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USE KNOWLEDGE. TAKE ACTION.

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To whom it may concern,

Re: Consultations

Introduction

This letter contains Fideres's response to the two parallel consultations launched by the Government in July 2021. The first, "Reforming Competition and Consumer Policy" proposes a series of policy changes. Here we focus on those relating to competition policy. The second, "A New Pro-Competition Regime for Digital Markets" contains the Government's proposals for a new ex-ante regulator of digital markets. Given the breadth of the topics examined we do not seek to answer every question. Rather we limit ourselves to those on which we have clear and well-informed views. We draw on Fideres's experience in antitrust litigation, as well as international best practice and the latest academic research on the issues.

Consultation: Reforming Competition and Consumer Policy

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

The CMA's state of competition report is an impressive start. However, it unfortunately makes no effort to measure the existence of monopsony market power in the UK. A Bank of England working paper has made a start here (Abel, Terneyro, and Thwaites, 2018), and Langella &

Manning (2021) build upon that. Azar et al (2019)[1], Azar et al (2020)[2], Dube et al (2020),[3] Marinescu & Hovenkamp (2019),[4] and Naidu, Posner & Weyl (2018) all examine the issues in a US context.[5]

This perhaps is a result of the wording of the CMA's duty which specifies consumers as the only beneficiaries of competition law. However, as is being clarified during the current debates in the US over the consumer welfare standard (which we understand the CMA are committed to), the consumer welfare standard is not meant literally to include only consumers. Instead, the 'consumer' in the consumer welfare standard should read 'counter-party' and hence reflect the prospect that counterparties to monopolists may suffer abuse at the hands of those monopolists (see Hovenkamp, 2019). The CMA has previously recognized the risks of monopsony market power building up through mergers (see 2010, merger guidelines, 5.4.19), which might suggest that harm to competition that adversely effects buyers (and not consumers) is relevant to the CMA's analysis. In that case this could be helpfully clarified within the primary duty. However, if that is not the case, and adverse effects on competition that do not affect consumers are intentionally exempted from competition law, then the government should reflect on the fact that this leaves a hole in UK competition law that leaves it weaker and misaligned with best practice in other parts of the world (most notably the US, see OECD, 2019).

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

Yes. If the CMA is asked to conduct the task, it must be given the powers and resources that are necessary to obtain the evidence it needs. Notably in other countries these powers might instead be given to a productivity commission, however there is at present still no such a body in the UK.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

No. Doing so would limit the CMA's ability to prioritize, since it would need to be ready to drop priorities and re-prioritize in response to increasingly frequent and specific steers from government. This would entail reducing the planning horizon on prioritization and limiting the opportunities that might be investigated.

Instead, the government, should, as part of its levelling up agenda, follow the successful experience of giving the Bank of England a Secondary Competition Objective (endorsed by the OECD, 2017) by giving the CMA a Secondary Inclusivity Objective (as proposed in Pike, 2021). This would help it to fulfill its primary duty to promote competition, in the most inclusive way possible. It would also improve policy coherence. For example in the case of the Bank of England this secondary objective has helped the Bank to fulfill its primary duty in the most competitive way possible.

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[1] Azar, J., Berry, S., and Marinescu, I. E. (2019). "Estimating labor market power", SSRN 3456277
[2] Azar, J., Marinescu, I., Steinbaum, M., and Taska, B. (2020). "Concentration in US labor markets: Evidence from online vacancy data", Labour Economics, vol. 66, 101886.
[3] Dube, A., Jacobs, J., Naidu, S., and Suri, S. (2020). "Monopsony in online labor markets", American Economic Review: Insights, vol. 2, no. 1, pp. 33-46.
[4] Marinescu, I.E., and Hovenkamp, H. (2019), "Anticompetitive Mergers in Labor Markets", Indiana Law Journal, vol. 94, Issue 3, Article 5.
[5] Naidu, S., Posner, E. A., and Weyl, E. G. (2018). "Antitrust Remedies for Labor Market Power", Harvard Law Review, vol. 132, 536.

This might then be complemented by shorter term steers from government but would enable the CMA to set out longer term prioritization plans and analytical reforms that would allow it to meet that secondary objective.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

No comment.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

No comment.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

Yes. Dynamic markets have sometimes been misunderstood as being 'competitive' markets that are prone to disruption. In fact, a dynamic market is simply one in which changes happen fast. This might be a change towards competition (e.g. the unravelling of a dominant position, though the speed of such a change does not make such a change likely), or a change towards monopolization (the impact of anticompetitive behavior is then to quickly result in foreclosure and monopolization). In these circumstances it is important for the CMA to be able to quickly impose interim measures to prevent the damage becoming irreversible. While the risk is that certain efficiencies might be temporarily prevented, it should be recognized that this is temporary, whilst harm to competition may well be permanent. Therefore, the judicial standards on interim measures should not deter the CMA from applying them, indeed an apparently 'perfect' record of imposing interim measures that are ultimately adopted should be recognized as an insufficiently cautious defense of competition.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

No comment.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Allowing the CMA to revisit remedies and strengthen those that have proved ineffective would be a valuable contribution. In doing so the CMA may wish to identify (perhaps internally) an ex-ante measure of the effectiveness of its remedy which it can use to assess the effectiveness of the remedy.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

In the EU the white paper on foreign subsidies has identified a framework for identifying distortions of competition in European markets that have been caused by foreign governments directly or indirectly subsidizing state-owned enterprises or privately-owned national champions. These distortions could potentially already be examined as part of a market investigation. In meeting its (soft law) obligations to provide for competitive neutrality within its markets (as set out in the recent OECD recommendation on Competitive Neutrality), the government and the CMA might also want to reflect on whether they currently have the necessary tools and international cooperation agreements to understand the extent and effect of such distortions, or indeed the tools to remedy those distortions where they are identified.

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

The OECD have suggested that the share of supply test offers valuable flexibility, and so the test should be retained. However, the proposal to change this to the share of supply of one firm would be helpful in ensuring that the CMA is able to examine potential killer acquisitions.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

No comment.

Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

No comment.

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

Yes, the proposed reforms would help. However considerable thought should be given to the composition of the CMA Panel. More independent academics and more economists on the panel would be valuable. The risk of a revolving door with firms and their advisors should also be transparently addressed. For example, the number that have worked for, or represented firms should be limited on any given case (and balanced across those with defendant and complainant side experience). There should also be some restrictions on panelist's ability to switch to the firms (or to work for those that represent them) after their term expires. This is not to avoid the passing of sensitive information, but to reduce the implicit threat to future employment opportunities that firms may otherwise wield over panelists (and staff) that might intend to switch roles further on in their career. While it is important to bring applied experience from business onto panels, this can also be achieved via a one-way street (panelists drawing on past applied experience), or in a consultative non-decision-making capacity, it does not require taking the additional risk of permitting a revolving door to operate.

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

Yes.

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

No comment.

Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

If the immunity thresholds are revised for agreements of minor significance, the immunity should apply only to agreements to which *all* the business that are a party have a combined

annual turnover of less than £10 million. This would preserve the ability to enforce against low-turnover high-valuation firms that might form agreements with large incumbents. Given the focus upon these in the case of killer acquisitions it would be inconsistent to start introducing exemptions for the same types of firms.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

The risk is that this will incentivize leniency applications, but may also incentivise participation in cartel agreements. For example, it will be important to see whether a possible increase in leniency applications is sufficient to outweigh the more direct and immediate increase in the expected returns on participating in a cartel (this follows from the reduced average liability for each member of a discovered cartel). The sensitivity of leniency applications to prospective damages will therefore be key. However there does nt yet appear to be good evidence on this point. OECD data confirms that leniency applications are on balance falling around the world, however it is perhaps notable that this appears to be occurring in different types of jurisdictions with a variety of different types of follow-on damages legislation. In addition in many jurisdctions it is increasing. This might therefore suggest an alternative explanation. It may therefore be worthwhile exploring the data in more detail before leaping to the assumption that liability explains this change. Certainly, there are self-serving reasons for firms themselves to argue for this and so such arguments should be evaluated with due skepticism.

Indeed, academic research and the practical experience of the US Securities and Exchange Commission (SEC) suggest that a much more effective reform to encourage the discovery of misconduct would be to make available to individual whistleblowers a percentage of the fines that follow from their evidence. While the CMA is unusual, and indeed a leader amongst competition agencies in already offering small payments to whistleblowers, the level of these offers little or no protection against the often career-destroying consequences of whistleblowing to an agency. Rather than withdrawing liability for cartelists, the government would therefore be better advised to introduce SEC-level percentage-of-fine incentives for individual whistleblowers, as well as a duty to report, and additional protections (since these have been found to be particularly valuable in motivating women to blow the whistle, see OECD, 2018).

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

No comment.

Q19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

No comment.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

Removing the requirement for an admission of infringement will inevitably weaken the effectiveness of competition law by reducing the deterrence effect. The deterrence effect is

estimated to be 5 times the harm of the specific cartel in question (Davies & Ormosi, 2016). Therefore, it makes no sense to reduce deterrence in order to bring about an early resolution which is of significantly less value to consumers.

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

This proposal, alongside a number of others in this consultation offers further assistance to protect cartelists against liability for their actions. Denying plaintiff's access to documents submitted to a voluntary redress scheme will again reduce the deterrence effect of competition law (which as noted is much larger than the possible redress that can be obtained from an individual redress scheme). These proposals therefore misguided.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

No comment.

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

No comment.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

In our view the level of judicial scrutiny for Competition Act decisions should be aligned with that in other areas in which the CMA's expertise is applied – notably mergers and market investigations.

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

No comment.

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

No comment.

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

No comment.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

No comment.

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

No comment.

Consultation: A new pro-competition regime for digital markets

In our view the case for ex-ante regulation of digital markets is built upon:

- the apparent inability of ex-post investigations to deter or effectively remedy anti-competitive conduct in digital markets
- the often-inadequate speed and vigor of enforcement in digital markets
- the difficulty in effectively enforcing exploitative conduct rules in digital markets (without over-reaching, or under-enforcing and tending towards inactivity).
  - For example, in theory, exploitative abuse of dominance cases might be taken when a firm with substantial and entrenched market power raises price significantly above cost (or sets excessively low quality, or unreasonable limits on choice). However, these cases are difficult to analyze, and competition agencies and regulators evidently have neither the resources, nor the inclination, to prioritize these cases (except in rare cases where it is the taxpayer that is exploited), which is why these are often left to private enforcement.
  - Equally there is non-exclusionary conduct that does need to be addressed. For instance, the rational exploitation by a platform of cross-platform and direct network effects and learning-by-doing advantages that form natural barriers to entry. Similarly, the rational exploitation of behavioral biases (e.g. default positions), and the distortionary effects of exploitative self-preferencing need to be addressed, even where they are not exclusionary. While these could be run as exploitative abuse cases, ex-ante no-fault anti-monopoly tools might be a better option. For example, market studies can be effective in fulfilling this role in stable mature markets, though in digital markets the timescales are often inadequate.

Question 1: What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?

In our view the DMU should have a duty "to further the interests of consumers and citizens in digital markets, *by promoting competition*". The DMU should not have a duty to promote competition *and innovation*. Including "and innovation" opens the prospect of interventions that arguably promote innovation, whilst not affecting (or on balance outweighing) concerns over competition. The CMA should not be put in a position of needing to balance those factors.

Question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?

The DMU should have a duty "to further the interests of consumers *and citizens* in digital markets, by promoting competition". In particular, it should work to promote competition in order to address monopsony market power in labour markets. This is quite rightly an increasing focus of competition agencies around the world that have recognized the serious failure over many years to investigate such concerns. For clarity, this does not mean a public interest test in relation to impacts on employment (see South Africa). Instead, it means conducting market studies and investigations that consider theories of harm in which a loss of competition harms workers but not consumers. See OECD (2019) for an introduction and an

explanation of why protecting competition in the interests of consumers is not sufficient. This is important across markets (and hence the US FTC have stated they will now explore such effects in every merger they review), but particularly so in digital markets in which citizens and individuals offer services.

The DMU's duty should therefore be focused on competition, but with a view to *any* group of citizens that would be harmed by a lack of competition, it should not discriminate. However, neither should it be burdened with a broad range of wider public policy issues as some have argued (these would not be driven by a lack of competition and so can be put aside under the proposed duty). A broad public interest test would dilute the focus of the DMU. Instead, the government should follow the successful experience of giving the Bank of England a Secondary Competition Objective, which has been endorsed by the OECD (2017). This has helped the Bank to fulfill its primary duty in the most competitive way possible. Likewise, the DMU should be given a secondary *inclusivity* objective. This would help it to fulfill its primary duty to promote competition, but in the most inclusive way possible (See proposals in Pike, 2021). Such a secondary objective would be valuable for the CMA as a whole but might be trialed in respect of the DMU.

Question 3: Should we explore the possibility of reducing the cost of the Digital Markets Unit to the public sector through partial or full levy funding?

Yes.

Question 4: Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the best use of sectoral expertise, and why? Do we have the correct regulators in scope?

Regulatory coordination should not be left to informal arrangements. Best practice suggests a series of mechanisms to formalize cooperation and coordination and ensure sharing of information and expertise – see OECD (2017, 2019).

Question 5: How can we ensure that regulators share information with each other in a responsible and efficient way?

See above.

Question 6: What are your views on the appropriate scope and powers for the Digital Markets Unit's monitoring function?

We at Fideres are continuing to see a huge amount of competition concerns arising in a range of different digital markets, many of which seem unlikely to feature within the SMS regime. The DMU would indeed be well-placed to identify competition concerns in digital markets outside the scope of the SMS regime. Its expertise in such areas would be invaluable. Certainly, competition agencies that lack specific expertise in digital markets have made costly mistakes in the past, and so ensuring that this expertise is available beyond the small number of firms and markets within the SMS regime will be important in ensuring that digital markets and the digital economy in the UK thrives.

Question 7: What are the benefits and risks of limiting the scope to activities where digital technologies are a "core component"? What are the benefits and risks of adopting a narrower scope, for example "digital platform activities"?

A narrower scope such as digital platform activities will potentially provide scope for firms to spend time and energy arguing whether their products and services qualify as platforms or

not. We have already heard some argue that Search is not a platform (since websites that users look to connect to do not need to be brought onboard in the same way as other matching platforms, though this ignores the role of advertisers).

Question 8: What are the potential benefits and risks of our proposed SMS test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?

It remains unclear what the need for a strategic position adds:

- Assessing strategic position by the size of the firm sits oddly alongside the recognition elsewhere that the size of a firm is in itself uninformative in regard to market power.
- Requiring that the firm control a gateway seems to add little since firms with substantial and entrenched upstream market power will control key inputs, while those firms with substantial and entrenched downstream market power will control access to consumers.
- Similarly, there is always a risk that a firm with substantial and entrenched market power might use that position to further entrench or protect its market power in that activity, or to extend its market power into a range of other activities.

If a firm has substantial and entrenched market power it is therefore difficult to see what this additional requirement for a strategic position adds, other than providing additional grounds upon which such a firm might appeal.

The digital taskforce proposed that a strategic position means that the effects of its substantial and entrenched market power are likely to be particularly widespread and/or significant. While substantial market power should by definition have significant effects, the meaning of 'widespread' here is unclear. Might firms with an allegedly strategic position interpret this as relating to the degree to which they able to affect a proportion of the UK economy? Or could it be relative to a particular market? In that case, what sort of substantial and entrenched market power would not have widespread effects within a market? In our view the imprecision and lack of an economic basis for this additional requirement poses a risk to effective enforcement.

Question 9: How can we ensure the designation assessment provides sufficient flexibility, predictability, clarity and specificity? Do you agree that the strategic position criteria should be exhaustive and set out in legislation?

While agreeing that a mechanistic assessment should not be determinative, common mechanistic rules (perhaps reflecting those in other jurisdictions) would be helpful in setting out the *presumptions* and identifying where the burden of proof lies. For instance, the designation rules set out in the EU's draft DMA would form a helpful and consistent rebuttable presumption that facilitates cooperation and coordination, while still allowing that presumption to be rebutted by the firm in question based on the facts of the case (and with that rebuttal being assessed by the DMU).

Question 10: What are the potential benefits and risks of the Digital Markets Unit prioritising SMS designation assessments based on the criteria in paragraph 77?

No comment.

Question 11: What are the benefits and risks of the proposed SMS designation process? What are the benefits and risks of a statutory deadline of 9 months for SMS designation?

A shorter deadline would be facilitated by identifying a clearer mechanistic presumption that it is still possible to rebut with evidence (see above response to Q9).

Question 12: Do these three objectives correctly identify the behaviours the code should address?

The code (and indeed the PCI) should be there to address exclusionary and exploitative conduct. Between them these two types of conduct should cover the unreasonable restrictions on choice, and the extending of market power that are identified in paragraph 88 of the consultation.

To the extent that the three objectives enable these two underlying economic objectives to be achieved they are a useful alternative way for the DMU to categorize behaviors that the code will address.

Question 13: Which of the above options for the form of the code would best achieve the objectives of the pro-competition regime, particularly in terms of flexibility, certainty and proportionality. Why?

No comment.

Question 14: What are your views on the proposal to apply principle 2(e) (see Figure 4 below) to the entire firm? Should any explicit checks and balances be considered?

Agree 2(e) should be applied to the entire firm for the reasons set out in the consultation.

Question 15: How far will the proposed regime address the unbalanced relationship between key platforms and news publishers as identified in the Cairncross Review and by the CMA? Are any further remedies needed in addition to it?

No comment.

Question 16: How can we ensure the appropriate use of interim code orders?

No comment.

Question 17: What range of PCI remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?

Ownership separation should be available (with the same safeguards of appeal that firms enjoy under the market investigation regime). Failing to include ownership separation will introduce significant delays since if the work to identify an appropriate PCI were to lead the DMU to conclude that ownership separation is necessary (as is perfectly possible, see OECD, 2020), then the CMA would need to open a market investigation in order to apply the appropriate remedy. Furthermore, the absence (or lack of credible resort to) such a remedial option will impact upon the incentives for the firms to engage and co-operate with other interventions.

In addition, it is worth reconsidering an incremental approach that applies light-touch perhaps ineffective remedies at first and then scales them-up if they prove inadequate. Such an approach is cautious from the perspective of the firms, but not from the perspective of consumers who continue to suffer harm from the ongoing lack of competition while this tinkering is applied. While it is equally true that the DMU should not reach straight for disproportionate remedies, it should seek to balance these two concerns, and so there should not be 'a thumb on the scale' pushing them towards minor, often ineffective remedies to urgent issues.

Question 18: To what extent is the adverse effect on competition ("AEC") test for a PCI investigation sufficient for the Digital Markets Unit to achieve its objectives?

The AEC test is sufficient. Indeed, as noted in Q2 of our response to the Reforming Competition and Consumer Policy consultation, it avoids the unnecessary and unhelpful narrowing of scope to focus on effects on competition that are adverse only to consumers, rather than addressing *all* adverse effects on competition, that is, it includes effects on competition that are adverse to workers as well as consumers (two groups that together might be labelled as citizens). See proposals in Pike (2021).

Question 19: What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity, in the circumstances described above?

The benefit is one of effectiveness. Without being able to apply PCIs outside the designated activity the harm to competition will not be effectively resolved. This will require duplicative action to be taken under existing competition law or the market investigation regime.

Question 20: How appropriate are the proposed flexibility mechanisms set out above? Are there any associated risks?

No comment.

Question 21: What is an appropriate statutory deadline for a PCI investigation?

No comment.

Question 22: What powers and mechanisms does the Digital Markets Unit need in order to most effectively investigate and enforce against conduct occurring both domestically and overseas?

No comment.

Question 23: What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?

No comment.

Question 24: Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?

There should be transparency and restrictions on those recruited to the DMU in order to address concerns over a 'revolving door'. For example, the number of those that have worked for or represented the firms should be limited and there should be restrictions on staff's ability to switch to the firms (or to work for those that represent them). Not to avoid the passing of sensitive information, but to reduce the implicit threat to future employment opportunities that firms may otherwise wield over staff that intend to switch roles. While a dialogue between enforcers and defendants is important to maintain, the risks of a revolving door outweigh the insights that it might generate.

Question 25: What standard of review should apply to appeals of the Digital Markets Unit's decisions?

These should be ordinary judicial review standards. They should not include on the merits standards except where the same is applied within the market investigation regime. To do otherwise is to offer SMS firms an advantage over firms that face remedies as a result of the market investigation regime.

Question 26: What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with SMS?

For the regulation to have an effective deterrent effect will require that there is very significant redress from those firms that breach their obligations. Notably the redress that applies to standard competition law has proven incapable of deterring and reducing anticompetitive behavior and so there is no room for excessive caution here. The full range of mechanisms should be enabled – the DMU should be able to require redress and private enforcement should be facilitated through both follow-on and stand-alone claims, both by individuals and by relevant classes of citizens.

The intention not to stop or even curb an individual's right to pursue a private law action is to be welcomed. However, the proposal to deliberately avoid applying best practices measures to streamline private enforcement that complements public enforcement will undermine the effectiveness of the regime. As the governments of France, Germany and the Netherlands have identified, digital regulation (in their case the DMA), will not be successful if it relies exclusively on public enforcement. While the CMA, like the European Commission, may be optimistic in their ability to comprehensively enforce in a timely fashion, it would be prudent to ask them to demonstrate this before a decision is taken to remove the additional support from private enforcement efforts. As Rupprecht Podszun notes, this would also recognize, rather than waste, the efforts that have over years built up an imperfect system of private enforcement, and which can be applied almost off the shelf to the digital regulation regime.

Question 27: What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with SMS?

No comment.

Question 28: What are the benefits and risks of introducing a transaction value threshold, combined with a 'UK nexus' test, for firms designated with SMS?

Recent work by the OECD (2020) suggests a transaction value threshold (with a UK nexus test) would be a useful addition for those jurisdictions that rely on turnover thresholds. However, it also suggests that the share of supply test already in place offers sufficient flexibility to ensure that killer acquisitions can be reviewed, provided the agency is aware of them. Therefore, the combination of the share of supply test and the in-advance notification should be sufficient.

Question 29: What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with SMS?

No comment.

Question 30: What are the benefits and risks, particularly with regard to innovation and investment, of amending the substantive test probability standard used during in-depth phase 2 investigations to enable increased intervention in harmful mergers involving firms with SMS?

The benefits of amending the substantive test are set out by the OECD (2020) and in a recent proposal (Caro de Sousa & Pike, 2020). In essence, these are that decision-making on potential competition cases in the presence of uncertainty can be improved through a revision of the substantive test. While the proposal in Caro de Sousa & Pike (2020) has the advantage of maintaining the existing evidentiary standard, the proposal by the digital taskforce to introduce a realistic prospect test does offer a simple way to address the same concerns. It is

therefore to be commended, though notably any watering down of the 'realistic prospect' threshold would reduce its effectiveness. To the extent that a smaller change in the standard is considered it would therefore be preferable to instead adopt the proposal in Caro de Sousa & Pike (2020) and therefore keep the evidentiary standard as is, while introducing the 3-stage burden-shifting approach that is set out in the paper. This would ensure that the evidentiary standard in the merger test is maintained while at the same time addressing the problem of decision-making on potential competition cases. Notably the case for such changes is not limited to digital markets, and instead extends to all cases in which there is a concern over potential competition (for instance, pharmaceuticals and medical devices are two prominent sectors that would benefit, though there are undoubtedly others across the economy).

For the reasons described in these papers the risks are minimal and yet often overstated. For example, incentives for start-ups to innovate are said to be damaged by the risk that an acquisition by just one incumbent amongst a wide field of potential future acquirers will be blocked. As the OECD note, to the extent that those additional incentives exist and in practice motivate start-ups, they derive from the anticompetitive rent (monopoly profit) that stands to be created by such an acquisition. In that context such incentives for innovation would be excessive (akin to funding a moonshot with distortionary taxes, the value of which exceed any realistic evaluation of the positive spillovers of such a moonshot). Moreover, they would be distortionary since they would push innovators into producing products that monopolists would buy, rather than those innovations that consumers within the market would want.

Question 31: What alternative proposals should the government be considering to improve UK merger control for firms with SMS in a way that is proportionate, effective and minimises any risk of chilling investment or innovation?

See above.

Yours sincerely,

[redacted]

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