To: The Digital Task Force
Competition and Markets Authority
London

By email: digitaltaskforce@cma.gov.uk

31 July 2020

RESPONSE TO CALL FOR INFORMATION, CMA 1 JULY 2020

To Whom it May Concern,

Please find below Snap Inc's response to the above call for information. I confirm that the response may be published.

Should you have any questions pertaining to the above responses, please do not hesitate to contact me using the details you already hold.

Yours sincerely,

Stephen Collins
Senior Director, Public Policy International

BEGINS

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?

The most obvious starting point, as Furman and others have noted, is the SMP regime in telecoms. Many of the key definitions and tests used to determine SMP can be re-used or adapted to help determine SMS in digital markets. Consideration should, however, be given to, and accommodation made for, the different characteristics exhibited by digital markets (greater dynamism, overlapping markets, importance of adjacent markets, propensity for tipping, etc) and the products and services (greater differentiation/specialisation/innovation, lack of commoditisation, high degree of experimentation, often shorter service durations).

The relevant market needs first to be defined. Geographical definition should not be an issue. Defining product/service, however, will be more difficult in the consumer digital space than in telecoms, due to the dynamism and fluidity of markets and their changing relationships with one another over, sometimes, quite short periods of time. Additionally, it is possible to identify more than one market operating simultaneously for the same service provision. For example, the relevant market in which search engines operate can be seen as search, search advertising, digital advertising or advertising more widely. There are also specialised search engines operating in niche verticals such as travel or shopping. To complicate matters further, general search engines of large conglomerates are usually present in other areas of their businesses, leveraging that privileged access in a way that competitors cannot. As a general rule of thumb, we would recommend starting with broad market definitions, which enable sufficient understanding to form a basis for the determination of SMS.

The more narrowly markets are defined, the less likelihood there will be for ex ante rules to be enduringly effective. For example, we would recommend that the digital advertising market be defined as a distinct market from offline and broadcast advertising (for the reasons given in multiple studies and competition cases to date), but that there is no need to segment the market further into search, display and so on. Advertising spend on digital points to advertisers using a dynamic, varying blend of search and display relative to their perceived return on investment at any one time.

In terms of assessing SMS: The baseline for SMP determination in telecoms begins with a 25% relevant market share (volume of sales, most likely) and we would recommend that be the starting point for digital markets too. Thereafter, the regulator must determine whether the company is a “strategic bottleneck” and “gateway”. But rather than attempting to granularly define these concepts -- an effort that would serve neither speed nor accuracy of decisions -- we recommend a qualitative assessment that considers multiple measurable factors lifted from the telecoms regime. These could include overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification (e.g. bundled products or services), economies of scale, economies of scope, vertical [and neighbouring] integration, a highly developed distribution and sales network, absence of potential competition, barriers to expansion, and so on. To these could be added the existence of direct, indirect and data-driven network effects, which form the core for success of most, if not all, dominant digital platforms today.

We would not add an essential facilities test to the criteria, for the reasons stated in multiple academic works on the subject.

A final question worth asking here is what role the telecoms regime itself will play when the new EU Electronic Communications Code is transposed into UK statute? Given that some of the digital platforms likely to be under scrutiny by the CMA will, for the first time, be captured by the telecoms regime[1], some more clarification of the interplay between CMA and OFCOM and how both sets of rules will be applied, presumably to the same markets and service providers, would be welcomed.

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)?

A firm designated as having (indeed, enjoying the privilege of having) SMS should be automatically and immediately subject to the high level behavioural code of conduct. The CMA should also have at its disposal a range of behavioural and structural tools to apply on a case-by-case basis for each SMS firm to ensure the proper functioning of the market. It could be that no additional remedies are required straight away, or that others are applied after a certain period of time and subsequent review, or it could be that several are applied up front and withdrawn following review. Providing the regulator with sufficient flexibility to select and apply/withdraw the right tools/remedies at the right time is an important ingredient in the overall success of the new regime. The slow speed of the telecoms SMP regime must be improved upon in this regard.

We believe SMS should apply to the corporate group as a whole, otherwise it is likely that a form of asset swapping across the affected group would occur in order to avoid meaningful regulatory capture.

Since the largest digital companies differ significantly in composition, and continue to develop, the regulator should be granted sufficient flexibility to determine on an ad hoc basis whether the implications of SMS status should apply to a sub-set of a firm's activities or to the whole group's activities.

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

[1] Most usually, as providers of Interpersonal Communications Services (ICS) a new sub-set of Electronic Communications Services (ECS), or, more occasionally, as providers of Electronic Communications Networks (ECNs) considering the growing submarine cabling, satellite and dark fibre assets of the largest digital companies

• *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.*

We would prefer the CMA to be given a broad remit at the outset in terms of scope in primary legislation. This is both for reasons of future proofing and to ensure scrutiny of the widest possible number of digital markets. While digital advertising, mobile OS and app stores are currently the main focus, in the future it could be other markets - say, AI, fintech or or neurotech. Ensuring the CMA already has the scope to assess the competitiveness of any digital market would be a prerequisite for future success of the regime.

In terms of the Furman Review, the danger of the rather static approach (relative to the speed of development of digital markets) it advocates is clear. Identification of a few markets for scrutiny, leaving others to be added in 3-5 years' time, is not realistic given the dynamism and speed of digital markets today and tomorrow. We would prefer to see the CMA, on its own initiative, be able to add markets on an ad hoc basis, following a short consultation period of 2-3 months, without waiting 5 years for a review.

The performance of the telecoms regime in this regard is illustrative and not something to be replicated for much more dynamic digital markets.

In terms of how other regulators have defined relevant markets, with particular regard to digital advertising and social media markets, we note and commend the German Bundeskartellamt's approach in its recent Facebook investigation[2]. While the BKartA identified the relevant markets quite narrowly, it acknowledged that those markets overlap materially, have significant impact on one another, and all compete for the same advertising spend. This kind of analysis at the outset can help define which markets deserve scrutiny and should be enabled in the scope of the final approach.

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 new approach should not have to rely on predicting future market developments. It should be capable of absorbing anything that happens, quickly addressing market-damaging developments. Providing the CMA with the widest scope and a capacity to act swiftly to protect markets is more important than trying to guess future technologies or market developments. Thus far, it is fair to say, regulators across the world have done a poor job predicting market outcomes in both merger control and abuse of dominance cases and there is little reason to suppose this will change in future.

[2] Bundeskartellamt, Case Summary: Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, 15 Feb 2019

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?

As we operate only in the markets considered by the market study, we are not able to answer this question.

6. In relation to the code of conduct:

• *Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?*

• *To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?*

We believe a principles based code, like that proposed by the market study could work well across all digital markets. The principles of fair trading, open choices, and trust and transparency are universally desirable and pre-requisites for properly functioning markets. We also note and agree with the market study's desire not to add granular, prescriptive measures to the code itself.

In terms of the three overarching principles proposed, we are comfortable with the entirety of the fair trading approach[3], open choices (with the exception of section 6.44, which would go too far in dictating technical decisions onto a business, restricting its room for manoeuvre in finding solutions to competition issues), and trust and transparency (with the exception of the final bullet of 6.46, which again is extremely prescriptive and would likely be overly punitive in a majority of cases)[4].

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?

Yes, a mandatory prior notification procedure for all acquisitions by firms designated with SMS should be introduced, irrespective of the value of the transaction or whether it is likely to result in concentration in a market vertical. As we have seen with numerous past transactions in digital markets, the market value of a transaction or its lack of market concentration provide no indication of its long-term strategic value to the acquiring firm or of its long-term effect on the market.

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[3] The fairness by design conceptual obligations could be usefully extended to encompass privacy by design and safety by design requirements. While policing these areas are the responsibility of ICO and OFCOM respectively, the competitive element of ensuring such design parameters are fairly met is also important

[4] References in this para to section numbers relate to the interim report's indexing, rather than that of the final report

The jurisdictional component could simply mirror the current (reasonably effective) merger control regime in terms of nexus.

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?*

Behavioural remedies here can be split into two categories: those that would appear in a code of conduct and apply to all firms with SMS and those that could be applied on an ad hoc basis, depending on particular circumstances of the SMS firm and the market(s) in which it operates.

The code should proscribe activities which are generally harmful to the market when undertaken by a dominant firm. These include self-preferencing, discriminatory treatment of third parties (in relation to both first party services and to other third parties), and unavoidable unfair terms and use of data.

Ad hoc behavioural remedies could be applied where it is believed that they could help restore competition to the market. These could include an obligation on the dominant firm to provide access to raw data that smaller competitors lack the scale and resource to collect, but are necessary to be able to compete with the dominant firm. Similarly, some forms of mandated limited interoperability might be imposed to help smaller competitors grow their networks. This should be considered only on an ad hoc basis and as a remedy applied only to the dominant firm. There should be no obligation on the wider competitor landscape to interoperate with the dominant firm, should smaller companies not see the benefit in doing so.

Unlike in utility-style industries, where services are essentially fully commoditised and driven by price and QoS alone, the consumer Internet space is characterised by highly differentiated products and services and innovation-based advances are frequent. Introducing an interoperability mandate into any of the digital markets would, through existing strong network effects, create a vortex around the dominant firm, pulling customers of smaller competitors irresistibly towards the core, with its frictionless functionality and larger user base.

It is hard to overstate the importance of not falling into the trap of seeing interoperability as a panacea for failing, or tipped, digital markets. We believe its blanket imposition would have the opposite to the intended effect. Thus, its use should be highly targeted, on an ad hoc basis and participation by smaller market players should be optional.

Structural remedies are obviously a more serious step, since the economic effect can be quite destructive in terms of market value lost. Nevertheless, the option to impose structural remedies, should behavioural remedies not restore market competitiveness, must be an option available to the regulator as a last resort. It is clear from past actions taken by competition authorities in the UK and internationally regarding digital markets that behavioural remedies and fines have proven inadequate in most cases. Lowering the thresholds for the imposition of structural remedies on firms with SMS would help create more market effective outcomes in the future.

We would also recommend that, when weighing up potential remedies to impose, the regulator is obliged not to focus solely on economic value (gain/loss), but also on the social and societal harm/benefit accruing when a particular action is, or is not, taken. This would need to go beyond the traditional individual consumer benefit/harm considerations in terms of pricing and choice.

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?

We do not see the need for additional tools to be available to address possible systemic issues in digital markets. While market tipping is clearly a phenomenon, trying to predict where, when and how it might happen would be very difficult. More important would be to address the dominant firms' market effects quickly and effectively. Smaller digital firms in the UK are already burdened with increasing amounts of regulatory red tape; adding more in order to protect a market that is functioning but might not in future, doesn't feel like smart policy making. On the contrary, as we have seen many times over, the winners of pre-emptively regulated markets are usually those most capable of handling the additional administrative and regulatory burden - i.e. the dominant firms.

The recent EU "P2B" Regulation already addresses relations between digital platforms and businesses using those platforms and introduces various important and necessary

protections regarding asymmetries of power, information and data [5]. We would urge the CMA and UK Government to take a step back and see how effective the P2B Regulation is proving in, say, 18-24 months' time before considering any further market-wide interventions or tools to enable such.

In terms of user control over data, the GDPR already provides a robust framework for users to exert control. The problem occurs when the largest firms abuse their position of dominance, forcing users to relinquish control in order to avoid losing access to a particular service. We would recommend using the competition tools under discussion in this questionnaire, rather than trying to replicate mandatory data portability processes evident in other sectors. Those other sectors are, for the most part, utilities providing commoditised services, easily interchangeable. Examples given by the Furman Review and the CMA in the past include retail banking, internet access provision and telephony. In contrast, the heterogeneous composition of digital services makes any form meaningful data portability very difficult, if not impossible, to achieve. One can see this from moribund projects like the Data Transfer Project[6].

It is true that open standards in the Internet economy have facilitated a lot of growth, reduced costs and driven competition, primarily at the infrastructure and access layers. Arguably, though, the public Internet owes it phenomenal success to the services that run atop the infrastructure. Constant innovation at the services layer has driven huge economic value and societal benefit because of, not in spite of, a lack of standardization.

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?

Yes.

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 believe the CMA's current thinking in these areas, as laid out in the market study final report, is generally sound. We would emphasise the need for speed of review and taking decisions; timeframes that, in the past, might have been counted in months and years, need to be condensed down to weeks and (a very small number of) months. Evidentiary thresholds for SMS designation should be lower than for anti-trust or merger control investigations, since decisions can be reviewed and revised on an ongoing basis. There should be sufficient provision made in the process to protect against vexatious appeals being used to delay or disrupt the imposition of legitimate designations.

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[5] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services
[6] https://datatransferproject.dev/

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)?

It is important that the CMA takes a broad approach to upholding the proper functioning of digital markets. Theories of harm should consider not just economic harms, but also social and societal ones, and any new pro-competitive regulatory approach should reflect the same. As the question acknowledges, this gives scope for overlap with existing and proposed regulatory regimes. Most important among them are: the GDPR-based data protection regime (which is the ICO's responsibility) and the online harms / content liability regime (which will be OFCOM's responsibility). We have three recommendations to make: 1. Request that the ICO and OFCOM nominate a dedicated representative for ex ante competition-related matters led by CMA and second those people to the CMA during the regime and process establishment phase. 2. During evaluations for SMS designations, ensure ICO and OFCOM are part of the standing distribution for comment. 3. Reciprocally, the CMA would participate in any evaluation of the ICO or OFCOM that involved, or could impact upon, the proper functioning of digital markets.

Enhancing operational cooperation and decision-making transparency among these three, highly capable, authorities would allow for a comprehensive and united front on SMS designations, specifically, and reduce the likelihood of contradictory outcomes to regulatory investigations, more generally.

ENDS