Google

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BY EMAIL

Re **Digital Markets Taskforce: Call for Information**

Well-designed regulation benefits suppliers, customers, and consumers in digital markets. Independent regulators give consumers confidence that their interests are being protected as they shop, search, and socialize online. And protection against opaque or unfair practices means business customers will be more likely to use intermediary platforms in the long-run.

We appreciate the opportunity to continue to contribute ideas and evidence to the discussion of how existing competition rules can be adjusted -- or new rules introduced -- for the UK in the digital age. We set out below our responses to the Digital Markets Taskforce's (**DMT**) specific questions. In sum:

- We believe that **a Code of Conduct (Code), administered by the Digital Markets Unit (DMU) could have a positive role** in providing greater clarity about the rights and responsibilities of digital platforms, and ensuring that the rights of business customers and consumers are protected.[1]

- **Determining which platforms qualify as Strategic Market Status (SMS) firms is a complex exercise that requires further analysis**. It will need to ensure that Code rules apply only to markets where SMS firms have the requisite degree of market power. Digital platforms often operate using different business and monetisation strategies, across multiple markets, geographies, and sectors, with varying degrees of competitive strength in each.[2] Regulators should not favour or discriminate against any business, business model, or technology. In certain sectors, the platform may have market power; in others, it may be a new entrant or marginal player. It would be misguided for SMS designations to be evaluated by reference to the position of an entire company or corporate group.

- The appropriate addressees of the Code may depend on the particular rules or principles at issue. Certain rules may be appropriately addressed only to SMS firms. For harms that can arise regardless of platform's size or market position, **some rules may need to apply on a**

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1 *See e.g.*, J. Tirole, Competition and the Industrial Challenge for the Digital Age, April 2020, p.27 ("*Institutional change will be crucial to make competition policy more agile and effective. The balance between anticipating evolutions and reacting ex post should tilt more toward the former. This requires collecting information about dominant firms and their markets, designing codes of good conduct (and making more use of business review letters, provided that the Authority can pick its fights), and the agencies' being given the ability to impose interim measures*").

2 There are also platforms that focus exclusively (or almost exclusively) on a particular sector, but which nonetheless occupy powerful market positions in their area of focus -- such as TV and movie streaming (Netflix) and music streaming services (Spotify) -- or in a particular geography (*e.g.*, Stubhub's position in the UK secondary ticketing sector).

sector-wide basis (*e.g.*, greater transparency over fees, ensuring consistent privacy standards, enabling data portability, approaches to default setting, and unfair sales methods[3]).

- The provisions of the Code ought to promote competition and innovation from all digital platforms and should promote platforms entering or expanding into new markets. **Any new rules ought to enhance competition and consumer welfare and will require regular reviews and updates to ensure that regulation keeps pace with market developments.** To that end, we agree with the Competition and Markets Authority (**CMA**) that it would sensible to agree high level principles that could be applied across different types of platform (*e.g.*, a measure to address actual or perceived conflicts of interest where a platform owner competes on the platform), complemented by platform-specific guidance that depends on the technologies at issue (*e.g.*, what this means in the context of ad tech services as compared to what this means in the context of an app store or marketplace).

- **The Code should allow concerns to be resolved quickly, consensually, and in a way that preserves incentives to innovate and invest.** In particular, to ensure effective administration of the Code, the DMU could deploy a combination of reputational sanctions and referrals of unresolved matters to the CMA, Information Commissioner's Office (**ICO**), or the Office of Communications (**Ofcom**) for enforcement, recognising that the DMU will sit within a constellation of agencies that oversee the digital sector. Further-reaching orders (*e.g.*, powers to suspend or reverse product changes) would, as the CMA notes in several places in its Final Report, be invasive and require safeguards, including rights of defence and appeal.[4] As the Final Report notes (para. 8.255ff.), a pragmatic approach to new rules could involve a sequencing of new measures to test how markets respond.[5]

- The Call For Information discusses other measures that would fall outside the Code, such as data access and separation of business units. As the CMA's Final Report notes (para. 7.16), these measures would entail significant costs and could harm innovation and investment. **Objectives of the most extreme types of proposed intervention could be achieved proportionately through other means**.

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3 *See e.g.,* CMA, Hotel booking sites to make major changes after CMA probe, concerning alleged practices such as "*giving a false impression of the availability or popularity of a hotel or rushing customers into making a booking decision based on incomplete information*" and misleading discount claims that were based on "*comparisons with a higher price that was not relevant to the customer's search criteria*". Changes were made by a range of participants in online hotel bookings; not only those with market power.

4 CMA, Final Report, Online Platforms and Digital Advertising, 1 July 2020 (**Final Report**): "*These powers would follow an investigation into a breach of the code that balances reasonable rights of defence against the need for prompt decisions*" (para. 7.95); "*To allow for appropriate rights of defence, we envisage that timescales for considering the imposition of fines would be longer*" (footnote 450); and "*We would expect that there would be a right of appeal on judicial review grounds by the SMS firm or other materially affected person against decisions of the DMU. This would enable a timely review of the DMU's decisions in line with other regulatory regimes*" (para. 7.99).

5 The DMU's function is arguably to create conditions in which markets can be effectively competitive without the need for *ex ante* regulation. Regular review of powers granted ought therefore to involve a determination of whether market conditions mean that those powers are still needed or can be withdrawn.

We would welcome the opportunity to discuss these matters with the DMT further.

Scope Of A New Approach

1. ***What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:***
    - ***The Furman Review refers to 'significant market power,' 'strategic bottleneck', 'gateway', 'relative market power' and 'economic dependence':***
        - ***How should these terms be interpreted?***
        - ***How do they relate to each other?***
        - ***What role, if any, should each concept play in the SMS criteria?***
    - ***Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?***
    - ***What evidence could be used when assessing whether the criteria have been met?***

In determining the appropriate criteria for SMS assessments, we think three principles ought to be considered. First, SMS designations should be business model agnostic. Second, SMS assessments should be reviewed periodically. Third, some rules ought to apply on a sector-wide basis.

I. SMS designations should be business model agnostic

We believe the DMU should apply SMS designations in a way that minimises the potential harms from asymmetric regulation (*i.e.*, the risk of distorting competition and exposing consumers to harm from players falling in and out of scope of new rules based on arbitrary and/or out-of-date designations).

The prevailing view appears to be that SMS designations would be determined based on consideration of three factors: market power, gateway functionality, and dependency. These are not clear cut criteria. The DMU would therefore need to ensure that there is clear guidance for firms, and consistent application of these factors across varying contexts.

- ***Enduring market power.*** Recent competition enforcement demonstrates the range of platforms that have been found to have market power (*e.g.*, Microsoft, Google, Facebook, Amazon, and Apple) and other platforms may be found to have market power in the future (borne out by the CMA's investigation into online auction platform services). Therefore, the SMS assessment should recognise that a range of platforms -- operating a range of different business models (*e.g.*, ads-funded, subscriptions-based, commissions-based, hardware sales) -- may hold 'market power' in different circumstances and *vis-à-vis* different platform participants.
- ***Strategic bottlenecks and gateways.*** Platforms operating a range of different business models might be said to act as gateways for businesses to reach consumers. Developers and consumers connect through app stores. Large smartphone manufacturers determine how users

engage with particular apps or services. Software developers and desktop or laptop manufacturers operate through desktop OSs. And merchants find buyers through e-commerce sites. In each of these sectors there may be firms that hold a strategic or gateway position at a particular moment in time (*e.g.*, during the Covid-19 pandemic). Other sectors may also be characterised by gateway platforms. For example, vertical search services -- not only general search services -- can act as important gateways (online travel agencies are likely to be significant sources of traffic for airline and hotel bookings).

- ***Relative market power and economic dependence.*** The CMA's Final Report describes a situation where a "*platform enjoys a powerful negotiating position resulting in a position of business dependency*."[6] All platforms through which a significant proportion of traffic -- or highly monetising traffic -- is channeled ought to be treated as satisfying this criterion.

A version of the 'significant market power' (**SMP**) test could potentially take account of these considerations within an established analytical framework. The SMP test has been in place and updated over the course of almost two decades, has been clarified through guidelines, and is applied through established systems of periodic SMP assessments. These assessments can take account of a range of evidence, such as shares of customers and consumers, barriers to entry, control over hardware and software on devices, control over sales or distribution channels.

II. SMS assessments should be reviewed periodically

SMP or SMS assessments should be reviewed periodically. Digital markets are fast-moving, and companies with seemingly formidable competitive advantages can lose competitive strength quickly. And inefficiencies can arise where regulations fail to keep pace with market changes. For example, the hard copy Yellow Pages publication used to be considered a powerful market player and was subject to fee caps and restrictions on publishing new products. But these interventions were only revoked in 2013, long after the print version of Yellow Pages had lost its former competitive significance and had been largely displaced by online directories. To ensure the Code remains relevant and reflects competitive realities, the DMT ought to carry out regular reviews of whether businesses should have SMS designations added or removed.

III. Some rules ought to apply on a sector-wide basis

Several of the contemplated provisions of the Code appear to us designed to address consumer harms independent of the SMS/non-SMS status of a platform. If that is the case, the benefits to platform users would be maximized by ensuring a consistent application across all players in the sector.[7]

Perceived concerns about digital services -- such as those relating to privacy, transparency, and ranking decisions -- arguably apply regardless of the size of the service provider or its business model. For example, the Guardian Media Group brought a high-profile claim against the Rubicon Project in respect

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[6] Appendix U of the Final Report, para. 17.

[7] As a general matter, regulations governing the digital sector are consistently applied on a sector-wide basis (*e.g.*, the General Data Protection Regulation (**GDPR**) and the Platform To Business Regulation).

of alleged hidden fees, and concerns about transparency and objectivity in search rankings have been raised by restaurants that are listed on Yelp.

We think provisions of the Code addressing these kinds of issues should apply equally to all firms in the relevant sector, not merely a subset. We therefore agree with the Call For Information's proposal that certain remedies could be applied to non-SMS firms, including "*to address behavioural biases, information asymmetries, barriers to switching or coordination failures*" (para. 2.17).[8] Rules that aim to promote user choice of services could fall into this category of remedies, consistent with similar consumer protection rules.[9]

There may be circumstances, though, in which it could be appropriate to introduce rules for a smaller group of firms, including: (i) where the prohibited conduct is of concern only when carried out by firms with SMS status; or (ii) where the costs of compliance are so much higher for new entrants than incumbents that they constitute a barrier to entry.[10] It is difficult to anticipate in advance which rules might satisfy one or both of these conditions. Therefore, the DMU ought to consider this question on a case-by-case basis.

In making this assessment, the DMU should take account of the risk that applying regulations to only certain firms in a given sector could: (i) raise the costs -- and limit the activities -- of those companies relative to their rivals, thereby distorting competition; (ii) expose customers of out-of-scope companies to harm; (iii) create a regulatory framework that is complex to administer; and (iv) reduce companies'

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8 In the context of consumer protection, the CMA has investigated these (and other) issues which arose due to auto-renewal terms in contracts offered by anti-virus software providers, leading the CMA to contact more than 16 providers.

9 The consumer credit industry offers examples of regulatory intervention designed to ensure that a consumer is fully aware of options available to them, both prior to entering into a contractual commitment and throughout the life of such commitment. Under BCOB 4.1.2 of the FCA Handbook, a firm which notifies a customer of a material change to the interest rate applicable to a retail banking service which that customer has contracted to receive must also inform that customer that they may wish to switch to a comparable service offered by another firm, and that the incumbent firm will assist the customer in making that switch. Similar requirements apply in the mortgage industry, where lenders must, in certain circumstances, notify customers if a more affordable mortgage becomes available with another lender and provide information as to how to switch (MCOB 11.9.14(5)).

10 *See e.g.*, Opinion of Advocate General Jacobs of 28 May 1998, *Bronner*, C-7/97, EU:C:1998:264, para. 66 (if "*cost [...] alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market*").

incentives to grow beyond a certain size. Certain studies have identified instances where inconsistent regulation has left gaps in consumer protection and less competition.[11]

2. ***What implications should follow when a firm is designated as having SMS? For example:***

    - ***Should an SMS designation enable remedies beyond a code of conduct to be deployed?***
    - ***Should SMS status apply to the corporate group as a whole?***
    - ***Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?***

The Call For Information -- like the CMA's Final Report -- envisages that SMS firms could be subject to a Code. We believe that the Code could have a positive role in the digital sector, provided it is appropriately scoped and the content of the Code maintains innovation and investment.

SMS designation ought not, though, to lead to other remedies that would fall outside the scope of the Code, such as interventions to require structural separations and data access (these issues are discussed further in response to Question 8).

- First, as the Final Report noted, these "*would be very significant interventions, the costs and benefits of which would need to be considered very carefully*" (para. 7.16). As explained in response to Question 8, several of the contemplated interventions could, depending on how they are implemented, deter innovation, reduce efficiency, and undermine the value of proprietary algorithms and businesses that have been built up through large-scale private investment. SMS-specific interventions that effectively cap or limit returns deter risky but economically desirable investments, thereby hindering innovation and economic growth.

- Second, granting the DMU discretion to implement these changes at will would undermine the legal safeguards that are built into the existing antitrust and market investigation regimes, including a requirement to identify adverse effects on competition, respect parties' rights of

[11] For example, the CMA published a policy paper in 2015 on creating 'An effective regulatory framework for higher education.' This paper identified significant concerns arising from applying regulations to certain higher education institutions but not others. In particular, it found that gaps and discrepancies in the scope of regulatory oversight could (i) distort competition between higher education providers, and (ii) lead to worse outcomes for students (*i.e.*, consumers). The CMA's paper stated that: "[The] *regulatory gap creates a risk that poor quality provision by providers that are not subject to direct QAA scrutiny will not be noticed and addressed promptly, thereby causing detriment to students and the reputation of the sector. Such uneven application of the quality assurance regime also risks distorting providers' incentives to provide quality.*" (pp.22-23 and 27). *See also* a 2006 note by the European Commission's former Chief Economist. It relates to the approaches that regulators have taken to regulating mobile termination rates, noting that "*Despite all the flaws of asymmetric regulation, some countries are still regulating mobile termination charges on an asymmetric rather than symmetric basis*" (p.11). The Note pointed out that requiring larger operators to reduce their charges, while allowing others to set higher charges, "*may be expected to harm the competitive process and reduce the incentives to efficiency*." In addition, this approach could create "*situations where the small firm will indeed prefer to stay small for a long time to keep the benefits arising from this inappropriate form of protection. In other words, the very same policy that arguably tried to make the small firm more aggressive, ends up achieving the opposite effect*" (p.12).

defence, ensure that remedies are proportionate, and provide for rights of appeal. These safeguards, for example, are essential limits on the already wide-ranging powers of the CMA to mandate behavioral and structural changes following a Market Investigation Reference without having to identify a violation of competition law. Giving the DMU discretion to implement such measures without any finding of an 'adverse effect on competition' or a violation of competition law would circumvent both the market investigation and antitrust enforcement regimes.

- Third, businesses operating in digital markets would be unable to plan effectively for the future if they could be subject to far-reaching remedies at the DMU's discretion. This is a concern not only for SMS firms but also counterparties and other players (*e.g.*, advertisers, publishers, OEMs, and consumers) who would be negatively affected by cancelled or delayed product launches and investments due to the threat of such interventions.

- Fourth, the CMA's Final Report counsels seeing how the Code operates in the first instance before deciding whether further interventions are necessary, including to ensure that the costs and benefits can properly be weighed (para. 8.256). Indeed, the Code may be able to address the goals of these interventions in a more proportionate way. For example, the contemplated Code requirements to allow customers 'open choices' in the ads intermediation space could achieve the same outcome as operational separation of demand- and supply-side platforms without sacrificing efficiency.

- Fifth, conferring such extensive powers of intervention on the DMU would likely lead to more contested and adversarial proceedings under the Code, leading to slower outcomes and less effective cooperation (*e.g.*, on remedy design). This would be inconsistent with the model of a regulator that operates at speed and largely by consent, as contemplated in the Furman Review.

SMS designations should apply to identified business activities in specific markets within a corporate group. Large digital platforms tend to operate across multiple markets and sectors, with varying degrees of competitive strength in each. In certain sectors, the platform may have market power; in others, it may be a new entrant or marginal player. Conversely, companies with a smaller market capitalisation may nonetheless hold market power in particular markets where they operate. Accordingly, SMS designations ought to be evaluated by reference to specific business activities in specific markets; not by reference to the position of the entire company or corporate group.

The provisions of the Code ought, therefore, only to apply to firms in their core markets where they are found to have SMS.[12] This could, we think, include anti-competitive leveraging conduct in a core market. It is unclear to us why distinct rules would also apply to conduct in a so-called 'adjacent' market. Applying Code provisions outside firms' core markets would create a risk of deterring pro-competitive market entry through excessive regulation, thereby depriving SMEs and consumers of attractive new products.[13]

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[12] *See e.g.*, G. Federico, F. Scott Morton, and C. Shapiro, Antitrust and Innovation: Welcoming and Protecting Disruption in Innovation Policy and the Economy (Eds. J. Lerner and S. Shern, University of Chicago Press), December 2019, p.127 ("*the same firm can be a market leader in one area and a disruptive upstart in another*").

[13] As has been commented elsewhere, an important component of rebuilding the economy post-COVID is to call for "*aggressive investment in new products, in new industries, in new factories, in new science, in big*

Impeding pro-competitive entry -- including by players that have a large presence in other markets -- would be a major concern.[14] UK consumers and SMEs benefit from digital platforms and other services providers entering new markets and developing innovative products. Tools and techniques that Google has developed primarily in the context of general search have led to increased quality and choice for consumers in a range of other sectors. Chrome offers such an attractive way of browsing the web that its open-source technology is being adopted by a range of other browser providers. Tools such as Google Maps and YouTube help SMEs reach potential consumers more effectively and cheaply than might otherwise be possible. And Google, Apple, Facebook, Amazon, Microsoft, and many others have all announced major AI initiatives (while AI and machine learning startups continue to attract investment from VCs, with 137 deals worth over $1.4 billion closed in Q2 2019). For example, Artificial Intelligence and machine learning are being deployed in medical diagnostics to improve cancer screening results.

Moreover, there are many sectors in which tech companies compete head-to-head, such as in cloud computing and operating systems. The European Commission's Chief Economist has noted that entry of platforms into new markets can increase competition, asking "*Who tells us we are not moving towards a model of competition with six, seven, eight platforms with different complementary patterns, some of them overlapping, and this could give us quite fierce competition?*" Consumers and SMEs would undoubtedly be worse off if SMS firms were impeded from using their skills, knowledge and assets to enter new markets and provide attractive services.

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

    - ***What are the criteria that should define which activities fall within the remit of this regime?***

    - ***Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.***

The notion of a 'digital' sector is not clear cut. The technology used to deliver goods and services is increasingly 'digital', and the distinction between online and offline is becoming ever more blurred. For example, the automotive sector has seen the development of car-sharing (and ride-sharing) platforms, autonomous vehicles, and in-vehicle operating systems, which have challenged existing business models. And traditional offline advertising is increasingly adopting programmatic solutions to deliver ads (*e.g.*, Sky AdSmart). An approach that designates certain markets as 'digital' and others as 'non-digital' is unlikely to reflect industry realities.

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leaps forward", which is best served by encouraging market entry (M. Andreessen, It's Time To Build, April 2020).

[14] *See e.g.*, G. Federico, F. Scott Morton, and C. Shapiro, Antitrust and Innovation: Welcoming and Protecting Disruption in Innovation Policy and the Economy 20 (Eds. J. Lerner and S. Shern, University of Chicago Press), December 2019, p.126 ("*Competition policy seeks to protect the competitive process by which disruptive firms challenge the status quo. Competition policy is agnostic regarding the type of firm or the type of innovation involved. Start-ups that grow rapidly can certainly be disruptive. Uber and Airbnb are prominent recent examples. But large established firms can also be disruptive, especially when they attack adjacent markets. Think of Walmart entering local retail markets, Microsoft Bing challenging Google in search, or Netflix producing its own video content*").

A better approach could be to recognise that the types of issue that the Code seeks to address affect a wide range of industries and a wide range of players, and that at least some provisions of the Code would need to apply equally to non-SMS firms. In determining the activities covered by the Code, the following assessments should, we think, be relevant:

- ***Identification of likely problems.*** The starting point for the regime should be to identify which market features or characteristics are causing competition problems that may warrant heightened scrutiny of particular players. In principle, the solution outlined in the Furman Review that the new regime should identify "*significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability*" (Call For Information, para. 2.13(a)) could be effective, although a case-by-case assessment would be needed.

- ***Identify any harmful gaps in pre-existing law.*** The Code could be used as a way of addressing harmful gaps in the existing law that allow perceived problems to occur and prevent them from being addressed. These gaps could be substantive (*i.e.*, existing law does not address a particular practice) or procedural (*i.e.*, issues making existing law ineffective, slow or unduly difficult to enforce). This stage of the assessment should also take account of whether existing law can address the identified problem without needing to be supplemented by further measures.[15]

- ***Weighing up the costs and benefits of additional intervention.*** Any new measures ought to promote competition and innovation. Achieving this goal requires both the costs and benefits to be taken into account and weighed up. Accordingly, the Code should incorporate in its terms the need for the DMU to test whether interventions are likely to enhance consumer welfare on net.[16]

- ***Consideration of what type of intervention is proportionate to the perceived problem.*** A range of possible tools can be used to address conduct that raises concerns, from formal sanctions to guidance. In fast-moving industries, where it takes time to understand the various

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15 This was borne out in a number of responses to the proposal for a 'fairness by design' obligation in the CMA's Interim Report into Online Platforms and Digital Advertising. The Advertising Association noted that "*Introducing a 'fairness by design' requirement appears to duplicate elements already covered by data protection law*"; the IAB stated that it was unconvinced by proposals that appear "*similar to requirements already established by the existing GDPR*", particularly while the "*GDPR [is] still in the process of being interpreted by both businesses and data protection authorities across Europe*"; and Snap noted that there is already "*privacy-by-design, age-appropriate-design and safety-by-design requirements to interpret and implement, not to mention multiple voluntary codes and charters companies are regularly pressured - rightly or sometimes wrongly - to sign up to*" and that "*we are fast approaching the point at which there will be little incentive to establish a consumer Internet business in the UK*" due to the regulatory environment.

16 The fact that regulation has benefits as well as costs is well understood. *See e.g.*, T. Philippon, The Great Reversal, 2019, p.143 (Regarding the deregulation of the airline industry that allowed EasyJet to enter the French market in 2008, and the 'unbundling' deregulation of the French telecoms industry that allowed Free Mobile to acquire a 4G license in 2011: "*I have already described in this chapter a long list of deregulation efforts spurred by the European Commission. These efforts were – and still are – critical to the success of the Single Market*"); and CMA, Regulation and Competition, January 2020, pp.3-4 ("*greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth*").

costs and benefits of a practice -- and where the consequences of product changes are uncertain -- proportionality plays a particularly important role in deciding how best to resolve a perceived concern, while preserving innovation and competition. In some cases, it may be sufficient to issue guidance on the circumstances in which a practice will raise concerns, and work with industry groups to develop relevant standards.[17]

The Furman Review described the need to achieve a balance between establishing "*sufficient breadth to future-proof [the new regime] against changing markets*" and "*concerns about sweeping powers and scope creep*" (para. 2.115). While legislation could set out the type of features that it is appropriate for the DMU to scrutinise, any designations of SMS will need to be based on a clear legal test and procedure, and evidence-based reviews. Regulatory uncertainty could lead to firms delaying or cancelling investment and the roll-out of new products, which would negatively affect consumers and SMEs.

The Furman Review's proposal for a periodic review of the scope of the Codes would help ensure that regulation keeps pace with market changes. This review could operate alongside the contemplated review of SMS designations.

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?***

We believe that promoting market entry and innovation across the entire economy will be important to the recovery of the UK economy in the wake of the COVID-19 pandemic.

One example of how digital technology has helped consumers, businesses, and governments manage the effects of the crisis is the contact tracing technology jointly developed by Apple and Google. Another example is that, from March to May 2020, more than 1 million businesses posted Covid-19 updates, with millions of clicks to retailers' websites each week. Moreover:[18]

- Google Search has displayed additional information in its local units to present Covid-19 specific information for shops (*e.g.*, in-store shopping or curbside pickups options), restaurants (*e.g.*, dine-in, takeout, or delivery options), delivery information (*e.g.*, no contact delivery), and temporary closures. And Google added features that let users purchase gift cards from -- or donate to -- their favourite local businesses.

- As businesses adjust to remote working, we are starting to see more interest in topics such as productivity, technology, and digital transformation on Google Search. Our newly launched Teach from Home hub provides information, training, and tools to help instructors keep teaching from home.

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[17] *See e.g.*, J. Tirole, Competition and the Industrial Challenge for the Digital Age, April 2020, p.26 ("*Firms that are both a marketplace/technological platform and merchants supplying this marketplace/apps cannot treat equally a rival offering that is inferior to its own. But self-preferencing has the potential to be anticompetitive, and economists should put more work on designing guidelines that would facilitate the authorities' dealing with such behaviors*").

[18] *See also* Sundar Pichai, Coronavirus: How we're helping, 6 March 2020.

- On YouTube, Learn@Home gathers resources for families from YouTube's most popular learning channels, and our YouTube Learning hub centralizes high-quality educational content from across YouTube. And our Grow with Google program, focused on supporting SMEs, will continue to offer free online tools and learning resources for small and medium businesses.

These developments show that platforms can create value for consumers and SMEs, even in the circumstances of Covid, including by (i) providing information for consumers directly in knowledge panels (*i.e.*, information boxes that appear on Google when users search for entities (people, places, organisations, things)) and other formats, and (ii) integrating new services on which SMEs can build their businesses.[19] They also underscore the innovative capacity and pro-competitive effects of Google -- and other digital platforms -- being able to roll out product changes and improvements at speed. It is essential that new regulation does not jeopardise these types of actions, which benefit consumers and SMEs.[20]

Moreover, the task of developing and enforcing Code provisions needs to take account of the possibility for competition in digital services to change in rapid and unpredictable ways, such as the implications of artificial intelligence for market entry; the ability of new firms and business models to disrupt established industries (*e.g.*, Netflix and TikTok); and the displacement of web apps by native mobile apps. Accordingly, any interventions will need to be proportionate, time-limited (*e.g.*, through the use of sunset clauses), and regularly reviewed.[21]

Remedies For Addressing Harm

5. ***What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?***

The existence and extent of anti-competitive effects arising from conduct by digital platforms cannot be assessed in the abstract. Those effects turn on the practices at issue, as well as the market conditions and economic context, and should be assessed on a case-by-case basis.

Competition agencies have identified -- or are investigating --allegations of anti-competitive effects arising from the conduct of a wide range of digital platforms and service providers, including platforms whose practices were not assessed in detail in the CMA's market study (*e.g.*, Amazon, Apple, and Microsoft). Undistorted competition and consistent customer protection require that other SMS platforms -- not only the ad-funded platforms addressed in the CMA's market study -- are included in

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19 Google has developed a range of free tools to help small businesses adapt: *see* Google, Open for Business.

20 The economic shock of the Covid-19 pandemic may also provide possibilities to improve our understanding of conditions and market dynamics in technology sectors (*e.g.*, how customer dependency may vary across different types of platforms). There is a strong case for the DMU being required to report on a regular basis on developments in the markets that may have implications for competition.

21 *See e.g.*, CMA, Regulation and Competition, January 2020, para. 1.16 ("*in dynamic markets more flexible forms of regulation can reduce the risk of deterring innovation, and therefore harming competition. Such approaches can include the use of sunset clauses for new regulation which are triggered after a fixed period of time or once certain criteria have been met. There can also be greater experimentation about different approaches to regulation*").

the scope of the DMT's work and the contemplated Code. And, as noted above, at least some requirements of the Code ought to apply to non-SMS firms too.

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?***

We think the structure contemplated by the CMA in the market study is an appropriate basis to develop the Code. High-level objectives and principles are better suited to fast-changing digital services than prescriptive or rigid rules, which risk becoming quickly obsolete. These principles can set general -- and broadly accepted -- standards that players in digital markets (or, indeed, any market) should aim to achieve. The principles of 'fair trading', 'open choices' and 'trust and transparency' are reasonable goals and are relevant to a wide range of SMS and non-SMS platforms. Supporting guidance will be needed to ensure that companies have certainty about what the Code requires and what steps they need to take in order to comply.

How those principles are interpreted and applied matters at least as much as the principles themselves. Accurately distinguishing pro-competitive innovation from anti-competitive conduct is important to preserve the benefits that digital platforms offer to consumers and business users. If the Code is to be used as a tool to facilitate consensus-building and to steer the design of new products and innovations, then firms will need clear and sufficiently detailed guidance on how the Code is to be interpreted, which will be updated over time.

The example of contemplated rules on 'self-preferencing' illustrates this issue.

There is a recognised risk that 'self-preferencing', whereby a digital platform owner gives preferential treatment to its own downstream products or services, can unfairly advantage the company's own services at the expense of rivals. At the same time, certain practices that some might label as 'self-preferencing' have led to product improvements. In *Streetmap.EU*, for example, the High Court of England & Wales found Google's practice of showing a Google Maps thumbnail at the top of search results pages to be an "*indisputable*" product improvement. Likewise, the Hamburg District Court found that Google's display of weather information at the top of search results for weather queries served "*to increase the overall attractiveness of [Google's] search engine*". This type of product integration creates a richer search experience and offers more relevant information, thereby saving users time, reducing search costs, and improving discovery. Indeed, efficiencies arising from vertical integration are well

understood in the economic literature, as discussed by the Commission's Expert Group for the Observatory on the Online Platform Economy.[22]

Faced with these kinds of trade-offs, it seems to us that the purpose of a Code (and supplemental platform-specific guidance) ought to be to provide more detail to an SMS firm as to the characteristics of problematic conduct, and the supporting evidence that is likely to be relevant to prove those characteristics, rather than trying to anticipate particular technologies and practices and prohibit them *ex ante*.[23]

For example, the following questions may be relevant to the assessment: (i) Does the new product design integration confer an undeserved advantage? (ii) Does the design increase the relevance of search results by providing more relevant information? (iii) Does the design benefit third parties by directing traffic to their sites? (iv) Does the design improve quality and benefit consumers (and has the platform carried out testing to prove that this is the case)?[24] (v) Does the design allow users to choose rival services (*e.g.*, through a choice carousel)? (vi) What is the competitive significance of the design?

This is consistent with the fact that competition authorities have resisted introducing a blanket ban on alleged self-preferencing, instead emphasizing the need for case-specific analyses. Google shares this view. On the one hand, allegations of self-preferencing may require scrutiny to ensure that competition and consumers are not being harmed; on the other hand, a blanket approach could deny users the benefits of innovation and product improvements.[25]

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22 Progress Report on Differentiated Treatment, Expert Group for the Observatory on the Online Platform Economy (July 2020), p.24: "*self favouring may improve static efficiency by eliminating double marginalisation and can also induce a platform to invest more at the platform level or at the level of integrated products/services*" (p.24).

23 In particular, we believe that interventions against vertical integration ought -- in the absence of prima facie evidence of likely anticompetitive effects -- to be preceded by guidance for firms to help them understand the circumstances in which long-term dynamic harms are held to outweigh short-term efficiency gains. In our view, this continues to be an area of significant uncertainty where the risks of chilling pro-competitive integrations are high.

24 Similar questions are discussed in G. Federico, F. Scott Morton, and C. Shapiro, Antitrust and Innovation: Welcoming and Protecting Disruption in Innovation Policy and the Economy (Eds. J. Lerner and S. Shern, University of Chicago Press), December 2019, p.162 ("*Whether or not consumers are harmed depends on whether the platform owner's policies increase the overall value of the platform to users, the nature of competition among substitutes for the complement, and the ability to move away from the platform (which is a function of the degree of effective interplatform competition)*").

25 *Streetmap.EU v Google* [2016] EWHC 253 (Ch), para. 149 ("*Where the efficiency is a technical improvement, proportionality does not require adoption of an alternative that is much less efficient in terms of greatly increased cost or which imposes an unreasonable burden (at the very least in a case where there is no suggestion that the conduct impugned was likely to eliminate competition)*") and para. 171 ("*I consider that Google is appropriately concerned at the accuracy and relevance of the information on its SERP, and that the Maps OneBox is presented as Google's own offering. There is in my view a material difference between, on the one hand, Google displaying a blue link to a third party website which the user finds is inaccurate once it is accessed, and on the other hand, information presented directly on the Google SERP which proves irrelevant or unreliable. The quality of the SERP is (along with speed of response) the key means by which search engines compete. The Maps OneBox is not simply a convenient means of access to a full-size map, but information for the user in its own right*"). Similar issues arise in the context of local search. Google's search results pages cannot, as a technical matter, display dedicated results from third-party local search services without seriously degrading the quality of its search results, which would undermine

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?***

Google agrees with the DMT that the "*UK merger control regime is overall fit for purpose*" (Call For Information, para. 2.26). The jurisdictional thresholds capture material acquisitions by large digital platforms, particularly given the flexible 'share of supply' test, including investigations into acquisitions by Amazon, Facebook, and Google. In recent merger decisions, the CMA has developed frameworks to investigate features such as network effects, multi-homing and other characteristics in digital markets (*e.g.*, through surveys and econometric analysis). The CMA has developed innovative lines of inquiry to investigate losses of potential competition, in particular by assessing whether deal valuations reflect expected efficiencies or a premium for eliminating competitive constraints (an important component of the *PayPal/iZettle* merger review). The CMA has consulted on updating its Merger Assessment Guidelines with a view to reinforcing the CMA's substantive analysis still further. And the CMA has carried out intensive reviews of digital mergers, as borne out by Google's own experience in *Google/Waze*[26] and *Google/Looker*.[27]

For the reasons set out below, there is no reason to treat digital mergers as a distinct class -- or as being particularly likely to raise concerns -- and changes to the current regime would raise significant practical problems, and legislation to introduce more stringent merger control rules could deter or delay pro-competitive deals. Proposals to require SMS firms to notify all of their proposed acquisitions and introduce "*a more cautious standard of proof*" (Call for Information, para. 2.28) should not therefore be pursued.

Acquisitions by large digital platforms are often pro-competitive. Contrary to the narrative of digital markets being characterised by 'killer acquisitions,' the Furman Review recognized that "*the large majority of the acquisitions by large digital companies in recent years have likely been benign or beneficial for consumers*." The European Commission's special advisers' report on 'Competition Policy for the Digital Era' noted the substantial efficiencies that digital acquisitions can bring about. And there

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the quality of the general search service provided to consumers. *See also* F. Curto Millet, S. Lewis, and P. Stoddart, *Local Search Quality: A Rebuttal of Kim and Luca*, SSRN, June 2019.

[26] The CMA subjected Google's 2013 acquisition of Waze to a careful review, even though Waze had no meaningful UK revenue at the time it was purchased. The CMA cleared the acquisition after its review found that the merger would not result in a substantial lessening of competition, and in fact enabled Google Maps users to benefit from Waze's real time traffic data. This conclusion was confirmed by the Lear ex-post review of past mergers in digital markets. *See* Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, para. II.116 ("*efficiencies that resulted in the improvement of Google Maps were realized to the benefit of all Google Maps users. Google Maps' high market penetration… means that a large number of users have benefitted from them, making efficiencies quite significant*") and para. II.130 ("*the merger has enabled Google Maps and Waze to exploit their complementarities and generate efficiencies. These efficiencies are clearly merger-specific and should be taken into account when assessing whether the decision has proved to be beneficial or detrimental to consumers*").

[27] The CMA scrutinized Google's acquisition of Looker in 2019 "*more carefully than [it] would have done in the past*" (Mike Walker, remarks at 4th Innovation Economics For Antitrust Lawyers Conference, July 6, 2020). *See also* the Phase 2 investigation into the Taboola / Outbrain merger inquiry.

are ample success stories of targets that have been expanded and 'supercharged' following acquisition. For example:

- When Google acquired Android in 2005, not a single Android smartphone had been released. Now there are approximately 2.5 billion active Android devices worldwide, including cheaper models that have made smartphones available in the poorest countries in the world. Android competes vigorously with iPhones in the UK and across the world.

- When Google acquired YouTube, third party analysts asked "*whether Google's $1.65bn investment is a gargantuan folly*" and how Google could solve the problem that "*much of YouTube's content is not exactly advertiser friendly*." In fact, the deal has led to pro-competitive efficiencies that have contributed to YouTube's success. Today, YouTube has over 2 billion users, providing ways for artists and small businesses to show their content and services to consumers worldwide.

- By the time Google acquired Kaggle, a small company that hosts data science and machine learning competitions, in 2017, it had been around for approximately seven years. Within approximately two and a half years since it was acquired, Kaggle quadrupled its user base, released Kaggle Learn, which provides micro-courses in data science; integrated Google's BigQuery which allows users to analyse data faster; and used Google funding to increase headcount, invest in additional computing resources, and offer a more generous free tier for users.

Acquisitions by large digital platforms provide an important 'exit option' for innovators and route to market for their technologies. The Furman Review noted that "*being acquired is also an important exit strategy for technology start-ups, providing significant incentive for investors to provide funding to risky projects and support market entry*" (para. 3.102). The European Commission's special advisers' report found that "*the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation*" (p.111). And, as Commissioner Vestager said on March 28, 2019, it would be "*very, very far-reaching*" to tell company owners "*as a rule of thumb that you cannot sell your business*." The prospects of a buyout by existing technology companies can provide entrepreneurs and start-ups with an exit option, which encourages them and their financial supporters to invest in building new companies in the first place. Buyouts also provide an important alternative to IPOs, which firms may be reluctant to undertake due to regulatory burdens and uncertainty, among other considerations.

Evidence of 'killer acquisitions' is weak in the digital sector. So-called 'killer acquisitions' have been defined as "*acquisitions for the purpose of killing or taming a potential future threat to the acquirer's core business*." There is little evidence of such acquisitions occurring in the digital sector. A recent paper estimates what proportion of acquisitions by large tech platforms could, even theoretically, fit a 'killer acquisitions' pattern. Even on what the paper admits is an over-inclusive basis, it finds that just 11 out of 117 deals pass the broad-brush criteria of (i) a deal valuation in excess of $100 million, and (ii) a target that is horizontally or vertically connected with the core businesses of the acquirer. And the paper does not claim that these deals were in fact killer acquisitions; a detailed review of the evidence would be needed. Indeed, the 2019 CMA-commissioned *ex post* review of digital mergers did not conclude that the deals under review ought to have been blocked (in the case of *Facebook/Instagram*, the report

noted that "*Instagram's growth has significantly benefited from the integration with Facebook*" (para. II.83)), even if certain aspects of the analysis could have been conducted differently.

It is not clear that a lower standard of proof is workable. The Furman Review rightly rejected the idea of a presumption against acquisitions by large digital platforms, which would be disproportionate and could undermine the benefits of such acquisitions, described above. The alternative proposal was for a standard based on a 'balance of harms', which was rightly rejected by the CMA since there are "*practical challenges in applying this kind of test in a transparent and robust way*" and it creates a risk of "*unintended consequences*". The Call For Information does not indicate what the "*more cautious standard of proof*" would entail or how it differs from the options already rejected. The Call For Information also discusses the possibility of a separate merger assessment of data protection or other non-competition concerns. No details are provided, which makes it difficult to comment on the proposals meaningfully. Nonetheless, it is hard to see a basis for this far-reaching proposal in the absence of evidence that mergers involving large digital platforms lead to violations of data protection law.

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?***

The types of additional remedies that the Call For Information discusses (*e.g.*, remedies concerning data access and structural intervention) may increase the costs -- and decrease the rewards -- of conduct that promotes innovation and generates efficiencies, as explained below. This, in turn, runs the risk of deterring practices that benefit UK firms and consumers. Any such changes should therefore be considered only after a detailed analysis of the type that a market investigation is designed to carry out, with concomitant rights of defence, established legal standards, and obligations to respect the principle of proportionality. A consultation by the DMU is not -- and should not be treated as -- a substitute, absent the type of established safeguards that characterise the market investigation process.[28]

We think there is, in fact, a strong case for the goals of these interventions being more effectively and proportionately pursued through other already existing means. For example, digital platforms could work with the CMA, ICO, and industry to identify specific use cases where data access or interoperability would promote innovation, and cooperate on ways to facilitate data sharing without jeopardising privacy or incentives to invest. On data access, Google has adopted an approach that is open but respectful of users' rights by making large-scale search datasets publicly available for free (*e.g.*, through the Google Trends and Natural Questions tools, along with multiple other free and open source datasets). And

[28] While para. 8.255 of the CMA's Final Report appears -- rightly in our view -- to anticipate a sequencing of measures from the least to the most intrusive, it is not clear how accompanying procedural safeguards would strengthen in conjunction. This seems to us an important consideration for the DMT.

Google has developed data mobility tools that enhance user choice without sacrificing innovation or variety. Specifically, Google has played a leading role in the Data Transfer Project, together with Facebook, Microsoft, Twitter, and various other digital service providers (including Apple, which joined the project on 30 July 2019) to develop a system of data mobility.

Moreover, there is a fundamental choice about what type of regulator the DMU is intended to be. One model is that of an agency with far-reaching powers of intervention, but which accordingly requires formal procedures to be followed, full rights of appeal for regulated companies, and which therefore may take longer to reach decisions following -- to some extent -- an adversarial process. An alternative model is to have a regulator that achieves changes predominantly through collaboration with industry and has available certain forms of sanction if solutions are not achieved consensually (discussed further in response to Questions 10 and 11). The CMA's Final Report noted the Furman Review's aim "*that fast resolutions could often be achieved through a participative approach, within weeks, to ensure behaviour can be changed*" and that "*although the formal route of investigation will be a central part of the DMU's toolkit, it would not be practical or desirable to apply it to every breach of the code*"; accordingly, there would be an emphasis on remedy design rather than establishing fault (paras. 7.34 and 7.37-7.39). These goals -- ensuring quick resolutions through a participative process, and using industry expertise to design remedies -- are less likely to be achievable when far-reaching, structural remedies are at stake.

Structural separation. As a starting point, we think that these remedies are unlikely to achieve pro-competitive outcomes that would not already be achieved by the proposed Code. For example, Code provisions giving effect to the principle of 'open choices' in ads intermediation can achieve the same outcome as operational separation but without the same loss of efficiency or business disruption (see Question 9 below). The CMA accepts in its Final Report that "*vertical integration can allow intermediaries to realise technical efficiencies*" (para. 62). Interoperating ad tech products, for example, allow ads to be shown with the minimum possible latency and allow advertisers to take advantage of additional reporting metrics.[29] There is no good reason to think that it would be welfare-enhancing to sacrifice these benefits in favour of structural separation. Moreover, the CMA recognised in its Final Report that "*a form of operational separation [between Google's Ad Manager and demand-side platform businesses] is already in place for Google's internal purposes*" (para. 8.202).

Data access. Any assessment of data access remedies should take account of the varying significance of different types of data, both in terms of (i) enhancing the competitive abilities of data recipients, and (ii) any negative consequences of data access on competition and investment.[30] Proposals to share user-level datasets comprising both click and query data score poorly on both fronts. The evidence shows that 'more data' does not lead to improvements in rival search engines' results. For example, the

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[29] The fact that Google's take rate across Demand Side Platforms and Supply Side Platforms is lower than the industry average is consistent with it having achieved efficiencies. Google recently published two blogs illustrating that Ad Manager publishers keep over 69% of digital advertising revenues generated, and news publishers keep over 95% on average (Sissie Hsiao, How our display buying platforms share revenue with publishers (23 June 2020); and Bonita Stewart, A look at how news publishers make money with Ad Manager (23 June 2020)). The CMA's Final Report found that "*on average in 2019, publishers received around 65% of initial advertising revenue that was paid by advertisers*" (para. 2.70).

[30] *See e.g.*, CMA's Final Report, para. 8.41 ("*The overall effect on innovation is likely to be dependent on a number of factors, and in particular the specific type of data to be shared (query data alone, click and query data, click and query data and search results, or even all of these plus value-added services such as quick answers)*").

Microsoft/Yahoo! deal doubled Bing's query volume overnight but failed to improve the relevance or monetisation of Bing's search results. In other words, having more data did not lead to an improvement in rivals' performance. Rather, improvements come from technical innovation and rigorous user experiments (in 2019 alone, Google ran over 464,065 experiments, resulting in more than 3,620 improvements to Google Search).

The evidence also shows that sharing user-level click and query data would not enhance competition to find the best results; rather, click data would inform rivals as to how Google answers a particular query.[31] It would therefore enable rivals to clone Google's search results in a systematic way, reducing product diversity and chilling incentives of Google and its rivals to invest in product improvements. This is borne out in the comments of one of Google's search rivals, Mojeek.[32] And as the CMA's Final Report comments, "*there is a risk, if such a remedy included a requirement to disclose the outputs of proprietary search algorithms, which are the result of investments in search and associated infrastructure, that this could dampen incentives for Google to innovate and improve its algorithm by enabling free riding*" (para. 8.40). Moreover, sharing such granular data could expose users to privacy violations, as borne out in both historical examples[33] and a paper in Nature by an author of the EC Special Advisers' Report on digital competition.[34] Accordingly, we agree with the CMA that defining the scope and operation of any data access remedy is critical to avoid creating negative effects, both on privacy and innovation.[35]

Digital advertising transactions data. The CMA's Final Report proposes that the DMU would have the powers to introduce transaction or impression IDs, to facilitate transaction-level data sharing. This raises significant privacy concerns by allowing advertisers and publishers to join secure bid data with other information in a way that allows individual users to be identified. It would also allow 'pooling' of these

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31 This is not a mere hypothetical concern. Indeed, Bing has already engaged in this kind of behavior. Utilising query information that it was able to observe from users of Microsoft browsers who had issued queries to Google, Bing extracted information about Google's ranking and imported it into its search results.

32 Mojeek commented that *"Despite disagreeing with some of their practices, the search giants have spent billions of dollars on building and maintaining their own search index, it could therefore be seen as unfair to force them to open up what is essentially their product and share it with others, or to offer search query and click data they have obtained by way of that product… If these steps are made in the name of positive competition, it will actually just result in multiple search engines all offering the same service but under different banners. And whilst it's important that metasearch engines like DuckDuckGo and Startpage exist to offer users better privacy than mainstream search engines, they are not offering any new innovation with regards to improving the core element of search… instead we call for more search engines with independent search indexes and algorithms."*

33 For example, in 2006 New York Times journalists were able to re-identify 'Searcher No. 4417749' from anonymised AOL search logs.

34 *See also* the CMA's Final Report, para. 8.36 ("*We agree that concerns from a privacy perspective arise if the disclosure of search data could lead to the identification of users. This risk arises if the disclosed data includes personal identifiers or enables the reverse identification of users. We understand that this risk is heightened when information is disclosed as 'sessions', which provide a record of a consumer's searches linked together over time or by device through a single identifier*").

35 CMA, Final Report, para. 8.43 ("*In seeking to strike the right balance between overcoming barriers to entry and expansion and creating a risk of free riding, the DMU would need to pay careful attention to design, including precisely which data should be within scope and, potentially, whether third parties should be required to pay for access to the data*").

data, without user consent. The CMA's Final Report acknowledges that "*the privacy implications*" of these interventions "*would need to be carefully considered*" (para. 8.218).

In sum, data access and structural separation remedies are extreme measures. They require detailed analyses of the trade-offs involved and, in the case of shared data, the impact of overlapping legal regimes. In the UK, a legal framework already exists for making these kinds of necessary evaluations. A DMU could serve an important function by developing technical expertise and specialist information gathering processes, and publishing guidance for SMS firms. However, the powers to enforce the kinds of interventions raised in this question ought to reside with current enforcers and be subject to established procedural safeguards.

Interoperability requirements are potentially less far-reaching, although much depends on the nature of the interoperability and how it is enforced. That notwithstanding, interoperability requirements would likely always be technology-dependent and ought, therefore, to be industry-led. We believe that initiatives like the Data Transfer Project could serve as inspiration for the kinds of work that a DMU could be involved in.

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?***

As explained above, the definition of SMS firms should be drawn sufficiently widely that it avoids distorting competition between platforms based on their core products (*e.g.*, search engines, social networks, e-commerce, desktop operating systems, app stores) and business models (*e.g.,* ads-funded, commission-based, license fee or subscription-based, or sales of hardware). And, as also explained above, there are certain rules that ought to be applied to non-SMS firms too to ensure appropriate and consistent customer protection.

We suggest several measures that could potentially apply more broadly than SMS firms to tackle perceived competition problems:

- ***Data portability.*** Data portability regimes most effectively facilitate user switching, multi-homing and innovation when the maximum number of platforms take part. Rules on data portability or mobility should therefore apply on an industry-wide basis. For example,

participation in data mobility systems, such as the Data Transfer Project, could be mandated for some use-cases that have been demonstrated to impact materially entry and expansion.

- ***Fee transparency.*** Customers have an interest in fee transparency, regardless of the size or market position of the particular platform. There is no suggestion that concerns relating to fee transparency are less likely to arise when dealing with non-SMS firms (and the CMA's Final Report found that the "*evidence does not indicate that Google is currently extracting significant hidden fees*" (para. 5.242)).

- ***Data privacy.*** The GDPR is not limited to SMS firms; it is an industry-wide regulation and any enhancements or supplements to the GDPR that are included in the Code ought to be applied equally to non-SMS firms.

- ***Choice of services.*** As the Call For Information notes, "*behavioural biases*" may warrant interventions that apply to all firms (not only those with SMS). Consumers on any platform -- large or small -- may have an interest in being presented with a choice of frequently used services, particularly if there is otherwise a risk of their being defaulted to suboptimal services. These issues can arise on a range of different platforms -- mobile, desktop, web-based services, and more. And it may distort competition if some platforms are permitted to 'nudge' consumers towards a particular service, but others are not.

The Call For Information does not describe in detail the contemplated tool that would enable 'pre-emptive action' in relation to 'tipping' markets. There are several reasons to be cautious about creating powers to intervene in relation to markets perceived to be at risk of tipping.

- First, it is difficult to predict whether a particular market or sector is at risk of tipping. Sectors characterized by network effects, multi-sidedness, and data-intensive services have confounded theories that these characteristics lead inevitably to tipping. In food delivery, Deliveroo, Uber Eats, and JustEat compete in parallel, despite indirect network effects between restaurants and users. Likewise, there are multiple competing platforms in ride sharing (*e.g.*, Uber, Addison Lee, Kapten, Kabbee, Bolt, ViaVan, Ola), online travel services (*e.g.*, Booking.com, Skyscanner, Expedia, Trivago) and dating apps (*e.g.*, Tinder, Bumble, Hinge, Happn).

- Second, as the Call For Information notes, incentives to 'win' a market can encourage innovation and investment that might otherwise not occur (para. 2.38). In digital markets, firms may subsidise quality user-facing products in order to achieve sufficient scale for the product to be competitive and attractive to users (*e.g.*, Bolt offered riders up to 50% off their first ten trips). Doing so has benefits for platform users which may be jeopardized if such strategies were (mis)characterised as anti-competitive.

- Third, as the Call For Information notes, "*pre-emptive action may be more likely to lead to unintended consequences and/or undue burdens on business*" (para. 2.38). Such consequences could include (i) deterring growth, for fear of being accused of tipping the market; (ii) chilling legitimate competition through misdiagnosing a market as being likely to tip; and (iii) deterring investments or market entry by players that come with the knowledge, experience, and resources to offer attractive new services.

- Fourth, where markets are at risk of tipping the CMA has other tools at its disposal that avoid conferring such extensive power and discretion on the DMU. These include using interim measures in circumstances where the conduct is considered likely to amount to an antitrust violation, and using market investigations to address features of competition that appear to lead to tipping.

Procedure and structure of a new pro-competition approach

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

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.?***

Questions 10 and 11 are answered together.

The following principles are important to deliver effective outcomes: speed; flexibility; clarity; legal certainty; due process; proportionality; collaboration; and pro-innovation (**Guiding Principles**).

The sections below identify considerations we believe the DMT should take into account when designing the procedural framework for: (i) the designation of SMS; (ii) the format of the Code; and (iii) remedies and enforcement measures, in order to give effect to these principles.

Procedural framework

SMS designation criteria

When designing a procedural framework that covers the designation of SMS and the scope of the Code, Google encourages the DMT to consider the following Guiding Principles:

- ***Clarity and legal certainty.*** Any SMS designation should relate to identified business activities in specific markets within a corporate group so that the scope of that firm's obligations are clear. In order to achieve the requisite certainty, the DMU should specify the products and/or services that are subject to the Code.

- ***Flexibility and pro-innovation.*** New technologies develop and marketplaces change quickly in the digital economy (as acknowledged in the CMA's Final Report, para. 79). For example, small companies can rapidly achieve a prominent position displacing incumbents (*e.g.*, despite only being released globally in 2018, TikTok is now one of the most downloaded apps of the last decade[36] and ranked in sixth place in the global mobile app rankings by monthly active users for 2019[37]). It is therefore important that the DMU has flexibility to keep SMS designations under review. Inefficiencies arise -- and innovation is constrained -- where regulations fail to keep

[36] *See* App Annie, A Look Back at the Top Apps and Games of the Decade, 16 December 2019.

[37] *See* HootSuite, There Are More Social Media Users Today Than There Were People in 1971, January 2020; and AdWeek, App Annie: TikTok Was the Most-Downloaded App in Q1 2020, 2 April 2020.

pace with market changes. To ensure that the Code remains relevant and reflects competitive realities, the DMU should (as proposed in the Call For Information) be under an obligation periodically to review the SMS designations that it makes.

In addition, an SMS firm should be able to trigger a re-review by the DMU of its SMS designation where it considers that the factual basis on which the designation was made has substantially changed (*e.g.*, due to changes in the market such that the SMS firm no longer has a position of enduring market power or control). These 'special circumstances' reviews could take place in addition to the periodic reviews that the Call For Information envisages.

- ***Due process.*** SMS designations under the Code can have serious implications, such as requiring firms to change their business practices. The framework should therefore respect due process by providing for an appeals process under which firms can appeal an SMS designation decision and the scope of that decision. Appeal rights should apply when a firm is first designated as SMS, and when this designation is confirmed following a review (whether a periodic review or a review requested because of 'special circumstances'). To enable firms to assess their grounds of appeal, the DMU should also clearly outline the evidence upon which it is relying when making SMS designation decisions.

Format of the Code

Google agrees with the CMA that the Code should take the form of broad high-level principles, rather than detailed and prescriptive rules (Final Report, paras. 79-80, 7.67). Rules that are too detailed risk becoming obsolete quickly due to the "*complex and rapidly changing nature*" of the market (Final Report, para. 79).[38] When designing the Code, the DMT should therefore bear the following Guiding Principles in mind:

- ***Clarity and legal certainty.*** If not supported by sufficient practical guidance, it may be difficult for firms to know what is required under the Code. In this case, rather than promoting innovation and enhancing certainty, the Code could delay or deter new product launches in the UK. It is therefore vital that sufficiently detailed guidance that recognises how platforms operate in practice is developed iteratively with the firms regulated by the Code, to ensure there is clarity and certainty in the Code's application.

- ***Collaboration, pro-innovation and proportionality.*** The Code will introduce new rules and its application (at least initially) will be uncertain. Collaboration between firms and the DMU will be important to protect incentives to innovate; for example, a voluntary consultation procedure under which SMS firms could have the option to constructively engage with, and receive feedback from, the DMU with the aim of ensuring compliance with the Code.

  Additionally, the principles under, and guidance in respect of, the Code ought to be developed incrementally in consultation with industry and the impacted firms, with reference to precedent and with examples of practical applications for the companies that they will impact. It makes

[38] *See e.g.*, T. Philippon, The Great Reversal, 2019, p.4 ("*Regulation and technology are deeply intertwined. Technological change creates a permanent, and often beneficial, challenge to existing regulations*").

sense for principles to be introduced iteratively and tested before they are enshrined in a formal Code.

- ***Flexibility.*** The Code will need to be sufficiently flexible to recognise that digital business models, and the potential harms arising from them, differ from firm to firm. Google considers that the Final Report's proposal for individually-tailored Codes could be an effective way to retain this flexibility (Final Report, para. 81) (as explained above, the DMU could establish high level principles that could be applied across different types of platform, complemented by platform-specific guidance).

- ***Evidence-based processes.*** An evidence-based approach to enforcement is important. Otherwise, the Code risks penalising legitimate business conduct. The DMU should clearly outline the evidence upon which it is relying when deciding that there has been an infringement of the Code, so that the firm subject to that decision can effectively assess its grounds to appeal that decision.

- ***Effective triage mechanisms.*** A DMU is likely to become a 'clearing-house' for complaints about digital firms. Some of those complaints will merit investigation by the DMU. Others will not. We believe it will be important for the DMU to have a mechanism for rejecting complaints that are without merit and demonstrating this publicly. This will dissuade abuse, and allow for more efficient use of agency resources, as well as showing that any powers deployed are used in a proportionate and fair way thereby increasing public trust.

Remedies and enforcement measures

The design of enforcement is important to the nature and impact of the regime as a whole. The DMT should keep the objectives of flexibility, pro-innovation and legal certainty front of mind when considering this question. If the overriding objective is to implement a system that is efficient and nimble (with heavy duty enforcement in exceptional cases being left to the existing antitrust regime) then that will be facilitated by a framework that focuses on collaboration, consultation and conflict resolution rather than fault-based enforcement. In contrast, a regime with new far-reaching enforcement powers would need to provide for evidentiary standards in decision-making and rights of appeal that are commensurate to those powers. This is likely to slow down enforcement.

There are various possible approaches to enforcement that would retain the effectiveness of the Code as a guide to behaviour, while still providing for rapid enforcement and preserving incentives to innovate. This could include:

- ***Reputational sanctions*** where the DMU would publish decisions finding a breach of the Code and maintain a public register of all upheld complaints. This is similar to the sanctions most often used by the Groceries Code Adjudicator (**GCA**) and the Advertising Standards Authority (**ASA**).[39] A negative statement would be reputationally damaging with partners, consumers, and

[39] The ASA notes that while the "*vast majority of advertisers and broadcasters agree to follow ASA rulings*," for non-compliant parties "*[o]ne of our most persuasive sanctions is bad publicity – an advertiser's reputation can be badly damaged if it is seen to be ignoring the rules designed to protect consumers.*" In particular, the non-compliant advertiser's "*name and details of the problem with their advertising may be*

regulators, and because it is public it would require a response. For example, the GCA has reported a large reduction in Code-related concerns while using recommendations and reputational sanctions, rather than fines or mandating behavioral change orders.[40]

- ***A reporting obligation*** whereby firms that have been found to have breached the Code would be required to publish periodic reports on: (i) changes they have made to their practices that are relevant to the infringed part of the Code; and (ii) any measures taken to resolve the infringement. Platforms could also be required to disclose findings of Code violations to customers and suppliers, as well as in merger control filings.

- ***Referral of serious breaches*** to the CMA's antitrust and consumer protection directorates, the ICO, Ofcom, or other regulators to be investigated for possible violations of the relevant laws or regulations. The DMU's decision -- and evidence already gathered -- could form part of the relevant regulator's case file, thereby giving the regulator a headstart in any investigation. Indeed, the House of Lords Report on 'Regulating in a digital world' envisaged a 'Digital Authority' as having this type of coordinating role (p. 68, para. 30).[41]

If, on the other hand, the DMU is granted the more extensive enforcement powers proposed in the Final Report,[42] it will be important that the DMT's recommendations provide for procedural fairness in decision-making and commensurate rights of appeal. The proposed enforcement powers include quasi-criminal financial penalties and mandatory orders that will impact how firms use their IP rights, proprietary algorithms, and assets that they have invested heavily in creating. This will have far-reaching consequences on businesses. In particular:

- Decisions prohibiting, or requiring the unwinding of product changes or improvements that involve large-scale investments could have significant financial ramifications and hurt users that could otherwise benefit from those product improvements (*e.g.*, see our discussion of *Streetmap.EU* in response to Question 6). The proposed mandatory orders, together with the threat of fines, for Code violations is such that the proceedings could be equated to criminal proceedings for the purposes of the right to a fair trial under Article 6(1) of the ECHR. Such measures therefore warrant full procedural rights and on the merits appeal.[43]

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featured on a dedicated section of the ASA website, designed to appear in search engine results when a consumer searches for a company's website […]".

40 See GCA Annual Report and Accounts 2020 (23 June 2020), section 1.1.

41 The House of Lords Report, Regulating in a digital world (9 March 2019) (HL Paper 299). Similarly, the ASA has the power to refer persistent violations of advertising rules "*to other bodies for the[ir] further action, such as Trading Standards or Ofcom. Such referrals are rarely necessary, as most advertisers prefer to resolve the matter directly with us.*"

42 The Final Report proposes that the DMU be afforded far-reaching powers to enforce the Code -- specifically, the power to: suspend, block and reverse the decisions of SMS firms or order the SMS to rectify a breach of the Code (para. 79, and Appendix U para. 184); and impose financial penalties for non-compliance with its orders and intentional or negligent breaches of the Code (Appendix U, para. 184).

43 See for example *Napp Pharmaceuticals Holdings and Subsidiaries v Director General of Fair Trading* [2002] CAT 1.

- Since an erroneous conclusion could have serious consequences for the firm in question, as well as competition and innovation in the industry, the DMU's enforcement decisions should not be taken lightly. A merits-based appeal ensures an independent review of regulatory decision-making that should lead to better and more robust decision-making.

Another relevant question for the DMT to consider is the scope of and limitations to the DMU's evidence-gathering powers when it carries out investigations into potential Code violations. The Final Report envisages that the DMU will have the powers to compel SMS firms, and other market participants, to provide it with information (Final Report, para. 7.98). Google recognises that it will be important for the DMU to have the power to access the evidence needed for it to assess compliance with, and potential violations of, the Code. However, it will be important to define how and when the DMU can exercise these powers in order to prevent disproportionately burdensome information requests and general fishing expeditions. In particular, the DMU's evidence-gathering powers should be limited to what is needed to fulfil its primary role of monitoring compliance with, and detecting violations of, the Code. Broad-ranging information gathering powers, such as those exercised by the CMA when undertaking enforcement action, would go beyond what is required. For example, if (as suggested in the CMA's Final Report, Table 7.3) the Code includes a principle requiring firms to "*allow [for the] audit and scrutiny*" of their algorithms by the DMU, any concomitant information-sharing obligations on those firms should be limited to explaining how their algorithms operate and whether they operate objectively.[44]

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)?***

There is a risk of duplication in the CMA's recommendations to the Government that could result in more than one regulator exercising concurrent jurisdiction over the same type of conduct. In particular, there is scope for overlap between the proposed Code and:

- ***The existing rules on abuse of dominance.*** The DMT should ensure that its proposals complement, rather than overlap with, the existing rules on abuse of a dominant position under Article 102 TFEU / Chapter II Competition Act 1998.

- ***International regulatory regimes.*** Tech companies -- and the digital solutions they offer -- generally operate on a global basis. Therefore the DMT should consider the remedies and/or regulatory requirements imposed in other jurisdictions (whether as a result of competition inquiries or otherwise) to ensure that its proposals do not require platforms to (i) act in a way that is inconsistent with the requirements in those jurisdictions, or (ii) act differently in other jurisdictions. Indeed, the Final Report acknowledges this challenge, noting that international

[44] As opposed to where the CMA takes enforcement action, where greater information-gathering rights are justified by the thresholds that limit the circumstances in which the CMA can initiate an investigation. See *e.g.*, section 25 of the Competition Act 1998.

engagement is "*vital in seeking to develop consensus on the issues and on potential solutions to the challenges posed by digital platforms*".[45]

- ***Financial reporting and disclosure regimes.*** The DMT should ensure that any proposed reporting obligations are in line with, or seek to complement, existing financial reporting and disclosure requirements (*e.g.*, the UK GAAP).

- ***The data protection regime.*** For example:

    - The CMA has recommended that the DMU be given powers to introduce a choice requirement remedy that would require (initially SMS) platforms to give consumers the choice not to share their data for personalised advertising (Final Report, paras. 95-97). In contrast, the GDPR requires all firms (not just those designated with SMS), as data controllers, to justify the use of user data to personalise ads by, for example, obtaining the user's opt-in content.[46] There is therefore a risk of the CMA's recommendation conflicting with the equivalent requirements under the GDPR by requiring some firms to allow users to opt-out of personalised advertising completely.

    - Similarly, it will be important to ensure that the CMA's 'fairness by design' intervention complements, rather than conflicts with, the GDPR 'data protection by design and by default' duty[47] (Final Report, para. 8.129). The ICO along with individuals respectively also have extensive enforcement powers and remedies against firms that breach information rights under the GDPR.[48] This is explained above in response to Question 3.

- The CMA's proposed 'fairness by design' intervention could also overlap with the existing proposal in the Online Harms UK White Paper to develop a 'Safety by Design' framework aimed at, among other things, giving users more control over, and information about, the use of their personal data.[49]

If, following consideration of the overlaps described above, the DMT determines that existing and proposed law cannot adequately address these concerns, then close collaboration and dialogue between the DMT and other regulators during the design phases of the Code will be required so that the DMT puts forward proposals that: (i) address the gaps in existing law; and (ii) make clear what is and

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45 Final Report, para. 10.10.

46 See Articles 4(1), 6(1)(b) and 22 of the GDPR available at: https://gdpr-info.eu/; see also the Information Commissioner's Office (ICO) GDPR guidance and Article 29 Working Party guidelines respectively.

47 Under this duty, the GDPR requires firms to put in place appropriate technical and organisational measures to implement the data protection principles and safeguard individual rights. See ICO GDPR Guidance, Data protection by design and default.

48 See for example, Articles 58 and 77-82 of the GDPR.

49 See for example, Online Harms UK White Paper, para. 8.14. "*[T]he government will work with industry and civil society to develop a Safety by Design framework to help companies incorporate online safety throughout the development or update of online services. This framework will set out clear principles and practical guidance...[which] include guidance which highlights the need for providers to: [...] Give users control of their experience by collecting the minimum amount of personal data and giving them informed choices about how their personal information, including geolocation data, is used.*"

is not covered by the Code. The DMT will also need to establish principles and protocols for cases in which more than one regulatory regime may apply, and in such cases, which regulatory regime takes precedence as a matter of law in order to avoid conflicts once the Code is implemented.[50]

At an operational level, Google considers that the Digital Regulation Cooperation Forum (DRCF) will be an important vehicle for collaboration between regulators and to ensure the ongoing success of complementary regulatory regimes.

Sincerely,

Oliver Bethell

Legal Director for Competition, EMEA, Google

50 For example, in the energy sector, Ofgem has concurrent jurisdiction with the CMA to enforce the provisions of Part 1 Competition Act 1998 and Part 4 Enterprise Act 200 (subject to limited exceptions) in relation to certain commercial activities, and in such cases, the regulators must consult each other before exercising their respective functions as a matter of law. The CMA has issued guidance on how to determine which regulator should exercise their authority in certain circumstances (para. 3.22), and there is a memorandum of understanding that sets out practical detail on how the regulators can work together (paras. 28-29).