

# DMT call for information response (redacted) 29 Oct 2020

[Note: this is to be used anonymously only under the descriptor 'a software developer'.]

## Commercial sensitivity

This submission is highly commercially sensitive due to the importance of the relationships of the respondent with a number of SMS platforms. Not only are they the gatekeepers to our customers, but we

This submission is made on the basis of complete confidentiality and we ask that you not publish or share it in either an anonymous or public format without prior agreement.

## Questions for input and evidence – scope

1. *What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:*
  - *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?*

Designation as a firm with strategic market status should be based upon the following criteria:

- They operate a two-sided or multi-sided platform (e.g. app stores, operating systems, e-commerce platforms) and are an unavoidable trading partner for other businesses to access a significant proportion of consumers within a market
- They have significant market power over a relevant product or service market
- They have the ability to leverage their power in one market to strengthen their position in another

The [REDACTED] result primarily from the position a particular company or service holds in controlling the access point to a large proportion of users and being able to set the rules for that access point. [REDACTED]

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)?*

An SMS designation should come with responsibilities to ensure fair treatment of other companies that are reliant on the SMS firm to access the market and to protect competition and consumer choice. Ex ante obligations and prohibitions should be set out in statutory codes of conduct and compliance should be monitored and enforced as part of a regulatory framework.

An additional option for case by case remedies specific to companies with SMS would deliver the flexibility to address anti-competitive practices that are more specific to individual scenarios or that arise in the future, potentially even as a consequence of changes in gatekeeper behaviour in response to the prohibitions and obligations.

It would be important to consider how best these additional case by case remedies could be layered on top of existing competition rules in a way that could enable swifter enforcement. Abbreviated mechanisms, shorter review processes, the level of evidentiary thresholds, dedicated monitoring and oversight teams, ability to compel provision of information, greater use of injunctive powers/interim measures, shifting the burden of proof, the use of certifications of compliance [REDACTED] and the ability to suspend or reverse the implementation of a potentially harmful decision by a gatekeeper are amongst the options that could be evaluated to ensure those remedies can be meaningful.

SMS status should apply to a corporate group as a whole [REDACTED] the ability of these companies to leverage their power in one market or segment to their own competitive advantage in an adjacent market or segment. Examples include: leveraging power in app stores to drive competitive advantage in both payment processing and specific app categories where the app store operator competes as a first party provider [REDACTED]

[REDACTED] Often this power is leveraged across multiple different markets or segments in a cumulative way.

If exclusions to SMS status are applied for activities in markets that are not plausibly 'adjacent', [REDACTED] monitoring and evaluating market developments in order to identify future trends and adjust designations before new anti-competitive leveraging opportunities occur.

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.*

The activities that fall within the remit of the code [REDACTED] and any additional case-by-case remedies should be based upon identifying which companies hold SMS (based upon the criteria proposed in response to question 1) and applying the regime to all activities of the SMS companies other than those which are specifically excluded as not plausibly 'adjacent'.

We have not fully evaluated the case for additional elements of the regime to focus on particular markets or activities in a proactive pro-competition way, for example, via the statutory reviews discussed by Furman. [REDACTED]

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?*

[REDACTED] the continued entry of companies with SMS into more and more new markets [REDACTED] This problem will only continue to worsen as [REDACTED] becomes an increasing focus for revenue growth for those companies. The inevitable trend is towards [REDACTED] with a tiny number of companies. Without intervention in the market [REDACTED] restrictions on innovation, competition and consumer choice reinforce one another. The capacity of gatekeeper platforms to [REDACTED]

A second concerning development is that increased consolidation and anti-competitive behaviour further weakens the position [REDACTED]

██████████ Whilst at the same time companies with SMS become the rule setters for how consumers are able to move between different services, defining norms on portability, interoperability, identity management, payments and other factors in their favour.

A third concerning development is the continuation of the trend towards ever-greater imbalance in access to data between companies with SMS and those that operate on their platforms. Developers have very limited insight into what data companies with SMS collect ██████████ or how that data is used. Without that, it is impossible to fully assess the competitive advantages that companies with SMS have and the information asymmetry further strengthens their negotiating power.

A fourth concerning development is the increasing ██████████  
██████████ As the two ██████████ developer freedom in the ██████████ will inevitably be eroded as control of ██████████ by the proprietary ecosystems expands.

## Questions for input and evidence – remedies

*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?*

Significant anti-competitive effects arise from the exercise of market power by the operators of the main app stores ██████████

### App stores

- The 30/15% fees on app store sales are unfair because they are disproportionate to the service or value provided by the app store, which is akin to that of a payment processor where fees are typically around 1-3%. App store operators argue that they provide marketing services that justify these fees, but ██████████  
██████████-The fees can only be applied at the current level because of the powerful position of app stores in controlling the route to market for apps on the respective mobile operating systems ██████████  
██████████ The fees are only applied to third-party apps; the competing services of the app store operators are not subject to the fees.
  - Impact:
    - In the long term, app store fees inevitably raise costs and limit choice for consumers to the sole advantage of app store operators. In the short term, ██████████-choice between passing on those costs directly, ██████████  
██████████ Or alternatively taking a direct hit to revenue and margin ██████████  
██████████-to invest in R&D and product innovation to improve consumer choice.

App store terms are unfair because [REDACTED] -making app store customers aware of alternative payment methods or alternative [REDACTED]

o Impact:

- This directly impacts our revenue and margin because alternative payment methods for our services incur significantly lower fees [REDACTED]

-It creates frustration for customers [REDACTED]

Customers also lose out because [REDACTED]

-Finally, it binds consumers to a single payment option within the app store, when they may prefer or derive benefits from alternative payment options. [REDACTED]

[REDACTED] -Any genuine costs associated with the provision and security of the app stores should rightly be shared by all participants [REDACTED]

o Impact:

- [REDACTED] This further consolidates the position of the app store providers whose terms permit them access to the data of third party apps. It also limits consumer choice by [REDACTED]

App store terms are also unfair in that they impose different rules for first party and third party competing apps. [REDACTED]

o Impact:

Terms that relate to customer protection should be applied equally to first party apps provided by the gatekeeper and third party apps sold through an app store. [REDACTED]

- App stores terms are set unilaterally, enforced inconsistently and without transparency and are often changed with inadequate notice to developers. Their review practices are opaque and inconsistent and the downside of 'failure' to get an app approved is very high i.e. threat of removal from app stores.

- Impact:
  - The review process places unlimited power with the app store provider. [REDACTED]-significant engineering resources to managing the review process. [REDACTED] app updates get delayed which in turn [REDACTED]-revenue planning. The app review process further tilts the playing field towards the gatekeeper, as first-party apps do not bear this cost or uncertainty.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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?*

A code structure for SMS firms could be effective across other digital markets in addition to the digital advertising market. This would depend upon the codes being statutory in nature and compliance being monitored and enforced as part of a regulatory framework as discussed in response to question 2. In particular, we believe this could be effective in addressing anti-competitive behaviours in app stores [REDACTED]

The objectives of 'Fair trading', 'Open choices' and 'Trust and transparency' are highly relevant to the problem behaviours exhibited by app stores [REDACTED]  
[REDACTED]-The majority of the principles are directly applicable. There are a few, primarily in the 'Trust and transparency' section that are somewhat more specific to features of the

advertising market which may need adapting or may not apply in all instances. And we have not yet conducted a gap analysis to consider whether there are other effects in these markets that would require additional principles.

We [REDACTED] support the proposal for a principles based code, potentially with additional, more detailed codes tailored to specific companies with SMS [REDACTED]  
[REDACTED]  
[REDACTED]

*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?*

[REDACTED] It is the case that M&A activity that expands SMS firms into new or existing markets is likely to further consolidate their power and strategic status, and may directly or indirectly kill off competitors, thus it must be properly evaluated.

*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?*

Key remedies to address the sources of market power include:

- Preventing situations where a company can act as the gatekeeper that controls the access point to a large proportion of users and set the rules for that access point in an unfettered manner.
- Preventing the myriad forms of self-preferencing that companies with SMS apply to favour first party services over third party services.

[REDACTED]  
[REDACTED]

*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?*

We have confined our comments in this response to platforms with SMS-

-potential pre-emptive action to prevent market tipping.

Addressing imbalances of power between companies with SMS and the businesses that operate on their platforms requires the application of clear prohibitions and obligations to companies with SMS. As discussed in response to question 6

The control that consumers have over the use of their data correlates strongly to the

-Equal treatment would encourage a diversity of business models enabling consumers to better select the services that offer the level of control that they prefer.

## **Questions for input and evidence – designing procedure and structure**

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

Speed, flexibility, clarity and legal certainty are all important characteristics of a new approach. We welcome in particular the recognition of the need for speed and flexibility which we highlight in response to question 2.

We would highlight in addition the importance of both proactivity and commercial sensitivity on the part of the regulator. The imbalance in power between companies with SMS and the companies that depend on them is so great that the majority of those [REDACTED] are too afraid of reprisals to instigate formal complaints. Even where complaints are brought it is often impossible for competition authorities to intervene in a timely manner given the extent and impact of anti-competitive behaviour. Furthermore, *ex post* remedies are often unable to undo damage that has occurred and sometimes cannot even preclude future damage [REDACTED]. It will be important that the regulator tracks this type of [REDACTED].

*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.?*

In addition to the factors listed in the question the Taskforce should consider:

- Changes in status i.e. how it captures changes as a result of, for example, M&A activity or entry into new markets to ensure that designation of firms or application of the right codes is done swiftly (and not left to review scheduled on the basis of time).
- Monitoring and oversight i.e. how the regulator should proactively monitor for evidence of violations of the code and, very importantly, how it can create a ‘safe’, confidential environment to facilitate reporting of code violations by third parties without fear of reprisals
- Use of injunctive powers
- Ability to compel provision of information from SMS platforms
- Ability to suspend or reverse the implementation of a potentially harmful decision by an SMS platform
- Shifting the burden of proof
- Use of certifications of compliance [REDACTED]

*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)?*

It is important that any new pro-competitive approach complements other regulatory regimes. In relation to existing competition rules, it makes sense for the new rules for companies with SMS to be layered on top of existing rules as additional requirements.

In relation to adjacent regulatory regimes in other areas, it will be important for companies with SMS that the rules are harmonised with those regimes. It is also important for non SMS companies that there is clarity on how those rules fit together in order to prevent misuse or

misinterpretation of rules. [REDACTED]

It will be critically important to involve companies of all sizes and business models directly in the detailed development of the new approach and to provide the right environment and confidentiality assurances to enable them to engage. [REDACTED]