Digital Markets Taskforce

Questions for input and evidence – scope

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?

We believe it is important, regardless of various terminology used that any regulatory regime encapsulates and accurately describes the 'systemic' nature of dominant digital platforms, as it is their systemic nature which distinguishes them from the majority of other platforms and the rest of the internet eco-system.

We are aware of the different attempts to identify entities that should be subject to regulation in the Furman Review and in various other reports / proposals that have been formulated by competition authorities.

Having regard to the definitions and the various terminology put forward, we believe a workable definition would be that a digital platform is systemic or has 'strategic market status' (SMS) if the following cumulative conditions are met:

(a) It has enduring market power over a relevant market across a significant part of the UK digital eco-system and most likely over the digital landscape of many countries globally entrenched by economies of scale and direct and indirect network effects;

(b) It has bottleneck power in that it acts as an important gateway for businesses to access a significant portion of consumers which primarily single-home; in doing so it sets the 'rules of the game' under which other market participants must operate and;

(c) It leverages, or is able to leverage, its market power over a relevant market to adjacent markets on which it competes with other businesses that need access to the platform.

The first condition means that the dominant digital platform of strategic market status should have <u>enduring</u> market power. This stops the definition becoming over-inclusive and means that digital platforms which are not dominant, and thus pose low risk for the fairness and contestability of the

entire digital eco system are not included within the scope, so that it includes those, but only those, firms with truly systemic status as firms with SMS.

The second condition means that to be included under the definition of SMS, the dominant digital platform should act as a bottleneck, such that businesses depends on the platform in order to reach a significant portion of their user base. This position enables the platform to control access of third parties to the market, thereby performing a "gatekeeper" function, charge a premium for those third parties' access (either in the form of high fees or other onerous conditions), in addition to controlling the functioning of that market, thereby performing a "regulator" role – setting the rules of the game.

The third condition encompassed the "horizontal" nature of the dominant digital platforms who are systemic. Dominant digital platforms who pose the greatest risks for competition are those that by virtue of their strategic position, have access to resources or competitively relevant data are able to leverage that advantage to expand into adjacent new markets (e.g travel). This allows firms with strategic market status to monopolize in adjacent new markets, while simultaneously entrenching their own position on their core market and thereby elevating their overall significance for competition across markets.

• Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms,40 could be used as a starting point for these criteria?

While we can see the merits of comparing a proposed regulatory regime for tackling firms with strategic market status to that of the existing regime in place for telecoms, we are not convinced this is the right approach.

Firstly, the structure of the digital eco system and in particular the structural placement of the search engines and social networks in question is distinct from that of the telecoms market. Telecoms is dominated by a large number of companies each with a strong dominant position in their own domestic markets, whereas the digital eco system is controlled by relatively fewer (in fact a very small core group) of global conglomerate systemic platforms. A regulation which recognizes those important distinctions, and ultimately accounts for the borderless nature of digital markets, is therefore required.

Second, the framework for telecoms imposes rather granular and prescriptive regulatory requirements. Due to the fast-changing nature of the digital landscape, prescriptive rules (which are easily circumvented by fast-evolving large digital businesses) should be avoided in favour of a principle- based approach.

• What evidence could be used when assessing whether the criteria have been met?

We would suggest that the indicative criteria should be based on the cumulative conditions put forward above as part of the definition above in Question 1 (qualitative criteria as set by the regulatory authority). Whilst some quantitative criteria may be helpful in identifying which platforms should be subject to the regime, they should always be combined with those qualitative criteria. For example, we do not believe that the time users spend on a platform or the number of visits it receives are, in isolation, reliable indicators of the systemic or SMS nature of a platform.

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

• Should a SMS designation enable remedies beyond a code of conduct to be deployed?

• Should SMS status apply to the corporate group as a whole?

• Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?

We would suggest that the effect of such a designation should be that asSystemic digital platform is automatically subject to the new regime, and remedies beyond a code of conduct should be considered, if they fall under this definition.

We would also suggest that the regulatory authority should be vested with the full power in order to undertake all necessary measures to ensure the object and purpose of the regime, to avoid a toothless regulation and ideally be able to undertake information-gathering powers, have the ability to accept commitments proposed by the platform who has SMS as well as the power to order the platform to cease with an infringing action. The imposition of restorative remedies, i.e. remedies aimed at restoring competition to the status quo could also be considered.

In addition, in light of the fast-evolving nature of digital markets, ideally the authority would be able to impose interim measures aimed at preserving the status of competition, pending a full investigation of the SMS platform's compliance with the regime.

We believe that the question of whether the SMS designation should apply to the whole corporate groups is contingent on whether the SMS platform in question is able to draw significant extra advantage applicable to the cumulative conditions we suggest in Question 1 by virtue of their group status.

Regarding whether the status should apply to a sub-set of the firm's activities, this, we suggest, should come down to whether the firm in question has the ability to take advantage of their ability to leverage their market power in their core market (e.g., search) to adjacent markets (e.g. flights). If this is the case, we believe it should apply to their activities covering both core and adjacent markets as these are inextricably linked.

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?

The main activity which we believe should be regulated under the regime is self-preferencing of large systemic platforms with strategic market status. In particular many systemic digital platforms with SMS seek to leverage their market power from one market into an adjacent or other related market. Systemic Digital Platforms, use their market power in one market to favour their position in an adjacent market at the expense of their rivals. Forexample, giving preferential treatment to their own products and services should be prohibited, especially where this has clearly harmful competitive effects.

A clear example of this is when Google favours and places its own Google Flights widget above all other ranked organic results, therefore displacing their rivals' products in favour of their own. When Google engages in these practices its self-preferencing damages competition, innovation and consumer choice.

Limiting data cross-usage to leverage advantage against rivals in adjacent verticals, we believe, should also be considered under the new regime. Google is able to engage in 'envelopment' strategies to conquer markets by internally combining data across products, such as the revenue made on ads to cross-subsidize and enhance products in rival adjacent verticals. Ideally, we would like to see a new regulatory regime tackle this by placing limitations on systemic gate-keeper platforms' ability to use data across their various products and services (also sometimes referred to as 'data unbundling') if it has obvious anti-competitive affects. For example, we believe systemic firms with strategic market status should be prohibited from utilizing the data they collect from one product in order to improve their service and gain an unfair advantage in other services they offer (for example in adjacent verticals such as travel).

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?

The COVID-19 pandemic makes the problems observed with systemic platforms' self-preferencing and cross-subsidization more acute. . A strong example of this is reflected in the travel sectorwhich, of course, has been one of the most severely affected by the pandemic..

As described in the question above, the self-preferential treatment which Google gives to its own competing travel products disadvantage rivals whose results are demoted. During the pandemic, many brands who would typically pay for Google paid placements are unable to pay for these placements, due to inevitable and necessary cost-cutting. This has meant that while Google's Flights product would

usually sit below paid for placements (but above organic results), on many search terms it now sits at the top of the page in the absence of adverts, making its self-preferencing position even more prominent.

Secondly, with regards to cross-subsidization, while Google may have lost some revenue from travel advertisers, their dominant position across general search and across so many adjacent markets means that it is likely they are able to still carry on offering their flights services at a loss, as they are buoyed up by the many other revenues from across the wide span of their business. No other travel brand would ever be able to compete in this way enduring sustained losses within their core travel revenues. This will therefore only serve to strengthen and entrench Google's position relative to other smaller rivals.

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?

While there may be issues resulting from select platforms (other than the 'Big 4' large systemic conglomerate platforms), we believe these have already been addressed by a combination of the Platform to Business regulation, GDPR and various sector-specific consumer regulations. We would therefore hope that the new regulatory regime be laser focused on the very small pool of dominant systemic platforms, so as not to burden the majority of relatively smaller players in the eco-system and disadvantage them relative to the 'Big 4' systemic platforms further.

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?

Yes, we believe this format would work well. A principles-based approach would be more advisable than an overly prescriptive format, which we agree (as stated in the document) would merely lead to circumvention by platforms with SMS status who are typically able to adapt quickly.

It would be highly advantageous to have thorough guidance documents alongside the code or regulation to provide greater detail on how it should be applied in practice, particularly on a more case by case basis.

• 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?

While these are laudable aims, more focus should be given to business-to-business or SMS to other market player considerations, and on regulating against the harmful end outcomes and effects of conduct rather than on further communication of the conduct.

While we would always support consumer-friendly initiatives, we believe most of these are adequately covered by the GDPR and other existing consumer regulations. We believe more focus should be made on preventing and prohibiting unfair self-preferencing practices which distort the market and make an even playing field impossible, as these outcomes we believe more disproportionately negatively impact both competition and consumers.

Codes of practices which are designed to improve transparency between SMS platforms and other business users may help in giving more clarity and advanced notice to the self-preferencing conduct the SMS platforms are undertaking but do not prohibit these activities in and of themselvese, which is what we feel is merited to stop further irreversible damage.

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?

This is not something we would be well placed to comment on.

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?

Our answer to this is covered in response to Question 3.

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

Yes, we believe they should be. These should be considered when there is clear evidence of competitive harmful effects, such as those set out in the responses to the questions above.

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?

As in Question 5, while there may be issues resulting from select platforms (other than the 'Big 4' large systemic conglomerate platforms,) we believe these have already been addressed by a combination of the Platform to Business regulation, GDPR and various sector-specific consumer regulations. We would therefore hope that the new regulatory regime be laser focused on the very small pool of dominant systemic platforms, so as not to burden the majority of relatively smaller players in the eco-system and disadvantage them relative to the 'Big 4' systemic platforms further. The regime should be focused on those who have therefore been designated as having SMS status.

• Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?

An Ex Ante regime is the optimal solution, however, we believe that a pro-competition regime should be able to enact pre-emptive action, when there is sufficient evidence to support likely anti-competitive effects of conduct and certainly where there is evidence that implies a likely infringement of competition rules.

Pre-emptive action (such as interim measures, pending full investigation) are even more important in the context of the digital eco-system as the fast-evolving nature of the system tends to produce network effects (both direct and indirect) which quickly entrench and strengthen the position of the incumbent dominant company, and make the effects hard to reverse once the market has irreversibly tipped.

• 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?

We would defer here to our answer to Question 3 with regards to limiting data cross-usage by dominant systemic platforms, where there is no clear consumer benefit.

• What measures, if any, are needed to enable consumers to exert more control over use of their data?

As in our answer to Question 6, we support initiatives which increase consumer protection, and we do believe significant strides have already been made in this area with the introduction of the GDPR. It should also be noted that additional remedies that are intended to protect consumer user privacy can have unintended negative consequences for the market.

For example, it is clear that the GDPR has actually strengthened theposition of the 'Big 4'systemic platforms relative to others as they have used this to operate against other businesses in a quasi-regulatory capacity. In doing so these platforms apply a higher standard for data sharing with third parties but permit themselves a less restrictive interpretation of the data rules when it comes to their own 'walled garden'.

Questions for input and evidence – designing procedure and structure

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

Yes, we agree that they are. Of particular importance is speed. This is especially important in the context of the digital eco-system as the fast-evolving nature of the system tends to produce network effects (both direct and indirect) which quickly entrench and strengthen the position of the incumbent dominant company, and make the effects hard to reverse.

As has been observed with the various Google cases that the EU Commission are engaged in, the very slow nature of these has meant that competition law has struggled to keep pace with the market and Google's new products and developments. It is vital a new regime, is structured such that it can make swift interventions.

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.?

We would support the Taskforce assigning a clear ownership structure in terms who is vested with the responsibility to designate firms with SMS status, as per the cumulative conditions we suggest for the definitions of SMS under the regime.

Once deemed to be a firm with SMS status, we believe the Code of Conduct should ideally apply straight away to that firm.

Given the fast-changing nature of digital markets, the regulator should undertake to examine the effectiveness of the Code on a regular basis and update guidance accordingly, but once a systemic SMS firm is designated as such their inclusion in that should be in force for an indefinite time period, unless there were significant grounds to alter this such as exceptional and significant material changes to the market.

We would also suggest that, as in other Ex Ante regimes, the burden of proof should be reversed, such that practices would be deemed to be in breach of the code, unless the SMS firm can demonstrate that they do not have adverse ramifications for competition.

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)?

We believe we have already answered this question with regard to interplay with data protection and privacy in the previous questions.