK/Sky Betting and Gaming <sup>26</sup>	Online gambling services	Phase 1 Clearance
2017	Just Eat/Hungryhouse <sup>27</sup>	Online food platforms	Phase 2 Clearance
	Blackbaud/Giving <sup>28</sup>	Online fundraising platforms	Phase 1 Clearance
2015	CVC Capital Partners/Sky Bet <sup>29</sup>	Online payment services for online betting and gaming services	Phase 1 Clearance
2013	Motorola Mobility (Google)/Waze Mobile <sup>30</sup>	Turn-by-turn navigation applications for mobile devices	Phase 1 Clearance
	Web Reservations International/Hostelbookers.com <sup>31</sup>	Online travel agencies for hostel accommodation	Phase 1 Clearance
	Priceline.com/Kayak <sup>32</sup>	Online travel agents and price comparison site	Phase 1 Clearance

<sup>19</sup><https://www.gov.uk/cma-cases/paypal-holdings-inc-izettle-ab-merger-inquiry>.

<sup>20</sup><https://www.gov.uk/cma-cases/topcashback-quidco-merger-inquiry>.

<sup>21</sup><https://www.gov.uk/cma-cases/experian-limited-credit-laser-holdings-clearscore>.

<sup>22</sup><https://www.gov.uk/cma-cases/ebay-inc-motors-co-uk-limited-merger-inquiry>.

<sup>23</sup><https://www.gov.uk/cma-cases/nielsen-ebiquity-merger-inquiry>.

<sup>24</sup><https://www.gov.uk/cma-cases/moneysupermarket-com-financial-group-limited-decision-technologies-limited>.

<sup>25</sup><https://www.gov.uk/cma-cases/atg-media-holdings-limited-lot-tissimo-merger-inquiry>.

<sup>26</sup><https://www.gov.uk/cma-cases/stars-uk-sky-betting-and-gaming-merger-inquiry>.

<sup>27</sup><https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry>.

<sup>28</sup><https://www.gov.uk/cma-cases/blackbaud-giving-merger-inquiry>.

<sup>29</sup><https://www.gov.uk/cma-cases/cvc-capital-partners-sicav-fis-s-a-sky-bet>.

<sup>30</sup><https://www.gov.uk/cma-cases/motorola-mobility-holding-waze-mobile-ltd>.

<sup>31</sup><https://www.gov.uk/cma-cases/web-reservations-international-hostelbookers-com-ltd>.

<sup>32</sup><https://www.gov.uk/cma-cases/priceline-com-kayak-software-corporation>.



2012	Digital Property/Zoopla <sup>33</sup>	Online property advertising portals	Phase 1 Clearance
	Facebook/Instagram <sup>34</sup>	Virtual networking services	Phase 1 Clearance
	Experian/192business <sup>35</sup>	Online identity verification and authentication services	Phase 1 Clearance
2011	Amazon/The Book Depository <sup>36</sup>	Online book retail	Phase 1 Clearance
	Google/BeatThatQuote.com <sup>37</sup>	Consumer finance price comparison sites	Phase 1 Clearance

Table 3: Digital economy merger investigations by the CMA

At least five digital economy cases are currently pending. Three of them are Phase 1 merger investigations: *Amazon/Deliveroo* concerning food delivery services;<sup>38</sup> *Salesforce/Tableau Software* regarding cloud software and data analytics;<sup>39</sup> and *Bottomline Technologies/Experian* concerning payments processing.<sup>40</sup> Public information is currently only available for *Bottomline Technologies/Experian*. The CMA has expressed concerns that the merged entity may increase prices, reduce product availability or lower investment in innovation.<sup>41</sup> Unless the parties offer appropriate remedies, the transaction will be referred for a Phase 2 investigation. Furthermore, there are at least two antitrust investigations based on Article 101 TFEU and Chapter I of the Competition Act 1998 (CA1998) in progress. The first involves the use of wide MFN clauses by ComparetheMarket, a price comparison website (PCW) for home insurance products.<sup>42</sup> In November 2018 a Statement of Objections (SO) was issued indicating that the practice may have led to higher premiums.<sup>43</sup> The second concerns online RPM by Fender, a guitar firm, for which an SO was issued in October 2019.<sup>44</sup>

## Question 2

*Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?*

*a. How have these adaptations taken shape (legislative changes, policy changes, changes in enforcement strategies)?*

*b. Which enforcement tools are or have been available in your jurisdiction to this end? Has the competition authority drafted reports or explicitly adopted guidelines or binding*

<sup>33</sup><https://www.gov.uk/cma-cases/digital-property-group-zoopla>.

<sup>34</sup><https://www.gov.uk/cma-cases/facebook-instagram-inc>.

<sup>35</sup><https://www.gov.uk/cma-cases/experian-192business-ltd>.

<sup>36</sup><https://www.gov.uk/cma-cases/amazon-com-inc-the-book-depository-international-ltd>.

<sup>37</sup><https://www.gov.uk/cma-cases/google-beatthatquote-com>.

<sup>38</sup><https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry>.

<sup>39</sup><https://www.gov.uk/cma-cases/salesforce-com-inc-tableau-software-inc-merger-inquiry>.

<sup>40</sup><https://www.gov.uk/cma-cases/bottomline-technologies-de-inc-experian-limited-merger-inquiry>.

<sup>41</sup><https://www.gov.uk/government/news/merger-of-payment-software-providers-raises-competition-concerns>.

<sup>42</sup><https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

<sup>43</sup><https://www.gov.uk/government/news/comparethemarket-home-insurance-deals-could-deny-people-better-prices>.

<sup>44</sup><https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-3>.



*administrative rules tailoring competition law and/or enforcement practices to digital businesses?*

*c. Have legislators or authorities in your jurisdictions been conducting evaluations of (competition) policy regarding digital markets? If so, could you summarize the outcome of those evaluations?*

The CMA has taken several steps to keep up with digital markets, which were identified among the themes of ‘particular strategic significance’ in its last two Annual Plans. While there have been no legislative changes yet, the authority has been keen to adapt its policy and enforcement practices.

In recent years, the CMA has made effective use of the tools available to it. First, it has conducted several antitrust and merger investigations dealing with the digital economy, as detailed above. Second, it has completed market studies into the Commercial Use of Consumer Data (2015)<sup>45</sup> and Digital Comparison Tools (2017)<sup>46</sup> and market investigations into Payday Lending (2015)<sup>47</sup> and Retail Banking (2017).<sup>48</sup> Third, it has enforced consumer protection legislation in a wide range of issues relating to the digital economy, such as secondary ticketing websites,<sup>49</sup> online dating services,<sup>50</sup> online gambling,<sup>51</sup> and online reviews and endorsements.<sup>52</sup> Fourth, it has built its knowledge by drafting a working paper on Pricing Algorithms,<sup>53</sup> conducting a literature review on Online Search<sup>54</sup> and commissioning a report on the ‘Ex-post Assessment of Merger Control Decisions in Digital Markets’ (Lear Report).<sup>55</sup> Fifth, in October 2018 it established a Data, Technology and Analytics (DaTA) unit so as to boost its digital capabilities.<sup>56</sup>

Competition in the digital economy has also attracted the attention of the UK Government, which invited the CMA’s advice on necessary legislative and institutional reforms and appointed a Digital Competition Expert Panel led by Professor Furman to make recommendations on how the existing competition framework could be further enhanced to meet the challenges of the digital economy. In February 2019 the CMA’s Chairman proposed

<sup>45</sup><https://www.gov.uk/cma-cases/commercial-use-of-consumer-data>.

<sup>46</sup><https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>.

<sup>47</sup><https://www.gov.uk/cma-cases/payday-lending-market-investigation>.

<sup>48</sup><https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.

<sup>49</sup><https://www.gov.uk/cma-cases/secondary-ticketing-websites>.

<sup>50</sup><https://www.gov.uk/cma-cases/online-dating-services>.

<sup>51</sup><https://www.gov.uk/cma-cases/online-gambling>.

<sup>52</sup><https://www.gov.uk/cma-cases/online-endorsements-potential-non-disclosure>.

<sup>53</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746353/Algorithms\\_econ\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf).

<sup>54</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/607077/online-search-literature-review-7-april-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf).

<sup>55</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803576/CMA\\_past\\_digital\\_mergers\\_GOV.UK\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf).

<sup>56</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781151/Letter\\_from\\_Andrew\\_Tyrie\\_to\\_the\\_Secretary\\_of\\_State\\_BEIS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf).

several reforms, including the sharpening-up of the interim measures regime, the broadening of the authority's powers to gather information and impose sanctions and the strengthening of consumer enforcement.<sup>57</sup> In March 2019 the Digital Competition Expert Panel published its Report on Unlocking Digital Competition (Furman Report), which made six strategic recommendations (and identified twenty related actions): creating a 'Digital Markets Unit' with regulatory functions for digital platforms of 'strategic market status'; revisiting merger assessment in digital markets, including the possible adoption of a new 'balance of harms' test; updating the CMA's enforcement tools against anticompetitive conduct, including greater use of interim measures; monitoring machine learning and artificial intelligence developments; conducting a market study into digital advertising; and international engagement on future steps.<sup>58</sup>

The CMA welcomed the recommendations of the Furman Report, which supported to a large extent some of its own reform proposals. While the authority considers that existing antitrust and merger tools have worked well and remain relevant in the digital world, they could be strengthened in a number of ways to effectively tackle harms in fast-paced digital markets and better protect consumers. Against this backdrop, in July 2019 the CMA published its Digital Markets Strategy.<sup>59</sup> Its five aims are to use existing tools effectively and efficiently in digital markets; to build knowledge and capability to better understand digital business models; to adapt available tools where necessary to meet the challenges of the digital economy; to support the Government's consideration of new regulatory structures in digital markets; and to consider potential digital-focused remedies, such as data portability or interoperability. In working towards these aims, the CMA has identified seven priorities: (a) to use its existing powers to address poor practices and concerns in digital markets; (b) to continue and expand the work of the DaTA unit; (c) to conduct a market study on online platforms and digital advertising, launched at the same time as its Strategy;<sup>60</sup> (d) to review its approach to digital mergers, taking into account the feedback provided by stakeholders in the call for information which the authority launched in early June 2019;<sup>61</sup> (e) to carry out policy work on a possible 'Digital Markets Unit'; (f) to support the Government, while it considers the CMA Chairman's proposals for reforms; and (g) to increase its efforts towards international cooperation so as

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<sup>57</sup> Other proposals include an overriding 'consumer interest' duty, increasing the effectiveness and flexibility of market studies and market investigations, and the potential imposition of individual responsibility in competition and consumer enforcement.

<sup>58</sup> <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>.

<sup>59</sup> <https://www.gov.uk/government/news/cma-launches-digital-markets-strategy>.

<sup>60</sup> <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

<sup>61</sup> <https://www.gov.uk/government/consultations/call-for-information-digital-mergers>.

to capitalise on the synergies between its own digital markets work and that of its counterparts.<sup>62</sup>

The UK Government is due to publish a Competition Green Paper later in the year analysing the recommendations in the Furman Report, but it has already indicated its keenness to take the proposal for a Digital Markets Unit forward.<sup>63</sup>

### Question 3

*Is your domestic competition law using the consumer welfare standard as its specific goal?*  
*a. If no, what other standards are being relied on as the goal of competition law enforcement?*  
*b. If yes, how do you interpret the consumer welfare standard in your jurisdiction?*  
*c. Has this standard been applied consistently in cases dealing with digital businesses or with competition between digital businesses and incumbent operators?*

The CMA's statutory duty is to 'promote competition, both within and outside the United Kingdom, for the benefit of consumers'.<sup>64</sup> An analogous duty is borne by many sector regulators with concurrent competition powers.<sup>65</sup> The consumer welfare standard best portrays the goal of competition law in the UK.<sup>66</sup> This is interpreted broadly and not confined to prices. In its Prioritisation Principles, the CMA describes consumer welfare as including 'better value for consumers in terms of price, quality, range or service, both static and dynamic', as well as 'non-financial detriment such as the avoidance of physical harm or emotional distress'.<sup>67</sup> Furthermore, the authority recognises that 'increased competition in the market may deliver further consumer benefits over time resulting from the improved competitive process'.<sup>68</sup>

In its recent proposals to the Government, the CMA advocated an overriding 'consumer interest' duty, on the ground that the current one may constrain it 'from acting to protect consumers' interests unless doing so through purely competition-based remedies'.<sup>69</sup> In the CMA's view, such a new duty would be better aligned with its strategic mission 'to make

<sup>62</sup> These priorities echo the Government's 2019 Strategic Steer ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/818676/cma-strategic-steer-responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818676/cma-strategic-steer-responses.pdf)).

<sup>63</sup> See <https://www.gov.uk/government/speeches/pm-speech-opening-london-tech-week-10-june-2019> and [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/808272/Smart-Data-Consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808272/Smart-Data-Consultation.pdf), 17.

<sup>64</sup> ERA13, §25(3).

<sup>65</sup> E.g. the Office of Communication (Ofcom) is required to 'further the interests of consumers in relevant markets, where appropriate by promoting competition' (s3(1)(a)-(b) Communications Act 2003).

<sup>66</sup> The Government's 2015 Strategic Steer to the CMA noted that it should 'conclude enforcement cases as quickly as possible ensuring that it has the maximum possible positive impact on the welfare of consumers' ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf)).

<sup>67</sup> §3.1.

<sup>68</sup> §4.10.

<sup>69</sup> Chairman's Letter (n 56), 9-12.

markets work well in the interests of consumers, business and the economy' and would enable it to address new and emerging forms of consumer detriment, although it should not constrain it 'from intervening to promote and protect the competitive process'.<sup>70</sup> By contrast, considering the need for a paradigm shift, the Furman Report concluded that the current goal is appropriate and that 'UK competition policy should remain rooted in the consumer welfare standard as properly conceived, giving sufficient focus to non-price elements of competition, and to innovation in particular'.<sup>71</sup>

Because the consumer welfare standard is conceptualised in broad terms, it can be applied flexibly, and it is difficult to tell whether it has been enforced in a consistent manner in digital economy cases. In antitrust investigations, the focus has predominantly been on price effects, which is unsurprising considering the nature of the practices involved (online sales limitations, algorithmic collusion, MFN clauses). In merger cases, non-price effects - for instance, on quality and innovation - have been taken into account.<sup>72</sup> For example, in *Experian/ClearScore* the CMA provisionally found that the merger would reduce the parties' incentives to invest in improvements and product developments, thereby reducing the rate of innovation.<sup>73</sup> Or in *Google/Waze* the OFT considered whether the merger would dampen Google's incentives to innovate and improve quality as a result of the loss of an innovative rival.<sup>74</sup> Nevertheless, merger control has been criticised for paying insufficient attention to long-run effects - for instance, on quality and choice -<sup>75</sup> while the Lear Report identified gaps in the UK authorities' approach to digital mergers which may have led to insufficient consideration of non-price effects.<sup>76</sup>

It should be noted that in the UK mergers are subject to a public interest test, where they pertain to media plurality, national security and financial stability.<sup>77</sup> The House of Lords Communications Committee recently recommended a public-interest test for data-driven mergers so as to manage the accumulation of data.<sup>78</sup>

## B. Market Definition and Market Power

### Question 4

*How does your competition authority define the market with regard to digital economy players?*

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<sup>70</sup> *ibid.*

<sup>71</sup> Furman Report (n 58), §3.18-3.23.

<sup>72</sup> See also: Merger Guidelines, §4.2.3

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284449/OFT1254.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf)).

<sup>73</sup> §11.69.

<sup>74</sup> §28.

<sup>75</sup> Furman Report (n 58) p12 and §4.12.

<sup>76</sup> Lear Report (n 55), Part II.6.

<sup>77</sup> Enterprise Act 2002, Chapter 2.

<sup>78</sup> <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/29907.htm>, §149.

- a. Are the traditional price/product and geographic area criteria being relied on in ongoing or completed investigations or is a new data-focused market test taking shape?*
- b. Does your authority make use of a specific methodology when defining markets for online platforms? (e.g. a distinction between transaction and non-transaction platforms or between business models and functionalities)*
- c. Is the particular nature of platform markets taken into consideration in the market definition practice of your jurisdiction?*
- d. Have the authorities or courts been seized with cases involving zero price markets, and how did they define the relevant market?*

In antitrust cases the CMA applies the Market Definition Guidelines,<sup>79</sup> while in merger cases it applies the Merger Guidelines.<sup>80</sup> The approach in each document is similar but not identical. Two-sided markets, for instance, are considered only in the latter and are defined as ‘platforms (...) that intermediate between distinct and unrelated groups of customers’.<sup>81</sup> Nevertheless, the discussion thereof is brief. The Merger Guidelines simply note the relevance of indirect network effects and that ‘prices charged to each set of customers take account of the need to get both sets on board’ and acknowledge the difficulties of conducting the hypothetical monopolist test given that: ‘(i) there is no single price to both sets of customers to which to apply a SSNIP; (ii) the effect of a SSNIP on the demand of one set of customers may be exacerbated by indirect network effects; and (iii) the constraints on the merging firms’ products may come not only from other two-sided intermediaries but also from ‘one-sided’ firms serving one set of customers’.<sup>82</sup>

In principle, the CMA relies on traditional product and geographic area criteria when defining markets in cases involving digital economy players. It generally identifies the overlapping activities of the parties in the narrowest plausible market and then examines whether this should be widened in view of demand-side and supply-side substitution. Depending on the circumstances, a range of factors may be considered, including the features of the service or product;<sup>83</sup> product or customer segmentation;<sup>84</sup> the existence of alternative sales, distribution or marketing channels;<sup>85</sup> and different business models and monetisation strategies.<sup>86</sup> Where the evidence on substitutability is ambiguous, the CMA typically takes a cautious approach, proceeding with the narrower definition.<sup>87</sup> Two-sided markets in particular

<sup>79</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284423/oft403.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf).

<sup>80</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284449/OFT1254.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf).

<sup>81</sup> Ibid, §5.2.20.

<sup>82</sup> Ibid.

<sup>83</sup> e.g. *TopCashBack/Quidco*, §34-59; *Experian/ClearScore*, §9.26-9.35; *eBay/Motors*, §35-36; *Blackbaud/Giving*, §22-26.

<sup>84</sup> e.g. *PayPal/iZettle*, §6.11-6.24; *Experian/ClearScore*, §9.19-2.25; *eBay/Motors*, §37-38; *Priceline/Kayak*, §29-32.

<sup>85</sup> e.g. *Experian/ClearScore*, §9.10-9.18; *Priceline/Kayak*, §18-21; *Amazon/The Book Depository*, §9-26.

<sup>86</sup> e.g. *MoneySupermarket/Decision Technologies*, §37-41; *JustEat/Hungryhouse*, §2.16-2.34; *Google/Waze*, §15, 20; *Priceline/Kayak*, §8-13, 43.

<sup>87</sup> e.g., *TopCashBack/Quidco*, §35-47; *MoneySupermarket/Decision Technologies*, §53-58. cf *Kayak/Priceline*, §41-45 and Lear Report (n 55) pp 89-90.

have been considered in several merger cases, including *Google/BeatThatQuote*, *Digital Property/Zoopla*, *Facebook/Instagram*, *Priceline/Kayak*, *Google/Waze*, *JustEat/Hungryhouse*, *ATG Media/Lottissimo*, *Moneysupermarket/Decision Technologies*, *eBay/Motors*, *Experian/ClearScore* and *TopCashBack/Quidco*.<sup>88</sup> Except *ATG Media/Lottissimo*,<sup>89</sup> all other mergers involved zero price markets and the importance of indirect network effects has been generally noted.<sup>90</sup>

Nevertheless, the two-sidedness of digital platforms was arguably insufficiently appreciated in earlier market definitions. According to the Lear Report, in certain cases – for instance, *Facebook/Instagram* and *Google/Waze* – too much emphasis was placed on product functionalities and on the users' side of the market and little attention was given to business models and monetization strategies, a shortcoming which possibly undermined the subsequent assessment of these transactions.<sup>91</sup> In recent decisions though, the CMA's approach has been more sophisticated. In *JustEat/Hungryhouse*, the authority distinguished between platforms that facilitate transactions and those that do not. While in the latter case two separate markets may be defined, in the former 'a single market definition is appropriate, which takes account of the competitive constraints on both sides of the market and assesses the hypothetical monopolist's ability to increase the price of concluding a transaction, given the number of close substitutes on each side and the impact of any indirect network effects on the platform'.<sup>92</sup> The same approach was followed in *TopCashBack/Quidco*<sup>93</sup> and *Experian/ClearScore*.<sup>94</sup> In all three cases, the CMA explained the difficulties of implementing the hypothetical monopolist test and considered demand-side and supply-side substitution based on the evidence. In *JustEat/Hungryhouse* the authority also noted that 'where products and services on one side of the market are provided 'free' of charge, other dimensions of competition, such as quality, may be a more important measure of substitution than price on that side of the market'.<sup>95</sup>

While it is impossible to provide an exhaustive account, it is worth mentioning the most recent digital market definitions. In *JustEat/Hungryhouse*, food-ordering marketplaces were deemed substitutable with food ordering and logistics specialists but not with direct ordering and vertically integrated food chains.<sup>96</sup> In *eBay/Motors*, the CMA noted the categorisation of

<sup>88</sup> See also *Live Online Auction Platform Services*, a Chapter II commitment decision.

<sup>89</sup> §29.

<sup>90</sup> e.g. *TopCashBack/Quidco*, §25; *Experian/ClearScore*, §7.8; *eBay/Motors*, §37; *JustEat/Hungryhouse*, §4.9; *Google/Waze*, §19; *Google/BeatThatQuote*, §11.

<sup>91</sup> Lear Report (n 55) p 117.

<sup>92</sup> §4.11

<sup>93</sup> §24-28 (see also Issues Statement in Phase 2, §13, 21).

<sup>94</sup> §9.6.

<sup>95</sup> §4.10.

<sup>96</sup> *ibid*, §4.26.



online advertising into search, non-search and classified but did not consider it appropriate to widen the market for online classified vehicle advertising to include other forms of advertising, such as paid search or social media.<sup>97</sup> In *Experian/ClearScore* the authority provisionally found that CCPs are not substitutable with other marketing channels, including lenders' own websites and traditional offline channels, and online advertising.<sup>98</sup> The CMA also considered that paid-for and free CCTs are part of the same market, their different monetisation not preventing this conclusion.<sup>99</sup> In *TopCashBack/Quidco* the authority concluded that cashback websites were not substitutable with PCWs, money-saving content websites and deal aggregator websites.<sup>100</sup> Finally, *PayPal/iZettle* should be highlighted as one of the identified markets - omni-channel payment services by the same provider - was/is still nascent. Remarking that such services are an emerging trend and may develop rapidly with merchants' demand, the CMA considered industry views on how this market might evolve 'in the near future, rather than focusing solely on existing requirements and solutions'.<sup>101</sup>

## Question 5

*How is market power established in the practice of your competition authority in cases relating to digital economy players?*

*a. Are market shares being relied on?*

*b. Is a business' power in related markets taken into consideration? If so, how?*

*c. Has potential or future competition been taken into account when defining market power? Is it used differently for cases in the digital economy?*

*d. Can you notice variations in the use of the concept of market power in digital economy cases compared to other fields?*

In establishing market power, the CMA considers undertakings' shares over time and the strength of any competitive constraints, including existing competition, potential competition and buyer power.<sup>102</sup> With regards to mergers, since market power is assessed in the context of the examination of the competitive effects of the transaction, this answer should be read in conjunction with the response to Question 7. Generally, the conventional approach applies to both antitrust and merger digital economy cases. Large market shares may be cause for concern,<sup>103</sup> although in merger investigations incremental increases will typically point towards the opposite conclusion.<sup>104</sup> Furthermore, a business' power in related markets may be taken into consideration. An abuse may be found 'where an undertaking that is dominant in one

<sup>97</sup> §32-36.

<sup>98</sup> §9.18.

<sup>99</sup> *ibid*, §9.28-9.49.

<sup>100</sup> §54.

<sup>101</sup> §6.49-6.75.

<sup>102</sup> For antitrust cases, see Guidelines on the Assessment of Market Power,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284400/oft415.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf).

For merger cases, see Merger Guidelines, §5.3-5.6 and 5.7-5.9.

<sup>103</sup> e.g. *Live Online Auction Platform Services*, §3.11; *TopCashBack/Quidco*, §65.

<sup>104</sup> e.g. *Google/BeatThatQuote*, §56-67; *Blackbaud/Giving*, §70.



market commits an abuse in a different but closely associated market'.<sup>105</sup> Likewise, in horizontal mergers the CMA may 'consider the possible impact on other markets', and for non-horizontal mergers it will analyse the consequences for upstream, downstream, and related markets.<sup>106</sup>

That said, some particularities are worth noting. First, while market shares provide the starting point for assessing the firms' competitive positions, the proper metric may be uncertain. In *Facebook/Instagram* the OFT relied on app downloads,<sup>107</sup> but this measure did not reflect user engagement; actual usage data would have arguably been a better proxy.<sup>108</sup> In *Priceline/Kayak* the OFT had reservations about relying on internet traffic and considered net revenue, volume and gross booking value as more appropriate benchmarks.<sup>109</sup> More recently, in *eBay/Motors* the CMA calculated advertising shares by listing revenue, number of unique visitors and number of dealers, noting that 'shares by revenue are likely to provide only limited insight into competitive conditions'.<sup>110</sup> Differentiated products and business models may further complicate this exercise. In *Experian/ClearScore*, the CMA calculated shares based on CCP revenues as consisting in commissions from financial product providers, noting though that, due to the different ways in which CCPs attract users - i.e. through a free CCT or not - 'CCP-wide market shares may not fully reflect the strength of competitive constraints between different market participants'.<sup>111</sup> A similar issue arose in *TopCashBack/Quidco*.<sup>112</sup>

Furthermore, in *eBay/Motors* and *PayPal/iZettle* the authority acknowledged that in dynamic and fast-growing markets, shares of supply can provide some insight but may not be an appropriate guide to the competitive constraints currently faced by the parties, insofar as they provide a historical and static picture of competition, and should be thus given relatively limited weight.<sup>113</sup> In view of this, the CMA has also considered more forward-looking measures, in particular new user acquisitions. In *PayPal/iZettle*, it held that the relative rates of new customer acquisition by different mPOS suppliers - as calculated on the basis of app downloads, whose limitations as a proxy were noted - are a more accurate measure of their competitive positions than shares by transaction volume.<sup>114</sup> New user acquisitions based on

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<sup>105</sup> *Abuse of dominance*, §5.7

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284422/oft402.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf)). See also *Streetmap v Google Maps* [2016] EWHC 253, [15], [98] (markets for online search and online maps were 'clearly related').

<sup>106</sup> Merger Guidelines, §4.1.6, 5.6.2.

<sup>107</sup> §17.

<sup>108</sup> Lear Report (n 55), §II.28.

<sup>109</sup> §55-57.

<sup>110</sup> §47-48.

<sup>111</sup> §10.8.

<sup>112</sup> §102-105.

<sup>113</sup> *eBay/Motors*, §49; *PayPal/iZettle*, §8.88.

<sup>114</sup> §8.41-8.46.

subscription numbers were considered in *Experian/ClearScore*, too, as ‘particularly informative of the current competitive dynamic amongst free CCT’.<sup>115</sup>

In any event, the presence of strong rivals which can sufficiently constrain the post-merger entity will prevent a finding of market power.<sup>116</sup> Potential competition may also undermine such a provisional conclusion, where entry is timely,<sup>117</sup> likely and sufficient. In digital economy cases, growth rates,<sup>118</sup> future product developments and business plans,<sup>119</sup> and entry barriers, such as network effects, incumbency advantages and access to data, are particularly relevant. In *Live Online Auction Platform Services*, dominance was provisionally found since ATG was ‘faced with only a limited degree of potential competition’ due to existing network effects.<sup>120</sup> The absence of barriers to entry was key to the clearance of *Web Reservations International/Hostelbookers.com*: although combining the two largest online hostel booking portals, the CMA found that the growth of small, dynamic rivals would maintain sufficient competitive pressure.<sup>121</sup> By contrast, in *TopCashBack/Quidco*, the CMA considered that ‘the infrastructure and investment required as well as the strategic and marketing barriers mean that barriers to entry and expansion are high’.<sup>122</sup> The importance of user numbers, incumbency and scale to competing successfully was also noted in *Experian/ClearScore*<sup>123</sup> and *eBay/Motors*.<sup>124</sup>

Countervailing buyer power has rarely featured in digital economy decisions, though it was explicitly rejected in *TopCashBack/Quidco*: a handful of large advertising buyers could not counteract a 90-100% post-merger market share for cashback websites with limited switching opportunities.<sup>125</sup>

## Question 6

*Can you notice a difference in ex post assessments (abuse of dominance cases) and ex ante assessments (concentration merger control cases), both in relation to defining markets and conceptualizing market power?*

It is still too early to identify any clear differences between ex post and ex ante assessments of market definition and market power in digital economy cases, since the only abuse of

<sup>115</sup> §11.8.

<sup>116</sup> e.g. *Digital Property/Zoopla*, §60; *Google/Waze*, §74; *Just Eat/Hungryhouse*, §7.2; *eBay/Motors*, §102.

<sup>117</sup> Usually the CMA considers two years to be timely, but a shorter period may be considered (e.g. *Experian/ClearScore*, §13.26).

<sup>118</sup> e.g. *eBay/Motors*, §87-88, *PayPal/iZettle*, §8.34; cf *TopCashBack/Quidco*, §94.

<sup>119</sup> e.g. *Experian/ClearScore*, §11.37ff; *Just Eat/Hungryhouse*, §6.42-6.50.

<sup>120</sup> §3.12.

<sup>121</sup> §103-124.

<sup>122</sup> §142-146.

<sup>123</sup> §7.28-7.29, 13.6-13.61.

<sup>124</sup> §103-106.

<sup>125</sup> §146-151.

dominance case in digital markets investigated by the CMA is *Live Online Auction Platform Services*, which closed following commitments. Nevertheless, the CMA is monitoring digital economy issues and continues to develop its thinking in the light of relevant cases and market investigations and market studies – such as, for instance, the recently initiated market study into online platforms and digital advertising – and drawing, where relevant, on its consumer enforcement experience in the digital area.

## C. Anticompetitive behaviour in the digital economy

### Question 7

*Which practices in digital markets or involving digital businesses have been analysed in the decision-making practices or case law of your jurisdiction?*

- a. What types of collusive behaviour have been considered as restrictive by object or by effect? Have others been considered as not posing a restriction? What elements have been taken into account to reach either conclusion?*
- b. Which unilateral practices (tying, refusal to supply, refusing access to data, long term predatory pricing) have been considered as abusive? Have others been considered not to constitute an abuse? What elements have been taken into account to reach either conclusion?*
- c. Have mergers or other concentrations involving digital businesses have been handled by your authority? What criteria or tests have been relied on to allow or prohibit the envisaged concentration?*

The CMA has completed cases analysing the following types of collusive behaviour in the digital economy under Chapter I CA1998:

- **Online sales limitations.** All such arrangements were deemed to restrict competition by object. ‘Recommended’ prices were found to amount to online RPM in *Pride*,<sup>126</sup> *Bathroom Fittings*<sup>127</sup> and recently in *Digital Pianos and Keyboards*, where Casio used automated price change alerts to monitor compliance with its ‘guide’.<sup>128</sup> Bans on online discounting were prohibited in *Commercial Refrigeration*<sup>129</sup> and *Light Fittings*,<sup>130</sup> and formed the basis of the subsequently quashed *Hotel Online Booking* commitments decision.<sup>131</sup> A similar SO was recently issued to Fender.<sup>132</sup> The other mobility scooter decision, *Roma*, involved preclusion of online advertising of offline prices and a ban on internet sales,<sup>133</sup> a restriction by object to which the CMA returned in its decision against Ping, a customised golf club manufacturer.<sup>134</sup>

<sup>126</sup> §3.197-3.128.

<sup>127</sup> §1.3-1.11, 6.39-6.52.

<sup>128</sup> §3.104-3.110.

<sup>129</sup> §1.3-1.9, 6.42-6.50.

<sup>130</sup> §3.41-3.91, 4.125-4.153.

<sup>131</sup> §5.1-5.14.

<sup>132</sup> <https://www.gov.uk/government/news/cma-alleges-guitar-firm-illegally-prevented-price-discounts>.

<sup>133</sup> §3.159-3.197.

<sup>134</sup> *Sports Equipment*, §3.78-3.122.

- **Algorithmic price collusion.** In *Posters and Frames* the CMA prohibited such conduct as restrictive of competition by object.<sup>135</sup> The parties adopted price-matching software for their rival products sold via Amazon, autonomously adjusting prices to the same level.<sup>136</sup> The potential for algorithmic pricing to facilitate explicit and tacit collusion was also noted in the CMA's 2018 Working Paper.<sup>137</sup>
- **MFN clauses.** Although the primary concern was RPM, the investigated firms in *Hotel Online Booking* agreed, in response to market feedback, not to enforce or use MFN clauses to ensure RPM did not materialise indirectly.<sup>138</sup>

MFN clauses were also the subject of the only digital markets decision pursuant to Chapter II CA1998. *Live Online Auction Platform Services* involved platforms bringing together auction houses and consumers to facilitate real-time online bids at offline auctions.<sup>139</sup> Alongside exclusivity obligations and restrictions on advertising competitors,<sup>140</sup> MFN clauses prevented auction houses from securing agreements with rival platforms offering more favourable terms to bidders. These were judged to act as a financial penalty against auction houses agreeing lower fees with rival platforms, who would be obliged to give bidders on the dominant firm's system the same benefits but at its higher commission rate.<sup>141</sup>

One practice deemed not to breach Chapter I CA1998 was a 'one other portal' quasi-exclusivity rule for online platforms. The CAT and the Court of Appeal agreed that OnTheMarket, an online property portal created by an association of agents, could restrict users from listing properties on more than one other online portal, as this was objectively necessary for its effective operation.<sup>142</sup> The High Court has also ruled that Google's preferential display of its own map service did not breach the Chapter II prohibition. Based on the evidence, such presentation was not reasonably likely to appreciably affect competition by foreclosing rival online map providers.<sup>143</sup>

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<sup>135</sup> §5.42-5.50.

<sup>136</sup> *ibid*, §3.62-3.93.

<sup>137</sup> *Pricing Algorithms* (n 53) 23-31.

<sup>138</sup> §4.16, 4.6, 6.39-6.42. Later quashed by the CAT and closed by the CMA on priority grounds, although the authority continued to monitor market developments (n 14).

<sup>139</sup> §2.15, 2.19.

<sup>140</sup> §2.3, 2.23-2.30. Exclusivity inhibited rivals from acquiring scale and network effects promoting growth; advertising restrictions entrenched the incumbent's position: §3.15.

<sup>141</sup> *ibid*, §3.15.

<sup>142</sup> *Agents' Mutual v Gascoigne Halman* [2017] CAT 1.

5; [2019] EWCA Civ 24.

<sup>143</sup> *Streetmap* (n 105), [99]-[141].

The CMA has mostly engaged with the digital economy through merger control. Although certain transactions fell short of the jurisdictional requirements,<sup>144</sup> the majority have been cleared in Phase 1. In determining whether a merger has resulted or is expected to result in a substantial lessening of competition (SLC),<sup>145</sup> the CMA applies the Merger Guidelines and compares its effects against the foreseeable competitive situation absent the concentration, i.e. the counterfactual.<sup>146</sup> As noted in Question 5, market shares, existing competition and countervailing factors, such as barriers to entry and buyer power, are among the relevant factors when conducting the SLC analysis. Efficiency arguments, considered in Question 8, are also pertinent. In horizontal mergers, the closeness of competition between the parties - as demonstrated by the similarity of pricing<sup>147</sup> or service offered;<sup>148</sup> customer perceptions as to their comparative functionality;<sup>149</sup> the extent of switching between them or to other rivals;<sup>150</sup> and other considerations<sup>151</sup> - is another important aspect. In the few non-horizontal mergers in digital markets reviewed by the authority, the ordinary analytical framework of ability and incentive to foreclose and competitive effect was applied, but no concerns were identified.<sup>152</sup>

While some early decisions did not squarely address possible digital economy implications,<sup>153</sup> such considerations have featured more prominently in recent merger analysis.

Firstly, although in most cases the pre-existing conditions of competition were taken as the relevant benchmark, more competitive counterfactuals have been occasionally considered. In *Experian/ClearScore* the CMA rejected the parties' claim that rivals would exert greater competitive constraints in the future owing to regulatory and technological developments, since their impact was not sufficiently foreseeable.<sup>154</sup> In contrast, in *PayPal/iZettle* the authority considered whether greater future competition between the merging parties was foreseeable enough to be reflected in the counterfactual<sup>155</sup> and concluded that, absent the acquisition, PayPal would have strong incentives to improve its offering.<sup>156</sup> The Lear Report also urged the CMA to better acknowledge more competitive

<sup>144</sup> e.g. *MoneySupermarket/MoneySavingExpert*; *Expedia/Trivago*.

<sup>145</sup> ss35-36 Enterprise Act 2002.

<sup>146</sup> § 4.3.

<sup>147</sup> *Amazon/Book Depository*, §55; *Digital Property/Zoopla*, §38; *Blackbaud/Giving*, §48.

<sup>148</sup> *Priceline.com/Kayak*, §58; *eBay/Motors*, §52-57; *TopCashBack/Quidco*, §67.

<sup>149</sup> *Blackbaud/Giving*, §48-51; *Experian/ClearScore*, §58-60.

<sup>150</sup> *Amazon/Book Depository*, §66-72, 83; *Blackbaud/Giving*, §56-60.

<sup>151</sup> e.g. brand recognition (*Blackbaud/Giving*, §50), variable consumer uptake (*Facebook/Instagram*, §17-21; *Experian/192business*, §34), online customers' location (*Stars/Sky Betting*, §64-67).

<sup>152</sup> Merger Guidelines, §5.6. e.g. *CVC Capital/Sky Bet*, §49-70; *Experian/ClearScore*, §12.1-12.53; *Google/BeatThatQuote*, §94-109; *Moneysupermarket.com/Decision Technologies*, §158-167; *Blackbaud/Giving*, §76-81.

<sup>153</sup> e.g. *Zipcar/StreetCar*.

<sup>154</sup> §12-14, 6.3-6.6, 6.8-6.14.

<sup>155</sup> It further denied that iZettle would be a stronger competitor in the omni-channel market: §7.49-7.65.

<sup>156</sup> *ibid*, §7.32-7.42.

counterfactuals where small, innovative, but hitherto unprofitable acquisitions could grow to challenge the acquirer.<sup>157</sup>

Secondly, merger analysis has incorporated other digital economy factors. Multi-homing, for instance, has been taken to indicate the ease of switching, thus mitigating the likelihood of post-merger exercises of market power.<sup>158</sup> In *Just Eat/Hungryhouse* the CMA investigated whether customers may cut out the intermediary and go directly to the supplier-side, thereby constraining the market power of the platform.<sup>159</sup> In *Digital Property/Zoopla* the authority noted that network effects generated by the scale of the merging parties may inhibit the growth and competitive pressure of smaller rivals, while conversely the significant network effects enjoyed by larger rivals may limit the post-merger entity's ability to exercise market power.<sup>160</sup> The former phenomenon was important in provisionally prohibiting the *Experian/ClearScore* acquisition, as combining the two-sided user groups of their CCPs would inhibit customer switching.<sup>161</sup> Furthermore, in *Just Eat/Hungryhouse* the CMA rejected the parties' claim that network effects led to a 'winner-takes-all' market for online food ordering platforms.<sup>162</sup>

Last but not least, the general opportunities presented by the digital economy have been referenced as reducing barriers to entry, such as the ease of new app development<sup>163</sup> or producers' use of online trading platforms (Amazon Marketplace, eBay).<sup>164</sup>

As noted earlier, the CMA recently launched a call for views on its approach to the assessment of digital mergers to inform a review of the existing Merger Guidelines. Importantly, the authority invited thoughts, among others, on the market features that are likely to be relevant to the assessment of mergers in digital markets – such as their multi-sided nature; the fact that users may pay for products or services through non-monetary means - e.g. through the provision of personal data; the relevance of data assets for competition; and the importance of network effects.<sup>165</sup>

## Question 8

*What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?*

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<sup>157</sup> Lear Report (n 55), iv, xiv.

<sup>158</sup> *Google/BeatThatQuote*, §51; *Blackbaud/Giving*, §66-69; *Just Eat/Hungryhouse*, §6.71, 6.74; *Experian/ClearScore*, §10.115.

<sup>159</sup> §6.132-6.143.

<sup>160</sup> §32, 39, 44.

<sup>161</sup> §10.121-10.122.

<sup>162</sup> §6.57, 6.80-6.94.

<sup>163</sup> *Facebook/Instagram*, §36.

<sup>164</sup> *Amazon/Book Depository*, §109, 114, 116.

<sup>165</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/805962/CMA\\_call\\_for\\_information\\_on\\_digital\\_mergers.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805962/CMA_call_for_information_on_digital_mergers.pdf).



- a. Have economic efficiency justifications been offered by digital economy players to justify certain types of behaviour considered as anticompetitive? If so, please summarize them.
- b. Have these justifications been accepted or rejected by your authority in the cases in which they were offered?
- c. Has the multi-sidedness of markets been factored into the assessment of potential efficiency justifications?
- d. Does your authority also take justifications other than those grounded in economic efficiency into account (e.g. in relation to innovations brought by digital players)? Have such justifications also played a role in permitting certain types of behaviour in the digital economy?

Efficiency justifications have not featured prominently in digital economy decisions: parties have not raised such claims in Chapter I infringements;<sup>166</sup> the only Chapter II investigation was concluded with commitments; and most mergers have been cleared due to lack of concerns whether in Phase 1 or 2, while some *prima facie* problematic mergers were cancelled.<sup>167</sup>

Nevertheless, in *Roma* and *Pride* the firms argued that online sales restrictions and RPM were necessary to prevent internet distributors free-riding upon the investments of brick-and-mortar shops, where customers could physically inspect scooters and receive post-sales services.<sup>168</sup> They argued that the rise of internet sellers with lower operating costs necessitated substantial protection for offline distributors from free-riding and undercutting. These efficiencies were dismissed as lacking in evidence as to whether they mitigated free-riding, outweighed the resultant higher prices, or couldn't be similarly achieved through incorporating pre-/post-sales services into selective distribution agreements. The free-rider argument was also advanced by Ping to justify an online sales ban protecting its offline distributors' investments in customisation services,<sup>169</sup> but was supplemented by the claim that the measure was necessary to protect its luxury brand image for personalised clubs.<sup>170</sup> The CMA rejected this latter argument as an objective justification or mitigating efficiency for the practice.<sup>171</sup> An online sales ban was not indispensable for customers to acquire personalised clubs, with a range of less restrictive alternatives available.<sup>172</sup>

*Digital Property/Zoopla* acknowledged the multi-sidedness of online property portals and recognised the merged entity's greater network effects as facilitating more effective

<sup>166</sup> *Bathroom Fittings; Commercial Refrigeration; Posters and Frames; Light Fittings*.

<sup>167</sup> Note *Experian/ClearScore* (paras 13.62-13.65) where the CMA concluded that the efficiencies offered were outside its remit (international growth) or insufficiently evidenced (stimulating innovation).

<sup>168</sup> *Roma*, §3.206-3.230; *Pride*, §3.231-3.243.

<sup>169</sup> *Sports Equipment*, §4.89-4.92. Rejected as distributors already had to maintain a physical shop and their customisation costs were recouped.

<sup>170</sup> *ibid*, §3.97-3.101, 4.83-4.88.

<sup>171</sup> *ibid*, §4.93-4.156, 4.208-4.249. The CMA's extensive analysis of objective justification was deemed an error of law: *Ping Europe v CMA* [2018] CAT 13, [97]-[100].

<sup>172</sup> *ibid*, §4.120-4.141 (e.g. online promotion of customisation, offering customisation online, interactive personalisation advice).



competitive pressure upon the market leader, Rightmove.<sup>173</sup> Network effects on two-sided markets made it difficult for smaller platforms to grow organically, an issue eased by accumulating scale through mergers.<sup>174</sup> The pro-competitive consequences of strengthening the merged entity's network effects through combining their users and agents thus factored heavily in the clearance decision.<sup>175</sup>

Lastly, while not technically *justificatory* efficiencies, the CMA has occasionally noted the procompetitive rationale for otherwise unproblematic digital economy mergers. These have included increasing scale to compete more effectively and reduce costs,<sup>176</sup> combining differing business expertise,<sup>177</sup> and to facilitate entry into new geographic markets.<sup>178</sup>

## Question 9

*Have you witnessed the emergence of specific theories of harm tailored to digital markets?*  
*a. How is harm defined and where does it differ from theories of harm in other sectors?*  
*b. Do arguments focused on innovation play a role in determining the presence or absence of harm to competition?*  
*c. What standard of proof is relied on to establish harm to competition? If likelihood evidence is used, what level of probability is defined as a threshold for intervention?*

The CMA has routinely stressed that pre-existing concepts are sufficient to meet issues arising in digital economy markets; offline antitrust principles continue to apply.<sup>179</sup> Whilst some of the practices which give rise to harm may differ in the online and offline world, the underlying theories of harm that have been investigated (or posited) in digital markets are in many cases not new. However, with the abundance of merger clearances and the relatively small number of infringement decisions, there have been limited opportunities for experimentation.

Chapter I infringement decisions concerning online selling restrictions are based upon similar theories of competitive harm. Internet sales bans soften price competition amongst online and offline outlets, restrict retailers from accessing the broad consumer base offered by the internet, limit consumers to local distributors, prevent 24-hour purchases, and hinder the use of online tools that facilitate shopping around (search engines, PCWs).<sup>180</sup> The theory

<sup>173</sup> §46-59.

<sup>174</sup> *ibid*, §48, 53-54, 56.

<sup>175</sup> *ibid*, §61, 70.

<sup>176</sup> *Google/BeatThatQuote*, §8; *Just Eat/Hungryhouse*, §3.7; *PayPal/iZettle*, §4.6.

<sup>177</sup> *Stars/Sky Betting*, §10; *PayPal/iZettle*, §4.6.

<sup>178</sup> *ATG Media/Lottissimo*, §12.

<sup>179</sup> *CMA Response: Online Platforms and the EU Digital Single Market*

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502607/Response\\_to\\_House\\_of\\_Lords\\_inquiry\\_on\\_online\\_platforms.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502607/Response_to_House_of_Lords_inquiry_on_online_platforms.pdf)) 12-13; *CMA Response: Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*

([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502606/Response\\_to\\_EC\\_s\\_questionnaire\\_on\\_the\\_regulatory\\_environment\\_for\\_platforms.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502606/Response_to_EC_s_questionnaire_on_the_regulatory_environment_for_platforms.pdf)) 2, 6; *Pricing Algorithms*: (n 53) 5, 27, 31, 47-79.

<sup>180</sup> *Roma*, §1.15-1.16; *Sports Equipment*, §4.53-4.54, 4.72-4.82.

of harm underpinning the prohibition of online RPM likewise focuses upon the internet as a tool for fierce competition and discounting, which is dulled by the imposition of a singular price.<sup>181</sup> RPM further prevents the lower overheads of internet distributors from being translated into reduced prices,<sup>182</sup> and may act as a barrier to entry in markets where small firms aggressively discount to acquire scale.<sup>183</sup>

The theory of harm relating to MFN clauses in the *Live Online Auction Platform Services* commitments decision was also clear: ‘wide’ MFN clauses may foreclose competing online platforms by acting as a financial penalty on auctioneers securing more favourable terms for bidders on rival platforms, as they required the investigated firm’s bidders to be given the same terms (while still paying its agreed commission fee).<sup>184</sup> In the pending investigation into MFN clauses and home insurance PCWs, press releases suggest a two-fold theory of harm: that ‘wide’ MFN clauses prevent price competition between PCWs on discounted insurance to consumers; and that they reduce competition on the commission rates charged by PCWs to insurance providers which may inflate consumer prices.<sup>185</sup> These theories reflect the CMA’s broader thinking.<sup>186</sup> ‘Wide’ MFNs preventing *both* service providers and rival PCWs from offering more favourable terms have been found to eliminate inter-website price competition without convincing efficiency justifications.<sup>187</sup> In contrast, ‘narrow’ MFN clauses only preventing providers from directly offering services on more favourable terms than the PCW are considered less problematic, since they maintain the business credibility of PCWs by preventing suppliers from free-riding on their advertising efforts by offering a reduced direct price.<sup>188</sup>

CMA publications on digital markets have discussed additional theories of harm, including: *consumer exploitation through price discrimination* facilitated by data collected on previous online visits, transactions and evidence of shopping around;<sup>189</sup> *hollowing-out*, i.e. using the consumer focus upon pricing in digital comparison tools to reduce the quality of the product;<sup>190</sup> *non-resolicitation*, i.e. agreements between digital comparison tools and service providers preventing the former from contacting previous customers, reducing the visibility of

<sup>181</sup> *Pride*, §1.14-1.22; *Bathroom Fittings*, §1.13-1.16, 4.8-4.21, 4.24-4.25; *Commercial Refrigeration*, §4.6-4.31; *Light Fittings*, §3.25-3.30.

<sup>182</sup> *Bathroom Fittings*, §4.19-4.21; *Commercial Refrigeration*, §4.23-4.35; *Light Fittings*, §3.28.

<sup>183</sup> *Hotel Online Booking*, §5.9.

<sup>184</sup> §3.14-3.15.

<sup>185</sup> <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

<sup>186</sup> *Private Motor Insurance Market Investigation: Final Report*, §8.1-8.123; *Digital Comparison Tools* (n 46) 57-60, Appendix E.

<sup>187</sup> *Digital Comparison Tools* (n 46) 57-58, Appendix E.

<sup>188</sup> *ibid* 59-60 (though recognising their ability to restrict competition under specific circumstances).

<sup>189</sup> *Online Targeting of Advertising and Prices: A Market Study* (2010); *Pricing Algorithms* (n 53).

<sup>190</sup> *Digital Comparison Tools* (n 46) 60-62, Appendix E.

offers/competing suppliers, and hampering innovation in targeted marketing;<sup>191</sup> and *non-brand bidding/negative keywords matching*, i.e. agreements between rival brands to prevent each other's products/services being simultaneously advertised in paid online search results when specific brands or particular keywords are input.<sup>192</sup>

The primary theory of harm in digital economy horizontal mergers coheres with other enforcement: that the loss of actual competition between rivals may create or strengthen a position of market power, usually through subsequent price rises,<sup>193</sup> but sometimes potentially manifest as a reduced range of products/services<sup>194</sup> or degradation in quality.<sup>195</sup> Occasionally the CMA has noted that increased market power may dull future incentives to invest in innovation, but – as suggested by the Furman Report<sup>196</sup> – this theory of harm has not been substantiated in detail.<sup>197</sup> Despite the dearth of detailed assessments in digital economy mergers of coordinated<sup>198</sup> and unilateral non-horizontal effects, the CMA has seemingly maintained pre-existing theories of harm.<sup>199</sup> As evidenced by its analysis of vertical mergers, the novelty derives more from the *means* by which such harms to competition may be achieved: manipulation of search engine results,<sup>200</sup> preferential treatment of online platforms by related PCWs,<sup>201</sup> or deteriorating interoperability between social media networks and photo sharing apps.<sup>202</sup>

A common apprehension in digital markets is the harm to potential future competition and innovation resulting from established technology companies acquiring fledgling rivals, whether actual or potential.<sup>203</sup> Early decisions often dismissed concerns by emphasising incremental market share changes, potential future entry with ease and the firms not *currently* competing closely.<sup>204</sup> Following *Facebook/Instagram*, an acquisition cleared largely based on Instagram's then lack of advertising profits,<sup>205</sup> *Google/Waze* was more alive to possible harm to future

<sup>191</sup> *ibid*, 64-65, Appendix E.

<sup>192</sup> *ibid*, 62-64, Appendix E. For a closed investigation concerning this: <https://www.gov.uk/cma-cases/energy-price-comparison-websites-suspected-anti-competitive-agreements>.

<sup>193</sup> *Google/BeatThatQuote*, §45-60; *Amazon/Book Depository*, §49-92; *Facebook/Instagram*; *Just Eat/Hungryhouse*, §6.96-6.97; *Experian/ClearScore*, §27, 39, 11.3.

<sup>194</sup> *Amazon/Book Depository*, §97-101; *Just Eat/Hungryhouse*, *ibid*; *Moneysupermarket.com/Decision Technologies*, §79.

<sup>195</sup> *Google/Waze*, §27; *Moneysupermarket.com/Decision Technologies*, §79, 108; *Experian/ClearScore*, §27, 39, 11.3.

<sup>196</sup> Furman Report (n 58) 12, 95.

<sup>197</sup> *Google/Waze*, §27, 40; *Just Eat/Hungryhouse*, §6.96-6.97; *Moneysupermarket.com/Decision Technologies*, §79, 108; *Experian/ClearScore*, §32, 39, 10.133-10.134, 11.69.

<sup>198</sup> This theory of harm is omitted from almost all digital economy merger decisions. For brief consideration: *Digital Property/Zoopla*, §63-65; *Experian/192business*, §38-43; *Priceline.com/Kayak*, §81-85.

<sup>199</sup> Merger Guidelines, §5.5, 6.6.

<sup>200</sup> *Google/BeatThatQuote*, §68-115.

<sup>201</sup> *Priceline.com/Kayak*, §89-94.

<sup>202</sup> *Facebook/Instagram*, §30-41.

<sup>203</sup> See Furman Report (n 58) 97.

<sup>204</sup> e.g. *Google/BeatThatQuote*, §46-47, 56, 61-66; *Amazon/Book Depository*, §41-46, 108-117.

<sup>205</sup> §23, 29.

competition,<sup>206</sup> but found little reason to believe that Waze would become a strong competitor to Google Maps.<sup>207</sup> The most extensive engagement with this theory of harm was in *PayPal/iZettle*. Nevertheless, the CMA found no evidence of an anticompetitive motive for the acquisition,<sup>208</sup> nor that iZettle was likely to significantly expand its online offering to compete with PayPal as an omni-channel payment systems provider.<sup>209</sup>

The standard of proof for antitrust infringement decisions and for merger prohibitions is the balance of probabilities (i.e. more likely than not).<sup>210</sup> The Furman Report advocated a 'balance of harms' approach, whereby merger assessment would weigh up not only the likelihood but also the magnitude of both the harms and the benefits of the transaction.<sup>211</sup> The CMA is concerned that this would be a fundamental shift in merger policy, raising practical challenges and possibly unintended consequences.<sup>212</sup>

## Question 10

*What kind of remedies have been employed in cases relating to digital markets? Do you see any differences to remedies in other markets?*

Few remedies have been employed in cases relating to digital markets, which have largely cohered with other enforcement.

- As restrictions by object, all Chapter I infringement decisions naturally invited fines under s36 CA1998.<sup>213</sup> Some were lowered for compliance with the CMA and/or following the settlement procedure,<sup>214</sup> while others were reduced on appeal.<sup>215</sup> Under ss32-33 CA1998, the CMA can also impose binding directions; these have been used to order defendants to cease adopting and enforcing the prohibited contractual terms,<sup>216</sup> where the investigated conduct has not already ended.<sup>217</sup>
- The commitments secured pursuant to ss31A-31E CA1998 in *Live Online Auction Platform Services* simply prevented the investigated conduct: the firm would not enter contracts limiting auction houses from using other platforms, negotiating better terms, or advertising

<sup>206</sup> §26, 40.

<sup>207</sup> §37-39, 44-49, 52.

<sup>208</sup> §11, 9.14.

<sup>209</sup> §9.4-9.15.

<sup>210</sup> *Tesco v OFT* [2012] CAT 31, [88]; *IBA Health v OFT* [2003] CAT 27 [182].

<sup>211</sup> pp13, 98-101.

<sup>212</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/788480/CMA\\_letter\\_to\\_BEIS\\_-\\_DCEP\\_report\\_and\\_recommendations\\_Redacted.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations_Redacted.pdf)

<sup>213</sup> Though in *Posters and Frames* one defendant benefitted from immunity, while in *Roma* and *Pride* the defendants' turnover fell within the "small agreement" exception (s39(3) CA1998).

<sup>214</sup> *Commercial Refrigeration*; *Digital Pianos*.

<sup>215</sup> e.g. *Sports Equipment* in *Ping* (n 171).

<sup>216</sup> *Roma*; *Pride*; *Sports Equipment*.

<sup>217</sup> e.g. *Bathroom Fittings*; *Light Fittings*.

rival services. The commitments in *Hotel Online Booking* were more proactive. Although MFN clauses were subject to cessation, RPM was remedied by commitments permitting online travel agents and hotels to discount to membership groups and to publicise their ability to do so. However, the decision was subsequently quashed by the CAT in *Skyscanner*.<sup>218</sup>

- The vast majority of digital economy mergers have been unconditionally cleared without the need to consider remedial commitments.<sup>219</sup>

Although not a decision, the ‘Open Banking’ remedy arising from the retail banking market investigation *utilised* the digital economy to facilitate greater competition.<sup>220</sup> To improve switching between current accounts, the CMA recommended the development of an open application programming interface (API) for banking.<sup>221</sup> This would allow intermediaries between banks and customers – finance platforms, apps, PCWs – to access up-to-date information from major banks and customers to thereby recommend accounts tailored to their individual needs.<sup>222</sup>

## D. Regulatory overlap and enforcement challenges

### Question 11

*Has there been any overlap in practice between ex ante regulation aimed at controlling market behaviour – such as, but not limited to, consumer protection legislation, the proposed platform Regulation, the GDPR, the geo-blocking Regulation, the ePrivacy Directive and/or proposed ePrivacy Regulation, or similar national instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?*

- If no, have steps been taken to tackle potential overlap and conflicts in future cases?*
- If yes, has this overlap resulted in conflicting interpretations/visions of how digital enterprises can behave on the market?*

UK competition law is complemented by the following ex ante regulation:

- The **Consumer Rights Act 2015 (CRA2015)**.<sup>227</sup> Part 1 provides consumer rights against businesses supplying goods, services and paid-for (only) digital content.<sup>223</sup> Part 2 makes unfair non-core terms in consumer contracts not binding, with Schedule 2 listing terms

<sup>218</sup> *Skyscanner* (n 14). As noted earlier, the CMA took a fresh look at the case but eventually decided to close the investigation on administrative priorities grounds.

<sup>219</sup> For a rare example: *Mastercard/VocaLink* (<https://www.gov.uk/cma-cases/mastercard-vocalink-merger-inquiry>).

<sup>220</sup> Retail Banking Market Investigation Order 2017 (<https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>).

<sup>221</sup> *Retail Banking Market Investigation: Final Report* (<https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>) 441-461.

<sup>222</sup> *ibid*, xxxvii-xxxviii, 441-442.

<sup>223</sup> s33.

which may or must be regarded as unfair. The CMA has occasionally indicated how such terms might apply in the digital economy.<sup>224</sup>

- **The Consumer Protection from Unfair Trading Regulations 2008 (CPRs).**<sup>230</sup> These prohibit unfair business-to-consumer commercial practices. Typically, unfair practices contravene requirements of professional diligence.<sup>225</sup> This broadly means conduct below the standard expected of an honest trader which impairs the average consumer's ability to make an informed choice. The CPRs specifically prohibit misleading actions and omissions,<sup>226</sup> aggressive practices,<sup>227</sup> and a list of conduct 'in all circumstances considered unfair',<sup>228</sup> a number of which are relevant to the digital economy.<sup>229</sup> The Electronic Commerce (EC Directive) Regulations 2002 impose additional information obligations on online traders.
- **The Privacy and Electronic Communications (EC Directive) Regulations 2003**<sup>230</sup> and the **Data Protection Act 2018**, the latter of which implements the GDPR.<sup>231</sup> These constitute the UK data protection regime.
- The Geo-Blocking Regulation<sup>232</sup> and the **Geo-Blocking (Enforcement) Regulations 2018**, which designated the CMA as the body responsible for enforcing the prohibitions included within Articles 3-5.
- Given the UK's decision to leave the EU, it is unclear whether legal changes will be introduced to implement the **Platform Regulation**.<sup>233</sup> The CMA was initially unconvinced that such an instrument was necessary, highlighting the risk of diverging online and offline obligations, pre-existing sector-specific requirements (e.g. financial lending, real estate) and that regulation might insulate incumbent platforms from greater competition.<sup>234</sup> Its preference was for guidance, self-regulation and ex post competition/consumer protection enforcement.

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<sup>224</sup> e.g. *Consumer Data* (n 45) 16.

<sup>225</sup> Regulation 3.

<sup>226</sup> Regulations 5-6.

<sup>227</sup> Regulation 7.

<sup>228</sup> Schedule 1.

<sup>229</sup> e.g. promoting endorsements by users that have been paid for.

<sup>230</sup> Implementing Directive 2002/58/EC.

<sup>231</sup> Regulation 2016/679.

<sup>232</sup> Regulation 2018/302.

<sup>233</sup> Regulation 2019/1150.

<sup>234</sup> *CMA Response: Online Platforms* (n 179); *CMA Response: Regulatory Environment for Platforms* (n 179).



Although ex ante regulation imposes various requirements on digital economy firms, the greatest possibility for overlap derives from ex post enforcement.

- This is especially true of UK consumer protection law due to the CMA's dual role. In addition to CA1998, the authority also enforces the CRA2015 and the CPRs.<sup>235</sup> Consumer enforcement is seen as supporting competition through: facilitating well-informed consumer decision-making which rewards the best firms; addressing practices which hinder transparency or switching; and ensuring a level playing-field of fair business behaviour.<sup>236</sup> This cohesion is demonstrated by investigations into paid-for positive online endorsements,<sup>237</sup> opaque charges and terms for internet transactions,<sup>238</sup> automatic renewal of digital services<sup>239</sup> and the reliability of internet reviews.<sup>240</sup> Other consumer protection investigations in digital markets have focused upon preventing exploitation (e.g. websites charging for free government services,<sup>241</sup> unfair terms and practices by online gambling firms)<sup>242</sup> and protecting vulnerable groups (e.g. children pressurised to make in-game/app purchases).<sup>243</sup> Although early consumer protection publications in the digital economy often marginalised the competition perspective,<sup>244</sup> more recently the CMA has effectively blended the two.<sup>245</sup> While consumer enforcement has been a valuable complement to competition enforcement, the inability to order cessation and impose fines independently of the courts has led its Chairman to recently note that the CMA's consumer powers are 'unfit' for purpose and should be boosted.<sup>246</sup>
- Data protection and privacy legislation is enforced by the Information Commissioner's Office (ICO). The ICO has often undertaken enforcement action against digital economy firms, including fining Uber for failing to protect customer's data during a cyber-attack,<sup>247</sup>

<sup>235</sup> Part 8 of the Enterprise Act. For other regulations enforced: CMA, *Consumer Protection: Enforcement Guidance* (2016) Annex A.

<sup>236</sup> *Consumer Protection*, ibid §2.2.

<sup>237</sup> <https://www.gov.uk/cma-cases/handpicked-media-ltd-non-disclosure-of-commercial-blogging-activity>; <https://webarchive.nationalarchives.gov.uk/20140402215217/http://www.oft.gov.uk/OFTwork/consumer-;https://www.gov.uk/cma-cases/social-media-endorsements>.

<sup>238</sup> <https://www.gov.uk/cma-cases/car-rental-intermediaries>; <https://www.gov.uk/cma-cases/online-hotel-booking>.

<sup>239</sup> <https://www.gov.uk/cma-cases/online-console-video-gaming>; <https://www.gov.uk/cma-cases/anti-virus-software>.

<sup>240</sup> e.g. <https://www.gov.uk/cma-cases/online-reviews-and-endorsements>; <https://www.gov.uk/cma-cases/fake-and-misleading-online-reviews>.

<sup>241</sup> <https://webarchive.nationalarchives.gov.uk/20121204222607/http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/government-services/>.

<sup>242</sup> <https://www.gov.uk/cma-cases/online-gambling>.

<sup>243</sup> <https://www.gov.uk/cma-cases/children-s-online-games>.

<sup>244</sup> e.g. *Internet Shopping: An OFT Market Study* (2007); *Online Targeting* (n 189); *Protecting Consumers Online: A Strategy for the UK* (2010).

<sup>245</sup> e.g. *Consumer Data* (n 45) 10, 95; *CMA Response: Online Platforms* (n 179).

<sup>246</sup> Chairman's Letter (n 56) 20-21.

<sup>247</sup> <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-fines-uber-385-000-over-data-protection-failings/>



penalising Facebook for not sufficiently guarding user data from app developers,<sup>248</sup> and an undertaking from WhatsApp not to share data with Facebook until it had met concerns about data protection.<sup>249</sup> It has also published related materials on privacy and data in mobile apps,<sup>250</sup> cloud computing,<sup>251</sup> social networks<sup>252</sup> and a report on big data, AI and machine learning.<sup>253</sup> Some of the CMA's consumer protection investigations have also touched on privacy<sup>254</sup> and its publications have occasionally raised related issues.<sup>255</sup> Rather than inconsistent aspirations, its Report into the commercial use of consumer data viewed competition, consumer protection, and privacy as operating in tandem: of firms competing in a "race to the top" to offer users the most protective and transparent data collection policy.<sup>256</sup> The on-going market study into online platforms and digital advertising will also look at consumer control over data collection practices, particularly assessing measures to improve transparency and consent for data collected for sale to advertisers.<sup>257</sup>

- As of yet, there has been no enforcement pursuant to the Geo-Blocking Regulation. Whether the Platform Regulation will apply in the UK from July 2020 is currently unknown.

## Question 12

*Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction?*

- Are the same authorities entrusted with the enforcement of ex ante digital economy regulation (such as the GDPR and the geo-blocking Regulation, platform regulation) and of competition law?*
- If yes, what tools are in place to guarantee a coherent and streamlined enforcement within that authority?*
- If not, do these authorities cooperate? Is there room for exchanges of information between them?*
- Are authorities' decisions reviewed by courts? Is there one court responsible for reviewing cases coming from different authorities?*

Under s54 CA1998, a variety of regulators have concurrent powers to enforce the Chapter I and Chapter II prohibitions: Ofcom; Ofgem (gas and electricity markets); Water Services Regulation Authority (OFWAT); Northern Ireland Authority for Utility Regulation; Office of Rail and Road (ORR); Civil Aviation Authority (CAA); Financial Conduct Authority (FCA); Payment

<sup>248</sup> <https://ico.org.uk/facebook-fine-20181025>.

<sup>249</sup> <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/blog-a-win-for-the-data-protection-of-uk-consumers/>

<sup>250</sup> <https://ico.org.uk/media/for-organisations/documents/1596/privacy-in-mobile-apps-dp-guidance.pdf>.

<sup>251</sup> <https://ico.org.uk/media/for-organisations/documents/1540/cloud-computing-guidance-for-organisations.pdf>

<sup>252</sup> <https://ico.org.uk/media/for-organisations/documents/1600/social-networking-and-online-forums-dpa-guidance.pdf>

<sup>253</sup> <https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf>

<sup>254</sup> e.g. *Online Dating Services*: <https://www.gov.uk/cma-cases/online-dating-services>.

<sup>255</sup> *Protecting Consumers Online* (n 244), recommending that the ICO reconsider notice and consent requirements for online targeted advertising and pricing.

<sup>256</sup> *Consumer Data* (n 45) 8.

<sup>257</sup> *Online Platforms and Digital Advertising Market Study: Statement of Scope* (2019) 5-6, 20-21.

Systems Regulator (PRS); and NHS Improvement. The CMA is the sole decision-maker for mergers.<sup>258</sup>

Coherent antitrust enforcement was strengthened by the ERR13 and the Competition Act 1998 (Concurrency) Regulations 2014, which facilitate information-sharing, notification of proposed investigations, and case transferral. The CMA has published guidance on the concurrent application of competition law in regulated industries<sup>259</sup> and has agreed a memorandum of understanding with each enforcement body.<sup>260</sup> Together they constitute the UK Competition Network, which aims to engage in strategic dialogue, cooperative enforcement and sharing best practices.<sup>261</sup> Given the sectors overseen by the concurrent enforcers, there has been little engagement with digital economy markets beyond the CMA. One exception is an Ofgem investigation into the use of negative keywords agreements between energy PCWs, preventing their rival advertisements displaying in response to certain user search inputs. This investigation was transferred to the CMA and closed on administrative priority grounds.<sup>262</sup>

With respect to consumer protection, CRA2015 enforcement is shared with Trading Standards Services (TSS), the concurrent sector regulators, ICO and the Consumers' Association (Which?).<sup>263</sup> TSS, operating at local government level, are also the lead enforcers of the CPRs. Case allocation is managed through the National Trading Standards Board and there is a legal duty to notify enforcement action. The CMA typically takes the lead against systemic market failures or practices with market-wide implications, where a legal precedent is necessary and if strong deterrence or compensation is required.<sup>264</sup> The CMA is part of the Consumer Protection Partnership, bringing together other enforcement (National Trading Standards Board, Scottish and Northern Irish equivalents) and advocacy bodies (Citizens Advice). In 2019 the CMA Chairman recommended 'entrenching a division of responsibilities' for enforcement between the CMA and TSS.<sup>265</sup>

Chapter I and II infringement decisions, findings of legality, commitment decisions, and penalties are appealable from the CMA to the CAT,<sup>266</sup> while other actions can be judicially reviewed by the High Court. A person aggrieved by a merger decision can also apply to the

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<sup>258</sup> The CMA consults Ofcom on local media mergers and NHS Improvement on mergers of foundation trusts. The Secretary of State may intervene in mergers that raise public interest considerations (n 77).

<sup>259</sup> *Guidance on Concurrent Application of Competition Law to Regulated Industries* (2014).

<sup>260</sup> <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents>.

<sup>261</sup> UKCN, *Statement of Intent* (2013).

<sup>262</sup> n 13.

<sup>263</sup> CRA2015 Schedule 3; Part 8 Enterprise Act 2002.

<sup>264</sup> *Consumer Protection* (n 235), §3.11.

<sup>265</sup> Chairman's Letter (n 56) 20-22.

<sup>266</sup> ss46-47 CA1998.

CAT for review.<sup>267</sup> Opportunities for the CAT to consider competition issues in the digital economy have been rare, though include accepting the “one portal only” rule in *Agents’ Mutual*,<sup>268</sup> quashing the online hotel booking commitments decision in *Skyscanner*,<sup>269</sup> and finding a non-decisive error of law in *Ping*.<sup>270</sup> Concerns have been raised about the length and cost of CAT proceedings.<sup>271</sup> The Chairman of the CMA also recently expressed dissatisfaction with the intensity of review by the CAT of CMA decision-making and recommended a more flexible standard of review for CMA fact-finding and legal analysis,<sup>272</sup> a proposal echoed in the Furman Report.<sup>273</sup>

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<sup>267</sup> s120 Enterprise Act 2002.

<sup>268</sup> See text accompanying n 142.

<sup>269</sup> *Skyscanner* (n 14).

<sup>270</sup> See n 171 and n 215.

<sup>271</sup> Chairman’s Letter (n 56) 2, 34-35, 37-38.

<sup>272</sup> *ibid* 12, 36, 39-40.

<sup>273</sup> Furman Report (n 58), 14, 106.

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