



Digital Markets Taskforce – July 2020 Call For Information
Response on Behalf of PayPal

EXTERNAL



Introduction

2. PayPal is committed to democratizing financial services and empowering people and businesses to join and thrive in the global economy. Our goal is to enable consumers and merchants to manage and move their money anywhere in the world, anytime, on any platform and using any device. PayPal facilitates consumers engaging in domestic and cross-border shopping and merchants extending their global reach, while reducing the complexity and friction involved in enabling e-commerce and cross-border trade.
3. As a pioneer in online and mobile payments, PayPal has been established in the UK since 2004. PayPal's offering involves the issuance of electronic money and other associated payment services. As a payment service provider our network builds on the existing financial infrastructure of bank accounts and credit cards to deliver innovative and secure digital payment solutions worldwide. Over time, PayPal has expanded its digital wallet proposition and payments offering more generally, and has identified and brought to market new ideas to provide benefits to consumers, SMEs and large enterprise customers.
4. During COVID-19, companies of all types and sizes are looking for ways to maintain the safety of their customers and employees through touch-free experiences. PayPal has supported merchants as they accelerate digital and touch-free payment options for consumers like "Click and Collect" and enhanced online shopping. Through partnerships, and our, device, network, and platform-agnostic approach, we are enabling digital payments around the world that everyone can access.
5. PayPal welcomes the opportunity to respond to the Digital Markets Taskforce (the "Taskforce") consultation. As a long-standing participant in the digital economy, PayPal is pleased to provide comments on the development of the contemplated Code of Conduct for digital platforms (the "Code"), which would be administered by the Digital Markets Unit (the "DMU"), as discussed in the government's Furman Review and the CMA's Final Report in the market study into digital advertising.
6. This submission comments on the three core aspects of the Taskforce's consultation: (i) the scope of the Code, (ii) the remedies for addressing harm, and (iii) the procedure and structure of the new regime.
 - A. The Scope of the Code
7. The consultation refers to 'significant market power,' 'strategic bottleneck', 'gateway', 'relative market power' and 'economic dependence' as possible criteria to assess whether a firm has 'strategic market status' and asks how these terms should be interpreted.

8. Each of these terms conveys the notion of a platform operator that has the ability to determine the competitive conditions under which business users of the platform are able to compete for consumers. To a large extent, these terms overlap: a platform that serves as a ‘strategic bottleneck’ is likely also to act as a ‘gatekeeper’, thereby placing its business users in a position of ‘economic dependence’. Therefore, an assessment of ‘strategic market status’ – a company with enduring market power over a strategic bottleneck – ought to evaluate these concepts as part of an overall assessment rather than interpreting them as distinct, individual criteria. Otherwise, the process of identifying platforms with ‘strategic market status’ could become frustrated by arid disputes about where the boundaries between the different criteria lie.
9. In assessing whether a particular platform satisfies the definition of ‘strategic market status’, a wide range of evidence could be taken into account, just as it is in assessments of dominance (e.g., market shares, user loyalty, degree of customer lock-in, availability and viability of alternative channels). Two considerations appear particularly important: the existence of conflicts of interest, and the presence of market power.
 - a. **Conflict of interest.** Operators that both manage and sell services through the platform may have conflicts of interest; specifically, they have an incentive to tilt competition in favour of their own services against those of third party business users. The existence of conflicts of interest should therefore be factored into the assessment of ‘strategic market status’.¹
 - b. **Market power.** Platform operators without market power can be punished through market mechanisms: unfair or imbalanced platform rules may lead business users to switch to different platforms instead. However, business users will not have an ‘exit option’ to the same extent where the relevant platform has market power (e.g., if there are few realistic alternatives or if business users or consumers are ‘locked in’). Accordingly, the assessment of ‘strategic market status’ should entail a market power threshold. One option, as the consultation notes, is to use the ‘significant

¹ See e.g., Statement by Commissioner Vestager to the US House of Representatives Sub-Committee on Antitrust, Commercial, and Administrative Law, 30 July 2020, pp.1-2 (noting that the Commission is reviewing the “dual role that digital platforms often have. By this, I mean that a company both operates a platform upstream, and at the same time competes with others who operate on the platform downstream. The company therefore has the possibility to influence the conditions of competition downstream in its favour in a way that may be detrimental to choice and innovation and that ultimately harms consumers. To use a sporting analogy, the platform is both a player on the downstream market against rivals, and at the same time is the referee which determines the conditions of that competition on the upstream platform and can therefore influence the result in its own favour”); and p.6 (explaining that the Commission is considering implementing “rules to stop platforms misusing their position as both player and referee – both owning a platform, and competing with others that rely on that very same platform”).



market power' standard, which is applied in the telecoms sector already and is well understood.

10. The consultation asks whether the 'strategic market status' designation (i) should apply to the "*corporate group as a whole*" or "*a subset of a firm's activities*", and (ii) should lead to firms being regulated under the Code or also "*remedies beyond a code*". These definitional issues are difficult to answer in the abstract and are less important than the fundamental objective of ensuring the platforms with gatekeeper power are subject to rules that protect competition. However, it is likely that the conduct at issue may primarily involve particular subsets of a firm's activities (e.g., certain business lines); therefore, it may not be necessary to apply the 'strategic market status' label or the relevant rules within the Code to an entire corporate group.
11. In concrete terms, the consultation explains that the Digital Markets Taskforce will "*broaden the market study's assessment to platforms not funded by digital advertising*," including to identify relevant operators of online marketplaces and app stores that have 'strategic market status'. PayPal supports this approach. In PayPal's experience, the notion of platforms with 'gatekeeper' or 'strategic' positions is not limited to ads-funded businesses. Therefore, any definition of 'strategic market status' should be capable of being applied to the full range of business models that form gatekeeper platforms, but should not be defined so broadly that it encompasses business models that do not present gatekeeper characteristics.
12. E-Commerce platforms and app stores may control merchants' or app developers' access to consumers and, depending on the market position, could operate as gatekeepers. As such, they should be subject to rules that foster competition by not allowing them to restrict availability or functionality of third party merchants or service providers on their platforms.
13. Should the government take forward expansion of the DMU's remit beyond digital advertising, the government should articulate and test the methodology and criteria it anticipates the DMU will use to apply the new 'strategic market status' concept at the earliest possible stage. In order to be successful and promote the aims of the Taskforce, the development of this new concept will need to be carefully defined and progressed through this consultation.
14. To ensure confidence in any new proposal, it will be essential to have clarity and transparency around the governance and structure of the Code as well as well as enforcement decisions, including the possibility of appeal to an independent party or the Courts. When designing an effective governance structure, the Taskforce should work closely both with businesses that would fall under the Code as well as those benefiting from the protections of the Code.

B. Remedies for Addressing Harm

15. The consultation states that the Taskforce will take as its starting point the Code structure described in the CMA's market study into digital advertising, developing provisions under the principles of 'fair trading', 'open choices' and 'trust and transparency'.
16. The consultation asks whether tools are required to tackle practices by firms without 'strategic market status' to address issues such as information asymmetries, consumer control over their data, and common standards. It also asks whether rules are needed to facilitate 'pre-emptive' action against such non-strategic firms where there is a risk of markets 'tipping'.
17. In our view, the effectiveness of the Code and the DMU is best served by focusing on the core task of preserving competition that might otherwise be harmed by platforms that have the power to determine the conditions of competition in the markets where they operate. Expanding the mission of the DMU and the Code to firms without 'strategic market status' would detract from that core objective and creates a greater risk of false positives (since firms without such a strong degree of market power are, by definition, less able to tip competition in their own favour). Existing regimes, such as the GDPR (which deals with both data privacy and data portability) and consumer protection, already have general and widespread application.
18. Further, there is a risk that extending the Code to apply to activities that do not constitute 'Strategic Market Status' would introduce confusion and uncertainty, and potentially disincentivise investors from entering the UK market. This could jeopardise the government's desire to "build confidence and clarity for businesses and consumers, boost innovation and investment, and reinforce the UK's position as a global leader in stable, innovation friendly regulation".
19. If the DMU were to have powers to extend the Code to apply to platforms that do not have 'Strategic Market Status', then clear and transparent criteria would be needed to determine when the DMU should act preemptively to tackle perceived competition concerns, since these powers might otherwise disincentive potential investors in UK digital services. Any such additional powers also should be accompanied by a guarantee that the DMU will work closely with other stakeholders and the business in question to craft procompetitive solutions.

C. Procedure and Structure of the New Regime

20. The consultation asks whether the new pro-competition regime should focus on the “*key characteristics of speed, flexibility, clarity and legal certainty*”. It also asks about timeframes for proceedings, frequency of review, evidentiary thresholds and rights of appeal. Finally, it considers how the new regime should interact with other new and existing areas of law that are relevant to digital markets, such as data protection and online harms.
21. These are appropriate and relevant considerations in designing the new regime. The chief advantage of developing an enforceable Code is to ensure that outcomes can be realised sufficiently quickly to preserve competition and avoid markets tipping irreparably to a particular player. For example, the Furman Review considered that the DMU “*should be set up to achieve fast resolutions, in multiples of weeks or months, but not years*” (para. 2.47). To ensure that ‘strategic market status’ designations and interventions under the Code remain relevant, the DMU could undertake periodic reviews, as proposed in the consultation and consistent with regulators’ practices in other sectors, such as telecoms.
22. Of course, to achieve these timelines, the rules under the Code need to be sufficiently clear so that (i) companies – both business users and platforms with ‘strategic market status’ – understand what the rules require; (ii) the DMU can make primarily factual assessments without having to undertake complex economic evaluations that typically characterise competition law proceedings; and (iii) appeals can be narrowly scoped and quickly administered. The civil standard of proof, which is currently applied in competition law proceedings, could also be applied by the DMU and reviewing courts.
23. The effectiveness of the Code is likely to be maximised if it focuses on the core mission of protecting competition against practices that unambiguously diminish it, through the use of clear rules, swift determinations, and the development of staff with expertise in both competition and digital markets. These goals could be compromised if the DMU also assumes responsibility for matters pertaining to data privacy, consumer protection and other issues that – while important – have limited relevance to competition. Retaining a clear focus will help the DMU achieve the goals of filling any gaps in competition policy in digital markets, rather than duplicating regulatory work in other areas.

D. Conclusion

24. The contemplated Code offers significant opportunities to resolve concerns about concentration and abuse of market power in the digital sector. A Code-based regime, administered by the DMU, that enforces clear rules could facilitate targeted pro-competitive improvements in the way digital markets operate.



25. In order the for Code to achieve its objectives, platforms with 'strategic market status' need to be correctly identified by making an overall assessment of the platform's position in a given market, paying particularly close attention to indications of conflicts of interest and market power.
26. Finally, although led by and housed in the CMA, the Taskforce is acting as an advisor to the government, which will make the final decisions on the report, as per terms of reference. Therefore, PayPal would encourage the government to ensure that there is an opportunity for stakeholders to discuss views on the Taskforce's findings.

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