28 July 2020

Response of

ACT | The App Association
Rue de Trèves 45,
1040 Brussels, Belgium

to the

# United Kingdom's Competition and Markets Authority's Digital Markets Taskforce Call for Information

on the

# Potential Design and Implementation of Pro-Competitive Measures for Unlocking Competition in Digital Platform Markets

# ACT | The App Association Comments to the Digital Markets Taskforce Call for Information

## I. Introduction and Statement of Interest

ACT | The App Association (hereafter "App Association") hereby responds to the Competition and Markets Authority (CMA) Digital Markets Taskforce (hereafter "Taskforce") call for information. The App Association welcomes the CMA's efforts to maintain the United Kingdom's fair and competitive digital economy.

The App Association is a not-for-profit trade association located in Brussels, Belgium, that represents more than 5,000 small and medium-sized application developers and connected device companies located across the European Union (EU) and around the globe. We are committed to creating an economic environment that fosters innovation, as well as supporting competition between and growth for all participants in digital markets.

Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €830 billion (ca. £755 billion) globally and is responsible for millions of jobs. Alongside the world's rapid embrace of mobile technology, our members have been developing innovative hardware and software solutions that power the growth of the internet of things (IoT) across modalities and segments of the economy. The App Association's members include many UK-based innovators who develop mobile technology products in both established and emerging markets.

For our members, the existing cooperation between developers and platforms represents a symbiotic relationship. Maintaining the level-playing field between big- and small-sized developers helps to ensure a healthy, competitive, and innovation-friendly ecosystem. We appreciate that the CMA is monitoring competition problems in this market. Considering the dynamic characteristics of both platforms' and our members' business models, it is vital that future competition policy allows new technologies to develop in a flexible and reliable digital environment, and that policy actions ensure strong competition while taking into account the possibility of unintended market distortions.

We share the ambition of the CMA to preserve competitive digital markets. Before determining policy recommendations, we advise the Taskforce to identify specific market failures and assess structural issues in detail, to avoid unintended consequences that would negatively impact SMEs. In the context of a new pro-competitive framework, an evidence-based, fair, and coherent regulatory approach is essential to guarantee small businesses have a strong voice in the UK's digital economy.

The App Association remains at the Taskforce's disposal to provide further input and would welcome the opportunity to work with the Taskforce to develop scalable solutions that address these issues in ways that benefit all actors in the European

data economy. We thank the CMA and the Taskforce in advance for its consideration of our submission, and we look forward to engaging further in the future.

## II. Questions for Input and Evidence related to Scope

1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:
    a. *The Furman Review refers to "significant market power," "strategic bottleneck", "gateway", "relative market power" and "economic dependence":*
        i. *How should these terms be interpreted?*
        ii. *How do they relate to each other?*
        iii. *What role, if any, should each concept play in the SMS criteria?*
    b. *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?*
    c. *What evidence could be used when assessing whether the criteria have been met?*

A market definition should precede a determination of SMS. While a market definition should consider antitrust foundations such as the existence of substitutes, such an analysis must be fact-specific, and traditional antitrust analysis is not easily applied to platforms that very often are multi-sided markets. Digital markets are complex, involving a variety of players ranging from massive online platforms to one-person software development companies. In markets as complex as digital ones, the lack of a clear definition of SMS is concerning to the App Association.

As digital markets are often multi-sided markets, they are characterised by the presence of network effects. The utility users on one side of the market derive from their participation in the platform depends on the number of participants on the other side of the market. In the app economy context, this means both app developers and mobile app users benefit from this market structure. Therefore, terms like "significant market power", "relative market power", and "economic dependence" must have very clear and quantifiable definitions and be based on hard evidence to be useful to determine anti-competitive behaviour. It is unclear how concepts like "strategic bottleneck" and "gateway" could be quantified to be used in an SMS assessment, thus their utility seems limited. In the SMS criteria, only those terms that can be based on data-driven economic analysis should play a role. They need to be well-defined, proportional, and align with antitrust principles and practices. To assess whether criteria have been met, more than hypothetical and/or theoretical harms and edge use cases must be shown; substantive evidence is necessary.

Once a market has been appropriately defined, an antitrust analysis should then turn to a determination of SMS designation. A firm's mere possession of "significant" or "relative" market power and potential SMS designation, however defined, is not enough to find

competitive harm unless an abuse of that market power that yields harms to consumers and competitors can be demonstrated. Demonstration of such abuse is critical to determining if antitrust remedies are appropriate, and if so, to what degree.

The SMS concept also does not make sufficiently meaningful distinctions between different types of digital actors and markets. For this reason, existing legal and regulatory regimes like the Significant Market Power Regime in Telecoms have limited utility as a starting point, as the telecoms market is not comparable to modern digital markets. For example, SMS may look one way for one digital platform and entirely different for another, depending on the market. Each platform is a unique entity and has its own eco-system of related parties that are part of multi-sided markets. They operate across several industries with very different business models. Amazon, for example, is not comparable with a platform like the Google Play Store. Even Apple's App Store and Google's Play Store are so different that the whole app-ecosystem would be harmed by a one-size-fits-all approach to app stores. For example, Google uses targeted advertising to link consumers with the products they want and generates large shares of its revenue by selling anonymised data analytics, whereas Apple's majority revenue comes from device sales. These distinctions impact interactions of platforms with third-party business users as well as consumers. Unnecessary and/or overly broad application of antitrust laws on successful digital ecosystems like the app economy is likely to hurt those they are intended to assist, namely business users of platforms and consumers. The SMS concept must ensure flexibility and be adaptable to each platform.

While UK antitrust policy has long reflected that market power assessments should be more holistic and rely on factors past market share alone, new digital platforms illustrate that the application of traditional antitrust fact patterns to complex software platforms is ill-advised. Over-reliance on basic market share (e.g., the relative size of user base) breakdowns wrongly equate share with power, ignoring unique attributes of multi-sided platforms such as the ability to benefit from multiple services on the same platform, a low barrier to substitution, and ease of market entry by new competitors. Such characteristics minimize the lock-in effect on users. A large firm with strong network effects can be very beneficial for users and consumers. Any determination of anti-competitive harm should be highly fact-dependent and based on data-driven economic analysis and a strong evidence base. Platforms are the most important intermediaries in digital ecosystems, enabling businesses of all sizes and types to easily and immediately reach consumers all around the world. The nature of a platform and its size do not automatically make it harmful to competition. It is not beneficial to focus on certain companies with a pre-designated status like SMS. What is much more indicative than size, market power, the number of consumers/business users (etc.) is the actual conduct and actions taken by a firm, and how it interacts with competitors. Further, a proper antitrust analysis should also demonstrate that the monopoly power at issue is not short-lived. Platforms' popularity and profitability do not necessarily indicate a failed marketplace or an anti-competitive environment. The focus should be on tackling harm, whichever form it may take rather than focusing on certain characteristics of a company.

2. What implications should follow when a firm is designated as having SMS? For example:
    a. *Should an SMS designation enable remedies beyond a code of conduct to be deployed?*
    b. *Should SMS status apply to the corporate group as a whole?*
    c. *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 CMA study indicated that when a firm has been designated as having SMS, the digital markets unit can "suspend, block and reverse decisions of SMS firms and order conduct" to achieve compliance. While a code of conduct is preferable over ex-ante regulation, we are concerned with the prospect of regulator-imposed mandates for SMS-firms. Any code of conduct should consist of high-level principles, rather than overly prescriptive rules, as suggested in the CMA study. The prospect of remedies beyond a code of conduct raises the question of what the use of a tailor-made code of conduct (as proposed by the CMA study) would be if additional remedies are being taken anyway. This reiterates our point that any remedy should only be imposed to manage harmful conduct. In this instance, tailor-made remedies that provide some flexibility to accomplish public policy outcomes based on a thorough investigation of harmful conduct are the most useful option. Especially in the context of technology, the speed of innovation in both new products and business models must be taken into account. For example, app stores started with only free and paid apps. Now we have in-app-purchases and subscriptions, various ad-driven and service-driven and media-licensing based business models. Regulating these systems with an inflexible code of conduct or pre-established remedies that go beyond this code of conduct would be a constant game of catch-up for the regulator, generating constant uncertainty and instability for businesses. Principles help everyone participating in a market to understand what acceptable behaviour is and what is not while providing flexibility in advancing public policy goals.

The App Association thus strongly urges the Taskforce not to recommend a code of conduct equivalent to a "blacklist" of unfair commercial practices. A code of conduct must be well-defined, outcome-focused and evidence-based, and justified by proportionality; and complementing (and avoiding conflict with) other UK laws and regulations, so that no other remedies would be needed. An SMS designation on its own should not enable remedies beyond a code of conduct to be deployed. Remedies beyond a code of conduct cannot be based simply on the SMS designation – rather, they should only be taken if harmful conduct has been proven. The demonstration of these harms is essential in determining the appropriate remedy.

Further, applying SMS status to the whole of the corporate group is too imprecise and risks damaging the wider ecosystem. Instead, assigning the SMS to the subset of a firm's activities that has clearly been found to be anti-competitive allows for narrower, and more

targeted remedies. It is also unclear, once a company has acquired SMS, how often the SMS designation will be reassessed if at all. If a company complies with the code of conduct, will its SMS be rescinded and the code of conduct no longer needed? The consequences of an SMS designation should be clarified to avoid creating high levels of uncertainty amongst market players.

3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:
    a. *What are the criteria that should define which activities fall within the remit of this regime?*
    b. *Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.*

As part of a new pro-competition approach, the Taskforce must provide details on how competition dominance and abuse of SMS would be determined. SMS in itself cannot be a criterion for intervention. Traditionally, European competition law prohibits the abuse of a dominant position, not the existence of the dominant position in itself, and the scope of a new pro-competition approach should reflect this. If the dominant market position is used to restrict competition, this behaviour would fall into the remit of the new pro-competition regime. Broadening the scope of the regime to companies that have been designated as having SMS without a demonstration of abuse ultimately denies consumers and society the benefits of healthy competition and creates disincentives for non-dominant firms to compete in their markets to not gain SMS. If the scope of the new pro-competition regime does not focus on the abuse of market power, the Taskforce will have to provide a clear, transparent test for intervention based on evidence. Criteria that should define which activities fall within the remit of this regime thus include a data-driven market definition, and an evidence-based determination of market dominance and/or abuse. Interventions should be implemented only after anti-competitive harm is found. SMS could then be considered in determining the appropriate, proportionate remedies for the existent abuse of market power. The Furman solution of a broad underlying scope risks overreaching and unnecessarily intervening in competitive markets, just because SMS may materialise there.

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?

As digital technologies become more important to our daily lives and the economy, they are also becoming more innovative and more complex. They will continue to improve our quality of life in a variety of ways, ranging from how we access healthcare and education, and work from home to the ways we exercise, travel, cook, and entertain ourselves. As the variety and adoption of technologies increase, so will the complexity of digital markets. This demonstrates that any legislation must leave room for future developments in these markets because they will change, and those changes are likely to be significant. We have already seen how COVID-19 has driven the demand for mobile apps, distance learning

tools, teleconferencing, and other work-from-home solutions, digital healthcare access, and more. In the short term, lockdowns around the world have highlighted the crucial role of technology and innovation in navigating and fighting a pandemic. AI-based smart planning solutions, for example, have provided crucial assistance to health care workers, and have shown that with timely and accurate data we can use AI in very beneficial ways. This increased importance of digital markets is unlikely to recede to pre-COVID-19 levels. Future developments like interoperability, technical specifications, and privacy may be relevant topics for the Taskforce, as well as data governance frameworks to preserve a free and open flow of data. COVID-19 has accelerated trends of digitisation that already existed, and legislation must enable innovators rather than hinder their progress.

## III. Questions for Input and Evidence related to Remedies

1. 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?

This question is unfairly framed. No solid or explicit evidence determines that platforms have anti-competitive effects. The abuse of market power by any economic player can create anti-competitive effects, usually meaning higher costs, less consumer choice, and less innovation. None of these are present in digital platform markets being considered by the Taskforce.

Digital platforms have had pro-competitive effects in many ways. The app economy, for example, is a highly competitive environment, enabled by platforms (app stores), that is currently thriving and continues to experience growth. Platforms have allowed developers of all sizes to compete on a global and level playing field, lowering their overhead cost, allowing them to innovate and providing them with instant world-wide consumer access and high levels of trust. For app developers, mobile app stores have thus significantly decreased entry barriers by providing development frameworks and testing tools, facilitating consumer access, providing payment infrastructure, and more. Due to easier market access for developers, innovation and competition have flourished. Consumers, on the other hand, significantly benefit from the trustworthiness, privacy protections, the update system for their mobile apps, as well as the convenience of centralised payments and refunds. The intense competition in digital markets has enabled consumers to enjoy new technologies and innovation at an unprecedented speed.

2. In relation to the code of conduct:
    a. *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?*
    b. *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?*

Each code of conduct must absolutely be predicated on the demonstration of abuse, and then be tailored, proportionate, and targeted for each firm. One code of conduct structure will not work across other digital markets. A code of conduct is preferable to ex-ante regulation, although as mentioned previously, we are very concerned that the Taskforce suggests it would be able to "suspend, block and reverse decisions of SMS firms and order conduct" to achieve compliance. It is thus important to ensure a high-level principle structure and remedies that are responsive to demonstrated harms to competition rather than overly detailed and prescriptive rules, as suggested in the questions. Supporting guidance must include practical advice so companies can follow the code easily and are not inundated with additional compliance work. The codes and objectives should be drafted separately for each digital market and should provide some flexibility in how to comply/achieve the goals of the code.

The "fair-trading" objective requires SMS firms to trade fairly and reasonably for services where they are an "unavoidable" trading partner as a result of their "gateway" market position. This objective is questionable. In a competitive market, the objective of fair trading should be applied to all market participants and not just to SMS firms. It is also unclear what quantifiable indicators determine the designation of an "unavoidable", and "gateway" trading partner. In fact, large platforms that constitute "unavoidable" trading partners often use the same terms and conditions for every business user, ensuring that everyone is treated in the same fair and reasonable way, no matter their size.

The "open choices" objective requires SMS firms to allow users to choose freely between elements of the firms' services and those offered by competitors. This is a supported objective, although may not be necessary since platforms have strong incentives not to self-preference and do already allow users to choose freely between products. Using Google and Apple as examples, it can be argued that there is an advantage for apps that are preinstalled to be used. However, consumers now reasonably expect phones to come with certain features preinstalled. While both Apple's and Google's preinstalled apps can now be removed from devices, they also have numerous apps that aren't preinstalled at all. Both platforms also constantly highlight good apps, very often alternatives to their own, and many of these apps are much more successful than Google's or Apple's apps. For example, Spotify captures 35% of total paid subscriptions, while Apple Music comes in second with 19%. Similarly, Microsoft Office apps (Outlook, Excel, PowerPoint) have much higher market shares than Google's equivalents. Because the competition on a platform is an important factor in its value, preserving great user experience and having the best quality apps on their stores is in their interest.

The "trust and transparency" objective requires SMS firms to provide sufficient information to users (consumers and businesses), so they can understand how the platform operates and can make informed choices. This objective is in line with what the European Union's

platform to business (P2B) regulation is targeting. While the UK is no longer part of the EU, taking into account elements of the P2B regulation such as guidelines for ranking transparency, clarification of terms and conditions and requirements to implement a mediation process may be immensely useful in achieving this objective.

3. 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?

Mergers are a part of how innovation works, and an anti-merger regime can severely stifle innovation. Heightened scrutiny or outright prevention of mergers could discourage investment (if investors cannot hope to get a return on their investment, they will not make it in the first place) and prevent integration of innovative new technologies into larger platform ecosystems that offer more leverage. Mergers may allow for greater investments in R&D, increase efficiency, and help firms to compete internationally.

Mergers should be scrutinised or prevented in cases where a company is only acquiring a competing technology firm to kill it (killer acquisition) and in circumstances when already dominant players are merging intending to reduce competition in their market and be able to charge higher prices.

4. What remedies are required to address the sources of market power held by digital platforms?
    a. *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?*
    b. *Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?*

Sources of market power should only be remedied if they are abused and used to distort competition. Additionally, any remedies taken involving data access and data interoperability must take into account the risk of conflict between data privacy and mandated data-sharing. With the General Data Protection Regulation (GDPR) just passing the two-year mark, stakeholders are still working through its implications, so additional uncertainty would be detrimental to most actors in the digital economy. Any such remedy must align with GDPR and other privacy regimes that apply in the UK. Companies also come up with their own innovative solutions if they have the room to do so. Apple, for example, introduced “Sign-In with Apple” which allows developers to send emails to their customers without Apple having to reveal the email addresses or other private information of users. Consumers and app makers benefit from this solution in terms of strong privacy protection and facilitated GDPR compliance.

Free competition is essential for maximum consumer welfare. Any antitrust action should focus on specific fact patterns to ensure that the most effective remedies are taken. Structural or behavioural remedies must only be taken once harm has been demonstrated. The existence of market power in itself cannot replace demonstrated harms – sources of market power should not be subject to remedies unless a company has proven to behave anti-competitively. Any enforcement must focus on a company's conduct, rather than structural factors like size, market share, or how much data a firm holds. In case of such behaviour, proportionate remedies that ensure continued competition are essential.

5. Are tools required to tackle competition problems that relate to a wider group of platforms, including those that have not been found to have SMS?
    a. *Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?*
    b. *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?*
    c. *What measures, if any, are needed to enable consumers to exert more control over the use of their data?*
    d. *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?*

A pro-competition regime should not enable pre-emptive action against platforms with SMS nor those without. A regime that allows market intervention without any finding of infringement would disrupt competitive markets and prevent emerging markets from transforming into successful ecosystems like the app economy. An investigative process with ample opportunities for responses by those who are the subject of the investigation provides safeguards for competitive markets and must be preserved. The objective of transparency and measures similar to the ones implemented in the platform to business (P2B) regulation can help to address potential information asymmetries.

With respect to enabling consumers to exert more control over the use of their data, existing privacy regulations, including the General Data Protection Regulation (GDPR), already give consumers extensive control over their data (such as the right to be forgotten). What is needed, rather than additional measures to grant consumers more control over their data, is increased transparency that allows consumers to make informed decisions. The Taskforce should recognize that companies can compete and differentiate themselves based on their privacy and data control practices and incentivise this competition.

## IV. Questions for Input and Evidence related to Designing Procedure and Structure

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

Flexibility, clarity and legal certainty are good characteristics that are important to increasingly complex markets and businesses participating in them. Speed is less useful because collecting evidence and thorough review and investigation are important and may take time, and such a process should be deliberate and transparent.

2. 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.?

Concerning a procedural framework for designating firms with SMS abuse, reviews, evidentiary thresholds, and rights of appeal, we strongly encourage a predictable framework to be made available that incorporates fair timeframes that allow for responses on complex questions (a minimum of 60 days for responses to formal inquiries, for example), with mechanisms in place to provide flexibility in timelines based on hardships. The process for designing a code of conduct should include opportunities for public input. Evidentiary thresholds to designate SMS abuse should be high, based on data and economic analysis. Firms should also be able to appeal an SMS designation or finding of noncompliance with the code of conduct through the regulatory process and, as a last resort, through the judicial system. Because of the changing nature of digital markets, a review should occur no more than every two (2) years.

3. 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)?

Increases in requirements for large platforms risk creating an unintended burden for smaller companies who rely on them. Therefore, practical overlaps between the new pro-competitive approach and existing/proposed regulatory regimes should be avoided. As suggested previously, the framework of the platform to business (P2B) regulation would be a good starting point for complementarity for the new pro-competitive approach. Similarly, concerning data protection and privacy, complementarity with the General Data Protection Regulation (GDPR) should also be ensured.

## V. Conclusion

The App Association shares the ambition of the CMA and the Digital Markets Taskforce to preserve a competitive digital market within the UK. Any new policy framework, however, must be based on the identification of specific market failures and, if found, a data-driven assessment of the structural issues that are causing the market dysfunction. We advise the CMA and the Digital Markets Taskforce to ensure that the new pro-competitive framework takes an evidence-based, fair, coherent, and scalable regulatory approach. This helps to minimise unintended consequences and to avoid negative impacts on small

businesses. While we support the efforts to strengthen the UK's digital economy, we urge the CMA to refrain from using the SMS designation to interfere in markets without any prior finding of infringement of competition rules.

The App Association remains at your disposal to provide further input and would welcome the opportunity to work with the CMA and the Digital Markets Taskforce to develop scalable solutions that address these issues in ways that benefit all market participants. We thank the CMA and the Digital Markets Taskforce in advance for its consideration of our submission, and we look forward to engaging further in the future.

Sincerely,

Mike Sax
Founder and Chairperson

Brian Scarpelli
Senior Global Policy Counsel

Anna Bosch
Policy Associate