Appendix I: Potential practices to be tackled through a code of conduct

Introduction

1. This appendix provides more detail about how a code of conduct for digital platforms could work. The potential role of and case for a code of conduct ('the code'), the criteria for identifying firms that the code should apply to, and the content of the code are summarised in Chapter 6. This annex provides some further context to how the code could work in practice, and provides examples as to how the principles which we identified in Chapter 6 could relate to some of the concerns which have been identified in Chapter 3 to 5.

2. We have a number of questions for stakeholders on how the code might work, and we encourage stakeholders to contribute to our ongoing work to review whether there should be a code, and if so, how it could be made to work most effectively.

Relationships the code of conduct would cover

3. As mentioned in Chapter 6, there are a range of different relationships within digital advertising markets and the consumer-facing services which are financed through digital advertising. In particular, a code of conduct might address concerns in relation to:

    - Advertisers' and publishers' relationships with platforms in relation to buying and selling digital advertising;
    - Publishers' and content providers' wider relationship with platforms as a gateway for hosting content and accessing consumers via the platform;
    - Business users' relationships with platforms where they are providing services via platforms, but which could also compete with the platforms' own service offerings (for example, price comparison sites or online travel agents); and
    - Consumers' direct interactions with platforms (e.g. using a search engine or accessing a social media page).

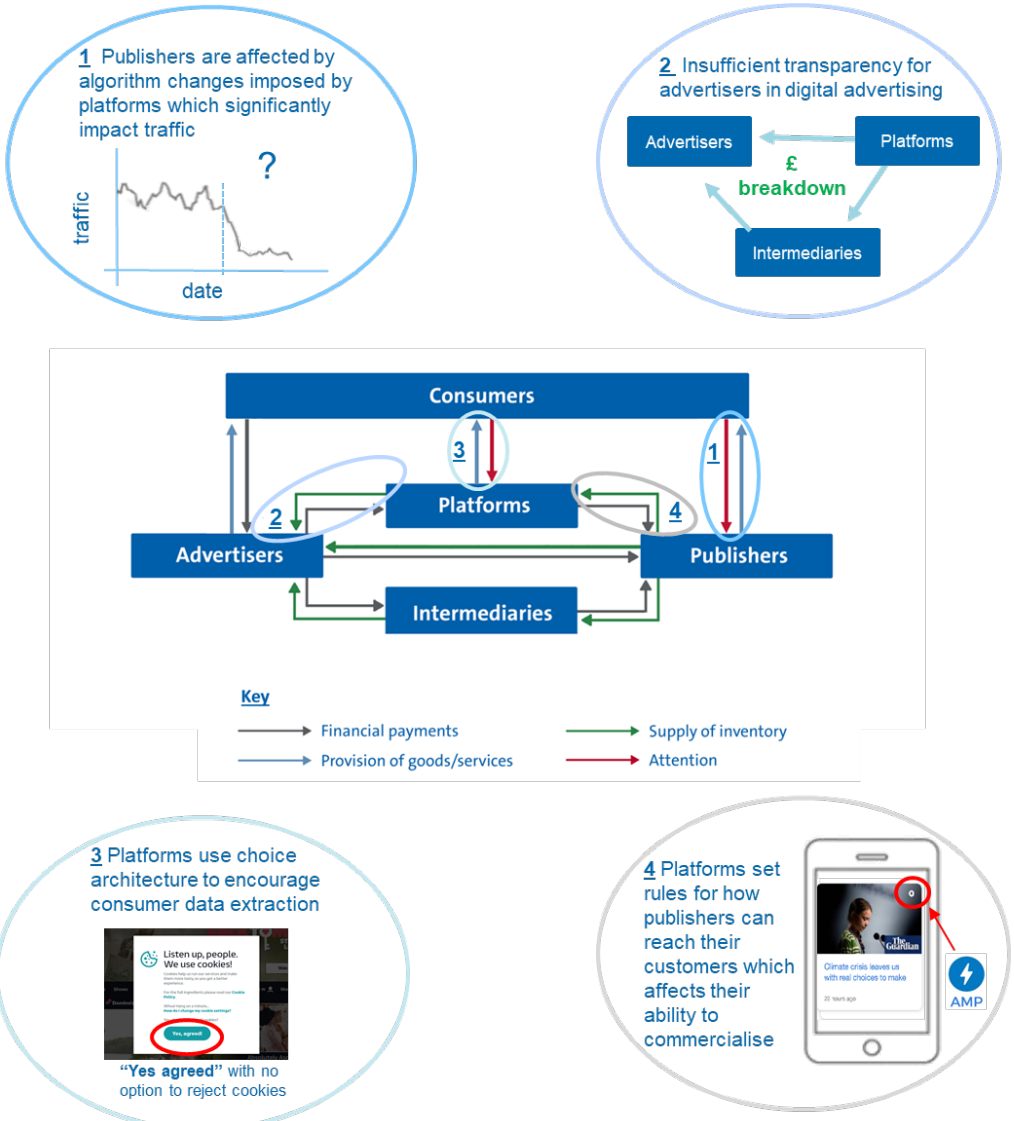
(a) These relationships have been summarised in Chapter 6. In Table I.1 below we outline a longer list of particular examples, which highlight the current concerns which we have identified. Our current view is that these represent examples of behaviour which could be covered by a code of conduct.

(b) We do not consider this to be an exhaustive list, nor are we drawing conclusions about competition problems in these markets, but rather, as highlighted in Chapter 6, our objective is to demonstrate that:

- there is a wide range of legitimate concerns across the markets we have reviewed;
- the number and complexity of issues are such that antitrust alone is unlikely to be sufficient to resolve them; and
- there is therefore a robust case in practice for the establishment of a code.

4. Figure I.1 below illustrates the interaction between the various stakeholders in this market. The examples focus on key areas where concerns with Google and Facebook have been highlighted in respect of the markets in the scope of this study and which would therefore be covered under the proposed code of conduct.

Figure I.1: Key relationships which could be governed by a code of conduct



How the code might work in practice

5. Our current thinking is that the body overseeing the code of conduct could have the power to set binding rules to govern and change the behaviours of platforms with strategic market status (SMS). This would ensure they act fairly (and in particular, do not engage in exploitative or exclusionary practices), as envisioned by the Furman Review. We refer to the potential regulatory body, which could be a new body, an existing body or bodies, or a combination of both to enforce the interventions as the 'regulator'.

6. Our expectation is these binding rules would be defined in the form of principles which would define behaviour, which the regulator has determined could cause harm and is therefore restricted by the code of conduct. We expect that this could cover both direct harm to consumers (e.g. unfair collection and use of consumers' data) and also the harm to competition and business customers which is directly envisaged by the Furman Review.

7. We provide a list of potential rules which could be covered by the code in the left column of Table I.1 below. The list represents our initial thinking from the first stage of the market study, and is targeted at issues which we have found could be relevant to Google and Facebook. It is likely that the code would also apply to SMS firms in other digital markets, and that to be effective some rules would need to be specific to the markets where the regulator finds that a firm has SMS.

8. Our initial thinking is that the code would define principles-based rules of the type envisaged in Table I.1 below, and then the regulator might define Guidance as to how those rules might apply in particular markets. The approach of defining Guidance which addresses particular problems could follow either own-initiative investigations or complaints about particular practices.

9. The advantages for the code, as opposed to existing *ex post* enforcement under competition and consumer law, has been established in Chapter 6 which included the ability for *ex ante* enforcement to:

    - Change behaviour much more rapidly and, where possible, before harms have materialised;
    - Allow action in respect to concerns which might fall short of the test of breaching competition law;
    - Allow certainty over what represents acceptable behaviour of the platforms;
    - Be able to develop its expertise over time; and

- Improve transparency and hence trust in the market.

10. The pro-competitive terms within the code would apply to the transactions between SMS platforms and each of the following:

    - Other digital businesses which interoperate with the SMS platforms in order to provide digital services to end users; and

    - Business customers such as advertisers, publishers and intermediaries acting on their behalf.

11. We also expect that the regulator could enforce, under the code, some of the pro-consumer rules proposed in chapter 6 and designed to give individual consumers more control of their data. Where these rules apply to the SMS platforms, these could be included within the code.

12. We welcome views from stakeholders on how the design of the code of conduct could work in practice.

Scope and Form

13. The starting point for the code would be the designation of SMS for a firm, which would need to be measured against a clear legal test. We have discussed the approach to defining SMS in section 6. We expect that the same regulator could be responsible for designating SMS and operating the code, although it is possible that the roles of designating SMS and operating the code could be separated.

14. We consider that the SMS status would apply to a corporate group as a whole (i.e. including all businesses with the same ultimate owner), with obligations under the code applying to the markets in which the firm has market power and adjacent markets, in which that market power can be leveraged.

15. We believe the code would take the form of high-level principles rather than detailed and prescriptive rules, as such, we have presented these provisions under three key principles; 'fair trading'; 'open choices' and 'trust and transparency'. Our views on the key components under each of these principles are given as examples of what could be included in guidance under the code in Table I.1.

Powers

16. The code would give a regulator the power to order firms to comply with its findings following an investigation into a breach of the code.

17. It would be important for the code to be directly enforceable by the regulator so that there is a strong deterrent to breaching the code and urgent issues can be dealt with. The regulator would therefore need the power to investigate effectively – this may include the power to:

- compel information from SMS firms (and other industry players where necessary to fulfil the code's objectives);
- suspend decisions of SMS firms pending the result of an investigation, including the imposition of interim measures;
- block decisions of SMS firms or order SMS firms to cease and/or unwind harmful behaviour at the end of an investigation;
- require ongoing reporting by SMS firms where necessarily to demonstrate compliance with the code;
- require SMS firms to comply with audit requirements, either where directly appointed by the regulator or an approved third party;
- appoint a monitoring trustee to monitor and oversee compliance by an SMS firm; and
- enforce quickly and effectively with appropriate sanctions against any SMS firm that breaches an order in line with one of the powers above.

18. The regulator would be able to carry out own-initiative investigations, with powers of audit, scrutiny and transparency.

Process and Timelines

19. The regulator would have a key role in hearing complaints and resolving disputes between industry players under the code.

20. One potential approach to investigations would be that where a competitor or business customer considers that a SMS firm is breaching the code or has made an announcement of a change which will breach the code, the regulator may consider whether the complaint is in the scope of the code. If so, the regulator would then need to consider whether there is a potential case to answer (eg that the complaint is not vexatious or trivial).

21. If the regulator considers there is a potential case to answer, it would have the discretion to undertake an investigation. We welcome views on whether there is a case for a two-stage process, which would discontinue some investigations after an initial investigation, and undertake a more detailed

investigation in other cases. In its merger investigations, the CMA undertakes a short time-limited review at the end of which most mergers are cleared, followed by a full in-depth review over a six-month period for a minority of cases where there is a realistic prospect of competition problems and at the end of which the merger may be prohibited.

22. On request, or on its own initiative, the regulator could simultaneously consider the suspension of a relevant action pending the conclusion of an investigation. If the regulator considers that it is necessary to avoid a risk of significant damage to a person or category of persons or to protect the public interest, then the regulator could require suspension pending the conclusion of the investigation.

23. At the end of the investigation, the regulator would be able to block decisions of SMS firms or order SMS firms to cease and/or unwind harmful behaviour. We do not currently envisage financial penalties for breaching the code, but we would welcome views on this.

24. The regulator would publish reports on its investigations and, where appropriate, on its work and the industry more generally.

Appeal rights

25. We would expect that there would be a right of appeal by the SMS firm or other materially affected person against the regulator's decisions, but in a much more timely manner and to a different standard than applies for competition enforcement, as the objectives of the code would be undermined if its enforcement was not timely.

Consultation Questions

26. We welcome views from stakeholders in identifying the scope covered by the code, the process of investigations and considerations on the enforcement and appeal rights under the code of conduct. In particular we are seeking views regarding:

    I.1 Do you agree with the overall proposed approach of regulation in the sector through a code of conduct applying to SMS firms? What thresholds should be applied by the regulator in determining SMS and compliance with the code?

    I.2 What are your views on our initial thinking on the list of potential rules described in the left column of Table 1 below?

I.3 What are your views on the proposed form of regulation: a set of principles-based rules, supported where appropriate by guidance?

I.4 What powers should the regulators have in making SMS companies change behaviour and under what conditions?

I.5 What sanctions should apply where a SMS platform does not comply with or breaches orders under the code of conduct, and, what impact that might have on the speed and effectiveness of the regime, including any appeal process?

I.6 How should the process of an investigation be defined? How would disputes under the code be tested and treated?

I.7 Should the regulator be able to direct SMS firms to implement, or unwind, measures for the purpose of fulfilling the objectives of the code?

I.8 What forms of reporting by SMS firms should be within the scope of the code?

Table I.1: Concerns that could be investigated under each of the key principles

The CMA has characterised complaints it has been told about, or has come across, however the CMA has not formed a view on the merits of the complaints for the purpose of inclusion in this table.

	Consumers (platform users)	Digital advertising and intermediation	Publishers and other customer-facing service providers
Principle 1: Fair trading. Platforms should offer services on fair terms: including pricing, non-price terms, requirements to share data, and any restrictions on how customers can use the services **Examples which could be included for guidance:** 1) that prices charged should be objectively justifiable; 2) that non-price terms should be objectively justifiable, for example that customers should not be required as a mandatory term to provide data to platforms which are not necessary for satisfaction of the contract; 3) a 'fairness by design' obligation in relation to the design of consumer consents to data use and choice architecture; 4) that contracts should not put any unreasonable restrictions on how users use the services, including that contracts should not impose requirements on customers not to use the services in a way which potentially competes with the SMS firm	Concerns that some platforms require access to publishers' data and other customers' data, in some cases without sharing that data with the publisher (Chapter 5).	Concerns that publishers do not have reasonable levels of control or flexibility over how they choose to sell their own inventory because certain important terms, eg floor prices, are influenced by the large platforms. (Chapter 5)	Concerns that some platforms require access to publishers' data and other customers' data, in some cases without sharing that data with the publisher, eg AMP and Instant Articles (Chapter 5). Concerns that platforms require publishers to place a tracking "tags" or "pixels" on their sites and in consequence have more information about customers than their competitors, allowing them to strengthen their competitive advantage in other digital advertising markets (Chapter 5)

	Consumers (platform users)	Digital advertising and intermediation	Publishers and other customer-facing service providers
Principle 2: Open Choices. Platforms which operate across multiple markets should offer consistent terms across the markets to allow consumers and business customers a fair choice between their services and their competitors. As part of supporting more effective competition in markets, platforms should offer open APIs or interoperability with their core services **Examples which could be included for guidance:** 1) where two products are bundled, the bundled price should be comparable to the prices of the separate products 2) separate services products should not be bundled on an exclusive basis, ie. bundles should not include products which are only available through a bundle 3) where platforms offer access to their own inventory or data as part of a bundled service or product or separately, the terms or conditions required to access the service as part of the bundle should not be unduly favourable relative to when accessing the service separately		Concerns that platforms bundle core services with services in more competitive markets (eg Google ad server and SSP) and fail to inter-operate properly with alternatives (Chapter 5). Concerns that platforms can set the rules of auctions in order to prefer their own inventory and sources of advertising demand. For example, within the open display market some have raised concerns that Google sets the rules for the auction in Ad Manager in a way that favour its own sources of advertising demand through Google Ads. (Chapter 5) Concerns that platforms do not allow third party DSPs to access their own inventory (eg YouTube) (Chapter 5)	Concerns that platforms restrict interoperability and degrade APIs to competitors. For example, Facebook has in the past imposed restrictions on the use of APIs, by not allowing them to be used for competing services (Chapter 3). Concerns that platforms require publishers to comply with mobile-friendly formats which favour the hosting platforms over the publisher in terms of access to data and ability to monetise. For example, these standards do not interoperate with third party approaches to auctioning digital advertising, including Header Bidding. (Chapter 5)

Principle 3: Trust and Transparency Platforms should provide sufficient information to users, both consumers and businesses which transact with the platform. Platforms should be open and transparent in how they operate their core services. **Examples which could be used for guidance:** 1) that where platforms are hosting content or digital advertising, that they provide a clear explanation of they choose to present content and give sufficient notice about any changes. Where these changes have a material effect on those firms which rely on the platforms to present their services, the platforms should give advance notice of any likely adverse effects, with reasons; 2) that the services provided by the platform to businesses should be properly explained, including transparency about auction rules; 3) that platforms should provide sufficient transparency about the fees that they are charging for their services, including any additional returns that they make from operating multiple auctions; 4) that there should be sufficient transparency about what advertisers are buying and what advertisers' publishers are transacting with and on what basis, including ready access to data about advertisers' own purchases for the purpose of verification and analytics; 5) that platforms should either provide this information direct to their customers, or where there are concerns about commercial confidentiality, that the regulator should be able to arrange an independent audit of the data or the workings of the processes. 6) platforms should not give particular prominence or preferential terms to their own services in terms of how they are presented to	There are concerns that platforms do not make it easy enough for consumers to understand and control what data they are agreeing to share (Chapter 4)	There are concerns that platforms do not provide sufficient data for advertisers to test against fraud and understand what they are getting for their money, or to publishers to understand bid behaviour and effectively commercialise content (Chapter 5). Concerns that Google and some other intermediaries operate on buy and sell side of multiple auctions, leading to concerns around hidden fees for both advertiser and publisher customers.(Chapter 5) Concerns from advertisers that they do not have access to data they require to allow independent third party verification of adverts (Chapter 5) .	Concerns that platforms make changes to their algorithms in respect of how they present content hosted on the platform which have a material adverse effect on some users. This is not transparent, not explained in advance, and does not allow providers to adapt to address what may be very material effects on their businesses (Chapter 5) Concerns that platforms can choose to reduce the level of information provided to publishers about the advertising that is placed on their websites without objective justification. Publishers have raised concerns that this is strengthened by a lack of transparency around the bids in auctions and other aspects of how platforms sell digital advertising, so they do not trust what they are told about how the auction process works. (Chapter 5) Concerns that platforms provide information in a way which prefers their own businesses. For example, that platforms may provide more information about performance about their own services than those provided by third parties even where they have access to the same data about both (eg Search Ads 360) (Chapter 5)

	Consumers (platform users)	Digital advertising and intermediation	Publishers and other customer-facing service providers
users on the core platform, or in terms of how they design the information provided to customers and users 7) platforms should also provide clear information to consumers about the services they receive and what data the platform takes in return for the service. This should be produced in a format which can realistically be read and understood			