

## Appendix A – Questions for input and evidence

### 1. Scope of a new approach

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

- The Furman Review refers to ‘significant market power,’ ‘strategic bottleneck,’ ‘gateway,’ ‘relative market power’ and ‘economic dependence’:
  - How should these terms be interpreted? – How do they relate to each other? – What role, if any, should each concept play in the SMS criteria?
- Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?
- What evidence could be used when assessing whether the criteria have been met?

The terms in question refer to characteristics of a market or of a firm that may be considered as an SMS (Strategic Market Status) platform (or meeting the SMS criteria). In particular, these terms relate to the ability that firms may have to impose market conditions, as well as act without competitive restraint from rival firms, and limit said firms from effectively competing in a specific market.

These terms may be interpreted as follows: to determine if a firm has significant market power or dominance, it is possible to use tools such as market shares, the degree of concentration in digital markets and the existence of barriers to entry. The other terms referred above, strategic bottleneck, gateway, relative market power and economic dependence are factors that determine the dominance of a firm. A strategic bottleneck as well as a gateway can be used to exclude other parties from the market, and possibly reduce innovation and the creation of entirely new categories of products and services. These two elements may generate economic dependence from smaller participants and reduce their relative market power. This depends on the possibility of other parties to bypass the strategic bottleneck in the short term, as well as on the existence of control by the dominant firm in the long run. Also, it may be useful to consider the possible reduction of entry and the price increases and choice reduction to other participants. In the same way, a competitive gateway may be described as a position of control over parties’ market access, where the negotiating position of the users to the platforms may be central.

In addition, the aforementioned terms are closely linked to the concept of barriers to entry and expansion, and market concentration. Regarding the relation between market power and the terms “strategic bottleneck”, “gateways”, it is relevant to mention that for SMS firms, control over markets where there are “strategic bottlenecks” and “gateways”, could represent a source of market power, or circumstances that reinforce said market power.

Furthermore, “economic dependence” may arise for smaller firms that compete with SMS platforms that control markets where there are “strategic bottlenecks”, or “gateways”. It’s possible that smaller firms depend on access to certain inputs in order to be able to compete, therefore, in practice, they may be subdued to SMS firms granting them access to these inputs. Particularly, in digital markets this may be observed in relation to access to user data or to certain platforms needed in order to offer products or services. In other words, in markets where there are “strategic bottlenecks” or “gateways” it’s possible for dependence from smaller firms to arise.

Complementary analysis should be considered in order to establish a starting point for determining the existence of market power in digital markets, considering where there are “strategic bottlenecks”, or “gateways”. There should be further consideration into determining whether these concepts are inherently part of market characteristics and how they operate, or whether they were created or made possible by a SMS firm, in order to inhibit entry from rival firms. In addition, there should be further consideration regarding whether a certain market displays characteristic of a natural monopoly, or if it is socially profitable for there to be competition, that guarantees access to scarce inputs by rival firms.

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)?

The designation of a firm as SMS requires the implementation of measures in order to prevent conducts that may be considered as abuse of dominance. In that context, compliance with a code of conduct could represent a form of preventive regulation, that can ensure these firms refrain from executing practices that harm competition in their respective markets.

To this point, in order to ensure legal certainty among firms that may be designated as SMS platforms, it is opportune to establish the possible remedies that may be implemented beforehand, and that said remedies be included in the relevant regulation.

In relation to the status being designated to a corporate group as a whole, it is relevant to point out that the SMS status should consider the totality of the firms that are linked to the operations where there was found to be “strategic bottlenecks” or “gateways”. Mainly, due to the fact that SMS platforms regularly participate in several related markets where they may not be found to have market power. Therefore, compliance to the code of conduct, as well as the consequential remedies or sanctions, should bind all firms or enterprises involved in the market that justified the SMS designation.

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

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

The criteria that defines the activities that fall within the pro-competition regime, particularly, the code of conduct, should be determined by those that develop in markets where there are strong network effects, and where the accumulation and access to user data is an input that is difficult to substitute or replicate. In addition, there should be consideration regarding markets where significant economies of scale are present, and where they entail substantial competitive advantages to the incumbents, as well as, where there are “strategic bottlenecks” or “gateways”, and barriers to entry, that inhibit competition from smaller firms.

Regarding the solution outlined by the Furman Review (paragraph 2.13), it is relevant to point out that in order to reduce network-effects in a data driven market, it may be necessary to enable interoperability among different platforms. Also, access to user data among different platforms could be facilitated. Creating conditions that make interoperability possible for entrant platforms and more efficient, may involve establishing technological features that make access easy for these platforms and cost efficient.

**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?

The Taskforce may consider working on establishing legal framework for future mergers and acquisitions that, in the case of digital markets, could take into account aspects related to data-driven platforms, in order to better identify potential lessening of competition, where platforms, in spite of offering notably different services across separate markets, rely heavily on the accumulation of user data.

Possibly, the COVID-19 pandemic will have negative impacts across economies. One of the most affected sectors will be the buying and selling of digital advertising spaces, because of the closeness of the digital advertising market with other productive sectors. In this regard, it is possible that businesses that regularly buy digital advertising will have profit reductions, which could lead to a reduction in the budget assigned to the acquisition of digital advertising spaces as well as the selection of well-known providers and less riskier options (that are correlated with large digital advertising providers). Then, the digital advertising industry could be significantly impacted in different ways, such as more concentration.

Furthermore, in general terms, said pandemic may have strong impact on the growth of digital markets in Mexico, due to the fact that the lockdown imposed on various sectors of the economy has led internet users to increase and diversify their use of digital platforms. However, at this stage, we have yet to collect data on the growth of said platforms.

## **2. 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?

One of the main negative effects on competition in digital markets is the reduction of innovation by incumbent companies. On the one hand, reduction of innovation will mainly affect consumers, who would not be able to acquire better products and services than in a competitive market. On the other hand, dominance and concentration in certain digital markets, that may be caused by the natural conditions of the market, can facilitate that dominant companies carry out anticompetitive practices, such as abuse of dominance and vertical restrictions, strengthening and maintaining their dominant position. An example of this kind of anticompetitive practices by dominant companies could be the "*Most Favored Nation clauses*" (MFNs) in commercial contracts, which are vertical arrangements whereby the supplier undertakes to offer the purchaser the most favorable terms available to its other purchasers. Finally, another possible anticompetitive practice could be the resale price maintenance or retail price maintenance, which is related to agreements that seek to establish a fixed or minimum price for the resale of products by a distributor to the final consumer.

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 proposal for a code of conduct is adequate to guide the behavior of big tech companies having Strategic Market Status. It is considered useful that this code of conduct be based on a set of core principles established by the industry, stakeholders and the authorities working together. Nevertheless, it may not be that necessary the pursue of all the principles across other digital markets, because competition among parties with relative market power may help to accomplish the same principles that the code encourages. For example, the fair trading principle (which requires the platform to trade on fair and reasonable terms for services where they are an unavoidable trading partner as a result of their gateway market position) is intended to address concerns around the potential for exploitative behavior on the SMS platform. So, in regular circumstances, where there are no bottlenecks or competitive gateways it won't be necessary to enforce said code. Besides, there is the possibility that authorities end up overregulating all of the digital markets, which can reduce innovation and the creation of new products and services.

However, in order to promote interoperability, a suggested element to incorporate in the code of conduct is to establish a minimum amount of user data available to other platforms. For example, in other sectors, such as the financial services sector, there are markets with network effects and where access to information may be a barrier to entry. In this specific sector, interoperability is promoted by sharing a minimum amount of user information, in order to facilitate the entry of new competitors that require, as a factor of production, data to compete properly. The available information does not have to be not very specific to avoid a "free-rider" problem in obtaining information, but there is a minimum amount of basic user information needed that can be easily shared. The minimum amount of basic information can facilitate the entrance of new participants in a given digital market, because it is a guarantee of having a minimum input or factor of production to generate basic products and services. In addition, the basic information should be regulated.

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?

Yes. Implementing special scrutiny on mergers or acquisitions by SMS companies could be very opportune because, as evidence indicates, recently SMS firms have acquired small competitors, which has allowed them to increase their Market Power substantially and their ability to take advantage of customers with abusive practices. For example, Google has acquired several AdTech companies that previously were competitors, therefore, accumulating technological infrastructure and user data. Consequently, in the past years Google's market position has been strengthened and now it is a relevant attribute. In addition, it seems that the traditional merger analysis regime has not been effective to prevent increase of the SMS firms' relevance and a possible future integrated supply chain. For instance, one legal issue that arises in the Mexican legislation is that the competition

authority is not able to consider individual mergers with different sellers (in the same market or related/adjacent markets) as a whole merger with the same purpose. In consequence, an individual basis analysis, as opposed to a holistic (aggregated) approach, may prevent the detection of anticompetitive effects in mergers by a possible SMS firm.

**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?

In terms of what is described later, the main benefits of the potential remedies linked to user data sharing and interoperability relate to the facilitation of entry by newer firms in a certain market, because, precisely, the access to said data ceases to be a significant barrier to entry. However, data sharing must be established in line with clear criteria and with a minimum amount of data transparently defined, where data privacy for users is not compromised. For instance, in the Mexican financial system, particularly, in the process of obtaining loans by persons or businesses, credit data sharing is crucial in order to compete properly among credit score companies. For this reason, there is regulation in place that establishes the characteristics of user credit data that may be shared among firms. It is a minimum amount of data that is considered sufficient to develop the most basic financial products. The rest of the detailed information may be exchanged by credit score companies for a certain regulated price, although client consent is necessary. Thus, consumer data privacy is protected and the handling of the data is procured, while new competing firms are provided minimum guarantees of access to user data.

Regarding data protection and privacy rights, it is important that the proposed remedies that involve access to data and interoperability among platforms, include specific provisions that allow users of a certain platform to consent, via terms and conditions, the sharing of their information with third party platforms.

- Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?

A structural remedy for the digital advertising market may be highly convenient. Considering that firms such as Google participate along the entire chain of value in some advertising markets (Ad tech stack), including both sides of a market, on the one hand, acting on behalf of advertisers, and on the other, on behalf of publishers. Therefore, separation of certain activities where a single firm is involved along the chain may enhance competition in such a market. Particularly, in this market, the separation of firms may aid in achieving transparency of prices in ad intermediation, which seems to be a concern that could affect advertisers as well as publishers.

**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)?

Yes. Otherwise, there is a risk of firms with market power seeking strategies to preserve or reinforce it overtime. Establishing preventive measures may be useful in order to avoid the inhibition of innovation and the increase, overtime of switching costs.

- 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?

In the digital advertising market, it is desirable to seek transparency regarding the determination of prices that are charged by firms such as Google and Facebook. There seems to be a lack of clarity on the proportion of spending that these companies retain from advertising transactions.

- What measures, if any, are needed to enable consumers to exert more control over use of their data?

Firstly, firms request permission from users in order to handle their information, by way of the acceptance of terms and conditions for registry on a platform. Regularly, these terms and conditions are not user friendly, due to their extent and complex texts. This circumstance inhibits most users to fully be aware of the implications of allowing these firms to gather and track their data, for the purposes of targeted advertising. For this reason, an adequate remedy could be to facilitate user understanding of terms and conditions, that may enable them to reject conditions that entail the aforementioned data gathering, without making it impossible to stay on the platform.

- 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?

Interoperability may be substantial for companies that gather data across multiple users (big data) and that elaborate products or services (such as targeted advertising), from this input. Interoperability may significantly facilitate the entry of new firms in digital markets, that, in the end, could enable innovation and more competitive prices. In this sense, generating standards for interoperability may be vastly important for the elimination or reduction of barriers to entry.

### **3. 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 four mentioned characteristics (speed, flexibility, clarity and legal certainty) are essential in the making of the new regulatory approach focused on maintaining competitive conditions in digital markets. Considering that SMS companies are large companies that have experience defending themselves in competition investigations (and big pockets), a valuable feature could be the ability to adapt and redirect most of the resources available towards investigations that can generate greater social benefits or address harm in a better way. In other words, a pre-evaluation of the benefits that could be brought by implementing a new regulation and directing most of the resources towards its development should be considered.

When implementing a new pro-competitive approach, it is important to consider that mostly the companies that compete in digital markets are multinational enterprises that develop in different

regulatory environments. This means that it's necessary to implement intense coordination between competition authorities in different jurisdictions where those companies are established o gather information to determine harm produced worldwide by these companies. Likewise, it is possible that the estimation of the productive capabilities of the SMS firms, including their market power and profitability could be misrepresented, since they are companies that have multiple branches all around the world. Agencies should not discard the possibility, for example, that these SMS companies have substantial market power, solely because its market share doesn't reach a certain threshold in a specific country. It should be considered that an SMS company that decides to enter a new market can quickly increase its productive capacity (considering the amount of available resources) and leverage itself in other markets where it currently has no market power in the short term.

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 taskforce should consider several legal aspects in designing the procedural framework. To begin with, regarding the timeframes considered for a designation of SMS, specific consideration should be set around market structure as well as evolution or development of markets, in order to include an adequate timeframe for markets that may be found to be relatively dynamic. As such, it seems to be relevant to designate the frequency of review, in terms of the elements that are found in a specific market and that justified the assignment of the SMS status.

As far as the evidentiary threshold is concerned, in the design of the procedures that an agency will undergo in order to determine whether a firm will qualify for SMS status, there should be clearly defined measures that allow the regulatory body to gather any information or evidence needed to reach a decision. Said framework must have the necessary provisions that enable full cooperation from firms under scrutiny, as well as provisions and sanctions that, absent cooperation, will provide the agency with the ability to reach a resolution.

Finally, in relation to the right to appeal, it is adequate for a firm to have access to judicial revision in order to insure due process. However, it is relevant to include such provisions, in relation to a procedural resolution, in order to avoid the obstruction of the proceedings, and the arrival of its conclusion in a timely manner.

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 Taskforce should consider that these three elements are aimed at improving market efficiency and that they are the main drivers that can affect the well-being of consumers in the long run. Online harms may include an important reduction of innovation as a result of the lack of competition in digital markets. However, there is a trade-off between the reduction of online harms and data protection and privacy. Now, it seems that preventing or reducing online harms, requires significant data sharing among competitors. As we mentioned before, data sharing is an important barrier to entry for small competitors, and a possible solution could be the sharing main information from users (partial data sharing). Another possibility relies on sharing data from most users but not including specific data, such as names, in order to prevent the violation of data protection regulation. So, the

implementation of regulation focused on protecting data protection and privacy should be considered, in a way that doesn't damage the implementation of online harms preventive regulation.