

Consultation Response

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee, together with the Consumer Law and Privacy Law Sub-committees, welcomes the opportunity to consider and respond to the Digital Competition Expert Panel's call for evidence.¹ The Sub-committee has the following comments to put forward for consideration.

General remarks

We welcome the Government's recognition of the importance of ensuring that the competition law framework is fit for purpose in the context of regulating digital markets. The development of digital markets raises a number of interesting legal and policy issues, which are attracting increasing interest from the legal profession, including in relation to competition law. We have identified a number of potential benefits and harms of the current trends in evolution of those markets and our thoughts are set out in response to the questions below.

An overarching consideration is how an individual market is defined or how the relevant market is determined in this context. If the market cannot itself be identified, this could lead to an inability to eg establish dominance, relevant to considerations of whether a particular transaction is anti-competitive.

¹ <https://www.gov.uk/government/consultations/digital-competition-expert-panel-call-for-evidence/digital-competition-expert-panel>

Response to questions

1. What are the emerging benefits and harms from digital markets such as social media, e-commerce, search, and online advertising tending towards only one or a small number of big firms?

We would particularly welcome evidence on:

- *the extent to which some digital markets appear to tend towards only one or a small number of firms;*
- *the key drivers of this trend (if present), and whether they relate to inherent features of these markets;*
- *the benefits or harms which are associated with concentration in digital markets; and*
- *the degree to which large market players enable or inhibit wider innovation and investment.*

We would welcome evidence on the positive or negative economic impacts of all of the above, for example on prices, quality, choice, innovation or privacy. The Expert Panel was asked to focus on the impacts on competition: please do not provide evidence relating to impacts on (for example) harmful content available online, or the impacts of digital markets on the availability of a range of news media which are beyond the scope of our review or being considered elsewhere. Please be explicit about the sources of evidence for your view, where possible.

The potential benefits and harms from digital markets tending towards only one or a small number of big firms are, in principle, the same as in any other market, namely loss of competition, barriers to entry, stifling of innovation, concentration of power.

However, specific aspects of those market may compound those effects – with potential larger benefits and harms. In particular, the reliance on data and the ability to collect and draw behavioural analysis and patterns from that data, can be used (and could be abused) in a variety of circumstances (see further response to question 2 below).

Healthy markets need level playing fields. Moreover, a benefit to one stakeholder may be a harm to another: the primary goal of regulation or legislation must therefore be to balance those competing interests to achieve a “fair” result.

Digital markets present a number of regulatory challenges: they are constantly evolving; the pace of that change is rapid; power dynamics may not follow conventional patterns; market data itself is a valuable commodity; and the algorithms which increasingly underpin digital markets can be incredibly complex. The full potential of data, groups of data, and the information that can be gleaned from aggregating different types of data is only just starting to be explored. It is therefore difficult to get a clear picture of benefits and harms which may be occurring right now, far less to assess the direction of travel and anticipate all the issues which will need to be addressed in the mid to longer term.

Social media and any other services which collect or may be used to collect personal data necessarily create potential privacy and personal security risks. That data is not, and should never be, an easily transferable commodity. This is certainly not to say that they are harmful *per se* but again, the risks may be difficult for users to appreciate, not least because, as referred to above, the full potential of data is not, and probably currently cannot be, fully understood.

We have no data on the extent to which some digital markets appear to tend towards a limited number of firms. However, as data is power, those already large, often global, businesses which are able to utilise existing data effectively, have advantages in terms of maintaining their existing position and further increasing their market share. This will inevitably pose a barrier to new entrants (without any such data) or even smaller competitors, where the data accumulated through service provision presents a competitive advantage in its own right. It is an advantage which they are able to maintain and grow.

There may be benefits for consumers if data collection and analysis facilitates more tailored offerings, or improves service levels generally but not at the expense of consumer control over data, or transparency over collection. Additionally, tailored offerings, which are often claimed by marketers to be in the interest of consumers, may not be perceived in the same way by the consumers themselves and can sometimes even be psychologically damaging.²

There could also be benefits in terms of market structure, for example facilitating market entry and enabling the unbundling of services. However, we note that there may be risks to consumers eg if data analysis suggests that a particular offering is less profitable, which results in this service being withdrawn or a premium being charged.

The impact of platforms may also merit consideration. A platform may be able to collect, analyse and use data to identify particular consumer behaviours or buying trends. This information could potentially be used to stifle competition in the longer term in markets where at present there are a larger number of suppliers. See in this regard, the European Commission's Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services.³

2.What are the emerging benefits and harms of the same small number of digital firms becoming present across a broad range of digital markets?

We would particularly welcome evidence on:

- *the extent to which the same small number of digital firms are becoming present across a broad range of digital markets;*
- *the key drivers of this cross-market presence*
- *the benefits or harms associated with cross-market presence.*

We would welcome evidence on the economic impacts of the above, along the same lines set out under question one.

There is a potential harm if a small number of actors reduce competition by preventing new entrants to the market or putting existing smaller players out of business. The nature of data also raises particular issues.

² For example, people who have searched for weight loss advice being sent repeated weight-loss related advertising, which can be damaging to their self-image.

³ COM(2018) 238 final - see https://eur-lex.europa.eu/procedure/EN/2018_112

As referred to above, the principle findings from one market, may be relevant to other markets. In addition, the greater the aggregation of data, the more potential uses to which that data can be put. This could therefore mean that those larger firms which are present across a range of digital markets may be able to obtain further market intelligence, leading to growth of their customer basis and therefore in turn further market intelligence in an ever-increasing spiral. This could stifle competition and in particular make it increasingly difficult for new entrants to break into all these markets, as well as leading to concentration of the commodity in the hands of a few.

3.What effect can the accumulation and concentration of data within a small number of big firms be expected to have on competition?

We are particularly interested in whether data may constitute a ‘barrier to entry or expansion’ for companies seeking to compete in the digital economy. Please provide any evidence for your view.

Concentration of data in hands of a few players is likely to lead distortion of the market. There is a growing appreciation of the potential economic value of holding large amounts of data. The larger the volume of data, the greater the potential for firms to use data analytics to process and understand that data in order to develop new products, understand and anticipate consumer behaviour and therefore inform their strategy. This is likely to give an ever-increasing advantage to bigger businesses, which could have a negative effect on competition from the perspective of both smaller would-be competitors and consumers.

There is a further crossover here with privacy law and the extent to which data “owned” by one entity may be used (or abused) when aggregated by data held by other companies.⁴ This may create the potential for detailed profiles of individual users to be created, giving the companies a potential competitive advantage in economic terms but also allowing for certain predictions in relation to that individual, which might not be to their advantage.

A further observation relates to the potential importance of interoperability and the development of standards to enhance the competitive conditions in a market. Where open data is being used as a policy tool to enhance competition, a lack of interoperability and standards can act as a barrier to entry. An example of where this has been considered is in the development of Open Banking in the UK. This was implemented by the CMA and required the largest providers of bank current accounts in the UK to develop a standardised approach to enable customers to share their current account transaction data with third

⁴ One question that could be asked in this context is whether a data subject’s consent given to a collector of personal data is assignable by the collector or is personal to the collector of that data. This could raise questions in the context of acquisitions. For example: a consumer “C”, buys an item from a vendor “A”; is there a sufficient explicit informed consent by C to enable A, in the event of sale of the goodwill of its business to B, to disclose the personal data to B without obtaining C’s express consent. Similarly, is consent to disclosure to another member of A’s group of companies limited to disclosures to members of A’s group as at the time when the consent was given? The answers to these questions will largely depend on the clarity of the notice given to the data subject in recognition of the transparency obligations imposed under the GDPR/Data Protection Act.

parties – through the development of common, standard, open application programming interfaces (APIs). This approach ensures that third parties can deploy a single, common API to link with banks, reducing their market entry costs, providing greater choice and variety of innovation to customers. Such interoperability is consistent with and required by the GDPR to support the right to data portability.

4. What is the economic impact of the acquisition of smaller firms with relatively small market shares by much larger ones and is this different in the digital space than in other sectors?

Does the potential for acquisition of smaller firms provide an efficient source of capital and exit or does it affect innovation? Does acquisition of smaller firms raise the value of their innovations as they get incorporated into larger platforms or does it forestall potential future competition? Does the tax system or other policy features create biases that lead to more or less acquisitions than would be the case with a neutral policy regime?

A big firm would appear to be able to accumulate data from more and wider customer sources. This is likely to give an exponentially-growing resource advantage over smaller firms for data mining purposes. See further responses to questions 1 and 2.

5. To what extent is it relevant for any identified benefits and harms that consumers receive ‘free’ services, paid for through their data? How does this affect competition in associated markets, such as the market for online advertising?

Please provide any evidence for your view.

The concepts of “free” services in exchange for payment in data raise a number of competition policy considerations.

The first of this arises in the context of mergers and acquisitions. Anecdotally we are aware that there is growing discussion around the extent to which competition regulators consider in detail the potential consequences from a competition perspective, which may result from the takeover of company A by company B in terms of data acquisition. Commentators have highlighted recent social network and digital entertainment services acquisitions, where approval was given but the full extent of the implications of data acquisition/amalgamation does not appear to have been explored.

The second strand ties in with the potential exploitation of consumers themselves, with perhaps particular danger of detriment for those of more limited economic means who may be more vulnerable to this type of abuse. This is encapsulated in the phrase “if you’re not paying for the product, you are the product”, which recognises the economic advantages which can be gained from data collection. This applies not only to “free” services per se but may also apply where the value of a good or service is outweighed by the value to the provider of the data obtained. This is a particularly relevant consideration in the context of the internet of things and smart products which gather larger volumes of user data. Where collection of that data is used to deliver value to the customer through a high-quality product or high quality of service, that data collection is merited; it is certainly not the case that collection of data will necessarily lead to an exploitative or anti-competitive result. However, if an inferior product or service is delivered in return for

harvesting large quantities of data which provides the company in question with a competitive advantage, or that data is used against the individual whose data was collected, there is the potential for competitive and consumer harm. There is a further question as to what happens when a “free” service (or app or piece of equipment), which is indispensable for the proper enjoyment of a paid-for service proves defective?

Access to high volumes of data can be aggregated and used in certain ways, including to dictate particularly targeted types of advertising. This is one of the ways in which “free” services can be used to deliver far higher value to those collecting data than is received by the data subject whose data is being used. We note that the GDPR does address some aspects of the issue of advertising but it is important to note that it does not attempt to deal with competition issues which may arise in this context.

Overall, associated markets are at risk of being dominated down-stream where the argument upstream is that the service is free and needs paid for. Regulatory scrutiny should continue to apply to any perceived linkage of data use in return for free service.

6. How do technologies such as artificial intelligence (AI) and machine learning affect competition and what are their implications for competition policy? Does algorithmic pricing raise new concerns about competition?

We are interested in any evidence on the implications of AI, machine learning and algorithms for competition. In particular we would welcome any evidence on whether prices set algorithmically but without explicit collusion can interact or converge in ways that would disadvantage consumers.

As we have commented elsewhere, digital markets pose a number of potential competition issues including: the detail of comparing like with like; algorithmic decision-making; price fixing; the emergence of intermediaries for data and questions around where transaction power lies from a competition perspective; and behaviour in online market places. A further key issue arises in terms of the increasing overlap between providers or agents for providers, for example a platform which offers a marketplace for other sellers while also offering goods or services in its own right (see further at question 1). This leads to a lack of transparency, which can in turn translate into a loss of ability to apply regulatory scrutiny.

Additionally, we note that algorithms may be created for constant monitoring of competitors’ prices. These could be expected to facilitate a business maintaining its own prices at level no lower than the maximum consistent with undercutting, or matching, the competition.

A final issue which is raising concerns is how search results are displayed. This may have an impact on competition in two ways, in particular where the systems or algorithms used to determine the order of such results are not transparent. Firstly, search results may drive consumers towards particular choices, giving preferential treatment to particular businesses and thereby delivering an unfair competitive advantage and perhaps further reducing the ability of new entrants to break into the market. Secondly, collecting data on particular individuals may lead to tailored pricing options which are set at the highest level which it is assessed that individual can or will be willing to pay. This can lead to prejudicial and exploitative outcomes for individual consumers.

7. What tools does competition policy need to deal with issues in the digital economy in a sufficiently timely, effective and far-sighted manner? To what extent are these in place in the UK?

Specifically:

A. What is the appropriate approach to mergers and takeovers in digital markets – what are the key challenges and how should they be addressed?

B. What is the appropriate approach to antitrust enforcement (cartels, vertical restraints and abuse of dominance) in digital markets – what are the key challenges and how should they be addressed? We would welcome specific proposals for changes to institutions, policy or its implementation under any of these headings. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

As we have said previously, generally speaking, we consider that competition law as such is fit for purpose to deal with new technologies – ie collusion by an algorithm is collusion just the same. One of the strengths of competition law is that the principles-based nature of the regime gives greater flexibility to deal with changing markets. However, there are still difficulties in terms of enforcement in evolving markets: an issue which could be dealt with by competition law may still be missed or the competition law relevance may be overlooked. The key question in fast moving markets is time taken to run complex cases – by the time decision is reached and litigated, the market has moved on. Fast-tracking or creation of nimbler enforcement tools could be helpful in this context.

There is also an inherent difficulty in less obvious cases as competition investigations and enforcement usually focus on past conduct. Often a particular action or behaviour will only be prohibited after an incidence of it has already occurred.

In both these scenarios the speed of decision-making in enforcement cases is a central consideration. While there may be advantages to fast-track decision-making in certain cases, there is a danger that pushing through cases too fast could erode the rights of the defence. On the other hand, significant delays can allow businesses to continue exploiting an advantage or gaining further market share. In this respect powers to take interim measures can have a positive effect. A possible solution would be to focus on changes the balance of risk, recognising the role of competition law in managing change while guarding against anti-competitive practices and ensuring protection of consumers.

We note that NRAs and competition authorities themselves have always used data to fulfil their duties. The emerging issue over the last few years has been the vast amounts of data that are now available. This data enables firms to compete in new ways, developing products, services and prices to better meet customer needs, but also to act in ways to undermine competition and produce detrimental consumer outcomes. Regulators therefore need to have an in-depth understanding of how those technologies might be used for anticompetitive purposes, and the tools to identify potential abuse, if they are to achieve effective enforcement.

In recent years NRAs and competition authorities have been developing their expertise in this area, to use data in their investigation and enforcement work. For example, in the UK the Competition and Markets Authority (CMA) has this year established its Data, Technology and Analytics unit, with a key part of its

remit being to consider how to develop its machine learning and artificial intelligence capabilities to be used across its case work. It is also developing capability within the CMA to better understand how firms are using data and whether there is a need for action. NRAs and competition authorities should explore opportunities to develop best practice in these important emerging areas to ensure there is sufficient capability across markets.

8. Are there other policy changes beyond traditional competition tools that could facilitate entry and thus improve competition and economic outcomes?

For example, you may wish to consider options for sector-led initiatives or regulation to make data more open, portable or interoperable between different platforms, or standardised in format if these would enable more effective competition in digital markets?

Again, in relation to policy changes beyond traditional competition tools, we would welcome specific proposals for changes to institutions, policy or its implementation. Please provide any evidence for your views demonstrating how changes would benefit consumers and the economy in response to these questions.

It is important to note that incumbent suppliers can also be innovators: the important thing is to promote a competitive environment which does not unfairly advantage incumbent suppliers or discourage new entrants. While it is too early to assess the impact and success of the recently open banking initiative, the legislation seeks to establish a framework that allows both new entrant and incumbent suppliers to offer services which may allow consumers to make better use of their data. If successful, this could provide a blueprint which might be expanded to other sectors to facilitate development of innovative services. For example, this could include the provision of other retail financial services such as mortgages, the management of investment portfolios and pensions (such as enhancements to the Pensions Dashboard). It could also be helpful in promoting competition and removing inefficiencies in wholesale relationships, for example through enabling increased interoperability between providers. The approach could also be adopted in other sectors, such as is the case in Australia, with consumer data rights being introduced in telecommunications and energy sectors, in addition to the establishment of open banking.

Furthermore, we can see that potential benefits could be realised from establishing central databases of consumer information, of the kind established by the Database Order referred to above, and making these available to all suppliers and price comparison websites. To the extent mechanisms and infrastructures have been introduced in the establishment of open banking and there is scope for these to be expanded and/or leveraged in order to introduce open data in other financial services markets, or indeed other sectors, then opportunities to do so should be explored and exploited.

We also note that data portability can be used to enhance price transparency and allow consumers to compare products with reference to their personal circumstances. It can be particularly useful where complex pricing structures are involved. Data portability can also facilitate switching by reducing the administrative burden on consumers when the decision to move to a new provider has been taken. This could also assist new entrants seeking to establish themselves in the market. At the same time further support may be needed: for example, even if an individual consumer is given access to his or her Midata, it

can be very difficult for them to understand how to apply this to searching for a new tariff. Allowing a consumer to approve their data being made available to price comparison websites and competitors of their current supplier, without the need for the consumer herself to enter that data online, could allow an algorithm to calculate the best tariff for that consumer and allow the consumer to benefit from the widest possible range of tariffs, which the CMA's 2016 report on its energy market investigation endorsed.⁵

We would encourage regulators to consider microbusinesses, and possibly SMEs more broadly, when considering how the benefits of data portability can be realised in driving a more competitive business environment. Microbusinesses are widely recognised to behave like consumers and can often benefit from the same regulatory interventions.

9. What approaches are being considered and developed by governments and competition authorities in other major economies? What needs to be done internationally and what can be done at the UK level?

We are interested in positive experiences of other jurisdictions in policy making in the digital economy and would welcome evidence on this. We are also interested in understanding what policy changes would be appropriate within the UK and what would need to be made at an international level. We are also interested in what policies would require or benefit from international coordination.

Please provide any evidence for your view.

As referred to above, we note the European Commission's Digital Market Strategy includes the development of a "fit for purpose regulatory environment for platforms and intermediaries" which resulted from concerns regarding the "growing market power of some platforms" and "their strong bargaining power compared to that of their clients ... may be reflected in their terms and conditions (particularly for SMEs), promotion of their own services to the disadvantage of competitors, and non-transparent pricing policies, or restrictions on pricing and sale conditions".⁶

We have also referred above to open data initiatives in Australia. The government there is introducing consumer data rights in retail banking, telecommunications and energy sectors, starting with the introduction of open banking, following the lead of the UK. There could be lessons for the UK to learn from the Australian experience in other, non-financial services sectors.

⁵ For further discussion, including the impact of data portability on vulnerable and disengaged consumers, see our response to the consultation on *Modernising Consumer Markets: Consumer Green Paper* - https://www.lawscot.org.uk/media/360683/comp-con-priv-beis-modernising-consumer-markets_july-2018.pdf

⁶ See the report of the European Scrutiny Committee of the House of Commons of 18 July 2018 available at https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/301-xxxv/30105.htm#_idTextAnchor017



10. Are there other issues you consider that the review should be considering, given its focus on competition in the digital economy?

We have no comment on this question.

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