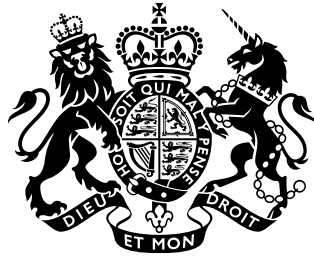




HM Government

Government response to the consultation on a new pro-competition regime for digital markets

May 2022



Government response to the consultation on a new pro-competition regime for digital markets

Presented to Parliament

by the Secretary of State for Digital, Culture, Media and Sport and the
Secretary of State for Business, Energy and Industrial Strategy
by Command of Her Majesty

May 2022



© Crown copyright 2022

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.uk/official-documents.

Any enquiries regarding this publication should be sent to us at digital-competition-consultation@dcms.gov.uk.

ISBN 978-1-5286-3298-0

E02740688 05/22

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of the Controller of Her Majesty's Stationery Office

Table of contents

Joint ministerial foreword	4
Executive summary	7
Part 1: Introduction	9
Part 2: The Digital Markets Unit	10
Part 3: Strategic Market Status	14
Part 4: Conduct requirements	18
Part 5: Pro-competitive interventions (PCIs)	24
Part 6: Regulatory framework	28
Part 7: Strategic Market Status merger reform	32
Annex A: List of respondents to the consultation	35
Annex B: Extended summary of consultation responses	36

Joint ministerial foreword



Digital technologies permeate almost every aspect of our daily lives. They are positively transforming the way we access information and services, how small businesses operate, and how we stay connected to colleagues, family and friends.

We are proud that the UK is a global leader in tech and innovation and that our government is boldly pro-tech. We are among Europe's top tech nations, with Manchester, London, Bristol, Oxford and Cambridge among Europe's top 20 cities for tech investment. Employment in the sector has grown by 40% in the last two years, accounting for 9% of the national workforce.

As we recover from the pandemic and take strides to level up the UK, unlocking the growth potential of digital markets has never been more important. We are fully committed to our pro-innovation, pro-enterprise vision for the economy.

This document summarises the responses to our public consultation on the new pro-competition regime for digital markets. We are delighted with the engagement in our consultation, from across the sector and beyond.

It is clear from the response we received that boosting competition in digital markets is a vital tool in realising our vision for the economy. There is an increasing consensus that economic growth could be even more impressive if we can ensure that there is vibrant competition in all digital markets.

Anti-competitive practices are bad for the economy, bad for small businesses, and bad for consumers. Evidence shows that a lack of competition is degrading the quality of people's experiences online, putting at risk the viability of companies dependent on dominant firms

and holding back innovation across the digital economy. The impact of weakened competition is stark - the Competition and Markets Authority estimates that Google and Facebook made excess UK profits of £2.4 billion in 2018 alone – harming consumers through higher prices.

In response to these challenges, a dedicated Digital Markets Unit has been established within the Competition and Markets Authority. Through our public consultation, you shared your views on the role and objectives of the Digital Markets Unit, the scope of the pro-competition regime for digital markets, the types of interventions available, and our plans to enforce it.

We are now setting out our response, explaining how we will empower our regime to proactively shape the behaviour of the most powerful technology firms with Strategic Market Status. We will pay close attention to the feedback as we move towards legislation.

By getting this right, we will all benefit. There will be increased growth and innovation for businesses of all sizes; better consumer experiences in the form of lower prices and more innovative products; and there will be greater certainty, trust and confidence in the UK tech ecosystem for innovators, investors and consumers alike.

Governments and regulators across the world are grappling with the challenge of regulating digital markets. Having left the EU, we can take our own, proportionate, pro-innovation approach that works for the UK. We can use the opportunity presented by Brexit to build on our existing advantages in a key growth sector, as identified in our [Plan for Growth](#). Compared to other emerging international regulatory regimes, we are building a more flexible and targeted regime that can better support innovation. This more proportionate approach will ensure that the UK remains a great place to start, grow and invest in tech businesses.

Our new regime forms a key part of our wider pro-innovation approach to governing digital technologies set out in the [Plan for Digital Regulation](#), through which we are also driving forward ground-breaking work on online safety and data protection. Our response also complements the '[Reforming competition and consumer policy](#)' consultation, which considered broader competition reforms and made a number of proposals which will also help to improve competition and protect consumers in digital markets more widely.

We are taking huge strides towards making this regime a reality, and we are delighted that the Chancellor announced additional funding in the 2021 Budget to roll out the dedicated Digital Markets Unit, within the Competition and Markets Authority, to oversee the regime.

We are confident that this publication will support us in delivering our pro-innovation, pro-enterprise vision for the UK and underpin the UK's standing as a global leader in tech and innovation.

The Rt Hon Nadine Dorries MP

Secretary of State for Digital, Culture, Media and Sport

The Rt Hon Kwasi Kwarteng MP

Secretary of State for Business, Energy and Industrial Strategy

Executive summary

1. Digital technology companies make a huge contribution to the economy. However, the unprecedented concentration of power amongst a small number of digital firms is holding back innovation and growth.
2. The size and presence of 'big' digital firms is not inherently bad. Nonetheless, there is growing evidence that the particular features of some digital markets can cause them to 'tip' in favour of one or two incumbents as outlined in, for example, '[Unlocking digital competition, Report of the Digital Competition Expert Panel](#)' (The Furman Review) and '[Online platforms and digital advertising: Market study final report](#)'. This market power can become entrenched, leading to higher prices, barriers to entry for entrepreneurs, less innovation, and less choice and control for consumers.
3. In response, we are establishing a new pro-competition regime for digital markets. This will build on the work of the Digital Competition Expert Panel and the Digital Markets Taskforce, which recommended the creation of a Digital Markets Unit with the bespoke regulatory toolkit required to address the unique issues arising from digital markets.
4. We launched a consultation on the new regime last year. There were some clear themes amongst the responses, notably on ensuring the regime is effective, but also transparent and open. In response to feedback and views we received, we are now confirming the design of the regime.
5. We have set up a Digital Markets Unit (DMU) within the Competition and Markets Authority (CMA). Its core objective will be to promote competition in digital markets for the benefit of consumers, in line with the views of most respondents. It will have a duty to consult with other regulators where proportionate and relevant. The costs of the regime will be partially recouped by a levy on the firms in scope.
6. The regime will be targeted at a small number of firms with substantial and entrenched market power, which gives them a strategic position ('Strategic Market Status') in one or more activities. Respondents recognised the importance of flexibility for the regulator to apply the Strategic Market Status test, but sought clarity and certainty on which firms would be in scope. To address this we will introduce a minimum revenue threshold to make it clearer which firms are out of scope of designation. Further clarity will be provided through legislation and guidance.

7. Once a firm is designated with Strategic Market Status, the DMU will set out how it is expected to behave through conduct requirements. Many respondents highlighted the need for these requirements to be carefully tailored to the particular harms associated with the firm and its activities. We will therefore specify categories of requirements in legislation but allow the DMU to determine the precise conduct requirements for each firm with Strategic Market Status, according to the evidence.
8. In addition, the DMU will be able to make targeted pro-competitive interventions. Pro-competitive interventions - such as those to support interoperability - have the potential to fundamentally transform digital markets. Respondents were broadly in favour of our vision for pro-competitive interventions, which were seen by many as key to driving up competition and innovation in digital markets. Respondents recognised that it is important for the DMU to deploy the most effective remedy to address the underlying source of harm. We will therefore provide the DMU with broad discretion to design and implement remedies, following a robust, evidence-based investigation.
9. Most respondents agreed that, in order to be effective, the DMU will need a range of enforcement powers. We will provide the DMU with the power to impose financial penalties of up to 10% of a firm's global turnover for regulatory breaches and to apply to the court to disqualify individuals from holding directorship roles in the UK. In order to embed a culture of compliance within Strategic Market Status firms, the DMU will also be able to apply civil penalties to named senior managers who fail to ensure that their firm complies with requests for information. Having considered a range of feedback from respondents on the relevant appeal standard, we have decided that judicial review principles will apply to the review of decisions of the DMU, in line with other ex ante regulators.
10. We will introduce new requirements for Strategic Market Status firms to report merger transactions to the CMA prior to their completion. This will allow the CMA to undertake an initial assessment of the merger to determine whether to look into the merger further. We intend to update the CMA's merger jurisdiction to ensure there is clarity around the CMA's ability to review large vertical and conglomerate mergers.
11. We are grateful for the range of responses to our proposed changes to the Phase 2 merger review threshold. We particularly noted stakeholders' concerns on how this may unintentionally impact UK investment, and we will not take these changes forward.

Part 1: Introduction

12. In July 2021, we published the consultation *A new pro-competition regime for digital markets*. The consultation sought views on the proposed design of a new pro-competition regime for digital markets which will actively boost competition and innovation by tackling the harmful effects and sources of substantial and entrenched market power. It will protect smaller businesses, consumers and competition by governing the relationship between users and key digital firms.
13. During this time, 105 written submissions were received from a range of respondents, including both large and small technology firms, non-technology sector businesses, trade associations, academics, and campaign groups. A full list of respondents is included in Annex A.
14. Alongside written submissions, we ran a wide-ranging programme of stakeholder engagement, including roundtables and technical discussions on our detailed proposals. We have carefully analysed all the responses and evidence submitted. We are grateful for the time and effort our stakeholders committed during this process, which has informed and strengthened our final policy positions.
15. The vast majority of respondents supported the proposals for the regime. Many provided evidence of the need for urgent action to ensure we have the regulatory tools needed to address the challenges arising from weak competition in digital markets. Respondents strongly supported our overarching approach to the regime, emphasising the need to equip the Digital Markets Unit with the ability to rapidly and flexibly respond to the fast moving issues in digital markets. However, there was also a general recognition that aspects of the regime will be new and untested and respondents suggested further clarity might be needed after the regime has been set up – for example through guidance and transparency.
16. The government will bring forward legislation to implement these reforms when parliamentary time allows.

Part 2: The Digital Markets Unit

17. The consultation asked the following questions on the design of the Digital Markets Unit:

Q1 What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?

Q2 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?

Q3 Should we explore the possibility of reducing the cost of the Digital Markets Unit to the public sector through partial or full levy funding?

Q4 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?

Q5 How can we ensure that regulators share information with each other in a responsible and efficient way?

Q6 What are your views on the appropriate scope and powers for the Digital Markets Unit's monitoring function?

Summary of consultation responses

18. There was strong support amongst respondents for the establishment of an independent and credible regulator, with sufficient powers and clear objectives to deliver the aims of the new regime. Respondents agreed that the core objective of the regime should be to promote competition, including competitive outcomes, in digital markets for the benefit of consumers.
19. Most respondents favoured an explicit duty to have regard to innovation, encouraging the DMU to focus on important longer term innovation as well as shorter term competition issues. The few stakeholders who opposed such a duty either argued it was unnecessary or were concerned how this would align with wider CMA objectives.
20. Respondents were generally opposed to a broader role for the DMU to look at concerns beyond competition. They expressed particular concern that a reference to 'citizens' in the core objective would be confusing, vague and risk regulatory overreach.

21. However, some respondents from consumer groups and media organisations thought a reference to citizens would be beneficial, allowing the DMU to consider broader social issues, and ensure consistency with other government objectives, including on press sustainability. Also, a small number of respondents supported allowing the DMU to monitor new markets which may become relevant to its core remit in time.
22. Respondents were in favour of effective coordination between relevant regulators to ensure that different regimes are joined up and that the DMU is able to draw on sectoral or other relevant expertise where necessary. There was general agreement that the DMU would need to engage with the Financial Conduct Authority, Ofcom, and the Information Commissioner's Office in particular. Respondents also generally argued that arrangements for coordination need to be set in statute to ensure transparency and consistency rather than relying on informal mechanisms. However there was little support for 'concurrent' powers for other regulators.
23. Respondents were almost universally in favour of effective information sharing between regulators, although the vast majority noted the importance of safeguards to protect confidentiality. Many respondents wanted the government to mirror the existing CMA Enterprise Act regime, while some sought a more robust regime with more of a focus on confidentiality.
24. There were mixed views on whether the DMU should be directly funded through the CMA's departmental budget or through charges or a levy to reduce its cost to the taxpayer. Some noted that a levy would be consistent with well-functioning funding models of other regulatory regimes, and that aligning the new regime with this precedent would ensure consistency of approach across the landscape. However, some were concerned that a levy-style funding arrangement could incentivise the DMU to over-designate in order to generate more revenue.
25. Some respondents favoured the DMU being given wider monitoring powers to develop a broad understanding of digital markets beyond the regime for firms with Strategic Market Status. However, others were opposed to these powers, emphasising that they would detract from the core role of the DMU and potentially duplicate the roles of other existing regulators.

Our response

26. We agree with respondents that the DMU should be a credible and independent regulator. This is why we have established the DMU in the CMA, allowing it to draw on

the CMA's competition expertise and reputation whilst also developing deep specialist knowledge of digital markets. The government will offer strategic direction to the DMU as part of its wider strategic steer to the CMA, to ensure the DMU remains focused on delivering real benefits for consumers and the economy.

27. In line with the majority of respondents, we believe that the DMU's objective needs to be clear and focused on promoting competition (including competitive outcomes) in digital markets for the benefit of consumers.
28. In the consultation document, we set out that we were minded against including a formal legal duty to have regard to innovation. Having carefully considered feedback from stakeholders on the benefits and risks, we remain of the view that it is not necessary to explicitly include innovation in the DMU's core duties, given that innovation is already a key consideration in any assessment of consumer benefits. The DMU will therefore have to actively consider the impact on innovation when it takes action, to ensure consumers can realise the benefits that innovation in digital markets can bring.
29. We note the important ways in which promoting digital competition will support wider policy objectives, but we agree with the views of the majority of stakeholders that including reference to citizens, as well as consumers, in the objectives of the regime would reduce clarity of the regime's remit and the role of the DMU.
30. We also reject broadening the regime's remit by giving the DMU supplementary duties because this would reduce clarity between the role of the CMA and other regulators. Instead we will require that the DMU works closely with other key regulators to ensure coherent and streamlined regulatory processes. We will therefore introduce a statutory obligation for the DMU to consult with the Financial Conduct Authority, Ofcom, the Information Commissioner's Office, the Bank of England and the Prudential Regulation Authority where proportionate and relevant, and notify them when opening an SMS designation assessment. This will manage any overlaps in regulatory remits and ensure that the work of the pro-competition regime is appropriately informed by the expertise of these regulators. We expect that the CMA and other regulators will set out the detail of how they will implement this obligation through memoranda of understanding.
31. We will also give the FCA and Ofcom a formal route to raise and hand over competition concerns that they identify in their sector if the DMU is better placed to address them through its new powers. This will ensure that digital competition issues

can be tackled by the DMU where it is better placed to do so. Finally, we will put in place mechanisms to ensure information flows effectively between the relevant regulators.

32. We have taken on board stakeholder views on levy funding, which highlighted the consistency such an approach would offer with comparable regulatory regimes. Stakeholders also noted the need to ensure that any levy was appropriately pro-competitive and proportionate, without creating any misaligned incentives for the DMU. Our view is that Exchequer funding, paired with partial cost recovery through a new levy on Strategic Market Status firms, will ensure smooth and predictable resourcing for the new regime and best value for money for the taxpayer.
33. We note the mixed views on whether the DMU should be given wider monitoring powers beyond the scope of the regime for firms with Strategic Market Status. Due to the potential burden on firms, and to avoid duplicating existing CMA responsibilities to monitor competition issues across the economy, we will not introduce additional monitoring powers.

The Digital Markets Unit - Summary

The DMU will be responsible for implementing and enforcing the new pro-competition regime.

The DMU's core objective will be to promote competition in digital markets within and outside the UK for the benefit of consumers.

We will place a statutory duty on the DMU to consult with other regulators where proportionate and relevant to ensure this new regime coordinates effectively with other regulatory systems.

The activities of the DMU will be funded by the Exchequer, with its costs partially recouped by a levy.

Part 3: Strategic Market Status

34. The consultation asked the following questions on the scope of the regime:

Q7 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'?

Q8 What are the potential benefits and risks of our proposed Strategic Market Status test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?

Q9 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?

Q10 What are the potential benefits and risks of the Digital Markets Unit prioritising Strategic Market Status designation assessments based on the criteria in the [prioritisation section](#) of the consultation (paragraph 77 in the PDF version)?

Q11 What are the benefits and risks of the proposed Strategic Market Status designation process? What are the benefits and risks of a statutory deadline of 9 months for Strategic Market Status designation?

Summary of consultation responses

35. Overall, stakeholders agreed that the scope of the regime should be limited to digital activities and that the assessment of Strategic Market Status should focus on particular activities rather than all of a firm's activities. This approach was generally preferred to linking the assessment to 'markets', as would normally be the case in a CMA investigation.
36. Stakeholders agreed that the definition of digital activities needs to allow for flexibility so that the regime can respond to new technological developments and business models, whilst providing clarity for business. However, some were not convinced that it would be workable in practice to define digital activities as those where digital technologies are a 'core component' of the activity provided. Most stakeholders agreed that restricting the scope of the regime to 'digital platform activities' would likely be too

narrow, although one very large technology company did express support for this approach.

37. Most respondents supported a designation assessment taking account of a range of quantitative and qualitative evidence. They generally agreed that, to be designated with Strategic Market Status, firms must have both substantial and entrenched market power in at least one activity and that this must provide the firm with a strategic position.
38. There was also broad agreement with our proposed criteria for assessing whether a firm has a strategic position, but respondents did not agree on whether the list of criteria indicating a strategic position should be exhaustive or non-exhaustive. There were also requests, particularly from the very large technology firms, for the concept of strategic position to be explained in more detail.
39. The consultation document proposed a process for prioritising which firms would be assessed for Strategic Market Status first, taking into account the firm's revenue, the characteristics of the activity in question, and whether other regulators were better placed to examine the issue. Respondents felt that there was a lack of clarity on how prioritisation factors might interact with, and differ from, the designation criteria.
40. Some respondents were against using revenue as a means of determining which Strategic Market Status designation assessments to prioritise because size alone does not necessarily mean that a firm has substantial and entrenched market power. However, other stakeholders suggested that using revenue to exclude small and medium-sized firms from consideration could lend greater clarity and certainty.
41. While stakeholders generally agreed with our proposed methodology for assessing Strategic Market Status, smaller technology companies leaned towards giving the regulator greater flexibility, to allow the DMU to keep pace with the rapid pace of technological change. Other respondents sought firmer criteria, to give greater certainty for business. Many stakeholders highlighted the need for greater clarity and guidance about which firms and activities would be in scope of the regime.
42. Some stakeholders who felt they would benefit most immediately from the effects of this regime argued that the proposed statutory deadlines for designating a firm with SMS needed to be shorter. Most large technology companies argued for longer statutory deadlines, but agreed that the regime should generally be efficient and agile.

Government response

43. The scope of the regime will be limited to 'digital activities'. The government will work to develop a definition of the activities in scope which is clear and easy to apply.
44. We are committed to ensuring that Strategic Market Status designation is evidence-driven and focused on a small number of the most powerful firms. The regime will only designate firms found to have substantial and entrenched market power in at least one digital activity, providing them with a strategic position. We will require the DMU to establish a UK nexus, ensuring a focus on competition in the UK.
45. We recognise the need to balance flexibility with clarity for business. In response to requests for greater certainty, we intend to adopt a minimum revenue threshold in legislation to make it clear which firms are out of scope of designation. We are considering what an appropriate minimum threshold would be.
46. We agree with respondents that further clarity will also be needed on how the DMU defines and groups 'activities', as well as how the concept of 'strategic position' will be applied. The list of criteria used to assess whether a firm has a strategic position will be exhaustive and set out in legislation. We will introduce a requirement for the DMU to publish guidance on these concepts, including how they will be applied in practice. We are exploring options for how the criteria can be periodically updated in response to fast-moving digital markets.
47. The DMU will have discretion to decide how to prioritise which cases to take forward in line with its statutory objectives and duties. This follows the approach currently taken by the CMA. In response to stakeholder concerns about how the prioritisation process will apply in practice, the DMU will be required to publish guidance on the way it will prioritise its assessments to provide clarity to stakeholders.
48. We are committed to designing a process which balances robustness with speed and efficiency. Following stakeholder feedback, we will adopt a statutory deadline of 9 months for the DMU to complete Strategic Market Status designation assessments. This deadline will be extendable by 3 months in exceptional circumstances.

Strategic Market Status - Summary

The regime will be targeted at certain types of ‘digital activities’ but we are considering alternative ways of defining this in legislation.

Strategic Market Status will be applied only to a small number of firms which meet certain criteria. These include having substantial and entrenched market power in an activity, providing the firm with a strategic position. A UK nexus requirement will ensure the DMU focuses on the impact on competition in the UK.

We will introduce a minimum revenue threshold to make clear that smaller firms will not be in scope.

To ensure clarity, we will specify clearly in legislation the criteria that should be used to assess whether a firm has a strategic position.

We will not specify in legislation how the DMU should prioritise designation assessments. Instead, the DMU will be given discretion to decide which cases to take forward first, in line with its statutory objectives.

The DMU will be subject to a 9 month statutory deadline to complete designation assessments. The DMU will be able to extend this deadline by 3 months in exceptional circumstances.

Part 4: Conduct requirements

49. The consultation asked the following questions on conduct requirements:

Q12 Do these three objectives correctly identify the behaviours the code should address?

Q13 Which of the 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?

Q14 What are your views on the proposal to apply principle 2(e) [‘not to make changes to non-designated activities that further entrench the firm’s position in its designated activity/activities unless the change can be shown to benefit users’] to the entire firm? Should any explicit checks and balances be considered?

Q15 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?

Q16 How can we ensure the appropriate use of interim code orders?

Summary of consultation responses

50. Conduct requirements will manage the effects of market power by setting out how firms are expected to behave in respect of the activities in which they are designated with Strategic Market Status. In our consultation we referred to these conduct requirements as “the code of conduct”.
51. Respondents were generally supportive of the overall structure and approach to conduct requirements, agreeing that a code should support the three proposed objectives we set out in the consultation: fair trading, open choices and trust and transparency. However, many highlighted the need for precise definitions of these terms to avoid uncertainty and set clear expectations as firms adjust to the new regime.
52. In our consultation we set out three options for how conduct requirements should be provided for in legislation, with varying levels of discretion given to the CMA in the design of those requirements. The majority of respondents supported our proposed

approach, combining principles set in legislation with the ability for the DMU to develop conduct requirements for individual firms' business models. This would allow the DMU to tailor the requirements on firms with Strategic Market Status according to the particular harms that need to be addressed. Nevertheless, respondents emphasised the need for the DMU to act within a clear framework so that firms have a predictable business environment.

53. We proposed that there should be one category of conduct requirement which prevents a designated firm from entrenching its position in a designated activity by making changes to other parts of its business. Responses to this specific proposal were mixed. Some respondents, including all the very large technology companies and some of the trade bodies and law firms, were concerned that such a cross-cutting requirement would be too broad. However, others, including most other business respondents and the press sector, supported its inclusion in principle. There was general consensus that clarity is required as to how this conduct requirement will be applied.
54. The press sector acknowledged that the proposed framework of the regime will address some of the challenges they face in digital markets, as identified in the Cairncross Review and CMA market study. However, the common view among news publishers was that a mechanism similar to the News Media Bargaining Code introduced in Australia would need to be incorporated into the Code of Conduct in order to maximise its effectiveness in redressing the imbalance in bargaining power between publishers and platforms. We asked the CMA and Ofcom for advice on how our Code of Conduct could apply to this relationship, which has been published alongside this document.
55. There was also general support for our proposal to give the DMU the power to impose interim orders where necessary. Many respondents agreed that the DMU would need interim orders to be able to prevent immediate or potentially irreversible harm from occurring while an investigation is underway, but highlighted the need for appropriate safeguards on their use. Those opposed included some of the very large technology companies and one think tank, claiming this was unnecessary in addition to final enforcement orders.

Government response

56. We welcome stakeholder support for the objectives and approach to conduct requirements for Strategic Market Status firms. Conduct requirements will be an

important part of the toolkit available to the DMU to proactively shape the behaviour of firms with Strategic Market Status.

57. In line with stakeholder comments, we agree that it is important to ensure we are clear in legislation on the types of behaviours that conduct requirements will address. We are finalising the precise wording of the objectives relating to 'fair trading', 'open choices' and 'trust and transparency' as we prepare to legislate.
58. We agree with respondents that it is important that we balance the ability of the DMU to adapt conduct requirements to different circumstances against the need to ensure the regime is transparent and brings certainty both to firms with Strategic Market Status and to users. We will therefore set out categories of conduct requirements in legislation, and allow the DMU to develop specific requirements within these categories for each firm with Strategic Market Status where appropriate. These specific requirements will be binding. Failure to comply could result in the DMU making orders to force firms with Strategic Market Status to comply or issuing financial penalties.
59. It is important that the DMU can respond to changes in the market and associated harms, as they evolve – including as a result of interventions made through this regime. We will therefore provide the DMU with the ability to remove or amend conduct requirements. We are considering the circumstances in which this will be possible as we finalise legislation.
60. The categories of potential conduct requirements will be based on the list of principles provided in the consultation. Examples of categories include:
 - requiring Strategic Market Status firms not to apply discriminatory terms, conditions or policies to certain users or categories of users, compared to equivalent transactions
 - preventing bundling or tying the provision of its other products or services by making access to them conditional on the use of the relevant designated activity and
 - providing clear, relevant, accurate and accessible information to users
61. The DMU will be required to publish guidance on how each firm's conduct requirements will operate in practice, in line with the general approach of ensuring transparency and openness. Conduct requirements will be developed in parallel to the Strategic Market Status designation assessment. There will be no statutory deadline

for their development, but we anticipate that the DMU will normally issue the conduct requirements alongside a final Strategic Market Status designation decision.

62. We will introduce an exemption to ensure that conduct which brings about net consumer benefits will not breach conduct requirements. Firms with Strategic Market Status will be able to put forward evidence that particular conduct that would otherwise breach a conduct requirement brings about benefits to consumers. The DMU will need to be satisfied that these arguments prove that the conduct is indispensable to achieving the benefits and that the benefits outweigh the potential harm.
63. For example, we want to prevent a firm using its position in its designated activity to further entrench that position or leverage its market power to the long-term detriment of its users. But we recognise that leveraging is not inherently problematic or anti-competitive, and that firms with a strong position in one market may present a healthy disruptive force to an adjacent market in which a different incumbent has market power. Firms will be able to use the exemption to prevent the DMU taking action by proving the benefits that are achieved through leveraging.
64. It is also important that changes to other parts of the Strategic Market Status firm's business do not cause market power in the designated activity to increase or become more entrenched. We will therefore include a cross-cutting category of conduct requirements which prevents anti-competitive leveraging into a designated activity. It is important that innovation by SMS firms is not discouraged. The DMU will not be able to take action against conduct that on balance benefits consumers.
65. We welcome the advice from the CMA and Ofcom on how the regime would govern the relationship between platforms and content providers including news publishers. The advice sets out how conduct requirements will help to address the effects of the imbalance of bargaining power between platforms and content providers. It concludes that the DMU must be able to intervene, where necessary, to address unfair and unreasonable terms that stem from the market power of firms with Strategic Market Status. The advice was focused on content providers but could be relevant to other digital activities.
66. Our view is that the DMU's fundamental role is to tackle the underlying causes of unfair and unreasonable terms, as far as possible. For example, through pro-competitive interventions, the DMU would be able to mandate interoperable standards across online advertising exchanges to address harms to competition. Additionally, conduct requirements could give publishers transparency over the algorithms that drive traffic

and revenue; more control over the presentation and branding of their content as well as access to the data required for a competitive advertising market. These interventions will drive up competition and give publishers greater ability to recapture advertising revenue.

67. These interventions will help rebalance the relationship between firms with Strategic Market Status and those who rely on them - such as news publishers. But they may not be enough to ensure fair compensation within a suitable timeframe. Therefore the government agrees with the report's recommendation that the DMU must be able to intervene, to address unfair and unreasonable terms that stem from the market power of firms with Strategic Market Status, where these can not be suitably addressed through other routes. We are minded to pursue a mechanism, as proposed by the CMA and Ofcom, based on binding final offer arbitration to address pricing-related disputes, for use in the event that other interventions are unlikely to change the fundamentals. We are considering how that mechanism would work in practice, ensuring it remains a last resort, works across all relevant activities and does not detract from our overarching aim of a more competitive digital economy.
68. We will move forward with plans to allow the DMU to impose interim orders as well as final enforcement orders. However, we agree with respondents that interim orders will need appropriate safeguards because they can be implemented quickly without having undergone a full investigation. We will therefore set out in legislation clear thresholds that must be met to put interim orders in place. We will also specify that interim orders can only be put in place when the CMA has formally opened an investigation, for which there must be reasonable grounds to suspect that conduct requirements are being breached. In addition to these safeguards, the scope of interim orders will be restricted to pausing or reversing behaviour only.

Conduct requirements - Summary

Binding conduct requirements will manage the effects of Strategic Market Status Firms' market power and prevent harms before they occur.

The objectives provide clarity on the types of behaviours that conduct requirements seek to address and we are considering the precise wording that should be set in legislation.

Categories of permissible conduct requirements will be set out in legislation, with the DMU having the power to develop specific conduct requirements corresponding to the exact circumstances of each firm.

The government will introduce an exemption to ensure that conduct which provides net benefits to consumers will not breach conduct requirements.

The categories of conduct requirements will include a category which prevents a firm from leveraging other parts of the business to further entrench its power in a designated activity.

As part of considering whether terms are fair and reasonable, the DMU will be able to intervene on price through the conduct requirements. We are considering how a mechanism based on final offer arbitration would work in practice, taking into account the CMA/Ofcom advice on platforms and content providers.

The DMU will be able to respond quickly to breaches of conduct requirements by issuing interim orders, which can pause or reverse actions taken, as well as through final enforcement orders.

Part 5: Pro-competitive interventions (PCIs)

69. The consultation asked the following questions on this topic:

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

Q18 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?

Q19 What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity [in certain specific circumstances]?

Q 20 How appropriate are the proposed flexibility mechanisms set out in the consultation document? Are there any associated risks?

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

Summary of consultation responses

70. Respondents were broadly in favour of the DMU being given the power to implement pro-competitive interventions, which were seen as key to driving up competition and innovation in digital markets.
71. There was general support for the DMU having broad discretion to design and implement remedies, in line with the CMA's existing powers following a market investigation. This approach would ensure that the DMU is able to deploy the most effective remedy to address the harm identified. Respondents from the very largest tech firms and from law firms said that, for clarity, guidance should be published on what types of remedies could be implemented and in what circumstances. Respondents agreed that the pro-competitive intervention process would need to be subject to the appropriate safeguards, in order to ensure that it is fair and robust.
72. Some respondents, particularly those from challenger tech firms and consumer groups, were supportive of the power to enforce ownership separation on firms as part of a pro-competitive intervention. Others from the very largest tech firms, law firms and trade bodies thought that this power should be exclusively retained for use following a market investigation under the CMA's general procedures.
73. Stakeholders agreed that the DMU should have to satisfy the 'adverse effect on competition' test in order to implement a pro-competitive intervention. Stakeholders

indicated that, as it is the legal test in the existing market investigation regime, this is well-established and understood. Some media respondents argued that the test should extend to explicitly include the effect on consumers.

74. There were differing views on whether the DMU should be able to implement pro-competitive interventions in non-designated activities to address an 'adverse effect on competition' in a designated activity. The very largest tech firms and trade bodies argued that pro-competitive interventions should focus only on designated activities given that Strategic Market Status focuses on those specific activities. Others from challenger tech firms and the press and broadcasting sectors believed that a broader scope would be necessary in order for the DMU to be able to effectively address leveraging concerns.
75. Respondents were generally satisfied with the proposed flexibility mechanisms, as they will allow the DMU to continue to act effectively as digital markets evolve. Respondents widely agreed that it will be necessary to trial, monitor, review and amend remedies in order to ensure ongoing proportionality and effectiveness. Some respondents, particularly those from law firms, believed that these flexibility mechanisms, whilst necessary, must be balanced with the need for legal clarity for firms and should be set out transparently, with clear constraints.
76. There was no consensus amongst stakeholders on the appropriate deadline for a pro-competitive intervention investigation. Respondents from the very largest tech firms and law firms were concerned that a short fixed deadline may not allow enough time to properly consider all the evidence and engage with all the relevant parties. Respondents from challenger tech firms, SMEs and consumer groups pointed out that the investigation period would be one of great uncertainty for businesses and should be concluded in the shortest time possible, with the possibility of an extension if required. They set out that the information already gathered during the Strategic Market Status designation process should be taken into account, thus enabling a quicker process.

Government response

77. We agree with stakeholders that we need to ensure a swift and agile approach to pro-competitive interventions, while ensuring processes are robust and fair.
78. In line with stakeholder feedback, the remedies available to the DMU via the pro-competitive intervention process will not be limited to a constrained list of specific

remedies set in legislation. Instead the DMU will have broad discretion over which remedies to implement at the end of the pro-competitive intervention process; and be granted the same remedy design powers as already available to the CMA (via Schedule 8 of the Enterprise Act 2002) following a market investigation.

79. Pro-competitive interventions will tackle the root causes of entrenched market power. They will be proportionate, evidence-driven remedies to address an “adverse effect on competition”. The DMU will take an iterative approach to intervention, and will be empowered to implement robust pro-competitive intervention remedies - such as the ability to enforce interoperability between platforms or services. The DMU will be able to implement ownership separation remedies, but this will only be used in circumstances where it is appropriate and other remedies are insufficient.
80. There will be safeguards to prevent the imposition of pro-competitive interventions which would harm consumers, including consultation requirements and rights of appeal. The DMU will need to take into account any countervailing benefits when considering whether an AEC exists, and consider the impact of any proposed remedies on benefits enjoyed by consumers.
81. We have noted calls for certainty for businesses, and will require the DMU to publish general guidance on the types of pro-competitive interventions it will consider implementing in different circumstances, how trials will be run and how interventions will be monitored and reviewed.
82. The DMU will be able to implement a pro-competitive intervention anywhere within a Strategic Market Status firm, provided that it relates to a competition concern in a designated activity. In our view, this scope is needed to ensure the DMU is able to address any anti-competitive leveraging of a firm’s market power across its ecosystem. The DMU will need to demonstrate the direct relationship between any intervention and a competition concern in the designated activity.
83. As with all pro-competitive interventions, those implemented in non-designated activities will be subject to procedural fairness requirements including consultation, proportionality requirements and the right to appeal.
84. Following the general support for flexibility mechanisms for pro-competitive interventions, these will be implemented as set out in the consultation document. This includes the ability to monitor, amend and trial pro-competitive interventions, as well as powers of direction and the ability to accept undertakings during the investigation.

85. Pro-competitive intervention investigations will have a statutory deadline of 9 months. However, we acknowledge the concerns of some stakeholders that this timeframe may not be sufficient for particularly complex remedies. Therefore the DMU will be given the ability to extend the statutory deadline by 3 months in exceptional circumstances.

Pro-competitive interventions - Summary

The DMU will have broad discretion over the pro-competitive interventions to be imposed on Strategic Market Status firms, including the power to implement ownership separation.

Pro-competitive interventions will only be imposed where an adverse effect on competition can be demonstrated. There will be safeguards to prevent the imposition of pro-competitive interventions which would harm consumers.

The DMU will be able to implement pro-competitive interventions anywhere within a Strategic Market Status firm, providing the intervention is related to a concern in a designated activity.

The DMU will be able to take a flexible approach to imposing pro-competitive interventions, from accepting binding undertakings from firms to trialling and iterating new remedies.

The pro-competitive interventions investigation will have a 9 month statutory deadline, with an optional 3 month extension for special reasons.

Part 6: Regulatory framework

86. The consultation asked the following questions on the regulatory framework for the pro-competition regime:

Q22 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?

Q23 What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?

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

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

Q 26 What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with Strategic Market Status?

Summary of consultation responses

87. Respondents agreed that the DMU must have a range of powers for effective enforcement.
88. Respondents broadly agreed that the DMU should work with firms with Strategic Market Status to drive change through light-touch and informal engagement where possible. However, stakeholders recognised the need for robust enforcement mechanisms, including significant financial penalties where necessary.
89. A range of stakeholders expressed support for director disqualification as an effective enforcement measure for regulatory breaches, although some had concerns that this and senior management liability may be disproportionate.
90. There was also agreement that the DMU should be empowered to investigate and enforce against conduct occurring overseas where there is sufficient connection between that conduct and the UK.
91. There was support for the proposed information-gathering powers, including the ability to require the production of information, require attendance at interviews, inspect and

search premises and compel evidence collection. Stakeholders emphasised, however, that these should be subject to appropriate safeguards.

92. Respondents also agreed that the DMU must show that its actions are objective, proportionate and evidence-based to ensure accountability and transparency.
93. There was some support for applying a judicial review standard for the pro-competition regime such as from the press and publishing sector. Respondents with this view noted that this supports the delivery of robust outcomes at pace. However, a few responses, including from big technology firms and a number of trade bodies, expressed a preference for a full merits review standard for at least the most critical decisions.
94. Respondents generally had favourable views on the proposed measures to ensure the digital competition regime is proportionate, accountable and transparent. Some of the very large technology companies suggested that the DMU should publish an impact assessment before taking regulatory action.
95. Some respondents, particularly the press and publishing sector, considered redress mechanisms would be meaningful additions to the DMU's public enforcement powers, but a significant majority, including challenger tech and wider business firms, agreed that these should not be the priority or the initial focus of the regime.

Government response

96. The government welcomes the broad support from stakeholders for the DMU to combine light-touch ongoing dialogue with firms with Strategic Market Status, alongside robust enforcement mechanisms.
97. The government notes the support for the proposed levels of penalties. The DMU will be empowered to impose fines up to a maximum 10% of a firm's global turnover for the most serious offences, with further daily penalties of up to 5% of daily worldwide turnover for continued breaches. This level reflects the scale of the companies in scope and the potential for irreversible economic harm if breaches occur. Fines of up to 1% of the firm's global turnover will be available for information offences, with additional daily penalties of up to 5% of daily worldwide turnover available.
98. We recognise the case for making senior managers liable for aspects of the regime, which will help embed a culture of compliance within Strategic Market Status firms. The DMU will be able to stop individuals guilty of serious misconduct from being

directors of UK companies. The DMU will also be able to apply civil penalties to named senior managers who fail to ensure that their firm complies with requests for information. Further, it will be a criminal offence to knowingly or recklessly provide false information to the DMU - as it is to other parts of the CMA - in addition to new civil penalties for this.

99. As set out in our consultation, we remain committed to ensuring the DMU is able to require provision of information stored overseas as well as to investigate and enforce against conduct occurring overseas where there is sufficient connection to the UK.
100. The DMU's range of information gathering tools will reflect that large amounts of information are now stored online and may not be held in Strategic Market Status firms' premises. These tools will be subject to appropriate safeguards. The DMU will be able to interrogate algorithms' impact on competition and require that firms carry out field trials (including A/B testing) to evaluate the impact of new innovations or processes if necessary. The DMU will also be able to request compliance reports from SMS firms to assist their monitoring of compliance with the regime.
101. We recognise the importance of ensuring that firms are able to appeal decisions of the DMU, and that there were a range of views on the most appropriate standard for reviews of decisions taken under the new regime. We have taken the view that, on balance, a review on judicial review principles is most appropriate for this regime and will ensure judicial scrutiny of the DMU's decisions while reflecting its expertise in deciding how best to promote competition in digital markets. This reflects the approach taken in respect of decisions by other ex ante regulators such as Ofcom and will allow the court to account for the range of requirements in each case. As the fines issued by the DMU have the potential to be significant, decisions about financial penalties will be suspensory so that firms do not have to pay until the determination of an appeal.
102. The regime will focus on public enforcement, in line with responses from the majority of stakeholders. The government will therefore not look to introduce new redress mechanisms at this stage.

Regulatory framework - Summary

The DMU will be able to impose financial penalties of up to 10% of a firm's global turnover, along with an additional 5% of daily turnover each day the offence

continues, for regulatory breaches and up to 1% of global turnover for information offences, with additional 5% daily penalties available for continued non-compliance.

Civil and criminal penalties will be available for anyone knowingly or recklessly providing false information to the DMU.

There will be the option to impose civil penalties on named senior managers who fail to ensure the firm complies with requests for information, and director disqualification for regulatory breaches.

There will be safeguards to prevent the imposition of conduct requirements and pro-competitive interventions which could negatively impact consumers.

Information gathering powers will be broad but subject to robust safeguards.

Decisions of the DMU will be subject to review on judicial review principles.

Part 7: Strategic Market Status merger reform

103. The consultation asked the following questions on merger requirements for firms that are designated with Strategic Market Status:

Q 27 What are the benefits and risks of introducing an ‘in advance’ reporting requirement for all transactions by firms with Strategic Market Status?

Q 28 What are the benefits and risks of introducing a transaction value threshold, combined with a ‘UK nexus’ test, for firms designated with Strategic Market Status?

Q 29 What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with Strategic Market Status?

Q 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 Strategic Market Status?

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

Summary of consultation responses

104. Challenger tech firms, consumer groups and academics in particular welcomed the introduction of new mandatory reporting requirements to be applied to firms with Strategic Market Status. Respondents recognised that these transactions can have significant impacts on competition, justifying greater scrutiny. However, very large technology companies and tech sector trade bodies emphasised that these requirements should be proportionate and avoid excessive burdens on businesses, for example by limiting this reporting to relevant mergers with a clear link to the UK.

105. The consultation document set out a proposed revised jurisdiction test for mergers, allowing the CMA to intervene in a merger involving a Strategic Market Status firm, where a transaction value threshold and UK nexus test were met. Some stakeholders noted that these jurisdiction reform proposals for firms with Strategic Market Status would have to be carefully considered in the context of the parallel proposals for all other merger investigations set out in *Reforming Competition and Consumer Policy*.

They highlighted the risk of complexity and the need for a joined-up approach across the UK's merger regime.

106. The proposals to make large transactions by these firms subject to mandatory review by the CMA were also met with mixed views from stakeholders. Those in favour, including some technology companies, thought that a review could be quick enough that it would not act as a deterrent to mergers. Those opposed, including some large technology companies and law firms, thought that this could be unduly burdensome for businesses.
107. A significant number of respondents gave views on our proposal to lower the intervention threshold for Phase 2 merger investigations, from “more likely than not” to a “realistic prospect” of a substantial lessening of competition. Many respondents in the tech and legal sectors expressed concerns that this wording would set the threshold of intervention too low, creating a risk of over-enforcement of mergers which could lead to negative implications for the UK tech sector and investment. However others, including leading academics, argued that a lower threshold of intervention is needed to address the high risk to competition in digital markets; some of these stakeholders urged the government to go further and take more radical steps.

Government response

108. We recognise the importance of ensuring that the changes to mergers are proportionate, targeted, and take account of the needs of the digital markets ecosystem by not blocking or discouraging beneficial mergers.
109. We welcome the broad support for measures to increase the CMA's visibility over mergers involving firms with Strategic Market Status. We also agree with the need for the changes to be targeted and to avoid disproportionate burdens on businesses.
110. Following feedback, we have refined proposals for the mandatory reporting and review requirements. To ensure these are proportionate and limit burdens on business, firms with Strategic Market Status will only have to report their most significant transactions prior to completion. We are minded toward this being when:
- the SMS firm acquires over a 15% equity or voting share after the transaction
 - the value of the SMS firm's holding is over £25m and
 - the transaction meets a UK nexus test
111. This will provide the CMA with visibility of SMS transactions which are more likely to raise competition concerns for UK businesses and consumers, before integration

between the firms has occurred. The CMA will undertake an initial assessment of the merger to determine whether to look into it further, for example by requesting further information, launching a merger investigation, or both.

112. We noted the feedback highlighting the risk associated with introducing different jurisdictional thresholds for SMS mergers compared to the wider merger regime. We therefore intend to bring in changes to the CMA's merger jurisdiction, discussed further in the *Reforming competition and consumer policy consultation response*, which will also apply to the new SMS reporting requirements.
113. Reflecting on the range of views submitted in response to the proposed Phase 2 threshold changes, including potential impacts on innovation and investment, we do not intend to take forward the changes to the Phase 2 threshold for merger intervention. We are conscious that this would represent a significant change for the merger regime, and do not believe there is sufficient evidence to take forward these changes at this time.

Strategic Market Status merger reform - Summary

We will introduce new mandatory reporting requirements for firms designated with Strategic Market Status.

Prior to completion of transactions which exceed the thresholds, Strategic Market Status firms will be required to report them to the CMA. The CMA will then have an initial review of the mergers to consider whether it would warrant further investigation.

The government will not take forward any Phase 2 merger intervention threshold changes.

Annex A: List of respondents to the consultation

- Google
- Facebook
- Amazon
- Apple
- Match Group
- Booking.com
- Snap
- Ebay
- Twitter
- Kelkoo
- Deliveroo
- Spotify
- DuckDuckGo
- Skyscanner
- Airbnb
- TikTok
- UK Cloud
- Gumtree
- Mojeek
- Yoti
- Tyk
- Internet Advertising Bureau
- ISBA
- Advertising Standards Authority
- Advertising Association
- Telegraph
- News Media Association
- The Guardian Media Group
- Daily Mail
- Bauer Media
- The Financial Times
- News UK
- Radiocentre
- BBC
- National Union of Journalists
- Vodafone
- IBM
- Experian
- Fideres
- Compare the Market
- Mydex CIC
- NCC Group
- Trustpilot
- BT
- Royal Mail
- Three
- Sky
- Virgin Media O2
- Channel 4
- ITN
- AT&T
- Foundem
- Trading Standards Scotland
- Coalition for App Fairness
- ACT | The App Association
- British Brands Group
- Online Dating Association
- UK Finance
- Professional Publishers Association
- Publishers Association
- Federation of Small Business
- Music Publishers Association
- Institute of Directors
- U.S Chamber of Commerce
- GC 100
- American Bar Association
- Coadec
- Confederation of British Industry
- TechUK
- British Retail Consortium
- Carnegie UK
- Which?
- Consumer Council for Northern Ireland
- Just Algorithms Action Group
- Open UK
- Article 19
- Ombudsman Services
- Computer & Communications Industry Association
- Dr. Cristina Caffarra
- International Centre for Law and Economics/Entrepreneur's Network
- Prof. John Van Reenen (LSE)
- Dr. Magail Eben (University of Glasgow)
- Dr. Oles Andriychuk (University of Strathclyde)
- Institute for Economic Affairs
- Prof. Chris Johnson (Queens University Belfast)
- Trustworthy Autonomous Systems
- Prof. Amelia Fletcher (UEA)
- Global Disinformation Index
- Competition and Markets Authority
- Payment Systems Regulator
- Information Commissioner's Office
- Ofgem
- Freshfields Bruckhaus Deringer LLP
- Baker McKenzie LLP
- Preiskel/Movement for an Open Web
- Linklaters LLP
- Joint Working Party
- Charlesworth Affiliate Services Ltd.
- Anon-1
- Lazer Electrics
- Metis Digital
- Heroes Technology

Annex B: Extended summary of consultation responses

Part 2

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

Respondents were generally supportive of the inclusion of a duty for the Digital Markets Unit to have regard to innovation. Respondents noted that without such a duty the focus of the Digital Markets Unit could be too short-termist, or simply considered it an important part of the overall aims of this new competition regime.

Those few respondents who were opposed to the inclusion of a duty to have regard to innovation raised a variety of points including: the view that innovation was already a feature of competition law; a risk of making the scope of the Digital Markets Unit's work overly broad or unclear; realignment away from the CMA; and a risk of mixed interventions.

Respondents consistently asked for innovation to have a clear statutory definition.

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?

Respondents were divided on the question of whether to give the Digital Markets Unit power to engage with wider policy issues. Many large technology firms were opposed, citing a lack of predictability, a view which was echoed by a range of other respondents.

On the other hand, many consumer groups were in favour. They preferred an inclusion of the reference to citizens, as suggested by the Digital Markets Taskforce. News, broadcasting, and publishing organisations also strongly preferred an inclusion of citizens to allow consideration of broader social factors. Another advocacy group was clear in the view that the interests of consumers were not sufficiently addressed under the current proposals. One respondent wished to include reference to human rights in the Digital Markets Unit's objectives.

Two technology companies raised the issue of coordinating digital competition issues and wider digital and technology policy, with the possibility of the Digital Markets Unit acting as an intermediary body.

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?

Few respondents had views on the funding of the Digital Markets Unit. Of those who did respond, many preferred an Exchequer-funded route to levy funding. Concerns included: perverse incentives and compromising the neutrality of the Digital Markets Unit; increasing costs to advertisers; and uncertain costs for industry, especially with other levies due to be introduced by other regulators also. One very large technology company argued that if there was levy funding it should be accompanied by safeguards ensuring neutrality and transparency.

Those in favour of levy funding considered it would be consistent with the approach taken by some sector regulators, where some or all of the costs of delivering regulation is recovered from those subject to the regime; taking such an approach in this instance would therefore ensure fairness across the regulatory landscape. Some supporters of the levy thought it should apply only to Strategic Market Status firms.

The majority of respondents were concerned that the Digital Markets Unit should have sufficient resources to stand up to such large organisations, noting the likelihood of extensive legal challenges.

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?

Nearly all respondents were in favour of a formal mechanism for promoting cooperation. Many respondents proposed variations on a duties model, potentially with the Digital Markets Unit in a coordination role. Respondents expressed both positive and negative views on the role of the Digital Regulation Cooperation Forum. The list of regulators in the consultation was seen to be largely correct, with additional suggestions on certain sector specific regulators.

Concurrent powers for sector regulators were rejected by a wide range of stakeholders, with the exception of respondents from the broadcasting sector.

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

Stakeholders agreed on the need for good information sharing. The Enterprise Act 2002 model was seen as right by some, too cumbersome by others, and in need of further safeguards by another group of stakeholders. One trade association suggested free information sharing between digital regulators. Several stakeholders were keen to reduce the burden on industry, noting the existing regime could be hard to comply with. One industry body requested a separate consultation on this issue given the potentially sensitive information in question.

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

Respondents of all kinds were mixed on the question of wider monitoring powers for the Digital Markets Unit. Those in favour pointed to the benefits of a broader understanding of the market and avoiding falling into siloed thinking. Those opposed raised the potential distraction from the Digital Markets Unit's core role and possible increased burdens on business, or potential duplication of other regulators' roles.

Part 3

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'?

Stakeholders of all kinds were sceptical of the workability of the 'core component' definition of digital activities set out in the consultation, considering it unclear and hard to apply to real-world scenarios. Stakeholders were not supportive of restricting the regime to 'digital platform activities', which they considered to be too narrow. The responses noted the difficulties in separating digital activities from non-digital ones.

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

Most stakeholders agreed with the inclusion of an economic assessment of market power as part of determining Strategic Market Status and only a minority of stakeholders said that they would prefer a mechanistic approach to identifying which firms would be in scope. There was less consensus on the criteria for assessing strategic position and the level of detail that

should be included in the test, although most media and publishing stakeholders agreed with the approach. Several of the very large technology companies thought that the DMU should have to demonstrate that the firm meets more than one strategic position criteria in order to satisfy this element of the test.

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?

Most stakeholders were generally supportive of the Strategic Market Status test, especially of the parts relating to substantial and entrenched market power. They agreed that a mechanistic approach is not appropriate because it could capture firms that do not have the type of market power that the regime intends to address. However, there was significant disagreement about the third part of the test. Several of the very large technology companies wanted the strategic position criteria to be exhaustive and set out in legislation, while others (including smaller technology companies) thought this might reduce flexibility. Legal stakeholders tended to prefer clarity over flexibility.

Many other technology companies wanted to alter the test to bring in other elements, such as a consideration of ecosystems, or specifying that the number of activities with substantial and entrenched market power had to be two or more rather than one. Other stakeholders had a very diverse range of views, from supporting the government's proposed structure to finding certain aspects unclear and requesting various changes such as including a formal market definition or adopting quantitative filters (which other stakeholders rejected).

Question 10 - What are the potential benefits and risks of the Digital Markets Unit prioritising Strategic Market Status designation assessments based on the criteria in the prioritisation section of the consultation (paragraph 77 in the PDF version)?

The responses on prioritisation were also marked by many and varied disagreements between stakeholders on the appropriate way forward. As with the questions above, roughly half were in support of the approach set out in the consultation document. Other stakeholders did not agree that revenue was a suitable basis for prioritisation as size alone does not necessarily mean that a firm has substantial and entrenched market power. However, some small and medium-sized firms suggested introducing a revenue threshold to exclude them from consideration and provide greater certainty.

Question 11 - What are the benefits and risks of the proposed Strategic Market Status designation process? What are the benefits and risks of a statutory deadline of 9 months for Strategic Market Status designation?

Most respondents were generally supportive of the process for designation. There were many suggestions for amending particular parts of the process, either making it longer or shorter, changes to the redesignation process, or greater clarity on the grounds for a reassessment. Some of the very large technology companies wanted the process to be longer, while small technology companies, press and publishing stakeholders wanted it to be quicker. Press sector respondents, who are particularly concerned by the urgency of the challenges they face in digital markets, consider that designation could be accelerated for firms in cases where the CMA have already gathered most of the relevant information through a market study and recent investigations.

Part 4

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

Stakeholders were, overall, very supportive of the objectives of 'fair trading', 'open choices' and 'trust and transparency' as set out in the consultation. A few stakeholders wanted to amend or clarify them slightly, for example to make sure that businesses were included in the definition of 'user'. Some trade bodies expressed concern that the objectives did not offer enough certainty for businesses about what the principles underpinning them would be.

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?

Most stakeholders supported "Option 3" with principles (referred to above as categories of conduct requirements) set out in legislation and the Digital Markets Unit having some discretion to tailor conduct requirements to the particular situation of the firm and activity in question. This was felt to strike the right balance between predictability and flexibility, which "Option 1" and "Option 2" respectively lacked.

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

The majority of stakeholders were supportive of an overarching cross-cutting requirement which prevents a firm from leveraging other parts of the business to further entrench a designated activity.

Those in favour generally considered the Digital Markets Unit would have to take a nuanced approach to enforcing this rule, and some said that this principle should be framed more tightly. Those opposed, including many of the biggest technology firms, were concerned about extending the scope of the Digital Markets Unit's activities too broadly, and potential damage to ecosystems that provide consumer benefits.

Several stakeholders sought clarity on the wording and specific conduct the Digital Markets Unit would be able to prevent.

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?

This question was primarily answered by content providers. Several stakeholders, including most of the press sector respondents, were in favour of a mandatory bargaining code, similar to the Australian News Media Bargaining Code. One very large technology company thought this was an opportunity for the UK to create positive incentives for both publishers and platforms in order to support the long-term sustainability of the press sector, and provided an indicative set of guiding principles for such a code. This included market based outcomes and consideration of both sides of the value exchange.

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

The majority of stakeholders were supportive of the need for interim orders. In particular, the need for the Digital Markets Unit to prevent potential harm to the wider ecosystem caused by potentially anti-competitive changes while investigations were carried out, was cited as a key reason to support introduction. Many stakeholders believe that with the proper safeguards it will be a very useful power to stop harm and incentivise adherence to the regime.

A large segment of stakeholders argued that the wording should be clarified further to explain the strength of the power and when it will be used. Some stakeholders, especially very large technology companies, were keen for the powers to only be the same as existing interim powers available to the CMA. Without such a change the very large technology

companies would be opposed to interim code orders, considering it too drastic an intervention.

Part 5

Question 17 - What range of PCI remedies should be available to the Digital Markets Unit?

How can we ensure procedural fairness?

Nearly all respondents agreed that the Digital Markets Unit should be able to apply a wide range of remedies as part of its pro-competitive intervention toolkit. In particular, interoperability and data sharing requirements were seen as key remedies the Digital Markets Unit would need to carry out its function.

Respondents were more divided on the question of whether ownership separation should be available to the Digital Markets Unit as a pro-competitive intervention remedy. Very large technology companies, trade bodies and legal stakeholders tended to be against including ownership separation as a possible remedy. This was because of the drastic effect ownership separation could have on the core operation of a business, as well as its irreversibility.

Other respondents, particularly from smaller technology companies were more in favour of including ownership separation as a remedy. This was typically on the basis that this would only be deployed as a last resort and where a robust investigation had demonstrated clear and material damage to the market and harm to competition. Some respondents went so far as to say that not including ownership separation would severely limit the Digital Markets Unit's ability to carry out its function.

In order to ensure procedural fairness, very large technology companies and legal stakeholders preferred a comprehensive list of remedies available as part of a pro-competitive intervention set out in legislation together with the circumstances in which they could be used.

However, other stakeholders, particularly from the press and publishing firms, considered an exhaustive list of remedies would unduly restrict the Digital Markets Unit and prevent it from carrying out its functions. These respondents preferred giving the Digital Markets Unit a mostly unlimited toolkit, subject to proper oversight.

Respondents generally agreed that pro-competitive interventions should be incremental and subject to ongoing monitoring and review. Respondents also agreed that pro-competitive interventions should be subject to judicial oversight and appeal to ensure fairness.

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?

Respondents mostly agreed the adverse effect on competition test was both suitable and well understood from the CMA's current practice.

Some respondents however were concerned that the CMA had historically taken too broad a reading of this test which should not be replicated in this new competition regime. Some smaller technology firms requested that guidance be issued on how the adverse effect on competition test would be used in practice to provide additional certainty.

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?

Stakeholders were divided in their opinions on this issue. Smaller technology firms, press and publishing firms, telecommunications stakeholders, and broadcasting firms were generally in favour of allowing the Digital Markets Unit to implement pro-competitive interventions outside of the designated activity as long as this could be linked to a harm relating to the designated activity. In particular this would help prevent unfair leveraging of another activity within a Strategic Market Status firm.

Very large technology firms and trade bodies tended to be against this approach, highlighting that this would cause additional uncertainty for businesses.

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

Stakeholders were in favour of flexibility for the Digital Markets Unit, given the rapidly evolving nature of digital markets, but were of the view that flexibility should not be unlimited.

Respondents were in favour of the trialling of remedies with a view to amending or removing them in view of their effectiveness or proportionality. Some smaller technology firms raised the risk of new entrants to a market being forced out suddenly if trialled remedies were removed, and therefore suggested the Digital Markets Unit publish its plans for trialling remedies in advance.

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

There was no consensus amongst stakeholders on the appropriate deadline for a pro-competitive intervention. Some respondents were concerned that a fixed deadline may not

allow enough time to properly consider all the evidence and engage with all the relevant parties.

Other respondents pointed out that the investigation period would be one of great uncertainty for businesses and should be concluded as soon as possible, with the possibility of an extension if required. Some stakeholders considered the knowledge already obtained by the Digital Markets Unit during the Strategic Market Status designation process would mean that less time was needed than during comparable competition investigations.

Part 6

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?

There was general support for the participative approach to enforcement and financial penalties outlined in the consultation document. There was a more limited but entirely supportive response on the use of court orders similar to those in the Competition Act 1998 and the Enterprise Act 2002.

Senior management liability was more contentious, though it was still supported by the majority of respondents who addressed it. Those opposed included some US-based trade bodies, who thought the need for such a strong penalty had not been demonstrated.

Stakeholders also suggested other remedies including reputational sanctions (similar to those of the Advertising Standards Authority), reporting obligations, referral of serious breaches to other regulators, a general duty of care to be owed by Strategic Market Status firms to other market participants, or a power to appoint an external auditor to monitor a firm.

There was widespread agreement on the need to allow for the gathering of information stored abroad and to coordinate with equivalent regulatory regimes in other jurisdictions. There was some discussion in the responses about the extent of the connection needed to justify international enforcement orders.

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

The response to the proposed information gathering tools was mixed. Most respondents acknowledged the Digital Markets Unit required powers at least as strong as the CMA currently uses. However, two very large technology companies were concerned that some powers currently available to the CMA may go beyond what is required by the Digital

Markets Unit, such as the ability to require specific persons to attend interviews and inspection and searches of premises.

One concern was that the powers should not impose too heavy a burden on firms without Strategic Market Status who may be involved in investigations, and that information gathering tools should be proportionate and reasonable. Some respondents suggested changes to the proposed financial penalties for non-compliance with information requests, for instance capping the maximum amount. Other respondents were eager for specific safeguards to protect confidential information. Some stakeholders suggested either flexibility on the timescales for responses to requests, or limiting the number of requests.

Respondents also noted the importance of effective inter-regulator information sharing to avoid duplicative requests and ensure the objectives of other regulatory regimes were also considered.

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

Stakeholders were in favour of the Digital Markets Unit having to be objective, proportionate and evidence-based in all its activities, although some respondents asked for additional details. Other stakeholders suggested additional safeguards including binding statutory best practice requirements, anonymisation of evidence, publication and notification requirements, formal separation of investigating and decision making elements of the Digital Markets Unit (or completely separate decision makers) and measures to prevent retaliation against companies who cooperate with investigations.

Respondents supported proposals for the Digital Markets Unit to consult stakeholders on key regulatory decisions and publish formal consultation responses. Some respondents emphasised the importance of including smaller companies in open and participative dialogues.

A few respondents requested that the Digital Markets Unit be required to carry out impact assessments before implementing code orders or pro-competitive interventions. One stakeholder noted that informal action should be made openly to avoid breaches of public law principles. One stakeholder wanted safeguards to prevent regulatory capture of the Digital Markets Unit through inappropriate hiring.

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

There were mixed views on the most appropriate way to handle appeals. Some stakeholders wanted to use a judicial review standard, which is streamlined and may be faster, although some wanted extra safeguards to limit extraneous or late evidence. Other stakeholders favoured a modified version of the judicial review standard, for instance similar to that used in aviation or telecoms appeals.

Some stakeholders did not like the proposal to take into account the merits of a case only in certain situations, pointing out the risk that different standards of review could disincentivise the Digital Markets Unit from taking action for fear of protracted litigation.

Very large technology companies, US trade bodies and legal stakeholders preferred a merits based appeals process, arguing this was what was most commonly used in comparable regulatory regimes and would provide greater certainty.

There were also mixed views on non-suspensory appeals. Two very large technology companies argued that where a decision causes significant damage to its business, an appeal should have a suspensory effect.

Question 26 - What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with Strategic Market Status?

Stakeholders agreed that the focus should be on public enforcement.

There were mixed views on regulator-led redress. Some US-based trade bodies suggested that the Digital Markets Unit should not be given any redress powers. A similar number of stakeholders suggested that redress should be de-prioritised as it might create unnecessary complexity. Most consumer groups and charities favoured redress powers, stating that it provided another layer of protection for consumers, an effective deterrent and an additional enforcement power.

Views were divided on private actions. Some stakeholders suggested that private actions should be deprioritised or disallowed. A similar number of stakeholders supported private actions on the basis that they are an effective and meaningful enforcement mechanism.

Stakeholders from the press and publishing sector supported a compensation mechanism for business users that have suffered harm because of Strategic Market Status firms' conduct.

Part 7

Question 27 - What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with Strategic Market Status?

There was general support for this proposal with stakeholders generally believing that this would support the CMA in their monitoring role. There were hesitations however expressed from very large technology companies about ensuring the administrative process is minimised and targeted to transactions that have a link to the UK or controlling stakes. A number of stakeholders (from the tech sector, wider businesses and academics) commented that this would not place undue burden on Strategic Market Status firms.

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

Very large technology companies, some smaller technology companies, legal stakeholders and a majority of non-technology sector companies were opposed to this proposal. Arguments included the fact that it could not be shown that any recent mergers had been missed under the current system. Others were concerned that over-regulation of mergers would damage innovation and investment.

Large (but not very large) technology companies, academics, and a slight minority of non-technology sector companies were in favour of the proposals. Some of those in favour considered the proposed financial threshold too high and argued it should be lowered, perhaps to as low as £20 million.

Many stakeholders from both sides agreed that the UK nexus test would have to be clearly defined and provided thoughts on how the nexus could be assessed (including UK turnover, UK premises, UK consumers and UK employees). Some also provided insights from other transaction based jurisdictional thresholds of other countries.

Question 29 - What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with Strategic Market Status?

As with other questions relating to the merger proposals, stakeholder opinion was divided on this question. Those in favour pointed out that the Phase 1 investigation would only take a limited amount of time, which would not be a significant deterrent to benign acquisitions. Those opposed pointed out that no evidence had been shown that harmful mergers had been missed under the current regime and that this would place unnecessary burdens to the businesses involved. If the regime was to include mandatory reviews, they argued that this

should have a fast track process, or an element of CMA discretion, and only when there are clear thresholds (transaction value and nexus criteria) to assess when this requirement needs to be complied with.

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 Strategic Market Status?

Very large technology companies, some trade bodies, some smaller technology companies and legal firms were strongly opposed to any change to the standard of proof required in a Phase 2 investigation. They feared it undervalued the benefits of mergers which they felt would effectively be banned under this change and some argued that the CMA can already sufficiently intervene under their current powers. There were also hesitations expressed as to the limited underlying evidence to support the rationale for such a change.

Other stakeholders, including most other technology companies and academics, were in favour of the proposal. Some preferred moving to a balance of harms test, considering the current proposal may not capture the full extent of the harm caused by certain mergers. Some highlighted that while this may impact investors, the harm to competition is greater if anti-competitive acquisitions were not able to be intervened in. Some stakeholders wanted to go further than the published proposals, for instance putting a temporary moratorium on all acquisitions by Strategic Market Status firms.

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

Stakeholders expressed a range of opinions to this question. The general sentiment expressed by many to this question was to ensure that the Strategic Market Status merger regime proposals and those that were suggested in the *Reforming Competition and Consumer Policy* consultation were unified. Many highlighted that some of the proposals were trying to achieve similar aims and warned that duplicative systems could cause overcomplication and confusion.

Some stakeholders responded to this question to call for greater evidence to demonstrate the need for changes of the kind proposed. Some highlighted that the merger reform proposals could be delayed to allow the impacts of the recent changes to the merger assessment guidelines and CMA's more proactive approach to digital mergers to be fully

realised. This could also allow time for the impacts of the wider Digital Markets Unit powers to be assessed to ensure that merger changes were still warranted. Equally, some press and publishing respondents raised concerns that any reforms to the merger regime might delay the implementation of the wider pro-competition regime.

E02740688

ISBN 978-1-5286-3298-0