

Company A

Digital Markets Taskforce - Response to the CMA's Call for Information

1. Introduction

1.1. [Confidential]

2. Background on Company A's activities

2.1. [Confidential]

3. The scope of any intervention in digital markets should be strictly limited carefully defined and targeted

(A) The intervention proposed by the DMT has the potential to be wide in scope and to give rise to uncertainty

- 3.1. Company A understands that the terms of reference for the DMT provide for a wide definition of digital platforms that could potentially define the scope of a government intervention, namely: "*online services that intermediate between different groups to buy, sell, share and exchange different goods and services, typically collecting and using vast amounts of data to deliver their services*".¹
- 3.2. However, Company A understands that the purpose of any intervention would be to target "*the most powerful platforms to exploit users and exclude competitors*".² In this respect, the CMA has asked for comments to identify criteria in order to define Strategic Market Status ("**SMS**") which would be the threshold for the proposed intervention and which would define the business subject to the proposed intervention.
- 3.3. Company A believes that it is essential that:
 - 3.3.1. First, the SMS designation does not catch all platforms: the DMT's advice to the government should recognise the diversity of platforms' business models and any intervention should be strictly limited to platforms giving rise to competition concerns that cannot be addressed with existing competition rules in the UK. *Ex post* competition law regulation and enforcement should remain the default, with SMS designation and consequent *ex ante* regulation the exception, to apply only where strict criteria are met.
 - 3.3.2. Second, the SMS designation should not be a discretionary tool which undermines legal certainty and predictability. It should be defined restrictively on the basis of objective criteria that are weighed against each other in individual cases before any determination that a business holds SMS.
 - 3.3.3. Third, no intervention should apply to any firm which has not been formally designated as having SMS, in a process that allows for appeal of any SMS determination.
- 3.4. Any different approach (1) may not be justified, given any potential competitive harm may already be addressed with existing competition rules in the UK, and (2) may result in significant harm to innovation, in particular if there is any uncertainty as to whether a firm may or may not be designated as having SMS (or be subject to an *ex ante* regime absent such a designation), as it would impose a burdensome regulatory process on firms thereby deterring them from innovation.

¹ DMT: Terms of reference, 11 March 2020.

² Call for Information, paragraph 1.16.

(B) The SMS criteria should be defined narrowly, recognising the exceptionally intrusive nature of *ex ante* enforcement

- 3.5. Further to the concerns set out at paragraph 3.3 above, Company A has suggested some criteria which it believes may be relevant to a SMS designation. These suggestions build on previous work referred to in the Call for Information³ which identified relevant criteria for the SMS designation and are based on Company A's experience as a digital business. Given the exceptionally intrusive nature of *ex ante* enforcement, Company A believes that SMS criteria should be defined narrowly, based on a set of criteria that are exhaustively and clearly defined.
- 3.6. Indeed, Company A believes that intervention in digital markets that are complex and dynamic gives rise to risks of unintended consequences. Most aggregators bring market transparency and enable entry of at the end user level by giving new entrants access to an audience. As such the ability to create a platform with a wide reach is essential to bringing competition to the end user level. A broad definition of SMS would adversely impact this, thereby stifling innovation to the detriment of consumers.
- (a) The SMS designation should require clear evidence of market failure
- 3.7. The Furman Review envisages the SMS designation criteria to capture a position of "*enduring market power over a strategic bottleneck or gateway market, whether a firm controls others' market access and where there are many dependent users on either side*".⁴ The Furman Review does not define what is meant by a '*strategic bottleneck or gateway market*'.
- 3.8. Company A believes that SMS can only relate to markets that present specific features showing that competition may not work effectively, such as for example weak competition between existing players and insurmountable barriers to entry. SMS cannot arise in a dynamic market which involves a number of players growing and is marked by recent market entry and expansion. Applicable competition rules already provide a reliable framework for competition enforcers in these circumstances and regardless of the market position of certain players.
- 3.9. Therefore, Company A believes that only significant market failures, which cannot be addressed by applicable competition rules, may justify an *ex ante* intervention. Company A believes that such market failures should be identified and established for the purpose of the SMS designation.
- (b) The SMS designation should consider a platform's ability to enter and distort competition in new markets
- 3.10. Related to paragraph (a) above, Company A believes that a SMS position should not necessarily be linked to a platform's market share or market power in a specific market. Rather, it should consider a platform's ability to enter new markets, using its 'generalist' power regardless of the market(s) it is active in (e.g. as explained further below, strong brand, consumer reach and access to 'unique' data) and harm competition in such new markets. However, the SMS designation should require clear and unambiguous evidence of a platform's ability to enter and distort competition in a new market, for example based on such platform's previous behaviour.
- (c) The SMS designation should consider the extent and frequency of a platform's consumer reach
- 3.11. The CMA online platforms and digital advertising market study indicates that evidence likely to be relevant in making this assessment (for platforms funded by digital advertising) include the extent of reach across consumers.⁵ For example, social networks or search engines involve daily uses and

³ Unlocking digital competition, Report of the Digital Competition Expert Panel, March 2019 (the "**Furman Review**") and the CMA online platforms and digital advertising Market study final report, 1 July 2020 (the "**CMA online platforms and digital advertising market study**").

⁴ Call for Information, paragraph 2.5.

⁵ CMA online platforms and digital advertising market study, paragraph 7.57.

consumer interactions throughout a day, over indefinite periods of time – i.e. there is no set end date for their use. They gather huge numbers of loyal users and therefore benefit from considerable consumer reach. They can use this considerable consumer reach to enter new markets and make their products or services known very quickly to millions of consumers. The consumer reach of a platform operating in a single vertical and used by consumers on a transactional, rather than a continuous, basis, is clearly significantly more limited.

3.12. Company A believes that the extent (in terms of number of users) as well as the duration and frequency of consumer reach and consumers' loyalty may be relevant factors in assessing SMS.

3.13. A platform that has a relatively limited consumer reach should not fall within the SMS designation. A number of platforms are used on a transactional basis for a limited period of time – e.g. in the case of Autotrader, the portal is only used to buy or sell a vehicle. These platforms do not have a loyal base of users which visit their website frequently and therefore they should not be found to have SMS.

(d) The SMS designation should consider a platform's access and use of 'unique' consumer data

3.14. The CMA online platforms and digital advertising market study has also placed emphasis on the access to, and use of, consumer data to determine whether a firm has SMS.⁶ In line with this, the Call for Information cites the leveraging of market power through the use of data as a potential criteria of SMS.⁷

3.15. Company A believes that access to 'unique' data that allows a platform to 'profile' consumers '*en masse*' - by contrast to localised or small scale profiling to deliver a service - across a range of consumer journeys and intents should be a criteria of SMS. The nature and volume of the data collected and what is susceptible to make such data 'unique' should also be taken into account for the purpose of the SMS designation.

3.16. By contrast, many platforms only have access to very limited consumer data (if any) and make relatively light use of the consumer data they have access to. By way of example, Company A does not require consumer users to provide any personal data in order to use its services, i.e. one can make a search on Company A's website and receive all relevant results without login in on Company A's platform. Even when users do log in, the personal information which Company A requests is very limited in scope, i.e. users have to provide their name and their email address.⁸

3.17. Many other platforms are in the same position and Company A believes that the SMS designation should not be relevant in these circumstances.

(e) The SMS designation should consider the cross-usage and monetisation of consumer data

3.18. The CMA online platforms and digital advertising market study previously found that concerns might arise where a firm has the '*ability to obtain and control unique data that is applicable outside the market*'.⁹ Company A believes that the cross-usage of unique consumer data across geographies or across a platform's disparate activities should be a relevant criteria when assessing SMS. By contrast, platforms which are only active in one consumer journey and that do not make use of the data they hold outside of this consumer journey should not be found to have SMS.

3.19. Moreover, the SMS designation should take into account the monetisation of consumer data. In this respect, Company A believes that a distinction should be drawn between (i) platforms which collect some user data for the purpose of their services but do not make further use of this data – these platforms should not be found to have SMS and (ii) platforms which collect user data and subsequently monetise it for a different purpose such as advertising.

⁶ CMA online platforms and digital advertising market study, paragraph 7.57.

⁷ Call for Information, paragraph 2.9.

⁸ [Confidential]

⁹ CMA online platforms and digital advertising market study, paragraph 7.57.

(f) The SMS designation should consider a platform's control over the rules or standards which apply in the market

- 3.20. The CMA online platforms and digital advertising market study has also considered a firm's ability to exert control over the rules or standards which apply in the market to determine whether a firm has SMS.¹⁰ Company A believes that this concept should be clearly defined in order to avoid any confusion and not to risk unnecessarily capturing more platforms than intended. Company A agrees that the lack of transparency of some activities and a platform's ability to maintain such lack of transparency could, in some circumstances, be a criteria of SMS. However, Company A believes that, in most circumstances, the existing regulatory framework has the ability to address such competition concerns.
- 3.21. By contrast, a two-sided platform which has to be transparent with its users and business customers to ensure customer retention and engagement cannot be found to have any control over the rules or standards which apply in the market. Such a platform does not have any incentive in exploiting customers or reducing transparency: there would be no benefit to do so, and this could only cause it to lose customers and revenue.
- 3.22. To conclude, Company A urges the CMA to exercise great caution in defining what amounts to SMS. The SMS designation has the potential to be wide in scope, which Company A believes to be detrimental to competition and innovation. If *ex ante* measures are considered necessary by the CMA, due to strong evidence of significant market failures and the inadequacy of existing regulatory tools, these measures should only be used to address these specific circumstances. They should not give rise to legal uncertainty and unpredictability.

(C) Interventions should not capture platforms that do not have SMS

- 3.23. The CMA has asked for views on whether the pro-competition regime proposed by the CMA, including remedies, should be required to deal with wider competition problems in digital markets. The CMA indicates that problems such as behavioural biases, information asymmetries, barriers to switching or coordination failures may require remedies which apply more widely, including to those firms who have not been found to have SMS.¹¹
- 3.24. *Ex ante* regulation, which prohibits business practices absent any proven anti-competitive effects, is a heavy handed approach which should be used sparingly. Any intervention therefore can only be justified in situations where there is a clear competition concern which cannot be addressed with the existing competition rules – antitrust enforcement, market investigations and merger control – and other regulatory frameworks in the UK.
- 3.25. In addition, intervention in digital markets that are complex and dynamic gives rise to risks of unintended consequences. It has the potential to inhibit a platform's ability to deliver services that consumers value, including in relation to data protection, safety and security, or exposure to harmful content. Therefore such intervention should be strictly limited to exceptional circumstances which the DMT may identify in SMS.
- 3.26. Company A believes that there is currently a solid and comprehensive regulatory framework which has the ability to address the competition concerns identified by the CMA. This includes competition rules currently applicable in the UK, but also consumer law and specific (and recent) platform regulations, e.g. the EU Platform to Business Regulation. Company A believes that the impact of such new regulations should first be assessed before introducing any new and additional regime.
- 3.27. Moreover, competition authorities currently have enforcement tools to intervene quickly to address competitive harm even if they have not concluded their investigation. For example, section 35 CA would allow the CMA to act as a matter of urgency for the purpose of preventing significant damage

¹⁰ CMA online platforms and digital advertising market study, paragraph 7.57.

¹¹ Call for Information, paragraphs 2.34-2.43.

to a particular person or category of person. Using interim measures would also allow the CMA to address competition harm with measures that are specific and adapted to the relevant circumstances. Company A believes that such intervention may be better suited than an *ex ante* approach which would not necessarily be suited to the specificities of a given digital market.

- 3.28. In light of the above, Company A believes that extending the proposed intervention to platforms which do not have SMS may not constitute a proportionate and justified response to the concerns raised by the DMT.