



Law Society
of Scotland

Consultation response

Algorithms, competition and consumer harm: call for information

March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Competition Law, Consumer Law and Privacy Law Sub-committees welcome the opportunity to respond to the call for information on *Algorithms, competition and consumer harm*.¹ We have the following comments to put forward for consideration.

Generally speaking, we welcome the proposals. However, we consider that evaluation of consumer harm needs to incorporate greater recognition of the impact on privacy and the potential for infringement of individuals' right to data protection, alongside the consideration of power dynamics. The two issues are becoming increasingly intertwined.

Response to questions

1. Are the potential harms set out in the review paper the right ones to focus on for our algorithms programme? Are there others that we have not covered that deserve attention?

We agree that the potential harms set out in the review paper seem sensible topics to focus on, at least in the short to medium term, in terms of competition and consumer law. As markets evolve, and new types of algorithms are created, other potential harms may emerge which require to be assessed in future.

We note that algorithmic discrimination is an issue which could arise in numerous areas and there may be an opportunity for shared learning with other fields of research to understand where and how discrimination could arise and at a further stage to consider how best to tackle those issues.

In addition, the harm to privacy and infringement of the right to data protection, need to be reflected in the discussion. In particular, the CMA should consider carefully whether it is appropriate to allow commercial use of special category data or to draw inferences about someone's health, sexuality, etc for commercial purposes and how this should be regulated to ensure consumers are not harmed. These categories of data and the stricter rules surrounding them exist to guard against individuals being discriminated against. The possibility, for example, to make inferences about an individual's health from their online activity has the potential to cause serious harm, both in terms of ensuring access to goods and services on a price-competitive basis as well as the general invasiveness of such profiling activities, which could impinge upon rights to privacy and

¹ <https://www.gov.uk/government/consultations/algorithms-competition-and-consumer-harm-call-for-information>

data protection. It would be helpful if the paper gave greater acknowledgement that the absence of transparency in access to and use of data can be used to deliver outcomes and so in a wider context to shape the economics of our society, competition and competitive practices.

2. Do you agree with how we have described each harm, and are there other examples that demonstrate them in addition to the examples we have included?

We are satisfied with the descriptions.

3. How likely and impactful are the identified harms now, and how might they evolve in the next few years?

We do not have any data on the extent of the identified harms. However, we note that a number raise potentially very significant concerns from both a competition and a consumer perspective, and in addition may have implications for the right to protection of personal data.

4. Are there specific examples that we should investigate further to consider whether they are particularly harmful and potentially breaching consumer or competition law?

We have no comment on this question.

5. Are there any examples of techniques that we should be aware of or that we should consider beyond those that we've outlined?

We have no comment on this question.

6. Are there other examples where competition or consumer agencies have interrogated algorithms that we have not included?

We have no comment on this question.

7. Is the role of regulators in addressing the harms we set out in the paper feasible, effective and proportionate?

We have no comment on this question.

8. Are there other ideas or approaches that we should consider as part of our role?

We have no comment on this question.

For further information, please contact:

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