

# DIGITAL MARKETS TASKFORCE CALL FOR INFORMATION

## BBC RESPONSE

### BACKGROUND AND EXECUTIVE SUMMARY

#### The BBC group

The BBC is the UK's leading public service broadcaster and one of the most recognised British brands around the world. The BBC has over almost a century built up significant knowledge with regards to developing high quality and distinctive public service content and services on TV and Radio platforms. In recent decades, this knowledge has extended to digital content, including via the BBC iPlayer, BBC websites and mobile apps. BBC content is available on or discovery through the services offered by online platforms such as Google, Facebook, Amazon and Apple, and as such, the BBC has a strong interest in seeing the market power of these entities being subject to proportionate and appropriate regulation.

#### Executive summary

Overall, the BBC is concerned that the online platforms do not gain the sort of stranglehold over audiovisual content production and distribution which they have done in digital advertising. Consumers now have unprecedented choice in audiovisual content. We are concerned that online platforms do not gain the position where they will have the ability to reduce that choice, potentially by creating entire media eco-systems that may eventually drive out UK players. For instance, online platforms are already leveraging their positions of market power into VOD services, IPTV services, in-car audio and into voice services. If, however, the online platforms were to be allowed to continue leveraging their market power in this way, it will have adverse impacts for audiences in the UK, including in fundamentally important areas such as news, and it will result in less choice for UK audiences across the full range of content as audiences are directed to a smaller number of services which are not focussed on UK audiences or covered by Ofcom's regulatory framework on content, and editorial standards.

The main issues impacting on the BBC's ability to serve our audiences in the UK are:

- **Access to data** – the BBC views access to data as essential in order to develop digital content and to supply personalised services to users. We have provided a number of examples which demonstrate online platforms refusing to provide the BBC with the data we require to improve and personalise our services for audiences. This has been exacerbated by a strict interpretation of GDPR requirements which is often not warranted by the circumstances, as also identified by the CMA.
- **Attribution** – the aggregation of content by online platforms, including by news aggregators, has led to a lack of attribution of value being provided to UK content providers, including the BBC. This damages our relationship with audiences and undermines the BBC's funding model.
- **Self-preferencing** – online platforms offering preferential treatment to their downstream divisions has had significant anti-competitive effects, which have negatively impacted our ability to serve our audiences. We have set out examples of online platforms' leveraging their market power from their core markets into adjacent markets in which we are active.

In terms of the scope of the new competition approach, the BBC considers that Significant Market Power (SMP) provides a helpful starting point for defining Strategic Market Status (SMS), even if terms such as strategic bottleneck and gateway better characterise the “must have” nature of platforms such as Amazon, Apple, Facebook and Google. SMS should apply to the corporate group as a whole, as this best represents the realities of the business models of these online platforms.

In terms of the remedies to be available to the regulator, we support the idea of a flexible code of practice. This should have inherent objectives which apply across all platforms with SMS, whilst having principles and guidance which can be tailored to the issues raised by each individual platform. This code of practice must also be supplemented by powers for the regulator to implement a wide variety of other potential remedies. In particular, given the issues we have outlined above and in more detail further in this response, we support the idea that the regulator should have the ability to:

- Mandate third party access to data in a way which is compatible with the GDPR and other privacy legislation. This should include data relating to the consumption of the relevant business user’s products and services on the platform, as well as relevant contextual data which may be at a more aggregated level. As part of this, the regulator should have the ability to mandate more transparency on what data a platform holds, to the extent it is necessary to go beyond the provisions on data transparency in the Platform to Business Regulation.
- Mandate interoperability, so as to ensure that SMS platforms are obliged to offer their data in a uniform exchange format (as per the CMA’s Open Banking remedy).
- Impose remedies to address default installations of online platforms’ apps/services on devices. This could include options such as choice screens as well as various prohibitions on anti-competitive pre-installation of services.

The new regulator should have robust powers to investigate companies with SMS and to order them to comply with the code of practice and other remedies. The nature of the issues which the regime covers, which are not purely to do with competition e.g. data protection issues referred to above, means that the regulator will need to be under a duty to consult closely with other regulators in the UK e.g. the ICO. Given the global reach of the online platforms, it is also vital that UK authorities co-operate with their international counterparts and that co-operation mechanisms are built into the regulatory regime from the start.

Finally, the ex-ante regulation of platforms must avoid duplicative regulation of entities such as the BBC, which are already subject to regulation. Ofcom is, and should remain the primary regulator for the audiovisual sector. To this end, we agree with the importance which the CMA has attached to ensuring that the regulator co-ordinates and shares information with other UK regulators.

We are happy to discuss any of the issues raised in this response, as the CMA wishes.

## **SCOPE OF A NEW APPROACH**

**I. 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,<sup>58</sup> could be used as a starting point for these criteria?**
- **What evidence could be used when assessing whether the criteria have been met?**

The threshold for the application of the new regulatory regime is the critical question in our view.

### *Significant market power (SMP)*

The BBC considers that SMS should be reserved for firms that not only have a significant degree of market power, but can also demonstrably have a significant adverse impact on fair and effective competition. Any regime should provide a high level of legal certainty, both to the entities which are subject to the regime and those who benefit from it (whilst accepting that there is a degree of legal uncertainty at the beginning of any new regulatory regime, since by definition it has not been tested). In this respect the concept of relative market power is not necessarily helpful, as most business relationships will involve disparities in market position. It therefore lacks clarity. The other descriptors are more targeted on the issues reported.

SMP is a well understood concept in telecoms regulation. The telecoms regime may form a useful starting point, for example as regards the concept of dominance from competition law which forms the basis for SMP under the updated telecoms regime.<sup>1</sup> Given the issues which arise from online platforms leveraging their market power into other markets in which they may not yet be dominant, it is helpful that under the telecoms regime a firm can be found to have SMP in adjacent markets to those in which a firm has SMP. Specifically, under the telecoms regime:

*“Where an undertaking has significant market power on a specific market, it may also be designated as having significant market power on a closely related market, where the links*

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<sup>1</sup> Article 63(2) of the European Electronic Communications Code provides that “An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.” This is based on CJEU jurisprudence, e.g. Case 322/81 *Michelin BV v Commission* ECR 3461, para 6.

*between the two markets allow the market power held on the specific market to be leveraged into the closely related market, thereby strengthening the market power of the undertaking.”<sup>2</sup>*

The fact that SMP is assessed from a forward-looking perspective is also helpful, as is the idea that there is no need to demonstrate anti-competitive effects i.e. once SMP has been demonstrated, the regulatory authority must impose at least one of a variety of possible remedies. Remedies under the SMP regime also offer useful precedents and we will point these out in answer to relevant questions below. However, the telecoms regime more widely has obligations which are applicable to all operators, whilst a special regulatory regime applies to operators with SMP. We are not here advocating that requirements should be imposed on all operators in digital markets; rather, the focus is on requirements being imposed on companies with SMS.

More generally, definitions in the telecoms regime will not necessarily read across perfectly into the new digital markets regime. The SMP regime that has evolved is onerous on the regulator to prove SMP ahead of regulating the firm. The SMP regime has the disadvantage that a formal market definition exercise needs to be undertaken to establish SMP in a particular market, whereas the CMA is clear that no market definition exercise needs to be undertaken to establish whether a platform has market power.<sup>3</sup> Such procedural issues and rights of defence should be considered when developing how the criteria are applied. There could be a significant period between the regulation being launched and its actually being applied.

#### *Strategic bottlenecks and gateways*

The major online platforms such as Amazon, Apple, Facebook and Google act as strategic bottlenecks or gateways. From the perspective of consumers and audiences, they are “must have” platforms.<sup>4</sup> In turn, businesses are obliged to use these platforms if their businesses are to be successful in reaching the substantial number or unique segment of consumers who use each platform. They are in effect unavoidable trading partners for many businesses, including the BBC.

Concepts of strategic bottleneck, or gateway are likely easier to define and evidence than whether a firm holds SMP. Metrics around the firm’s market penetration (on one or more sides of the market) and prevalence of multi-homing or single homing amongst users could be used as a starting point to structure clear tests. This is because, as above, platforms with extremely large or unique userbases are unavoidable trading partners for businesses seeking to reach a certain volume or type of audience. Those metrics need to be applicable across a variety of industries and consistent over time. The industries/platforms we have today may not be the industries/platforms of concern for tomorrow. Faster broadband speeds and the 5G roll out are going to change existing markets and open new ones. For example, in our industry we see developments of IP TV, Voice control and IP in-car services, wherein each of the major platform providers are already making inroads into these nascent markets.

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<sup>2</sup> Article 63(3) of the European Electronic Communications Code.

<sup>3</sup> Market study, para 3.175.

<sup>4</sup> As the CMA concludes about Facebook in its Market Study, para 3.197.

## **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)?**

Remedies beyond a code of conduct are essential. Other remedies, as suggested by the CMA in its market study, are required to ensure that market power is dealt with at source.

SMS should apply to the corporate group as a whole, given the incentive and ability of firms with SMS to leverage into adjacent markets in which they may not yet have SMS. This has been recognised by the CMA in its market study, where it also notes that the application of the SMS status to the corporate group as a whole is critical in order to ensure that the regulator will have the ability to require all the information it needs from the corporate group, and to ensure that corporate reorganisations do not undermine the effectiveness of regulation.<sup>5</sup> As stated above, the SMP regime is a useful precedent in this regard, given the assumption that firms with SMP in one market will have SMP in other markets if they have the capability of leveraging their SMP into that market.

Designations of SMS should represent the realities of the business models to which they apply. It is not clear that digital platforms hold business units separate and that the data collected is siloed within these units. Instead we see that data is collected and shared across the suite of services run by the platform, and that multiple services can be offered to end-users in the form of a bundle. As above, applying the code of practice to only a subset of a corporate's activities may result in regulatory arbitrage where activities are moved out of the regulated entities. Ultimately, setting restrictions at the group corporate level makes more sense as the behaviour of firms with SMS in a core market can set trends in adjacent markets.

For example, a finding that Amazon has SMS in e-commerce alone would neglect the fact that Amazon bundles its video-on-demand services with its marketplace subscriptions, and the fact that Amazon pools its data from both services to enhance its recommendation technology. Therefore, Amazon's SMS status in e-commerce has implications for competition in video-on-demand. A similar example could be made of Amazon's development of devices.

## **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.**

We agree with the broad scope of the new pro-competition regime as summarised in paragraph 2.13 of the call for evidence. We consider that trying to define digital markets too

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<sup>5</sup> Market study, para 7.65.

narrowly will be challenging, given that so many sectors involve the internet in one way or another. Moreover, it is crucial that the new regulatory regime is future-proofed so as to reduce the need for further primary legislation to keep the regime up to date with the way in which the internet is used. In addition, a narrow definition would be more likely to lead to expensive and time-consuming litigation with companies clearly having SMS arguing that they are outside the scope of the regime.

#### **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?**

Both audio and audio-visual sectors are undergoing a rapid transformation. Music streaming and podcasts are changing the audio market. On-demand services are changing viewing habits away from linear broadcast TV. The changes are happening both in and outside of the home with the deployment of 5G networks set to increase trends to new forms of media consumption for consumers.

Both TV viewing and video on-demand (VOD) services have seen an acceleration in rises in consumption because of the COVID-19 lockdown. VOD services have seen far greater rises in consumption than broadcast TV. We consider it likely that behaviours around on-demand viewing in lockdown will be persistent and will accelerate the trend away from traditional broadcast as the economy reopens. While broadcast is likely to remain strong, IP delivery of audio-visual services is set to become the norm for many audiences. This means that for the audio-visual sector the development and operation of next generation platforms for the delivery of IP TV will become a key feature of competition in the future. Next generation platforms are focused on delivery over IP rather than by broadcast (such as by digital terrestrial television or digital satellite). With IP delivery comes a greater opportunity for audience engagement and data driven insights. Whoever owns these platforms will potentially have significant control over the relationship content producers have with their audience.

In audio, voice assistants on connected devices, such as Google Assistant, Amazon's Alexa and Apple's Siri, create a new level of intermediation. Discovery of content on such devices is more complex than those with a visual interface, as a result we consider that defaults will be stickier. Furthermore, voice assistants provide platforms with the scope to make selections for consumers, without necessarily providing them with a selection of content from which to choose. This in turn could remove control from content providers and give them little understanding about how and why the user is consuming their content. Gaining insight into consumer behaviour on such products will be key for those seeking to develop content and services for this new technology.

In car audio is also changing with infotainment systems becoming smart with more IP integration. Apple and Google already offer a mirroring service between their device and connected cars (Apple Car Play and Android Auto).

Digital Platforms such as Amazon, Apple and Google have already taken strong positions leveraging both hardware and software in Voice. They are in a prime position to enter and set the norms in these nascent markets of next generation TV platforms and car operating systems (which potentially control a wide range of a car's functions from fuel management to

navigation to infotainment). Leveraging their position in adjacent content and distribution markets they could quickly gain a bottle neck position in these markets. [36]

## **REMEDIES FOR ADDRESSING HARM**

### **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?**

The BBC considers that the issues highlighted by the CMA in its report also apply across non-ad-funded platforms. As is now well established, price is not the only parameter of competition (particularly given that many platforms charge a zero monetary price for their services) and the anti-competitive effects that can arise from the exercise of market power by digital platforms are not restricted to price increases. Importantly, the exercise of market power will often be to prevent rivals from innovating, thus harming consumers. Appropriate remedies therefore need to recognise the effect on non-parameters of competition.

#### **Access to data**

##### *Main issues with access to data*

In summary, the BBC considers that data is a key part of competition regardless of the platform funding mechanism. The BBC uses the data it collects (1) to develop digital content, (2) to supply a personalised service to users and (3) to understand content performance and inform commissioning. This applies to both the BBC's operations of the UK Public Services and its commercial operations including UKTV and its distribution arm. Higher quality data is available on our own proprietary platforms than when we place content on third party platforms. However, as explained above, to reach audiences we need to place content (whether individual pieces or via our applications i.e. iPlayer) on third party platforms. The BBC has limited negotiating power with most platforms and where our content is intermediated it is the platform that decides on the level and quality of data to provide. The lack of quality data provision from third party platforms inhibits our ability to develop valued content (i.e. TV shows) and useful services (i.e. BBC Sounds), as well as inhibiting our ability to successfully personalise, a key requirement for younger audiences in particular. This in turn hinders our ability to innovate and invest, and therefore limits dynamic competition, to the detriment of audiences.

For example, the BBC provides a range of audio-visual content on both YouTube and Facebook. We consider these routes to be a significant way to engage with younger audiences and direct them towards BBC platforms and services. [37]

Digital platforms such as video sharing platforms and social networks, along with the BBC, know that the best analysis of this consumption in the modern world is conducted at an individual, not content, level. It is this individual level analysis of consumption that provides the most important insight for business decisions. To illustrate, this more granular level of data:

- allows the BBC to personalise its services more effectively. This ability to personalise services is essential for the BBC to deliver on its public service remit, provide value

for consumers and to meet all audience needs and expectations in the new media landscape; and

- gives the BBC teams the ability to deliver both structured and planned insight whilst also allowing the data scientist to look for unexpected patterns of behaviour, which are the driving force of business development in the digital world and which would allow the BBC to achieve its public service goals.

Aggregated reporting, such as at series or episode level can help with some simple “did people watch this” type questions but without more detailed usage information the BBC is not able to understand more fully our audience’s relationship with the content and so plan our investment decisions and personalise our services more. In particular, as regards the critical issue of increasing the personalisation of our services, there are many instances of platforms refusing to allow for sign in (to our services) or other mechanisms that would allow us to understand individual’s behaviour (1) across platforms and (2) over time. This creates a clear imbalance as platforms do have access to this data for the BBC and for all content providers on their platform, as well as for their own content. In particular, this allows platforms to continue to favour their own services over others, whilst holding back the improvement in value we can provide to our audiences.

In addition, we are aware that other PSBs will also use data from platforms in order to support their advertising operations, on which they are wholly or partly dependent for revenue. In particular, ITV, Channel Four, Channel 5 and our own UKTV will use data to increase the effectiveness of their personalised advertising, so ensuring that they can increase the revenues for that inventory and so generating funds for more and better British content. Platforms on which we distribute content on a commercial basis are not incentivised to provide performance data to us as this can keep their input prices low. This is because our ability to assess accurately the value of content licences is inhibited by the fact that platforms with whom we distribute content on a commercial basis, do not provide good data on the performance of that content on the platform.

#### *Examples of the BBC not gaining access to data and the impact on competition*

As above, it is this granular, individual, data which the BBC is consistently unable to obtain from the major online distribution platforms. The BBC has explored opportunities to co-create solutions, which are fully respectful of privacy. However, the BBC does not feel that the major online platforms have engaged in these conversations willingly and openly, but rather have wanted to keep valuable information to themselves so creating competitive advantage for their services and disadvantaging the audiences the BBC serves.

The following is a non-exhaustive list of examples which demonstrate the extent of the issues outlined above: [redacted]

We note that in the course of the market study, the CMA were told of many instances of online platforms using privacy regulation as the basis for refusing to share data, and that the CMA notes that online platforms take a more permissive view of data protection regulation when combining data across different divisions of their operations.<sup>6</sup> This has the effect of

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<sup>6</sup> Market study, paras 5.319-5.320.



consolidating the data advantages of online platforms and entrenching their market power.<sup>7</sup> The BBC agrees that this should be explored further to test what data can be shared in accordance with the GDPR framework.

And the anti-competitive effects go beyond access to data. Key additional areas of concern for the BBC include: algorithmic transparency, attribution for BBC content and services and control of prominence and placement, as set out further below.

### ***Algorithmic transparency***

More generally, the performance of content and services is also affected by the platforms ranking algorithms. We do not have transparency over how the algorithms that rank our apps or content work (i.e. Apple App store, Google Play, Google Search, Apple or Google News). This can be problematic for several reasons, including the fact that platforms may give preferential treatment to their own content, to sponsored content, or to content where providers have paid for prominence. This can be particularly challenging for a public service organisation like the BBC, with limited resources with which to meet our universality conditions.

### ***Attribution***

The recent growth of digital platforms has radically reshaped the media ecosystem, and digital platforms now form a powerful intermediary between the BBC (as a content creator and service provider) and consumers. As intermediaries they can create additional value for consumers through aggregation. Indeed many digital platforms now aggregate content. This is particularly the case in news and in audio. However, our research suggests that this intermediation can undermine the attribution of content back to the BBC as provider, the BBC's relationship with the licence fee payer, and damage the perceived quality of our content. For example, on news aggregator services, like [✂], attribution back to content providers like the BBC is low.

[✂]

In certain media markets, particularly news, competition needs to take account of wider considerations. Attribution goes much deeper than simply brand recognition – it also relates to perceptions of value and trust. This issue can be compounded where a platform provider directs consumers through its own aggregation services at the expense of third party aggregation services or publishers' own services.

Ofcom's Media Use and Attitudes found that 'When deciding whether or not to trust online content, participants cited a number of factors including awareness, knowledge or (ideally) previous experience of the site or source. The latter was perhaps the most important factor in determining the level of trust accorded to it.' When attribution is undermined it lessens the ability of audiences to judge these factors.

This is particularly problematic for the BBC because we rely on attributed consumption by audiences to support the licence fee operating model. While ad-funded news providers may derive value from aggregators driving traffic to their content, for the BBC and for subscription-based media outlets, attribution is a critical means of establishing a strong relationship with

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<sup>7</sup> Market study, para 46.

licence fee payers who can attribute value and consumption of high quality content back to the BBC.

### ***Self-preferencing***

Digital platform operators increasingly have significant control over which content and services are promoted to users. Self-preferencing by SMS platform operators of their own downstream divisions operating on their platforms creates significant anti-competitive effects, from which the BBC has suffered (see examples below). The CMA rightly noted in its market study that curation of content by Google and Facebook has significant consequences for the ongoing viability of particular publishers; the online platforms select what content consumers see, and in which order.<sup>8</sup>

Moreover, we also note the high number of complaints concerning Facebook and Google leveraging their positions of market power into adjacent markets (for example, Sonos' complaint about Google leveraging).<sup>9</sup> The BBC has itself experienced this, for example: [✂]

While Ofcom has recognised the need for regulated prominence to ensure continued findability of PSB services in online, on demand TV platforms – the problem remains and is intensifying on other digital platforms.

[✂]

These issues strike at the heart of consumers' ability to access media of sufficient quality, plurality and standards. We note that there is precedent for competition rules to support the media ecology which we would encourage the CMA to take into account when they reflect on our evidence. For example, the Enterprise Act 2002 considers a range of media concerns and how they serve consumers and the public interest. It allows for the Secretary of State to intervene in mergers where they give rise to certain specified public interest concerns: specifically, issues of national security; media quality, plurality and standards; financial stability; and public health emergencies.<sup>10</sup>

### **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?**

The BBC is supportive of a code of practice as basis for regulating digital platforms. The risk with any code or set of rules is that the regime may end up becoming outdated rapidly. This has happened in other areas, such as the must-carry regime under the common regulatory

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<sup>8</sup> Market study, para 6.38.

<sup>9</sup> Market study, paras 58, 2.38 and 2.85, 3.135 and 3.246.

<sup>10</sup> Enterprise Act 2002, section 58.

framework and the EPG prominence regime under the Communications Act.<sup>11</sup> It is now recognised that these must be adapted to a more technology neutral approach.<sup>12</sup> The regime therefore needs to be flexible so that, whilst it has certain inherent principles, the regime can adapt to changes in technology, business and consumer usage.

The approach proposed in paragraphs 2.19-2.23 of the call for evidence should be sufficiently flexible to deal with the heterogenous nature of the various digital platforms. In particular, the three objectives (fair trading, open choices, and trust and transparency) capture in broad terms the issues we have identified in answer to question 5 above. We agree that whilst there may be a standard set of principles within each objective, these should also be made bespoke to the platform. The code will need to apply principles to each platform with SMS which are tailored to the actual anti-competitive effects that have been identified. It is important that the detailed guidance can be changed relatively frequently as required so as to reduce the risk that the code becomes outdated.

However, in building agility into the system, it will be important for the CMA to nevertheless provide a degree of legal certainty to both the platforms who may gain SMS status and those firms who interact with the platform. This is less easy to provide when a platform with SMS may be subject to an entirely bespoke code of conduct.

### **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?**

The BBC considers that there should be heightened scrutiny of acquisitions by SMS firms through a modified merger control regime.

In common with many other organisations, we are concerned that current merger control regimes have failed to examine more closely so-called “killer acquisitions” by Google, Apple, Facebook and Amazon, and that such acquisitions have ended up reinforcing the market power of these online platforms. The CMA market study demonstrates that Whatsapp and Instagram are important elements in reinforcing Facebook’s market power, and yet Facebook’s acquisitions of Whatsapp and Instagram were both cleared by the European Commission and the OFT respectively.<sup>13</sup>

One of the central difficulties with assessing mergers in digital markets is that it is difficult to assess what the potential impact of acquisitions will be. This is in part due to the fact that digital markets are so dynamic, with multi-sided platform markets exhibiting rapid growth and with companies pursuing high risk/high reward strategies, and due to the importance of data. Theories of harm in digital markets are often based on the loss of potential competition, and the current substantial lessening of competition (SLC) legal test could be improved upon in order to better accommodate such theories of harm.

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<sup>11</sup> The must-carry regime is transposed into UK law under the Communications Act, section 64. See sections 310-311 of the Communications Act on the EPG prominence regime.

<sup>12</sup> The European Electronic Communications Code has reformed the must-carry regime, whilst Ofcom has recommended that the EPG prominence regime should be extended beyond PSB linear services to regulate the prominence of PSB on-demand services.

<sup>13</sup> See the Commission’s decision in Case M.7217 *Facebook/Whatsapp* of 3 October 2014 and the OFT’s decision in *Facebook/Instagram* of 14 August 2012.

We therefore believe that there are a number of changes to the mergers regime which should be considered by the Digital Markets Taskforce and the Government given the difficulties outlined above. In particular, consideration should be given to lowering the thresholds for notification by SMS firms under the current regime, in the same way as the thresholds have recently been lowered for certain additional sectors impacting national security (for example, the turnover test thresholds have been lowered from £70 million to £1 million for such mergers/acquisitions). Alternatively, acquisitions by SMS companies should be subject to an entirely new regime of mandatory notification. This would clearly be a more significant change given the current UK system of voluntary notification, but is potentially justified in the circumstances.

## **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?**

### ***Data-related remedies***

The BBC views the most important data-related remedies as being (1) mandated third-party access to data (2) mandating interoperability and (3) mandating data separation/data silos. We focus on the first two of these in particular.

Mandated access to data about the BBC held by online platforms is essential for the BBC (as explained in answer to question 5 above). This could be both data about the BBC but also contextual data that helps us understand and interpret our own data.<sup>14</sup> [X] The platforms can develop standardised APIs which will ensure that costs of providing data are minimised. We are aware that costs can be reduced, since the BBC has chosen to provide a standardised audiences portal which provides both BBC and independent production companies with data about their productions for the BBC. This has been relatively cost efficient and has not required the production companies to pay.

In order to facilitate a data access remedy, there should be greater transparency over what data exists. This may be achieved in part by the Platform to Business Regulation, but the CMA should ensure that full transparency is provided if the Platform to Business Regulation does not secure this. The overall burden on online platforms on complying with a data access remedy can be reduced by ensuring that for some data, business users will need to demonstrate why they require access to data and some idea of how they will use this data (without divulging business secrets). The CMA's Open Banking remedy has demonstrated that data access remedies are viable, and the remedy has resulted in Fintech companies being able to access a greater range of data to create new products, as well as allowing consumers to compare banking products/services across the market. The mechanism has proven to be

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<sup>14</sup> We note that contextual data can be aggregated so that it does not include personal data.

durable and we note that a well-resourced trustee from the CMA has greatly assisted with the implementation of the remedy.

The issue of how to ensure that a data access remedy complies with data protection and privacy laws is clearly vital as the CMA rightly identifies. Whilst we agree with the CMA's conclusions that platforms have an incentive to take a stricter interpretation of GDPR than they need to, privacy concerns need to be addressed carefully but they should not only be addressed by aggregation or anonymisation.<sup>15</sup> The CMA seems to imply that only aggregation and anonymisation are sufficient to address data protection issues.<sup>16</sup> There are other ways in which privacy concerns could be addressed and data can be transferred in a manner consistent with the GDPR. This may, for example, involve a requirement on platforms to consider the gateways by which personal data could be lawfully shared with PSM for particular purposes and to reflect such data transfer arrangements in the platforms' privacy notices.

We think it is important to make a clear distinction between an approach that compels online platforms to share data with third parties by implementing legislation to that effect and legislation that compels online platforms to put in place measures that would enable data sharing within the existing data protection and e-Privacy legislative regime. The latter approach would involve compelling online platforms to implement what is referred to in the Market Study as "Data Mobility".

For example, the distinction between the two approaches is relevant when considering whether the aggregation and anonymisation of data is appropriate: whilst the aggregation and anonymisation of data may be an appropriate mitigating step to address the privacy concerns arising from legislation that compelled online platforms to share data with third parties, such mitigations would not be required or appropriate in circumstances where online platforms were compelled to implement Data Mobility measures.

Furthermore, privacy laws do not contain blanket prohibitions on implementing Data Mobility measures. In contrast, such laws set out conditions that must be observed in order to collect and use data derived from individuals, including the sharing of such data with third parties. These conditions primarily exist to recognise rights that privacy laws have conferred on individuals themselves, such as the right to be informed and the right to withhold or grant consent to certain uses of their data. The specific privacy rights and accompanying conditions that would be relevant in a Data Mobility context are dependent on three key factors: firstly, the nature of the data, secondly the means by which the data is collected and lastly the manner in which the data will be used.

Finally, online platforms already have measures in place in relation to their own use of user data (such as privacy notices and user consent mechanisms) that could be extended to form the basis of Data Mobility measures that will enable third parties to access such data, subject to the implementation of conditions that are determined by the manner of data collection, the nature of the data and the purposes for which the data will be used.

Mandating interoperability is also crucial for the BBC. A remedy mandating interoperability should legally ensure that SMS platforms are obliged to offer their data in a uniform exchange

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<sup>15</sup> Market study, paras 106 and 8.243.

<sup>16</sup> Market study, para 8.243.

format (as per the CMA's Open Banking remedy). A uniform exchange format could be created in a similar way to the procedure for USB-C. Whilst interoperability of advertising based data is currently possible via open API service methods, these generally need to be adapted and worked towards, so a standard unit of data would be valuable. Taxonomy is also a factor in advertising delivery and measurement, and a standard way of doing that would increase operational efficiency. However, we note that the majority of data is unstructured (rather than structured data) and therefore inherently difficult to standardize. In addition, we make the above points whilst also emphasising that standardisation should be sufficiently flexible (1) to allow for the differences in how metadata is structured in different jurisdictions and (2) to ensure that the standards can keep pace with the rapid development of how data will be applied to understanding consumer journeys in the future. The process of standardisation should make it easier for all parties to share data and not lead to some parties (or some jurisdictions) having greater difficulties in sharing data as a result of standardisation. The ideal would be a global format, rather than just a UK only (or even regional e.g. EU) format.

Finally, we also consider that mandating data separation/silos is important. This may be necessary, for example, where it is not possible to mandate third-party access to certain forms of data due to data protection concerns. In such cases, the regulator should have the power to ensure that data silos are used by a vertically integrated platform with SMS to prohibit the use of the certain data by the downstream businesses belonging to the platform (e.g. Amazon TV, Google News). This remedy may also overlap with elements of operational separation. We note that data silos have been proposed as an effective and practical remedy recently, such as in the Google/Fitbit merger, where Google has offered to keep fitness data siloed from its other operations.

### ***Remedies to address default installations***

As identified by the CMA, default settings play a significant roles in reinforcing market power, as consumers will typically settle on the first option presented.<sup>17</sup> This is of direct relevance to the BBC as referred to in the answer to question 5 above.

We therefore consider that in order to address these competition issues, the regulator should be able to impose a fairness by design remedy to maximise consumers' awareness of their choices. For instance, this could involve one or a combination of the following remedies: (I) the use of choice screens to allow users to select their preferred service providers (in e.g., news, search, browsers, voice assistants) upon first activation of their devices, (II) the option to prohibit players from pre-installing their services in a bundle, (III) the option to prohibit vertically integrated platforms from pre-installing their downstream or adjacent services, and (IV) the requirement for default aggregator apps to redirect users to the original content provider's app or website. These should properly empower consumers to use their preferred apps and service providers on their devices, and stimulate competition on the merit between app developers and service providers. The exact remedy required may differ from case to case, supported by evidence for which remedy will be both necessary and effective in providing consumers with genuine choice.

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<sup>17</sup> Market study, paras 31 to 32, and para 3.15 and 3.94.

## **Structural separation**

We consider that structural separation may be a useful tool to have in the DMU arsenal. In particular it may be appropriate to implement data silos between different business units, such as proposed in the recent Google/Fitbit merger. However, care needs to be taken as to the cost of implementing and policing such structural separation, both of which could be high as against the benefits gained. It should be reserved as a last resort, only where it can be shown that joint ownership and control of the business units is the cause of the competitive harm. Divestment could be a potential remedy but only with the appropriate protections in place, given also that currently such a remedy is available to the CMA only from an adverse finding in a Market Investigation Reference.

### **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?**

The BBC considers that a limited form of pre-emptive action may in certain cases be important to prevent markets tipping. This means that the regulator should have the option of giving advisory guidance to a player who is on the verge of SMS in a limited number of circumstances. However, this would not amount to a power to impose regulation on a player who does not yet have SMS; rather, it should purely be a way of flagging to such a player that they are approaching the threshold for SMS and that they should act cautiously in light of the possibility that they cross the threshold for SMS.

Where competition problems relate to a wider group of platforms, we suggest these could be investigated and dealt with under the current market investigation regime. For instance, we do not think the case is made to impose remedies under the new regulatory regime beyond firms with SMS:

- to ensure that platform terms are clear and fair. This is already covered by the Platform to Business Regulation. The call for evidence rightly notes that there is considerable overlap with this proposed remedy and the Platform to Business Regulation<sup>18</sup>. There is therefore no need to duplicate the Platform to Business Regulation's provisions on transparency. Rather, if further transparency is required, this should be implemented only on platforms with SMS.

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<sup>18</sup> Market study, para 2.40 and footnote 47.

- to address coordination failures where there are no market players with SMS, for example, by mandating open standards and interoperability in such a scenario. In the absence of a market player with SMS, then these standards should be arrived at by cooperation between market participants in the usual way.

## **PROCEDURE AND STRUCTURE OF A NEW PRO-COMPETITION APPROACH**

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

The BBC agrees that these proposed characteristics are the right ones to ensure that the new regulatory regime results in effective outcomes for businesses, audiences and consumers. We note that there is a certain tension between these outcomes (for example, flexibility and legal certainty) but that given the worsening position for firms without SMS in many markets, the new approach should err towards the side of flexibility and speed to begin with, since there is an element of legal uncertainty which is inherent in any new regulatory regime and legal certainty will naturally increase as the regulator implements remedies.

### **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.?**

The BBC agrees with the factors to consider when establishing the procedural framework as set out in the call for evidence. We consider the following factors to be of particular importance:

- the regulator should be able to carry out investigations on its own initiative as well as following a complaint;
- the regulator should be empowered to suspend, block and/or reverse decisions of SMS firms. It should also be able to order an SMS firm's conduct to be in compliance with the code and to order other interventions;
- it is vital that the regulator has sufficient compulsory information-gathering powers;
- given the importance of rapid action being taken to address the market power exercised by companies with SMS, the regulator must have powers to impose interim measures at short notice.<sup>19</sup> These must not be seen as powers of last resort, but powers which can be used as necessary;
- the rights of appeal should be limited to a judicial review standard so as to ensure that the regulator carries out its duties effectively.<sup>20</sup> On the other hand, appeals on the merit will take too long, use up too much resource and create significant legal uncertainty.

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<sup>19</sup> As the CMA notes at para 7.98 of the Market Study.

<sup>20</sup> Market study, para 7.99.



**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)?**

The BBC considers that there are four main areas of interaction between the new regulatory regime and existing regimes:

- **GDPR and other privacy legislation.** As already noted, the CMA has rightly identified that the GDPR must be used properly and organisations should not hold back data which is critical for ensuring competition. Greater coordination with the ICO is clearly a vital step to understanding how remedies can be designed in a way which is compliant with the GDPR.
- **The Platform to Business Regulation.** As already observed, transparency of the data which platforms have access to is absolutely critical. The new regulatory regime should supplement the Platform to Business Regulation on this point, and develop the principles further in order to ensure there is full transparency.
- **The new UK online harms regime.** We note that the regime will have significant requirements on platforms that require them to treat third party content in certain ways. While we do not have the full proposals yet, it is likely that Ofcom will be mandated to assess and regulate platforms' systems of filtering and take down of harmful content and perhaps also their algorithms that promote content (with a view to dealing with the promotion of both fake news / clickbait and also of quality news). There is clear overlap here with questions of prominence – including news prominence – raised above. In addition, online harms rules may require systems of interaction and appeal which allow content creators to understand and challenge how their content is being disseminated and censored by platforms. Although the online harms context is one of freedom of speech, there is a close relationship here to the kinds of measures, requirements and remedies that might be envisaged in the CMA's code of conduct.
- **Sector-specific regulation, including audio-visual regulation.** The ex-ante regulation of platforms must avoid duplicative regulation of entities which are already subject to regulation. This includes the BBC and the other PSBs, as well as commercial broadcasters, which are already subject to varying degrees of regulation. For example, the BBC is already subject to a strict regulatory regime under its Charter and Agreement. Highly regulated entities, such as PSBs and telecoms companies, should not be subject to a further layer of regulation which simply duplicates the first area of regulation. Furthermore, we believe that there is still a role for ex-post regulation, particularly for the bespoke regime that the BBC falls under and a balance between ex-ante and ex-post regulation must be struck depending on the specifics of the firms and markets involved.

Finally, we agree with the importance which the CMA has attached to ensuring that the regulator co-ordinates and shares information with UK regulators and with authorities in other jurisdictions. This is of particular importance for the BBC as Ofcom is, and will remain, our primary regulator.

**31 July 2020**