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Citation: Kalintiri, A. & Stones, R. (2020). United Kingdom. In: Mândrescu, D. (Ed.), EU Competition Law and the Digital Economy: Protecting Free and Fair Competition in an Age of Technological (R)evolution: The XXIX FIDE Congress in The Hague, 2020, Congress Publications. (pp. 559-583). The Hague, the Netherlands: Eleven International Publishing. ISBN 9789462361300

This is the accepted version of the paper.

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United Kingdom

Dr Andriani Kalintiri* and Dr Ryan Stones**

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?

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).¹

The main completed antitrust cases dealing with the digital economy are listed in Table 1.²

Year	Case	Issue	Outcome
2019	Digital pianos and keyboards ³	Online RPM	Infringement
2017	Sports equipment sector ⁴	Online sales ban	Infringement
	Live online auction platform services ⁵	Exclusivity, MFN clauses, advertising restrictions	Commitments
	Light fittings ⁶	Online RPM	Infringement
2016	Online sales of posters and frames ⁷	Algorithmic collusion	Infringement
	Commercial refrigeration ⁸	Online RPM	Infringement
	Bathroom fittings ⁹	Online RPM	Infringement
2014	Mobility aids - Pride ¹⁰	Online RPM	Infringement

*Lecturer in Competition Law, King's College London (andriani.kalintiri@kcl.ac.uk).

**Lecturer in Law, City, University of London (ryan.stones@city.ac.uk).

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

² As at 13 October 2019.

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

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

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

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

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

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

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

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

2013	Mobility aids - Roma ¹¹	Online sales and price advertising ban	Infringement
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Table 1: Completed UK digital economy antitrust cases

Several antitrust investigations relating to the digital economy were closed on administrative priority grounds, as Table 2 shows.

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

Table 2: UK Digital economy antitrust cases closed on administrative priority grounds

Furthermore, the CMA has investigated several digital economy mergers; Table 3 provides an indicative list.¹⁸ These have involved payment services, cashback websites, credit comparison platforms (CCP) and credit checking tools (CCT), online food and travel platforms, digital comparison tools and online gambling.

Year	Case	Market/Sector	Outcome
2019	PayPal/iZettle ¹⁹	Offline and omni-channel payment services	Phase 2 Clearance

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

¹² <https://www.gov.uk/cma-cases/medical-equipment-anti-competitive-practices>. This was closed after the restrictions ended.

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

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

¹⁵ <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.

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

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

¹⁸ Cases below UK jurisdictional requirements 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>)).

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

	TopCashBack/Quidco ²⁰	Cashback websites	Phase 2 Cancellation
	Experian/ClearScore ²¹	CCPs and CCTs	Phase 2 Cancellation
	eBay/Motors.co.uk ²²	Online-classified vehicle advertising	Phase 1 Clearance
2018	Nielsen/AdIntel ²³	Advertising intelligence	Phase 2 Clearance
	Moneysupermarket.com/Decision Technologies ²⁴	Digital comparison tools	Phase 1 Clearance
	ATG Media Holdings/Lottissimo ²⁵	Live online bidding auction platform services	Phase 1 Clearance
	Stars UK/Sky Betting and Gaming ²⁶	Online gambling services	Phase 1 Clearance
2017	Just Eat/Hungryhouse ²⁷	Online food platforms	Phase 2 Clearance
	Blackbaud/Giving ²⁸	Online fundraising platforms	Phase 1 Clearance
2015	CVC Capital Partners/Sky Bet ²⁹	Online payment services for online betting and gaming	Phase 1 Clearance
2013	Motorola Mobility (Google)/Waze Mobile ³⁰	Turn-by-turn navigation applications for mobile devices	Phase 1 Clearance
	Web Reservations International/Hostelbookers.com ³¹	Online travel agencies for hostel accommodation	Phase 1 Clearance
	Priceline.com/Kayak ³²	Online travel agents and price comparison site	Phase 1 Clearance
2012	Digital Property/Zoopla ³³	Online property advertising portals	Phase 1 Clearance
	Facebook/Instagram ³⁴	Virtual networking services	Phase 1 Clearance
	Experian/192business ³⁵	Online identity verification and authentication services	Phase 1 Clearance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2011	Amazon/The Book Depository ³⁶	Online book retail	Phase 1 Clearance
	Google/BeatThatQuote.com ³⁷	Consumer finance price comparison sites	Phase 1 Clearance

Table 3: UK Digital economy merger investigations

At least five digital economy cases are currently pending. Three are Phase 1 merger investigations: *Amazon/Deliveroo* concerning food delivery services;³⁸ *Salesforce/Tableau Software* regarding cloud software and data analytics;³⁹ and *Bottomline Technologies/Experian* concerning payments processing.⁴⁰ 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.⁴¹ The second concerns online RPM by Fender, a guitar firm, for which a Statement of Objections was issued in October 2019.⁴²

Question 2. Has your competition authority adapted its enforcement practices in order to keep up with the pace of digital markets?

The CMA has taken several steps to keep up with digital markets. While there have been no legislative changes yet, the authority has been keen to adapt its policy and practice.

In recent years, the CMA has made effective use of its existing tools. First, it has conducted several antitrust and merger investigations dealing with the digital economy (see above). Second, it has completed market studies into the Commercial Use of Consumer Data (2015)⁴³ and Digital Comparison Tools (2017)⁴⁴ and market investigations into Payday Lending (2015)⁴⁵ and Retail Banking (2017).⁴⁶ Third, it has enforced consumer protection legislation on a wide range of issues, including secondary ticketing websites,⁴⁷ online dating services,⁴⁸ online gambling,⁴⁹ and online reviews and endorsements.⁵⁰ Fourth, it has built its knowledge by drafting a working paper on Pricing Algorithms,⁵¹ conducting a literature review on Online Search⁵² and commissioning a report on the 'Ex-post Assessment of Merger Control Decisions

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

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

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

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

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

⁴¹<https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

⁴²<https://www.gov.uk/cma-cases/musical-instruments-and-equipment-suspected-anti-competitive-agreements-50565-3>.

⁴³<https://www.gov.uk/cma-cases/commercial-use-of-consumer-data>.

⁴⁴<https://www.gov.uk/cma-cases/digital-comparison-tools-market-study>.

⁴⁵<https://www.gov.uk/cma-cases/payday-lending-market-investigation>.

⁴⁶<https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>.

⁴⁷<https://www.gov.uk/cma-cases/secondary-ticketing-websites>.

⁴⁸<https://www.gov.uk/cma-cases/online-dating-services>.

⁴⁹<https://www.gov.uk/cma-cases/online-gambling>.

⁵⁰<https://www.gov.uk/cma-cases/online-endorsements-potential-non-disclosure>.

⁵¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf.

⁵²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf.

in Digital Markets' (Lear Report).⁵³ Fifth, in October 2018 it established a Data, Technology and Analytics (DaTA) unit to boost its digital capabilities.⁵⁴

Competition in the digital economy has also attracted the attention of the UK Government, which invited the CMA's advice on necessary reforms and appointed a Digital Competition Expert Panel 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 reforms to the interim measures regime, the authority's powers to gather information and impose sanctions and the strengthening of consumer enforcement.⁵⁵ In March 2019 the Digital Competition Expert Panel published its Report on Unlocking Digital Competition (Furman Report), which made six strategic recommendations: 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.⁵⁶

The CMA welcomed the recommendations of the Furman Report, which largely supported its own proposals. While the authority considers that existing 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.⁵⁷ Its five aims are: to use existing tools effectively and efficiently in digital markets; 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 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;⁵⁸ (d) to review its approach to digital mergers, taking into account the feedback provided from its call for information launched in June 2019;⁵⁹ (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 international cooperation so as to capitalise on the synergies between its own digital markets work and that of its counterparts.⁶⁰

⁵³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

⁵⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf.

⁵⁵ Other proposals include an overriding 'consumer interest' duty, increasing the effectiveness of market studies and market investigations, and the potential imposition of individual responsibility in competition and consumer enforcement.

⁵⁶<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>.

⁵⁷ <https://www.gov.uk/government/news/cma-launches-digital-markets-strategy>.

⁵⁸ <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

⁵⁹ <https://www.gov.uk/government/consultations/call-for-information-digital-mergers>.

⁶⁰ 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).

The UK Government is due to publish a Competition Green Paper analysing the Furman Report recommendations, but has already indicated its keenness to take the proposal for a Digital Markets Unit forward.⁶¹

Question 3. Is your domestic competition law using the consumer welfare standard as its specific goal?

The CMA's statutory duty is to 'promote competition, both within and outside the United Kingdom, for the benefit of consumers'.⁶² An analogous duty is borne by many sector regulators with concurrent competition powers.⁶³ The consumer welfare standard best portrays the goal of competition law in the UK.⁶⁴ 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'.⁶⁵ Furthermore, the authority recognises that 'increased competition in the market may deliver further consumer benefits over time resulting from the improved competitive process'.⁶⁶

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'.⁶⁷ In the CMA's view, such a new duty would be better aligned with its strategic mission 'to make 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'.⁶⁸ 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'.⁶⁹

As the consumer welfare standard is conceptualised broadly, it can be applied flexibly, making it difficult to tell whether it has been enforced consistently 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.⁷⁰ Nevertheless, merger control has been criticised for paying insufficient attention to long-run effects - for instance, on quality and choice -⁷¹ while the Lear

⁶¹ 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, 17.

⁶² ERA13, §25(3).

⁶³ 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).

⁶⁴ 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).

⁶⁵ §3.1.

⁶⁶ §4.10.

⁶⁷ Chairman's Letter (n 54), 9-12.

⁶⁸ *ibid.*

⁶⁹ Furman Report (n 56), §3.18-3.23.

⁷⁰ See also: Merger Guidelines, §4.2.3 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf); *Google/Waze*, §28; *Experian/ClearScore*, §11.69.

⁷¹ Furman Report (n 56) p12 and §4.12.

Report identified gaps in the UK authorities' approach to digital mergers which may have led to insufficient consideration of non-price effects.⁷²

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.⁷³ The House of Lords Communications Committee recently recommended a public-interest test for data-driven mergers so as to manage the accumulation of data.⁷⁴

B. Market Definition and Market Power

Question 4. How does your competition authority define the market with regard to digital economy players?

The CMA applies the Market Definition Guidelines in antitrust cases⁷⁵ and the Merger Guidelines when reviewing mergers.⁷⁶ The approach in each document is not identical. Two-sided markets are considered only in the latter and are defined as 'platforms (...) that intermediate between distinct and unrelated groups of customers'.⁷⁷ 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.⁷⁸

In principle, the CMA relies on traditional product and geographic area criteria. 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;⁷⁹ product or customer segmentation;⁸⁰ the existence of alternative sales, distribution or marketing channels;⁸¹ and different business models and monetisation strategies.⁸² Where evidence on substitutability is ambiguous, the CMA typically takes a cautious approach, proceeding with the narrower definition.⁸³ Two-sided markets 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*.⁸⁴ Except *ATG Media/Lottissimo*,⁸⁵ all other

⁷² Lear Report (n 53), Part II.6.

⁷³ Enterprise Act 2002, Chapter 2.

⁷⁴ <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/29907.htm>, §149.

⁷⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf.

⁷⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf

⁷⁷ *ibid.*, §5.2.20.

⁷⁸ *ibid.*

⁷⁹ e.g. *TopCashBack/Quidco*, §34-59; *Experian/ClearScore*, §9.26-9.35; *eBay/Motors*, §35-36; *Blackbaud/Giving*, §22-26.

⁸⁰ e.g. *PayPal/iZettle*, §6.11-6.24; *Experian/ClearScore*, §9.19-2.25; *eBay/Motors*, §37-38; *Priceline/Kayak*, §29-32.

⁸¹ e.g. *Experian/ClearScore*, §9.10-9.18; *Priceline/Kayak*, §18-21; *Amazon/The Book Depository*, §9-26.

⁸² e.g. *MoneySupermarket/Decision Technologies*, §37-41; *JustEat/Hungryhouse*, §2.16-2.34; *Google/Waze*, §15, 20; *Priceline/Kayak*, §8-13, 43.

⁸³ e.g., *TopCashBack/Quidco*, §35-47; *MoneySupermarket/Decision Technologies*, §53-58. cf *Kayak/Priceline*, §41-45 and Lear Report (n 53) pp 89-90.

⁸⁴ See also *Live Online Auction Platform Services*, a Chapter II commitment decision.

⁸⁵ §29.

mergers involved zero price markets and the importance of indirect network effects were generally noted.⁸⁶

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.⁸⁷ 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’.⁸⁸ The same approach was followed in *TopCashBack/Quidco*⁸⁹ and *Experian/ClearScore*.⁹⁰ 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’.⁹¹

It is impossible to provide an exhaustive account of digital market definitions, but it is worth noting *PayPal/iZettle*, where 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’.⁹²

Question 5. How is market power established in the practice of your competition authority in cases relating to digital economy players?

The CMA considers undertakings’ shares over time and the strength of any competitive constraints, including existing competition, potential competition and buyer power.⁹³ 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,⁹⁴ although in

⁸⁶ e.g. *TopCashBack/Quidco*, §25; *Experian/ClearScore*, §7.8; *eBay/Motors*, §37; *JustEat/Hungryhouse*, §4.9; *Google/Waze*, §19; *Google/BeatThatQuote*, §11.

⁸⁷ Lear Report (n 53) p 117.

⁸⁸ §4.11

⁸⁹ §24-28 (see also Issues Statement in Phase 2, §13, 21).

⁹⁰ §9.6.

⁹¹ §4.10.

⁹² §6.49-6.75.

⁹³ 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. For merger cases, see Merger Guidelines, §5.3-5.6 and 5.7-5.9.

⁹⁴ e.g. *Live Online Auction Platform Services*, §3.11; *TopCashBack/Quidco*, §65.

merger investigations incremental increases will typically point towards the opposite conclusion.⁹⁵ Furthermore, power in related markets may be taken into consideration.⁹⁶

That said, some particularities are worth noting. While market shares provide the starting point, the proper metric may be uncertain. In *Facebook/Instagram* the OFT relied on app downloads,⁹⁷ but this measure did not reflect user engagement; actual usage data would have arguably been a better proxy.⁹⁸ 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.⁹⁹ 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'.¹⁰⁰ 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'.¹⁰¹ 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.¹⁰² 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.¹⁰³ New user acquisitions based on subscription numbers were considered in *Experian/ClearScore*, too, as 'particularly informative of the current competitive dynamic amongst free CCT'.¹⁰⁴

In any event, the presence of strong rivals which can sufficiently constrain the post-merger entity will prevent a finding of market power.¹⁰⁵ Potential competition may also undermine such a provisional conclusion, where entry is timely,¹⁰⁶ likely and sufficient. In digital economy cases, growth rates,¹⁰⁷ future product developments and business plans,¹⁰⁸ 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.¹⁰⁹ 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

⁹⁵ e.g. *Google/BeatThatQuote*, §56-67; *Blackbaud/Giving*, §70.

⁹⁶ Abuse of dominance, §5.7 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft40_2.pdf) (see also *Streetmap v Google Maps* [2016] EWHC 253, [15], [98]); Merger Guidelines, §4.1.6, 5.6.2.

⁹⁷ §17.

⁹⁸ Lear Report (n 53), §II.28.

⁹⁹ §55-57.

¹⁰⁰ §47-48.

¹⁰¹ §10.8. Also: *TopCashBack/Quidco*, §102-105.

¹⁰² *eBay/Motors*, §49; *PayPal/iZettle*, §8.88.

¹⁰³ §8.41-8.46.

¹⁰⁴ §11.8.

¹⁰⁵ e.g. *Digital Property/Zoopla*, §60; *Google/Waze*, §74; *Just Eat/Hungryhouse*, §7.2; *eBay/Motors*, §102.

¹⁰⁶ Usually the CMA considers two years to be timely, but a shorter period may be considered (e.g. *Experian/ClearScore*, §13.26).

¹⁰⁷ e.g. *eBay/Motors*, §87-88, *PayPal/iZettle*, §8.34; cf *TopBachBack/Quidco*, §94.

¹⁰⁸ e.g. *Experian/ClearScore*, §11.37ff; *Just Eat/Hungryhouse*, §6.42-6.50.

¹⁰⁹ §3.12.

competitive pressure.¹¹⁰ 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’.¹¹¹ The importance of user numbers, incumbency and scale to competing successfully was also noted in *Experian/ClearScore*¹¹² and *eBay/Motors*.¹¹³

Countervailing buyer power has rarely featured in digital economy decisions, though was explicitly rejected in *TopCashBack/Quidco*.¹¹⁴

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 too early to identify any clear differences between ex post and ex ante assessments of market definition and market power in digital economy cases; the CMA’s only abuse of dominance case in digital markets 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 light of market investigations, market studies and consumer enforcement 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?

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

- **Online sales limitations.** All such arrangements were deemed to restrict competition by object. ‘Recommended’ prices amounted to online RPM in *Pride*,¹¹⁵ *Bathroom Fittings*¹¹⁶ and *Digital Pianos and Keyboards*, where Casio used automated price change alerts to monitor compliance.¹¹⁷ Bans on online discounting were prohibited in *Commercial Refrigeration*¹¹⁸ and *Light Fittings*,¹¹⁹ and formed the basis of the subsequently quashed *Hotel Online Booking* commitments decision.¹²⁰ Similar allegations were recently made against Fender.¹²¹ The other mobility scooter decision, *Roma*, involved preclusion of online advertising of offline prices and a ban on internet sales,¹²² a restriction by object to which the CMA returned in its decision against Ping, a customised golf club manufacturer.¹²³
- **Algorithmic price collusion.** In *Posters and Frames* the CMA prohibited such conduct as restrictive of competition by object.¹²⁴ The parties adopted price-matching software for

¹¹⁰ §103-124.

¹¹¹ §142-146.

¹¹² §7.28-7.29, 13.6-13.61.

¹¹³ §103-106.

¹¹⁴ §146-151.

¹¹⁵ §3.197-3.128.

¹¹⁶ §1.3-1.11, 6.39-6.52.

¹¹⁷ §3.104-3.110.

¹¹⁸ §1.3-1.9, 6.42-6.50.

¹¹⁹ §3.41-3.91, 4.125-4.153.

¹²⁰ §5.1-5.14.

¹²¹ <https://www.gov.uk/government/news/cma-alleges-guitar-firm-illegally-prevented-price-discounts>.

¹²² §3.159-3.197.

¹²³ *Sports Equipment*, §3.78-3.122.

¹²⁴ §5.42-5.50.

products sold via Amazon, autonomously adjusting prices to the same level.¹²⁵ The potential for algorithmic pricing to facilitate explicit and tacit collusion was noted in the CMA's 2018 Working Paper.¹²⁶

- **MFN clauses.** Although the primary concern was RPM, the firms investigated in *Hotel Online Booking* agreed not to enforce or use MFN clauses to ensure RPM did not materialise indirectly.¹²⁷

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.¹²⁸ Alongside exclusivity obligations and restrictions on advertising competitors,¹²⁹ MFN clauses prevented auction houses from securing agreements with rival platforms offering more favourable terms to bidders.¹³⁰

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, could restrict agents from listing properties on more than one other online portal, as this was objectively necessary for its effective operation.¹³¹ 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 map providers.¹³²

The CMA has mostly engaged with the digital economy through merger control. Although certain transactions fell short of jurisdictional requirements,¹³³ 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),¹³⁴ the CMA applies the Merger Guidelines and compares its effects against the foreseeable competitive situation absent the concentration, i.e. the counterfactual.¹³⁵ As noted in Question 5, market shares, existing competition and countervailing factors, such as barriers to entry and buyer power, are relevant. Efficiency arguments, considered in Question 8, are also pertinent. In horizontal mergers, the closeness of competition between the parties is very important, as demonstrated by: the similarity of pricing¹³⁶ or service offered;¹³⁷ customer perceptions as to comparative functionality;¹³⁸ the extent of switching;¹³⁹ brand recognition;¹⁴⁰ and online customer location.¹⁴¹ In the few non-horizontal mergers in digital markets reviewed by the authority, the ordinary analytical

¹²⁵ *ibid*, §3.62-3.93.

¹²⁶ *Pricing Algorithms* (n 51) 23-31.

¹²⁷ §4.16, 4.6, 6.39-6.42. Later quashed by the CAT and closed by the CMA on priority grounds (n 14).

¹²⁸ §2.15, 2.19.

¹²⁹ §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.

¹³⁰ *ibid*, §3.15.

¹³¹ *Agents' Mutual v Gascoigne Halman* [2017] CAT 15; [2019] EWCA Civ 24.

¹³² *Streetmap* (n 96), [99]-[141].

¹³³ n 18.

¹³⁴ ss35-36 Enterprise Act 2002.

¹³⁵ § 4.3.

¹³⁶ *Amazon/Book Depository*, §55; *Digital Property/Zoopla*, §38; *Blackbaud/Giving*, §48.

¹³⁷ *Priceline.com/Kayak*, §58; *eBay/Motors*, §52-57; *TopCashBack/Quidco*, §67.

¹³⁸ *Blackbaud/Giving*, §48-51; *Experian/ClearScore*, §58-60.

¹³⁹ *Amazon/Book Depository*, §66-72, 83; *Blackbaud/Giving*, §56-60.

¹⁴⁰ *Blackbaud/Giving*, §50.

¹⁴¹ *Stars/Sky Betting*, §64-67.

framework of ability and incentive to foreclose and competitive effect was applied, but no concerns were identified.¹⁴²

While some early decisions did not squarely address possible digital economy implications,¹⁴³ such considerations have featured more prominently in recent 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, as recommended in the Lear Report.¹⁴⁴ 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.¹⁴⁵ In contrast, in *PayPal/iZettle* the authority concluded that, absent the acquisition, PayPal would have strong incentives to improve its offering.¹⁴⁶

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.¹⁴⁷ In *Just Eat/Hungryhouse* the CMA investigated whether customers may cut out the intermediary and go directly to the supplier-side, thereby constraining the platform.¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ In *Just Eat/Hungryhouse* the CMA rejected the claim that network effects led to a 'winner-takes-all' market for online food ordering platforms.¹⁵¹

Finally, the general opportunities presented by the digital economy have been referenced as reducing barriers to entry, such as the ease of new app development¹⁵² or producers' use of online trading platforms.¹⁵³

As noted earlier, the CMA requested views on its approach to digital mergers to inform a review of the existing Merger Guidelines. Importantly, it invited thoughts on the features that may be relevant to the assessment of mergers in digital markets, such as their multi-sided nature, users paying for products or services through non-monetary means (e.g. personal data), the relevance of data assets for competition and the significance of network effects.¹⁵⁴

¹⁴² 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.

¹⁴³ e.g. *Zipcar/StreetCar*.

¹⁴⁴ Lear Report (n 53), iv, xiv.

¹⁴⁵ §12-14, 6.3-6.6, 6.8-6.14.

¹⁴⁶ *ibid*, §7.32-7.42. See also: §7.49-7.65.

¹⁴⁷ *Google/BeatThatQuote*, §51; *Blackbaud/Giving*, §66-69; *Just Eat/Hungryhouse*, §6.71, 6.74; *Experian/ClearScore*, §10.115.

¹⁴⁸ §6.132-6.143.

¹⁴⁹ §32, 39, 44.

¹⁵⁰ §10.121-10.122.

¹⁵¹ §6.80-6.94.

¹⁵² *Facebook/Instagram*, §36.

¹⁵³ *Amazon/Book Depository*, §109, 114, 116.

¹⁵⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805962/CM_A_call_for_information_on_digital_mergers.pdf.

Question 8. What reasons have been offered by the businesses concerned to justify (prima facie) anticompetitive behaviour?

Efficiency justifications have not featured prominently in digital economy decisions: parties have not raised them in Chapter I infringements;¹⁵⁵ the only Chapter II investigation was concluded with commitments; most mergers have been cleared due to lack of concerns; and some *prima facie* problematic mergers were cancelled.¹⁵⁶

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.¹⁵⁷ 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 achieved through less restrictive means. Free-riding on offline customisation services was also advanced by Ping to justify an online sales ban,¹⁵⁸ further said to be necessary to protect its luxury brand image for personalised clubs.¹⁵⁹ The CMA rejected this latter argument as an objective justification or mitigating efficiency for the practice.¹⁶⁰ The ban was not indispensable for customers to acquire personalised clubs, with a range of less restrictive alternatives available.¹⁶¹

Digital Property/Zoopla acknowledged the multi-sidedness of online property portals and recognised that the merged entity's greater network effects increased competitive pressure upon the market leader.¹⁶² Network effects on two-sided markets made it difficult for smaller platforms to grow organically, an issue eased by accumulating scale through mergers.¹⁶³ 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.¹⁶⁴

Lastly, while not technically *justificatory* efficiencies, the CMA has occasionally noted the procompetitive rationale for otherwise unproblematic digital economy mergers – e.g. economies of scale,¹⁶⁵ combining differing business expertise,¹⁶⁶ and entering new geographic markets.¹⁶⁷

Question 9. Have you witnessed the emergence of specific theories of harm tailored to digital markets?

The CMA has routinely stressed that pre-existing concepts are sufficient to meet issues arising in digital economy markets.¹⁶⁸ Whilst some of the practices which give rise to harm may differ

¹⁵⁵ *Bathroom Fittings; Commercial Refrigeration; Posters and Frames; Light Fittings*.

¹⁵⁶ 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).

¹⁵⁷ *Roma*, §3.206-3.230; *Pride*, §3.231-3.243.

¹⁵⁸ *Sports Equipment*, §4.89-4.92. Rejected as distributors already had to maintain a physical shop and customisation costs were recouped.

¹⁵⁹ *ibid*, §3.97-3.101, 4.83-4.88.

¹⁶⁰ *ibid*, §4.93-4.156, 4.208-4.249. The CMA's extensive analysis of objective justification was an error of law: *Ping Europe v CMA* [2018] CAT 13, [97]-[100].

¹⁶¹ *ibid*, §4.120-4.141.

¹⁶² §46-59.

¹⁶³ *ibid*, §48, 53-54, 56.

¹⁶⁴ *ibid*, §61, 70.

¹⁶⁵ *Google/BeatThatQuote*, §8; *Just Eat/Hungryhouse*, §3.7; *PayPal/iZettle*, §4.6.

¹⁶⁶ *Stars/Sky Betting*, §10; *PayPal/iZettle*, §4.6.

¹⁶⁷ *ATG Media/Lottissimo*, §12.

¹⁶⁸ 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) 12-13; CMA Response: *Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*

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 small number of infringement decisions, opportunities for experimentation have been limited.

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 a broader consumer base, limit consumers to local distributors, prevent 24-hour purchases, and hinder the use of online tools facilitating shopping around (search engines, PCWs).¹⁶⁹ The theory of harm underpinning the prohibition of online RPM likewise focuses upon the internet as a tool for fierce competition and discounting, dulled by the imposition of a singular price.¹⁷⁰ RPM further prevents the lower overheads of internet distributors from being translated into reduced prices,¹⁷¹ and may be a barrier to entry in markets where firms aggressively discount to acquire scale.¹⁷²

The theory of harm in the *Live Online Auction Platform Services* commitments decision was that '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).¹⁷³ The pending investigation into MFN clauses and home insurance PCWs suggest a two-fold theory of harm: that 'wide' MFN clauses prevent price competition between PCWs on discounted insurance to consumers; and reduce competition on the commission rates charged by PCWs to insurance providers which may inflate consumer prices.¹⁷⁴ These theories reflect the CMA's broader thinking.¹⁷⁵ '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.¹⁷⁶ In contrast, 'narrow' MFN clauses only preventing providers from directly offering services on more favourable terms than the PCW are less problematic, since they maintain the business credibility of PCWs by preventing suppliers from free-riding on their advertising efforts.¹⁷⁷

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;¹⁷⁸ *hollowing-out*, i.e. using the consumer focus upon pricing in digital comparison tools to reduce product quality;¹⁷⁹ *non-resolicitation*, i.e. agreements between digital comparison tools and service providers preventing the former from contacting previous customers, reducing the visibility of offers/competing suppliers and hampering innovation in targeted marketing;¹⁸⁰ and *non-brand bidding/negative keywords matching*, i.e. agreements between rival brands to prevent each

(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 51) 5, 27, 31, 47-79.

¹⁶⁹ *Roma*, §1.15-1.16; *Sports Equipment*, §4.53-4.54, 4.72-4.82.

¹⁷⁰ *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.

¹⁷¹ *Bathroom Fittings*, §4.19-4.21; *Commercial Refrigeration*, §4.23-4.35; *Light Fittings*, §3.28.

¹⁷² *Hotel Online Booking*, §5.9.

¹⁷³ §3.14-3.15.

¹⁷⁴ <https://www.gov.uk/cma-cases/price-comparison-website-use-of-most-favoured-nation-clauses>.

¹⁷⁵ *Private Motor Insurance Market Investigation: Final Report*, §8.1-8.123; *Digital Comparison Tools* (n 44) 57-60, Appendix E.

¹⁷⁶ *Digital Comparison Tools* (n 44) 57-58, Appendix E.

¹⁷⁷ *ibid* 59-60 (though recognising their ability to restrict competition under specific circumstances).

¹⁷⁸ *Online Targeting of Advertising and Prices: A Market Study* (2010); *Pricing Algorithms* (n 51).

¹⁷⁹ *Digital Comparison Tools* (n 44) 60-62, Appendix E.

¹⁸⁰ *ibid*, 64-65, Appendix E.

other's offerings being simultaneously advertised in paid online search results when specific brands/keywords are input.¹⁸¹

The primary theory of harm horizontal digital 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,¹⁸² or sometimes reduced product/service range¹⁸³ or quality degradation.¹⁸⁴ Occasionally the CMA has noted that increased market power may dull future incentives to invest in innovation, but – as suggested by the Furman Report¹⁸⁵ – this theory of harm has not been substantiated in detail.¹⁸⁶ Despite the dearth of detailed assessments in digital economy mergers of coordinated¹⁸⁷ and unilateral non-horizontal effects, the CMA has seemingly maintained pre-existing theories of harm.¹⁸⁸ The novelty derives more from the *means* by which such harms to competition may be achieved: manipulation of search engine results,¹⁸⁹ preferential treatment of online platforms by related PCWs,¹⁹⁰ or deteriorating interoperability between social media networks and photo sharing apps.¹⁹¹

A common apprehension in digital markets is harm to potential future competition and innovation resulting from established technology companies acquiring fledgling rivals, whether actual or potential.¹⁹² Early decisions often dismissed concerns by emphasising incremental market share changes, potential future entry with ease and the firms not *currently* competing closely.¹⁹³ Following *Facebook/Instagram*, an acquisition cleared largely based on Instagram's then lack of advertising profits,¹⁹⁴ *Google/Waze* was more alert to possible harm to future competition,¹⁹⁵ but found little reason to believe that Waze would become a strong competitor to Google Maps.¹⁹⁶ The most extensive engagement with this theory was in *PayPal/iZettle*. Nevertheless, the CMA found no evidence of an anticompetitive motive for the acquisition,¹⁹⁷ nor that iZettle was likely to significantly expand its online offering to compete with PayPal as an omni-channel payment systems provider.¹⁹⁸

The standard of proof for antitrust infringement decisions and for merger prohibitions is the balance of probabilities (i.e. more likely than not).¹⁹⁹ 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.²⁰⁰ The CMA is

¹⁸¹ *ibid*, 62-64, Appendix E. For an illustrative closed investigation: <https://www.gov.uk/cma-cases/energy-price-comparison-websites-suspected-anti-competitive-agreements>.

¹⁸² *Google/BeatThatQuote*, §45-60; *Amazon/Book Depository*, §49-92; *Just Eat/Hungryhouse*, §6.96-6.97; *Experian/ClearScore*, §27, 39, 11.3.

¹⁸³ *Amazon/Book Depository*, §97-101; *Just Eat/Hungryhouse*, *ibid*; *Moneysupermarket.com/Decision Technologies*, §79.

¹⁸⁴ *Google/Waze*, §27; *Moneysupermarket.com/Decision Technologies*, §79, 108; *Experian/ClearScore*, §27, 39, 11.3.

¹⁸⁵ Furman Report (n 56) 12, 95.

¹⁸⁶ *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.

¹⁸⁷ 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.

¹⁸⁸ Merger Guidelines, §5.5, 6.6.

¹⁸⁹ *Google/BeatThatQuote*, §68-115.

¹⁹⁰ *Priceline.com/Kayak*, §89-94.

¹⁹¹ *Facebook/Instagram*, §30-41.

¹⁹² See Furman Report (n 56) 97.

¹⁹³ e.g. *Google/BeatThatQuote*, §46-47, 56, 61-66; *Amazon/Book Depository*, §41-46, 108-117.

¹⁹⁴ §23, 29.

¹⁹⁵ §26, 40.

¹⁹⁶ §37-39, 44-49, 52.

¹⁹⁷ §11, 9.14.

¹⁹⁸ §9.4-9.15.

¹⁹⁹ *Tesco v OFT* [2012] CAT 31, [88]; *IBA Health v OFT* [2003] CAT 27 [182].

²⁰⁰ pp13, 98-101.

concerned that this would be a fundamental shift in merger policy, raising practical challenges and possibly unintended consequences.²⁰¹

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 invited fines under s36 CA1998.²⁰² Some were lowered for cooperation with the CMA and/or following the settlement procedure,²⁰³ while others were reduced on appeal.²⁰⁴ Under ss32-33 CA1998, the CMA has also imposed binding directions to order defendants to cease adopting and enforcing prohibited contractual terms,²⁰⁵ where the investigated conduct has not already ended.²⁰⁶
- 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 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.²⁰⁷
- The vast majority of digital economy mergers have been unconditionally cleared without the need to consider remedial commitments.²⁰⁸

Although not a decision, the ‘Open Banking’ remedy arising from the retail banking market investigation *utilised* the digital economy to facilitate greater competition.²⁰⁹ To improve switching between current accounts, the CMA recommended the development of an open application programming interface (API) for banking.²¹⁰ 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.²¹¹

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

²⁰¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CM_A_letter_to_BEIS_-_DCEP_report_and_recommendations_Redacted.pdf

²⁰² 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).

²⁰³ *Commercial Refrigeration*; *Digital Pianos*.

²⁰⁴ e.g. *Sports Equipment* in *Ping* (n 160).

²⁰⁵ *Roma*; *Pride*; *Sports Equipment*.

²⁰⁶ e.g. *Bathroom Fittings*; *Light Fittings*.

²⁰⁷ *Skyscanner* (n 14). The CMA subsequently decided to close the investigation on administrative priority grounds.

²⁰⁸ For a rare example: *Mastercard/VocaLink* (<https://www.gov.uk/cma-cases/mastercard-vocalink-merger-inquiry>).

²⁰⁹ 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>).

²¹⁰ *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.

²¹¹ *ibid*, xxxvii-xxxviii, 441-442.

instruments of legislation in relation to most favoured nation clauses– and the enforcement practice of competition authorities?

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

- The Consumer Rights Act 2015 (CRA2015).²²⁷ Part 1 provides consumer rights against businesses supplying goods, services and paid-for (only) digital content.²¹² Part 2 makes unfair non-core terms in consumer contracts not binding, with Schedule 2 listing terms which may or must be regarded as unfair. The CMA has occasionally indicated how such terms might apply in the digital economy.²¹³
- The Consumer Protection from Unfair Trading Regulations 2008 (CPRs).²³⁰ These prohibit unfair business-to-consumer commercial practices. Typically, unfair practices contravene requirements of professional diligence.²¹⁴ The CPRs specifically prohibit misleading actions and omissions,²¹⁵ aggressive practices,²¹⁶ and a list of conduct ‘in all circumstances considered unfair’,²¹⁷ a number of which are relevant to the digital economy.²¹⁸ The Electronic Commerce (EC Directive) Regulations 2002 impose additional information obligations on online traders.
- The Privacy and Electronic Communications (EC Directive) Regulations 2003²¹⁹ and the Data Protection Act 2018, the latter of which implements the GDPR.²²⁰ These constitute the UK data protection regime.
- The Geo-Blocking Regulation²²¹ 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.²²² The CMA was initially unconvinced that such an instrument was necessary, its preference being for guidance, self-regulation and ex post competition/consumer protection enforcement.²²³

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.²²⁴ 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.²²⁵

²¹² s33.

²¹³ e.g. *Consumer Data* (n 43) 16.

²¹⁴ Regulation 3.

²¹⁵ Regulations 5-6.

²¹⁶ Regulation 7.

²¹⁷ Schedule 1.

²¹⁸ e.g. promoting endorsements by users that have been paid for.

²¹⁹ Implementing Directive 2002/58/EC.

²²⁰ Regulation 2016/679.

²²¹ Regulation 2018/302.

²²² Regulation 2019/1150.

²²³ *CMA Response: Online Platforms* (n 168); *CMA Response: Regulatory Environment for Platforms* (n 168).

²²⁴ Part 8 of the Enterprise Act. For other regulations enforced: CMA, *Consumer Protection: Enforcement Guidance* (2016) Annex A.

²²⁵ *Consumer Protection*, *ibid* §2.2.

This cohesion is demonstrated by investigations into paid-for positive online endorsements,²²⁶ opaque charges and terms for internet transactions,²²⁷ automatic renewal of digital services²²⁸ and the reliability of internet reviews.²²⁹ Other consumer protection investigations in digital markets have focused upon preventing exploitation (e.g. websites charging for free government services,²³⁰ unfair terms and practices by online gambling firms)²³¹ and protecting vulnerable groups (e.g. children pressurised into in-game/app purchases).²³² While consumer enforcement has been a valuable complement to competition enforcement, the inability to order cessation and impose fines independently of courts has led the CMA's Chairman to suggest that its consumer powers are 'unfit' for purpose and should be boosted.²³³

- Data protection and privacy requirements are enforced by the Information Commissioner's Office (ICO). The ICO has often undertaken action against digital economy firms, including fining Uber for failing to protect customer's data during a cyber-attack,²³⁴ penalising Facebook for not sufficiently guarding user data from app developers,²³⁵ and an undertaking from WhatsApp not to share data with Facebook until data protection concerns were addressed.²³⁶ It has also published materials on privacy and data in mobile apps,²³⁷ cloud computing,²³⁸ social networks²³⁹ and a report on big data, AI and machine learning.²⁴⁰ Some of the CMA's consumer protection investigations have also touched on privacy²⁴¹ and its publications occasionally raise related issues.²⁴² 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.²⁴³ The ongoing 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.²⁴⁴
- 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 unknown.

²²⁶ <https://www.gov.uk/cma-cases/handpicked-media-ltd-non-disclosure-of-commercial-blogging-activity>; <https://webarchive.nationalarchives.gov.uk/20140402215217/http://www.ofc.gov.uk/OFTwork/consumer/>; <https://www.gov.uk/cma-cases/social-media-endorsements>.

²²⁷ <https://www.gov.uk/cma-cases/car-rental-intermediaries>; <https://www.gov.uk/cma-cases/online-hotel-booking>.

²²⁸ <https://www.gov.uk/cma-cases/online-console-video-gaming>; <https://www.gov.uk/cma-cases/anti-virus-software>.

²²⁹ e.g. <https://www.gov.uk/cma-cases/online-reviews-and-endorsements>; <https://www.gov.uk/cma-cases/fake-and-misleading-online-reviews>.

²³⁰ <https://webarchive.nationalarchives.gov.uk/20121204222607/http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/government-services/>.

²³¹ <https://www.gov.uk/cma-cases/online-gambling>.

²³² <https://www.gov.uk/cma-cases/children-s-online-games>.

²³³ Chairman's Letter (n 54) 20-21.

²³⁴ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-fines-uber-385-000-over-data-protection-failings/>

²³⁵ <https://ico.org.uk/facebook-fine-20181025>.

²³⁶ <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/>

²³⁷ <https://ico.org.uk/media/for-organisations/documents/1596/privacy-in-mobile-apps-dp-guidance.pdf>.

²³⁸ https://ico.org.uk/media/for-organisations/documents/1540/cloud_computing_guidance_for_organisations.pdf

²³⁹ <https://ico.org.uk/media/for-organisations/documents/1600/social-networking-and-online-forums-dpa-guidance.pdf>

²⁴⁰ <https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf>

²⁴¹ e.g. *Online Dating Services*: <https://www.gov.uk/cma-cases/online-dating-services>.

²⁴² *Protecting Consumers Online: A Strategy for the UK* (2010), recommending that the ICO reconsider notice and consent requirements for online targeted advertising and pricing.

²⁴³ *Consumer Data* (n 43) 8.

²⁴⁴ *Online Platforms and Digital Advertising Market Study: Statement of Scope* (2019) 5-6, 20-21.

Question 12. Which authorities are responsible for enforcing competition law in the digital economy in your jurisdiction?

Under s54 CA1998, various regulators have concurrent powers to enforce the Chapter I and Chapter II prohibitions: Ofcom; Ofgem (gas and electricity); 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 Systems Regulator (PRS); and NHS Improvement. The CMA is the sole decision-maker for mergers.²⁴⁵

Coherent antitrust enforcement was strengthened by the ERRA13 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 industries²⁴⁶ and agreed memoranda of understanding with each enforcement body.²⁴⁷ Together they constitute the UK Competition Network, which aims to promote strategic dialogue, cooperative enforcement and share best practices.²⁴⁸ Given the sectors overseen by the concurrent enforcers, engagement with digital economy markets beyond the CMA has been limited. One exception is Ofgem's investigation into negative keywords agreements between energy PCWs, preventing rival advertisements displaying in response to certain search inputs. This investigation was transferred to the CMA and closed on administrative priority grounds.²⁴⁹

With respect to consumer protection, CRA2015 enforcement is shared with Trading Standards Services (TSS), the concurrent sector regulators, ICO and the Consumers' Association (Which?).²⁵⁰ 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 strong deterrence or compensation is required.²⁵¹ In 2019 the CMA Chairman recommended 'entrenching a division of responsibilities' for enforcement between the CMA and TSS.²⁵²

Chapter I and II infringement decisions, findings of legality, commitment decisions, and penalties are appealable from the CMA to the CAT,²⁵³ while other actions can be judicially reviewed by the High Court. A person aggrieved by a merger decision can also apply to the CAT for review.²⁵⁴ Opportunities for the CAT to consider digital economy issues have been rare, though include accepting the "one portal only" rule in *Agents' Mutual*,²⁵⁵ quashing the online hotel booking commitments decision in *Skyscanner*,²⁵⁶ and finding a non-decisive error of law in *Ping*.²⁵⁷ Concerns have been raised about the length and cost of CAT proceedings.²⁵⁸ The Chairman of the CMA also recently expressed dissatisfaction with the intensity of review

²⁴⁵ The CMA consults Ofcom on local media mergers and NHS Improvement on foundation trust mergers. The Secretary of State may intervene in mergers raising public interest considerations (n 73).

²⁴⁶ *Guidance on Concurrent Application of Competition Law to Regulated Industries* (2014).

²⁴⁷ <https://www.gov.uk/government/collections/uk-competition-network-ukcn-documents>.

²⁴⁸ UKCN, *Statement of Intent* (2013).

²⁴⁹ n 13.

²⁵⁰ CRA2015 Schedule 3; Part 8 Enterprise Act 2002.

²⁵¹ *Consumer Protection* (n 224), §3.11.

²⁵² Chairman's Letter (n 54) 20-22.

²⁵³ ss46-47 CA1998.

²⁵⁴ s120 Enterprise Act 2002.

²⁵⁵ See text accompanying n 131.

²⁵⁶ *Skyscanner* (n 14).

²⁵⁷ See n 160 and n 204.

²⁵⁸ Chairman's Letter (n 54) 2, 34-35, 37-38.

applied by the CAT and recommended a more flexible standard of review for CMA fact-finding and legal analysis,²⁵⁹ as echoed in the Furman Report.²⁶⁰

²⁵⁹ *ibid* 12, 36, 39-40.

²⁶⁰ Furman Report (n 56), 14, 106.