

## DIGITAL MARKETS TASKFORCE CALL FOR INFORMATION

### RESPONSE OF THE FINANCIAL CONDUCT AUTHORITY

#### A. INTRODUCTION

On 1 July 2020, the Competition and Markets Authority (CMA) published a Call for Information (CFI) in relation to the Digital Markets Taskforce (the Taskforce). This submission sets out the view of Financial Conduct Authority (FCA) in response to the CFI.

Digital markets are rapidly changing the way we live. This is true of regulated financial services in the UK in terms of how such services are provided and used, with Amazon entering the insurance and payments markets and Google and Apple now active in mobile payments.<sup>1</sup> We can also expect the social changes driven by COVID-19 to further accelerate the development of digital markets in financial services, particularly online payments, and virtual interactions with financial services providers.<sup>2</sup>

These changes have the genuine potential to have positive impacts on consumer outcomes in financial services. Innovation can improve the lives of consumers across financial services, with beneficial products and services coming to market and incumbent firms responding to new challengers to improve their own offerings. This means consumers can be better served, through products/services that are better suited to their needs, greater access, and/or lower prices.<sup>3</sup>

To maximise these benefits, since 2014, we have developed and applied new policy approaches to support innovation.<sup>4</sup> The latest of these was announced in May this year: a collaboration with the City of London Corporation to pilot a “digital sandbox” which will provide enhanced support to innovative firms tackling challenges caused by the COVID-19 pandemic.<sup>5</sup> With data also changing how financial markets work in the digital ecosystem, the UK has led the way on open banking and we are now committed to leading the debate around open finance.<sup>6</sup> Data ethics is also a focus for us: for example, our current project with the Alan Turing Institute on Artificial Intelligence (AI) transparency. The purpose of the project is to better understand how the transparency principle can contribute to the development of trustworthy AI.<sup>7</sup>

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<sup>1</sup> See paragraph 5.2 below.

<sup>2</sup> See page 17, [FCA Business Plan 2020/2021](#) and paragraph 4.11 et seq below.

<sup>3</sup> See *The Impact and Effectiveness of Innovate*, April 2019 <https://www.fca.org.uk/publication/research/the-impact-and-effectiveness-of-innovate.pdf>.

<sup>4</sup> This includes (1) Project Innovate which was established in 2014 to address regulatory barriers and support firms to innovate in the interest of consumers; (2) our RegTech programme which encourages adoption of new technologies to achieve more effective and efficient compliance outcomes; (3) our regulatory sandbox which allows firms to test innovations in a live market environment; and (4) TechSprints, which are typically two-day events that bring together participants from across and outside of financial services to develop technology-based ideas or proof-of-concepts to address specific industry challenges.

<sup>5</sup> <https://www.fca.org.uk/firms/innovation/digital-sandbox>.

<sup>6</sup> [FCA Call for Input: Open Finance](#), December 2019. Open finance refers to the extension of open banking-like data sharing and third-party access to a wider range of financial sectors and products. See also paragraph 4.4 below.

<sup>7</sup> See <https://www.turing.ac.uk/news/new-collaboration-fca-ethical-and-regulatory-issues-concerning-use-ai-financial-sector>. See paragraph 8.8 below.

At the same time, we are cognisant of the challenges posed by digital markets - one of our business priorities for 2020/2021, for example, is to deliver fair value in a digital age<sup>8</sup> – and we share the concerns of the Furman Review<sup>9</sup> and the CMA in its market study on online platforms and digital advertising.<sup>10</sup> We agree that issues around data, in particular, can lead to the distortion of competition and poor consumer outcomes in financial services. Sophisticated data storage, data management and AI techniques, along with unrivalled amounts of data, are likely to give large platforms a competitive advantage if they choose to enter and/or expand in financial services. Incumbent financial services providers and start-ups might find it difficult or impossible to match these skills and resources to compete effectively. Moreover, whilst use of vast amounts of data and combining financial and non-financial data may improve access to financial services for some vulnerable consumers,<sup>11</sup> it may also pose exclusionary risks from some of these services (or risk worsening existing exclusion). For example, in insurance, data availability may reduce the scope for pooling of risks across consumers, and can lead to significant reductions in access to insurance products at affordable prices for consumers deemed “higher risk”.<sup>12</sup>

Moreover, the pace of digitalisation poses challenges to existing regulatory frameworks established in an analogue age. The ability to regulate online financial promotions is a prime illustration of this. For example, the FCA’s Chairman, Charles Randell has stated there is need for a framework to stop social media platforms and search engines from undertaking promoting unsuitable investments, including scams, to ordinary retail consumers.<sup>13</sup>

Against this background, we welcome and support the proposals for a pro-competitive regime as set out in the CFI.<sup>14</sup> We believe this forward-looking approach will make a necessary contribution to the protection and promotion of digital competition in the UK – and that it should, in principle, apply to the financial services sector.

However, an effective and flexible approach is essential, with further and detailed consideration given to the interplay between the new approach and the existing/any proposed regulatory framework within financial services.<sup>15</sup> Failure to explore the relationship between “the established” and “the new” risks (1) unnecessary duplication; (2) inconsistency; and (3) a disproportionate regulatory burden that may chill innovation and harm all UK business, competition and consumers.

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<sup>8</sup> See page 17, FCA Business Plan 2020/2021 at footnote 2 above.

<sup>9</sup> [Unlocking digital competition: Report of the Digital Competition Expert Panel](#), March 2019.

<sup>10</sup> [CMA’s market study into online platforms and digital advertising](#), 1 July 2020.

<sup>11</sup> Larger and less conventional amounts of data may help address “thin files” (where there may not be enough information on a file for a provider to make a lending decision) in credit markets.

<sup>12</sup> See paragraph 5.3 and 5.4 below.

<sup>13</sup> See our response to Question 12 below.

<sup>14</sup> We also note that Taskforce intends to pay close attention to similar proposals coming from the European Commission, including forward-looking rules covering large online platforms acting as “gatekeepers”. See the European Commission’s proposals for [the Digital Services package](#), June 2020.

<sup>15</sup> The financial services sector has an existing and extensive regulatory regime which has developed over many years. The activities we regulate are commonly referred to as being within the “FCA perimeter”; they are set out in legislation and we report on them annually (see our [first Annual Perimeter Report](#)). Moreover, this regime governing “regulated activity” is not the only basis for our regulatory responsibilities. Other UK and EU legislation is also relevant, including, but not limited to, our concurrent competition law powers, acting as the UK’s listing authority, the market abuse regime, the payment services regulations, the financial promotions regime, and enforcing certain provisions of the Consumer Credit Act 1974. Depending on the circumstances, there may be other consumer protection legislation or other legal duties, such as contract terms or fiduciary duties, which apply.

It is also imperative to understand what principles should underpin the new regime. Once those principles are in place, the mechanism for delivering on those principles can be properly considered, i.e. whether a code of conduct should be based on compliance with rules or should be focused on outcomes.<sup>16</sup> It will also be necessary to create the appropriate architecture around the new regime in terms of how it will be monitored and enforced – the CFI does not appear to explore this in detail. This framework is equally as important as the nature of any “remedies” that may be imposed to provide consistency, certainty and deterrence. Many of the FCA’s powers are enshrined in statute e.g. the power to impose financial penalties. Without a statutory basis for key elements of the framework, enforcement may be challenging.<sup>17</sup> We suggest that a national, cross-sector strategy will be necessary now to explore an intended framework with input from Government and a triangulation of the relevant sectoral, data protection and competition authorities. We encourage the Taskforce to give early consideration to this issue, as well as to the questions posed by the CFI.

We welcome the opportunity to discuss this further with you. We look forward to sharing knowledge and expertise to support the role of the Taskforce and ultimately to improve outcomes for consumers.

## **B. RESPONSE TO CFI QUESTIONS**

### **Scope of the new approach**

#### **Question 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?*

1.1 We agree with the approach set out in the Furman Review that a key feature of digital platform markets, and a criterion to be considered in relation to SMS, is the strong network effects that many exhibit.<sup>18</sup> We see this in the financial services sector with firms that have features similar to digital platforms, for example wholesale financial markets infrastructure firms, such as trading venues (e.g. stock

<sup>16</sup> See the response to Question 2 below.

<sup>17</sup> See the response to Question 11 below.

<sup>18</sup> See paragraph 1.80.

markets) and clearing houses. They share similar features to platforms such as Google and Facebook, whereby we see the existence and entrenchment of network effects<sup>19</sup> and large economies of scale and scope.

- 1.2 We also recognise the challenges of creating a consistent and coherent regime to assess and tackle innovative digital platforms. We accept, as set out in the Furman Review, that the "Significant Market Power" regime in the communications sector may be a good starting point for assessing "Strategic Market Status" (SMS).<sup>20</sup> We therefore make no additional comment on the definition of market power for the purposes of defining certain platforms<sup>21</sup> as having SMS.
- 1.3 That said, our view is that the regulation of financial services may provide some useful examples to draw upon when considering the framework for the SMS regime. Turning to designation in particular, we have similar processes within financial services that, whilst not necessarily focusing on economic dependence, may have some useful elements that the Taskforce may wish to consider in designing the SMS regime. For example, certain investment firms that are deemed to present significant risks to the stability of the financial system are subject to prudential supervision by the Prudential Regulation Authority (PRA) and the PRA has to determine whether a particular firm should be designated for prudential regulation by it. The procedure for designation includes consultation with the FCA.<sup>22</sup>
- 1.4 The CMA may also be interested in the framework for "globally systemic important banks" (G-SIBs).<sup>23</sup> The assessment methodology for G-SIBs is an indicator-based approach comprising five broad categories: size (calculated according to an indicator-based measurement approach), interconnectedness, lack of readily available substitutes or financial institution infrastructure, global (cross-jurisdictional) activity and complexity. Banks are designated as G-SIBs based on these indicators and supervisory judgement.

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<sup>19</sup> We note that "significant direct or indirect network effects" were identified in the Furman Review as being relevant to an SMS designation, although it is not clear how significance may be measured. See paragraph 2.115 of the Furman Review.

<sup>20</sup> See paragraph 2.117.

<sup>21</sup> We consider the scope of the new regime must take into account how digital platforms are themselves defined. See further paragraph 9.1 below. In this context, we note the reference at paragraph 1.28 of the Furman Review to what it describes as a "helpful" definition of online platforms, namely that they "share key characteristics including the use of information and communication technologies to facilitate interactions (including commercial transactions) between users, collection and use of data about these interactions, and network effects which make the use of the platforms with most users most valuable to other users".

<sup>22</sup> <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/statement-of-policy/2013/designation-of-investment-firms-for-prudential-supervision-by-the-pra>.

<sup>23</sup> <https://www.bis.org/publ/bcbs255.htm>.

## Question 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)?*

- 2.1 We consider that a sensible starting point for any regulatory regime is the objectives that underpin it. For example, Parliament has given us a single strategic objective as a financial services regulator, to ensure the relevant markets function well. We also have three operational objectives to advance: to secure an appropriate degree of protection for consumers; to protect and enhance the integrity of the UK financial system; and to promote effective competition in consumers' interests.<sup>24</sup> Put simply, and as set out in our Mission,<sup>25</sup> as a public body our aim is to serve the public interest by improving the way financial markets work and how firms conduct their business. By doing this, we provide benefit to individuals, businesses, the economy, and so the public as a whole. This establishes a clear framework on which our regulatory regime is built.
- 2.2 It is important, therefore, that the purpose and objectives of the SMS regime are considered carefully ahead of designing a forward-looking approach that can deliver. Once that had been done, it leads to a series of questions. Should the regime have a focus on compliance by SMS platforms with rules set out in a code of conduct, or should the focus be more prescriptive in terms of delivering a set of outcomes by which the effectiveness of the regime can be assessed? If so, what are those outcomes?<sup>26</sup> These are the issues that we have been grappling with in our sector. We are adopting a more outcomes-based approach to our work, so that we bring about a shift in focus – both internally and in the industry – from narrow rules-based compliance to a focus on delivering the outcomes we want for the users of financial services.<sup>27</sup> As important will also be a framework for monitoring and enforcing the regulatory regime that is in place, irrespective of the form it takes. The FCA welcomes further discussion with the Taskforce on all these elements.
- 2.3 As a more general point, careful thought should be given to the implications of an SMS designation: too little by way of remedies may be ineffective; while too much risks hampering innovation. For example, if the larger players are key

<sup>24</sup> [Financial Services and Markets Act 2000](#) as amended.

<sup>25</sup> <https://www.fca.org.uk/publication/corporate/our-mission-2017.pdf>, at page 5.

<sup>26</sup> See a speech by Christopher Woolard, 21 October 2019, *Regulation in a Changing World* at <https://www.fca.org.uk/news/speeches/regulation-changing-world>.

<sup>27</sup> See FCA Business Plan 2020/2021 (at footnote 2 above) and our recent [Sector Views 2020](#).

drivers of innovation, an over-rigorous regime could dampen incentives to innovate and all the associated benefits for consumers.

- 2.4 With respect to the question of whether SMS status should apply to the corporate group as a whole, we broadly agree with the approach suggested by the CMA's market study, as set out in paragraph 2.9 of the CFI.<sup>28</sup> From our experience of regulating large, complex international entities, there are two key issues that must be balanced.
- a. First, it may be difficult to quickly and effectively take action against firms that use complex international corporate structures. It is therefore important to ensure that any designation that applies to a large digital company also provides visibility of, and direct control over, its subsidiaries (direct and indirect) where their actions may affect the UK market and UK consumers. This must be the case wherever in the world that subsidiary is based.
  - b. Conversely, excess coverage across corporates can unnecessarily increase the regulatory burden both for the regulator and the entity. An example relevant to the FCA's remit is the financial services offerings of retailers. It would be unnecessary and undesirable for us to have regulatory responsibility for the retail actions of such companies, but we need to have oversight over their financial services offerings.
- 2.5 Our experience following the 2008 financial crisis also showed that regulating at a corporate level can be insufficient to create a genuinely compliant culture and may also lead to limited accountability.<sup>29</sup> Following recommendations from Parliament, a new framework was developed which has aimed to raise standards by introducing individual senior level responsibility through the Senior Managers & Certification Regime (SM&CR). This initially applied to the largest financial firms, with global reach. Feedback on this regime has been positive and we have recently rolled it out across all FCA firms.<sup>30</sup> We consider that this is a crucial support to the corporate responsibility that regulation imposes and must not be forgotten in the design of a new pro-competitive regime (in terms of complementarity).

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<sup>28</sup> This notes that while SMS would apply to the corporate group as a whole, it would only have implications for the subset of a firm's activities directly linked to the source of the SMS (i.e. those markets in which the firm has market power and on the basis on which the SMS designation is made, and those markets into which that market power can be leveraged).

<sup>29</sup> In particular, the Approved Person Regime, which had been in force at the time of the financial crisis, was seen to "create a largely illusory impression of regulatory control over individuals, while meaningful responsibilities were not in practice attributed to anyone". <https://www.parliament.uk/documents/banking-commission/Banking-final-report-volume-i.pdf>, page 8.

<sup>30</sup> <https://www.fca.org.uk/publication/policy/ps18-14.pdf>, paragraph 1.16.

### Question 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.*

- 3.1 We agree with the direction of the CMA's market study that the activities that should fall within the remit of the forward-looking approach should be those that are linked to the SMS designation directly. We also support the new regime applying to markets into which that SMS market power could be leveraged, e.g. through the use of data, including the combination of data from different sources (perhaps by designating the use/combination of data as an activity that is within the scope of the regulation).<sup>31</sup>
- 3.2 However, to the extent any of these activities fall within the FCA's regulatory perimeter, careful thought will need to be given as to any overlap between the new regime and existing regulatory powers; who would take action in that situation; and who would decide on the powers to employ. We would welcome further discussion with the Taskforce on the scope of the new approach.

### Question 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?*

#### *Ongoing developments*

#### Open banking and open finance

- 4.1 We note that the Furman Review said that the scale and breadth of data that large digital platforms have been able to amass, usually generated as a by-product of an activity, is "*unprecedented*". This can make targeted advertising possible and services tailored, but with many consumers not being aware of the extent and value of the data they are providing. We also note the view, as reported in the Furman Review, that the significant amounts of data held by

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<sup>31</sup> We note the recent decision of the German Federal Court of Justice of 23 June 2020 upholding the decision of the Bundeskartellamt that Facebook abused its dominant position. This was by combining data it collected about users across its different platforms, including WhatsApp and Instagram, as well as from outside websites and third-party apps.  
<https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html?nn=10690868> (in German).



incumbent firms are the single biggest barrier to entry in the digital economy, albeit with the acknowledgment that this view is not universally accepted.<sup>32</sup>

- 4.2 Similar issues can arise in financial services markets (and more on this is set out below in our response to Question 5). Personal data mobility in this regard can be seen as a pro-competitive measure, where consumers are given greater control of their personal data, for example their profile, purchase history or content, so they can access and derive greater value from the data businesses hold about them. Relevant and ongoing digital technology developments in this space include the outcome of the CMA's Retail Banking Market Investigation Order 2017.<sup>33</sup> As the CMA will be aware, the Order requires the nine financial institutions with the greatest market share of UK personal current accounts to provide access to payment account data to regulated third parties free of charge, as part of the open banking remedy.
- 4.3 We expect open banking to continue to grow, providing benefits to consumers and increasing competition and innovation with regards to payment accounts, including the sharing of data and the adoption of payment initiation services. Services that have been developed as a result of open banking include: personal finance management (PFM) dashboards, which enable the customer to understand and optimise their overall financial position; automating switching and renewals; new advice and financial support services; and more accurate creditworthiness assessments.
- 4.4 As noted in our Call for Input on open finance, open banking only provides access to payment account data, and does not provide consumers with a holistic view of their finances. In this context, we are currently leading the way and considering the potentially transformative benefits, and the risks, that could come from open finance – the extension of open banking-like data sharing and third-party access to a wider range of financial sectors and products including savings, credit, investments, pensions, and insurance.<sup>34</sup> Open finance is based on the principle that the data supplied by and created on behalf of financial services customers are owned and controlled by those customers. Re-use of these data by other providers takes place in a safe and ethical environment with informed consumer consent. Open finance includes personal financial management dashboards to enable customers to understand and optimise their overall financial position; automating switching and renewals to encourage shopping around; new advice and financial support services for mass market consumers making financial decision and more accurate credit worthiness assessments.<sup>35</sup> We also note that there are also industry-led initiatives for open finance-like solutions.<sup>36</sup>
- 4.5 It will be important for the Taskforce to consider the intersection between large digital companies and developments in financial services such as those outlined above. These companies have mass market access and a significant amount of data on consumer behaviour. In future, they could develop their financial services offerings further and potentially access additional data through open

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<sup>32</sup> See paragraphs 1.37-1.39 of the Furman Review (at footnote 9), and paragraph 1.72.

<sup>33</sup> <https://www.gov.uk/government/publications/retail-banking-market-investigation-order-2017>.

<sup>34</sup> See footnote 6.

<sup>35</sup> See paragraph 3.8 of the Call for Input.

<sup>36</sup> See, for example, The Investment and Savings Alliance's (TISA) [open savings and investments project](#).



banking. It is therefore important to consider the role of reciprocity with data sharing, and the impact on competition of these large companies entering the market.

### Cryptoassets

- 4.6 We continue to explore issues around cryptoassets, including so-called stablecoins, both internationally in a variety of working groups and domestically, including as part of the UK Cryptoasset Taskforce (together with the Bank of England (BoE) and Her Majesty's Treasury (HMT)). The UK Cryptoasset Taskforce ensures a coherent UK approach towards cryptoassets.<sup>37</sup> HMT recently published a consultation paper proposing the regulation of promotions of certain types of cryptoassets.<sup>38</sup>

### Innovation

- 4.7 We believe that regulators sometimes need to proactively engage with digital platforms and firms to help promote and foster innovation. One of the ways that we have done this in the past is by providing market-facing functions,<sup>39</sup> which now continue to provide support to innovative firms throughout the COVID-19 crisis. More on the impact of the crisis on innovation is set out below at paragraphs 4.19 to 4.19.
- 4.8 While digital innovation has grown in recent years, in some markets a significant proportion of entrants do not have a clear path to sustainable financial performance.<sup>40</sup> In part, this is due to barriers to entry that result from the strong positions held by incumbents, with sticky customer bases and strong balance sheets.
- 4.9 Our Innovate services (such as the regulatory sandbox) have helped fintechs bring positive disruption to the market by increasing competition and reducing barriers to entry, allowing consumer needs to be more closely met. Evidence suggests that our work gives firms the regulatory certainty they need to develop their innovations and deliver them at speed; improves outcomes for consumers by firms we support bringing innovation to market and incumbents responding to compete harder and improve their own offerings; and encourages positive innovation domestically and internationally.<sup>41</sup>
- 4.10 Alongside our existing services, we are continuously looking at ways to broaden and improve the support that we provide to firms and start-ups looking to innovate. As noted above in the introductory section to this response, we have been exploring the concept of a "digital sandbox", which would bring together our broader innovation services and further enhance collaboration between regulators, government and the industry to test, learn and solve significant issues.

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<sup>37</sup> Further information on the FCA's activities with regards to cryptoassets can be found here: <https://www.fca.org.uk/firms/cryptoassets>.

<sup>38</sup> More information can be found here <https://www.gov.uk/government/consultations/cryptoasset-promotions>.

<sup>39</sup> For example, our regulatory sandbox; advice unit; and direct support provision.

<sup>40</sup> As reported here <https://www.innovatefinance.com/uncategorised/uk-fintech-covid-19-impact-survey-the-results/>.

<sup>41</sup> See footnote 3 above.

### *Impact of COVID-19*

- 4.11 The digitalisation of financial services has been happening for some time. However, changes in consumer and firm behaviour due to the pandemic may accelerate this faster than we previously anticipated. This could bring increased benefits to consumers and businesses, but also present risks, in particular through digital and financial exclusion.
- 4.12 So far, it appears that the COVID-19 pandemic has increased the demand for digital financial services, particularly online payments, and virtual interactions with financial services providers. Early evidence shows an increase in customers using online banking or banking apps as well as making payments online.<sup>42</sup>
- 4.13 It has become necessary for many consumers to take up digital payment methods during COVID-19 while self-isolating and due to concerns around virus transmission through payment methods. We note the increasing use of contactless payments<sup>43</sup> and welcomed the industry decision to raise the single contactless threshold from £30 to £45 in order to minimise physical contact between merchants and customers.<sup>44</sup> We are also currently taking a flexible approach towards enforcement of the rules around contactless.<sup>45</sup>
- 4.14 As consumers grow familiar with using these payment methods, this temporary shift during the pandemic has the potential to become permanent. In light of this, regulatory input will be important to address the needs of consumers who do not have the skills, income or digital connectivity to use digital payment methods. Our research has found that, as at February 2020, 9% of adults are digitally excluded,<sup>46</sup> equating to 4.7 million people. Of these, an estimated 2.7 million have never used the internet. Which? research<sup>47</sup> also found many consumers who were less likely to use digital payments, particularly those who are older, struggled to access and use everyday banking during this period.
- 4.15 The long-term decline in cash has imposed many pressures on banks and cash infrastructure. COVID-19 has exacerbated these and may accelerate commercial decisions to close branches and ATMs. This could harm consumers who are pushed towards digital payment methods that are not suitable for them. The Access to Cash Review<sup>48</sup> identified that new innovative payment methods, and

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<sup>42</sup> In a recent Capgemini Consumer Behaviour Survey conducted in April 2020 with more than 11,000 respondents, more than 52% said they preferred self-service bank mobile apps during the COVID-19 outbreak as compared to 47% before the pandemic. 54% said they were conducting bank transactions over the internet during the pandemic, a five-percentage point jump from before the crisis. For the insurance sector, channels such as firm's website (27%) and social media (26%) remained the top interaction choices for policyholders, a noticeable jump in numbers in comparison to before COVID-19.

<https://www.capgemini.com/2020/05/everything-will-change-starting-with-consumer-behavior-and-expectations-toward-fs-providers/>.

<sup>43</sup> <https://www.yourmoney.com/saving-banking/contactless-payments-have-become-the-new-normal/>.

<sup>44</sup> <https://thefintechtimes.com/uk-to-increase-contactless-limit-from-30-to-45-what-does-this-mean-for-the-future-cashless-society/>.

<sup>45</sup> <https://www.fca.org.uk/firms/strong-customer-authentication>.

<sup>46</sup> [Financial Lives 2020 survey](#). We count as "digitally excluded" those UK adults with poor or non-existent digital skills, defined through survey questions as "All UK adults excluding those who use the internet at least once a week, and those who last used the internet in the last three months (but less often than once a week) and who rate their ability to use the internet as excellent, good, fair or don't know how to rate it".

<sup>47</sup> <https://www.which.co.uk/news/2020/06/coronavirus-cash-crisis-puts-millions-of-people-at-risk/>.

<sup>48</sup> <https://www.accesstocash.org.uk/media/1087/final-report-final-web.pdf>.

digital payments more broadly, are generally aimed at those who were most digitally savvy, and tended to exclude “*the 20% with more challenging needs*”.

- 4.16 Our workplan includes: consumer research to understand the cash needs and preferences of consumers, including those who are digitally excluded; research on the costs of cash acceptance by SMEs; analysis of access to, and availability of cash; consulting on new guidance on branch and ATM closures; and a second consultation on our draft guidance for firms on the fair treatment of vulnerable customers.<sup>49</sup> This may include considering those consumers who may struggle to access digital services, for example where they have low digital capability or a lack of access due to poor broadband connections.
- 4.17 COVID-19 is also having a significant impact on the ability of some nascent digital competitors to survive due to declining revenues and reductions in capital availability and appetite to fund operating losses. HMT has recently launched a review with the aim of boosting support to this area.<sup>50</sup>
- 4.18 However, while funding for start-ups may have shrunk as a result of the adverse impact on the economy of COVID-19, the change in circumstances also presents opportunities for new, innovative ideas. We note the positive contribution of innovative fintechs during the crisis. For instance, a number of initiatives came to life using open banking to support customers and businesses, including innovative technology which helped individuals to evidence their self-employed income in order to benefit from governmental support.<sup>51</sup> However, it is not clear whether any impact on innovation will be short term (and driven solely by the pandemic), or longer term (and driven by structural changes occurring in the market that are being accelerated by the pandemic). These changes may positively or negatively impact innovative financial services’ business models after the pandemic is over.
- 4.19 The structural changes outlined above could, post COVID-19, manifest as a rapid transformation in how incumbent and challenger businesses digitally evolve due to demand and supply side changes affecting both businesses and consumers. This evolution may be observed inside the FCA’s perimeter, through changes to business models and the provision of regulated activities to consumers, or outside our perimeter, where third-party service providers increasingly provide the technology stack/infrastructure that financial services firms depend on to provide regulated activities.<sup>52</sup> This transformation could have many benefits and harms, including on competition, consumer protection, operational resilience and cyber-security.

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<sup>49</sup> <https://www.fca.org.uk/publications/guidance-consultations/gc19-3-guidance-firms-fair-treatment-vulnerable-customers>.

<sup>50</sup> <https://www.gov.uk/government/news/review-launched-to-boost-uk-fintech-sector>; terms of reference here [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/901067/Fintech\\_review\\_HMT\\_ToRs\\_June\\_2020\\_Final\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901067/Fintech_review_HMT_ToRs_June_2020_Final_.pdf).

<sup>51</sup> <https://www.openbanking.org.uk/insights/power-of-the-network/>.

<sup>52</sup> <https://www.ft.com/content/ac12f5b6-46a1-40fe-b262-27ec505126e5>.

## Remedies for addressing harm

### Question 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?*

- 5.1 The digital economy has significant implications for the financial services sector, both in terms of the benefits it can provide to consumers and the harm it might cause, as further set out below.
- 5.2 Some large digital platforms already have permissions and provide financial services in the UK. For example, Amazon has entered the insurance and payments markets, and Google and Apple are active in mobile payments. Large digital platforms could leverage their market power into financial services markets – if they choose to enter and/or expand – by making use of their large number of users, access to significant amounts of non-financial data about consumers, substantial financial resources, and presence in many non-financial services markets.<sup>53</sup> This kind of competition can lead to advantages for consumers, with benefits of technology and data resulting in real improvements in innovation, value and access.
- 5.3 However, as recognised by the Furman Review and the CMA’s market study, there are a number of competition/consumer harm risks associated with the potential to leverage market power into financial services markets. We consider that:
- a. Increased barriers to consumer switching, in particular where data portability and interoperability of providers’ systems is limited, could lead to weak consumer side competitive pressures on the providers (see also responses to Questions 8 and 9).
  - b. Where consumer data, “attention”, or privacy becomes the price paid for products and services, there is a significant risk of distortion of competition and consumer harm as the parameters of competition might become less transparent and less understandable for consumers.
  - c. Increased concentration and raised barriers to entry, in particular if large platforms’ business models in financial services are driven by economies of scale and scope and by network effects (e.g. leading to the market “tipping”), could present some financial services markets with similar competition issues

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<sup>53</sup> We refer, by way of example, to Libra, the blockchain digital currency proposed by Facebook. Mark Zuckerberg has stated (May 2020) that that Libra and all of Facebook’s commerce initiatives should be viewed through the lens of its ad business. He said “...if we can make commerce be more effective for businesses if when they run an ad, somebody who clicks on that ad is now going to be more likely to buy something because they actually have a form of payment that works that’s on file, then it basically becomes worth it more for the businesses to bid higher in the ads than what we see are higher prices for the ads overall. So that’s broadly the strategy around going deeper on commerce and payments.” <https://s3.amazonaws.com/atom-dev-docs/transcripts/BF028B9B-2428-4E1E-A237-B3F9D3A9FFFB.pdf>.

as those considered by the CMA, the European Commission, and other authorities in many jurisdictions.

- d. It is possible that (and is being investigated whether) large digital platforms may bundle and/or self-preference when marketing and supplying financial services alongside a range of their other services.<sup>54</sup>
- e. Sophisticated data storage, data management and AI techniques, along with unrivalled amounts of data, are likely to give large platforms a competitive advantage if they choose to enter and/or expand in financial services. Incumbent financial services providers and start-ups might find it difficult or impossible to match these skills and resources in order to compete effectively (though at the moment they seem to enjoy incumbency and brand recognition advantages in financial services). Initiatives such as open banking and open finance could tackle some of these concerns.
- f. Competition could be distorted where firms have access to data not available to competitors. Large platforms can hold significant amounts of non-financial data, and using that data to supply financial services to consumers could distort competition and lead to poor consumer outcomes in financial services markets.

5.4 Our recent work shows that issues around data – for example, in the way it is collected and used by firms – can lead to the distortion of competition, poor consumer outcomes and exclusion from certain financial markets.

- a. The economic incentives in the markets for the sale of data may not lead to well-functioning markets, and can create the opportunities for excessive and/or discriminatory pricing of data. An example of this may arise in wholesale financial markets where firms use data to trade, make investment decisions, to evaluate positions and provide other products and services. We are seeking to understand whether users have concerns with the way data is sold in such markets and, in March 2020, issued our Accessing and Using Wholesale Data Call for Input.<sup>55</sup>
- b. Improved access to data by financial services providers can enable financial services to be marketed more precisely than before. This can be efficiency and welfare-enhancing, but can also be detrimental, for example, for products where there is a risk of consumer harm arising from over-reliance (such as consumer credit markets).<sup>56</sup>
- c. Moreover, whilst use of vast amounts of data and combining financial and non-financial data may improve access to financial services for some

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<sup>54</sup> For example, the Commission's investigation into Apple: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073). See also <https://www.law.com/international-edition/2019/04/11/dutch-antitrust-regulator-pursuing-investigation-of-apple-for-favouring-its-own-apps/?slreturn=20200620042118> and <https://www.politico.eu/article/italy-competition-watchdog-opens-probe-into-amazon-adding-to-eu-list/>.

<sup>55</sup> <https://www.fca.org.uk/publications/calls-input/accessing-and-using-wholesale-data-call-input>.

<sup>56</sup> One example of this was overdraft fees, which we acted on in 2017, having found that in 2016, more than 50% of banks' unarranged overdraft fees came from just 1.5% of customers.

vulnerable consumers,<sup>57</sup> it may also pose exclusionary risks from some of these services (or risks worsening existing exclusion). Data availability can reduce the information asymmetries between firms and consumers that have lain at the heart of insurance products for many years. This may reduce the scope for pooling of risks across consumers, and can lead to significant reductions in access to insurance products at affordable prices for consumers deemed “higher risk”. This was a key issue highlighted in the FCA’s Feedback statement on the Big Data Call for Input.<sup>58</sup> We support a careful consideration of the ways consumer and other data may be used and the extent to which consumers have control and an effective understanding of the way data is used by the Taskforce’s SMS regime and its approach to non-SMS digital platforms (see also our response to Question 9).

- 5.5 In this context, we agree that action needs to be taken in respect of the digital economy. Such action will require careful discussion between Government and triangulation of regulatory, data protection and competition authorities. We welcome the opportunity to discuss this with the Taskforce further.

## Question 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?*

*Would a code structure work well across other digital markets?*

- 6.1 Whether a code like structure is the right “solution” is likely to differ across markets, depending on the existing regulatory regime governing those markets (if any) and the nature and structure of the markets themselves. As noted above in our introduction, it is essential that the right framework for monitoring and enforcing a code is also put in place. The relevant enforcer needs the right tools and resources to investigate and enforce potential code breaches given the likely size/resources of the digital platforms subject to the new regime and the possible complexity of the issues.
- 6.2 We have significant expertise in the design, operation, supervision and enforcement of principles-based regulation in relation to financial services (see paragraph 6.3 below), as well as experience of seeking to remedy harms through

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<sup>57</sup> As noted above in our introduction (at footnote 11), larger and less conventional amounts of data may help address “thin files” in credit markets.

<sup>58</sup> <https://www.fca.org.uk/publications/feedback-statements/fs16-5-call-inputs-big-data-retail-general-insurance>.

the use of codes of conduct. We do not, however, have the power to enforce codes of conduct.<sup>59</sup>

- 6.3 We see parallels between the proposed code structure and our Principles for Businesses (the Principles), which apply to the firms that we regulate.<sup>60</sup> The Principles are a general statement of the fundamental obligations of firms and the other persons to whom they apply under the regulatory system. These 11 high-level binding obligations provide flexibility, as they are designed as a general statement of regulatory requirements applicable in new or unforeseen situations. This ensures that firms are held to certain standards even if there is no prescriptive rule that covers the issue in question.
- 6.4 Our aim is to encourage firms to exercise judgement about, and take responsibility for, what the Principles mean for them in terms of how they conduct their business. We also recognise the importance of an environment in which firms understand what is expected of them. We have therefore indicated that firms must be able to reasonably predict, at the time of the action concerned, whether the conduct would breach the Principles.<sup>61</sup> Our intention is to acknowledge that firms may comply with the Principles in different ways, and to indicate that the FCA will not take enforcement action unless it was possible to determine at the time that the relevant conduct fell short of our requirements.
- 6.5 As envisaged by the CFI, we consider it necessary to complement a principles-based regulatory approach with more detailed rules and guidance.<sup>62</sup> We also publish a range of communications which help alert industry to perceived risks and give an FCA view on emerging issues. The provision of such information and guidance is an ongoing process. Our enforcement action on the basis of the Principles provides further clear examples of how the Principles work in practice.
- 6.6 We would welcome further discussion with the Taskforce to share our experience of enforcing the Principles, our more outcomes-based approach as set out above in response to Question 2 and to discuss our regulatory approach more generally.

#### *Appropriateness of the objectives*

- 6.7 The three objectives of “Fair trading”, “Open choices” and “Trust and transparency” from an initial perspective appear useful in terms of the overarching objective for any code.
- 6.8 We do note that, as part of our Call for Input on open finance,<sup>63</sup> we are currently consulting on a set of draft principles aimed at ensuring an effective interoperable environment for data sharing, which may have some relevance to the proposed code of conduct. The draft principles cover: a user right to share their data; a

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<sup>59</sup> We do have a mechanism for “recognising” industry codes of conduct for certain unregulated financial markets and activities, known as “FCA recognition”. This process is designed to support and encourage the development and use of good quality industry codes of conduct. By conducting themselves in line with a recognised code’s provisions, individuals may take comfort that they are likely to meet their obligation to comply with the relevant requirements and standards of their market. For information about recognition of industry codes, see <https://www.fca.org.uk/about/recognised-industry-codes>, and on how the FCA grants recognition for such codes, <https://www.fca.org.uk/about/recognised-industry-codes-criteria-process>.

<sup>60</sup> <https://www.handbook.fca.org.uk/handbook/PRIN/2/1.html>.

<sup>61</sup> <https://www.handbook.fca.org.uk/handbook/EG/2/8.html>.

<sup>62</sup> The FCA has a statutory power to publish Guidance under section 139A of FSMA.

<sup>63</sup> See footnote 6.



user right to instruct a Third Party Provider (TPP) to act on their behalf; a user right to be in control of their data and transact and share data securely; cohesion across open finance; common provision of a minimum set of standardised data and transactions via open standard APIs; TPP right of access; and accessibility of key product information. The draft principles were designed to generate debate and reflect the topics set out in our Call for Input, as well as our experience with open banking and the discussions of our open finance Advisory Group.

- 6.9 We have already received a number of responses to our Call for Input, which closes on 1 October 2020. We will review all responses to inform our next steps. We envisage that a final set of principles could be developed in partnership with the Government and following consultation with a broad cross-section of industry, and, if appropriate, recognised by us.

## Question 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?*

- 7.1 Although “killer acquisitions” appear to be most common in the pharmaceutical sector,<sup>64</sup> the issues related to firms acquiring emerging/innovative competitors in order to pre-empt future competition might also occur in financial services. Recently the CMA considered, in the *PayPal/iZettle* case<sup>65</sup> whether the acquisition was motivated by PayPal’s intention to prevent future competition from iZettle, an emerging rival. The CMA assessed the likely evolution of the competition between the merging parties, as well as the future commercial strategies of both parties. The CMA also considered, in the *MasterCard/VocaLink* merger,<sup>66</sup> the effects of the merger in relation to loss of potential competition in real-time payment solutions.
- 7.2 In this context, we acknowledge the current debate around merger control in digital markets.<sup>67</sup> We see the benefits of a merger control regime based on mandatory notification of acquisitions made by SMS firms – it may assist with identifying nascent competitors “worth protecting” (which the voluntary regime may overlook) who could be removed by the acquisition as a competitive constraint.<sup>68</sup> This must be balanced against the possibility that more rigorous scrutiny might increase the administrative burden on firms, and generate

<sup>64</sup> See the survey of economic literature related to killer acquisitions in the report commissioned from Lear by the CMA [Ex-post Assessment of Merger Control Decisions in Digital Markets \(2019\)](#).

<sup>65</sup> PayPal Holdings Inc / iZettle AB, [Final report 12 June 2019](#).

<sup>66</sup> [MasterCard/VocaLink](#), 4 January 2017.

<sup>67</sup> See a recent OECD roundtable: [Start-ups, killer acquisitions and merger control](#) (10-12 June 2020). Also Andrea Coscelli’s speech on 2 March 2020 at *GCR Live Telecoms, Media and Technology 2020* where he said that the Facebook/Instagram and Facebook/WhatsApp merger control decisions, amongst others, “are seen by some as examples of merger control gone wrong”. <https://www.gov.uk/government/speeches/speech-at-gcr-live-telecoms-media-and-technology-2020>.

<sup>68</sup> See Andrea Coscelli’s speech on 3 June 2019, [Competition in the digital age: reflecting on digital merger investigations](#): “...it will be important to consider whether there might need to be some form of closer scrutiny for acquisitions by particularly powerful companies. In concentrated markets ... the elimination of even a very small or nascent competitor could remove an important source of competition. In such markets, it could be that any entrant with a credible strategy and route to funding is worth protecting.”

additional costs. A mandatory regime may also necessitate more emphasis on those deals which do not require detailed scrutiny moving swiftly through the system to avoid unnecessary delay in terms of investment in innovation or new products and services.

- 7.3 As a final point, we note that the operation of some firms, especially in the financial sector, may be wider than national – with intangible assets (data and IP) often being the most valuable part of the enterprise. International cooperation in designing and implementing remedies for otherwise problematic mergers will be key, especially in those cases where the target’s assets are not significant in a jurisdiction (or when the assets are intangible).

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

### *Remedies required to address sources of digital platforms’ market power*

- 8.1 The European Commission has already stressed that in a functioning digital market, users can switch platforms as easily as possible, with data portability and interoperability as key factors for facilitating switching and reducing switching costs. It also emphasised the importance of online platforms acting responsibly.<sup>69</sup>
- 8.2 We agree with both the European Commission and the Furman Review that data mobility, standardisation and interoperability are key to opening up competition.<sup>70</sup> Our Call for Input on open finance<sup>71</sup> highlights the importance of common standards and interoperability in driving competition and good consumer outcomes. We have also flagged potential risks caused by the digital transformation of financial services.<sup>72</sup>
- 8.3 We can draw some parallels to wholesale financial infrastructure markets, such as stock exchanges and clearing houses. Standardisation and interoperability have been critical in stimulating competition in the wholesale financial markets through enabling the different firms to interact and transact without, or limiting, the need for users to be part of more than one of them.

<sup>69</sup> [Communication on Online Platforms](#) (2016).

<sup>70</sup> See Communication on Online Platforms (at footnote 6969 above) and Furman Review (at footnote 9).

<sup>71</sup> See footnote 6.

<sup>72</sup> See the response to Question 5 above.

- 8.4 However, standardisation may also come at a cost. It could create barriers to entry for smaller firms. It may result too in a loss of innovation, including by disincentivising investment in innovation and in technological improvements, and through deterring entry by firms with innovative technologies. Hence any regime for standardisation and interoperability should consider how to optimally deliver the benefits of standards while ensuring that the potential advantages of innovation and disruption of standards are enabled.

*Common standards of data access in digital markets*

- 8.5 We consider that common standards of data access and interoperability in the open finance space might create incentives for firms in this area to voluntarily share data or compel them to do so. Currently, mandatory data sharing does not exist in open finance as it does in open banking, and an FCA Advisory Group report concluded that “[i]n the absence of compulsion, firms are unlikely to provide open access voluntarily to the core data required for open finance.”<sup>73</sup> We are considering our strategy in this space.

*Promoting competition while respecting data protection and privacy rights*

- 8.6 In considering an ecosystem for open finance that would promote effective competition whilst respecting data protection and privacy rights, a range of common and agreed standards would be required, including, for example, on technology and architecture; operating principles, processes and practice; security protocols; service level agreements for performance; liability models; dispute resolution; data rights and authentication; and identity management.
- 8.7 Another aspect of key importance is the ethics of data use. There is currently debate as to whether AI can redefine how consumers access finance (by making it fairer and more inclusive) or whether it can exacerbate existing harms. As the recent joint FCA/ BoE survey on machine learning in UK financial markets illustrates, there is currently significant investment in AI by financial firms.<sup>74</sup>
- 8.8 This illustrates the important of data ethics – what are the input factors and what do firms do with the insights gained – and whether these are in the best interest of consumers and markets. Data and data ethics is currently a business priority for us. One example is our current project with the Alan Turing Institute on AI transparency. The purpose of the project is to better understand how the transparency principle can contribute to the development of trustworthy AI.<sup>75</sup> We and the BoE are also in the process of setting up the joint financial services public-private forum on AI to support the safe development and adoption of AI in the UK.<sup>76</sup> We would be happy to discuss our work on this subject further with the Taskforce.

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<sup>73</sup> <https://www.fca.org.uk/publication/documents/incentives-advisory-group-open-finance-advice-note.pdf>.

<sup>74</sup> <https://www.fca.org.uk/publication/research/research-note-on-machine-learning-in-uk-financial-services.pdf>.

<sup>75</sup> <https://www.turing.ac.uk/news/new-collaboration-fca-ethical-and-regulatory-issues-concerning-use-ai-financial-sector>.

<sup>76</sup> <https://www.fca.org.uk/news/news-stories/financial-services-ai-public-private-forum>.

- 8.9 More broadly, financial services are dependent on a multitude of different infrastructures, nationally and internationally.<sup>77</sup> How they all interconnect so they are truly interoperable and harmonised is key to the resilience, financial stability, competition and innovation of the UK's financial services.

*Structural intervention*

- 8.10 We do not have specific comments on structural intervention, but we note that a previous CMA report<sup>78</sup> provided valuable insights related to the process and lessons learnt from the perspective of an authority addressing a structural remedy. In particular, the CMA stressed the time needed for benefits to materialise and the difficulty in quantifying benefits (including the final price paid by consumers), addressing a timeline of main events covering 8 years.
- 8.11 From this, we would observe that if structural intervention were available (notably through divestments), it would be important to be fully aware of the complexity of such remedies. These potential difficulties with structural remedies also highlight the need for effective conduct remedies.

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

- 9.1 We envisage two issues in relation to scope: (1) how are digital platforms themselves defined;<sup>79</sup> and (2) to what extent is SMS "key" to the application of a forward-looking regime? If the net is cast too narrowly, then there could be many businesses or markets that have characteristics of digital platforms that may not be covered by the Taskforce's activities. There is also a need to tackle and pre-empt competition issues in a wider group of platforms, including those that have not been found to have SMS. How this could be monitored and enforced needs

<sup>77</sup> Those within the financial services ecosystem include central bank settlement systems, payments systems operated by the private sector and emerging structures such as central bank digital currencies and cryptoassets that use data. Outside that ecosystem, structures such as cloud provision, 5G and broadband are vital.

<sup>78</sup> [BAA airports: Evaluation of the Competition Commission's 2009 market investigation remedies](#) (2016).

<sup>79</sup> See footnote 21 above.

careful consideration and we welcome the opportunity to explore that with the Taskforce.

*Information asymmetries and imbalances of power*

- 9.2 We consider that two important measures to tackle imbalances of power are data portability and genuine transparency for consumers (for example, tackling excessively lengthy and complex terms and conditions and cookie requirements). These measures can help consumers regain a degree of real choice and can help mitigate the imbalance between platforms with market power and their competitors.

*Measures needed for consumer control*

- 9.3 We agree with the Furman Review that it is key for consumers to have transparency and real control over who has access to their data and why. If consumers can be excluded from digital marketplaces/ecosystems purely for declining to share their data, this will have implications both for competition and efficient markets. Governments may need to consider data sovereignty as a strategic aspect of the UK's critical national infrastructure and the benefits, or otherwise, of free trade and data sharing.

*Open or common standards and interoperability*

- 9.4 As noted in our response to Question 5, we consider that open or common standards and interoperability are both important measures to increase consumer-side competitive pressures on providers. We would be happy to discuss with the Taskforce the progress we have made on these fronts in our open banking and open finance projects.

## **Procedure and structure of new pro-competition approach**

### **Question 10**

*Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?*

- 10.1 In our view, the key characteristics of speed, flexibility, clarity and legal certainty proposed by the Taskforce appear reasonable. As noted in the CFI, balancing these characteristics will be challenging. There is an inherent tension between speed and flexibility on the one hand, and clarity and legal certainty on the other.
- 10.2 However, this need not be regarded as a binary choice. As an example of balancing what can appear to be conflicting obligations, we introduced a restriction on the mass marketing of speculative "mini bonds" to retail customers. We said that we thought this gave rise to a significant risk of consumer harm and required immediate action which we undertook using our product intervention powers for a limited period, whilst we consulted on making permanent rules.<sup>80</sup>

<sup>80</sup> <https://www.fca.org.uk/news/press-releases/fca-make-mini-bond-marketing-ban-permanent>.

We are happy to discuss these particular powers in more detail with the Taskforce.

## Question 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.?*

- 11.1 We agree that the process and evidentiary thresholds for the different elements outlined (e.g. designation of a firm as SMS, content of a code, investigatory and sanctioning powers) are likely to have strong interdependencies. From our experience, there are a range of factors that will apply to each part of the process and procedures. These include balancing the ability to act quickly with rights to challenge by a firm.
- 11.2 We have a range of intervention powers, which we exercise to advance our statutory objectives. Our use of these powers in urgent cases is set out in our Enforcement Guide.<sup>81</sup> This explains that we may, for example, impose a requirement that takes place immediately. The Enforcement Guide sets out the type of factors that may be applicable when considering whether to impose an urgent requirement. However, the exercise of these powers is subject to a statutory notice procedure and a right of challenge to the imposition of a requirement by making representations to the FCA's Regulatory Decision Committee or taking action via the Upper Tribunal. Our ability to use these powers is set out in statute.
- 11.3 Our intervention powers are part of our suite of protective measures. We have a range of supervisory and enforcement powers in our regulatory toolkit. Having a variety of options enables us to take the most appropriate regulatory response to any particular set of circumstances. This should be taken into account when deciding on, any framework that is put in place for regulating digital markets.
- 11.4 The main factor that the Taskforce will need to consider is how to impose its procedural framework. Many of the FCA's powers are enshrined in statute, e.g. the power to impose financial penalties. Without a statutory basis for key elements of the framework, enforcement may be challenging.
- 11.5 Other factors the Taskforce will need to consider are unique to the field in which the proposed framework would operate. For example, it will be important to consider how such a framework will apply to parties outside the United Kingdom and which online operators will fall within the scope of code. Careful consideration of international enforcement will, in particular, be key, so that any future regulator can take steps against companies outside the UK. Finally, given the rapid change in the digital world, it will be essential that the framework is reviewed within appropriate timeframes and with sufficient frequency.

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<sup>81</sup> <https://www.handbook.fca.org.uk/handbook/EG/8/?view=chapter>.

## Question 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)?*

- 12.1 At this stage, without further discussion of the intended architecture for the new pro-competition approach, it is difficult to comment on any key areas of interaction between that and our existing regulatory regime.
- 12.2 What we can say at a high level is complementarity in terms of approach and procedure will be critical to ensure equality of arms in terms of regimes to be applied. This is essential as the FCA progresses its work in relation to online harms in financial services, for example with respect to high risk investments.<sup>82</sup> We welcome the opportunity to discuss our ongoing work on this and to assist the Taskforce develop its thinking in relation to the interactions between these important, developing and connected regimes.

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<sup>82</sup> Speech by Charles Randell, Chair of the FCA and PSR, to a virtual roundtable of bank chairs hosted by UK Finance, 16 June 2020 at <https://www.fca.org.uk/news/speeches/financial-system-support-recovery>: "We need a framework to stop social media platforms and search engines from promoting unsuitable investments, including scams, to ordinary retail consumers. It is frankly absurd that the FCA is paying hundreds of thousands of pounds to Google to warn consumers against investment advertisements from which Google is already receiving millions in revenue. We will be saying more about the issue of high risk investments in the near future."