1 October 2021

Re: Consultation on ‘A new pro-competition regime for digital markets’

Introduction

We, a group of civil society organisations and experts in the field of digital rights, are pleased to submit this contribution to the UK government’s consultation on ‘A new pro-competition regime for digital markets’.

The way digital marketplaces are shaped has a tremendous impact on human rights. However, this perspective is not always sufficiently present in decision-making nor in public debate.

We have argued - echoing the Furman review and the CMA - that the largest platforms should be required to make their services **interoperable** with competitors, giving users genuine choice, enabling the entry of SMEs to digital markets, and thereby putting competitive pressure on platforms to better support privacy and freedom of expression[1]. We have also advocated legislation to require genuine informed consent in certain circumstances from users, restricting firms’ use of “**dark patterns**” in user interfaces, as well as more broadly giving **users** more rights, and ensuring effective **enforcement**.

We are therefore glad to see that the UK government is planning to consider these measures in its plans for the new regime, and we would like to offer the following comments/suggestions on a few specific topics.

We are grateful for this opportunity to comment and we remain at your disposal for any queries.

1. **Civil society should be included in the open dialogue with the DMU**

We welcome the government’s plans for the Digital Markets Unit’s (DMU) engagement with stakeholders as part of the preparatory work the DMU is called to do in the implementation of its mandate. However, this open dialogue should be open to all relevant stakeholders, including consumer associations, digital rights groups, democracy and press freedom groups, and other parts of civil society. As the DMU activities will have a strong impact on

[1] Among others, see:
https://www.article19.org/wp-content/uploads/2021/06/Civil-society-letter-to-IMCO-on-the-Digital-Markets-Act-28-June-2021.pdf;
https://www.article19.org/wp-content/uploads/2021/05/Response-to-BEREC-consultation-on-DMA-paper-final.pdf;
https://www.privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets;

end-users' rights, on democracy, and on the digital public sphere, it is important that end-users and civil society organisations are provided adequate space and meaningful channels to contribute their views to the debate. Moreover, providing proper mechanisms for end-users and civil society to participate will give greater legitimacy to the new regulatory regime, and will enrich the DMU's evidence base and improve the quality of its analysis, as also recently noted by the head of CMA[2].

Civil society and consumer rights organisations conduct many investigations exposing the abusive practices of companies in the digital markets and these organisations have developed technical and legal expertise to support users in protecting their rights and interests. For these reasons, civil society and consumer organisations should be consulted both in the assessment of current conduct and Strategic Market Status (SMS) positions, and in the assessment of future developments and evolutions (see question 11 of the consultation document). A constant and inclusive dialogue is necessary to overcome the strong asymmetry of information in digital markets, and for regulators and other stakeholders to build a better knowledge of market and societal dynamics and practices.

2. The interests of citizens

A reference to the interest of citizens should be included within the Digital Markets Unit's (DMU) overarching statutory duties (as it is with Ofcom's) (see question 2 of the consultation). To keep competition separated from the other policy objectives linked to those markets, and to separate the consumers that buy services from the citizens that use those services for an ever increasing variety of everyday activities is an artificial wall that does not add value. Rather, it risks undermining the efficiency and impact of both competition and other interlinked policy objectives. Further, we consider the concept of 'individuals' should be used instead of 'citizens', as the relevant services are used by all individuals in the UK, irrespective of their citizenship status.

What UK society needs is synergies and a holistic approach, not rulemaking and enforcement in silos. A duty to consult will not deliver this. A similar argument applies with regards to the duty to cooperate, depending on how the latter is shaped. Moreover, neither a duty to consult nor a duty to cooperate is sufficient in terms of prioritising competition measures that have also the potential to achieve further policy objectives, or of assessing the former's unintended consequences on the latter.

Including a reference to the interest of individuals would be consistent with the government's acknowledgment that in a number of digital markets competition has a deep interaction with a number of other issues, including data privacy and media plurality (see point 30 of the consultation document).

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[2] See for example, Andrea Coscelli, Ahead of the curve - Bannerman Competition Lecture, available at: https://www.gov.uk/government/speeches/andrea-coscelli-ahead-of-the-curve-bannerman-competition-lecture

3. Strategic position

We welcome the four criteria for the assessment of the strategic position identified on pages 22-23 (consultation question 8). Nevertheless, we strongly encourage the government to also include 'the consideration of whether an activity has significant impacts on markets that may have a broader social or cultural importance' as a key element in the assessment. Indeed, such importance should be an essential component of the DMU's reasoning and intervention. Without it, the DMU's action would fall short in adequately limiting the enormous power a few players enjoy in digital markets that are key for the functioning of our democracies. These considerations should be part of the assessment at its earliest stage.

Furthermore, the relevance of the fourth criteria, i.e. whether the firm can use the activity to determine the 'rules of the game' for users, cannot be properly assessed without careful consideration of the societal or cultural importance of the market in question.

More generally,the DMU should not limit itself to the assessment of market power as interpreted in traditional competition terms. On the contrary, it is of vital importance that the DMU focuses on the regulatory dimension of the business activities of a number of digital platforms. The attention on the regulatory power of digital intermediaries is growing. As rightly pointed out by scholars, 'a special feature of the intermediation function that platforms frequently fulfil is that it is accompanied by a rule-setting function: many platforms, in particular marketplaces, actually act as regulators, setting up the rules and institutions through which their users interact'.[3] As such, the DMU needs to take this regulatory power into utmost account when assessing the significant market status of digital companies and when defining its interventions. Democratically elected governments, not platforms, should make decisions about society's rules.

The DMU should also look at whether a single firm controls multiple digital platforms, applications, or layers of a technology stack. Such vertical integration should be considered when assessing the strategic position of a digital platform, particularly when it aids in the aggregation of personal data from multiple sources, creates bottlenecks for competitors and locks in consumers.

4. The legal test to implement a pro-competition intervention

We suggest that the Government upholds the 'adverse effect on competition and consumers' (AECC) test in order to implement a PCI (consultation question 18). Although we agree the impact on consumers can find space under the traditional 'adverse effect on competition' (AEC) test, it would be clearer to explicitly include the consumer element in the test. The explicit approach would have strong advantages in terms of legal certainty. It would also allow the consideration of a range of price and non-price factors, such as consumer welfare, quality, innovation, and privacy which are fundamental in the digital economy, as noted by the CMA online platforms and digital advertising market study. Further, as the CMA already

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[3] European Commission, Competition Policy for the Digital Era: A Report by Jacques Cremer, Yves-Alexandre de Montjoye & Heike Schweitzer, published April 2019. See also: Orla Lynskey, Regulating 'Platform Power', LSE Law, Society and Economy Working Papers 1/2017; Niam Dunne, Platforms as Regulators, Journal of Antitrust Enforcement, 2021, 9, 244–269.

determined in its study, an interoperability remedy is one of the best options for improving the competitiveness of social media and messaging markets.

5. Redress

We recommend that the DMU is equipped from the onset with the powers to seek redress from damages caused by companies with SMS (consultation question 26.) Such power would likely have a deterrent effect and would increase the effectiveness of the DMU enforcement. It would be particularly important to ensure that DMU can receive formal complaints about abusive practices of companies with SMS from affected individuals and from civil society. In particular the capacity of civil society organisations to lodge complaints on behalf of affected individuals is crucial to ensure effective redress since the imbalance of power and the information asymmetry makes it particularly difficult for individuals to claim their rights effectively and many abusive practices by companies with SMS affect thousands rather than single individuals.

Signatories

ARTICLE 19
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