

## About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

## Summary

Which? welcomes the Committee's call for evidence on the UK's future competition policy. It is clear that the current competition and consumer frameworks have failed to keep pace with the types of harms that consumers now face, particularly with regard to fast-moving digital markets. Without much-needed reform to the UK's competition policy, UK consumers face less choice, higher prices, worse quality and less innovation. Now is a key moment for the government to push ahead with reforms, with the economic recovery following the pandemic depending on confident consumers engaging in well-functioning, innovative consumer markets.

While the Committee's focus on much-needed changes to competition policy is welcome, it should not lose sight of the role consumer policy also has in fostering a well-functioning market economy. Competition and consumer policy should work together to ensure markets operate fairly and efficiently creating thriving consumer markets and delivering the best outcomes for consumers. Competition policy creates the right conditions for companies to compete to win consumers' business. Consumer policy ensures consumers have the right protections to confidently engage with markets. These protections also ensure that responsible businesses that treat consumers fairly compete on a level playing field and are not undercut by unscrupulous competitors. By building consumer confidence and trust, consumers are more likely to engage with new products and services, driving innovation and growth.

Our response to the Committee's questions below focuses on the areas where Which? has more developed views on the impacts on consumers. Many of these questions touch on similar points to the Government's recent consultations, and we point the Committee to our responses to these consultations for more detail on our positions:

- [Which? response to the BEIS consultation on Reforming Competition and Consumer Policy](#)
- [Which? response to DCMS and BEIS consultation on A New Pro-Competition Regime for Digital Markets](#)

# 1. UK Competition Policy and the Competition & Markets Authority

## **Is the CMA's statutory duty – to promote competition for the benefit of consumers – the right one?**

Which? has concerns that the CMA's duty may be too narrowly focused on promoting competition as the only means to deliver benefits to consumers. The CMA's role goes beyond its competition work, with it also being responsible for enforcing breaches of consumer law. As such, the current statutory duty does not adequately reflect the full suite of its responsibilities to protect consumers. These consumer protection responsibilities will become an even more prominent part of the CMA's toolkit if it is given the necessary improved consumer enforcement powers proposed in the Government's recent consultation, which we strongly support.

Currently, the CMA's mission is "to make markets work well in the interests of consumers, businesses and the economy", which is much more reflective of the range of its activities across its competition and consumer functions. However, without this wider mission being enshrined in law there is a risk that future decision-makers at the CMA could interpret its role as narrowly focused on competition harms without giving proper regard to its wider responsibilities to protect consumers.

The CMA is in a unique position to take a broad view of UK markets and ensure that they are working for consumers, even where it finds harms that are not strictly related to competition. It is possible that the current duty could prevent the CMA from prioritising work or making findings that would be in the best interests of consumers, simply because they cannot make a definitive link to competition. This could also cause issues in the courts if companies wish to use the duty's focus on competition to challenge CMA findings which benefit consumers.

## **Has competition policy in the UK weakened over recent years? What impact is the COVID-19 pandemic and digitalisation having on competitive forces in the UK economy?**

It is clear that competition policy has not kept up with the UK's rapid transition into a digital economy. There are now a small number of very large companies that hold very strong market power in key digital markets that make it impossible for new UK entrants to compete. For example, in its Market Study on online platforms and digital advertising, the CMA made an incontrovertible case that Google and Facebook are not subject to sufficient

competitive pressure in the online search and display advertising markets. These and some other digital markets are characterised by having a single firm that not only has substantial market power, but its position in the market means that it acts as a gatekeeper between consumers and other businesses, giving it a strategic role in determining market outcomes. For example, they are able to influence consumer choices by deciding what information consumers see as well as how and what consumer data to use.

The harms caused to consumers by a lack of competition in some digital markets include:

- higher prices, as the gatekeeper charges higher prices to other businesses and these are passed through to the prices paid by consumers;
- a lack of competition on quality;
- consumers giving up more personal data than they would like;
- reduced innovation, and ultimately lower economic growth through reduced productivity improvements.

These digital markets play an integral part in the lives of most consumers, and so intervention is needed to increase competition and deliver better outcomes for consumers. However, the traditional enforcement tools of the current competition regime are not sufficient to tackle this in digital markets, which means these harms continue to grow while economic damage becomes entrenched.

**How will the CMA manage its enhanced responsibilities for merger control, anti-trust control, Digital Markets Unit, Subsidy Advice Unit, Office for the Internal Market? Given the large expansion of its role post-Brexit, should its governance be reformed?**

Which? does not have a view on whether the CMA's governance should be reformed to deal with its expanded responsibilities. However, more consideration should be given to whether the CMA itself will need additional resources to deal with the increased workload and additional technical challenges that will arise from the expansion of its post-Brexit caseload and the introduction of the Digital Markets Unit. Simply redeploying existing resources is unlikely to be enough to deliver meaningful change.

**Do the new tools and powers for the CMA proposed by the Government in its two consultations sufficiently equip the CMA effectively to respond to the challenges in the modern economy, and ensure markets remain dynamic and competitive in the years ahead?**

Which? is largely supportive of the new tools and powers that have been proposed for the CMA in the Government's two consultations. If enacted, the reforms have the potential to move competition policy closer to being able to deal with the challenges of the modern economy. We also note however that it is not only competition policy which needs to be

updated in order to sufficiently equip the CMA to ensure markets work for consumers. Reforms to consumer policy are equally as vital, in particular strengthening the CMA's enforcement powers, enabling collective redress and updating the Consumer Protection Regulations (please see our response to the [BEIS consultation on Reforming Competition and Consumer Policy](#) for more detail).

While we are largely supportive of the Government's proposed reforms, we also believe that there are significant missed opportunities in both consultations. These could enable the CMA to deliver significant benefits to consumers and create a more competitive economy. In summary these are:

### **Reforming Competition and Consumer Policy**

- **Allowing remedies which address *adverse effects on consumers or competition in the markets regime*:** We support the government's proposed reforms of the markets regime, including wider powers for the CMA to impose remedies at the end of market studies. However, there is also a missed opportunity to allow the CMA to address harms to consumers in the markets regime that are not strictly related to competition. Having this additional flexibility in the markets regime would address a continued deficiency in the consumer protection regime by allowing the CMA to act against new and emerging harms where it identifies them.

### **A new pro-competition regime for digital markets**

- **Wider consideration of consumer harms:** We are concerned that the proposals to only allow the DMU to implement remedies for harms that arise directly from competition will reduce its potential effectiveness. The government is right that the focus of the DMU must be to improve the competitiveness of key digital markets, but we feel its proposed duty jeopardises the DMU's ability to fulfill its role and fails to take advantage of the opportunity to address a systemic weakness of the UK's consumer protection regime in digital markets. We therefore recommend that the DMU is given a duty that gives prominence to addressing competition harms, but which allows the DMU to look at consumer harm in the round. For example, a duty 'to further the interests of consumers in digital markets, in particular by promoting competition'.
- **Reform of the mergers regime for digital markets:** the government's current preferred option, according to the Impact Assessment published alongside its recent consultation, does not include the creation of a bespoke merger regime for firms with Strategic Market Status. This is despite many concerns being raised in the consultation itself about the scale of acquisitions by firms with SMS. We fear that if the government fails to take this opportunity then the UK will be left with a merger regime that is inadequately designed for the demands of assessing acquisitions in digital markets. An effective merger regime in digital markets is key to stop those firms with Strategic Market Status from continuing to entrench their market power by

acquiring nascent future competitors or using acquisitions to get into new markets. The UK competition framework should create conditions which give new entrants the opportunity to get into markets currently dominated by SMS firms, and to challenge them with innovative new services.

- **Super-complaint powers:** To ensure that the regime is sufficiently accountable, designated bodies should have the power to make a super-complaint to the DMU on the basis that the conduct of one or more services meet the SMS test, and/or are in breach of the principles of the Code. Which? (The Consumers' Association) would expect to be made such a designated body equivalent to its status under the Enterprise Act 2002, and financial services legislation.

### **What do changes to competition policy in other jurisdictions – particularly in the US under the Biden administration – mean for the UK? How will the CMA collaborate with the European Commission on competition policy?**

It is highly important that the CMA is appropriately equipped to cooperate with its international partners in an increasingly globalised economy. This is likely to become even more important over time as digital services which operate across borders become larger elements of the economy. Sharing information with partners will be vital and reciprocity will be an important principle to make that happen. To enable this, Which? agrees with Government proposals to introduce new investigative assistance powers in civil competition and consumer enforcement investigations to allow the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

## 3. Competition in Digital Markets

### **What will the CMA's approach to digital markets be? Will it, and should it, be more interventionist?**

The CMA's approach to digital markets should be more interventionist. Trends in recent years have demonstrated that the application of existing competition policy in digital markets has not been sufficient to prevent some markets from becoming dominated by very large gatekeeper firms. As such we are wholly supportive of the introduction of the new Digital Markets Unit, and government proposals to give it more powers to intervene in digital markets.

It is right that the DMU will be given powers to designate firms as having Strategic Market Status, and that these firms be subject to an enforceable code of conduct. It is also important however that the DMU has the power to introduce pro-competitive interventions

(PCIs) which aim to tackle the sources of the entrenched market power of SMS firms. We believe that the DMU should be given broad discretion to design and implement a wide range of PCIs to allow it to determine the most appropriate intervention for the circumstance. We expect its options to include a large number of demand-side remedies, such as interventions to support consumer control over their personal data, to improve data mobility, and to support consumer decision making through fairer use of choice architecture and defaults. We believe such interventions could greatly reduce harm.

We also agree with the Digital Markets Taskforce that the DMU will need to make use of other interventions such as mandating interoperability and creating obligations to supply on fair, reasonable and non-discriminatory terms.

### **How should the government ensure the pro-competition digital markets framework is sufficiently flexible and fast-moving to meet the challenges created by digital markets?**

Key to the success of this will be ensuring that the DMU is sufficiently empowered to act in response to a range of consumer harms. More detail is provided in our response to the following question.

### **How can the government ensure that digital markets regulation interacts coherently with other fields such as data protection?**

The principal role of the DMU and its new powers to regulate digital markets will be to improve outcomes for consumers by promoting competition. However, we agree that this objective will interact with other policy issues - the government suggests data privacy and media plurality as two examples of these - and the success of the DMU will depend on how well it manages to promote competition in the context of these interactions.

Which? believes that many of the difficulties involved with the interaction between these policy objectives could be resolved if the DMU's duty is focused explicitly on the outcome that we want to achieve - better outcomes for consumers - rather than just focus on the primary means with which it is to achieve this (ie by promoting competition). We would favour a duty that would allow the DMU to look at consumer harm in the round, rather than solely those harms that can be attributed only to a lack of competition.

We believe the benefits of this would be threefold. First, it would allow the DMU to take a balanced view on issues where there may be a trade off to consumers in benefits and costs. For example, pro-competitive interventions requiring the sharing of data held by SMS firms will also need to protect consumer privacy. With a broader duty, the DMU would be better able to consider whether the benefits of the intervention were merited in the round.

Second, in undertaking its investigations for designation assessments the DMU may uncover some consumer harms which are not directly related to a lack of competition. An overly

narrow duty would prohibit it from acting to address these. Such a regime for digital markets would fail to satisfy the principles of being agile and equipped to act swiftly, and create a serious risk that the harms go completely unaddressed. The harm would need to be passed back to the CMA to open a consumer enforcement case, but this may not be possible since the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) are not always sufficient to tackle new harms as they emerge in digital markets. We have seen this, for example, with the issue of fake reviews at online marketplaces which the CMA has been unable to satisfactorily deal with to date and hence the government is now proposing to amend the CPRs to add the commissioning of fake reviews to the list of unfair practices set out in Schedule 1. The DMU ought to be empowered to implement remedies against consumer harms both through its duty and by the ability to intervene on the basis of an adverse effect on competition or consumers.

Third, a narrow duty even risks the DMU being unable to protect consumers from harms that could be interpreted as competition harms. We fear that the duty as currently suggested may leave an opportunity for SMS firms to challenge the decisions of the DMU in the courts on the basis that a harm may not be directly linked to a lack of competition. These are some of the world's richest and most litigious firms and a failure to draft the duty broadly enough risks the DMU being unable to adequately protect consumers.

Given all this, we believe the DMU should be given a broader duty to protect consumers. For example, to further the interests of consumers in digital markets, in particular by promoting competition.

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