

Appendix U: supporting evidence for the code of conduct

Introduction

1. Chapter 7 of the main report sets out the case for a code of conduct to govern the behaviour of Google and Facebook. This appendix provides further evidence to support our proposed design of the code and greater detail on how the code would work in practice.
2. The appendix has two main sections.
 - First, it sets out stakeholder views on the key issues we discuss in Chapter 7, covering: the case for the code; which platforms and markets the code would apply to; the structure and content of the code; and the powers and procedures to enforce the code. For each issue, we summarise the views we have received and set out our conclusions.
 - Second, it describes how a wide range of the concerns that we have identified in this study relating to the behaviour of Google and Facebook could be investigated under the code, setting out how the DMU could approach such investigations and some of the factors the DMU would likely take into account in reaching its conclusions. We structure this discussion under each of the main objectives of the code: ‘fair trading’; ‘open choices’; and ‘trust and transparency’.
3. Our objective in going into this level of detail is to demonstrate ‘proof of concept’ of the code by showing how it would work in practice. The conclusions we have drawn in this study are based solely on the analysis we have carried in relation to platforms funded by digital advertising. The work of the Digital Markets Taskforce, which we are formally launching alongside the publication of this report, will build on the conclusions of this study and also consider a broader range of online platform markets in making more detailed recommendations for the design of the code.

Stakeholder views and our conclusions

4. In the interim report, we set out our initial view that an enforceable code of conduct may help address a number of concerns that we had identified in digital advertising markets. We highlighted a number of examples of behaviour where a code of conduct would potentially make the market work better, and where the range and complexity of issues were such that antitrust tools alone are not sufficient to resolve them. We proposed that the code of conduct could work as an effective complement to competition law, addressing concerns that require rapid intervention to avoid lasting competitive harm and, for the firms captured by the code, providing increased certainty over what represents acceptable behaviour when interacting with users and competitors.

5. In this section we set out the responses we received to our interim report proposals, covering: the case for the code; which platforms and markets the code would apply to; the structure and content of the code; and the powers and procedures to enforce the code. For each issue, we summarise the views we have received and set out our conclusions.

Case for the code

6. In our interim report, we set out our view on the case for an enforceable code of conduct, noting that a code could have a number of advantages over existing ex post enforcement, including that it could help change behaviour much more rapidly than is possible through existing antitrust tools, could allow action in respect of a wider range of concerns, and could provide increased certainty over what represents acceptable behaviour of the platforms when interacting with consumers and competitors.

Stakeholder responses

7. Overall, the vast majority of stakeholders were keen to see the development of a code and agreed that there is a very strong case for its establishment. Of the 77 responses we received, 47 referred directly to the case for a code of conduct, and of those, 42 indicated some degree of support for the proposal.
8. All of the publishers who responded to our consultation supported the introduction of a principles-based code of conduct as a means of limiting platforms' ability to exploit their market power.¹ It was generally believed that our interim report struck the appropriate balance in the scope, structure and enforcement of the proposed code.
9. Many advertisers were broadly in agreement over the introduction of the code. A broadcaster, BT, British Brands Group and Vodafone highlighted that it was vital for any interventions in this sector to be flexible and able to adapt to a fast-moving market. A broadcaster believed that a code would deliver against these aims. British Brands Group highlighted numerous models where harms like to those identified in digital markets have been addressed proportionately by behavioural remedies similar to the code. It drew attention to examples such as the Groceries Supply Code of Conduct and the Pubs Code that govern and address unfair trading practices.
10. Social media platforms Twitter and Snapchat held a range of views. Snap Inc. supported the code and thought the 'ex ante nature of the code would ensure the most egregious behaviours of a company with SMS would be identified and

¹ Baylis Media, News Media Association, Horizon, Midlands News Association, Telegraph Media Group, Independent News and Media, DMG Media, Professional Publishers Association and the Guardian Media Group.

remedied quickly, without the need for lengthy investigations. Twitter feared that if all market participants were required to abide by a code of conduct, this would 'increase costs for new entrants and challengers to established market operators' which could lead to less consumer choice.

11. Google was, in general, not opposed to a code and stated that the principles underpinning the code would be essential to a healthy digital economy. However, as discussed below, Google thought it should apply to all digital platforms. Similarly, Facebook although supportive of our proposals to deliver increased choice and transparency, thought the proposed approach would result in regulation that is 'ineffective and not fit-for-purpose'.
12. A small number of respondents were concerned that the code would not address the competition concerns in full. For example, News UK submitted that while proposals for regulatory reform would go some way to addressing the concerns that we identified in our interim report, it noted one of the potential limitations of the code, as we had acknowledged, is that it may not restrict all of Google and Facebook's incentives to exploit the market position that they have built up to their own advantage.

Our views

13. The responses we have received to our interim report and our further analysis in the second half of the study has strengthened our view that there is a need to introduce an enforceable code of conduct. We have set out our full reasoning of the case for doing so in Chapter 7.
14. Responses to our interim report consultation highlighted to a number of existing codes and regulatory regimes with potential relevance to a code of conduct for use in digital advertising markets. For example:
 - *Groceries Supply Code of Practice*² – to govern and address unfair trading practices between large groceries retailers and their suppliers. This includes, amongst other things, a 'principle of fair dealing' provision to deal with retrospective contract variations, requirements for unfair charges, delays in payment and inadequate notice. The *Grocery Code Adjudicator* (GCA), who has the power to issue fines and launch investigations and an obligation to monitor progress through annual reports, has proved to be effective in addressing supplier harms that were prevalent in the groceries market. The 'soft power' of the GCA is very significant. Without having adjudicated on a large number of cases or launched a large number of investigations, the GCA has

² [Groceries supply code of practice.](#)

had a significant impact on the behaviour of retailers who build the code into their everyday working practices;

- *Pubs Code*³ – to promote fair and lawful dealing and increase rights for tied pub tenants to receive information, have their rent reviewed or, in certain circumstances, exit from a tie; and
- *Ofcom's Broadcasting Code*⁴ – to decide whether a broadcaster has breached the Broadcasting Code and, in serious cases, put the broadcaster on notice at that point that it will consider the imposition of a statutory sanction. Whether a financial penalty or other statutory sanction is imposed is then the subject of a further procedure.

15. These Codes have in common that they are designed to guide the appropriate behaviour of firms in the relevant markets and to deter unreasonable behaviour, and not to, for example, determine prices or particular outcomes that firms must deliver. This distinguishes these Codes from the form of ex ante regulation imposed by most sector regulators, such as Ofcom and Ofgem. The Groceries Code and Pubs Code have been designed to address unfair commercial terms, and therefore mirror the objectives to the proposed code to apply to SMS platforms in preventing the platforms from exploiting market power. However, these codes can in some cases ultimately have the effect of determining certain terms within the market, where there is a complaint over a particular term which a firm subject to the code seeks to implement.
16. We have drawn on these experiences in considering the case for the code of conduct. As discussed below and in Chapter 7, our conception of the enforceable code of conduct combines element both of existing codes (in the speed with which decisions can be taken, and the emphasis on protecting competition in the presence of significant imbalances in bargaining power) and utility-style regulation (in the binding nature of decisions and the wide range of formal powers given to the DMU to intervene).

Which platforms and markets should the code apply to?

17. In our interim report we proposed applying the concept of 'strategic market status' (SMS), as introduced by the Furman Review, to define the category of firms to which the code of conduct would apply. We noted that SMS was not explicitly defined in the report but was described as a position of enduring market power/control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency. Our initial view was that both Google and Facebook would likely be

³ Pubs code and adjudicator.

⁴ The Ofcom broadcasting code.

considered to have SMS against these criteria and on the basis of the evidence we had reviewed, and that SMS status would apply to the corporate group as a whole, 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.

Stakeholder responses

18. Several respondents agreed with the proposals in our interim report that the code should be applied to SMS firms, based on a broad set of criteria as a starting point.
- Both the Professional Publishers Association and News Media Association supported the conclusions that the code should apply to SMS platforms, which would cover Google and Facebook at present. The scope of the code should be flexible enough to capture platforms that develop and become dominant in existing and potentially new markets. They commented that the definition of SMS should be future proofed to capture these platforms.^{5,6}
 - Microsoft⁷ and BT⁸ were supportive of a cumulative three stage test as an appropriate starting point.
 - Snap Inc. stated that the criteria for SMS inclusion that we set out in our interim report appeared to be reasonable and, importantly, measurable. It agreed SMS should be applied to the corporate group as a whole.⁹
 - Similarly, BT also stated that the broad principles should be capable of application to all of the firms' activities in relevant and adjacent markets including their relations with consumers, competitors and partners.¹⁰
19. Several respondents, however, disagreed with our proposals in our interim report and highlighted the following key concerns:
- Vodafone stated it would be appropriate to apply the pre-existing and well-established concept of 'significant market power' (SMP) instead of SMS. However, they did not dismiss the concept of SMS entirely and highlighted the importance for a clear definition and detailed guidance on the thresholds that define SMS in digital markets.¹¹

⁵Professional Publishers Association's response to our interim report.

⁶News Media Association's response to our interim report.

⁷Microsoft's response to our interim report.

⁸BT's response to our interim report.

⁹Snap Inc's response to our interim report.

¹⁰BT's response to our interim report.

¹¹Vodafone's response to our interim report.

- Telefonica UK stated that they were not confident that SMS is a sufficiently clear benchmark.¹²
- An advertiser suggested such a code should apply to all platforms, not just SMS platforms.¹³
- Facebook called for an industry-wide application of the code.¹⁴ They told us that the proposed code of conduct's approach is incongruous with the principles of the UK Government's Better Regulation Framework and would result in regulation that is ineffective and not fit-for-purpose. Facebook stressed that the code should apply to all industry participants and drew on examples from the Trust and Transparency principle such as; trialling and testing choice architecture and requiring transparency over advertising fees.
- Facebook also disagreed that the SMS status should apply to the platform's corporate group as a whole. It told us that 'it is entirely out of line with regulatory best practice to apply the code to markets in which regulated companies do not have market power on the basis that – under the CMA's current formulation – they are in some way leveraging their market power in an adjacent market'.
- Facebook and Google similarly voiced concerns that, in our interim report, relatively little detail had been put forward concerning the methodology for determining which platforms are deemed to have SMS, both in terms of the requisite market power threshold (and how this compares to dominance under Article 102 TFEU/Chapter II of the Competition Act 1998), and the definition of a 'strategic bottleneck market' or 'important gateway'. Facebook stated that the proposal, as currently framed, risks creating a serious degree of regulatory uncertainty.¹⁵
- Radiocentre urged us to extend the scope to ensure advertising in radio and audio is covered by the code which would include smart speakers or similar internet-connected devices.¹⁶

Our views

Which platform and markets should the code apply to?

20. In determining the scope of regulation, we considered the possibility of using the significant market power (SMP) threshold, which would benefit from extensive precedent of application in telecoms markets. We note the arguments made by

¹² [Telefonica](#)'s response to our interim report.

¹³ [An advertiser's](#) response to our interim report.

¹⁴ Facebook's response on Certain Policy Proposals in our interim report 21 May 2020.

¹⁵ [Google](#)'s response to our interim report.

¹⁶ [Radiocentre](#)'s response to our interim report.

telecommunications operators that the use of SMP might improve legal certainty. However, we consider that some of the characteristics of digital platforms are different, and a different test is more appropriate:

- Many of the user-facing services which are operated by the large platforms have zero monetary price, and therefore the concept of market power, which is often measured in terms of ability and incentive to increase prices or reduce quality, is harder to apply;
- The concept of a code is intended to be targeted at the largest platforms which have influence across the widest range of users, and therefore may be an unavoidable trading partner for businesses. The case for a code would be less clear for smaller platforms, which may have market power in smaller digital markets, but do not have comparable strategic significance beyond those markets to, for example, Google and Facebook.

21. 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 expect that the same regulator would 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.
22. We have discussed the approach to defining SMS in Chapter 7. We note, however, that firms which have not been in the scope of this study (ie platforms not primarily funded by digital advertising) may also be considered to have SMS. The Digital Markets Taskforce, therefore, will be carrying out further work on the detail of the SMS test, including the process for designation, the opportunity for the SMS firm, third parties and the public to make representations on designation, and the scope for appeals against designation.
23. In this study, we have concluded that the definition of SMS is highly likely to include both Google and Facebook on any reasonable definition, due to their enduring market power and positions as important gateways in that businesses depend on their platform to access users on the other side of the platform. We have not concluded whether any other large firms which have a smaller position in digital advertising, such as Apple, Amazon and Microsoft, would be subject to the code due to their positions in other user-facing markets which were not in the scope of this study.
24. As discussed in Chapter 7, we do not agree with Facebook that the code should be industry-wide. The aim of the code is to address the ability and incentive of gatekeeper platforms, including Google and Facebook, to exploit their position of market power in user-facing markets, both to consumers and business customers, and to potentially exclude actual and potential competitors. Smaller platforms, which do not have market power, do not have the same ability or incentive to impose

unreasonable terms, as advertisers and publishers would be more able to switch away from their services.

25. In light of our findings in respect of Google and Facebook, we recommend that the Government should give consideration as to whether it is appropriate to designate these firms as having SMS as part of the legislative process or otherwise from the outset of the regime. Under such an approach, the DMU would not need to conduct material further analysis on the issue because it could rely on the findings in this study. This would minimise the delay in putting in place an appropriate code for these firms in circumstances where consumer harm already exists, and it would reduce the duplication of work that would exist in the scenario where the DMU needed to assess the case for their designation in detail for a second time.
26. The Taskforce will develop advice on how the appropriateness of designation of a SMS firm is kept under review, including whether designation applies for a fixed period, is ongoing subject to periodic review, or if designation is reviewed where there has been a material change of circumstances. In particular, the implementation of the pro-competitive interventions recommended in this study would be expected to change the functioning of these markets. The regime would need to balance the need for regulation to reflect current circumstances in these fast-moving markets against the uncertainty and burden that would arise if reviews were too frequent.

Which markets should the code cover?

27. The main substantive provisions of the code should apply to the markets in which the SMS firm has market power and adjacent markets in which that power can be leveraged. However, as explained in Chapter 7, we recommend that SMS status should apply to a corporate group as a whole (ie including all businesses with the same ultimate owner). This is for the following reasons:
 - To ensure effective compliance. In digital firms, there is significant flexibility to assign the technology associated with core SMS markets from one market or legal entity to another, and therefore enforcement could not be effective in the absence of an ability to do so across a corporate group.
 - To address leveraging of market power. One of the main concerns associated with SMS is the ability of digital firms to leverage their market power from one market to another. This is the concern particularly addressed in the objective of 'open choices' discussed below. To effectively address the risks that SMS firms are able leverage market power from core SMS markets into other markets, the DMU needs the power to regulate the activities of the SMS firms in both markets.

- To ensure the DMU would have the ability to require all the information it needs from the corporate group.
- To ensure that parent companies procure their subsidiaries' compliance with the code and are held responsible for any breaches.
- To prevent the possibility of corporate reorganisations frustrating the operation of the code.

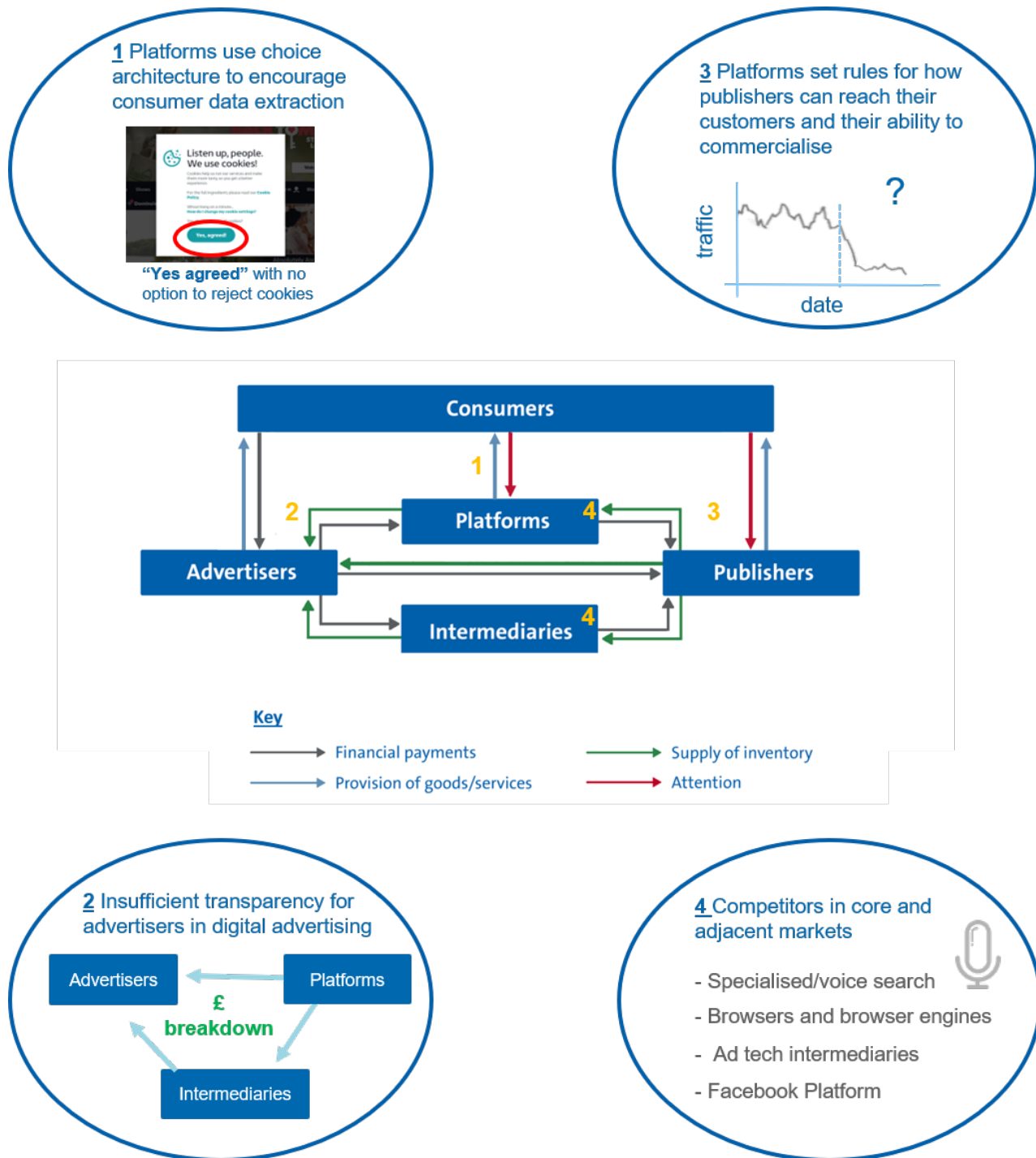
28. We also agree with the submissions that clarity and certainty about the scope of regulation is appropriate for SMS firms and those which trade with them, particularly given the size of ecosystems in which some of the firms operate. Google, for example, operates in many highly competitive markets, and others where it has enduring market power. As discussed below, whilst the code would apply to the corporate group in respect of its legal status, the scope of its effect will be limited to those markets where the SMS firm is able to affect competition.

29. We have illustrated below some of these relationships within digital advertising markets and the consumer-facing services which are financed through digital advertising. We propose that the code would 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 (eg using a search engine or accessing a social media page).

30. Figure U.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 code.

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



Source: CMA.

31. As described in Chapter 7 of the report, we propose that the DMU would provide clarity over the markets covered by the code through the definition of ‘core markets’ and ‘adjacent markets’.
- ‘Core markets’ would be those where the firm has market power and which are linked to the definition of SMS. In the example above, this would be likely to cover Google Search, and Facebook’s core social media platform, and the associated digital advertising businesses. It could also cover some of these firms’ other activities where they have established market power, such as Google’s publisher ad serving business.
 - The code would then apply to the SMS firms’ activities in those core markets, in terms of fair trading, open choices and trust and transparency. These represent markets where the SMS firms would potentially be able to impose unreasonable terms on customers and entrench their market power through exclusion of potential rivals.
 - ‘Adjacent markets’ would be those where the SMS firm operates (or will operate) and where there are links to core markets including through the leveraging of data and user attention. These links would be strong enough that the SMS firm would potentially have the ability to leverage market power in core markets into those adjacent markets. The code would apply to any actions by SMS firms in those adjacent markets which might be in conflict with the ‘open choices’ objective, including self-preferencing or bundling of services.

Structure of the code

32. In the interim report we proposed that the code should take the form of high-level principles rather than detailed and prescriptive rules, with more detailed periodic guidance issued by the regulator to help with interpretation. We proposed that the key provisions of the code could be summarised in the form of three overarching principles: ‘fair trading’; ‘open choices’; and ‘trust and transparency’.

Stakeholder responses

33. The majority of respondents supported the proposal in our interim report of a principles-based approach with guidance. Several stakeholders highlight the approach to use principles is not dissimilar to the regulation for utilities such as telecoms and the financial services.
34. All the publishers and many of the advertisers who responded supported our proposal for a statutory code of conduct to embed principles of fair trading, open choice and transparency in the relationship between SMS firms and their business users. News Media Association commented that any code of conduct should be

principles-based and capable of governing market players' future conduct, as well as resolving specific issues that have already arisen.¹⁷

35. While it was important for the code to set out the high-level principles, Horizon thought it was equally important for the code to include certain, commonly accepted mandatory technical or design requirements. In their view, these specific requirements would effectively address existing issues and would not prevent the generic principles from governing future practices as technologies evolve.¹⁸
36. Google stated that it would be appropriate for the code to have broad principles rather than detailed rules, at risk of becoming obsolete quickly. However, it also highlighted that broad principles may allow for wide-ranging and unpredictable interventions.¹⁹
37. Facebook described the principles outlined in the report as ambiguous and stated that a 'combination of high-level principles enforced by a powerful regulator could lead to legal uncertainty for businesses'.²⁰

Our views

38. We have concluded that the code for each SMS firm should comprise:
- High-level objectives (fair trading, open choices, trust and transparency). These are likely to be relevant across all platforms.
 - Principles, based on an assessment of the areas where the code is necessary to address the risk of exploitation of markets power. These principles are likely to be similar across SMS firms but with sector-specific adjustments to reflect the different concerns which the code is intended to address for each of the core markets in which SMS firms operate.
 - Guidance, setting out in more detail the potential application of the code to specific market arrangements. The guidance would provide more detail on practical application of the principles and would need regular updating as the market evolves. The guidance should have the objective of providing clarity over the specific actions of SMS firms which the DMU considers need to be performed in a way which is consistent with the principles.
39. We describe below in detail principles that we consider could apply to Google and Facebook based on the findings in this study.

¹⁷ [News Media Association](#)'s response to our interim report.

¹⁸ [Horizon](#)'s response to our interim report.

¹⁹ [Google](#)'s response to our interim report.

²⁰ [Facebook](#)'s response to our interim report.

40. The legislation would make provision for the code's high-level objectives, with the DMU empowered to prescribe principles in the code for each of the SMS firms, and guidance. The development of the contents of the code would generally occur concurrently with the process of designating a firm, including consultation on initial guidance. The Taskforce will develop the CMA's advice in this area.

Powers – investigation, operation and enforcement of the code

41. We set out in our interim report that the code would give the DMU the power to order firms to comply with its findings following an investigation into a breach of the code, and set out our initial views on the powers the regulator would need.

Stakeholder responses

42. Overall, stakeholders agreed that reporting obligations should be in line with the level of information deemed necessary by the regulator to monitor compliance and enforcement of SMS platforms' substantive obligations under the code.
43. DMG²¹ and News UK²² submitted that the applicable threshold for action should normally be that of the '*balance of probabilities*'. However, in DMG's view, a lower threshold would 'seem more appropriate' when determining whether interim measures should be granted. In that case, the threshold could be that of a '*prima-facie*' case of non-compliance.
44. News UK submitted that SMS firms should not be subject to prescriptive limits (eg specific categories of information) but instead, the regulator should be able to require SMS firms to report whatever information (and in whatever form) it considers reasonably necessary for the purpose of monitoring and enforcing compliance with the code. While it accepted the prospect of parties seeking civil remedies against large online platforms for breaches of the code was unlikely to be attractive in practice, it saw some value and drew analogy to Ofcom's Broadcasting Code.²³
45. There were varying views on sanctions for breaching the code.
- News UK submitted that the regulator should be able to impose financial penalties for non-compliance with the code. Without the prospect of substantial financial penalties, News UK submitted that SMS firms would have a strong incentive to engage in practices that contravene the code and have no

²¹ DMG Media's response to our interim report.

²² News UK's response to our interim report.

²³ News UK's response to our interim report.

countervailing costs for doing so.²⁴ News Media Association²⁵ and The Guardian Media Group²⁶ echoed these views.

- News UK also told us that if the concern is to avoid delay in reaching a decision requiring the termination of the infringing conduct, it could be achieved either through the use of interim measures, or by designing the process so that penalties are imposed in a subsequent administrative proceeding, after the finding of a substantive infringement.²⁷
- Reach stated that a balance must be struck to ensure that penalties imposed by the regulator do not hinder or interrupt the services offered by platforms with SMS because these services were indispensable to their business and those of the publishing industry as a whole.²⁸
- BT submitted that although financial penalties are a useful tool, the CMA should consider how the regulator would best ensure that required changes in behaviour occur given that financial penalties would need to be very large to deter entities with very high turnover.²⁹
- Google felt it would be inappropriate to fine companies for practices that they cannot know in advance that would be deemed not to comply with the principles of the code.³⁰

Our views

46. The Digital Markets Taskforce will continue to develop the details of the DMU's processes. This section sets out our views at this stage.
47. The DMU's effectiveness would be enhanced by a general duty of expedition in its work, supported by a framework which sets it statutory deadlines to deliver its work, a duty to act transparently including publishing its decisions and reasons, supported by a duty to publish guidance both on its procedures and the substantive analytical framework to be applied by it.
48. As part of ensuring the code worked well, the DMU would need to have the ability to receive complaints arising from possible breaches of the code, in addition to launching its own-initiative investigations. Where a competitor, customer or supplier considers that a SMS firm is breaching the code or has proposed a change which will breach the code, the DMU may consider whether the complaint is in the scope

²⁴ News UK's response to our interim report.

²⁵ News Media Association's response to our interim report.

²⁶ Guardian Media Group's response to our interim report.

²⁷ News UK's response to our interim report.

²⁸ Reach Plc's response to our interim report.

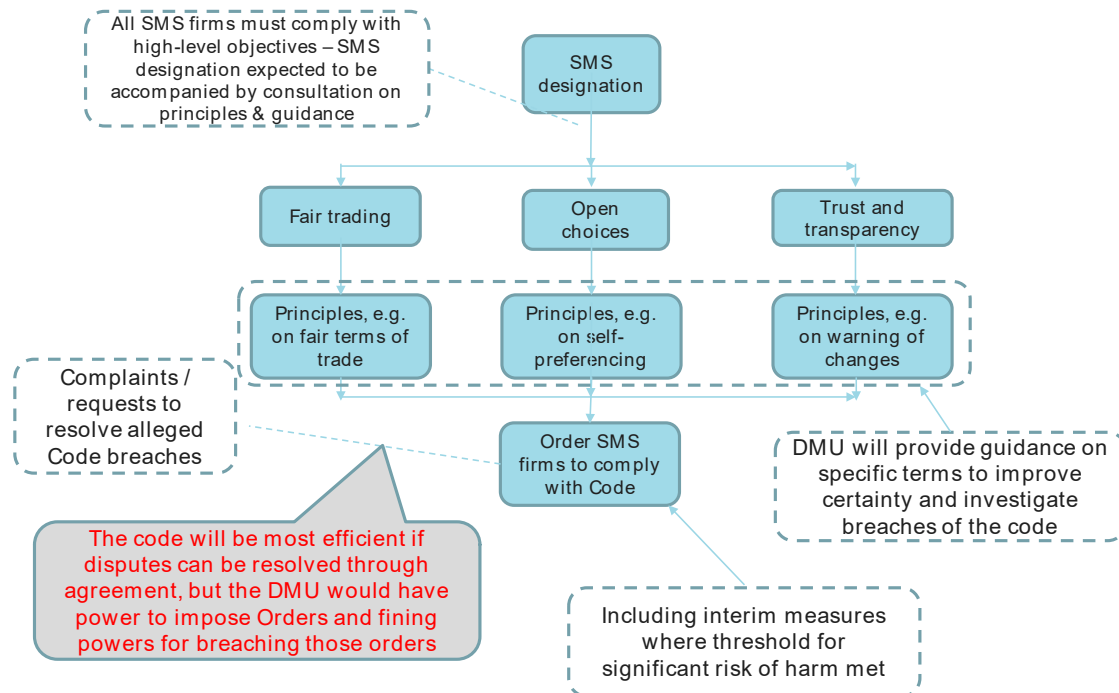
²⁹ BT's response to our interim report.

³⁰ Google's response to our interim report.

of the code. If so, the DMU would need to consider whether this is a case it should prioritise bearing in mind factors such as its available resources, administrative priorities, and the nature of the complaint. If the DMU considers there is a potential case to answer, it would have the discretion to undertake an investigation.

49. Figure U.2 illustrates how this process might work, in terms of how either own-initiative investigations or investigations that respond to complaints about behaviours in the scope of the code.

Figure U.2. The process for imposing and enforcing requirements on SMS firms under the code



Source: CMA.

50. The DMU will need powers to gather the information necessary to discharge its functions. This will include requiring the production of documents and data, including algorithms, from SMS firms and other market participants. Whilst the Taskforce will develop the CMA's advice in this area, the set of information powers, the DMU will need across its work are likely to include;
- statutory production notice – requiring the production of information (including code, data, documents, explanations, views, etc.) for the purpose specified in the notice;
 - inspection – the power to access premises and to search for information accessible from the premises (including remotely accessible storage); and
 - interview – the power to require the attendance of persons to answer questions.

51. As set out in our interim report, the DMU will need allied powers, eg to appoint or approve the appointment of a person to investigate or audit, or the adoption of a monitoring trustee to monitor and oversee compliance by an SMS firm.
52. To ensure compliance with these information gathering powers, the DMU would need an enforcement mechanism. This is likely to include the power to impose a financial penalty for non, or inadequate, compliance, at a sufficient value to have a deterrent effect.
53. The conduct the DMU will investigate will often impact a number of areas of regulatory oversight, and take place and have effects in multiple jurisdictions. To be effective, the DMU would need the express power and function of sharing necessary information with other relevant UK public authorities, both to support the DMU's functions and to assist the other authority with its functions. This power would extend to sharing with overseas public authorities with similar objectives, where the DMU is satisfied that confidential information will be treated appropriately.
54. As an effective and enforceable code, in addition to making a finding that the code has been breached, or a proposed step would breach the code, the DMU will need the power to order a remedy to end or prevent any breach it found to restore compliance with the code (a Final Code Order).
55. Whilst it is envisioned that DMU investigations will be prompt, there may be a risk of harm whilst the DMU establishes a breach has taken place. The DMU would need the power to direct what steps are taken pending the determination of its investigation to prevent or mitigate that risk (Interim Code Orders). These may be particularly valuable, for example, where an SMS firm proposes to implement a decision that could significantly or irreversibly harm a market participant and the DMU could suspend that implementation pending its determination on the issue.
56. At the conclusion of the investigation, the DMU would be able to issue a Final Code Order to block actions of SMS firms or order SMS firms to cease and/or unwind conduct which breaches or would breach the code, and require the SMS firm to desist from the same or similar conduct. A Final Code Order could require positive actions to be taken by an SMS firm, but only for the purpose of reaching and maintaining compliance with the code. A Final Code Order would not be used to order major new interventions of the type envisaged by the pro-competitive interventions in this study. If an investigation under the code raised an issue that may require such an intervention, the DMU ought to use other powers with a suitable process to achieve them, perhaps in a similar manner to a CMA market investigation under Part 4 of the Enterprise Act 2002.
57. In addition to ending or preventing breaches of the code, Final Code Orders would have an important function of providing clarity of what the code requires. For

example, if the DMU were to find that the variation or depreciation of an important API, which had enabled rivals to innovate, was not compliant with the code unless sufficient notice had been given, in addition to suspending the variation of the API, the order may also make provision on future notice periods for material variations of that, and similar APIs. Publication of this decision would also provide helpful guidance to other SMS firms, and those who use their services or do business with them, of what the code requires.

58. It would be important that Interim and Final Code Orders are complied with. The DMU would be able to require the appointment of a monitoring trustee as part of the order, and would be able to use its information powers to monitor compliance, and if necessary, investigate non-compliance. To ensure compliance with these orders, the DMU will need an enforcement mechanism. The DMU would need the power to impose financial penalties for non-compliance with Interim and Final Code Orders of a sufficient value to have a deterrent effect.
59. Where the DMU finds a designated SMS firm has intentionally or negligently breached the code, the DMU would also have the power to impose financial penalties (without the need to investigate and impose a Final Code Order first).³¹ To be effective such potential penalties need to be substantive and of an order commensurate to those imposed in regulated sectors and in antitrust enforcement. If the situation arose where a SMS firm adopted a course of conduct which it knew, or should have known, breached the code, the regime would risk being ineffective by design if the DMU could only sanction that conduct by opening an investigation, finding the code had been breached, and ordering the breach ceased. At that point, the SMS firm could comply with the order having suffered no downside to the harm it had caused.
60. As explained in Chapter 7, given the global nature of the markets in scope, the DMU's scope of investigation, and the application of its powers to gather information and issue orders would need to expressly cover all those who supply services to UK consumers or businesses, ie those with a sufficient connecting factor to the UK jurisdiction. To be effective it is important that the DMU's powers are not be limited only to those persons who have established a physical presence in the jurisdiction.
61. A requirement on the DMU to conclude investigations promptly would provide certainty. This could provide more clarity to all parties over the scope of a review of a breach of the code, although we recognise this could potentially come at the expense of in-depth analysis and extended consultation periods. We are aware that

³¹ This liability for intentionally or negligently breaching the code, would be in addition to existing legal regimes. As such conduct by an SMS firm which was neither intentional nor negligent, but nevertheless breached the code and was unlawful, eg as a data protection or antitrust matter, would be liable for sanction under those existing legal regimes in the normal manner. Similarly, action by the DMU under this regime would not preclude action by other regulators under other regimes.

some stakeholders have stressed the need for actions to be timely and to be able to quickly address changes which are having a material impact on their businesses. As an initial indication, we might expect the DMU to be able to consider whether to impose an Interim Code Order within weeks, and take a final decision within six months. Investigations relating to possible financial penalties for intentional or negligent breaches would not necessarily be subject to the same timescales.

62. The regulator would publish reports on its investigations and, where appropriate, on its work and the industry more generally.
63. As set out above, the role of private damages for breach of the code was raised in response to our interim report. This could help to ensure compliance, but we agree that it would not be appropriate to rely on the risk of private damages alone to trigger compliance with the code given the challenges for third parties litigating against SMS firms. Whilst the detail would depend on any implementing legislation, we recognise that the objectives of the code may in principle be supported by the possibility of private actions for loss caused by a breach of that statutory duty by an SMS firm.

Concerns that could be investigated under the code

64. We are proposing that the code will be organised under three broad objectives – fair trading, open choices and trust and transparency. The three objectives are intended to address the main areas of competition and consumer concern that are likely to arise in relation to SMS platform behaviour.
65. Broadly speaking, fair trading is primarily about exploitative behaviour; open choices is primarily about exclusionary behaviour; and trust and transparency is primarily about behaviour that reduces transparency or presents information in a way that is likely to manipulate users. It is likely that, in some cases, concerns regarding a specific practice could be raised under more than one objective and more than one principle.
66. As discussed in Chapter 7, the DMU would consult on and adopt the code for each SMS firm (and publish guidance to improve legal certainty for SMS firms and other market participants).
67. The following sections highlight issues that we have identified in this study, which represent examples of behaviour which could be covered by the code. We do not consider this to be an exhaustive list, nor are we drawing conclusions about the outcome of any investigation of these practices under the code. Rather, as highlighted in Chapter 7, 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 existing laws are unlikely to be sufficient to resolve them; and
- there is therefore a robust case in practice for the establishment of the code.

Fair Trading

68. The first objective we have established is 'fair trading'. Fair trading relates to the ability of firms with a strong trading position to impose terms which are worse than those which would be observed in a competitive market, such as high prices or poor service quality. The aim of the code under a fair trading objective would be to ensure that those users that rely on trading with the platforms can have confidence that they will be able to trade on reasonable terms with those platforms. In effect, the fair trading objective is intended to address concerns around the potential for exploitative behaviour on the part of the SMS platform.
69. We have identified the following principles that would apply under the objective of fair trading:
- to trade on fair and reasonable contractual terms;
 - not to unduly apply discriminatory terms, conditions or policies to certain customers;
 - not to put any unreasonable restrictions on how customers can use platform services;
 - to act in customers' best interests when making choices on their behalf; and
 - to require use of data from customers only in ways which are reasonably linked to the provision of services to those customers.
70. In submissions to the study, a number of issues were raised that could be covered by these principles. We also received concerns from some platforms that this form of intervention would represent over-regulation. We discuss the case for these principles below, by reference to how they affect users, advertisers and publishers.

Practices that affect advertisers

71. We identified four main practices affecting advertisers that relate to fair trading principles in the course of our study:
- Lack of control for advertisers over setting of key parameters in advertising auctions, and the potential for platforms to exploit the influence they have over bidding behaviour;

- The 'direct' exploitation of market power in search advertising, for example through the setting of high ad load for commercial searches;
- Contractual terms on ad and site content in search enforced in arbitrary way to the advantage of Google;
- Unfair use of advertiser data / insufficient contractual protections.

72. The first set of concerns relates to SMS platforms restricting the degree of control advertisers have over key aspects of their interaction with auction processes used to buy advertising and, where they have discretion over bidding behaviour within auctions, exercising this discretion in a way that furthers their own interests rather than those of advertisers. The market power Google and Facebook benefit from means that they have the ability to limit advertiser control in a way which allows them to exploit their market power and generate greater advertising revenues.
73. As set out in Appendix Q, Google and Facebook provide various tools and functionality to assist advertisers in formulating and implementing bidding strategies when buying advertising from auctions on their platforms. These include functions that assist with keyword generation and matching and automated bidding algorithms to optimise return on investment. These tools can be valuable for advertisers wishing to get the most out of their advertising budgets. However, we have heard concerns that in some cases this comes at the expense of advertisers being able to control various aspects of their bidding strategy.
74. For example, we heard from several advertisers that Google had recently changed the way its 'Exact Match' keyword matching algorithm worked, now no longer requiring the keyword to exactly match with the search term but also allowing for 'close variants'. Advertisers told us that this limited their ability to determine which auctions to bid into and their ability to optimise bidding across multiple keywords. The result may be that advertisers end up participating in auctions for search terms that are less relevant to them and where their bids might have a reduced quality weighting, resulting in increased prices.
75. The ability to act on behalf of advertisers in deciding how much they should bid and which auctions they should bid in also gives platforms the ability to make some of these decisions in a way that increases their own revenues and may not be in the interests of advertisers collectively.
76. We have identified two principles under the code to address these concerns. The first is that platforms should not put any unreasonable restrictions on how advertisers can buy advertising. The objective of the first principle is to ensure that advertisers are able to exercise control over key parameters of their bidding strategy, such as the maximum bid an advertiser is willing to pay and the auctions in which they participate. While many advertisers may want to rely on automated

tools provided by Google and Facebook, they should be given the option to control key decision parameters if they so choose. For example, in relation to keyword matching algorithms, this would mean allowing advertisers to choose an Exact Match function that did not include 'close variants'.

77. The second principle is that platforms should always act in advertisers' best interests when making choices on their behalf. This principle is intended to capture both individual advertisers' interests and the interest of advertisers collectively. Recognising that many advertisers may benefit materially from using automated functionality provided by Google and Facebook, it is important that they can trust that Google and Facebook are acting in their interest when performing these functions rather than in ways that generate more revenues at advertisers' expense. To ensure compliance with this principle, it is important that there is some regulatory oversight of the algorithms used for automated bidding, for example to ensure that increasing platform revenues is not part of the objective function of automated bidding algorithms (or that the use of automated bidding algorithms by multiple advertisers would not have this effect). This is discussed further under the section on Trust and Transparency below.
78. The second set of concerns relate to the direct exploitation of market power by SMS platforms. As set out in Appendix Q, many stakeholders highlighted that one of the main ways in which Google has exploited the market power of its search engine is through increasing the number of ads shown to users for more commercial searches. The prominence of a greater quantity of search advertising can result in user traffic diverting to paid advertising over organic results. This can be harmful in two ways. First, users may click on advertising links that are less relevant than organic results. Second, it may result in higher advertising costs, which are then passed on to consumers through higher prices for final products. We heard concerns about the crowding out of organic content by advertising for both general and specialised search. This issue may also apply analogously to the ad load set by Facebook for display advertising.
79. In theory, these concerns could be addressed by a principle that directly restricts SMS platforms from setting key market outcomes at levels that are 'excessive'. This could allow a regulator to respond to concerns that ad load is excessive and not justified by other factors, or even that overall advertising prices are excessive. However, in practice it may be difficult to judge what constitutes excessive, as clear objective benchmarks are lacking. This creates a challenge for the regulator in enforcing the principle. It also results in a lack of regulatory certainty for the platform wishing to balance its incentive to maximise profit with compliance with the principle.
80. A solution could be the direct regulation of market outcomes, as occurs in other regulated markets such as telecommunications. Some stakeholders suggested that this form of regulation would be appropriate in search given Google's market power.

For example, this might require a regulator to directly cap ad load or ad prices on the basis of an assessment of whether platforms would earn excessive profits above such a threshold. This would have the advantage of fully addressing the exploitation of market power. However, various factors mean the assessment required to establish an appropriate benchmark price would be very difficult for a regulator to carry out in practice. Platforms such as Google are global and provide various interconnected services, only some of which are monetised. In addition, the regulator would need to account for the dynamic nature of competition and ensure that incentives for entry and innovation were preserved. Our view is that this type of regulation is unlikely to be well suited for these markets.

81. Because of this, it would be preferable for the regulator to focus enforcement on other principles that act as a more indirect constraint on the ability of SMS platforms to exploit market power. For example, a principle that platforms should not apply discriminatory terms to certain customers without objective basis would enable the regulator to enforce in situations where exploitation was targeted at specific customer groups. Ensuring platform policies were set consistently across different customer groups would provide a clearer benchmark of what practices are acceptable to both the platform and the regulator. In the case of ad load, a principle that advertising must be presented in a way that is clearly distinguishable from organic content may allow user behaviour to act as a constraint on the ability of an SMS platform to exploit market power through excessive ad load. This principle is discussed under Trust and Transparency below.
82. The third set of concerns relate to Google enforcing its policies on ad and site content in an arbitrary way. We received similar submissions from several advertisers that Google's policies are not clearly formulated, and that ads or accounts were often suspended for reasons that were unclear, arbitrary or inconsistent. They told us that Google often refused to elaborate on the details behind specific issues, instead relying on 'standard canned answers' in response to queries. This led to losses that were difficult to recover via legal means given the lack of clarity in terms and conditions and absence of alternative dispute resolution mechanisms. Given Google's market power in search, advertisers had little choice to advertise on alternative platforms despite these issues severely impacting their businesses. These concerns are discussed in Appendix Q.
83. We have identified two principles under the code that are relevant in addressing these concerns. The first is that platforms should provide clear information to customers about the terms and conditions of the services they receive. This principle would aim to ensure that terms and conditions were formulated more clearly and is discussed under Trust and Transparency below. The second is that platforms should not apply discriminatory terms, conditions or policies to certain customers without objective basis. This would aim to ensure that Google's policies were applied fairly and consistently across customers. Implementation of these

principles could involve greater regulatory oversight of standard platforms terms and conditions and potentially a requirement on platforms to establish more formal complaints handling and alternative dispute resolution processes.

84. The final set of advertiser concerns relates to the lack of contractual protection provided to advertisers over the use of the data they provide to platforms. These concerns were raised by several specialised search providers in relation to data provided to Google about sales made on their websites in order for them to track the effectiveness of search advertising. They told us that this gave Google granular visibility of their business model and that this data could be used by Google to develop its own specialised search tools, for example allowing it to focus its efforts on the most profitable product lines. They are forced to agree to standard advertiser terms and conditions, which meant they are unable to agree any contractual terms that restricted the use of their data in this way. These are discussed in Appendix P.
85. As set out in Chapter 3, similar concerns arise for Facebook. We heard concerns that in the course of providing developer tools and advertising services to other businesses, Facebook is able to obtain access to data on these businesses' customers, which it can then use to replicate the consumer-facing service of the business receiving access. Given the importance of Facebook's services, we heard that some businesses had been unable to negotiate restrictions in the purposes for which Facebook can use their data..
86. To address these concerns, a principle that restricts platforms from requiring the use of data from customers in ways not directly related to the provision of services to those customers would be appropriate. This is analogous to the principle that platforms should seek consent from users when using their data in order to address concerns from users over privacy. The objective of this principle would be to ensure that customers are able to establish appropriate contractual protections despite the market power of the SMS platforms.

Box U.1: Example of the code's application under the 'Fair Trading' objective

The lack of contractual protection provided to advertisers over the **use of the data** they provide to platforms



Google has granular visibility of their business model and this data could be used by Google to develop its own specialised search tools, for example allowing it to focus its efforts on the most profitable product lines

POTENTIAL COMPLAINT:

Advertisers raise concerns on contractual terms that allows Google access to data including granular visibility into the sales made on their websites

POTENTIAL OUTCOMES:

NO ACTION:

not a breach of the code

VOLUNTARY CHANGE:

SMS platforms would agree not to use data from consumers in ways not directly related to the provision of services

DMU ORDER:

could result in restricting platforms from requiring the use of data from customers in ways not directly related to the provision of services to those customers would be appropriate

Practices that affect publishers

87. Google and Facebook provide critical ways for publishers to reach users and for users to access valuable publisher content. The market power enjoyed by Google and Facebook on the user side has resulted in them becoming unavoidable trading partners and created the opportunity for them to exploit their commercial relationships with publishers. This exploitation is likely to lead to consumer harm as it may result in publishers being less able to monetise their content, reducing their incentives to produce valuable content for users, and to the broader detriment of society.

88. The commercial relationships between publishers and Google and Facebook cover several dimensions: the hosting of publisher content, the monetisation of advertising inventory shown alongside this content, user traffic referred to publishers by the platforms and the flow of valuable user data between the platforms and publishers. An obligation on the platforms to abide by a principle of fair trading under the code would need to consider all of these dimensions.
89. In Appendix S, we set out concerns relating to Google and Facebook's behaviour in exploiting their position as unavoidable trading partners in relation to publishers. We have identified three practices that could potentially be addressed through the code:
- actions that reduce user traffic to publishers by incentivising users to remain within the platform ecosystem;
 - restricting the opportunities for publishers to monetise content hosted within the platform ecosystem; and
 - requiring access to publishers' data on consumer interactions when platforms host content, in some cases without sharing the same level of detail with the publisher.
90. The code would be a valuable tool in addressing these concerns and in several respects would meet the objectives of the codes between newspapers and platforms recommended by the Cairncross Review into the sustainability of journalism. This is discussed in more detail in Chapter 7.
91. Some publishers have argued that there is an increasing tendency for content to be consumed within the Google and Facebook ecosystems without clicking through to the source websites. For example, publishers have highlighted the practice by Google of showing hyperlinks and short explanatory 'snippets' of news-related content within its organic search ranking pages. Currently, publishers are able to effectively 'opt out' of allowing their content to be scraped by Google's search engine. However, they have limited ability to do so in practice given their reliance on Google's search engine as a source of traffic. Publishers are unable to control the content and length of the snippets. The content included within these snippets and the way they are presented can affect the propensity of users to click through to the publisher's source website and consequently the ability of the publisher to monetise the content. Google appears to have the ability and incentive to present this information to users in a way that is more likely to keep users within its ecosystem to the detriment of publishers and ultimately users.
92. To address this concern, a principle under the code could require platforms to take reasonable steps to ensure that publishers are able to exercise additional control over how their content is shown on platforms. This could be addressed, for

example, by platforms committing to processes to work collaboratively with publishers as to how content is presented.

93. Publishers have also mentioned that they cannot always easily monetise content that is hosted on Google and Facebook properties. For example, publishers do not benefit from advertising that is placed next to 'standard' Facebook content in Facebook's Newsfeed. Publishers can benefit from advertising revenue that is generated from their own content posted on YouTube, Facebook Watch and through IA. However, several publishers have suggested that the mechanism by which they receive the remuneration is opaque and that any revenues they receive are limited. Publishers have also suggested that their ability to monetise content hosted on AMP is significantly reduced when compared to their standard mobile web pages. One of the reasons suggested for this was that AMP does not currently support client-side header bidding and that, whilst a form of server-side header bidding is supported, the number of partners they are able to integrate into this is limited to five or less.
94. This concern could be addressed by a principle that contractual terms concerning the ability of publishers to monetise their content should be objectively justifiable. This would create scope for possible intervention were more detailed investigation by the DMU to suggest that publisher remuneration was insufficient. What is 'objectively justifiable' may be difficult to determine in practice, particularly bearing in mind that part of the benefit to the publisher from hosted content may come from the referral of user traffic to publisher websites. However, it could restrict the application of discriminatory terms by platforms to certain publishers and provide a mechanism to restrict them from worsening terms over time without objective basis.
95. Other principles that may help to address this concern relate more closely to Open Choices and Trust and Transparency. For example, a principle that prevents platforms from imposing their own advertising software on publishers when they use platforms' publishing software (eg AMP and Instant Articles) may help address this concern. This would allow publishers to use the same SSPs when selling ad inventory as they do when selling inventory displayed on their own websites. The DMU would have to consider whether this was warranted, taking into account the potential for harm to the user experience, for example from slower page loading times. A principle that ensures platforms provide transparent information on remuneration mechanisms may also be useful in allowing platforms to make more informed decisions around how they use platform services to monetise their content. This is captured under Trust and Transparency below.
96. Fair trading principles in the code may also be useful in ensuring a more even relationship between publishers and platforms over access to user data.
97. Google and Facebook are able to collect and use individual data from consumers who interact with content on the publisher websites through the use of Google and

Facebook analytics services. Publishers do not have access to the same level of data on consumer interaction with their own content when hosted on Google and Facebook properties. Publishers report that they generally receive data that is very aggregated and anonymised, which they cannot match to their own first-party data to create consumer profiles across domains. Publishers told us that the reason why data is only provided in an aggregated and anonymised form is generally stated as being due to privacy.

98. One impact of this imbalance is to reinforce the advantages Google and Facebook have over most other online publishers in offering targeted advertising due to their greater access to online data. There is also the possibility that access to data on consumer interactions on many publisher sites may undermine the value of this data to the publishers themselves, as the data may be used for targeting by Google ad tech companies for ads on sites other than the original publisher website. This may undermine incentives for publishers to invest in valuable content.
99. We have considered specific data-related interventions to address the imbalance of data between Google and Facebook and their rivals in Appendix Z. However, behavioural remedies under the code are necessary in the first instance and may ultimately be sufficient. In particular, a principle that contractual terms between platforms and publishers should be objectively justifiable could address imbalances in the sharing of user data. For example, this could oblige platforms to ensure that the appropriate user consent is sought to ensure disaggregated user data can be shared with the relevant publishers when hosting publisher content.

Open Choices

100. The objective of open choices is intended to require the SMS platform to allow users to choose freely between elements of the platform's services and those offered by competitors. This aim of the open choices objective is to address the potential for exclusionary behaviour on the part of the SMS platform. It would cover both behaviour that may protect existing market power and behaviour that may leverage existing market power to other markets.
101. There are likely to be two main domains in which this objective is important: contractual terms and commercial behaviour; and technical standards and interoperability. Regarding contractual terms, this objective would focus on concerns relating to tying, bundling and self-preferencing behaviour. In relation to technical standards, this objective would seek to ensure that the SMS platform take reasonable steps to allow third parties to interoperate with the platform's services, and comply with common standards.
102. We have identified the following principles that would apply under the objective of open choices:

- not to impose undue restrictions on ability of customers to use other providers that compete with the SMS platform or to compete with SMS platform themselves;
- not to unduly influence competitive processes or outcomes in a way that self-preferences a platform's own services, or services for which the platform derives a commercial benefit, over rival services;
- not to bundle services in markets where the SMS platform has market power with other services in a way which has a material adverse effect on users;
- to take reasonable steps to ensure that core services interoperate with third-party technologies where not doing so would have a material adverse effect on users; and
- not to withhold, withdraw, or deprecate APIs or otherwise change them in a way which has a material adverse effect on users.

103. In submissions to the study, a number of issues were raised that could be covered by these principles. We discuss the case for these principles below, with reference to the markets where Google and Facebook have market power and whether the behaviours that the principles address would have the effect of protecting this market power or leveraging it to another market.

Practices that protect market power in search

104. The following concerns were raised about behaviour that protects Google's market power in search:
- web browser and device defaults and pre-installation that favour Google's search engine over rivals and the cross-promotion of Google's search engine by other services within Google's ecosystem;
 - contractual terms in syndication agreements that restrict competition;
 - the interoperability between Google's search intermediation tool SA 360 and rival search engines.

Web browsers and device defaults

105. In Chapter 3 and Appendices E, H and V, we describe how digital platforms with their own ecosystems can influence outcomes in related markets. In particular, we explained how search defaults can harm competition and how actions taken by Google as owner of the Android operating system and the Chrome web browser may support or exacerbate these concerns.

106. Specifically, we heard concerns that cross-promotions may confuse or mislead consumers, restricting and influencing consumer choices and harming competition between search engines. We have also heard concerns that vertically integrated platforms may make certain functions or settings unavailable on competitor products or reduce the compatibility of their services, degrading quality, to redirect consumers to their properties.
107. Appendix V sets out certain proposed interventions that could directly address the impact of Google's acquisition and occupancy of extensive search default positions. Those interventions would sit outside of what we envisage would be addressed through the code. However, as indicated above, there are additional behaviours that we consider could be more appropriately and effectively addressed through the code.
108. To address potential concerns in relation to web browsers, the code could incorporate a principle that prohibits hindering consumers and businesses in their selection and choice of web browser and search engine and ensures that Google designs its software in a manner that facilitates interoperability and web compatibility.
109. In practice, there may be some challenges in enforcing the principle, given it will require judgment of whether it is reasonable to impose an exclusivity condition, or whether prompts issued to users are objectively justifiable. In addition, such an assessment may involve technical complexities, particularly if it concerns allegations of Google limiting interoperability and web compatibility. However, this principle has the potential to address harmful behaviours and prevent Google from engaging in practices that distort competition.

Syndication agreements

110. In Chapter 3, we explain that downstream search engines with syndication business models have provided some fringe competition to Google. For example, several of these providers take organic results from Google or Microsoft and add their own selling points and features. However, as described in Appendix V, provisions made in these agreements can restrict the ability of these downstream search engines to compete effectively and to access consumers and may therefore harm competition in search.
111. For instance, clauses within these agreements impose constraints on the recipient's ability to change the ranking of search results or the use of third-party advertisements. Clauses also mean that downstream providers seeking to occupy a default position on a device or browser require approval from the upstream provider. Google has stated that general search providers that syndicate search results and ads from Google and display them in their apps and webpages to

European users are not eligible to participate in its choice screen on Android devices.³²

112. We recognise the challenges that smaller search engines face seeking to enter and expand in this market and how the conditions imposed through syndication agreements can restrict competition. The code could be used to meet the aim that the terms of syndication agreements should be fair, reasonable and non-discriminatory. In particular, the code could be used to prevent SMS platforms from imposing non-price terms that restricted the ability of search engines reliant on syndication agreements to compete and access consumers.

Search intermediation tools

113. In Chapter 5, we discuss the concern raised by Microsoft about the relative interoperability between SA360, a tool used by many advertisers to automatically optimise expenditure across keywords and platforms, and Google Ads compared to that between SA360 and Bing. In particular, the concern is that new functionalities of Google Ads are introduced on SA360 quickly while Bing has often had to wait significant periods of time for innovations in the functionality of its search engine to be adopted by SA360.
114. Google has submitted that decisions by SA360 over which engine features to build into the product are driven by advertiser demand, resource availability and engine requirements, and that demand for Google Ads features is typically greater than for Bing features. This is an objective process that applies consistent criteria for innovations on Google Ads and innovations on Bing. Against this, Microsoft has submitted that it generally implements advertising features that are also implemented by Google Ads and that the engineering necessary to support Bing features in addition to Google features is not significant.
115. We have not had the scope in our study to assess these submissions in more detail. However, it appears likely that Google has the ability and incentive to engage in this type of practice. If pursued it would be likely to contribute to higher barriers to entry in search and result in a loss of competition and innovation, both from reducing the ability of third parties to enter the market and have innovations adopted by intermediaries and from the resulting reduction in competitive pressure on Google itself. These harms may arise even if Google's behaviour is objectively justified by the need to prioritise the integration of search engine features on SA360 according to the scale advertiser demand.
116. To address these potential concerns, the code could incorporate a principle that creates responsibility for SA360 to ensure a reasonable level of interoperability with

³² <https://www.android.com/choicescreen/>

rival search engines by adopting features in a timely fashion. This objective would be to ensure that SA360 approaches the adoption of features from rival search engines in an equivalent way to how it approaches the adoption of features on Google Ads.

117. This principle should address the potential for harm to a large extent. It may not do so fully as the joint ownership of SA360 and Google Ads would allow SA360 to anticipate innovation by Google Ads and adopt it more quickly, regardless of how it treated innovations by other search engines.
118. In practice, there may be some challenges in enforcing the principle, given it will require judgment of what is 'reasonable' and 'timely'. Such an assessment would need to account for the technical complexity and resources required for features to be integrated and may be difficult to enforce effectively. The DMU would also have to consider to what extent adoption of rival search engine features should be on an *equivalent basis* to how features are adopted for Google Ads and to what extent other objective factors, such as the scale advertiser demand, should be taken into account.

Practices that leverage market power from search to adjacent markets

Specialised search

119. The main concerns we have heard relate to how Google can use its market power in general search to assist its entry into various specialised search markets, including flights, hotels and local searches.
120. Specialised search providers are heavily reliant on user traffic from Google's search engine. As set out in Appendix P, several specialised search providers have raised concerns about self-preferencing behaviour by Google. These concerns relate to prominent 'One-boxes' shown at the top of general search results that may divert traffic to Google's own specialised services away from specialised search rivals. For example, for hotel-related searches Google's Hotel finder box directs user traffic to Google Travel specialised search. These concerns are analogous to those investigated by the European Commission in the Google Shopping case.
121. In addition to promoting the One-box itself, we heard concerns that Google prioritises its own paid ads over content from third parties within its One-boxes, denying rivals the opportunity to compete fairly for space. For example, there are concerns that Google excludes content from Yelp and TripAdvisor within its One-box for local searches. Similar to the concerns about the promotion of the One-box itself, this practice may make it more difficult for specialised search providers to access user traffic.

122. These practices may have the potential to deny specialised search providers an equal opportunity to access user traffic and compete on a fair basis with Google's own services. Consumers may suffer harm from reduced innovation in specialised search services and in the long term from the reduction in competitive constraint on Google's general search.
123. These practices can be addressed equivalently by either of two principles under Open Choices:
- not to unduly influence or set competitive processes or outcomes in a way that self-preferences a platform's own services, or services for which the platform derives a commercial benefit, over rival services; and
 - not to bundle services in markets where the platform has market power with other services in a way which has a material adverse effect on users.
124. The ultimate objective of either of these principles would be to ensure Google sets out its general search results in a way that gives fair access to user traffic for rival specialised services. If satisfied fully, these principles should be effective in addressing the concerns. However, there are a number of issues in how this might be achieved in practice that would require detailed assessment by the DMU.
125. The DMU would need to account for the fact that there are several different ways in which Google may be able to foreclose competition from specialised search providers, in addition to the promotion of the 'One-box'. We have heard concerns from specialised search providers that Google has increased their costs by increasing paid ad load and crowding out organic traffic. In addition, Google may be able to disintermediate rival specialised search providers by diverting user traffic direct to merchant websites, either through its organic search algorithm or through the presentation of ads.
126. The DMU would also need to consider possible efficiencies from any improvements to the user experience deriving from the incorporation of Google's own specialised services within its general search results. Users may benefit from this if it results in information being presented in a more convenient way. The DMU would need to balance preserving these benefits with ensuring rival specialised search providers are able to compete.
127. As discussed in Appendix P, one stakeholder has expressed concern that the remedies to the Google Shopping case result in traffic being diverted directly to merchant websites, bypassing the websites of comparison shopping services. This is important as the user interface and comparison functionality on the specialised search providers' websites is the key value added by specialised search to users and the key dimension over which competition and innovation occurs. As discussed in Chapter 7, a key benefit of the code as oppose to enforcement action is that it

would give the DMU much greater influence over the design of any remedy and, crucially, allow it to monitor effectiveness on an ongoing basis and amend the intervention if necessary.

AMP and other mobile friendly formats

128. We have also heard concerns from publishers about how Google only shows AMP news articles in Top Stories and the News Carousel presented at the top of its general search results, rather than alternative mobile friendly formats provided by publishers. These concerns are analogous to the concerns around Google's self-preferencing in specialised search verticals. While AMP is an open source project rather than a directly-owned Google service, as discussed in Appendix S, Google may derive a commercial benefit from preferencing AMP over other mobile friendly formats. Therefore, this practice may also be covered by the same principle under the code.

Smart speakers

129. In relation to voice search using smart speakers, Google restricts the concurrent use of Google Assistant and Amazon's Alexa on Sonos smart speakers.³³ Google Assistant partly relies on results from Google's search engine. This could conceivably be a way for Google to leverage its market power in search into the adjacent markets such as smart speaker devices and voice assistant software. On the other hand, Google said that concerns that it could foreclose voice recognition services that compete with Google Assistant are unfounded. Any investigation into concerns relating to such behaviour could be undertaken under a principle not to bundle services in markets where the platform has market power with other services in a way which has an adverse effect on users.

Practices in social media

130. We received concerns about Facebook's conduct in relation to the interoperability of its APIs, suggesting that this conduct had the potential to either foreclose competition in social media or to leverage Facebook's market power in social media to other markets.
131. As described in Chapter 3 and Appendices J and W, Facebook provides third-party developers with access to its platform through APIs, enabling the developers' systems to programmatically interact with Facebook and access data that users have chosen to share with those third parties. This enables developers to access

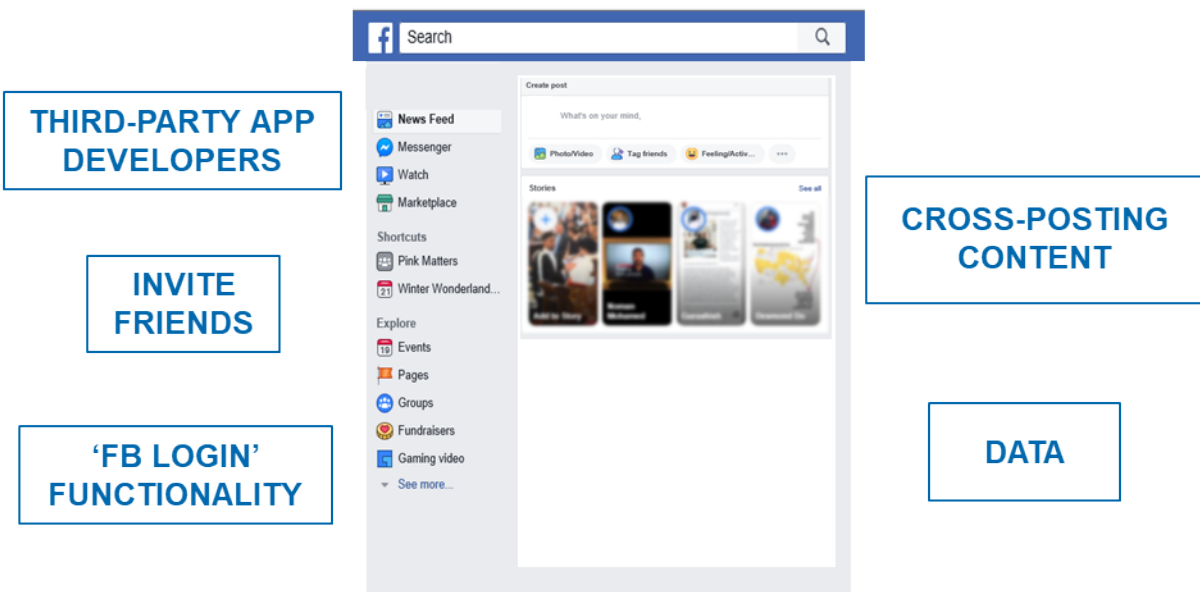
³³ Sonos smart speakers have both of these assistants built in. However, Sonos submitted that Google prevents usage of the wake words for each assistant concurrently: only one assistant can be active at a given time.

the data and users required to create their own products, applications and experiences which are complementary to Facebook's own services.

132. As explained in Appendix J, the functionality currently enabled, and conditions associated with the provision API access, can have a significant influence over the level of competition in these markets. We have heard concerns that Facebook's actions with regards to the full deprecation of APIs and functionalities, such as Friends Invite or Publish Actions, has harmed the quality of rivals' services and their ability to attract and retain users and hence competition and outcomes for consumers.
133. Prior to December 2018, Facebook's terms of access to its APIs also included a non-replication principle. In practice, this meant that developers who tried to access Facebook's platform and provide competitive products to Facebook could have their access revoked. Facebook told us that, for the purposes of enforcing this policy, it considered its core functionality to principally relate to its News Feed and messaging functionality.
134. Appendix W sets out certain proposed interventions that could directly improve the level of interoperability between Facebook and other platforms. Those interventions would sit outside of what we envisage would be addressed through the code. However, as indicated above, there are additional behaviours that we consider could be addressed through the code. For instance, the code could incorporate a principle that prohibits SMS platforms from altering existing API access without consultation and objective justification or from degrading overall services for the purposes of protecting their market position. Such a principle could apply to actions targeted at individual developers or general deprecations applicable to all market participants. This could take the form of requiring prior notice of API changes, giving market participants an opportunity to raise any competition concerns with the DMU before implementation.
135. Facebook has told us that it engaged in the practices highlighted in Appendix J to prevent third-party developers from free-riding on its substantial investments, which would fundamentally harm Facebook's own business proposition and reduce its incentives to continue to innovate. In addition to these practices, Facebook submitted that many of its past deprecations had been done in light of user demand and regulatory calls for increased privacy.
136. Consequently, enforcing the principle may require an assessment of Facebook's actions on incentives to innovate in this market and users' privacy. In addition, such an assessment may involve technical complexities, particularly if it concerns allegations of Facebook limiting interoperability. However, this principle should deter Facebook from engaging in practices that distort competition and harm consumers.

Box U.2: Example of the code's application under the 'Open Choice' objective

Concerns about the **interoperability of Facebook's APIs**, in ways which had the potential to either foreclose competition in social media or to leverage Facebook's market power in social media to other markets



POTENTIAL COMPLAINT:

Third-party developers raise concerns about Facebook's deprecated API access

POTENTIAL OUTCOMES:

NO ACTION:

not a breach of code

VOLUNTARY CHANGE:

SMS platforms would agree to not alter existing API access without consultation and objective justification or from degrading overall services for the purposes of protecting their market position

DMU ORDER:

Potential for interim order and/or decision that case for breach of a code and no agreement from Facebook: to reverse decision to deprecate an API

Practices in advertising intermediation

137. We received concerns about various practices whereby Google's vertical integration in advertising intermediation might give rise to conflicts of interest, where Google has the incentive to favour its own integrated operations over rivals when either buying advertising on behalf of advertisers or selling on behalf of publishers. These practices may allow Google to leverage market power from one part of the value chain to others, potentially foreclosing competitors.

138. These practices are discussed in more detail in Appendix M. Broadly they fall into the following categories:

- using Google’s market power in inventory and data to advantage its own DSP services (Google Ads and DV360);
- self-preferencing between Google’s DSP and SSP;
- channelling Google Ads demand through Google’s SSP (AdX) and limiting the integration of AdX with rival publisher ad servers; and
- self-preferencing between Google’s publisher ad server and AdX.

Leveraging inventory and data

139. Specific remedies to address the first set of concerns around how Google may use the richness of its data and its YouTube inventory to strengthen its position as a DSP provider are discussed in Chapter 8 and Appendix Z. As set out there, given the nature of these concerns, our view is that pro-competitive interventions would be more appropriate to address these issues rather than remedies applied under the code.

140. The remaining concerns relate to Google’s common ownership of intermediaries in the ad tech stack and various practices whereby Google may self-preference its own intermediaries. In Appendix ZA, we have also considered potential separation interventions to address these concerns as a potential complement to the code as an effective means of tackling self-preferencing behaviour in open display.

Self-preferencing between DSP and SSP

141. For example, a principle that Google-owned intermediaries should not self-preference its own services over rivals may address concerns that Google could potentially be favouring its own SSP by preferring it when DV360 decides where to submit its bids, helping to foreclose competition from other SSPs. In practice the implementation of such a principle is not straightforward. This is in part because the DMU would need to distinguish between pro-competitive reasons for Google to favour its own services and anti-competitive reasons.

142. There are pro-competitive reasons why DSPs may favour certain SSPs over others. As publishers typically work with multiple SSPs, DSPs receive multiple bid requests related to the same ad opportunity. There is currently no way to efficiently de-duplicate such requests, so it can make sense for DSPs to develop systems to reduce the volume of bid requests that reach them by favouring certain SSPs over others, reducing the costs they have to sustain to listen to the bid stream and respond to bid requests. Moreover, there are efficiency reasons why a DSP would

tend to buy impressions from its vertically integrated SSP more often than from other SSPs. When the DSP and the SSP are operated by the same firm, they use the same user identifier, eliminating the loss of data due to failed cookie matching; in addition, the low level of latency in the communications between the DSP and SSP means that the bid submitted by the DSP will always reach the SSP before the auction closes, unlike with third-party SSPs.

143. Because of this, it may be useful for a code to include more specific principles that cover practices that result in self-preferencing but without objective justification. For example, we received some concerns suggesting the possibility that DV360 may purposefully delay the sending of bid responses to rival SSPs. It also appears to us that DV360 may have the ability and incentive to limit or delay interoperability with rival SSPs in a similar way to the concerns expressed above about the interoperability between its search intermediation tool, SA360, and rival search engines. A similar principle that creates responsibility for DV360 to ensure the timely implementation of a reasonable level of interoperability with SSPs could be applied here. This objective would be to ensure that DV360 takes reasonable steps to interoperate with other SSPs as best it can.

Reduced interoperability between AdX and rival ad servers

144. The third set of concerns relates to reduced interoperability between AdX and rival ad servers. Broadly, the concerns are that, in addition to self-preferencing between Google's DSP and AdX, Google makes it difficult to access AdX from non-Google publisher ad servers, thereby increasing its market power at the ad server level. The main mechanism for this reduced interoperability is the lack of participation by AdX in header bidding. This makes it significantly more difficult for publishers using non-Google ad servers to place AdX demand in real-time competition with that from other SSPs, resulting in a less efficient selling process and reduced revenues for publishers.
145. Similar to the previous concern, a principle that creates responsibility for SMS platforms to take reasonable steps to interoperate with third-party technologies would be relevant here. Google has submitted some objective reasons why it does not participate in header bidding, for example because of increased latency or user privacy concerns. These are discussed in more detail in appendix M. The DMU would need to consider the trade-off between these benefits and the harm to competition caused by the lack of interoperability.

Self-preferencing between ad server and AdX

146. The final set of concerns relate to various practices whereby Google's ad server may favour its own services, through the ability of the ad server to set or influence rules or other aspects of the auction processes in open display that other intermediaries then need to abide by. This behaviour may leverage the substantial

market power that Google has at the ad server level to other intermediation services.

147. The overall principle to address these concerns may be that Google should not use its ad server to set or influence auction processes in a way that favours its own services. Below we unpack this principle according to different dimensions, to illustrate how it might address the various concerns we have received during the course of our study.
- *Google should ensure there is fair sequencing of information pre-auction*, such that some auction participants do not receive sensitive auction information, for example on competing bids, before others. This principle would address practices similar to AdX's historic 'last look' advantage over header bidders, ie that bid requests received by AdX included as a price floor the highest bid from the header bidding auction. This gave AdX an advantage as it could win the impression by submitting a bid only slightly higher than the highest bid from header bidding. While Google has removed the 'last look' advantage as part of its move to a unified first-price auction, our view is that there should be a principle that ensures this type of practice does not recur.
 - *Google should ensure that historic data on auction outcomes is not shared preferentially across market participants*. We have received various concerns that Google-owned services benefit from data on auction outcomes not available to other market participants. For example, 'minimum bid to win'³⁴ data is provided by Google to bidders using Open Bidding on AdX but not to bidders using header bidding. Similarly, we received several concerns that data on auction outcomes visible to Google's ad server, such as clearing prices and the performance of rival demand sources, could be used to refine the bidding strategies for Google demand sources in a way that rivals could not replicate. Consequently, the sharing of this sort of information with only Google demand sources could contribute to the foreclosure of rival intermediaries. While the sharing of this information with the demand side may contribute to improved auction efficiency of the unified first-price auction, to avoid the risk of foreclosure this principle would aim to ensure that it was shared with the demand side equally. If this was not possible, for example because of technical reasons, the DMU would need to consider whether the efficiency benefits of preferentially sharing this information outweighed the costs.
 - *Google should ensure that sufficient time is allowed for bids to be submitted by rivals*. We have received various concerns that Open Bidding has shorter

³⁴ Information on the minimum bid that would have allowed a bidder to win an auction (typically, if a bidder has lost the auction, the 'minimum bid to win' would be the winning bid; if a bidder has won the auction, the 'minimum bid to win' would be the second highest bid). While this information cannot be used to bid on the same auction, as it is provided ex-post, it is useful for training bidding algorithms for future auctions.

timeouts than generally provided by other types of integrations in programmatic advertising, reducing SSPs' ability to submit a bid and compete with AdX. While having a short time limit is necessary to ensure pages do not take too long to load harming the user experience, too short a time period may have the effect of favouring Google's own services, which benefit from lower latency compared to rivals. The objective of this principle would be to ensure that the time allowed is sufficient to facilitate a level playing field for competition, without compromising user experience.

- *Google should ensure that rules on auction eligibility do not discriminate against rivals.* The aim of this principle is to ensure that any practices by Google's ad server in setting rules about which intermediaries can participate in open display auctions do not favour Google-owned services over rivals. For example, we received concerns that, according to terms of use of Open Bidding, first-party demand is not allowed. As a result, an SSP that also operate a DSP would need to eliminate all bids from its own DSP before submitting the final bid back to Open Bidding. Google, on the other hand does not face any equivalent restriction on AdX submitting bids from its own DSP. This removes the opportunity for vertically integrated providers, other than Google, to take advantage of the technical efficiencies deriving from the integration of DSP and SSP.
- *Google should ensure a reasonable level of technological interoperability between its ad server and rival intermediaries.* We received a concern that there are barriers to technological interoperability between Google's ad server and rival SSPs that Google has chosen not to address. As for interoperability between other Google intermediaries discussed above, we believe a principle that creates responsibility for Google to take reasonable steps to interoperate with third-party technologies should be applied here.

Trust and transparency

148. The objective of trust and transparency is designed to ensure that SMS platforms provide clear and sufficient information to users, including both consumers and businesses which transact with the platform, so that they understand how decisions that affect them are made and can exercise informed choices when using platform services.
149. We have identified the following principles that would apply under the objective of trust and transparency:
 - to provide clear information to consumers about the services they receive and the data the platform takes in return, in a format which can realistically be read and understood;

- to ensure that choices and defaults in how to use services provided by the platform are presented in a way that facilitates informed customer choice;
- to ensure advertising is presented in a way that is clearly distinguishable from organic content;
- to explain the operation of search and ranking algorithms and advertising auctions and to allow audit and scrutiny of their operation by the regulator;
- to give fair warning about changes to the operation of algorithms where these are likely to have a material effect on users, and to explain the basis of these changes;
- to comply with industry standards and provide access to relevant data required for third-party verification and measurement; and
- to be transparent about fees charged.

150. In submissions to the study, a number of issues were raised that could be covered by these principles. We discuss the case for these principles below, by reference to concerns about transparency over different types of information provided by the platforms.

Terms and conditions and choice architecture

151. Two main issues were raised relating to the transparency of information provided to users by the large platforms:

- Terms and conditions and policies on data gathering and protection are unclear; and
- Choice architecture, including the use of defaults, may bias user choice over privacy settings.

152. We have considered these concerns in some detail in Chapter 4 and have considered a specific 'Fairness by Design' remedy to address them. The concept of this remedy is covered separately in Appendix Y and Chapter 8. As discussed there, these remedies, where targeted at SMS platforms, could be implemented as principles under the code. This could include a principle to provide clear information to consumers about the services they receive and the data the platform takes in return and a principle to ensure that choices and defaults in how to use services provided by the platform are presented in a way that facilitates informed customer choice. We envisage that the Fairness by Design duty would include requirements to test and trial different forms of choice architecture

153. Similar issues around the clarity of terms and conditions may also apply to the transparency of information provided to advertisers. We heard concerns about the clarity of Google's terms and conditions relating to ad and site content and noted, in Appendix N that the use of defaults in both Google and Facebook's interfaces for buying advertising may influence advertisers' choices.
154. To address these concerns similar principles that apply to consumers should also apply to other users of the platform such as advertisers. For example, the Fairness by Design duty could also be applied to the choice architecture of platforms' sales interfaces, to ensure that they facilitate fully informed choice by advertisers

Presentation of search advertising

155. Several stakeholders raised a third concern that Google presents its search engine results in a way that influences users to click on search advertising rather than organic search results. Several have argued that recent changes to the way mobile ads and organic search results are labelled make advertising less distinguishable from organic search results and have resulted in greater click through rates on mobile ads. Our more detailed analysis of the evolution of Google's presentation of search advertising is set out in Appendix Q.
156. This concern may result in harm to consumers in two ways. The first is more direct in that users may be influenced to click on links that are less relevant than those they would otherwise had clicked. The second is that the diversion of user traffic to paid advertising over organic search results in increased costs to advertisers which are then likely to be ultimately passed on to consumers through the prices of final products.
157. This concern could be addressed by a principle that advertising must be presented in a way that is clearly distinguishable from organic content. As part of this principle, platforms could also be required to ensure transparency to the DMU of the rationale and the results of AB testing for changes to the presentation of advertising.
158. The idea that advertisements should not be presented misleadingly as organic content is already captured by consumer law and applies universally across providers. A principle under the code may go beyond what is required by consumer law. This recognises that consumers have little alternative but to use SMS platforms and that SMS platforms have the ability to influence user behaviour through how they present content, even if these practices fall short of being regarded as misleading under consumer law. As shown in Appendix Q, platforms like Google have the ability to experiment at a granular level with different presentations of advertising and then to implement those presentations that are most favourable in terms of generating revenue from users, even if not in users' best interests.

159. We consider that the code of conduct would allow the DMU to provide clear guiding principles on how Google and Facebook present and distinguish between organic content, digital advertising, and their own services, such as specialised search. Adherence to these principles may provide a constraint on Google and Facebook's ability to exploit their market power through excessive ad load. As discussed above, this may be a preferable way of addressing this concern, compared to direct regulation of the quantity of ads, or ad-load, that can be shown within search results.

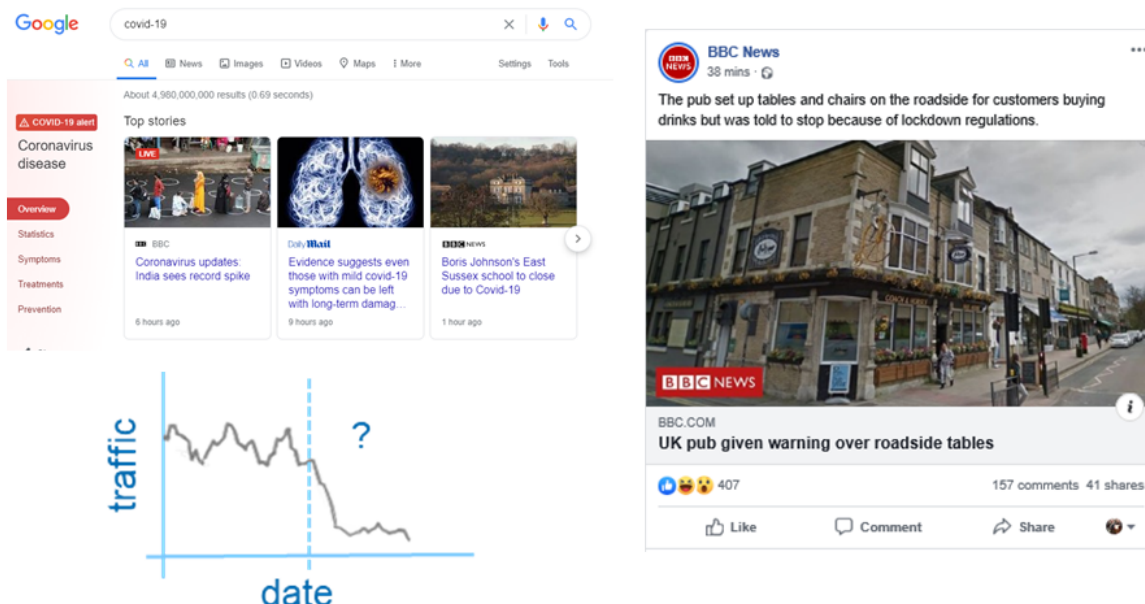
Transparency of algorithms and advertising auctions

160. Many important processes on the large digital advertising platforms are driven by complex and opaque algorithms. Both Google's search engine and Facebook's Newsfeed use algorithms to present relevant content to users and to determine the outcomes of advertising auctions.
161. Given the importance of Google and Facebook as key sources of user traffic for many businesses, the ways in which these algorithms work and changes that are made to them can have very serious consequences for these businesses and the markets in which they compete. It does not appear that Google and Facebook have the incentive to fully take into account these consequences when designing their algorithms and making changes to them. Therefore, an important area of focus for the code is in ensuring there is sufficient transparency around the operation of algorithms and changes that are made to them.
162. Many stakeholders, including small advertisers, specialised search providers and publishers, have expressed concern about unexpected and unexplained changes to Google and Facebook's algorithms, most notably in relation to Google Search and Facebook's Newsfeed. These changes can have very material impact on the flows of user traffic visiting different websites and so are highly important commercially to the many businesses that rely on this traffic. Several told us that sudden, unexplained and significant algorithm changes make planning and financial decision-making more complicated and can lead to significant, potentially wasteful, expenditure on understanding these opaque algorithms and optimising content to appear high up in the rankings. Those expressing concern are broadly of the view that they do not get sufficient warning of algorithm changes or sufficient explanation of their impact or of what they might do to mitigate any loss of traffic. A number have suggested that there should be a role for the DMU to monitor and report on the main Google and Facebook search ranking algorithms.
163. In addition, some have expressed concern about the transparency of algorithms used in advertising auctions, including both those used to weight bids by relevance and algorithms provided by the platforms to assist advertiser in optimising bids when buying advertising inventory.

164. We have identified two main principles that could apply under the code to address these concerns.
165. The first is a requirement for SMS platforms to explain the operation of search and ranking algorithms and advertising auctions and to allow audit and scrutiny of their operation by the DMU. We recognise that there are constraints on the degree of transparency that can be provided to market participants about how these algorithms work. In particular, some degree of opacity is needed to ensure that they cannot be gamed by market participants. However, given their importance to the functioning of competition in the many downstream markets that rely on traffic from Google, we believe some regulatory oversight is warranted. In the interest of proportionality, rather than full reviews of all the coding behind all the various algorithms, this regulatory oversight may be more targeted in response to specific issues and may look at evidence on the high level 'objective functions' behind an algorithm and at the results of A/B testing looking at the impact of changes.
166. The second principle would require SMS platforms to give fair warning about changes to the operation of algorithms where these are likely to have a material effect on users, and to explain the basis of these changes. Sufficient advance notice and disclosure of some of the results of A/B testing of the impact of prospective changes may allow users to prepare and respond to the changes more quickly, minimising temporary disruption that sudden unexplained changes may otherwise cause.

Box U.3: Example of the code's application under the 'Trust and Transparency' objective

Unexpected and unexplained **changes to algorithms** which have material impact on the flows of user traffic visiting different websites



POTENTIAL COMPLAINT:

Publishers and advertisers raise concerns about changing algorithms leading to a decline in user traffic and subsequently a loss of revenue

POTENTIAL OUTCOMES:

NO ACTIONS:

not a breach of code

VOLUNTARY CHANGE:

SMS platforms provide explanation on the operation of search and ranking algorithms, providing fair warning about changes and allow audit and scrutiny of SMS operation by the DMU

DMU ORDER:

breach of a code and no agreement from Google or Facebook to change: could result in order to reverse change of algorithm implemented without reasonable consultation or transparency

167. Concerns have also been expressed about the transparency to advertisers of several types of information relating to the outcomes of advertising auctions, such as information needed to assess the quality of advertising. Various parties suggested that Google and Facebook do not provide sufficient data to allow effective verification of what they are buying and do not allow third parties to access data for ad verification purposes on behalf of advertisers. This may reduce the trust that advertisers have in the quality of advertising inventory they buy. The market power of Google and Facebook may mean they have little alternative. These concerns are discussed in more detail in Appendix O.

168. One principle that can be applied under the code to address these concerns is a requirement on Google and Facebook to comply with industry standards on ad verification and measurement. Industry standards ensure a minimum level of reporting consistent across providers. Our understanding is that Google and Facebook do currently comply with industry standards, though we think this principle is still relevant to ensure they continue to do so as standards evolve in the future.
169. However, this principle only addresses the issue to some extent. While Google and Facebook may adhere to industry standards, they do not currently allow full access to the relevant data for viewability and brand safety to third-party verification providers, instead measuring outcomes themselves. Third-party verification may be important to ensure greater independence and that advertisers can trust in the results. It may also be important to ensure advertisers have sufficient flexibility to measure quality outcomes consistently across platforms in ways that go beyond what is catered for by industry standards. We therefore think it is also important to have a principle requiring Google and Facebook to provide access to the relevant data required for third-party verification of their own advertising inventory.
170. These principles are also relevant to the measurement of advertising effectiveness and attribution. As set out in Appendix O, the importance of flexibility in defining empirical approaches to measuring effectiveness across multiple platforms means that it is both important for Google and Facebook to follow industry standards and to allow access to the relevant data to independent third parties.
171. Finally, as set out in Appendix Q, several advertisers expressed the concern that Google had reduced the transparency of reporting of certain outcomes in its search advertising auctions. These concerns related in particular to Google deciding to stop providing information to advertisers on the average position in which their ads were shown in search auctions. This made it more difficult for advertisers to implement bidding strategies focusing on lower ad positions. These concerns could be addressed by a principle under the code requiring transparency to advertisers over key information on the outcomes of search auctions, such as the prices, quantities and positions in which ads are shown.

Fee transparency

172. Fee transparency is key to allow customers to make the informed choices needed to drive effective competition between different market participants. The concerns around fee transparency in our study related predominantly to advertising intermediation, where many market participants are concerned that the lack of transparency of fees along the intermediation chain limits their ability to make optimal choices on how to buy or to sell inventory, reducing competition among intermediaries. These concerns are discussed in Appendix M.

173. A principle in the code requiring that platforms are transparent about the fees they charge would aim to ensure that the fees directly charged to an advertiser or publisher by a Google or Facebook owned intermediary were transparent to the advertiser or publisher concerned. We note that there may be constraints on the degree of transparency that can be provided. Google has submitted³⁵ that it is constrained in disclosures to parties other than customers of relevant services:
- It is technically difficult and likely a breach of confidentiality to tell advertisers the sell-side margin for each of thousands of publishers, or publishers the buy-side margin for each of millions of advertisers.
 - It would require extensive and expensive integration / data sharing between these products to reconcile fees reliably, breaking existing information barriers.
174. Information on average fees, aggregated across multiple publishers or advertisers may be sufficient to allow customers to make informed choices while circumventing these constraints. Google may be able to satisfy the principle of fee transparency by publishing this information or allowing its aggregate fees to be subject to audit by a third party.
175. In addition to ensuring transparency in the ad tech intermediation chain, a principle of fee transparency would also apply to remuneration mechanisms used when platforms host publisher content, for example on AMP or Instant Articles. This may be useful in allowing platforms to make more informed decisions around how they use platform services to monetise their content.

Appeal rights

176. In our interim report we set out our expectation that there would be a right of appeal by the SMS firm or other materially affected person against the DMU's decisions, but in a more timely manner and to a different standard than applies for antitrust enforcement, as the objectives of the code would be undermined if its enforcement was not timely.

Stakeholder responses

177. Many stakeholders did not feel like they were in the position to comment on appeal rights or the process of investigations.
178. BT agreed with us that SMS firms (and other materially affected persons) should have the right to appeal the regulator's decisions.³⁶

³⁵ Google presentation on Open Display advertising 18 March 2020.

³⁶ BT's response to our interim report.

179. Competition Law Forum stated that ‘the imposition of financial penalties may have an impact on the speed of the regime as an appeal process will be required.’³⁷ Nonetheless, a fast track procedure can be implemented to allow parties to question the decisions of the digital regulator before a specialised tribunal similar to the Competition Appeal Tribunal. Another characteristic of the appeal procedure could be the implementation of an ouster clause to reduce judicial review only to specific due process violations. The validity of ouster clauses in UK primary legislation has been extensively discussed and the UK Supreme Court has not ruled out their validity’.
180. Google said that there was an inherent tension between the powers for enforcement, including appeal rights, and the breadth and scope of the rules or principles in a code of conduct. Google said that more extensive enforcement powers would require a fully developed appeals process, and by contrast, a regime that relies on a more participative approach would be compatible with broader, more flexible rules.
181. Facebook disagreed with us that the right of appeal should be applied ‘to a different standard than applies for competition enforcement’ in the interests of timely enforcement. It stated that this appears to envisage limiting the rights of defence of regulated companies to a lower level than is the accepted norm and then would apply under UK competition and consumer protection law. It told us that parties’ rights of defence must be meaningfully protected, through access to information and reasoning, and robust procedures for appeal of regulators’ decisions.³⁸

Our views

182. There is a strong case for making specific provision in legislation for appeals. We would expect that there would be a right of appeal on judicial review grounds by the SMS firm or other materially affected person against decisions of the DMU. This would enable a timely review of the DMU’s decisions in line with other regulatory regimes. The Taskforce will continue to develop detailed advice in this area.

Conclusion

183. In this section, we have considered how the code might work in practice. We have provided examples of principles which could be applied under the code for Google and Facebook, based on the assessment of the potential concerns raised within this study. We have not sought to assess any of the merits of the cases specifically, but we consider that taken together they illustrate the case that a code could address

³⁷ [Competition Law Forum](#)’s response to our interim report.

³⁸ [Facebook](#)’s response to our interim report.

competitive concerns in the markets within the scope of this study, and as a consequence could provide confidence to new entrants.

184. Based on this analysis we propose:

- That the code should apply to SMS firms, and that in these markets it is highly likely to include Google and Facebook on any reasonable definition.
- That the code should be designated at the level of the corporate group, in order that it can be effectively implemented and enforced. The principles under the code would apply in core markets, which drive the designation of SMS, and adjacent markets, where the SMS firm would have the ability to exercise market power.
- That the code should be enforceable, and that on conclusion of an investigation, either the SMS firm would agree to address the breach of the code, or the DMU would have the power to impose orders to require the SMS firm to do so. The DMU should have the power to impose financial penalties on any SMS firm that does not comply with such orders and on any SMS firm that intentionally or negligently breaches the code.
- That the code should cover the objectives of fair trading, open choices, and trust and transparency. We have identified proposed principles which could be applied to Google and Facebook to achieve these objectives.

185. The form of the code and its implementation will be developed further by the Digital Taskforce. We expect this will include the test for SMS, how the scope of implementation will be defined, the definition of principles, the form of associated guidance, and some of the practicalities around implementation and enforcement.