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## BGL Group Limited (BGL) / Compare The Market Limited (CTM)

### DIGITAL MARKETS TASKFORCE: RESPONSE TO CALL FOR INFORMATION

#### **Background**

##### ***About BGL/CTM***

BGL is a privately owned financial services business. Founded in 1992 as an insurance underwriter, the original business subsequently diversified into a range of related activities including, in 1997, switching from underwriting to broking.

BGL also owns the popular UK price comparison website (**PCW**) 'comparethemarket.com' (launched in 2006), which is now operated through BGL's separately-managed subsidiary, CTM.

CTM's purpose is to provide customers with an easy way to make informed choices about a wide range of important insurance products including motor, home, life, travel, pet and business insurance, as well as utilities (energy, broadband, TV and phone) and money products, such as mortgages, credit cards, bank accounts and loans. CTM has grown to become one of the UK's most loved PCWs, helping UK consumers achieve savings across this range of products.

CTM competes, not just with other PCWs, but with the providers that, as well as using CTM's services to help advertise their products, also sell direct to consumers (whether encouraging them to switch or to remain/renew). In this highly competitive marketplace, CTM and many others rely heavily, to greater or lesser degrees, on search (and, in some instances, display) advertising to attract customers.

##### ***Call for Information***

In its Call for Information, the Digital Markets Taskforce (**DMT**) asked 12 questions in relation to the new approach for regulating firms with Strategic Market Status (**SMS**) covering a wide range of issues including scope, remedies and procedure.

For the purposes of its responses, BGL does not concern itself with all of those questions. In particular it makes no specific representations in relation to remedies or procedures at this stage.

BGL's responses are non-exhaustive and, at this stage, focus exclusively on the scope of the new approach for regulating firms with SMS. Specifically, BGL considers some of the criteria that might be used when assessing whether a firm has SMS and could therefore be liable to ex ante regulation (Question 1) and some of the types of activity that should be covered within the Code of Practice (Question 3).

In order to respond to this Call for Information, BGL has relied primarily on the perspectives of CTM, on the basis that this part of the group has the most experience of using digital advertising platforms

## 1 What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status and why? (Question 1)

1.1 In formulating the legal test for determining whether a firm has SMS, it is essential that the DMT has regard to certain principles articulated in the Furman Review, which stated as follows (BGL's emphasis):

*"A key component of this system is to develop a **clear legal test** for the characteristics of a company's market position above which regulatory powers are appropriate – termed in this review a strategic market status. This needs to be carefully designed to identify where companies operating platforms are in a position to exercise potentially enduring market power, **without granting an excessively broad scope** and[nor] bringing within the bounds of regulation those companies who are effectively constrained by the competitive market. **Only a small number of companies should be within the definition** of a well-defined test that matches the characteristics of the sector<sup>1</sup>."*

1.2 The test for determining whether a firm has SMS must be a narrow and rigorous one, not least as the focus of the Market Study leading to the present recommendations in this area comprises, in the main, the two largest global platforms, Google and Facebook.

1.3 Great care is therefore required to ensure that the Code of Practice only applies in exceptional circumstances - to undertakings that are not only dominant in the conventional sense, but who also possess unique and 'enduring' market power – potentially those benefitting from the type of unassailable incumbency advantage referenced by the CMA in its Final Report.<sup>2</sup>

1.4 In any event, defining which companies have SMS and which companies do not will be a complex exercise. For example, taking the above quote from the Furman Review into account, over what period would 'enduring' market power be assessed? How does a firm know that it is 'effectively constrained' by the competitive market in which it operates? Regardless of where the line is drawn, it will be the responsibility of the DMT to ensure that all firms understand precisely where they stand to avoid unexpected and unfair outcomes. This demands a clear, objective and exceptionally well-defined legal test, which sets out a meaningful threshold delineating the point at which the relevant firm may become susceptible to ex ante regulatory obligations.

1.5 The Furman Review suggests that the 'significant market power' (**SMP**) test in telecoms regulation provides a starting point for identifying whether a firm has SMS; however, SMP is often just seen as a proxy for market dominance, so this term would need amplification and clarification (if it is to add anything), not least as it seems clear that the intention of the proposed initiative is to focus on a more extreme set of circumstances involving:

- 1.5.1 far more entrenched levels of market power, alongside;
- 1.5.2 the potential for strategic bottlenecks (see below);
- 1.5.3 pronounced and widespread levels of 'economic dependence';
- 1.5.4 acute differences in bargaining power; and
- 1.5.5 the ability to grant or deny access to markets at will.

Although SMP might be a useful starting point (see below), simply relying on SMP will not be sufficient if SMS is to apply beyond the highly regulated telecoms sector and in circumstances where market definition is not an exact science and markets can be defined on a narrow basis, which can inflate the importance of relatively small firms. Ensuring a well-defined

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<sup>1</sup> Unlocking digital competition: Report from the Digital Competition Expert Panel, 2.116

<sup>2</sup> Online platforms and digital advertising - Market study final report, 1 July 2020, page 11, paragraph 22

relevant economic market, and engaging in a rigorous assessment of competition, is only the starting point.

- 1.6 If the test for assessing SMS is formulated in a way as to be too loose or broad, this could significantly undermine the policy objective driving the need to regulate global giants such as Google and Facebook. It is important not to cast the net too wide; otherwise the outcome will be the gold-plating of existing regulation on smaller (even if still significant) businesses that already have to comply with complex and comprehensive rules, but which operate in a very different environment and on an entirely different scale to those the present initiative is truly intended to capture.
- 1.7 If specialised search platforms or PCWs were captured within a very broad SMS framework, this could have the unintended consequence of adding an excessive (and unwarranted) regulatory burden on the very businesses that might have the potential to exercise at least some future competitive constraint on firms such as Google<sup>3</sup>. In the case of specialised search and PCWs etc., this would be a particularly undesirable outcome given that platforms within this category are amongst the most dependent on Google (the CMA's online platforms and digital advertising market study Final Report observes that Google's five largest customers of search advertising are all specialised search providers).
- 1.8 The Code of Practice should not conflate the regulation of specialised search platforms or PCWs, which operate in highly competitive and dynamic markets (competing against each other as well as direct channels) with the likes of Google and Facebook. The latter operate across markets without having to take account of any true rivals or meaningful competitive constraints. Any Code of Practice that seeks to cover a broader category is unlikely to be fit for purpose and may limit innovation and the development and growth of alternative providers that it must be the intention of the DMT initiative to foster.
- 1.9 With regard to the specific terms proposed in the Call for Information, BGL's comments are as follows:  
  
Appropriate criteria for defining SMS
- 1.10 For the reasons above, BGL considers that it is essential for the process by which SMS is defined to capture the unique and exceptional market power of the few global platforms which, by virtue of their (near) unassailable position and the inexhaustible financial and informational resources available to them (and/or controlled by them), lack any meaningful commercial constraints on their activities or behaviour.
- 1.11 In this respect, it might, for example, be the case that a term such as "strategic bottleneck" is an appropriate feature of the definition, and preferable to the more vague term "gateway" for the following reason:
  - 1.11.1 "Gateway" is a term often used to describe platforms that provide an important distribution channel for suppliers. However, BGL believes there are a number of platforms that can be characterised as providing a gateway (i.e. access) to a particular market or customer base while simultaneously being under significant competitive constraint by rival distribution channels.
  - 1.11.2 Indeed, we note that the term "gateway" is used by the European Commission in the context of the Platform to Business Regulations, which of course captures certain platforms that are far from dominant (indeed having market power is not a prerequisite for being caught by the P2B Regulations). It follows that "gateway" is too generic a term to be used in defining SMS.
  - 1.11.3 By contrast "strategic bottleneck" is more illustrative as it succinctly captures not just the gatekeeper status of a platform with SMS, but it also has the potential to reflect (i) the very high (indeed unique) level of demand for the platform's services and (ii) the absence of competition.

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<sup>3</sup> Ibid, page 88, paragraph 3.48

- 1.12 Notwithstanding the difficulties with SMP identified above, it is possible that aspects of the SMP telecoms regime might also be appropriate for helping to formulate the SMS test.
- 1.13 A possible theory behind this is that platforms with SMS effectively operate as “digital utilities” with a level of market power on a par with traditional monopoly providers. It relies on certain unique market features being present, which go beyond mere dominance. The following features could, in the round, signal SMS (as a complement to very high market shares which might, in theory, approximate to super-dominance):
- 1.13.1 **Control of infrastructure not easily duplicated.** In a digital markets context, this could apply to the kind of unrivalled sophisticated digital infrastructure that only platforms on the scale and sophistication of Google, Amazon and Facebook control.
  - 1.13.2 **Technological superiority.** As above, this would capture the fact that a SMS firm is likely to have significant technological superiority that compounds over time, further cementing their dominance.
  - 1.13.3 **Product/services diversification.** The significant breadth of product and services offered by Google and Facebook is another important feature that sets them aside from a standard platform (such as a price comparison website) which performs a relatively narrow service (albeit in some instances across a range of product verticals).
  - 1.13.4 **Economies of scope.** The wide scope of product and services offered by firms with genuine SMS makes it considerably easier for the firm in question to leverage its technical superiority into other aspects of the digital economy. For example, Google’s technical might and access to data mean it could relatively easily move into the specialised search market, if it so wished.

Less appropriate criteria for defining SMS

- 1.14 Of the specific terms the DMT is consulting on, BGL considers the following would not be appropriate for determining SMS:
- 1.14.1 “Relative market power”. This term is, arguably, too broad and open to different interpretations, which in turn might undermine its practical application when defining SMS. It is not clear what advantage this term would have over a traditional competition assessment; indeed it suggests a lower threshold than the established dominance test, which appears inconsistent with SMS.
  - 1.14.2 “Gateway”. For the reasons discussed above, this term is too broad and risks capturing any platform that provides an important route to market for small suppliers.
  - 1.14.3 “Economic dependence” is similarly vague and implies a lower threshold than dominance. It should, in any event, be clear what is meant by “dependence”. BGL’s view is that true ‘dependence’ in this context should capture not only the (very high) levels of economic reliance placed on the platform by its users for a wide variety of their key needs, but also the fact that the platform with SMS has no competitors who can realistically compete with it in terms of scale and breadth of the service it provides.
- 1.15 For example, a specialised search provider may provide an important route to market for many suppliers, some of whom might choose to cooperate primarily with that one particular provider; however, this should not, of itself, be interpreted as dependence. On the contrary, there is dynamic competition between providers for suppliers’ trade (as well as alternative routes to market open to the suppliers themselves) which means that every provider is sufficiently constrained by market forces.
- 1.16 It follows that the concept of “economic dependence” – and indeed the SMS threshold as a whole - needs to be raised beyond traditional ‘dominance’ to reflect the quasi-monopoly status of the platform in question. The mere fact that a supplier relies heavily on a platform or that

some customers (on the demand side of the market) happen to “single home” on a particular platform is clearly not enough to result in economic dependence on the supply side of the market.

## 2 What should be the scope of a new pro-competition approach, in terms of the activities covered? (Question 3)

- 2.1 As the Call for Information suggests, the Code of Practice would need to cover a wide range of activities including fair trading, open choices, trust and transparency. BGL broadly agrees with this; however, these concepts can be nebulous and subjective, so would require careful definition, if possible.
- 2.2 That said, BGL considers that one of the most important areas that the Code of Practice must address is transparency in relation to paid search advertising prices, particularly on Google.
- 2.3 The points raised below relate specifically to Google, although BGL considers that they would apply equally to any platform with SMS.

### Google paid search pricing – requirement for enhanced transparency

- 2.4 The traditional abuse of dominance regime prohibits excessive pricing, however it does not place dominant undertakings under a general duty to objectively justify price increases or to offer customers any degree of predictability in terms of how prices are determined or, importantly, changed. This is important when prices are not negotiated.
- 2.5 The lack of transparency and information asymmetry in relation to paid search prices on Google raises very significant concerns. For example, as BGL outlined in its RFI submissions to the online platforms and digital advertising market study (the **Market Study**):
  - 2.5.1 CTM cannot know for sure what the source of this cost inflation is as Google is quite opaque in relation to how it arrives at the exact pricing in areas such as landing page quality, ad relevance score and quality score. This lack of transparency means that CTM may have to spend much more for the same volume of traffic compared to CTM's competitors.
  - 2.5.2 Equally there is also no transparency from Google as to whether this cost inflation is being driven by Google (based on adjustments to its own pricing model) or whether (and to what extent and how) it is due to competitor bidding activity.
- 2.6 This makes it extremely difficult for CTM to accurately assess whether it is getting a fair return on investment, or to anticipate future advertising costs.
- 2.7 Indeed, we note that the Market Study's Final Report acknowledges the “opaque and complex nature” of Google's pricing.
- 2.8 BGL fully appreciates that combatting this information asymmetry presents a number of practical problems. Excessive price transparency could itself inadvertently raise competition concerns.
- 2.9 However, BGL considers there are potentially two ways of dealing with this under the “*Trust and transparency principles*” within the Code of Practice:
  - 2.9.1 Google could be required to disclose headline details to customers as to what proportion of CPC or other forms of paid search advertising represents Google's “baseline price”, and what proportion represents the inflation caused by the dynamic bidding process. As discussed above, CTM currently has no knowledge of the weighting between the two, which makes it impossible to know whether price inflation is caused by Google's supra-competitive pricing or market forces within the Google bidding process.
  - 2.9.2 The DMT could undertake regular independent audits of Google's pricing models to satisfy itself (a) that Google is operating a fair bidding system and (b) that it is being sufficiently transparent in relation to the extent to which price inflation is caused by increases to its own baseline charging model.

2.10 The latter recommendation is expressly endorsed in the Market Study Final Report, which proposes the following under “Trust and transparency principles” (our emphasis):

Trust and transparency principles	Example of practices that could be investigated under the principle
To explain the operation of algorithms and advertising auctions and to <b>allow audit and scrutiny</b> of their operation by the regulation	A lack of transparency of algorithms used in advertising auctions, including those used to weight bids by relevance and automated bidding algorithms

2.11 BGL supports this recommendation. Further recommendations as to what this “audit and scrutiny” may involve in relation to search term auctions (branded search in particular) are set out below.

Google paid search bidding auctions – duty of care

2.12 As part of the overriding objective of ensuring that platforms with SMS operate fair and transparent charging models (particularly in circumstances where prices are not negotiated), BGL recommends that the Code of Practice places any SMS firm that operates its own “internal market” (e.g. Google’s search term auction process) to take ownership of that marketplace in a way that is proportionate and necessary for a platform with such unique levels of market power.

2.13 Clearly this would involve a duty to ensure transparency (as described above), however BGL suggests that this should involve a wider “duty of care” to capture both transparency and trust.

2.14 If complete transparency is not achievable (particularly if that transparency afforded to the regulator is not extended to the platform’s users) trust in the process remains essential.

2.15 BGL’s experience is that Google will not intervene in the competitive bidding process, even when clear instances of unscrupulous bidding behaviour are reported. For example, BGL has experienced numerous instances of rogue businesses bidding on search terms for its “Beagle Street” brand and purporting to offer the product, despite not being authorised to sell it. Little or no enforcement action is taken against the businesses concerned when these matters are brought to Google’s attention.

2.16 In BGL’s view it is essential that the Code of Practice places platforms with SMS under a duty to resolve issues like this in a prompt and fair manner as, commercially, it will always be in Google’s interest to ensure the maximum number of bidders in the race, even if those bidders are unscrupulous actors who distort competition, flout intellectual property rights and, potentially, mislead consumers.

2.17 BGL would therefore invite the DMT to place platforms with SMS under a general duty of care to ensure that the competitive bidding process it oversees is administered in accordance with the principles of transparency and fair trading.

**3 Closing remarks**

3.1 BGL and CTM are grateful for the opportunity to contribute to the DMT’s Call for Information and look forward to contributing further feedback to support the development of the Code of Conduct in due course.

ENDS