

FACEBOOK

July 31, 2020

Facebook Response to the Digital Markets Taskforce Call for Information on a New Pro-Competition Approach for Digital Markets in the UK

1. Introduction

Facebook welcomes the opportunity to respond to this call for information launched by the Digital Markets Taskforce (the “Taskforce”). This submission presents Facebook’s preliminary observations on selected areas of the Taskforce’s consultation document. Facebook looks forward to working with the Taskforce in order to achieve a regulatory framework that protects and enhances consumer choice and control, continues to spur innovation, and enables businesses to thrive.

Recognising the “[i]nternet has entered a new phase”, Facebook understands that the oversight of technology’s role in our lives also needs to evolve. It is in this context that Mark Zuckerberg, Facebook’s CEO, has called for a “more active role for governments and regulators” so that “by updating the rules for the internet, we can preserve what’s best about it – the freedom for people to express themselves and for entrepreneurs to build new things – while also protecting society from broader harms”.¹

Facebook continues to call for, and already engages in, a structured and forward-looking dialogue around regulation that Facebook believes is important for the evolution of the rulebook for the internet. Facebook has outlined four areas: harmful content, election integrity, privacy and data portability - which Facebook is very keen to continue to explore both as part of the Taskforce process and beyond. Against this background, Facebook has already taken proactive steps to further understanding and discussion among the wider policy community and public. Good examples are our White Papers on ‘Data Portability and Privacy’² aimed at contributing to the discussion on how to advance data portability in a privacy-protective way and ‘Communicating about Privacy’³ which explores how companies can better communicate privacy information by putting people at the center of privacy design decisions.

¹ Mark Zuckerberg: *The Internet needs new rules. Let’s start in these four areas.* Appeared in the Washington Post on March 30, 2019: https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html

² *Charting a Way Forward on Privacy and Data Portability.* White Paper from September 2019, available at: <https://about.fb.com/news/2019/09/privacy-and-data-portability/>

³ *Communicating About Privacy: Towards People-Centered and Accountable Design.* White Paper from July 2020, available at: <https://about.fb.com/news/2020/07/making-data-and-privacy-easier-to-understand/>

Some of the policy options that are discussed in the UK and beyond would constitute a bold step as they would significantly rewrite the regulatory framework that online platforms are currently subject to. Facebook encourages the Taskforce to carefully weigh the potential trade-offs of intervention and ensure that the value created by Facebook is not destroyed, to the detriment of users and innovation. These trade-offs should be thoroughly assessed and understood in markets characterised by complex multi-sided interactions, strong synergies, high levels of innovation, and constant market entry, resulting in dynamic competition of a new kind. The call for information is a welcome opportunity to start a deeper discussion on the objectives of a new regulatory framework that is targeted, proportionate, and does not impede the high level of innovation not seen in arguably any other sector.

For Facebook, this contribution is the start of an ongoing conversation we look forward to having with the Taskforce and UK policymakers. As Facebook's own position will continue to develop, this response will touch on the following themes: Section 2 explains how Facebook services drive value for consumers, business partners, and the wider UK economy. Section 3 outlines how Facebook views the establishment of a potential Digital Markets Unit (DMU) as an opportunity to ensure that the development of a coherent and innovation-friendly approach to digital markets is fully informed, including with respect to prevailing assumptions on the sources of market power. Section 4 comments on what Facebook considers to be the key issues in the Taskforce's questionnaire while Section 5 shares Facebook's thoughts on some additional regulatory design elements.

2. Facebook Services Drive Value for Consumers, Businesses, Advertisers, and the wider UK Economy

As the Taskforce assesses the need for a new set of regulatory oversight mechanisms for online platforms, Facebook urges the Taskforce not to lose sight of the significant benefits and economic efficiencies that these platforms, and Facebook specifically, bring to UK consumers and the wider economy.

2.1. Facebook's advertising services democratise advertising in the UK and contribute to the country's economy

Even just a few years ago, effective advertising was simply not an option for large numbers of businesses in the UK, either because it was too expensive (for example, a commercial to air on prime-time TV) and/or too inefficient (for example a print advert which might only be relevant to a fraction of a publication's readers). Today, over 2 million UK businesses have a presence on Facebook and 375 million people around the world are connected to a UK business on Facebook. Facebook's services enable enterprises of all sizes, and small and medium enterprises (SMEs) in particular, to run affordable and efficient marketing campaigns across the UK and internationally to find new commercial opportunities, scale their business, and increase cross-border trade. Businesses can reach target audiences more efficiently and cost-effectively, allowing them to challenge and ultimately compete alongside much larger, more established businesses, including in more concentrated industries. A recent study, produced by Copenhagen Economics and commissioned by Facebook, analysing SMEs using Facebook apps and technologies in 15 countries across Europe, including the UK, noted that:

- (a) 47% find the apps helpful to start a new business;
- (b) 59% report that the apps are important for growing their business;
- (c) 58% find the apps helpful in lowering their marketing costs; and
- (d) 55% consider them instrumental in entering new geographical markets.⁴

The study further notes that through its services, Facebook helped those businesses generate sales corresponding to an estimated EUR 208 billion in economic activity in 2019. These numbers reflect the value and quality of Facebook services for businesses across Europe, including in the UK.

Across the EU, including the UK, 25 million businesses, large and small, use Facebook services to generate sales - the vast majority relying on free-to-use tools to promote and grow their businesses. Where businesses spend on marketing, Facebook offers a suite of tools that enable them to measure their return on investment to ensure they are getting good value, and to adjust their marketing spend if not. This ability to measure effectiveness is key in today's context, where small gains in efficiency can help businesses and entrepreneurs to stay afloat during an economic downturn.

As the Taskforce assesses the scope of regulatory intervention it should do so seeking to preserve the value generated by Facebook services for businesses, particularly, as the UK enters a phase of economic recovery. Facebook knows from our close work with SMEs across the country that the COVID-19 crisis is existential for many SMEs. A new report by the Centre for Policy Studies (CPS) undertaken with Facebook's support has shown that over 60% of SMEs surveyed thought that without digital platforms it would have been harder for them to operate during COVID-19.⁵ Indeed, 52% of UK SMEs agree that their business is stronger today because of Facebook's suite of products and services.

In May 2020, as part of an ongoing collaboration between Facebook, the World Bank, and the Organisation for Economic Co-operation and Development (OECD),⁶ Facebook surveyed SMEs in more than 50 countries and regions, to understand their experiences and need for support. The research demonstrated widespread effects of the pandemic on SMEs, particularly among consumer-focused sectors, female-led businesses, and micro-businesses. In 15 of the countries surveyed, more than one-half of businesses were making at least 25% of their sales online. This is important in the current climate as the survey also showed that 41% of operational SMEs on Facebook expect cash flow to be a challenge in the next few months. Facebook would like to continue contributing to businesses' ability to thrive by using our services. Any regulation introduced should seek to preserve and unlock further economic opportunity.

⁴ Copenhagen Economics (2020). The Facebook Company - Empowering the European Business Ecosystem, available at: <https://www.copenhageneconomics.com/publications/publication/empowering-the-european-business-ecosystem>

⁵ Center for Policy Studies (July 2020), Platforms for Growth: How new digital technologies can boost productivity in Britain's small businesses: <https://www.cps.org.uk/files/reports/original/200706165436-CPSPLATFORMSFORGROWTH1.pdf>

⁶ Global State of Small Business Report (May 2020): <https://dataforgood.fb.com/wp-content/uploads/2020/07/GlobalStateofSmallBusinessReport.pdf>

2.2. UK consumers derive substantial benefits from Facebook's multi-sided business model because it creates value

Facebook users in the UK, just like all other Facebook users across the globe, benefit from innovative, personalised services that are available at no cost. These services allow people to stay connected, share content, express opinions, and discover relevant content. Facebook strives to create a valuable positive experience for each user by ranking and prioritising the content a user sees every time they use Facebook. Through design and product features Facebook ensures users get optimal value from engaging with each other on Facebook. These include:

- (a) Audience control tools that help users decide who can discover them, reach them, or be recipient of a large variety of meaningful interactions;
- (b) User focused personalisation from responsible data collection, which allows Facebook to provide each user with an individualized experience; and
- (c) Opportunities for meaningful experience and active engagement that eliminate passive low value interactions.

Importantly, Facebook responds quickly and organically to the heterogeneous needs of its users, and this capability to innovate on observed user behaviour is key to increase value to users.

This personalised user experience stands at the heart of Facebook's value proposition. Facebook's News Feed is a good example of a tailored user experience which is valued by consumers as it prioritises content in accordance with what each individual user is likely to find most relevant. This applies to both organic and sponsored content. To provide its services at no cost to users, Facebook relies on advertising revenue. In tune with its core value proposition, Facebook does not view advertising as an "add-on" to its services, but as part of the overall aim to serve users the most relevant content. The revenues derived from relevant ads enable Facebook to constantly improve its services to ensure meaningful interactions, active engagement, and the development of new features that respond to users' needs. Moreover, this revenue is also used to keep Facebook services safe for users across the globe.

2.3. Facebook is a rich ecosystem of interdependent stakeholders that all benefit from the platform

Facebook brings together individual users, businesses, organisations, and developers to produce a rich ecosystem that delivers ever more innovative ways to connect and engage. Facebook strives to provide an environment that delivers value to users and partners and keeps up with innovation. As the Taskforce assesses the details of a new regulatory framework for digital businesses, it will be important to avoid recommendations that could degrade or reduce the platform's ability to deliver individual and business user value and to explicitly consider their direct and indirect impact on user experience. Ecosystems, such as the ones Facebook has built around its various services, should be recognised as a *source of value* due to their supply and demand side efficiencies as well as their capacity to exert quality control. Businesses should retain their ability to adopt efficient business models which are the driver for platform ecosystem innovation. These dynamics ultimately drive competition in the market to the benefit of UK consumers. New regulatory solutions should be careful not to undermine the benefits that flow from the many efficiencies created by online platforms on all sides of their multi-sided business model.

3. The Digital Markets Unit - An Opportunity for Greater Nuance

While Facebook understands the logic behind the Furman recommendations⁷ and the political demands for speedier intervention, the potential introduction of a new regulatory framework that limits online platforms' commercial freedom and gives wide-ranging discretionary enforcement powers to a dedicated regulator would be a significant step. Before laying out preliminary thoughts on the consultation's regulatory design questions, Facebook would like to highlight certain aspects of digital markets that merit greater consideration.

Facebook views the establishment of a potential Digital Markets Unit (DMU) as an opportunity to deepen understanding and expertise, especially around dynamics that are notoriously discounted in public debate. Facebook would also like to point to certain misleading assumptions and fallacies that often come up in regulatory debates. These could also be considered by a potential DMU so any intervention is based on actual evidence and an analysis of trade-offs.

Facebook observes that many policy recommendations seem to be based on broad assumptions that suggest that large online platforms are entrenched, are a blocker to innovation, and can no longer be challenged by newcomers. After having operated for 16 years in the digital space, Facebook's experiences are certainly very different. It is against this background that Facebook would like to point the Taskforce to the following observations.

3.1. Innovative products are the driver for competition

Facebook operates in an environment that is rapidly evolving, dynamic, and highly innovative, in which established digital platforms, new entrants, and increasingly traditional market players, compete vigorously. The ability to offer products and services that attract users is the key driver of competition. Competition on the user side is based on providing the most enjoyable, useful, and meaningful experience. This is often spurred by an innovative idea that is differentiated from existing offerings. There are no barriers to developing new ideas.

This is borne out by the many examples of successful new entrants over the last few years that have been able to enter digital markets by developing an attractive offering to meet or create new user demand. TikTok is a good example in the social media space while online video conferencing service Zoom offers valuable lessons in how fast a company can expand even in markets with many established players. By way of example, the most recent Ofcom *Online Nation* report states that:

“some of the fastest-growing services during the coronavirus crisis are not owned by Google, Apple, Facebook, Amazon and Microsoft [...]. TikTok [...] increased its reach among adults in the UK from 5.4 million to 12.9 million between January and April 2020, while Houseparty, owned by Epic Games, increased from 175,000 to 4 million. Zoom [...] reached 13 million adult internet users in April 2020, up from 659,000 in January 2020.”⁸

⁷ Report of the Digital Competition Expert Panel. (2019). *Unlocking digital competition*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

⁸ Ofcom *Online Nation - 2020 Summary report*, p. 6. Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0028/196408/online-nation-2020-summary.pdf

In other words, within the first *four months* of this year TikTok more than doubled its reach among adults in the UK, while the reach of Houseparty and Zoom increased almost 23- and 20-fold respectively.

3.2. Certain assumptions around sources of economic power require greater nuance

Facebook observes that policy recommendations are often based on assumptions around sources of economic power that require greater nuance. Without going into greater detail in this submission, below is a list of certain assumptions Facebook believes requires more in-depth analysis which a specialist regulator could be well-placed to undertake:

- (a) *Data accumulation gives an insurmountable competitive advantage.* The history of online services has shown that holding data is not necessary for success since many digital platforms have been able to grow without access to large amounts of data, including Facebook itself. Often these platforms have experienced rapid growth against more established players with greater initial user bases and large amounts of data. Conversely, the mere accumulation of data by itself does not guarantee continued success. There are countless examples of companies that were able to amass large amounts of data but that ultimately failed or were surpassed by challengers who quite simply offered a better, more innovative user experience.⁹ Facebook believes that more attention should be paid to the processes of turning data into information of economic value. After all, it is the ability to derive meaningful insights from data that generates economic value.
- (b) *Network effects shield companies from competition.* The current rationale for strong regulation in the area of digital platforms relies on the view that, once successful, platforms are entrenched thanks to barriers to entry brought about by network effects. The notion that new market entrants cannot compete with services that enjoy a large user base does not reflect reality. In practice, network effects can be local, specialised and divided into sub or micro-networks within a larger user base. There are also different types of network topologies designed to fit diverse business models which can affect the ability of a new entrant to build up scale.¹⁰ The success of Facebook's platform is also due to a careful management of its network effects that include providing audience control tools to its users. Efficiencies enabled by network effects are seldom given the necessary attention in the regulatory debate while the negative impact of network effects on entry are constantly asserted despite contrary evidence including multihoming and the presence of diversified services. The reality in the digital space is that users can generally multi-home (there are low switching costs), particularly in the presence of free services,

⁹ See also See Anja Lambrecht & Catherine Tucker, Can Big Data Protect a Firm from Competition?, December 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530

¹⁰ See, for example, Zhu Feng, Iansiti Marco (2019). *Why some platforms thrive and others don't*. Harvard Business Review. Here the authors identify five characteristics that enable networks to thrive: (1) the strength of network effects which can change over time; (2) network clustering (the structure of the network); (3) Risk of disintermediation (i.e. users take their interaction offline once they connect through the network); (4) multi-homing; (5) network bridging (ability to connect various networks).

- and that new entrants such as TikTok or Zoom can compete with established networks and gain enough critical mass to find a place in the market based on their service offering.
- (c) *A large user base is evidence of strong direct and indirect network effects.* Having a large number of users does not immediately mean that a service benefits from strong direct or indirect network effects. Such an assertion confuses network effects with mere scale. In many instances it just means that consumers like the user experience. A platform that has millions of users may capture only a small fraction of addressable demand as it is one of many the services consumers use. Conversely, a platform that has a relatively small user base in absolute terms may capture a high share of addressable demand.
 - (d) *Online service markets are characterized by high ‘tipping’ risks.* There are very few markets where the relationship between service quality and scale is such that there might be a real risk of tipping. Typically, several services coexist and compete with differentiated offerings and user experiences. In addition, consumers can and do multi-home across apps. That is especially true in social media services where a variety of companies successfully coexist because they were able to capture usage around differentiated products.

Facebook would like to stress that the list above is in no way intended to suggest that these issues *never* play a role for the competitive assessment, but that they do not lend themselves easily for broad conclusions across a steadily growing variety of online platforms.

3.3. Companies should not be penalised for success achieved via competition on the merits

Any future regulatory framework should make sure that any intervention is based on a comprehensive analysis of all relevant market factors. Facebook submits that its success is not a foregone conclusion because of its size or previous success. Facebook invests considerable resources to keep its products attractive, innovative, and safe. At Facebook, enormous efforts are made to: keep users engaged; provide them with more granular control tools; ensure the interface is uncluttered, easy to navigate and that there is high value content relevant to the user; observe and detect new usages of the platform to build innovative products and features to support it. These investments are in and of themselves indicative of Facebook’s ongoing need to stay relevant to compete with new entrants. It is also evidence of a dynamic market where a new and more efficient player can disrupt existing competitive dynamics.

In addition, Facebook believes that in making use of its future powers, the DMU should pay close attention to the following factors:

- (a) Low barriers to entry and expansion in digital services;
- (b) The prevalence of extensive multi-homing by consumers across online services;
- (c) The positioning and activities of companies at the different online service layers. The competitive dynamics for companies operating at the applications and services layer are naturally very different from those operating more upstream and it may be prudent to assess where the persistent bottlenecks in the market are; and
- (d) Technological advancements such as cloud-based storage and analytical tools (which has basically given firms of *all* sizes access to powerful and inexpensive technological resources).

4. A New Regulatory Framework for Digital Markets - Preliminary Comments

Facebook welcomes the opportunity to respond to some of the regulatory design questions the Taskforce is currently consulting on. As a starting point, Facebook believes that a flexible and proportionate approach to digital market regulation through a Code of Conduct (the “Code”) could add value - especially with respect to increasing trust and transparency in commercial relationships. Thus, Facebook is supportive of a Code that seeks to enhance transparency and predictability in the whole marketplace, while making sure that the commercial freedom of companies subject to the Code is not unduly curtailed. Ultimately, a sufficient level of commercial freedom is what incentivises firms to innovate and provide competitive services to consumers.

In tune with the above, Facebook would like to raise two broader points before responding to some of the consultation’s questions in greater detail. First, the Taskforce should give careful consideration to the balance between ‘symmetric’ and ‘asymmetric’ regulatory obligations. Facebook understands that the SMS designation as such would imply that the discussion is solely about asymmetric forms of regulation, but it is not clear why only SMS companies should be subject to trust, transparency and consumer empowerment obligations, all of which would benefit from horizontal applicability. It seems that measures aimed at enhancing trust and transparency in the market, including among consumers, would benefit from horizontal applicability. It is noteworthy that this is precisely the logic of the platform to business (P2B) Regulation and its transparency obligations that apply to all intermediation services, independently of company size or potential market power.¹¹

Second, asymmetrical forms of regulation allowing a regulator to impose far-reaching remedies on a company, such as under the European electronic communications framework, are based on existing competition law concepts. Such regulation obliges the regulator to establish dominance on a relevant market before imposing company-specific regulatory obligations. This ensures a proportionate regulatory approach where far-reaching remedies are not applicable to companies that do not have market power.

As the Taskforce considers some of these complex issues of regulatory design that could involve important trade-offs, Facebook looks forward to continuing the dialogue beyond this submission.

4.1. Scope of a new approach

4.1.1. Designating SMS should be led by competition policy principles

Because the SMS designation could ultimately allow the DMU to impose very intrusive regulatory obligations on a single company, it is sensible to closely align the SMS designation with competition policy principles. Accordingly, SMS should be designated on a case-by-case basis and should be *both* market and company specific. This would be in line with other regulatory frameworks where clearly identified markets and market power, rather than broad rulemaking as such, are the intellectual foundation for asymmetrical regulatory intervention.

¹¹ Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57.

For example, the telecoms regulatory framework is based on evidence-based economic assessments as opposed to more subjective criteria that could allow for considerable discretion in applying the designation to companies. Under the telecoms rules the regulator must first clearly define the markets which merit ex ante regulation under the so-called ‘three criteria test’ and then determine whether a given operator has ‘significant market power’ (SMP) on a relevant market. Only after those determinations is the regulator able to impose remedies on the SMP operator. There are a variety of good reasons for this approach, including the ability to address structural competition problems in a targeted and proportionate manner and ensuring that regulatory intervention does not go beyond what is necessary to promote consumer welfare.

4.1.2. SMS designation should not apply to the whole corporate group

In tune with the above, an SMS designation that applies to the whole corporate group would constitute a significant departure from existing frameworks that impose obligations on single companies *in a relevant market*. Facebook believes that it would be disproportionate and out of line with regulatory best practice to effectively extend the SMS designation, and therefore any asymmetric regulatory obligations, to markets in which the regulated company does not have market power. It is often the case that a company with market power in one market is a small, disruptive new entrant in another market. It is not clear why that new entrant in another market should be subject to the full substantive provisions of the Code based on the mere assumption that market power could be leveraged into this market. Facebook believes that competition may not be served by increasing the regulatory burden, and thus barriers to entry, for a new entrant that brings greater competitive pressure into a given market.

4.1.3. Adjusting the scope to various regulatory obligations merits further thought

The CMA market study into Online Platforms and Digital Advertising (the “CMA final report”) laid out a very wide spectrum of regulatory obligations/remedies that would be enforced via two instruments: a Code and “pro-competitive interventions”.¹² Facebook submits that empowering a DMU to impose such a broad set of remedies on a narrow set of companies may require a more nuanced approach. For example, and as explained above, the pro-competitive interventions suggested in the CMA final report are drastic measures that should only be enforced against companies found to have dominance in a given market. The CMA final report explicitly states that these pro-competitive measures should be designed to address sources of market power. Logically, that market power should first be proven through a test prescribed by competition law that has served markets well for decades.

Conversely, the CMA final report also mentions regulatory obligations that are intended to enhance overall transparency and trust among market participants. Facebook submits that some of these measures could benefit from a broader applicability, not tied to a finding of dominance *and* potentially not even tied to a SMS designation aimed to apply to a set of ‘bigger’ companies. Facebook believes that adjusting the scope of the new regulatory approach to the nature of the various regulatory obligations and remedies that are being discussed merits further consideration.

¹² CMA (2020). Online platforms and digital advertising. Market study final report, 1 July 2020, see p. 349 ff, available at: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

4.2. Remedies for addressing harm

4.2.1. The Code should not include a blanket list of prohibited conduct

The CMA's final report indicates that within each high-level objective, 'principles' could be laid out "providing greater specificity as to the behaviour allowed or prevented by the Code."¹³ Given the far-reaching nature of prohibiting commercial conduct, careful thought will need to be given to what practices merit prohibition. Determining whether a given practice is consumer-welfare enhancing and pro-competitive or whether it can result in harm to the competitive process to the detriment of users will require a very careful analysis. The experiences gathered during decades of competition law enforcement in the UK and more broadly in the EU could be instructive. As a general observation, competition enforcement has demonstrated how important it is to consider a given practice in its proper economic and legal context. With the exception of certain practices that fall foul of competition rules by their very nature (so-called 'by object' restrictions), competition authorities usually consider whether a given practice is, on balance, anti-competitive after having considered the overall economic context.¹⁴ After all, no business conduct exists in a vacuum.

A list of pre-determined prohibitions would not allow the same level of flexibility in an environment that is characterised by innovation and business model evolution. The user welfare and innovation costs could be substantial if a list of banned practices would effectively prohibit pro-competitive behaviour that leads to, for example, new products and services. 'Self-preferencing', referred to in the CMA final report, is a good example of conduct that does not lend itself to easy judgment because its effects on competition are context-dependent. A case-specific assessment is needed. That is why academic expert reports such as 'Competition Policy for the Digital Era' prepared for European Commission Executive Vice-President Vestager explicitly state that EU competition law "does not impose a general prohibition on self-preferencing" because it is subject to an effects test.¹⁵

Competition law teaches us valuable lessons in regulatory rigour which Facebook hopes will be taken into account in the Taskforce's ongoing work. The imposition of a rigid regulatory framework that bans prescribed commercial conduct is likely to capture pro-competitive practices as well, which would undermine the very objectives of such a framework.

4.2.2. Facebook supports efforts to increase transparency and trust

As stated above, Facebook supports the aim of achieving a more trustworthy environment through increasing trust and transparency with respect to both consumers and business users. In fact, Facebook has developed a wide variety of tools to offer consumers greater control over how their data is used, and also empowers advertisers with tools and information so that they can

¹³ Ibid., p. 339.

¹⁴ European Courts have stressed the need to take into account the legal and economic context of a given practice in a variety of cases: see, e.g., Judgments of the Court of Justice of 6 September 2017 in Case C-413/14 P, *Intel*, p. 139, and of 6 October 2015 in Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, (*Post Danmark II*), p. 30-32.

¹⁵ Expert report *Competition policy for the digital era* prepared for Commissioner Vestager, (April 2019, p. 7). Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

make well-informed decisions on whether, and how much, to advertise on Facebook.¹⁶ For example, the Download Your Information (DYI) tool allows users to request to download a single data file in HTML or JSON format, which can then be uploaded to a new provider. Facebook's new data portability tool based on the Data Transfer Project enables users to transfer all of their photos or videos to a new provider in a one-off transfer. The transfer can be repeated at the user's initiation.

Facebook believes that there is merit in discussing how transparency in business-to-business relationships can be further enhanced by building on the principles of the already applicable P2B Regulation. Likewise, Facebook supports initiatives that aim to ensure that platforms are designed in a clear and fair way towards consumers. Such initiatives must, however, complement the existing transparency and information obligations placed on companies by other legislation, including the GDPR, which governs the processing of personal data in the EU as *lex specialis* to other European and national laws. Finally, there is a case for provisions aimed at enhancing transparency, trust, and consumer empowerment to apply horizontally to improve digital markets more broadly.

4.2.3. Addressing sources of economic power requires a very careful approach

The CMA's final report calls for the DMU to be granted powers to introduce 'pro-competitive interventions' to tackle sources of market power and increase competition. These interventions could take the form of "data-related" and/or "consumer choice" remedies. Some of these remedies are intrusive and would potentially involve important trade-offs between policy goals. Third-party access to data or even certain interoperability obligations, for example, may raise issues of data protection. At the bare minimum, these sort of remedies will require a careful analysis of their assumed pro-competitive impact vs. their potential harm in terms of service quality, privacy, service integrity, and innovation. This analysis is even more important in light of the disputed assumptions underpinning the various sources of economic power as highlighted in Section 3.2.

In light of the above, Facebook believes that equipping a new and untested regulatory authority with such wide-ranging powers that would only be enforced against a limited number of SMS companies operating in digital markets is inappropriate. Furthermore, Facebook observes that the CMA already possesses the powers to impose far-reaching remedies as part of its competition enforcement toolkit, including different forms of separation.

4.2.4. There is no case for a separate and stricter merger control regime for SMS companies

Facebook does not believe that there is a convincing case for revising the UK's jurisdictional thresholds or substantive assessment test in order to examine transactions involving firms deemed to hold SMS. As regards jurisdiction, the Taskforce will be aware that the vast majority of the ca. 150 merger control regimes around the world have adopted "bright line", revenue-based, asset-based or transaction-size based thresholds. The International Competition Network has observed:

¹⁶ For a comprehensive list of Facebook's market-leading consumer control tools, please see Facebook's response to the CMA's market study interim report, p. 18 ff., available at: https://assets.publishing.service.gov.uk/media/5e8c827ae90e070774c61fdb/Facebook_response_to_interim_report_with_cover_letter.pdf

“Notification thresholds should be clear and understandable [...] the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable “bright-line” tests.”¹⁷

The ICN has encouraged the use of objectively quantifiable criteria for merger notification thresholds, noting that:

*“Market share-based tests [that] are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process [...] but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification”.*¹⁸

Conversely, the UK Enterprise Act 2002 provides for a more ambiguous “share of supply” threshold test. Moreover, in applying this test, the CMA is not bound to follow established antitrust market definitions, but may instead identify jurisdiction on the basis of a looser “reasonable” description of relevant goods or services. The CMA therefore already benefits from considerably greater discretion than peer competition authorities to examine acquisitions by firms of all types, including those deemed to have SMS.

Moreover, the CMA has applied this flexible test in an ambitious, expansive manner in order to review transactions with no clear nexus to the supply of goods or services in the UK. By way of example, in *Roche/Spark*, the CMA asserted jurisdiction over the acquisition of a target business with only tangential connections to the UK, on the premise that the target business’s global gene therapy R&D might ultimately, at an undetermined point in the future, result in the commercial supply of products in the UK. In *Sabre/Farelogix*, the CMA asserted jurisdiction over the acquisition of a target business that did not supply directly any services to UK customers. Facebook notes that the CMA’s jurisdictional decision in *Sabre/Farelogix* is currently being challenged before the Competition Appeals Tribunal.

Similarly, Facebook sees no sound basis for applying a different substantive test with respect to acquisitions by firms deemed to have SMS. The CMA has explained that its principal challenge in assessing mergers in digital markets (which may include firms deemed to have SMS) is how to predict, with a reasonable degree of certainty, the future development paths of digital markets. As the CMA has acknowledged, *“this may make it difficult to test dynamic theories of harm and as a result risk SLC decisions being wrong if dynamic effects [...] are under- or over-estimated.”*¹⁹ However, these difficulties suggest that the CMA should work with peer authorities and firms to refine the authorities’ existing economic and evidentiary frameworks, including through more effective data analytics. As the CMA has acknowledged, there is as great a risk of over-enforcement as of under-enforcement in such circumstances, with over-enforcement potentially

¹⁷ ICN Recommended Practices for Merger Notification and Review Procedures, p. 5, available at:

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf

¹⁸ *Ibid.*, p. 6.

¹⁹ CMA Response to the European Commission’s call for contributions on ‘Shaping competition policy in the era of digitisation’, p. 8, available at:

https://ec.europa.eu/competition/information/digitisation_2018/contributions/competition_and_market_s_authority_cma.pdf

having the unintended consequence of actually stifling innovation. Such difficulties therefore do not support a general lowering of existing evidentiary standards.

5. Procedure and Structure of a New Pro-competition Approach - Additional Thoughts on Regulatory Design

As policymakers in the UK and across the globe are thinking through policy initiatives that may target only a handful of companies, considerable efforts will be needed to ensure regulatory frameworks are workable, effective, serve well-defined goals, and do not go beyond what is necessary.

Any regulatory initiative should strive to protect user value and innovation. This implies ensuring the protection of users' privacy and the integrity of their personal data; protecting the integrity and safety of users on the platform; avoiding undermining the viability of successful businesses and the ability of new entrants to secure investment; and ensuring innovation on platforms and surrounding ecosystems is not curtailed.

With respect to more detailed regulatory design issues, in addition to the ones already outlined in this response, Facebook would like to raise some preliminary issues that merit closer consideration. The list below is by no means exhaustive but does represent a set of issues that the Taskforce should keep in mind in its ongoing work:

- (a) Rights of defence and recourse to an independent judicial authority are cornerstones of frameworks that have the ability to severely limit the commercial freedom of companies - especially when there are objective justifications for a given conduct. It will be of paramount importance to guarantee such safeguards;
- (b) Mechanisms for regulatory error correction could play a very important role. There should be sufficient flexibility in the system to loosen regulatory burden in light of changing circumstances and when evidence shows that a given remedy has not served its intended purpose. Periodic re-justification for regulation via sunset clauses would be one option;
- (c) Should a competition policy-based approach not be adopted, the 'list' of companies with SMS designation should be subject to periodic reviews with fast turnaround times. Reviews should equally apply to any positive or negative regulatory obligations. As explained, the digital sector is dynamic and fast-changing. That needs to be accounted for in the framework;
- (d) The framework must ensure that there is no inherent bias in favour or against certain business models; and
- (e) The imposition of regulatory requirements should meet necessity and proportionality tests. They should be no more than necessary to address a well-defined problem and no less restrictive alternatives should be available.

6. Conclusion

Facebook believes that there remains a lot to be researched and properly understood about the competitive dynamics in digital markets. Getting a better understanding of the technologies that underpin digital markets will be key to the formulation of policy that targets clearly identified problems, is proportionate, and is ultimately workable for the companies subject to it.²⁰ Facebook therefore supports initiatives that aim at advancing knowledge among regulators and policymakers. Our company stands ready to contribute to this goal and would welcome continued exchange and dialogue, also at technical expert level.

The digital economy creates a lot of value, is diverse, and highly dynamic. Facebook is convinced that a regulatory framework that allows for as much ‘permissionless innovation’ as possible will be in the interest of everyone. This includes existing companies that are digitising, upcoming challengers, consumers directly benefiting from innovation, and investors seeking to allocate capital in the UK.

This contribution outlined our preliminary thoughts on some of the policy questions laid out by the Taskforce. Careful consideration will need to be given to the various regulatory design questions to make sure a new framework will end up being workable for all parties and contribute to a better digital environment overall. Facebook is looking forward to continued dialogue over this important matter with the Taskforce and other stakeholders in the UK.

²⁰ The need to “gain a better understanding of both the technologies that underpin the digital sector and the relevance of data for competition and competition enforcement” is also one of the conclusions made by the expert report ‘Competition policy for the digital era’ prepared for Commissioner Vestager, (April 2019, p. 127), available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>