



**Digital Markets Taskforce  
Call for information  
Submission by Sky**

This submission comments on two issues raised in the Digital Markets Taskforce call for information: (i) the need for regulation of firms in digital markets without Strategic Market Status, and (ii) enforcement of the proposed new regulatory regime. We have also taken this opportunity to resubmit our previous submission on how to define firms with Strategic Market Status (SMS), which is attached.

We consider that there is no sound reason to introduce mechanisms to regulate firms providing digital services that do not have SMS. In relation to enforcement of the proposed new regulatory regime, this should be the responsibility of the new Digital Markets Unit, rather than a 'monitoring trustee' as suggested in the call for information.

**It would be inappropriate to regulate firms without Strategic Market Status**

The call for information states:

*"The Taskforce welcomes views on whether as part of the pro-competition regime, remedies may be required to deal with wider competition problems in digital markets. Examples could include behavioural biases, information asymmetries, barriers to switching or coordination failures. These problems may require remedies which apply more widely, including to those firms who have not been found to have SMS."*

It goes on to discuss "a couple of examples where such remedies may be required", namely "pre-emptive action in relation to 'tipping'" and "to ensure the terms of which users engage with platforms are clear and fair".

Sky is strongly of the view that such proposals (a) are unnecessary and (b) if they were implemented would be likely to be harmful to businesses and consumers.

The UK is relatively unique in having a market investigation regime that is ideal for investigating competition issues in specific sectors of the type described in the call for information. In essence, the proposal to investigate the need for remedies to specific issues in 'digital markets' is a proposal to have a digital markets-specific market investigation regime. This is both unnecessary – the existing market investigation regime is perfectly capable of addressing issues in digital markets – and likely to result in disproportionate focus on these issues in digital markets relative to other sectors of the economy.

It is also wrong to regard issues such as behavioural biases, information asymmetries and barriers to switching as "competition problems" in and of themselves. Such issues are basic features of markets and consumer behaviour. They may, or may not, lead to competition problems that warrant the consideration of government intervention intended to address them.

More generally:

- (a) The development and effective administration of the proposed regulatory regime for firms with SMS will be an enormous and complex undertaking. Proposals to require the Digital

Markets Unit to be a broader regulator of 'digital markets' would add substantially to the scale and complexity of the task facing the new regulator. Particularly in view of the lack of a sound rationale for this additional role, we consider that the Digital Markets Unit should focus its effort and resources on regulating firms with SMS and should not be given a broader remit.

- (b) It is wholly unclear what the boundaries of the term 'digital markets' might be; there are few activities today that do not have a 'digital' component to them. If it were considered to encompass goods and services that can be purchased via the internet then it is evident that the scope would be extremely broad, including everything from groceries and takeaway food, through to financial services. Whilst a definition that was limited to products and services that were *only* delivered via the internet, such as video services like Netflix and Amazon Prime TV, would be narrower it is evident that it would still cover a huge range of economic activity.

We have strong concerns about the two examples set out in the call for information about why regulation beyond that applied to firms with SMS may be required.

#### *Pre-emptive action in relation to tipping*

It would not be possible or desirable for a UK-based government agency to take pre-emptive action to prevent a market from 'tipping'. There are several reasons for this.

First, there are few if any examples of digital markets that have 'tipped' at a national level. The focus of the analysis of the Furman review and other such reviews around the world has, rightly, been on the 'tech giants' – firms such as Apple, Amazon and Google that have been able to exploit economies of scale created by the ability to use the internet to serve consumers at a global level. Even if it were possible to identify markets that were likely to 'tip' in the future, and desirable to intervene – both of which we doubt – action by a UK agency alone is unlikely to be able to prevent tipping.

Second, we do not consider that a government agency would have sufficient knowledge and information to be in a position *ex ante* to determine that a particular firm was likely to 'win' a competition for the market, and to take effective action to prevent that occurring. Intervention of this type would require predictions about the future course of market developments that are extremely unlikely to be right. A good way of appreciating this is to reflect on markets that are considered to have tipped in the past. We consider that it would have been extremely difficult for any government agency to have predicted that those markets were likely to tip prior to them doing so. Examples such as those of MySpace in social media, and Yahoo in numerous digital services are often cited as cases where predictions of long term dominance have been proven to be unfounded.

The situation bears a distinct resemblance to the problem in industrial policy of providing support to particular firms or types of firms, often known as 'picking winners'. One of the key reasons why this policy became widely rejected was governments' poor ability to identify those firms that had the potential to be successful in the future. Instead, the firms that received government support were often expensive lame ducks. Government agencies typically lack both the information and the experience needed to make judgements of this type.

There are potentially significant consequences for consumers of making the wrong calls in this area, such as preventing network effects being fully realised (resulting in consumers having to maintain multiple services when they would prefer to use fewer), or maintaining inadequately resourced sub-scale players in the market that do a poor job of serving consumers.

Finally, market tipping usually occurs after a period of intense competition and innovation – competition 'for the market'. There is a significant risk that, by diminishing the potential rewards from winning this competition, incentives to compete aggressively, particularly via innovation, would be diminished. As Alix Partners have stated:

*“the lesson from the empirical literature is that the real long-run driver of consumer welfare is genuinely disruptive innovation”.*<sup>1</sup>

We consider that regulators should be extremely cautious in relation to interventions that potentially diminish incentives for dynamic competition, such as a proposal to intervene to prevent markets tipping, for this reason.

*Ensuring the terms on which users engage with platforms are clear and fair*

The terms on which consumers engage with firms in the UK are governed by an established, effective, legal and regulatory regime. As the Government has recently stated:

*“The UK has a strong history of protecting consumer rights. UK consumers have relied on laws that protected purchasers of goods and services and outlawed unfair contract terms, before the EU acted in this area.”*

*“Consumers in the UK benefit from a wide range of rights when buying goods and services from businesses based in the UK and in the EU. The UK has been influential in the EU in developing these rights, and the UK’s 2015 Consumer Rights Act builds on EU consumer law principles. It sets out **a coherent framework of consumer protections across the spectrum of consumer goods, services and digital content supply contracts**. Organisations like Citizens’ Advice, Trading Standards and the Competition and Markets Authority, as well as the Government, work to ensure that consumers are aware of their rights and what to do when things go wrong.”* (Emphasis added.)

We have seen no sound reasons put forward as to why additional sector-specific consumer regulation is required, over and above the Consumer Rights Act, in relation to consumer engagement with digital service providers without SMS.

More generally, sector-specific regulation of this type is inherently undesirable absent sound reasons for introducing it. It risks creating a patchwork of inconsistent and potentially overlapping rights and responsibilities that are costly for firms to comply with and difficult for consumers to understand.

### **Enforcement of the proposed new regulatory regime**

The call for information states that the proposed Digital Markets Unit “*would need appropriate powers including the ability to... appoint a monitoring trustee to monitor and oversee compliance by an SMS firm*”. This is an unusual proposition. It appears to be based on the approach used in UK merger inquiries in relation to remedies. This is an outlier in relation to the standard approach to administration and enforcement of regulation, which is normally the direct responsibility of a regulatory body. For example, Ofcom administers and enforces sector-specific regulation in the telecoms sector, and Ofwat administers and enforces sector-specific regulation in the water industry. We consider that administration and enforcement of the proposed new regulatory regime for firms with SMS should be the responsibility of the Digital Markets Unit, and not a monitoring trustee appointed by them.

**Sky**

**August 2020**

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<sup>1</sup> ‘Unlocking digital competition... but locking up innovation? Comments on the Furman Report’, Alix Partners, April 2019. ([https://www.alixpartners.com/media/14557/ap\\_unlocking\\_digital\\_competition\\_apr\\_2019.pdf](https://www.alixpartners.com/media/14557/ap_unlocking_digital_competition_apr_2019.pdf))