

**CBI Submission to Digital Markets Taskforce Call for Information
August 2020**

The CBI is the UK’s leading business organisation, speaking for some 190,000 businesses of all sectors, sizes and regions that together employ around a third of the private sector workforce. We welcome the opportunity to respond to the Digital Markets Taskforce’s call for information.

This response provides a summary of the key guiding principles by which the Digital Markets Taskforce should approach any regulatory changes in digital markets, and the CBI looks forward to working closely with the Taskforce on detailed proposals in the coming months. As these proposals represent significant changes to the UK competition landscape and there is broad business interest in this process, we would encourage the Taskforce to continue to rigorously consult businesses on the proposals as they develop.

Summary: Principles and Recommendations

Principles	Recommendations
<ul style="list-style-type: none"> A pro-innovation competition regime – based on proportionality, effectiveness, clarity and quick decisions – will ensure the UK remains the best place for businesses to invest, grow and innovate. 	<ul style="list-style-type: none"> Recommendation 1: A Digital Markets Unit should be guided by a pro-innovation approach to competition in digital markets. This should be based on the outlined principles (speed, flexibility, clarity and legal certainty) as well as being proportionate, targeted, effective and subject to gold-standard consultation.
<ul style="list-style-type: none"> The UK digital economy is globally renowned. But as the UK regulatory regime undergoes seismic change, greater collaboration is required between regulators and government, as well as international counterparts. 	<ul style="list-style-type: none"> Recommendation 2: Regulators with major digital portfolios must coordinate to ensure consistent definitions and approaches to regulation in the UK. They should also consider the impact of, and engage with, ongoing international regulatory efforts. Regulators with digital portfolios must coordinate on cross-cutting strategic policy development, regulatory remit, and best practice on business engagement. This will help businesses understand the objectives of the regulators and plan for future changes in the market.
<ul style="list-style-type: none"> Strategic Market Status (SMS) must be clear, narrowly defined and based on strong evidence of anti-competitive market dynamics. 	<ul style="list-style-type: none"> Recommendation 3: Engage with businesses to develop an appropriate and proportionate approach to data sharing for firms with Strategic Market Status. The CMA should also engage with firms more widely to develop voluntary standards and

<ul style="list-style-type: none"> • Any new pro-competition regulatory change should focus solely on firms with Strategic Market Status and be based on extensive, evidence-based and gold-standard consultation to ensure the UK's world-leading digital economy continues to thrive. • Government and regulators should look to build a regulatory environment that support firms' own data sharing initiatives and advances access to high-quality data to support competition. • Flexibility, gold-standard market engagement, and coordination with existing sectoral regulation must guide future pro-innovation intervention in other digital markets. 	<p>support business-to-business data sharing, for example through legal clarification.</p>
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1. Principles for a new pro-competition approach (procedure and structure)

A pro-innovation competition regime – based on proportionality, effectiveness, clarity and quick decisions – will ensure the UK remains the best place for businesses to invest, grow and innovate

- The UK digital economy provides immense value to the UK, being worth over £149bn, and consistently outperforms our European counterparts on investment in technology.¹ Covid-19 has highlighted the best of British innovation and business dynamism, with digital technologies enabling businesses to implement flexible working, reach new customers and export online. However, the pandemic has also created a vastly uncertain economic operating environment for businesses. Many firms are struggling with lower cash reserves to invest in innovation, are increasingly concerned about the impact of future regulation on the UK's digital dynamism and are navigating the UK's changing place in the world. Firms are now particularly sensitive to the differences in operating environments globally as they decide where to locate, invest and innovate.
- Based on extensive cross-economy engagement, the CBI's recent report [Building a World-Class Innovation and Digital Economy](#) set out a vision for a pro-innovation regulation and competition regime by 2025.² A successful competition regime would facilitate companies to innovate and scale quickly by addressing the barriers to entry including access to finance and data, as well as providing clear rules, quick decisions, and proportionate, evidence-based, and effective interventions.

¹ CBI, 2020, *Building a World-Class Innovation and Digital Economy: recommendations for an innovation and technology-led recovery*

² Ibid

- Now more than ever, changes to competition policy in digital markets must take a pro-innovation, proportionate and effective approach, based on evidence of anti-competitive activity or market failure. Businesses are eager to work with the Digital Markets Taskforce, and the CMA, to help provide workable proposals that support a positive pro-innovation vision for digital competition in the UK and ensure markets remain open and contestable. This will ensure that individuals, businesses, and the UK at large can continue to harness the benefits of world-leading technology and innovation. The Digital Markets Taskforce's consultation is a welcome opportunity to ensure consistent gold-standard industry and regulator engagement on a proportionate, pro-innovation and targeted framework for regulatory change.
- Retaining the UK's vibrant mix of global companies, start-ups and scale-ups must be at the heart of the UK's approach to competition in digital markets. The UK should maintain its attractiveness to global and home-grown champions that provide major investment, job creation and innovation across the country. To ensure proportionate and effective outcomes, the UK's approach should be guided by clear success metrics, such as improving the UK's scale-up rate by addressing scale-up barriers including access to data and finance, and extending the UK's lead in technology investment.
- A pro-innovation competition regime in digital markets will provide consumer choice and value for money, alongside much-needed regulatory certainty to stimulate long-term business investment. This will allow all businesses to compete effectively without curtailing the existing innovation activities of established players. As such, firms are committed to working with the Digital Markets Taskforce, including by providing business insight to shape workable proposals that fit within this proportionate approach.

Recommendation 1: The Digital Markets Unit should be guided by a pro-innovation approach to competition in digital markets. This should be based on the outlined principles (speed, flexibility, clarity and legal certainty) as well as being proportionate, targeted, effective and subject to gold-standard consultation.

The UK digital economy is globally renowned. But as the UK regulatory regime undergoes seismic change, greater collaboration is required between regulators and government, as well as international counterparts

- The UK regulatory and competition regime is undergoing seismic change to adapt to the rapid pace of digitisation and innovation. The UK legal system gives companies a solid foundation, ranking 15th in the World Economic Forum's Global Competitiveness Index in terms of how well it adapts to digital business models.³ Companies located in the UK often point to the UK's long-standing history of stable, pragmatic and evidence-based regulation. Yet, as new forms of digital regulation and competition policy are developed simultaneously, there is a pressing challenge to reduce fragmentation, enhance expertise and increase coordination across government and regulators. Consistent definitions across UK regulation, for example in defining digital markets, platforms and business models, should be a minimum requirement.
- UK firms, particularly start-ups, highlight this regulatory fragmentation challenge as a burning issue. For example, in 2020 alone, new regulation on content liability (online harms), data protection, digital tax, and digital competition are being progressed. Many firms are concerned

³ World Economic Forum, Global Competitiveness Report (2019).

about the scope, proportionality, technological feasibility and overlap between proposed regulation of digital technologies and markets. The CBI has called on government to create a cohesive digital regulation strategy that would coordinate digital regulation, competition measures, and review regulatory remits. Greater regulatory coordination would also help to achieve this objective and firms are keen to provide insight to help regulators identify overlap and pinch points across existing and proposed digital regulation, as well as opportunities to limit the regulatory burden on new challengers and scale-ups. The creation of the joint Digital Regulation Cooperation Forum (DRCF) is a welcome step forward, but to be effective it must work in step with sectoral regulators and have an eye to international regulatory initiatives. The CBI values our working relationship with regulators and would be happy to help facilitate engagement between the DRCF and businesses.

- Due to the global nature of digital markets, cooperation with other regulators internationally is necessary, including on proposed regulatory changes in other jurisdictions such as the European Commission’s Digital Services Act. Regulators and government must also be cognisant of the international context, with proposed domestic legislation potentially having a significant impact UK trade negotiations and international relations which may result in trade-offs. Global cooperation also offers an opportunity to showcase UK regulatory expertise and play a leading role in shaping international standards and norms.
- Setting up new regulatory functions – such as a Digital Markets Unit – can also be used as an opportunity to further deepen technical expertise across regulators with digital portfolios, to facilitate workable and futureproof regulation. This must be accompanied by appropriate resourcing.

Recommendation 2: Regulators with major digital portfolios must coordinate to ensure consistent definitions and approaches to regulation in the UK. They should also consider the impact of, and engage with, ongoing international regulatory efforts.

Regulators with digital portfolios must coordinate on cross-cutting strategic policy development, regulatory remit, and best practice on business engagement. This will help businesses understand the objectives of the regulators and plan for future changes in the market.

2. Proposed remedies to support competition

Strategic Market Status (SMS) must be clear, narrowly defined and based on strong evidence of anti-competitive market dynamics

- Both the Furman Review and the CMA’s market study into online platforms and digital advertising have recommended the creation of new ex ante competition rules and the designation of ‘Strategic Market Status’ (SMS) on firms to address market power in digital markets, where regulators consider existing competition tools to be inadequate. Businesses across the UK are eager to engage in the process of developing these proposals.
- **Defining SMS:** Firms across the UK would urge the Digital Markets Taskforce to develop a definition that is narrow, unambiguous, and limited to a small number of companies to reduce

legal uncertainty and a disproportionate regulatory burden across the digital economy. When defining SMS, regulators and government should take into account the intricacies of individual digital markets, such as the differences in: business models, consumer behaviour, parameters of competition and the strength of competitive constraints, and how the international nature of digital markets impacts UK competition rules.

- International coordination on competition policy, and consistency where possible, will be vital for the UK's regulatory regime to be effective. At a minimum, definitions of business models related to digital markets and Strategic Market Status (for example social media platforms) should be consistent across UK regulation, as they have not yet been enshrined in case law.
- Another consideration for the Taskforce when defining SMS is that some companies may be dominant in one digital market but a challenger in an adjacent market (although potentially able to use their market power across market boundaries). In these cases, it will be important to assess the potential impact on competition, consumer benefit and innovation in the adjacent market when considering whether to apply SMS to the company's activities in the adjacent market or in its entirety. Checks and balances, for example a review mechanism, could be envisaged to monitor engagement in adjacent markets.
- **Designating SMS:** The process for designating SMS must be clear, transparent and conducted in line with the proportionate and targeted approaches taken in other regulated areas. The decision to intervene in a particular digital market and designate SMS should be based on strong evidence of anti-competitive market dynamics, and closely follow the principles of better regulation. This evidence must be the result of a robust and rigorous analysis, such as the CMA's review into the digital advertising market. This process should also enable flexible and swift action when warranted. Due to the fast-changing nature of digital markets, there should also be a clear and fast-paced review process to determine whether a company continues to retain its strategic market status.
- Businesses would welcome early clarity on how SMS will be defined and detail on the intended designation process (including the quantitative tests to be used), followed by another consultation opportunity.

Any new pro-competition regulatory change should focus solely on firms with Strategic Market Status and be based on extensive, evidence-based and gold-standard consultation to ensure the UK's world-leading digital economy continues to thrive

- Any future competition policy change must be based on the principles of better regulation, prioritising comprehensive, evidence-based analysis, extensive consultation and proportionate action. Proposed ex ante regulation such as a code of conduct, merger controls, and any mandated data sharing must be applied solely to companies determined as having Strategic Market Status. Businesses generally support a flexible code of conduct for SMS firms, however the competition changes proposed will require serious, extensive and gold-standard industry consultation to ensure that they do not negatively impact the UK's globally renowned digital economy or jeopardise the UK's position as an attractive place for investment and innovation. Businesses would also welcome clarity on the evidential requirements (proof of harm) for implementing each ex ante measure and any intended sequencing of these measures.
- Applying ex ante regulation beyond firms with SMS could prevent smaller firms from developing innovations for consumers, because regulation applied to these smaller firms could limit their

ability to monetise new innovative products and services. All other firms within digital markets should continue to comply fully with existing competition law, for example rules around fair trading and transparency.

Government and regulators should look to build a regulatory environment that support firms' own data sharing initiatives and advances access to high-quality data to support competition

- The UK can take a world-leading approach to data sharing as a method to drive competition and innovation in digital markets. Firms understand the importance of business-to-business (B2B) data sharing, which can lower barriers to entry and support user multi-homing across different networks. Addressing access to data issues will spur greater consumer choice and business investment in the UK.
- Mandating third party access to data (for firms with Strategic Market Status) is a significant intervention that must be proportionate, based on rigorous analysis of harm and analysis of the effectiveness of this remedy on the specific harm identified. Any decisions on this remedy must be guided by the better regulation principles of proportionality and effectiveness and aligned to existing data protection legislation. However, widespread mandatory data sharing requirements across digital markets (beyond companies with Strategic Market Status) is not proportionate.
- Data interoperability and portability requirements on companies with Strategic Market Status are potential tools but should be utilised based on analysis of their proportionality and pro-competitive impact. Greater data portability could have a broader impact on digital markets, for example by incentivising competitors and third parties to deliver solutions that allow users to move their data between platforms easily. A potential future role for the Digital Markets Unit could be to look at the terms of data mobility and portability. Online platforms 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, in line with privacy conditions that are dependent on the manner of data collection, the nature of the data and the purposes for which the data will be used.
- A crucial part of this process is data standards which should make it easier for all parties to share data. This standardisation should be sufficiently flexible to allow for differences in how metadata is structured in different jurisdictions, and ensure that the standards can keep pace with rapid developments in how data is applied over time. The requirement to offer data in a uniform exchange format as per the CMA's Open Banking remedy could be considered as an approach.
- Wider voluntary data sharing across digital markets could have a significant positive impact on competition and many firms are already exploring how they could open up the data they hold, in accordance with data protection legislation. Given the importance of data for competition, the CMA more broadly should work with firms that do not have Strategic Market Status to encourage greater voluntary business-to-business (B2B) data sharing, for example through wider market engagement strategies to develop data standards, legal clarification and support for companies' own data sharing initiatives as they develop. Regulators and government should also look to draw on lessons from existing firm-led data sharing initiatives. Greater regulatory support would be required for smaller firms who have datasets but do not have the resource or expertise to meet new technical data interoperability standards developed by regulators.

- Businesses' licence to innovate and compete must be matched by the highest standards of data protection, and any data-focused remedies to support competition must have due regard to the UK's data protection regime. Firms are positive about the benefits of aligning with GDPR, which is seen as the gold standard in data protection. However, firms do want to engage on opportunities for the current data protection regime to better support innovation. The CBI is currently undertaking an output to be released in Q4 2020, exploring how the data protection regime could evolve to better support innovation. We would welcome the opportunity to share this insight to support any future work on greater business-to-business data sharing as a pro-competition measure within the Digital Markets Unit.

Recommendation 3: Engage with businesses to develop an appropriate and proportionate approach to data sharing for firms with Strategic Market Status. The CMA should also engage with firms more widely to develop voluntary standards and support business-to-business data sharing, for example through legal clarification.

Flexibility, gold-standard market engagement, and coordination with existing sectoral regulation must guide future pro-innovation intervention in other digital markets

- As a Digital Markets Unit assesses the need for intervention in other digital markets over time, its regulatory approach must remain consistent with the principles outlined in section 2, notably evidence-based, proportionate, targeted to the companies designated with Strategic Market Status, and open to review as digital markets change quickly and the firms with SMS change with it. The approach should also take into account the differences between sectors and existing sectoral regulation. For example, the ability of locally operating companies (UK-based for example) to benefit from network effects is more limited than globally operating companies and is often subject to existing sectoral legislation, for example in telecoms. This may require tailoring codes of conduct to each individual firm with SMS.
- Going forward, the CMA (and future Digital Markets Unit) should outline a clear vision and set of tools to support pro-innovation competition policy, using the framework of anticipatory regulation which provides an approach to help regulators respond to emerging technologies and any regulatory challenges. This must be coupled with guidance on how firms can engage with regulators in the early stages of technology and product development.
- An important tool for competition in digital markets are regulatory sandboxes, which support companies in testing new business models in a safe environment and have facilitated the growth of UK fintech. These can be helpful as part of wider government policy and a suite of regulatory tools including market engagement strategies, regulatory clarification, or financial inclusion programmes.