

The Competition and Markets Authority’s response to DCMS Policy Paper: Establishing a pro-innovation approach to regulating AI

About the CMA

1. The Competition and Markets Authority (‘CMA’) is an independent non-ministerial department and is the UK’s principal competition and consumer protection authority. We work to ensure that consumers get a good deal when buying goods and services, and that businesses operate within the law. Our statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers. The Digital Markets Unit (‘DMU’),¹ housed in the CMA, has been established in shadow form, pending legislation to create a new regime for the most powerful digital firms, to promote greater competition and innovation in digital markets.

Overview

2. We welcome the opportunity to provide comment on the policy paper “[Establishing a pro-innovation approach to regulating AI](#)”.
3. Our response is shaped by our role in promoting competition in the interest of consumers, drawing on previously published research, including: [Algorithms: How they can reduce competition and harm consumers](#);² [The benefits and harms of algorithms: a shared perspective from the four regulators](#);³ and [Auditing algorithms: the existing landscape, role of regulators and future outlook](#).⁴ These papers set out the key benefits and harms of algorithms that we and DRCF regulators have identified, and a broader landscape review of the existing landscape for auditing algorithms.
4. We also draw on our experience of addressing the applications and uses of algorithmic systems, including artificial intelligence (‘AI’) systems, in the

¹ BEIS & DCMS, [Digital Markets Unit \(non-statutory\) – Terms of Reference](#), April 2021.

² CMA, January 2021.

³ Digital Regulation Cooperation Forum (‘DRCF’), April 2022.

⁴ DRCF, April 2022.

context of exercising our formal functions, including market studies, antitrust, and consumer protection work.⁵

5. Algorithms can create opportunities for businesses to deliver more accessible and personalised online services, such as in search and financial services. But we also see potential risks that algorithms can pose, including enhancing incumbent firms' ability to self-preference at the expense of new innovative services, be insufficiently transparent to consumers, or lead to discriminatory personalised pricing.
6. We see the benefits of a more context-specific and risk-based approach where regulators prioritise interventions towards the most significant harmful practices. Tightly targeted interventions similar to those envisioned in the pro-competition regime in digital markets proposed by government are the best way to address the potential risks posed by algorithms and could reduce the need for regulation applying to all firms using AI, as adopted in other jurisdictions.⁶
7. We would like to emphasise three key messages in our response:
 - (a) **Equipping regulators with the right tools:** We see the benefits of a context-specific and risk-based approach, enabling regulators to prioritise interventions in relation to the most harmful practices. It will be important for government to equip regulators with the appropriate powers to intervene.
 - (b) **Importance of cross-regulatory initiatives:** Government's support for voluntary fora such as the DRCF is welcome, particularly as these should help avoid gaps or overlaps between regulatory remits.
 - (c) **An international outlook on regulating AI:** We encourage government to advocate a risk-based approach and evolve its position as AI technologies develop and mature.

A principles-led approach to regulating the uses of AI

8. We are supportive of government's proposed cross-sectoral and principles-based approach to regulating AI as a responsible way of harnessing the opportunities that this technology presents for UK businesses and consumers.

⁵ We recognise that AI systems are a subset of wider algorithmic systems. Many of our views apply to wider algorithmic systems as well as AI systems, and we use the wider term where appropriate.

⁶ Department for Culture, Media and Sport, [A new pro-competition regime for digital markets: consultation outcome](#), May 2022.

9. This approach will enable firms to innovate, while ensuring that proportionate safeguards are in place to protect businesses and consumers from the most harmful risks. In particular, we would hope the cross-sectoral principles will achieve the following:
- (a) Provide greater **clarity** to firms about what they should consider when using AI in developing their product and service offerings.
 - (b) Encourage a **participative approach to regulation**, underpinned by regulatory guidance and dialogue with regulated entities to ensure that efforts are focused on ‘high-risk’ use cases.
 - (c) Enable **agile** regulatory responses as AI technology develops, matures, and becomes used across different contexts and regulatory remits (subject to those regulators having the competence to engage, collaborate and address concerns).
10. We note the Key Challenges set out in the policy paper and would like to highlight the following points for government to consider:
- (a) We support the cross-sectoral principle of making sure that AI is appropriately transparent and explainable. In a competition context, enabling consumers to have choice and control may also be an additional important factor to add. For example, consumers may want to know that they are being recommended products by an algorithm, but also understand their options for opting out of receiving recommendations for certain content or have the ability to indicate or receive recommendations for other interests they may not have necessarily been targeted for. We would also highlight however that many consumers may have considerable limitations in understanding complex algorithms and this may need to be consideration.
 - (b) The policy paper recognises that there may be considerations that limit the extent of transparency that is appropriate, including the need to protect confidential information and intellectual property rights. Any mandated disclosure needs careful design to prevent gaming or manipulation by bad actors. In the case of AI systems for pricing or bidding, when these systems are made more transparent to consumers, they are also made more transparent to competitors and, in some circumstances, this can relax competition between firms and facilitate collusion.
 - (c) Encouraging firms to adopt AI transparency approaches can be challenging where there is reticence to share proprietary information; and where machine learning models can be hard to interpret. Effective

regulation, underpinned by sufficient legal powers, skills and capabilities, will be necessary to address these issues. There may be a useful role for regulators to investigate and audit key AI systems, particularly where fuller public transparency of these systems is problematic, provided this is done in a limited, targeted and proportionate way.⁷

(d) Standards can play a key part in developing a coherent approach and reducing regulatory burdens, though regulators and standard-setting bodies need to work closely together, particularly to ensure that standards are developed in ways that do not preference incumbents.

(e) Regulators across different fields are likely to need to collaborate. For example, remedies that may address competition concerns might also need to factor in data protection considerations. We have experience with subject areas where such policy objectives interact which require very close collaboration, for example collaborating closely with the Information Commissioner's Office (ICO) on its supervision of commitments into Google's Privacy Sandbox.⁸

11. While AI applications are still developing, a more light-touch approach to the regulation of AI will be beneficial, using existing regulatory remits, as suggested by government. However, it will be essential to ensure there is a backstop of robust and effective, but proportionate, enforcement of this principles-led approach.
12. We agree with the position that regulation of AI should be pro-innovation and risk-based, focused on high-risk concerns rather than hypothetical or low risks associated with AI. However, this should not preclude regulation from addressing harms that have a diffuse impact across many people or which fully play out over a long period of time, and not just harms that have a highly visible, significant, and immediate impact on individuals. For instance, harms to competition can, by their nature, be long-term, structural, and spread across many people. While harms to competition may not have the immediacy of health and safety risks or harm to the fundamental rights of natural persons, inappropriate use of AI systems might: (i) allow incumbent firms to get away with higher prices and lower quality to consumers; (ii) affect the livelihoods of people who own, invest in, and work for competitors that have

⁷ The CMA and other DRCF members are actively considering how best to support the development of an effective AI assurance ecosystem. DRCF, [Auditing algorithms: the existing landscape, role of regulators and future outlook](#), April 2022. See also [Digital Regulation Cooperation Forum workplan 2022 to 2023](#).

⁸ CMA, [Investigation into Google's 'Privacy Sandbox' browser changes](#), January 2021. The 'Privacy Sandbox', refers to Google's project replacing the use of third-party cookies with a set of advertising technologies that rely on the use of AI and algorithms for privacy-preserving purposes.

been unfairly harmed; and ultimately, (iii) harm innovation, productivity, and economic growth.

13. Any risk-based principles should therefore not be too focused on simply the obvious or near-term risks but also include structural long-term risks. Although long-term risk is mentioned in the policy paper, we would encourage more emphasis on it and more work to understand the nature of long-term structural risks and what they might look like. To illustrate:
 - (a) Structural risks that could affect competition over time could include concentration of key inputs to AI supply chains, such as chips, data, and computational resources.
 - (b) The most powerful firms can act as quasi-regulators in the markets which they operate, affecting the ability and terms on which consumers and other businesses can trade. The rules and systems that incumbents implement (including via AI systems) may maximise their own private interests at the expense of the broader public interest. Effective and robust regulation of the conduct of dominant incumbent businesses, including their use of AI systems, may be necessary in order to lower the costs of doing business and to promote innovation by others in the market.
14. Consistent with the policy paper, we intend to take a proportionate, risk-based approach, including by establishing risk-based criteria and thresholds at which additional requirements come into force. We believe that, with respect to harms to competition, the risks from misuse of AI systems are greater when these are used by firms with a dominant market position, or by firms with enduring market power over a bottleneck market where they control others' market access. Accordingly, under the proposal for a pro-competition regime for digital markets, we may in future consider targeted and evidence-based remedies relating to AI among the possible approaches for keeping markets open, competitive and innovation-friendly.
15. We are actively considering which specific systems and uses of AI within our remit are particularly relevant to the considerations and principles set out in the policy paper. One possible future approach is issuing specific guidance for businesses' use of AI systems in particular sectors or where those systems fulfil certain important functions in the digital economy (such as search, aggregation, reviews, recommendation and comparison services, etc.).

Approach to interactions between relevant stakeholders in the regulation of AI

16. We agree that the principles set out by government are the right ones but would emphasise that as the framework for the regulation of AI continues to develop, including the forthcoming White Paper, they should be informed by a wide range of stakeholders to avoid risks of these principles favouring incumbents or larger online service providers.
17. We strongly encourage regular engagement from government with regulators so that front line considerations are considered as the regulatory landscape evolves. We expect this would include considering the existing powers regulators have, and how those might need to be updated and adapted to match the pace of innovation in AI. The policy paper states that the government may need to consider specific new powers or capabilities for regulators, where risks associated with particular applications arise. From our perspective, we highlight the opportunity that establishing the new Digital Markets Unit and implementing broader competition and consumer reforms could present to make sure we have the powers to ensure that the benefits from AI are widely felt, whilst being able to effectively investigate and remedy high-risk harms from misuses of AI systems to consumers and competitive businesses.
18. Additionally, we welcome government's recognition of the DRCF, and similar fora, as an appropriate venue to draw together different perspectives, and achieving the coherent regulatory outcomes envisioned by this policy paper. Our work with other DRCF member regulators on algorithms, considering both the benefits and harms of algorithms and the landscape review of algorithmic auditing represent in our view a positive step to develop coherence on the area.⁹
19. The policy paper correctly identifies the need to ensure that regulators are responsive in protecting the public. We have invested in proactive market monitoring and horizon scanning capabilities which have prioritised various technologies of interest including AI. Our horizon scanning also feeds into the collective DRCF horizon scanning programme, which focusses on collective areas of interest in emerging technologies and their future regulatory implications.¹⁰

⁹ DRCF, [Findings from the DRCF Algorithmic Processing workstream – Spring 2022](#), April 2022.

¹⁰ DRCF, [Joining up on future technologies: Digital Regulation Cooperation Forum technology horizon scanning programme - GOV.UK \(www.gov.uk\)](#), November 2021.

Advocating domestic and international coherence in the regulation of AI

20. We support government advocating internationally for similar context-specific and risk-based approaches to regulation of AI, founded on strong regulatory cooperation including with other jurisdictions.
21. Our existing strong relationships with international counterparts will play an important role – both bilaterally and within multilateral fora – to make sure we achieve this, exercising our formal functions efficiently and reducing burden on businesses, particularly in fast moving and innovative areas such as digital markets. These relationships are similarly important in developing our policy thinking through knowledge sharing. The Multilateral Mutual Assistance and Cooperation Framework agreement is a good example of how we are building stronger inter-agency cooperation to achieve these objectives in an increasingly global economy.¹¹
22. More broadly we are looking to continue building our collective knowledge and relationships established formally through such agreements by leading events and discussions in this space, such as the recent Data, Technology, and Analytics Conference.¹²

¹¹ [Multilateral Mutual Assistance and Cooperation Framework between the CMA, ACCC, CBC, NZCC, USDOJ and USFTC - GOV.UK \(www.gov.uk\)](#). The agreement between the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, the Competition Bureau of Canada, the United States Department of Justice and Federal Trade Commission and the CMA.

¹² CMA, [CMA Data Conference – Bringing data, technology and analytics to competition and consumer protection](#), June 2022.