The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool

Overview

1) The Competition and Markets Authority (CMA) is the UK's lead competition and consumer enforcement authority which works to promote competition for the benefit of consumers, both within and outside the UK. It is an independent, non-ministerial government department.

2) We welcome the opportunity to respond to the EU parallel public consultations on the Digital Services Act (DSA) package (i.e. the proposal for ex-ante regulation of large platforms with a gatekeeper role and the update of the E-commerce directive including as regards responsibilities of online platforms) and the New Competition Tool (NCT). We are responding to these consultations given the ongoing global discussions on these topical matters and we hope that our experience in the UK may be useful in the Commission's consideration of these issues.

3) We welcome the European Commission's focus on online platforms and digital markets and support the objectives to ensure a fair-trading and transparent environment and increase the innovation potential and capacity across the online platform ecosystems in the EU's single market. A forward-looking approach that can act quickly and flexibly to promote competition can ensure digital markets work for all. The form of our response combines our views on the proposals set out in both consultations given the close interplay between them, with each having a dedicated section in this response. We would welcome further engagement on these issues beyond this consultation period.

4) In relation to the DSA proposals, we support their aim to ensure that markets remain fair and contestable, in particular in situations where large online platforms act as gatekeepers. The CMA agrees with the Commission that the current framework is not able to adequately and efficiently address issues that can arise in such markets, and that a new approach is required. Furthermore, we consider the Commission's proposals for ex-ante regulation for large online platforms acting as gatekeepers as a step in the right direction. Many of the proposals are similar to those recommended by our own market study into online platforms and digital advertising.

We believe it is desirable there is a coherent approach across jurisdictions to regulating gatekeeper platforms.

5) We consider the Commission's work in relation to ensuring the E-Commerce Directive remains fit-for-purpose is important and necessary. The CMA's work in this area, referenced throughout this response, has highlighted that digital platforms are, in practice, able to play a significant role in controlling the activities which take place on their platforms. This has been emphasised further by the key role platforms have played throughout the Covid-19 pandemic. We believe the review of the E-Commerce Directive provides an opportunity to set out more clearly the responsibilities of online platforms, for example to identify and remove illegal content.

6) In relation to the NCT, the market-structure version of the proposed tool, applicable across sectors[1], as set out in the Commission's inception impact assessment, is very similar to the CMA's own Market Investigation (MI) Tool. In light of our experience of using this tool and the outcomes that we have been able to achieve by using it, we consider that a similar tool – if appropriately designed – would be a valuable and impactful addition to the European Commission's existing toolkit. However we note that there are certain practical considerations to be taken into account in designing and using the tool. One important consideration is that the MI is a 'one-off exercise'. While it may be very effective in intervening on a one-off basis to tackle some of the challenges faced in digital markets, it may not be a self-standing or "all-weather" solution when compared to ongoing dynamic regulatory oversight. So a careful case-by-case assessment of the specific circumstances will be required when considering the appropriate tool.

7) The CMA response to this consultation is separate from the response of the UK communications regulator OFCOM. The European Commission will wish to review

[1] In its inception impact assessment for the NCT, the European Commission sets out 4 policy options for the NCT tool, namely: (i) dominance-based tool to be imposed without a finding of abuse, applicable across all sectors; (ii) dominance-based tool to be imposed without a finding of abuse, with limited sector scope; (iii) market-structure-based tool to be imposed without a finding of dominance, applicable to all sectors; and (iv) market-structure based tool to be imposed without a finding of dominance, with limited sector scope.

that response in parallel, in particular given the additional sectoral expertise of Ofcom.

Ex-ante regulation of large digital platforms acting as gatekeeper

The challenge

8) Digital platform markets have revolutionised our lives with rapid and profound changes for consumers, businesses, the economy and society. The world of information is only a click away, as is the ability to connect and interact with friends and family all over the world, to consume music or video content whenever and wherever, and to buy products online and have them delivered the same day. For businesses, digital platforms have opened up new markets and audiences, providing new revenue streams, and revolutionised business models.

9) Digital innovation is a major driver of opportunity, productivity and creativity across the whole economy. Many of these changes have been driven in part by the ability of these platforms to benefit from network effects and economies of scale and scope, and to use data to improve user services. However, these features can also lead to the accumulation of market power.

10) To step up to the new challenges posed by digital platform markets, the CMA has increased our work in this area. We published our Digital Markets Strategy in July 2019 setting out our aims and priorities in digital platform markets. We have also undertaken a significant programme of consumer enforcement work focused on increasing trust in online markets, and established a Data, Technology and Analytics (DaTA) Unit which, in part, helps our case teams to identify new and emerging technologies and understand how they are impacting consumers and markets.

11) The CMA supports the main aims of the DSA proposals to ensure that “markets characterised by large platforms with significant network effects remain fair and contestable, in particular in situations where such platforms may act as gatekeepers”. The CMA agrees with the Commission that the current regulatory framework at EU level does not yet adequately address issues which have emerged

alongside the widespread growth and use of online platforms and/or specifically the economic power that certain large online platforms acting as gatekeeper hold.

12) The combination of challenges presented by digital platforms as outlined in the Commission's consultation cannot be effectively tackled by existing competition tools alone. Existing competition tools are ex-post in nature and tend to act mainly at individual firm level, focusing on stopping, deterring and/or penalising behavior, rather than designing remedies to correct it. As explained in more detail later in this response, our markets regime has been particularly valuable in helping the CMA consider market-wide issues which may not be captured under competition and consumer tools. However, in addition to the markets regime, we consider there is a need for a new approach to protect and promote competition in digital markets.

13) A number of in-depth studies, both in the UK and internationally, have argued that a forward-looking approach could address the ability of the most powerful platforms to exploit users and exclude competitors, by providing more upfront clarity and certainty about what behaviour by platforms towards users is and is not acceptable[2]. A pro-competition ex-ante framework would give business users of platforms greater confidence to innovate and invest, and would help platforms know what they are, and are not, allowed to do. It would also allow for quicker action to address problems. In turn, this would be expected to lead to improved outcomes for users and consumers and help ensure the realisation of the benefits digital platforms can bring.

14) The CMA recently concluded a year-long market study into online platforms and digital advertising.[3] This review found that competition is not working well in these markets, leading to substantial harm for consumers and society as a whole.[4] The final report recommended the UK Government establish a new pro-competition regulatory regime, overseen by a Digital Markets Unit. The CMA is now leading a Digital Markets Taskforce to consider the design and implementation of a forward-

[2] This includes e.g. Stigler Committee on Digital Platforms: Final Report, September 2019 ('Stigler Report'); as well as the Report of the Digital Communications Expert Panel ('The Furman Review'), and the CMA's market study into online platforms and digital advertising ('Market Study Final Report') in the UK.

[3] https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study

[4] The final report page can be found here.

looking, procompetitive framework for digital markets.[5] The Taskforce will provide its advice to the UK Government by the end of this year.

A new framework – gatekeepers and remedies

15) In regards to options 1 and 2 set out in the DSA consultation, we agree with the Commission's view that, whilst the EU Platform to Business Regulation[6] (P2B Regulation) is a good basis to build on, a new framework is required, in particular (but not necessarily only) in respect of large platforms with a gatekeeper role. Like the Commission, we consider that although the EU P2B has established important common transparency and redress standards for all platforms and search engines covered by it, it doesn't go far enough to address concerns relating to large gateway platforms. More prescriptive, substantive rules are needed particularly to address unfair trading terms and practices.

16) Our digital advertising market study recommended a new pro-competition regulatory regime with strong and clear ex ante rules for those firms deemed to have 'Strategic Market Status' (SMS).[7] Similarly, several of the policy options being proposed in the DSA consultation would apply specifically to large online platforms acting as gatekeepers. In particular, noting that "the more limited subset of large online platforms subject to the additional ex ante framework would be identified on the basis of a set of clear criteria, such as significant network effects, the size of the user base and/or an ability to leverage data across markets".

17) The CMA's Digital Markets Taskforce is currently considering the test which might be used to identify which firms may have SMS and therefore would be subject to additional rules. We consider that such additional regulation is likely to be justified where a firm has a position of substantial and entrenched market power which provides it with a strategic position. A variety of factors could indicate that a firm has a strategic position including:

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[5] CMA's Digital Markets Taskforce, launched July 2020 ('The Taskforce')

[6] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. It became applicable in all EU Member States (including the UK) from 12 July 2020.

[7] This would be applied only to particularly powerful companies, those deemed to have 'strategic market status', in order to avoid creating new burdens or barriers for smaller firms

- evidence of the ability of the firm to leverage one market position into a variety of other markets
- the firm's size and scale; or
- its position as an access point to customers for businesses across a diverse range of markets.

18) It is when a firm has obtained such a position that the effects of its market power are likely to be particularly significant and existing tools are unlikely to be adequate in addressing this market power.

19) The new regime we proposed in our market study would be comprised of two sets of tools. The first, an enforceable code of conduct to mitigate the effects of the market power of SMS firms by governing their behaviour. The second, a range of 'pro-competitive interventions' to tackle the sources of market power and promote competition. The CMA's Digital Markets Taskforce is also considering the powers needed to enforce a code of conduct and is likely to include (inter alia) powers with respect to: monitoring firms and market developments, and gathering information to investigate potential concerns similar to option 2 proposed in the DSA.

20) These two categories of intervention proposed in our market study map to the two sub-options the Commission identifies within Option 3 'a new and flexible ex ante regulatory framework for large online platforms acting as gatekeepers'. It follows that we consider both sub-options (3a 'blacklisted practices' and 3b 'tailor-made remedies') should be within scope of a new ex ante approach. Our view is that they would be complements rather than substitutes.

21) In respect of Option 3a ('blacklisted practices'), we consider it important to ensure that the approach retains appropriate flexibility to keep pace with the changes that could occur in digital platform markets. Our market study considered this and set-out our support for a principles-based approach, which the Commission intend to explore as part of, and beyond this consultation. We are considering the trade-offs between principles setting out what behaviour is not allowed and principles that instead focus on the outcomes we wish to achieve. It may be the case that the latter gives more scope for platforms to continue to innovate and take responsibility for ensuring their practices are in line with the overall purpose and spirit of the principle.

22) Our market study proposed three core principles on which we would expect our code to be based. These principles are:

- **fair trading**, requiring the SMS platform to trade on fair and reasonable terms for services where they are an unavoidable trading partner as a result of their gateway market position. This is intended to address concerns around the potential for exploitative behaviour on the part of the SMS platform;

- **open choices**, requiring the SMS platform to allow users to choose freely between elements of the platform's services and those offered by competitors. This is intended to address the potential for exclusionary behaviour on the part of the SMS platform; and

- **trust and transparency**, ensuring that SMS platforms provide sufficient information to users, including both consumers and businesses which transact with the platform, so that they understand how the platform operates and are able to make informed decisions.

23) In respect of Option 3b, we agree that there should be specific assessments undertaken before implementing remedies of the sort envisaged, given their potential impact on the operation of commercial entities. Our market study outlined some examples of the kinds of remedies that could be imposed in the context of the markets it looked at, and we would support a framework that enabled those. Of course, it would be necessary to have appropriate checks and balances in place for introducing such remedies.

24) The types of remedies that the market study outlines included **data-related remedies, consumer choice and default remedies, and separation remedies**. The data-related remedies reflect the fundamental role data plays in the business models of online platforms, particularly those funded by digital advertising, and could include interventions like increasing customer control over data, mandating interoperability or access to third party data, or mandating separation. For consumer choice and default remedies we have noted the power of defaults and choice architecture in influencing consumer decision making, and possible interventions could include a choice requirement remedy for platforms to give to

consumers, and a 'Fairness by Design' duty to ensure that they are promoting consumers' awareness and their ability to make informed choices about the use of their personal data. Finally, separation remedies can seek to address the ability of integrated firms to exploit market power through operating businesses across related markets and could take include several forms such as operational separation, ownership separation or structural separation.[8]

Coherence – internationally and between other regulatory regimes

25) Digital markets are fast-moving. New technologies and new business models can develop at pace and regulators need to be able to respond flexibly to new forms of potential detriment. This must be balanced against sufficient clarity. As such, the CMA is of the view that, in practice, it is desirable for there to be a coherent approach across jurisdictions to governing the way that gatekeeper platforms can act, so as to provide clarity for businesses, investors and consumers and ensure effective ex-ante control. Ensuring coherence will involve considering a wide number of issues and continued collaboration between authorities.

26) The largest digital platforms are multinational companies, operating across multiple jurisdictions, and their reach can extend across entire economies. The international nature of these 'borderless markets' means that it is essential for competition authorities to work with each other and with governments as we look to support innovation, whilst enabling fair competition and protecting consumer interests. The CMA takes the view that it would be desirable for strong regulatory coherence across jurisdictions to avoid creating a more complex landscape, which risks stifling competition, innovation and investment. We look forward to continuing to work with the Commission and our counterparts in this regard.

27) As well as noting the international nature of digital markets, we also believe that, as far as possible, we should aim for coherence between regulatory regimes with broader policy objectives in digital markets. For instance, when considering the intersection between competition and privacy, data protection or online harms, steps should be taken to ensure the regimes are complementary both initially and over the longer term. It is important to understand the boundaries of different

[8] More detail on examples of remedies outlined by the market study can be found in the final report.

regulatory regimes and have mechanisms to deal with issues at the edge of those boundaries, to ensure clarity for firms and beneficial outcomes for users.

Responsibilities of online platforms

28) Online platforms offer a range of benefits for consumers, in terms of increased choice, convenience and innovation. In order to drive competition, however, it is important that consumers can make informed choices between traders operating on the platform (and between platforms) and are not misled or provided with imperfect or inadequate information. In our view, platforms have a responsibility to take steps within their power to ensure that consumers are protected from abuse and exploitation, and that traders are competing fairly on the platform. This is important to ensure that consumers remain engaged and can drive competition: consumer trust is key to this participation, with low levels of trust resulting in low consumer engagement.

29) Like the Commission, we consider that, while the core principles of the E-Commerce Directive remain sound, technological developments over the last 20 years (since the Directive came into force) have led to challenges which have required further action - legislative measures, non-binding initiatives, and voluntary measures. As such, we agree that it is an opportune time to review the effectiveness of these developments and the need for further measures.

30) The CMA's work in this area has highlighted that digital platforms are, in practice, able to play a significant role in controlling the activities which take place on their platforms. While, as a matter of principle, we agree that platforms which operate as genuine 'passive' hosts should benefit from liability exemptions in some circumstances, in many, if not most cases, the platform can take active steps to ensure that what takes place on the platform ultimately operates to promote consumer trust and welfare. The CMA has undertaken a number of consumer enforcement cases in this area which have focused on ensuring that the platform takes adequate responsibility for what happens on the platform.

31) By way of illustration, the CMA undertook a programme of work aimed at maintaining consumers' trust in what they read online in connection with shopping

for goods and services.[9] Using our consumer protection powers, we focused in particular on online reviews and endorsements: more than half of UK adults rely on online reviews when deciding to make a purchase, while endorsements from social media influencers resonate with their followers as a form of peer recommendation which is seen as more trustworthy than traditional advertising. Outcomes from the CMA's work included:

- securing commitments from Facebook, Instagram and eBay to tackle the risk that people can buy and sell fake and misleading reviews through those platforms;
- agreeing undertakings with two marketing companies to ensure that all advertising and other marketing in articles and blogs is clearly labelled or identified, so that it is distinguishable from the opinion of a journalist or blogger;
- obtaining undertakings from a number of influencers to improve disclosures in their social media posts to make it clear when they had been paid or otherwise incentivised to endorse a product or service, and
- publishing a large amount of guidance for businesses and individuals to clarify consumer protection law as it applies to online reviews and endorsements.

32) The CMA has undertaken a number of consumer enforcement cases which have focused on the responsibilities of the digital platform. These include the enforcement cases relating to secondary ticketing websites, social media endorsements, and online hotel bookings.

33) The CMA takes the view that the proposed review of the eCommerce Directive provides an opportunity to set out more clearly the responsibilities of online platforms to identify and remove illegal content and facilitate compliance with consumer law on their sites, and clarify the extent to which platforms should be liable for third party content hosted on their sites where this content may be misleading, inaccurate or incomplete. While we agree that the basis underpinning the objectives of the eCommerce Directive (as described in the Commission's combined Evaluation Roadmap / Inception Impact Assessment) remains valid, we agree that certain further measures are now likely to be necessary.

[9] Fake and misleading online reviews.

34) In particular, where platforms have significant control over the way in which users interact with their sites, our firm view is that that platforms should exercise this control to ensure, as far as possible, that uses comply with their obligations under consumer (and other) law and the platforms' own terms and conditions (provided that those terms themselves are fair). Greater clarity in this area would help to limit occurrences of harmful content and the infringement of consumer protection legislation, which can erode trust in online markets and lead to a weakening of competition.

35) The CMA takes the view that it would be helpful if there were clearer rules around the extent of the platform's obligations in a number of situations. For example, where a user of the platform has posted misleading content, is the platform required to check all other posts by that user? Are platforms required to have systems in place for consumers to report inaccurate information? Does the level of diligence required depend upon the business model of the individual platform?

36) The CMA considers that clarification of the responsibilities of online platforms would be particularly helpful in those circumstances where the application of consumer protection law may be challenging. An example may be where platforms are less focused on commercial imperatives (e.g. charities). Another example may be in the 'sharing economy', consumer-to-consumer platforms where the individual offering to supply the service may require additional support from the platform (such as local initiatives enabling consumers to loan out power tools to other people or accommodation platforms).

37) The combined evaluation roadmap/inception impact assessment also identifies a number of issues which do not only involve consumer and competition law issues but which rely on the same technologies. For example, recommender systems and micro-targeting may be used by a platform to target advertisements, prices or particular products, but may also be used to target news or political messaging. Platforms may display content in this context which is not necessarily illegal but may still be harmful.

38) We agree broadly with the characterisation in the impact assessment of the range and nature of problems which have arisen as a result of technological developments. These extend beyond consumer and competition law. We agree that it is opportune now to review the interactions between the different regimes. This is something which, in the UK, the Digital Taskforce is considering, namely how a pro-competitive regime might interact with existing regulatory regimes, such as relationships between promoting competition and wider regulatory objectives, including but not limited to economic growth and innovation, privacy, data protection, and intellectual property rights.

39) The role of digital platforms to both promote competition and respect data protection rights is an example of an issue which reveals potential tensions. This is an issue we considered in our market study into online platforms and digital advertising. This found that the collection of data by digital platforms may reinforce market power and that consumers had insufficient knowledge and control over how data are collected and used, partly as a result of the conduct of the platforms in the design of consent interfaces. As a result, the report included recommendations to promote consumer choice through increased privacy and control. The role of the platforms to access, or control access to data, on both sides of the platform involves balancing considerations between, on the one hand, protecting personal data rights and privacy and, on the other, promoting competition.

40) The CMA recognises the need to achieve a balance between imposing responsibilities on platforms for ensuring compliance with consumer (and other) law, and placing disproportionate burdens on platforms, which may create barriers to entry or innovation. We also acknowledge – as mentioned above – that the array of platforms' business models may mean that different responsibilities would apply to different platforms (with the extent of liability for misleading content reflective of platforms' level of control and active intervention over the way in which users interact with the site). Despite these challenges, however, the CMA takes the view that the introduction of clearer rules is key to facilitating competition by safeguarding trust and increasing levels of consumer engagement in online markets.

The proposal for a New Competition Tool (NCT)

41) The CMA is one of a few authorities that have a very similar tool to the NCT under consideration here. In particular, one of the options[10] for the NCT currently envisaged by the European Commission, is very similar to our market investigation tool (MI).

42) This tool enables the CMA to identify and intervene, including imposing direct and forward-looking changes on businesses, in situations in which there are 'features of a market' that cause an 'adverse effect on competition (AEC)'. The MI is therefore one of the CMA's most powerful and broad tools, which has resulted in significant interventions in a range of different markets. Having had the MI tool since 2002 and undertaken 19 MIs, we have gathered considerable experience in this area, which we are pleased to be able to share for the purpose of this consultation.

43) In light of our experience of using our own MI tool and the significant outcomes that we have been able to achieve, we consider that a similar tool – if appropriately designed - would be a valuable and impactful addition to the European Commission's existing toolkit.

44) However, without by any means detracting from its benefits, the MI tool also has some practical factors associated with its use which are worth taking into account if designing a similar tool. Therefore our view is that while this tool would no doubt be beneficial in tackling some of the challenges faced in digital markets (as well as other markets), it should not be viewed as a self-standing solution to address all digital platform challenges. Rather it should be seen as a valuable complement to the existing competition toolkit and to current[11] and future ex ante digital platforms regulation.

<u>Main Benefits</u>

Wider scope and a more proactive, holistic approach than existing competition law

[10] Namely the market structure-based competition tool with a horizontal scope as set out in the European Commission's inception impact assessment related to the NCT.

[11] EU Regulation 2019/1150 of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services (also known as Platform to Business or P2B-Regulation) of 20 June 2019

45) The European Commission is considering the proposed new competition tool to enable it to address what it calls "structural" competition problems that current competition rules cannot tackle or cannot address in the most effective or timely manner. This was largely also the main rationale behind the introduction in the UK of the markets regime, the legal powers for which are contained in the Enterprise Act 2002 (EA02) as amended by the Enterprise and Regulatory Reform Act 2013. The UK markets regime comprise both the MI and market study[12] (MS) tools which sit, and are used, alongside the other CMA tools, namely competition enforcement, merger control and consumer enforcement.

46) We consider that having this range of different tools to tackle competition and consumer concerns and being able to use them in a complementary manner, has been and continues to be very valuable. The fundamental benefit of our markets regime (i.e. MIs and MSs) is indeed that it can help understand and uncover competition and consumer issues best tackled through enforcement while also allowing the CMA proactively and effectively to address itself market-wide issues that would not fall within the scope of these two areas of law.

47) Specifically, thanks to its MI powers, the CMA is able to look holistically at and intervene (where appropriate) to address a range of different possible features of markets (be they conduct and/or structural) which may be creating competition issues that negatively impact consumers. Examples of these are demand and/or supply-side behaviour, barriers to entry and expansion by firms, switching difficulties by customers, and regulatory restrictions.

48) An MI is particularly helpful in circumstances where each of these features or a combination of them may have evolved in such a way as to impede the competitive process and the effective functioning of that market, without any one or more firms breaking any particular competition or consumer laws.

[12] Market studies (MSs) and Market investigations (MIs) are similar. Both tools allow the CMA to take a proactive approach to examining and identifying markets that appear not to be working well for consumers or market practices that may be causing consumer or competition harm, even when it's not obvious that either competition or consumer laws have been broken. There are however some significant differences between them. MSs are less in-depth and shorter. Also, importantly, unlike for MIs, in an MS the CMA doesn't have legally binding order-making powers to make direct changes in the market concerned. MSs can, however, be precursor to MIs.

49) The scope of the CMA MI tool is deliberately wider than other competition or consumer law tools. We consider that for this tool (or a similarly designed NCT) to bring added value it is necessary that such wider scope is maintained, especially if one the main purposes of the tool is intended to help address the challenges brought about by digitisation.

50) It is often a combination of different types of market-wide issues and outcomes which have built over time that can lead to competition problems arising in markets, impacting consumer trust and confidence. These include increasing concentration in a few large established firms, combined with difficulties in switching, lack of transparency of charges or terms and conditions, and barriers to entry or expansion such as regulatory requirements or the size of user base.

51) In this context, we think it is also important to note that the word “structural” used by the European Commission in relation to the issues the NCT would help to tackle might not be sufficiently all-encompassing and may be construed for example as not addressing demand side issues. This is why in the UK we refer to “features of a market”. This is a more expansive concept including both supply and demand side issues, business to business (B2B) as well as business to consumers (B2C). The European Commission may wish to consider this further in developing the NCT.

52) The CMA’s MI tool (and MSs) looks beyond individual abuses of dominance, agreements that reduce competition, or breaches of specific consumer protection legislation. It can usefully consider and importantly remedy all aspects of both market structure and conduct affecting competition and outcomes for consumers.

53) In this context, based on our experience, it is fundamentally important that the NCT should not be a dominance-based tool but rather one that is applicable across sectors (a ‘market-structure based’ tool to use the terminology in the EU inception impact assessment and the consultation). Such a tool would allow for proper account to be taken of market structure, to ensure it can indeed be used to intervene in the scenarios not effectively covered by existing competition rules and can do so without having to establish dominance (which is not a necessary pre-requisite for competition problems to arise in markets as demonstrated in past cases) or abuse.

54) As also noted in a recent article by Amelia Fletcher on the parallels between the NCT and the UK MI[13], this can be particularly helpful in that it widens significantly the possibilities for a competition authority to intervene in circumstances when single firm dominance may not be obvious and/or easy to find, and/or notwithstanding the presence of significant market power. For example, the Aggregates, Cement and Ready-mix MI report in 2014 identified a combination of structural and conduct features that were leading to coordination and higher prices and, as a result, required structural remedies in relation to cement in the UK aggregates sector. This was based on a careful economic analysis of the complex vertical oligopoly situation in the UK and it is not obvious that single firm dominance would have been found.

55) Similarly in the Energy MI[14], completed in 2016, where the CMA found, among other things, that 70% of domestic customers of the six largest (but not necessarily individually dominant) energy firms were still on an expensive 'default' standard variable tariff while they could have saved significantly by switching. As a result of the analysis, the CMA set out a wide range of reforms and measures (including a price cap for customers on prepayment meters) to drive down costs for the benefit of customers, particularly by increasing competition between suppliers and helping more customers to switch to better deals.

56) The ability to make a market-wide intervention aimed at tackling 'features of the market' adversely affecting competition seems particularly relevant to the digital sector. As was highlighted in the 2019 Furman Report: *"The challenges to effective competition in digital markets do not come about solely because of platforms' anti-competitive behaviour and acquisition strategies."* which noted that the issues are wider and linked to the underlying economics of these markets.

Power to consider and impose a wide range of remedies

57) The second key benefit of our markets tools and particularly of the MI tool is that they enable the CMA to focus on how issues – both of a B2B and/or B2C nature –

[13] "Market investigations for digital platforms: Panacea or Complement?", by Amelia Fletcher, Centre for Competition Policy, University of East Anglia, 6 August 2020

[14] See here: https://www.gov.uk/cma-cases/energy-market-investigation

can most effectively be remedied and they are not restricted to imposing a fine or to stopping a behaviour.

58) Specifically, depending on the problems identified, an MI enables us to consider a range of forward-looking, market-wide remedies (structural and/or behavioural) which can implement changes to the supply-side, demand-side and/or regulatory framework. Where this is necessary to achieve an effective solution, such remedies can apply across the market, to current and future participants, irrespective of whether or not an individual firm is dominant. In this respect the MI is a particularly powerful tool. Like a MS, it can lead to a range of outcomes including recommendations to Government/regulators and/or enforcement action, but crucially – unlike a MS – a MI comes with order-making remedial powers to directly impose beneficial changes in markets (regardless of any business 'fault'). It is worth pointing out that this remedy-making power (alongside the wider scope discussed above) is also a main additional benefit of an MI compared to the EU sector enquiries.

59) Importantly, the high level of transparency in the CMA MI allows for an open, robust discussion and consideration of potential remedies with relevant parties and stakeholders. This process has recently been further improved so that potential remedies can now be considered from the start of the MI and developed alongside our analysis of the possible adverse effects, thus allowing more time to design and refine remedies.

60) The range of remedies that the CMA is able to impose with a MI is very wide and as noted earlier these could be behavioural as well as structural. Over the years, the CMA has imposed remedies designed for example to improve disclosure (e.g. Private Healthcare, Motor Insurance, Banking, etc.), support consumer engagement and/or decision-making (e.g. Banking, Energy, Payday Lending etc.), cap prices (e.g. Energy), introduce obligations to run competitive tenders (e.g. Audit, Investment Consultants), regulate access to key facilities (e.g. Buses), introduce a data portability regime e.g. Open Banking (Banking), impose limits on anti-competitive restrictions in agreements (e.g. Groceries) as well as requiring divestments (e.g. Aggregates and Airports). The majority of remedies arising from MIs to date have been behavioural in nature, reinforcing the value of having a wide type of remedy options available.

61) The ability to consider and develop a wide variety of potential remedies would be very valuable especially when dealing with the multi-faceted challenges of digital markets and will be no less so if ex ante regulation for digital platforms is introduced.

62) With regard to ex ante regulation, it is worth noting that, where the Orders arising from MIs are behavioural (which is often the case), they effectively constitute a form of *ex ante* regulation. This ability to introduce targeted *ex ante* regulation can be especially valuable in markets which require intervention in order to work more effectively, but which are not and do not necessarily need to be covered more widely by a sector regulator. It can also be a valuable complementary tool in regulated markets, where the issue in question is not within the scope of the regulation, or where the regulator does not otherwise have the requisite powers to address it.

Can the MI tool or a similar NCT tool be useful to address tipping?

63) The European Commission's Inception Impact Assessment for the NCT notes that one of the potential uses of the NCT would be to intervene early to prevent markets from tipping. Tipping is an issue typically associated with markets characterised by strong network effects, significant overheads but low marginal costs (and therefore economies of scale), or significant demand- or supply-side complementarities between markets (and therefore economies of scope). Digital markets are particularly, (but not uniquely), likely to have these features.

64) As also noted in Amelia Fletcher's article mentioned earlier, intervening effectively with the traditional competition tools may be difficult in the absence of single firm dominance. In light of this, we agree with Prof Fletcher that the MI or a similar NCT tool allowing for the holistic analysis of markets (beyond abuse of dominance by a firm or explicit collusion) is a very valuable tool. Although it has not been a focus of our use of the MI tool in the UK to date due to the challenges set out below, this tool may allow intervention to prevent markets tipping in a way the traditional competition tools do not.

65) Notwithstanding the benefits of the MI regime as set out above, based on our analysis so far, we consider that identifying when a market might tip is very difficult. There are real risks and difficulties of intervening pre-emptively without significant investigation and strong information gathering powers to determine in which

markets and what type of intervention may be warranted and effective. There is likely to be a small proportion of markets that will actually tip which (i) can be identified and (ii) where such identification can be done sufficiently far in advance or swiftly enough to act.

66) The CMA MI powers ensure that the CMA is well equipped to carry out in-depth investigations of the nature that could be required to assess which markets may tip. However, these types of in-depth investigations take time and are resource intensive. Especially in relation to the fast-moving nature of digital markets, this may mean that by the time the investigation is completed, the market concerned may have moved on.

67) Coupled with this, the CMA currently has no power to impose – prior to completion of an MI (which is typically up to 18 months long) – any temporary requirement on suppliers to stop problematic practices or alleviate ongoing consumer harm during the investigation.[15] This creates challenges if the aim is to ensure a timely and effective intervention and is one aspect of potential reform of our Markets tools explained further below. Therefore, while valuable, an MI type of intervention may however not always be enough on its own to tackle tipping effectively.

68) More fundamentally, even if one could accurately identify when tipping may occur and could identify and act swiftly enough to implement a suitable remedy, there remain questions as to the benefits of intervening. Intervening where unwarranted would have significant negative consequences in the market in which intervention occurs but could also deter procompetitive innovation across all markets.

Some practical considerations regarding MIs

69) The benefits of being able to make impactful direct interventions in markets as a result of MIs have been highlighted above. However, it is important to point out that such Markets tools are not the panacea to solving all problems affecting competition or consumers in digital (or other) markets. There are some practical factors associated with their use to bear in mind.

[15] The CMA has however advocated for these powers as part of the Lord Tyrie's reform programme letter to the Government of February 2019.

'One-off' exercise, timing, resources and litigation risks and high public expectations around outcomes

70) One of the main practical considerations is that MIs are a 'one off exercise.' This means they provide a 'point in time' assessment of problems in a market and a 'one chance' opportunity to intervene. There can be challenges in re-visiting a market including to amend or adjust remedies as markets evolve. This may be particularly challenging in fast-moving digital markets (and therefore the MI may not always be the most suitable tool in all circumstances and/or a self-standing or long-standing solution).

71) In addition, given the scope for potentially far-reaching remedies, there is the responsibility to ensure that any intervention is based on robust analysis. Even in more simple markets, the nature and scale of the work involved, and the importance of due process (particularly in relation to affected parties) means many MIs typically last the full maximum permitted timeframe of 18 months (which can be extended by 6 months under special circumstances).

72) Consequently, MIs can be seen as slow moving (particularly when combined with up to 12 months of preceding work where a MS has taken place). This may not always sit well with the fast-moving nature of digital markets where the need to act in a timely manner may be more pressing. So particular issues may be better dealt with through complementary ex ante regulation and/or other tools.

73) Further, prompt resolution of identified competition and consumer issues can be affected by subsequent legal challenge. This is particularly the case in relation to remedies that are more interventionist and 'impactful' on businesses. However, in any case there can be commercial incentives to challenge these decisions in order to try and delay the implementation of any remedies.

74) Given the above, MIs will typically require large teams to complete the investigation to the necessary standards. They therefore typically involve a large, relatively fixed resource commitment once the MI has been launched (dependent on the scope of the MI, analysis being undertaken, size of the market and complexity of the issues/remedies). Also, once launched, at least in the UK regime, they cannot be paused or stopped easily or quickly; they need to be completed within the statutory

timeframe regardless of an unexpected crisis such as Covid-19 or other market developments.

75) At a more general level, it is also worth noting that there can be high external expectations around the outcomes of MIs based on perceptions of how the market is working. In some cases, such expectations may be difficult to meet given the detailed investigation and analysis required may reveal a different picture and/or may not support the types of remedies some believe are necessary. This issue can, to some extent, however, be mitigated through undertaking preparatory work before launching cases and an effective communication strategy once launched.

Timing and resources associated with remedy monitoring

76) MIs are 'one-off' exercises and since the majority of MI remedies have been behavioural, there needs to be some process for monitoring, keeping them under review and enforcing them, particularly as parties may argue that the remedies are no longer needed due to changes in circumstances. This may be particularly the case in respect of digital markets, where remedies may need to be adjusted more frequently as markets evolve.

77) In markets which are overseen by sectoral regulators, either or both of these roles can potentially be passed to the regulator to be carried out alongside other monitoring and enforcement activity. In other markets, the CMA's Remedies Monitoring team typically takes on the responsibility. Reporting requirements, and sometimes the use of an independent 'monitoring trustee', can be incorporated into remedies design, to facilitate this process. This can work well for straightforward remedies, but some sorts of remedies require closer ongoing monitoring. This can be costly and time-consuming relative to the resources typically available within agencies (the CMA's Remedies Monitoring Team comprises 7 people). The use of MIs in digital platform markets might be expected to generate just this sort of complex set of remedies, and this is another reason why the Furman Report favoured the creation of a specialist *ex ante* regulatory function. As also noted in the Amelia Fletcher's article referred to earlier, otherwise, the CMA could effectively become a regulator by default anyway through a series of MIs and associated remedies, but such regulation could take a somewhat piecemeal and imperfect form.

Suggested enhancements

78) While we consider that the MI tool is very valuable and has many benefits and major impacts on the markets concerned, there are some areas where, based on the experience to date, we consider that it could be further improved.

79) Last year, the CMA provided advice to the UK Government on potential reform of the Markets tools, including the MI, as part of a wider package of reform proposals. We suggested how the CMA's tools could be made more effective and efficient. The aim of these potential changes was to strengthen our ability to tackle consumer harm within the dynamic fast-paced nature of modern markets.[16]

80) The main enhancements the CMA has suggested are as follows:

- Information gathering powers: higher fines for failure to comply with information requests would be welcome. It would also be useful for information gathering powers to be available to monitor remedy implementation and for ex post evaluation of remedies.

- Swifter remedies: the CMA currently has no power to intervene and impose remedies to stop problematic practices or alleviate ongoing consumer harm during an MI – prior to completion of the investigation. Therefore some form of interim powers enabling us to impose temporary requirements on suppliers would be very useful and desirable e.g. to stop potential harm more quickly and in some cases these could also be used to safeguard remedial options (as we have with mergers). In particular, these powers would be useful to have in the context of dealing with issues in the fast-moving digital markets.

[16] The CMA's advice of February 2019 to the then BEIS Secretary of State recognised the value of the CMA's Markets tools to tackle consumer detriment stating that 'On the face of it, the markets regime is a powerful tool. It can, in principle, be used to put a stop to consumer detriment, without having to resort to protracted enforcement action, and without involving penalties which encourage legal challenge. Few jurisdictions have such a regime'. It identified areas for improvement to the regime, to which 'would be likely to lead to more, and more successful, action to protect consumers. Reform of the "markets regime" would increase the scope for the investigation and remedy of market-wide detriment.'

- Undertakings: similar to the above, there would be benefit in being able to accept partial undertakings and doing so at an earlier stage. Prior to referring an MI, in the UK there is the option to accept from firms 'Undertakings in Lieu' of an investigation. However, this is currently a high bar as we are required to achieve "as comprehensive a solution as is reasonable and practicable to the AEC and/or any resultant customer detriment." An alternative option would be to accept UILs which clearly address a discrete set of issues in a market, whilst referring the remainder of the issues for further investigation. In addition to this, the CMA cannot accept legally binding undertakings to address issues until the end of the MI (and, if needed, can also, or in addition, impose an order at this point). Therefore, a further reform would be to enable us to accept legally binding undertakings again on a discrete set of issues, earlier in an MI where feasible and appropriate. These measures would allow for more narrowly scoped MIRs and potentially enable swifter, enforceable resolution to some harms prior to the conclusion of the MI.

- Stronger enforcement powers: the ability to punish and deter non-compliance with CMA remedies by levying administrative penalties for failure to comply. Also, the enhancement of fining powers in connection with non-compliance with information and investigatory requirements, including the provision of false or misleading information.

- Flexible remedies: the ability to review, adjust or change remedies in markets where competition concerns have been found and remedies introduced but problems in that market remain (particularly where the market has not fundamentally changed).

Conclusion

81) We see the European Commission's proposals in relation to the DSA package and the NCT as valuable and consider them a significant step in the right direction. We welcome the opportunity to provide input and would welcome further engagement on these proposals beyond this consultation period. As set out in this response, we believe it is desirable that there is strong coherence between different regimes internationally, particularly in relation to large platforms acting as gatekeepers and therefore would be very keen to continue engagement as we develop our thinking

in this area. In addition, we would be happy to have further discussions in relation to the NCT, given our experience of operating a similar tool in the UK.