

The Information Commissioner's response to the Competition and Markets Authority's consultation on new digital markets competition guidance

About the ICO

1. The Information Commissioner's Office (ICO) has responsibility for promoting and enforcing:
 - the UK General Data Protection Regulation (UK GDPR),
 - the Data Protection Act 2018 (DPA),
 - the Freedom of Information Act 2000 (FOIA),
 - the Environmental Information Regulations 2004 (EIR), and
 - the Privacy and Electronic Communications Regulations 2003 (PECR).
2. The ICO is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. We provide guidance and support to individuals and organisations, aimed at helping organisations to comply, and take appropriate action where the law is broken.

Introduction

3. The ICO welcomes the opportunity to respond to [the Competition and Market Authority's \(CMA\) consultation on new digital markets competition guidance](#). The Digital Markets, Competition and Consumers Act (DMCC), and the new pro-competition regime for digital markets that it will introduce, has the potential to complement and enhance the role of data protection law in driving good outcomes for consumers in digital markets. In particular, it can do this by:
 - providing more transparency to consumers on how their personal information is collected and used by digital services;

- increasing consumers' ability to exercise their data protection rights, and by giving them genuine choice and control over how their personal data is used; and
 - protecting consumers from harm that could arise from the misuse of their personal data.
4. As explained in our [2021 joint statement](#) with the CMA, competition and data protection law have overlapping objectives that are strongly aligned in the context of digital markets. This is why the ICO has engaged extensively with the Government and the CMA on the new regime as the DMCC has been developed. We have previously set out our views in our responses to [the government's consultation on the new digital markets regime in 2021](#), and [our written evidence to Parliament on the DMCC Bill in 2023](#).
5. As stated in those responses, the ICO is committed to building on the close cooperation we already undertake with the CMA on issues where our remits intersect. Our close working relationship is reflected in our ambitious programme of regulatory collaboration – undertaken through the [Digital Regulation Cooperation Forum \(DRCF\)](#)¹ – to leverage the synergies and manage potential tensions between competition and data protection regulation. This collaboration has seen us progress a number of significant pieces of work together, including:
- extensive cooperation to promote competition and privacy in online advertising, including working together to review [Google's Privacy Sandbox proposals](#) and ICO input to the CMA's [mobile ecosystems market study](#);
 - our [joint paper on harmful design in digital markets](#), which sets out ICO and CMA expectations on how firms present information and choices to users of digital services about how their personal data is processed;
 - an upcoming joint statement setting out our respective positions concerning the foundation models that underpin generative AI, which we plan to publish later this year. This statement will support coherence for businesses, and promote behaviours that benefit consumers, in areas where our remits intersect when applied to this AI technology;
6. The DMCC is an opportunity to expand on this cooperation.² This will help to ensure that competition interventions complement and enhance users'

¹ The DRCF brings together four regulators with responsibilities for digital regulation: the ICO, the Competition and Markets Authority, the Financial Conduct Authority, and Ofcom. See: [About the DRCF | DRCF](#)

² The ICO and CMA also plan to update our 2021 joint statement on competition and data protection, to take into account technical, policy and legislative developments, such as the DMCC. This will set out our joint approach to issues such as data access; data sharing and interoperability; and user choice and control.

privacy and data protection rights, and provide a more coherent regulatory landscape for businesses that wish to process personal data to provide digital services. The DMCC and its new regime aligns with the strategic objectives outlined in our [ICO25 strategic plan](#), in particular our objectives to a) safeguard and empower people, b) empower responsible innovation and sustainable economic growth and c) cooperate with others to maximise our effectiveness.

7. Below, we set out our specific views on both the draft digital markets competition regime guidance, and the draft guidance on the mergers reporting requirements for strategic market status (SMS) firms.

ICO comments on the draft digital markets competition regime guidance

Consideration of effects on privacy and information rights

8. The CMA's new powers to impose tailored conduct requirements and make pro-competitive interventions are likely to have a significant impact on the way in which firms designated with SMS status process personal information. For example, conduct requirements that require SMS firms to use data "fairly", or pro-competitive interventions that require SMS firms to share data with other companies, will have to be designed with privacy and data protection in mind. It is therefore vital that the ICO is consulted at an early stage to ensure a "data protection by design" approach can be embedded in any such measures.
9. The ICO also has an interest in the designation of SMS firms. Many of the firms likely to be of interest to the CMA under the new regime will be so because of the extremely large amount of personal information that they are able to collect and process. They are therefore likely to be firms that are also of significant interest to the ICO.
10. We are pleased that the effect on privacy is explicitly mentioned in the guidance, in particular:
 - Paragraph 3.31(c), which sets out the criteria the CMA will consider when assessing the proportionality of conduct requirements that it is considering imposing, including "effects on consumers and business users (eg on the safety and privacy of users...)";
 - Paragraph 4.38, which sets out examples of user or customer benefits that the CMA may consider when assessing whether there are any benefits resulting from factors giving rise to an adverse effect on competition. This includes benefits such as "higher quality (including in terms of parameters such as privacy, security and accessibility of products)", and

- Paragraph 7.64, which lists “protecting user security or privacy” as an example of benefits to users or potential users that could be considered a “countervailing benefit” of non-compliance with a conduct requirement.
11. As explained in more detail below, effective cooperation between the CMA and ICO will be key in ensuring that any privacy benefits or detriments are recognised and fully understood when CMA interventions could impact people’s privacy and information rights.

Coordination with relevant regulators

12. This section of the guidance (page 185) refers to the CMA’s statutory duty under section 107 of the DMCC to consult with the ICO, and other regulators, where our remits and responsibilities might be impacted by the exercise of the CMA’s new functions. The section states that the principles and arrangements that the CMA proposes to adopt to give effect to this statutory duty will be set out in bilateral Memoranda of Understanding between the CMA and relevant regulators.
13. We support publishing details of the cooperation approach between the ICO and CMA and look forward to developing the Memorandum of Understanding (MoU).³ The CMA and ICO have been able to achieve much through our existing bilateral partnership under the auspices of the DRCF. However, the interactions between data protection and the new pro-competition regime will be substantial. Formalising the detail of this cooperation in an MoU will be important for ensuring our cooperation is future proofed and able to withstand any changes in resourcing, personnel or priorities at either the ICO or the CMA.

Article 36(4) of the UK GDPR

14. Unlike other regulators that the CMA has a statutory duty to consult, the CMA is also under a separate obligation to consult with the ICO under Article 36(4) of the UK GDPR. Article 36(4) states:

“The relevant authority must consult the Commissioner during the preparation of a proposal for a legislative measure to be adopted by Parliament, the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly, or of a regulatory measure based on such a legislative measure, which relates to processing.”⁴

³ The ICO and CMA have an [existing MoU](#) that sets out our current framework for cooperation.

⁴ The government’s [guidance on the application of Article 36\(4\)](#) provides more details on the how public authorities such as the CMA are expected to comply with this obligation.

15. For clarity, it would be beneficial to recognise Article 36(4) in this section of the guidance, for example, by noting that “The CMA will also consult the ICO under Article 36(4) of the UK GDPR where required to do so”.
16. In order to ensure as streamlined a cooperation process as possible, and avoid the duplication of effort by both the ICO and CMA, it will be important for the detailed cooperation processes and ways of working set out in the new digital markets MoU to incorporate compliance with Article 36(4) as well as the statutory consultation requirements of the DMCC.

Reasonable excuse for the imposition of a penalty

17. Paragraphs 8.15 – 8.18 deal with the fact that the CMA can only issue a penalty to a firm under the new regime if a firm’s failure to comply is “without reasonable excuse”. Paragraph 8.18 states:

“The CMA is unlikely to accept as a reasonable excuse for non-compliance any claim that such non-compliance is required under an agreement or contract, or data protection laws”.

18. Footnote 543 then states:

“For example, in the UK, the Data Protection Act 2018 allows processing of personal data for the purposes of a legal obligation: see paragraph 3, Schedule 9 Data Protection Act 2018”

19. However, Schedule 9 of the DPA 2018 is not relevant to SMS firms. Instead, this schedule applies to intelligence organisations. We would therefore suggest that footnote 543 is removed from the guidance. We would also suggest that the reference to data protection law is removed from paragraph 8.18, as compliance with data protection law is a separate issue from compliance with a contract or agreement.
20. Instead, we would suggest that the CMA’s reasons for being unlikely to accept compliance with data protection law as a “reasonable excuse” recognise that any requirements imposed on firms under the new regime will have already been subject to consultation with the ICO where section 107 of the DMCC is engaged. They should therefore not require a firm to do anything that would breach data protection law.
21. However, there must also be space provided by the new regime to deal with any unforeseen consequences that a requirement might lead to. If a firm does have a legitimate concern about its compliance with data protection law when complying with a conduct requirement, this should not result in firms being forced to choose between breaching data protection law or having a penalty imposed on them by the CMA.
22. The ICO is happy to work further with the CMA on refining this section of the guidance.

ICO comments on the draft guidance on the mergers reporting requirements for SMS firms

23. At paragraph 5.24, this guidance states:

“The CMA routinely consults the sectoral regulators about any transactions in which they are likely to have industry specific knowledge. The CMA will take any views it receives from the sectoral regulators into account, although it is ultimately for the CMA to decide whether the reported transaction requires a formal phase 1 investigation.”

24. Whilst the ICO is a whole economy regulator, we would assume that the CMA would include the ICO as one of the regulators that it would consult with in the event that a merger raised concerns about data protection or privacy matters. The CMA may therefore wish to reword this paragraph to refer to “regulators” or “digital economy regulators” to make this clearer.

Conclusion

25. The new pro-competition regime presents an opportunity to further leverage the synergies between the competition and data protection regulatory regimes. In doing so, this will drive better privacy and competition outcomes for consumers, and support regulatory clarity for businesses. There is also a risk that competition and data protection interests may lead to tensions arising in some instances. Effective cooperation between the ICO and CMA will therefore be vital to ensure that mutual benefits can be realised and that any tensions can be effectively mitigated.

26. The ICO understands that it is vital for us to be engaging with, and providing input to, the CMA at an early stage when it is exercising its new functions in a way that interacts with our regulatory functions. Our ongoing bilateral partnership through the DRCF provides a very strong basis for this cooperation. We look forward to developing the new Memorandum of Understanding with the CMA that outlines the principles and arrangements that will underpin productive collaboration into the future.