Facebook Response to the Consultation on Reforming Competition and Consumer Policy

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FACEBOOK

1. Summary

1.1. The Government's consultation provides a valuable opportunity to improve the UK's competition and consumer law regime, in order to promote good outcomes for consumers and businesses, whilst mitigating avoidable and unnecessary burdens in the regulatory process. Facebook welcomes the opportunity to provide input based on its experience and observations of the CMA's market inquiry, merger control, and Competition Act 1998 ("Competition Act") tools.

1.2. Facebook agrees that there is scope to refine the UK's competition and consumer rules to secure efficiencies and enable quicker intervention to prevent consumer harm. These aims are laudable and should be pursued, provided they do not dilute or weaken the UK's strong commitment to robust, impartial, and evidence-based decision making that is based on established principles of procedural fairness, due process, and respect for companies' legal rights of defence. Such protections are necessary to ensure that the CMA arrives at substantively sound decisions based on a proper understanding of how markets and competition work. They are central to ensuring that competition enforcement in the UK respects international norms and retains the confidence of the business and legal communities. As one of the leading antitrust agencies in the world, the UK has a responsibility to maintain the highest possible standards - any lowering of those standards could undermine the UK's reputation.

1.3. This paper sets out Facebook's views on the proposed reforms to the UK competition regime, dealing separately with the proposals for the market inquiry, merger control, and Competition Act tools (Sections 2 to 4). It provides some brief observations on the suggested reforms to the consumer regime (Section 5) and considers the risks of duplication and undue burden arising from the proposed reforms to the competition regime and the parallel proposals for a new regime for digital markets (Section 6).

2. Market Inquiries

Efficiency-enhancing reforms

2.1. Facebook shares the Government's concerns that the market inquiry process is currently overly cumbersome and welcomes the proposals to:

(i) **Replace the existing system with a single stage market inquiry tool:** The existing two-stage system is sub-optimal. In Facebook's experience, there is a risk of the Government receiving and accepting recommendations following a CMA market study, that are not underpinned by adequately complete or rigorous analysis. In the 'Online platforms and digital advertising' inquiry, for instance, the CMA recommended significant and wide-ranging regulatory reforms at the end of its twelve-month market study. Consistent with the required market study standard, these recommendations were made, even though the CMA did not prove there had been an adverse effect on competition (the market investigation threshold). The Government is in the process of implementing these recommendations. The inevitable risks inherent in such a system could be mitigated by replacing the current system with a robust single stage tool

that requires the CMA to first meet a sufficient evidential threshold before it can recommend or impose market reforms.

A single stage tool is also desirable because it removes duplication and facilitates an efficient end-to-end markets process. Duplication is inherent in the current two-stage process because there is a lack of continuity between the market study case team and market investigation case team. The Government's proposed timeframe for the single stage process (two years extendable for a further six months) is also a welcome improvement on the current two-stage timeframe (12 months for a market study followed by up to 24 months for a market investigation). The condensed timeframe should, overall, speed up market inquiries.

For the avoidance of doubt, Facebook does not support the Government's alternative proposal to retain the two-stage system and introduce remedies at the end of a market study. In doing so, the Government would forgo the benefits of moving to a single-stage system described above. Introducing remedies at the end of a market study would also leave open the possibility of the CMA imposing potentially onerous remedies without the input of a full independent panel of decision-makers. Even if the CMA were only permitted to impose behavioural remedies at the end of a market study, as is the Government's proposal[1], this could have a significant and irreversible impact on businesses. Particularly in digital markets where intellectual property is often the most important asset, behavioural remedies such as orders to maintain interoperability or open access can be as (if not more) impactful than structural remedies. In circumstances where it is appropriate to bring a market inquiry to an early conclusion, this can already be achieved with the parties' cooperation through undertakings in lieu.

(ii) **Enable the CMA to accept binding commitments at any stage:** Commitments should be considered even where they address only part of an investigation as this still narrows the scope of the investigation, helping to minimise costs (both for businesses and the CMA) and delays. Being able to accept commitments at any stage would speed up market inquiries without undermining the robustness of the regime as the CMA will still have the option to reject any offers of commitments and impose remedies at the end of an inquiry.

Proposals that risk undermining the effectiveness of market inquiries

2.2. Facebook is concerned that certain of the Government's proposed reforms for market inquiries would make it easier for the CMA to intervene at the expense of limiting rights of defence and reducing the legitimacy and fairness of the CMA's processes. This could lead to substantively flawed decisions which are harmful to businesses and consumers. In particular, Facebook urges caution in relation to:

(i) **Enabling the CMA to impose interim measures from the beginning of a market inquiry:** Interim measures are not appropriate in the context of market inquiries as there is not necessarily any allegation of unlawful

[1] Consultation on Reforming competition and consumer policy, paragraph 1.60.

conduct. Giving the CMA the power to impose interim measures from the beginning of a market inquiry could lead to premature market distortions and be very burdensome (with potentially irreversible effects) for businesses. It would be disproportionate to impose such measures without sufficient evidence of harmful conduct or wrongdoing. And any such measures that are imposed should be subject to full merits review, as they are under the Competition Act.

(ii) **Requiring businesses to participate in implementation trials:** Facebook recognises that implementation trials may be valuable in certain circumstances. However, enabling implementation trials after a remedy has been imposed could significantly increase uncertainty for business by allowing for the change of a remedy's scope through a less rigorous process, and one that theoretically permits unlimited adjustments and revisions. Accordingly, if introduced, any such trials must be subject to strict time limits, and safeguards must be in place to ensure that they do not change the basic purpose and scope of a remedy.

(iii) **Varying remedies after a market investigation:** Expanding the CMA's powers to review, and if necessary, vary the remedies it imposes (or the commitments it accepts) some time after its original finding could lead to changes being made without a full understanding of their impact, including unintended consequences. Particularly in dynamic markets, the CMA should only be allowed to make changes having undertaken a proper assessment of the latest market conditions, including whether the remedy is still required or could be removed. The Government must set an appropriate legal and evidential standard for the CMA to meet in order to be able to vary a remedy. The Government should also consider introducing an equivalent provision for merger remedies, which could allow the CMA to be more confident in adopting behavioural remedies in appropriate cases when its current practice is to prefer structural solutions, even when a behavioural remedy would address their concerns.

3. Merger Control

Efficiency-enhancing reforms

3.1. The UK's merger control regime has become less predictable, slower and more costly in recent years, so far not realising the opportunities afforded by the UK's withdrawal from the EU to make merger reviewers quicker and more efficient. It is more onerous than the regime in any other leading economy, and imposes substantial extra costs on businesses without producing any corresponding benefits for UK consumers. Facebook provides several examples below which demonstrate this trend, for example the lengthening pre-notification periods, the increasingly expansive interpretation of the share of supply test, and the imposition of increasingly onerous information and document requests.

3.2. Accordingly, Facebook agrees with the proposed measures that speed up, increase the predictability and reduce the cost of the CMA's merger control, including the proposals to:

(i) **Raise the jurisdictional threshold to £100 million:** This should release parties to smaller, non-problematic mergers from having to notify the CMA, thereby removing the substantial time and cost required to draft a merger notice and respond to the CMA's requests for information during pre-notification and Phase 1;

(ii) **Create a *de minimis* safe harbour:** This should increase certainty and avoid cost and delay, by enabling businesses to predict whether a transaction qualifies for review and will allow the CMA to focus resources on transactions that are more likely to impact competition;

(iii) **Allow the CMA to agree commitments earlier at Phase 2:** This flexibility should help speed up investigations and encourage earlier engagement from the Inquiry Group on the need for and design of potential remedies;

(iv) **Restrict Phase 2 investigations to the issues identified at Phase 1:** By the time Phase 2 begins, the CMA will often have investigated the transaction for 4-6 months (and often much longer) during pre-notification and Phase 1. In these circumstances, there is no good reason for the Inquiry Group to start investigating afresh;

(v) **Improve the Phase 2 "fast track" process:** Given that Phase 2 investigations are onerous and cost intensive for parties and the CMA, efforts should generally be made to resolve cases at Phase 1. Nevertheless, for the few cases where Phase 2 will foreseeably be required in any event, the "fast track" option should be straightforward and not involve pitfalls or unnecessary hurdles (such as the requirement to concede a realistic prospect of an SLC and/or jurisdiction); and

(vi) **Limit the CMA's use of extensions at Phase 2:** Given the already-lengthy nature of merger investigations, the CMA should use extensions as efficiently as possible. This could be achieved by requiring extensions to be conditional on the merging parties providing their consent.

Additional proposals to further increase efficiency of the merger control process

3.3. Facebook considers that there are a number of other changes to the UK merger control process – not raised in the consultation – that would further increase the efficiency and speed of the CMA's investigations. It proposes the following seven reforms:

(i) **Earlier deadline for the CMA to establish jurisdiction:** The CMA does not have to make a final determination as to whether, on the balance of probabilities, it has jurisdiction over a merger until the end of its Phase 2 investigation.[2] Accordingly, businesses are often subject to many months

[2] At Phase 1, the CMA must satisfy itself that there is a realistic prospect of a relevant merger situation (i.e., that a jurisdictional threshold is met), based on a positive and reasonable belief that is objectively justified by the facts (*see* CMA, *Merger Assessment Guidelines*, CMA129, paragraph 2.9; and *OFT v. IBA Health Limited* [2004] EWCA Civ 142, paragraphs 43-49).

of substantive investigations before the CMA has determined that it is more likely than not to have jurisdiction.[3]

The CMA's investigation of *Facebook/GIPHY* is illustrative. Facebook acquired GIPHY in May 2020. The CMA opened an investigation and imposed an incredibly burdensome IEO in June 2020, preventing integration and freezing significant portions of Facebook's business – along with Facebook's investment in and innovation with GIPHY. In September 2021, the CMA unilaterally extended its statutory deadline to reach a final determination on jurisdiction to December 2021. It is therefore possible that Facebook's acquisition of GIPHY (a US company with no UK turnover or physical or legal presence) will have been delayed by some 18 months by UK merger control before the CMA has even determined whether it did ultimately have jurisdiction to intervene.

To avoid unnecessary delay and expense (for business, consumers, and for the CMA), the CMA should be required to make a final determination as to whether it has jurisdiction ***before*** it opens a Phase 1 investigation. Indeed, Facebook proposes that the CMA should determine jurisdiction within a fixed period (e.g., 3 weeks) of receiving the parties' response to a jurisdictional RFI, which would bring the UK closer into line with other major economies, where jurisdiction is assessed before an agency starts investigating or sending substantive questionnaires. This would avoid resources being wasted investigating transactions that are ultimately found to fall outside of the CMA's jurisdictional ambit.

The CMA should also be required to explain to the parties to mergers called in for review the basis on which the CMA considers it has or may have jurisdiction. The CMA's current practice, which does not require this, risks making the UK merger regime appear arbitrary, with the parties unaware of the CMA's analysis and so unable to respond to this, for example if a mistake has been made.

(ii) **Enable parties to shorten pre-notification:** It is now common for the CMA to require an extended "informal" period of investigation (referred to as "pre-notification") before the formal Phase 1 review period begins. Pre-notification was originally intended as a short period to allow some "space" for discussions before formal notification. However, it is now normal for pre-notification discussions to last a minimum of 2-4 months with a tendency towards 6-12 months in other cases).[4] This means that deals cleared at Phase 1 in the UK often involve a longer (and sometimes much longer) review than other major European jurisdictions apply in complex cases that have gone through an in-depth Phase 2 investigation:

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[3] See, e.g., CMA, ME/6891/20 *Completed acquisition by Facebook, Inc. of GIPHY, Inc.("Facebook/GIPHY")*, Notice of extension, 10 September 2021; CMA, *ME/6806/19 Anticipated acquisition by Sabre Corporation of Farelogix Inc.,* Final Report, 9 April 2020, paragraphs 11.95-11.102.

[4] See, e.g., CMA, *Anticipated Acquisition by Facebook, Inc. of Kustomer, Inc.* (pre-notification was >8 months); *Facebook/GIPHY* (pre-notification was >7 months).

Jurisdiction	Review timelines			
UK	Pre-notification *(c.2-4 months)*		Phase I *(40 WD)*	Phase II *(24 weeks)**
France	Phase I *(25 WD)*	Phase II *(65 WD)*		
Germany	Phase I *(one month)*	Phase II *(four months)*		
Spain	Phase I *(one month)*	Phase II *(two months)*		

* At this (indicative) scale, the UK Phase II period would of course extend significantly to the right of the chart.

To reduce the burden and cost of UK merger control, and bring review periods into line with other major economies, there should be an option for parties to shorten pre-notification to a specified number of weeks (i.e., a "fast track" to Phase 1).

Instead of responding to multiple rounds of wide-ranging questions over several months, the parties should be able to ask the CMA for a single RFI setting out the minimum information necessary for the merger notice to be considered complete. Phase 1 would then begin within one week of submitting that response, unless the CMA can demonstrate that information that is necessary to carry out a substantive assessment was omitted without reasonable justification. To ensure the fast-track process is not derailed by overly burdensome RFIs, the CMA should produce a template "fast-track RFI" setting out the types of information that will be required.

(iii) **Encourage the CMA to identify areas of concern earlier in Phase 1:** While the CMA process is long and intensive, it leaves little opportunity for substantive engagement between the CMA and merging parties, who typically have to wait several months before the CMA sets out its substantive concerns in an "Issues Letter". In *Facebook/GIPHY*, for example, despite responding to over 300 questions from the CMA in pre-notification, across multiple RFIs and submitting tens of thousands of internal documents, Facebook had to wait nearly nine months to find out the CMA's main concerns in its Phase 1 Issues Letter.

By the time the CMA has drafted and provided the Issues Letter, which increasingly represents a provisional Phase 1 decision, the CMA's views are at risk of being entrenched. The parties are then typically given only 48 hours to review and consider the Issues Letter and prepare an oral and written response, including any supporting evidence.[5] Early discussion between senior CMA officials and the merging parties would allow for a more focused review, with (i) simpler cases being progressed more quickly, and (ii) key issues being prioritised in more complex cases.

This is contrary to best practice in other jurisdictions. For example, for mergers before the European Commission, senior Commission officials

[5] CMA, *Mergers: Guidance on the CMA's jurisdiction and procedure*, paragraphs 9.21-9.32.

engage with the parties at the Phase 1 state of play meeting.[6] In a similar way, at the start of the formal Phase 1 review a CMA director or senior director should inform parties of the case team's emerging thinking, which would focus discussions and make better use of the time before the Issues Letter process.

The parties should also be afforded a longer period between the Issues Letter and Issues Meeting, allowing them more time to meaningfully respond to the theories of harm, and enabling the CMA to ground its Phase 1 decision on a more complete evidence base. Facebook proposes that merging parties are guaranteed a minimum of 5 working days to prepare for the issues meeting and a further 5 working days to respond in writing, which would go at least some way to addressing the imbalance between the CMA's having several months to build its case and the parties having 48 hours to rebut it.

(iv) **Greater access to Inquiry Group at Phase 2:** Merging parties have little opportunity to engage directly with Inquiry Group members. They will attend site visits and hearings, but these happen only a handful of times over the course of a six-month investigation, are formal occasions and do not allow for open and frank discussions. Other exchanges with the Inquiry Group must be made through the case team, who synthesise and present the evidence. Direct interaction between the Inquiry Group and the parties would provide greater clarity, avoid misunderstandings, and increase efficiency.

The lack of access to the Inquiry Group is most counterproductive during the final weeks of an inquiry, when merging parties find themselves trying to devise remedies in unnecessary isolation. To address this, Facebook proposes that merging parties should be able to engage in "across the table" exchanges, to increase the prospects of agreeing the most effective and least onerous remedy available in the prescribed time period. Such practices are already common before other authorities, like the European Commission.

(v) **Improve file access:** The CMA is not required to, and does not, provide merging parties with access to its case file in merger investigations. It is required only to provide the "gist" of the evidence on which it intends to rely, which cannot be tested and/or verified (other than by application to Court).[7] The CMA is also not required to provide a balanced view of the evidence, which means that the CMA risks withholding exculpatory evidence. Consistent with sound principles of administrative law and procedural fairness, merging parties should be afforded the fullest possible access to the entire body of evidence available to the investigative agency. Consistent with the European Commission's practice, this should include providing merging parties with full access to the case file during Phase 2 (e.g., after publication of the Issues

[6] European Commission, *Best Practices on the Conduct of EC merger control proceedings*, paragraphs 30-33.

[7] See, e.g., *Ryanair Holdings plc v. Competition Commission* [2014] CAT 3.

Statement), and the CMA's decisions should risk annulment where file access has been incomplete.[8]

The current approach is not only out of step with international best practice, but also more likely to lead to unfair outcomes. Merging parties have no way to verify whether the "gist" of the evidence that they are given is reliable, accurate or complete. Without access to the underlying documents and the opportunity to assess their content, context, and tone, it is impossible to determine their credibility and probative value. The CMA's approach is also lacking adequate justification. The process is designed to protect the confidentiality of third-party evidence, but this is much better dealt with by providing access to outside counsel under the terms of a confidentiality ring.

Affording merging parties full access to the CMA's case file is fundamental to, and necessary for, merging parties' rights of defence.[9] It would also promote efficiency in the merger process by avoiding costly, time-consuming, and unnecessary appeals to the CAT for more complete disclosure. Limiting this approach to cases that are referred for a Phase 2 investigation ensures that this procedure would be used in a proportionate manner in complex cases.[10]

(vi) **Reduce burden of document production:** One of the principal reasons for the burden and increasing length of merger investigations is the CMA's growing reliance on internal documents. The CMA routinely requires the production of thousands, sometimes hundreds of thousands, of internal documents,[11] often using formal information requests (section 109 notices) which carry a threat of financial penalties. The Government is proposing to increase these penalties substantially to bring them "*into line with international norms*."[12] Before doing so, the CMA's rules for document review and production should also be brought into line with international best-practice, including:

a. The CMA should seek to agree the scope of any document production exercise in advance, including the relevant IT systems, custodians, and "key words" searches, as well as realistic timelines.

b. The CMA should dispense with indexing and referencing which is time-consuming and difficult to accomplish, often involving subjective

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8 See, e.g., Cases T-5/02 and T-80/02 *Tetra Laval BV v. Commission EU:T:2002:264 and EU:T:2002:265*, paragraph 89.

9 See, e.g., Opinion of AG Kokott, Case C-265/17 P UPS ECLI:EU:C:2018:628 ("[i]n a field such as merger control, in which the Commission has a wide discretion in substantive terms, observance of the procedural guarantees is of particular importance").

10 See, e.g., *Group Eurotunnel S.A. v. Competition Commission* [2013] CAT 30; *Ryanair Holdings plc v. Competition Commission* [2014] CAT 3; *HCA v. CMA* [2014] CAT 23, Ruling of 25 July 2014; and *Tobii AB v. CMA [2019]* CAT 25, Ruling of 25 October 2019.

11 In *Facebook/GIPHY*, the CMA collected over 280,000 internal documents and in *Sainsbury's/Asda* it collected c. 140,000 (see CMA, ME/6752-18 *Anticipated merger between J Sainsbury Plc and Asda Group Ltd*, Final Report, 25 April 2019, paragraph 8.33).

12 Consultation on Reforming competition and consumer policy, paragraph 1.218.

interpretation of responsiveness. It would be more efficient for documents to be provided to the CMA without indexing, which would allow them to identify relevant material more quickly using automated searching and artificial intelligence.

c. In circumstances where a transaction is subject to multi-jurisdictional review (investigating similar or the same issues), the CMA should engage with other agencies to ensure internal document requests are broadly consistent, which would enable, where possible, the production of a single universe of relevant documents.

(vii) **More constructive approach to response deadlines:** As noted, the CMA should afford merging parties a reasonable time to respond to the CMA's substantive arguments, and in particular the Issues Letter at Phase 1. The CMA should also engage more with merging parties on appropriate deadlines to respond to section 109 notices (particularly if the CMA is to be afforded greater power to impose very significant fines for non-compliance). Often the CMA will set deadlines to respond to RFIs, including requests for significant numbers of documents requiring relevance and privilege review, privilege logs, indexing, and methodology notes within wholly unrealistic timeframes. For example, in *Facebook/GIPHY* the CMA requested a response to a lengthy section 109 notice, comprising over 60 separate questions, with a deadline of just 1 week. Ultimately, the response took over a month to complete, and ran to over 100 pages (demonstrating just how intensive the request had been, and how impractical the one-week deadline). The CMA has even denied requests for minimal extensions of time of 24 hours to account for a US public holiday, where all key business staff were US-based (consistent with the main geographic focus of the deal). This is out of step with international best practices and is unjustified in the context of such lengthy investigations.

Proposal that risks undermining the legitimacy of the UK merger control regime

3.4. Facebook believes that the Government's proposal to empower the CMA to review mergers in which <u>any</u> merging party has (i) a share of supply of at least 25%, and (ii) a UK turnover of more than £100 million would conflict with the Government's aims to increase the efficiency and speed of investigations. It would instead increase uncertainty for, and the regulatory burden on, businesses when in many cases there will be no possible impact on competition.

3.5. **No case has been made for broadening the share of supply test.** The UK has two alternative jurisdictional tests. One is clear and based on the target's turnover.[13] The other, the "share of supply test", is less clear and is based on the merging parties' share of supply of goods or services "of any description" in which their activities overlap.[14] In recent years, the CMA has increasingly used the share of

[13] Mergers are subject to review in the UK if the target's UK turnover exceeds £70 million (with lower thresholds in certain sectors that raise possible national security and public interest issues.

[14] It has always been clear that the test may be satisfied by reference to goods or services "of any description," irrespective of whether they constitute a plausible antitrust market. This latitude gives the CMA considerable flexibility. But that flexibility was intended to be constrained by the legal requirement that there must be a horizontal overlap for the test to apply.

supply test in new ways to allow it to intervene in global deals with no real connection to the UK. For example:

(i) In ***Sabre/Farelogix***, the CMA used the share of supply test to assert jurisdiction on the basis of the putative overlap in the provision of services to UK airlines despite the target having only indirect sales to a single UK customer (British Airways) where the direct sales were made to a US customer (American Airlines).[15]

(ii) In ***Roche/Spark***, the CMA used the share of supply test to assert jurisdiction over two non-UK firms, despite the target not having generated any UK revenues. The CMA determined that the test was met by reference to the merging parties' shares of UK-based research personnel engaged in a specific type of gene therapy research.[16]

(iii) In ***Mastercard/Nets***, the CMA used the share of supply test to assert jurisdiction despite the target submitting that it had no UK assets or activities or future business activities in the UK. The CMA determined that the test was met because the target registered to make itself available for certain UK procurement projects.[17]

(iv) In ***Facebook/GIPHY***, the CMA has provisionally found that it has jurisdiction under the share of supply test despite GIPHY not having any UK revenues or presence; GIPHY is merely accessible to UK users over the internet.

3.6. The CMA's recent approach to applying the share of supply test in novel ways means it is becoming impossible for merging parties to predict or plan for CMA review. Uncertainty is particularly onerous for smaller businesses, in particular when competing in a global market for investment. The uncertainty of the UK regime is unique amongst advanced economies.

3.7. A further extension of the share of supply test is unwarranted unless it is accompanied by a clear reset in the way the CMA must interpret the test in practice, so that it adopts a more predictable approach. Otherwise, the already considerable uncertainty that exists over the application of the share of supply test will be magnified.

3.8. Facebook believes that the case for a more expansive jurisdictional test in the UK has not been made. And, even if it had, the current proposal would be inappropriate because it does not constitute a "jurisdictional" test in any meaningful sense; it requires no deal-specific nexus to the UK whatsoever. To illustrate the point, the test could be satisfied by the acquisition of a target with no UK revenue, presence, customers, or end-users.

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15 CMA, ME/6806/19 *Anticipated acquisition by Sabre Corporation of Farelogix Inc.*, Final Report, 9 April 2020.

16 CMA, ME/6831/19 *Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.*, Decision of 16 December 2019.

17 The CMA requested that the case be referred to the European Commission under Article 22 of Council Regulation (EC) No 139/2004.

3.9. Given the flaws in the share of supply test, Facebook agrees that reform of the UK's jurisdictional rules would be appropriate. Facebook proposes the following three alternatives, each of which would be more effective than the current approach, by increasing certainty for businesses, reducing unnecessary burdens, and strengthening the UK's position as an attractive place for investment:

(i) **Mandatory regime with turnover-based thresholds.** The clear consensus within the international competition community is that merger enforcement should include "*bright-line*" rules based on "*clear and objective criteria*".[18] A mandatory regime with turnover-based thresholds set at appropriate levels would increase certainty and avoid the enormous burden on businesses that derives from the CMA's intervention in completed mergers that parties did not (and could not) reasonably contemplate would be called in. The Government is considering a mandatory regime in its Digital Markets consultation, and if it is deemed suitable in that context, Facebook believes it should be introduced economy wide.

(ii) **Predictable share of supply test.** If the UK's voluntary regime and share of supply test are to be retained, which appears to be the Government's preference (at least for firms not designated with Strategic Market Status ("SMS")), the CMA should be required to apply the test in a more predictable manner. It is plainly unsatisfactory that merging parties cannot easily determine whether a given transaction may fall within the scope of UK merger control rules and is contrary to international best practice, as highlighted above. To address this, the CMA should assess merging parties' shares of supply by reference to established market definitions and publicly available market data, where available. As noted above, the CMA should also share with the parties the basis on which they consider they may have jurisdiction and provide an opportunity for the parties to comment on this before a Phase 1 review is opened. This would assist the CMA to determine jurisdiction quickly and in any event before opening an investigation.

(iii) **Transaction-value threshold.** Facebook appreciates the balance to be struck between promoting legal certainty in merger enforcement and ensuring anti-competitive mergers do not slip through the net. A mechanism to address the latter risk could be to introduce a transaction-value threshold. The Government is consulting on such a threshold for SMS firms and Facebook believes that it may provide a more reasonable basis for economy-wide reform than the new share of supply test that the Government is contemplating.

A transaction-value threshold combined with an objective and verifiable UK nexus requirement (e.g. a certain level of sales or assets, or number of personnel in the UK) would be as effective in catching potentially harmful mergers as the share of supply test, and would be much clearer and less onerous for businesses. Unlike the share of supply test, this approach

[18] See, e.g., International Competition Network, Recommended Practices For Merger Notification and Review Procedures, amended May 2017; and Recommendation of the OECD Council on Merger Review, 23 March 2005.

would also ensure that the CMA has jurisdiction only over deals with a meaningful UK connection, thereby promoting the competition community's widely-recognised and accepted ambition to ensure that merger control is not unduly "*burdensome for either businesses or competition authorities [and] transaction [are] notifiable only when they have an appropriate local nexus*".[19]

4. Competition Act cases

Efficiency-enhancing reforms

4.1. Facebook agrees that it is important for the CMA to "*quickly and efficiently identify and fix anticompetitive conduct*."[20] Accordingly, it supports reforms that pursue these aims, so long as they are accompanied by corresponding safeguards to protect due process. In particular:

(i) **More efficient settlement process:** Reliance on admissions of facts or liability without having to corroborate it with evidence would enable the CMA to issue short-form settlement decisions by default, which would save the CMA and businesses from substantial and unnecessary time and cost.

(ii) **New settlement tool for abuse of dominance:** Early Resolution Agreements – not requiring an admission of liability or dominance – could speed up investigations, although the CAT's approval should not be required as it would build back in unnecessary delays.

(iii) **Streamlined decision making:** The appointment of a Case Decision Group ("CDG") is designed to ensure a "fresh pair of eyes" after a statement of objections, which is important to avoid confirmation bias and group-think, and to more broadly ensure robust decision-making. The requirement to include panel members within a CDG can, however, lead to delays and inefficiencies. Accordingly, there is scope to streamline the decision-making process, provided reforms to achieve this do not come at the expense of the fresh pair of eyes.

Additional proposals to further increase efficiency of Competition Act cases

4.2. Facebook considers that further improvements – not raised in the consultation – could also be made to the Competition Act process to improve efficiency. In particular, Facebook recommends:

(i) **Statutory deadlines for Competition Act cases:** To reinforce the above proposals, the Government should consider introducing statutory deadlines for the completion of Competition Act cases. There could, for example, be a deadline for issuing a Statement of Objections and a deadline for issuing a final decision after the Statement of Objections had been issued. There could be clear specified circumstances in which the

[19] OECD, *Executive Summary of The Roundtable on Jurisdictional Nexus in Merger Control Regimes*, 15 June 2016.

[20] Consultation on Reforming competition and consumer policy, paragraph 1.175.

deadlines could be extended, for example 'stop the clock' provisions where the parties had not provided information on time or where settlement discussions were underway.

(ii) **Encouraging the CMA to identify areas of concern earlier in the investigation:** As with the merger control process (on which, see paragraph 3.3(iii)), the Competition Act process currently leaves little opportunity for substantive engagement between the CMA and the parties under investigation, who often have to wait many months (and sometimes years) to understand the substantive issues. The CMA does not typically set out its provisional thinking until shortly before the internal decision is made on whether to issue a Statement of Objections. By that time, the CMA's assessment of the issues and evidence risks having become entrenched. The parties are then given only a maximum of 12 weeks to respond to the Statement of Objections and persuade the CMA to move away from a position it has formed over several years.[21] Early discussion between senior CMA officials and the parties would allow for a more focused investigation, with (i) simpler cases being progressed more quickly, and (ii) key issues being prioritised in more complex cases. It would also facilitate both the early resolution of cases through settlement where there has been a clear-cut infringement and early closure of cases by the CMA where there has been a misunderstanding of the facts by the CMA.

Proposals that risk undermining the legitimacy of Competition Act enforcement

4.3. Facebook is concerned that some of the Government's proposed reforms for Competition Act cases would make it easier for the CMA to intervene at the expense of limiting rights of defence and reducing the legitimacy and fairness of the CMA's processes, which would ultimately increase the risk of non-robust and unsound decision-making. In particular:

(i) **Interim measures require checks and balances:** Interim measures are currently used sparingly and are subject to strict procedural safeguards because they are imposed before a comprehensive investigation or any finding of unlawful conduct and can have substantial and irreversible implications for business operations and competition. For instance, interim measures may undermine the competitive process by inadvertently picking winners and losers, and may prevent businesses from launching new products or services that would have benefited consumers.

The current procedural safeguards reflect the need to carefully balance the risks of *erroneous* intervention with the risk of *delayed* intervention to prevent harmful conduct. The Government's proposals disrupt this balance, increasing the risk of erroneous intervention. First, it is unclear whether removing the requirement to provide access to the underlying evidence and lowering the standard of review would speed up intervention. If the CMA has evidence to support its decision, this can be sent to the parties, reviewed and verified very quickly. It is also uncertain

[21] CMA, *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*, paragraph 12.3.

whether a lower appeal standard is any quicker. Second, even if intervention were accelerated, the reformed rules would fall well short of "*providing sufficient protection*" to prevent unsound decisions.[22]

(ii) **It would be inappropriate to lower the standard of review:** Full merits review is justified by the quasi-criminal nature of Competition Act offences, which can result in significant penalties (of up to 10% of global group turnover).[23] The case for lowering the appeal standard has simply not been made. In circumstances where the CMA is empowered to impose fines of billions of pounds for infringing conduct, even for novel and untested theories of harm, it is not enough that the CMA's decisions are legal, or followed the correct procedure, or that they are not so irrational that no reasonable competition authority could have reached them. The CMA's decisions should be robust and sound, based on the correct interpretation of competition law and backed up by strong and compelling evidence.

Under the judicial review standard, the CAT is required to afford the CMA a "*wide margin of discretion*"[24] and therefore has no power to ensure that the CMA is reaching the correct decisions. As the Ministry of Justice has stated: "*Judicial review is the process by which a court reviews the lawfulness of a decision or action made by a public body, specifically looking at how the decision was made, rather than the rights and wrongs of the conclusions reached*."[25] Proposals to loosen the CMA's evidentiary standard or remove internal safeguards (such as with regard to interim measures, discussed above) would therefore only increase the need for proper judicial oversight.

Facebook believes that any lowering of the standard of review, and the corresponding accountability of the CMA for its decisions, would lead to less robust and less sound decision-making. As a result, the Government's reform could have the opposite effect to that intended by the reforms by increasing the length of proceedings and the burden on businesses. This is for two reasons. First, if parties consider the CMA's decisions unsound and unsupported by the evidence, they are more likely to challenge them (leading to appeals that could have been avoided). And second, judicial review can take longer than full merits review in any event because it can involve not only a court hearing[26], but also a remittal of the

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22 Consultation on Reforming competition and consumer policy, paragraph 1.169.

23 This review standard is also clearly justified when the decision is taken in a complex or novel market setting that is subject to dynamism, such as that subject to the new digital markets regime proposed by Government. See further Facebook's Response to the Consultation on a New Pro-Competition Regime for Digital Markets.

24 See, e.g., *Sabre Corporation v CMA* [2021] CAT 11; *Ecolab Inc. v CMA* [2020] CAT 12; and *Tobii AB (Publ) v CMA* [2020] CAT 1. The Government's consultation on the pro-competition regime also recommends that for "appeals against decisions to impose significant financial penalties" it may be necessary "for the courts to go further than merely reviewing the legality, reasonableness, or fairness of the process" (see *A new pro-competition regime for digital markets*, July 2021, paragraph 152).

25 Ministry of Justice, *Response to Judicial Review Reform Consultation, July 2021* (emphasis added).

26 From 2006-2016, hearings on judicial review grounds took over 11 months to complete (see fn. 26).

decision back to the CMA and time to reach a new decision (which is the usual consequence of a successful appeal on judicial review grounds).[27]

Moreover, there are more effective and appropriate ways for Competition Act cases to satisfy the timing imperative than by removing the checks and balances that exist to ensure robust and fair decision making. In particular, as the CMA has accepted in the past,[28] there is substantial scope for efficiencies in the CMA's investigation process (see paragraph 4.2(i)). Indeed, the average period from the opening of an investigation to the date when the OFT or CMA has adopted an infringement decision is approximately 29 months.[29] By contrast, the average period for a full merits appeal to be determined is approximately 12 months.[30] And the CAT could be given strict and shorter deadlines by which to reach a decision, as is the case for appeals in certain regulated sectors (e.g., water and energy).

5. Consumer law reforms

5.1. While Facebook generally supports the consumer law reforms, it will be important to ensure that rigorous procedural safeguards are put in place to ensure that there are sufficient checks and balances before the CMA issues a decision. Given the extremely high level of fines that are proposed, which are equivalent to Competition Act fines, it is essential that a full merits appeal regime be put in place to ensure that the CMA exercises its powers fairly and in compliance with the law. The CMA should also be required to issue guidance on how it will calculate financial penalties, as it does for Competition Act cases, to ensure that penalties are calculated in a fair and transparent manner.

6. Interplay between the competition regime and proposed digital markets regime

6.1. Facebook agrees that there are "important interactions between existing regulatory regimes and the new pro-competition regime," which require care to (i) ensure the "regulatory landscape is streamlined and effective, minimising unnecessary burden," and (ii) avoid "duplicating responsibilities."[31] But parallel proposals to extend the CMA's jurisdiction to review mergers in general (see

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27 See, e.g., CMA, ME/6866/19, *Completed acquisition by FNZ of GBST*, Final Report, 4 June 2021 (after FNZ challenged the CMA's decision successfully, the CMA required a further c. 6 months to reach a new decision accepting a partial rather than full divestment remedy; and CMA, ME/6827/19, *Completed acquisition by JD Spots Fashion plc of Footasylum plc*, Administrative Timetable 29 July 2021 (the CMA's final decision is due in October 2021, c. 11 months after the CAT identified issues with the CMA's assessment of the impact of Covid-19).

28 Dr Michael Grenfell, *UK Competition Law enforcement: the post-Brexit future*, 11 June 2019 ("*[i]f the system as a whole – the CMA, the economic regulators, the courts – is to be able to cope with the much larger and complex cases […] then making the system nimbler, swifter and more effective becomes absolutely imperative*").

29 Oxera, *Are competition appeals taking too long?*, 28 February 2020.

30 See fn 29.

31 Consultation on new pro-competition regime for digital markets, paragraphs 36, 38, and 48.

paragraphs 3.4 to 3.9 above) and also in digital markets appears both unduly burdensome and duplicative.

6.2. **No need for multiple tools to investigate digital mergers:** As noted, the case for expanding the CMA's jurisdiction has not been made. Even if it had, there is no justification provided for introducing a new jurisdictional threshold for all mergers as well as a regime for SMS firms specifically. Multiple, overlapping UK merger regimes for SMS firms would increase complexity and regulatory burden, without any demonstrable benefit to consumers.

6.3. Moreover, it is unnecessary to introduce this additional complexity when there are a number of economy-wide solutions that would address the Government's apparent concerns whilst also avoiding unnecessary burdens and expense for businesses (see paragraph 3.9 above). Facebook provides further comments with respect to the proposed reforms in digital markets, in its Response to the Consultation on a New Pro-Competition Regime for Digital Markets.

7. Conclusion

7.1. Facebook welcomes the Government's efforts to refine the UK's competition and consumer rules. The consultation includes several commendable proposals that could improve the efficiency of the CMA's processes, and reduce burdens on businesses (and the CMA), without undermining the robust, fair, and evidence-based nature of the UK regime, which has won the confidence of the international business and legal communities.

7.2. A number of the proposals would, however, expand the CMA's investigatory and enforcement powers without the corresponding checks, balances or judicial oversight. As such, these proposals would threaten the equilibrium – fundamental to any legitimate regulatory regime – that finely balances the promotion of quick and incisive regulatory intervention with the protection of parties' rights of defence and procedural fairness. The loss of such protections increases the risk of the CMA making substantively flawed decisions, harming both businesses and consumers. This could also ultimately harm the UK economy by having a chilling effect on investment and innovation. They would, further:

(i) **Erode legal certainty** by further reducing and blurring the threshold for intervention in legitimate business operations (see paragraphs 2.2(i), 3.5, and 4.3(i)), and allowing the CMA to change the scope of its decisions without carrying out a full evidence-based assessment (see paragraphs 2.2 (ii)-(iii));

(ii) **Impose unjustifiable regulatory burdens** on businesses by extending the CMA's jurisdiction over a greater number of unproblematic mergers (see paragraph 3.4 to 3.8), and having duplicative merger regimes for certain businesses (see paragraph 6.2); and

(iii) **Undermine due process**, for example by allowing the CMA to prematurely impose interim measures (see paragraphs 2.2 (i) and 4.3(i)) and lowering

the standard of review on appeal for Competition Act cases (see paragraph 4.3(ii)).

7.3. The Government's proposals to facilitate greater regulatory intervention and discretion, while at the same time reducing accountability, are not justified. There is a real risk that the assumed benefits would be outweighed by harm to the legitimacy of the UK regime and its reputation with the business community (UK and international) giving the CMA arbitrary powers to intervene when it wanted, with insufficient legal protections to ensure robust, evidence-based decision-making. This would damage the excellent work carried out over the years by the UK and the CMA, encouraging competition agencies around the world to have clear jurisdictional criteria and apply competition law rules in a fair and transparent way based on the evidence in the case.