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UK Digital Markets Taskforce

Call for Information

[redacted]

August 14, 2020

1. SUMMARY

(1) The digital economy has given rise to markets with strong network effects that can be captured and controlled by a single platform, characterised as having Strategic Market Status ("SMS").

(2) There is a clear incentive for such platforms to entrench and exploit their market position, and to extend it into neighbouring or other markets.

(3) The uniqueness and gravity of the situation affecting digital markets warrants consideration of a new code of conduct, comprising general objectives and sector-specific obligations and prohibitions.

(4) In particular, a regulatory approach should provide for greater transparency into how SMS platforms operate; require greater interoperability between SMS platforms and others in the ecosystem, including potential competitors; and allow for structural remedies that can engender competition.

(5) Effective competition in such markets can be restored only if the *source* of SMS is addressed as well as managing its effects. SMS, once achieved, need not be regarded as the end of competition, so long as the authorities are empowered to remedy ingrained structural issues in appropriate circumstances.

(6) With SMS designation and the establishment of a clear code of conduct, opportunities to game antitrust procedure and delay enforcement should be considerably fewer. The burden of oversight could be managed with the creation of independent monitoring trustees for each SMS undertaking, with an obligation on the new Digital Markets Unit ("DMU") to consult with those wishing to compete on the platform and a responsibility to provide periodic reports to the relevant authority.

(7) Against that background, this submission provides [redacted] response to the Digital Market Taskforce's (the "Taskforce") Call for Information. [redacted] response refers at various points to the Report of the Digital Competition Expert Panel: Unlocking Digital Competition ("the Furman Review") and the CMA's final report (the "Final Report") of its online platforms and digital advertising market study (the "market study").

(8) [redacted]

2. SCOPE

2.1. Strategic Market Status designation

Q.1	*The Furman Review refers to 'significant market power,' 'strategic bottleneck', 'gateway', 'relative market power' and 'economic dependence':*

- *How should these terms be interpreted?*
- *How do they relate to each other?*
- *What role, if any, should each concept play in the SMS criteria?*

Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?

What evidence could be used when assessing whether the criteria have been met?

(9) The concept of Strategic Market Status, or SMS, needs to be: broad enough to capture all situations where a special pro-competition regime is required; targeted to apply only where such a regime is required; and flexible to capture novel problematic situations that may arise in future.

(10) To achieve that, the concept could comprise certain conditions to a finding of SMS and exemplar market features that are indicative of SMS.

(11) Conditions could limit designation of SMS to undertakings meeting the following conditions:

a. present on one or more platform or data-based digital markets;

b. holding significant and enduring market power in that market, and

c. able to materially influence conditions of competition in that market, or an adjacent market, such that other market participants are dependent on the potential SMS undertaking.

(12) Significant market power could take into account Article 4, Directive 2002/21/EC, the Electronic Communications Framework Directive, which defines significant market power as an undertaking that "*enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*"

(13) The condition in (c) would allow the DMU some discretion in its designation of SMS. Given the difficulties of establishing dominance in emerging, fast-evolving and hard-to define digital markets, satisfaction of the test should not turn on traditional concepts of dominance alone. It would also enable application of SMS designation to neighbouring, or other, markets to the market in which significant market power is held.

(14) The test could also refer to a non-exhaustive and non-cumulative list of market features that could indicate an undertaking with SMS, for example:

a. digital platform-based markets and/or data-driven business models;

b. strong network effects, with limited offsetting effects of multi-homing and differentiation;

c. the market has tipped, the undertaking has a large market share, and the market position of the undertaking is entrenched. Other undertakings are small by comparison, and are unable effectively to contest the market;

d. the undertaking's platform acts as a gateway between businesses and their prospective customers. The undertaking can therefore control access to an important part of the market. Other undertakings are dependent on it, have limited bargaining power, and are often subjected to unfair terms in order to do business;

e. the undertaking can determine the terms on which the market operates, there is a lack of transparency, an ability to discriminate in favour of its own business and customers and/or,

f. the undertaking is able to leverage its market position in one market to gain a competitive advantage in another market.

2.2. Implications of SMS designation

Q.2 *What implications should follow when a firm is designated as having SMS? For example:*

- *Should a SMS designation enable remedies beyond a code of conduct to be deployed?*
- *Should SMS status apply to the corporate group as a whole?*
- *Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?*

(15) The Furman Review envisaged a pro-competition regulatory regime "*to provide every chance for competition to succeed in digital markets, tackling the factors that lead to winner-takes-most outcomes and to that position becoming entrenched. By using pro-competition rules and frameworks that open up opportunities for competition, it can deliver a market-led approach*."

(16) Against that background, the Taskforce rightly identified two main aims of a new regulatory regime: (i) to manage the effects of SMS, and (ii) to address the source of the SMS.

(17) The introduction of codes of conduct with high-level objectives and more precise principles governing the behaviour of SMS undertakings will go a long way to facilitating more effective competition in the markets in which they operate: both the immediate markets and neighbouring markets.

(18) However, there are limits to what can be achieved by those means alone. In particular, behavioural rules may not fully address structural competition issues that are often a feature of such markets, and which entrench the undertaking's position.

(19) SMS designation should empower a Digital Markets Unit to diagnose structural issues that require a more fundamental solution than can be provided by behavioural rules, and to propose bespoke solutions. Accordingly, SMS designation should enable

remedies to be deployed beyond the scope of the code of conduct. Doing so would help bring about tailored and comprehensive solutions relating both to the source of SMS and to its adverse effects.

(20) Achieving a comprehensive solution also depends on SMS designation applying to the undertaking's entire corporate group or undertaking. Limiting SMS designation to only part of an undertaking could provide it with means to avoid compliance, for example, by conducting prohibited activity within part of its business not subject to the new regime. Therefore, it would complicate application of the regime, and in any event be unnecessary.

(21) In particular, the proportionality of the regime can be managed by limiting the application of the code of conduct and remedies to certain markets only: those in which the SMS market position exists and neighbouring markets in which the undertaking can leverage its SMS status to gain a competitive advantage.

(22) Limitation of the regime's scope in this way has precedent in other regulatory regimes. For example, under the Electronic Communications Framework Directive, an operator with significant market power may be deemed to have such power on a closely related market. This may occur where the links between two markets allow the undertaking to leverage its power from one market to the other. An equivalent approach is appropriate in digital markets, where large online platforms can readily leverage dominance in one market to gain a competitive advantage in another.

(23) In unconnected markets, where the SMS confers no competitive advantage, there is potentially no need to regulate the undertaking's conduct in the same manner, in which case they should be free to operate and compete as any other undertaking without being subject to particular rules or remedies.

2.3. Scope of a new pro-competition regime

Q.3 *What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:*

- *What are the criteria that should define which activities fall within the remit of this regime?*
- *Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.*

Q.4 *What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?*

(24) The Furman Review was correct in both its diagnosis of the core competition problem in digital markets and its suggestion of the most effective and comprehensive solution to it.

(25) It recognised that the dynamics of certain digital platform and data-based markets leave them effectively uncontestable, which antitrust laws, such as the Chapter I and II

prohibitions, are not best placed to address, leading to sub-optimal competitive outcomes:

> "*Markets based upon digital platforms, with network-based and data-driven business models, show a tendency to tip towards a single winner. That dominance can be abused in a way that antitrust can seek to address. But even where conscious abuse does not occur, markets can produce better outcomes if they are less concentrated, more contested and more dynamic. In some situations, contesting the market can be an unrealistic goal.*"

(26) The Furman Review chose not to recommend telecoms-style regulation, in which regulators accepted "*the monopoly position of the utility operator while looking to minimise the resulting consequences for competition and consumers.*" It recommended instead an approach that would address the source of the SMS as well as the effects:

> "*The approach this review recommends is instead to use pro-competition policy tools to provide every chance for competition to succeed in digital markets, tackling the factors that lead to winner-takes-most outcomes and to that position becoming entrenched. By using pro-competition rules and frameworks that open up opportunities for competition, it can deliver a market-led approach*."

(27) There are good reasons to protect competition for the market, including boosting innovation, increasing consumer choice and lowering prices. However, the immediate benefit of such competition in markets with strong network effects does not preclude regulators from taking steps to reduce the likelihood of markets tipping irretrievably or to prevent entrenchment of a winning undertaking's market position. SMS once achieved need not be regarded as the end of competition for the market.

(28) The ability to restore effective competition to such markets requires remedies that can address the source of SMS and combat ingrained structural features that restrict competition, such as those relating to data access and the interconnected nature of certain technologies across markets.

(29) Therefore, having designated an undertaking as having SMS, and established a code of conduct, the DMU should be empowered to assess the need for, and impose, special remedies that address the source of the SMS. Such remedies will combat the underlying causes of the competition concerns and ensure a more comprehensive solution with less need for constant oversight of the SMS undertaking. This is addressed in section 3.2.

(30) The creation of a regime for SMS markets will also place the DMU in a strong position to act quickly to protect competition in future digital markets that are attractive to large operators and liable to tip towards a single winner (for example, technologies that large players may be incentivised to tie to their other offerings, including new and emerging markets for artificial intelligence technologies).

(31) In designing a new pro-competition regime, it is vital that the regime's scope and the powers of the DMU are clear, including in relation to the interface with and, where necessary, application of existing anti-trust tools (whether applied by the DMU or existing bodies such as the CMA). The goal ultimately is to ensure the new regime is effective and efficient.

3. TOOLS & REMEDIES

3.1. Managing the effects of SMS on platform users

(a) The Code of Conduct

Q.5	*What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?*
Q.6	*In relation to the code of conduct:* • *Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?* • *To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?*

(32) [redacted]

[redacted]

[redacted] A code of conduct consisting of high-level objectives and more detailed prescriptive rules would do much to manage these anti-competitive effects, by regulating the SMS undertaking's conduct.

(35) In general, the proposed high-level objectives of *'Fair trading',*[1] *'Open choices'*[2] *and 'Trust and transparency'*[3] are broad enough to capture the spectrum of competition concerns, and arguably reflect what the main regulatory aims should be. Underlying principles and guidance would provide the detail required to ensure clarity as to the SMS undertaking's obligations and applicable prohibitions. Assuming an appropriate governance framework, they would also facilitate effective oversight and swift enforcement in case of non-compliance, as set out in section 4.2.

(i) *Transparency*

(36) Transparency is arguably the most important objective and principle for a number of reasons.

(37) At its simplest, transparency forces the SMS undertaking to act in accordance with the code of conduct, because it allows regulators (and competitors) to check that an SMS undertaking is compliant and, if not, to take swift enforcement action. It thereby exposes or prevents certain abusive behaviour that might otherwise be concealed or difficult to prove, for example, self-preferencing, which is addressed below.

[1] Fair trading means requiring the SMS platform to trade on fair and reasonable terms for services where they are an unavoidable trading partner as a result of their gateway market position. The fair trading objective is intended to address concerns around the potential for exploitative behaviour on the part of the SMS platform. The Final Report identified the following principles that would apply under the fair trading objective: (i) to trade on fair and reasonable contractual terms; (ii) not to unduly apply discriminatory terms, conditions or policies to certain customers; (iii) not to put any unreasonable restrictions on how customers can use platform services; (iv) to act in customers' best interests when making choices on their behalf; and (v) to require use of data from customers only in ways which are reasonably linked to the provision of services to those customers.

[2] Open choices means requiring the SMS platform to allow users to choose freely between elements of the platform's services and those offered by competitors. The open choice principle is intended to address the potential for exclusionary behaviour on the part of the SMS platform. [redacted]

[3] Trust and transparency means ensuring that SMS platforms provide sufficient information to users, including both consumers and businesses which transact with the platform, so that they understand how the platform operates and are able to make informed decisions. [redacted]

(38) Transparency also affords users of a platform visibility into the product or service they are choosing. For example, independent sellers on a digital marketplace should understand what data a platform will derive from sales, and for what purposes that data will be used. Buyers and sellers of goods from that digital marketplace should have insight into the terms available from the various parties with whom they transact via the marketplace, and into how and why the platform displays the alternatives as they do. Where users of a platform lack this information, they are unable to discern their preferences for competitive alternatives.

(39) Transparency also implies an obligation on SMS undertakings to provide clear instructions as to how rival technologies should set up in order to interoperate in optimal fashion. As noted below, interoperability is key to ensuring a level playing and reducing the ability of SMS undertakings to leverage their position in one market to generate a competitive advantage in another. The obligation to communicate clear interoperability requirements extends to providing advanced notice of changes that require modification on the part of the rival technology.

(40) Transparency over service fees, performance data, and internal algorithms and procedures allows users to make a more informed decision about their choice of technology provider, as they would be in better position to compare the SMS undertaking's offering with those of its rivals. This would increase competition and facilitate switching:

a. Fee transparency empowers users to assess the relative value for money of rival technology offerings. [redacted] Google does not give [redacted] fee transparency. It appears to prefer opaqueness, which makes it more difficult for its customers to assess the relative value of Google's offering. This reduces the incentives to switch and therefore the competitive constraints on Google.

b. Performance data transparency likewise increases the ability of users to compare the performance of rival technologies. [redacted]

c. Transparency regarding how algorithms or other procedures determine results on digital platforms is also critical. [redacted]

d. Transparency regarding an SMS's use of data is also critical to competition. In particular, users of a platform should have transparency regarding how data might be used by the SMS undertaking, especially for purposes not related directly to provision of services to that customer. They should also have the option to opt out.

(41) Across a variety of digital platforms, increased transparency is key to affording platform users and regulators insight into the way these platforms operate. Where users understand the terms – regarding, for example, the use of their data, or the platform's policies towards self-preferencing – they can evaluate them and opt for more attractive terms as available from competing platforms, or even create demand for alternative platforms. Where regulators have transparency into platform operations, they can more efficiently identify and remedy the conditions that enable SMS undertakings.

(ii) *Interoperability*

(42) Interoperability is another key factor to prevent tipping or entrenched market power. In particular, interoperability can facilitate innovation and enable expansion by smaller undertakings operating in the same ecosystem as an SMS undertaking. For example, where an SMS undertaking owns and operates a key distribution platform, the ability of competitors to interoperate with that platform is likely to facilitate the availability of competitive alternatives for consumers. Promoting interoperability – and preventing SMS undertakings from imposing policies that limit interoperability – is critical to enabling competition for the market.

(43) [redacted]

(44) [redacted]

(45) [redacted]

a. [redacted]

b. [redacted]

(46) For a code of conduct to be effective, there must be a general obligation on SMS undertakings to allow rivals to interoperate with their platforms on reasonable terms and in an unencumbered fashion, and furthermore to engage in good faith to foster interoperability. These requirements will enable rivals to reach customers who are inaccessible outside of those platforms, and to compete for those customers. Interoperability is another key to levelling the playing field, increasing switching incentives, and increasing competition.

(iii) *No self-preferencing*

(47) A hallmark of many of today's digital platforms is the practice of self-preferencing. In a variety of circumstances, large digital platforms use their position as both operator of a market and participant in the market to advantage their own products and services over third party products and services, often without the knowledge of the ultimate consumer. For example, there are suggestions that several of today's largest digital platforms display search results to consumers in a way that prioritizes the platforms' own content or products over content or products available from third parties.

(48) An SMS undertaking that engages in self-preferencing is capable of distorting the market in which it operates. The SMS undertaking's scale and ability to lock in consumers may be capable of extinguishing even the most efficient competitors when it is permitted to use its position as a market operator to preference its own products and services.

(49) [redacted]

[redacted]

(50) The ability for SMS undertakings to self-preference is greater where there is a lack of transparency, which allows actions to go undetected or makes them more difficult to prove. Therefore, greater transparency will go some way to reducing self-preferencing incentives and opportunities. However, in other instances, self-preferencing may be more blatant, with the SMS undertaking making no attempt to conceal its actions, or doing so under the cover of spurious justifications. Therefore, a general prohibition of self-preferencing within the code of conduct is essential to reducing this behaviour.

(51) However, a prohibition by itself is unlikely to be sufficient. In circumstances where the SMS undertaking has complementary and interconnected activities, [redacted] the incentive to self-preference is strong. The undertaking has a ready means to confer a material competitive advantage on other parts of its business at the expense of rivals. Therefore, as suggested in the market study, a more structural solution is also required, for example, functional or operational separation of complementary and interconnected technologies. This is considered in more detail in section 3.2.

(iv) *Data access & portability*

(52) A fourth critical factor is the collection and use of data, and the ability (or inability) of third parties to access and make use of that data. Given their scale and number of consumer touchpoints, SMS undertakings are typically well-positioned to collect data from consumers who use their platforms. They may also be able to collect data from their competitors. For example, a content distribution platform with SMS status might condition access to the platform on a rival content provider's agreement to allow the SMS undertaking to gather data about its programming and audience, thereby enabling the SMS undertaking to foreclose competition from that rival.

(53) Through the collection of data from both customers and competitors, SMS undertakings gather insight that can be used to target particularly threatening competitors, depriving consumers of emerging alternatives and further entrenching an SMS undertaking's dominance. Where customers or competitors who operate on the SMS platform are prevented by the platform from using their data or insights outside the platform, the problem becomes even more acute.

(54) [redacted]

(55) [redacted]

(56) [redacted]

(57) To some extent, such conduct can be addressed through a code of conduct. For example, a code could require an SMS undertaking to adopt industry-agreed protocols on GDPR-compliant data transfers. However, a code of conduct cannot address the core issue, which is a material imbalance in access to user data, and in access to users themselves. Where an SMS undertaking is in a position to require data as a condition to access to its platform, and those conditions have an adverse effect on the structure of the market and the competitive alternatives available to consumers, [redacted] believes that a more fundamental solution is required in the form of tailored remedies, as described in section 3.2.

(v) *No Tying*

(58) A code of conduct should also restrict an SMS undertaking's ability to tie or bundle distinct but connected technologies or services. Whilst there can be efficiency benefits of tied products, the practice allows SMS undertakings to leverage their position in one market to gain a competitive advantage in another. It thereby reduces the possibility for competition on the merits in the connected market.

(59) [redacted]

(60) As set out in section 3.2, obligations against tying might need to be supplemented by remedies requiring functional or operational separation of distinct but connected technologies, including in certain cases, access to data.

(b) Merger control

Q.7	*Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?*

(61) The Furman Review made several proposals to amend or clarify the UK merger control regime applying to digital platforms. In particular, it proposed:[4]

a. a greater focus by the CMA on digital merger cases, since past acquisitions by large digital platforms of technology companies had fallen within the scope of the CMA's jurisdiction, but had not been called in;

b. an obligation on digital companies identified as having SMS to make the CMA aware of every intended acquisition;

c. changes to the Merger Assessment Guidelines to explicitly reflect the features and dynamics of modern digital markets; and

d. changes to the legal assessment of mergers in the digital sector, empowering the CMA to block mergers where they are expected to do more harm than good ('balance of harms' approach), particularly where considering potential competition.

(62) By contrast, the CMA in the Final Report considered that the merger regime in the UK was broadly fit for purpose.[5] The Final Report referred to the CMA's increasing focus on killer acquisition-type cases, and the CMA's approach in Google/Looker, PayPal/iZettle and Experian/Clearscore,[6] where the CMA took a more 'forward-looking' approach to assessing potential competition, for example by considering as part of the counterfactual whether the target company might expand post-merger. However, the Final Report indicated that the CMA remained open to considering legislative changes.[7]

(63) [redacted] considers that it would be beneficial to grant the CMA jurisdiction over all transactions that involve a SMS undertaking ceasing to be distinct with another enterprise. In other words, satisfaction of the Turnover Test or the Share of Supply test would not be necessary to give rise to a relevant merger situation. The majority of acquisitions by large digital platforms should not go un-notified, as is currently the case.[8] [redacted] also supports the Furman Review's proposal that SMS undertakings should alert the CMA to proposed acquisitions. While the intelligence unit of the CMA is clearly vigilant to M&A activity, this obligation would be easy to implement as part of a code of conduct, and would provide an extra layer of certainty, in particular for smaller mergers that may not attract press attention.

[4] Furman Review, from para. 3.55.
[5] Final Report, para. 10.31.
[6] Google LLC / Looker Data Sciences, Inc merger inquiry; PayPal Holdings, Inc / iZettle AB merger inquiry; Experian Limited / Credit Laser Holdings (Clearscore).
[7] Final Report, para. 10.31.
[8] Furman Review, para. 3.66.

3.2. Remedies to address the source of the SMS

> *Q.8 What remedies are required to address the sources of market power held by digital platforms?*
>
> - *What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?*
> - *Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?*

(64) A code of conduct can set out high-level objectives and underlying principles in order to regulate certain aspects of an SMS undertaking's conduct, including obligations and prohibitions. Such rules can serve to mitigate the worst effects of their entrenched position and their effective control of a digital ecosystem. However, a code of conduct cannot fully restore effective competition on its own.

(65) A regulatory regime based on a code of conduct alone would be akin to Telecoms regulation, in which regulators accepted "*the monopoly position of the utility operator while looking to minimise the resulting consequences for competition and consumers.*" However, as noted above, SMS once achieved need not be regarded as the end of competition for the market, so long as the DMU can implement special remedies that address ingrained structural issues and thereby enable new competition for the market at issue.

(66) The market study recognised that the SMS undertaking's urge to use its position in one market to favour its operations in another is strong, and therefore proposed remedies ranging from measures to manage the conflict of interest to full functional separation.

(67) [redacted] assesses the available options as follows.

a. Functional separation is the cleanest and most effective means of addressing this core structural issue, and once effected would remove the need for monitoring. However, it would also be the most radical. [redacted] presumes that the Taskforce would only recommend separation as an option if other less intrusive measures would be ineffective.[9]

b. Measures to manage conflicts of interest would typically be insufficient, as they would be too easily disregarded, and compliance would be difficult to monitor.

c. Operational separation could bring about lasting change, but only so long as its design prevents circumvention by the SMS undertaking. If not, functional separation would be required.

d. [redacted]

[9] The Final Report noted that "*ownership separation would be a highly interventionist remedy and the DMU would need to consider the feasibility of the UK acting unilaterally in this area*". See para. 101

[redacted]

e. The success of separation measures would depend on the degree of separation imposed and the impact of that separation on the SMS undertaking's incentives. In any event, in contrast to functional separation, operational separation would require on-going monitoring by the DMU. More broadly, in markets with a geographic scope that is broader than the UK, success will also depend on the extent to which operational separation imposed on an SMS undertaking in the UK impacts competition more broadly. The Final Report acknowledges that it may be difficult to design an effective approach to implementing operational separation for the UK part of an international business.[11]

3.3. Market-wide measures

Q.9 *Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?*

- *Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?*
- *What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?*
- *What measures, if any, are needed to enable consumers to exert more control over use of their data?*
- *What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?*

(68) As noted above, consumers can derive important benefits from vigorous competition for the market, including greater innovation, more consumer choice and lower prices. However, the protection of such competition does not preclude regulators from taking steps to reduce the likelihood of a market tipping irretrievably or to prevent entrenchment of a winning undertaking's market position.

[10] Final Report, Appendix ZA, para. 29.
[11] Final Report, para. 8.199.

(69) The Taskforce notes the need "*to act with caution to balance the strong incentives the aim of 'winning' a market creates for investment and innovation and the benefits that can accrue for consumers from 'tipped' markets, with the possible long-term consequence for competition and innovation once this goal has been achieved. It is also important to recognise that pre-emptive action may be more likely to lead to unintended consequences and/or undue burdens on business.*"

(70) [redacted] agrees that to accurately identify a market at risk of tipping could, in some circumstances, be very difficult. The DMU would have to undertake continual monitoring of a wide range of emerging markets, it would need to make predictions as to future market outcomes and intervene in a timely manner.

(71) DMU intervention might entail it designating an undertaking as on the cusp of SMS and imposing a code of conduct equivalent to those applicable to other SMS undertakings. Alternatively, it might entail the application of rules to all undertakings on the market. In both scenarios, there would be no guarantee that the DMU would make the right choice for a particular market, and potentially no way of knowing if it did so, even with the benefit of hindsight.

(72) Therefore, the Taskforce is right to approach the question of pre-emptive powers with caution. However, there is still an important role for pre-emptive action by the DMU.

- SMS designation should have consequences for the undertaking's conduct in the market in which its SMS arises and in closely related markets, in which it can leverage its significant market power to gain an unfair advantage. Extending the code of conduct to related markets enables pre-emptive action to prevent, for example, the related market from tipping.

- There is also a role for pre-emptive action in emerging markets in which an SMS undertaking could leverage its position. Such markets might fall outside the scope of related markets identified as being subject to the market power of an SMS undertaking. The ability to bring such markets within scope would likewise enable pre-emptive action and would increase the flexibility and effectiveness of the regulatory regime. If the review of SMS designation takes place at regular multi-year intervals, the DMU could be given the *ad hoc* power to extend SMS designation to new emerging closely related markets outside the regular review process.

(73) [redacted] recognizes the importance of consumers being able to exercise appropriate control over the use of their data. However, [redacted] would caution that any changes should be carefully designed so that they do not serve to strengthen any SMS's existing data dominance. [redacted]

(74) As noted in section 3.1(a)(ii), interoperability is vital to the restoration of effective competition [redacted]. Therefore, [redacted] supports efforts to increase interoperability across the market generally.

4. PROCEDURE & STRUCTURE

4.1. Key characteristics

> *Q.10 Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?*

(75) [redacted] agrees that focusing on the proposed key characteristics of speed, flexibility, clarity and legal certainty will help to create an effective regulatory regime. However, to the extent that these principles conflict with one another, the procedural framework should be designed to prioritise the preservation of competition. In the section below, [redacted] expands on how these characteristics might be achieved in the design of the procedural framework.

4.2. Procedural framework

> *Q.11 What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?*

(76) The design of the procedural framework will have a material impact on the effectiveness of the new regulatory regime. The regime must provide for close and on-going scrutiny of SMS undertakings on a broad basis, and the DMU must be able to act swiftly and decisively to enforce respect for the code of conduct and applicable remedies. Antitrust enforcement is ill-suited to this task in part because it is necessarily targeted, but also because defendants have been able to delay proceedings, and monetary fines have not deterred them from recidivism. The design of the procedural regime must help to address these shortcomings.

(a) Enacting the necessary legislation

(77) The new regulatory regime should be introduced as a matter of urgency to avoid the material risk of further harm to competition, and entrenchment of the position of SMS undertakings while the Taskforce implements the new regime.

(78) To expedite the process, and where further consultation is required in certain markets, the Taskforce could propose staggering implementation of the regime. Legislation empowering the DMU to designate SMS, to establish codes of conduct and to impose remedies could be introduced in short order.

(79) The pace at which the DMU would exercise those powers would depend on the extent of its understanding of the issues facing particular sectors. For example, in digital advertising, and with the benefit of the market study, the DMU would be in a strong position to take prompt action, designating undertakings as having SMS, introducing a code of conduct and imposing appropriate remedies. Equivalent steps in other sectors may require additional analysis, but should not hold up those where an understanding of the issues and solutions is well advanced.

(80) [redacted] notes that the Taskforce currently proposes to provide advice to the Government by the end of the year. That advice should include a recommendation that the legislative process is expedited to the fullest extent possible.

(b) SMS designation process

(81) [redacted] has provided substantive comments above about appropriate criteria to determine which undertakings should be treated as having SMS. In addition, [redacted] provides the following comments on the procedural aspects of the SMS designation process.

(82) [redacted] agrees that the regime requires a mechanism so that "*SMS designations can be reviewed, and candidates for new SMS designations can be assessed, within a reasonable timescale*."[12]

(83) Once an undertaking has been designated as having SMS, reviews of that assessment should not be so frequent as to create a disproportionate administrative burden, but should be frequent enough to enable the DMU to take stock of changes to digital markets, for example, every three to five years.

(84) To ease the regulatory burden of reviews, the DMU should be able to rely on its previous assessment designating an entity as an SMS undertaking, unless the SMS undertaking is able to demonstrate that the market structure and/or competitive conditions have shifted significantly, requiring the DMU to undertake a more detailed analysis.

(85) The DMU should be able to undertake ad hoc, own-initiative assessments of whether to designate an undertaking as having SMS, or whether to extend existing SMS designation to new, emerging or related markets.

(c) Designing the code of conduct & remedies

(86) As noted above, the DMU should be able to designate SMS, establish a code of conduct and impose remedies when it is in a position to do so. This would inevitably result in codes of conduct being introduced for different SMS undertakings at different times. For example, in light of the market study, the DMU will be in a position to act in relation to [redacted] swiftly and with authority.

(87) In all cases, the code of conduct must be clear, comprehensive and flexible. As noted above, the CMA's proposal of high-level objectives, principles and supporting guidance is well suited to achieving those objectives.

(88) However, given the fast pace of change in the digital sector, building in the ability to update or amend the code and its supporting documents will be vital. The DMU should not be restricted in its ability to conduct a review of the code and update it as appropriate, taking into account industry views. Whilst its periodic reviews of SMS designation would also provide an appropriate opportunity to consider the content of

[12] Final Report, 7.70

the code, it should also be able to carry out such reviews on an ad hoc basis where necessary.

(d) Monitoring compliance

(89) Effective monitoring of compliance is central to an effective regulatory regime. In this context, monitoring will likely be a significant undertaking, given the potential application to a broad range of activities of SMS undertakings.

(90) The Taskforce has proposed the appointment of monitoring trustees to oversee implementation of remedies. That process works well in merger control and antitrust contexts and would be suited to remedies in this context too.

(91) The role of monitoring trustees should arguably be much broader. For example, their appointment could be an immediate consequence of SMS designation, with the trustee being given the on-going task of monitoring the SMS undertaking's compliance with all aspects of the code and any applicable remedies. The trustee could be required to consult with platform users, given the power to request information from the SMS undertaking, and have the responsibility of reporting periodically to the DMU. Market participants should also be given the ability to make a complaint to the monitoring trustee and/or the DMU regarding non-compliance with the code or remedies. That would facilitate the monitoring process and enable swift resolution of concerns.

(92) Appointment of a monitoring trustee would therefore relieve some of the regulatory burden on the DMU. In addition, and most importantly, it would provide an in-depth institutional understanding of the SMS undertaking's operations, create additional incentive for the SMS undertaking to comply, and increase detection of non-compliance.

(e) Enforcement action

(93) [redacted] agrees that the DMU should undertake enforcement action within a "*limited, but achievable*" timeframe.[13]

(94) Creation of a quicker and more fluid enforcement regime than that available in antitrust is achievable due, in part, to important substantive differences:

a. Whereas in Chapter II/Article 102 cases a complex assessment of dominance is required, in this context, SMS will already have been established. Therefore, in most cases, it will be a more straight-forward question of whether, as a matter of fact, specific provisions of the code have been breached.

b. In addition, a finding of breach would not entail an infringement finding or therefore automatically result in civil or quasi-criminal liability (though of course such liability should not be ruled out). Accordingly, the Taskforce may wish to consider whether there are aspects of the DMU's assessment that could be established with a lower evidentiary burden, without fundamentally obstructing the rights of defence of an SMS undertaking.

[13] Final Report, para. 7.32.

c. Scrutiny of SMS undertakings should be viewed as ongoing monitoring of its compliance with the code and remedies, rather than as an investigation. Appointment of a monitoring trustee on an on-going basis would be consistent with that approach. It would enable the DMU to have a supervisory relationship with the SMS undertaking in much the same way that the Financial Conduct Authority does with investment banks. Under Principle 11, authorised firms "*must disclose to the FCA appropriately anything relating to the firm of which the FCA would expect notice*". An equivalent rule could compel SMS undertakings to report to the DMU, for example, suspected breaches of the code and changes to policy or technology that are relevant to the code or remedies. The worst cases of misconduct could still warrant an antitrust investigation alongside robust action within the remit of the new regime, but otherwise there could be a continual line of communication during which compliance issues would be raised by the DMU and action expected of the SMS undertaking.

d. Therefore, there may be considerable scope to resolve breaches of the code informally, where appropriate having regard to the degree of seriousness of the conduct, and where effective to ensure a more timely outcome.[14] However, informal resolution should not be an expectation of SMS undertakings, or the deterrent effect could be undermined. In any event, it may be appropriate to consult with industry on proposed informal settlement terms.

(95) The ability of SMS undertakings to game the procedure, as some have done in antitrust investigations, should therefore be more limited. However, in any event, the DMU should be able to impose interim measures more readily to force the SMS undertaking into compliance, whilst balancing other competing considerations, including the need to undertake a robust assessment and to safeguard the rights of defence.

(96) The need to safeguard competition during the DMU's investigation is clear, and recognised in the market study.[15] By definition, markets characterised by the presence of an SMS undertaking are particularly vulnerable, and less capable of withstanding a drawn-out investigation. The imposition of interim measures would preserve competition for the duration of the investigation, while relieving pressure on the timing of the substantive enforcement investigation. Interim measures would also operate to reduce incentives on the part of a SMS undertaking to engage in tactics that would delay the DMU's final decision.

(97) The DMU's ability to impose interim measures should be effective and not merely theoretical. [redacted] agrees that the interim measures provisions in Section 35 of the Competition Act 1998 are too burdensome to be effective in these circumstances.[16] In particular, as far as [redacted] is aware, the CMA has imposed interim measures only once since the Competition Act 1998 came into force,[17] despite changes to the test in 2013 that lowered the legal threshold. In constructing the procedural framework

[14] Final Report, para. 7.34
[15] Final Report, para. 7.98
[16] Final Report, para. 7.33; Call for Information, fn 18.
[17] Direction given pursuant to Section 35 of the Competition Act 1998, London Metal Exchange, 27 February 2006; [2007] CE/4778-04 (OFT)

empowering the DMU to impose interim measures, [redacted] therefore proposes that the following principles should apply.

a. If the Taskforce chooses to bring the framework for interim measures within the current provisions in Section 35 of the Competition Act 1998, the legislation should be adapted so that there is a presumption in favour of interim measures in circumstances where the DMU suspects a breach of the code, in order to prevent significant damage to a person or category of persons or protecting the public interest. Such a presumption could be rebuttable where necessary to protect SMS undertakings' legitimate business interests, for example, where an SMS undertaking is able to demonstrate that harm to competition will not accrue during the time period of the investigation or that the imposition of interim measures would be excessive and disproportionate. In any event, the DMU would be empowered to impose interim measures only to the extent necessary to remedy the alleged breach of the code.

b. In any event, since SMS undertakings by definition enjoy a special status, and the decision to apply a code of conduct reflects the exceptional situation in those markets, the DMU should not have to demonstrate further exceptional circumstances in order to impose interim measures.

c. More broadly, given the prospect of appeals, the Taskforce should avoid a test that requires the DMU to prove complex substantive elements, such as the existence of a tipping point or significant competitive harm, but should consider the appropriateness of presumptions in favour of interim measures.

d. The DMU should have the ability to amend interim measures if the DMU identifies additional conduct of concern or if it becomes clear that the interim measures as initially formulated are not effective to address the relevant competition concerns (or indeed, if the DMU determines that conduct under investigation is no longer of concern and will not be pursued further).

e. The Taskforce should also recommend procedural mechanisms to ensure that interim measures remain in force unless and until they are successfully overturned on appeal or a final decision is likewise successfully appealed.

(98) The Final Report proposed that the DMU should have the power to impose fines for intentional or negligent breaches of the code, or failure to comply with DMU orders. [redacted] agrees that the prospect of penalties is a useful tool to encourage compliance, and would be particularly powerful in the form of daily fines for continued non-compliance. However, large online platforms have shown themselves to be relatively unaffected even by record European Commission fines, and appeals and uncertainty can last for years. Therefore, other more permanent solutions to restore effective competition, such as functional separation of technologies, should assume greater importance.

(99) The Final Report proposes a right of appeal on judicial review grounds by the SMS undertaking or other materially affected person against decisions of the DMU, on the basis that this would enable a timely review of the DMU's decisions in line with other regulatory regimes. [redacted] agrees that there is little benefit to lengthy appeal processes. As noted above, assuming that DMU enforcement decisions will not give rise to follow-

on damages liability for SMS undertakings, there may be a principled distinction to the framework applicable to infringements of Chapter I and Chapter II of the Competition Act 1998, where affected parties are provided with a right of appeal on the merits.

Q.12 What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

(100) The European Commission is pursuing parallel legislative initiatives that are likely to overlap to some extent with the UK's proposed new regulatory regime. In particular, there are a number of potential similarities with the proposed 'Ex Ante Regulation of large online platforms that act as gatekeepers'. If so, the operation of parallel regimes should serve to reinforce efforts to restore effective competition in sectors such as [redacted], and will at least help to achieve a pan-European solution, if not a global one. Whilst each regime will have its unique characteristics, given the different underlying legal regimes, there are potential benefits to the two being structured in a similar manner, including to facilitate SMS undertaking compliance and to achieve a comprehensive and consistent result. The competition issues and related principles are the same in both jurisdictions, so there may be benefit in both jurisdictions sharing ideas. The public nature of the CMA's market study, the Taskforce's work and the Commission's consultation process will facilitate that in any event.

(101) GDPR and data privacy rules are also an important consideration, given their prominence in digital markets generally, [redacted]. For example, as noted above, changes to increase consumer control over data should not become a tool for SMS digital platforms to reinforce their data dominance, [redacted]. Such concerns are not an obstacle to changes to consumer control rules, but the code of conduct and remedies should be designed in way that combats that risk.

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