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To whom it may concern,

Thank you for inviting Twitter to participate in the Call for Information. We have read the CMA's report on online platforms and digital advertising, and broadly welcome its conclusions as we strive to ensure a customer-friendly, competitive offering for users of our services whether they are individual consumers or advertisers. Any actions that the CMA promotes to encourage competition between platforms and ensure a level playing field is to be welcomed.

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?

Employing the SMS test in assessing market power in the context of social media and digital media advertising can be challenging. In markets without barriers to consumers posting and consuming information and other content, one or multiple firms may rise to dominance due to the features of their platform, without actually having the ability to control access to the market, either due to their existing business practices and design or because of other factors. So, it is important to account for the ability of a platform to block the sharing of information as well as the ease of a consumer in switching among platforms. Also, the products and services we are considering are dynamic. At Twitter, we see a continual evolution in how people communicate.

There is constant innovation and firms must have flexibility to continue to innovate or the platform will stagnate. Consumers are not better off if rules as to a firm's SMS inhibit product innovation, whether organically developed or obtained through third parties (e.g., licensing, joint ventures, acquisition). Ex ante rule-setting can be especially problematic in markets that are marked by creativity and constant tinkering. Such rule-making has the potential to block out change that can create new value for consumers and break down entrenched platforms and business models. It is more important to assess conduct that is exclusionary because this conduct has the potential to prevent a consumer from freely sharing digital content.

In fast-moving markets such as social media platforms and digital advertising, it will be important that any criteria for identifying SMS are flexible enough to apply to platforms that have the market power to act in ways that potentially harm competition, as well as being clear so that market participants know what features or criteria are relevant. It may be necessary to give the DMU flexibility to change or adapt the criteria it uses to identify firms with SMS.

It may also be appropriate for SMS to be determined on the basis of a combination or variety of criteria, e.g. when a firm has either "significant market power" or "relative market power." The potential criteria listed in the question do not have to be mutually exclusive. There is, in fact, no reason why all of the criteria listed could not be used as the basis on which SMS could be determined.

In dynamic markets, one indicator of SMS may be the progression of market share. For example, if an undertaking with more than 50% market share has seen its share reduce over two consecutive years that might suggest a firm does not have SMS. In such a scenario a firm may have SMS, then cease to have it and then re-acquire it if its market share remains the same or grows over a two-year period.

In terms of the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS), the key point is to ensure (i) they are objective and transparent; and (ii) based on conduct that has exclusionary or anticompetitive effects.

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)?

It is challenging to develop remedy rules ex ante for a finding of SMS. A firm that is using its dominance in ways that harm competition is likely doing so through specific conduct. That conduct can vary widely. An effective remedy should be tailored to fit that specific conduct. It

may be, for example, that the acquiring firm should not be permitted to make an acquisition without commitments as to ensuring open access to the to-be-acquired firm's products.

Twitter considers that where a firm is identified as having SMS the implications of that status should be limited to the firm's areas of activity in which it has SMS. It would be disproportionate, and could stifle innovation, if any restrictions on conduct were extended to all areas of the firm's activities. In some instances, the remedy may require putting restrictions on the firm's areas of activity that have SMS from other aspects of its business (e.g. operational and/or accounting separation) to ensure the firm does not distort competition in other areas (e.g. through cross-subsidization of its other activities). In particular, additional rules on sharing customer data within the firm could be imposed preventing personal and other data collected by the area(s) of the firm with SMS being transferred to/used by other areas of the firm (even if consumers explicitly consented).

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?
We are also interested in views on the proposals made by Australia, Germany and the Benelux countries or the proposals made by the European Commission.
• Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.

The approach adopted needs to balance the perceived need to have tools to address possible issues in digital markets with ensuring the system does not disincentivize innovation and stifle competition. The new regime could have unintended consequences and must be carefully calibrated.

We are currently studying the Commission's proposals for a "new competition tool." However, our current view is that the existing framework is the most effective way to ensure the proper balance between maintaining/promoting competition and encouraging investment and innovation which drives competition. The proposal to introduce the ex-ante regulation of digital platforms should only be a matter of last resort where, as in the U.K., a detailed market investigation and analysis has identified systemic problems arising from the existence of SMS.

Whatever the scope of the approach adopted, it needs to be clear so parties can assess if they are covered by it. Ultimately, the focus should be on whether the activities in question are exclusionary in nature, with some balancing of the benefits to consumers. A part of that analysis should not simply be a net balancing of the positive and negative effects on competition, but also the relevance of the challenged activities to the achievement of those benefits. Do the activities (e.g. restrictions on open access, portability of a user's data, etc.), facilitate the development of new products or services or are they pretextual? Similarly, has the necessity of the restriction passed, or is it still vital to make the benefit possible? It may be, for example, that a restriction is justified by the need to protect a nascent product and that this is no

longer the case as it scales up and becomes widely adopted. Likewise, it should be more difficult for a mature platform with SMS status to justify making exclusionary changes to a smaller acquired firm for the purported purpose of integrating with its dominant platform.

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 impact of Covid-19 on all sectors in the U.K. has been well-documented, including digital advertising. When companies are forced to cut advertising spend, smaller firms are usually hit the hardest. As the Culture Secretary moves to develop and launch a comprehensive digital strategy, it will be important to ensure that the cumulative effects of Covid-19, Brexit, the Digital Services Tax, the ICO's Age Appropriate Design Code and the Online Harms Bill do not further entrench monopolies. The largest market actors often have the deepest pockets to monitor and comply with additional regulatory burdens and costs - and due consideration is essential to aligning the Government's broader digital policies with pro-competition work.

The very nature of digital markets is that they develop rapidly and are not easy to predict. It does, however, appear clear that COVID-19 has accelerated the transition of traditional business models, in all parts of the economy, to digital delivery and digital solutions. For this reason, a framework that covers "digital" markets will inevitably cover almost all sections of the economy. Therefore, if there are specific issues that the DMT wishes to address it may be beneficial to set out its areas of primary interest/concern.

<u>Remedies for addressing harm</u>

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 many academic articles have noted, there are a number of technology companies that offer free products for consumers and this can present challenges in identifying the impact of alleged anticompetitive behavior. Particularly when focusing on consumer welfare, there are typically no price change indicators to show consumer harm. There are other non-price indicators, like limitations in customer choices for interoperability, changes to further enforce the confines of a walled garden, or overall decreases in innovation. Another harm may be not giving consumers information about how their data is used or not giving consumers control over their data through interoperability and data portability. Twitter is deeply committed to both, and believes these are foundations to maintaining an open internet.

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?

Twitter believes that any code of conduct should apply only to those entities which have been identified as having SMS in a particular market. Otherwise, a code of conduct – on top of existing laws such as competition law, GDPR, or the upcoming Online Harms legislation – will create an additional regulatory burden which may increase barriers to entry, stifle innovation, and further entrench dominant firms. Expanding a code of conduct to all market participants (and markets not even covered by the market study) risks having longer-term unintended consequences.

With this as a starting point, a code of conduct may provide helpful benchmarks for reviewing potentially anticompetitive conduct and agreement terms. To be effective, however, the principles should be clearly articulated and objective in nature. A code of conduct that asks market participants to be good actors by engaging in 'fair trading' does not set out clear objectives. Terms like 'open choices' and 'trust and transparency' are not much better in providing objectivity, and leave the policy open to wide interpretation, dispute, and even irrelevancy due to vagueness. It is also possible to be overly prescriptive and lose the flexibility that is important to effective guidance. It is important to balance precision with flexibility.

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 a difficult question, but it is not obvious to Twitter why a separate regulatory regime for mergers is necessary. There is already a proliferation of merger control regimes globally. Rather than a new layer of oversight, it would be better to evaluate existing merger control regimes and make appropriate modifications to the extent the existing regime is determined to be incapable of addressing acquisitions by firms with SMS.

As to the components of the merger rules that should apply to a firm with SMS, as you may be aware, in the US the Clayton Act Section 7 prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." This is the equivalent of the U.K.'s "substantial lessening of competition" test. If there is evidence that large technology companies have substantially less incentive to compete on any dimension after acquiring its rivals, these deals may run afoul of the antitrust laws.

However, at the time a SMS company acquires a startup, there can be challenges in determining whether the acquisition will substantially lessen competition. And post-acquisition there may be product-based changes, like decreases to interoperability, that deserve closer inspection, to determine whether the changes were made to exclude competitors or for a procompetitive purpose.

So long as the existing merger control rules enable the CMA to review potentially anti-competitive mergers then it may not be necessary to have a separate merger control regime for entities with SMS. If one were to be introduced it should be very easy to identify whether it applies (e.g. it could apply to all companies having been designated as having SMS by the DMU). Alternatively the existing regime could allow intervention up to, say, 2 years after completion (rather than 4 months) so the CMA can see how the market develops and whether a merger merits review.

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?

Remedies should be tailored to the specific conduct and harm. If a firm with SMS adopts a restriction on access and reduces interoperability to harm consumers and the market, then an appropriate remedy would be to remove the restriction on access. In other cases, other remedies may be warranted by the facts. Just as regulatory rules should be carefully crafted, remedies should be carefully crafted and not overreach creating new harm.

Barriers to entry include network effects (the larger the platforms are, the more valuable they tend to be for their users), and switching costs (the time and effort involved for consumers to choose to use a different communications platform, or reluctance by advertisers to switch to advertising on other platforms because of the work involved in setting up an advertising campaign). Disabling forms of interoperability (like cross posting) can increase those effects.

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?

It is critical to ensure that interventions do not inhibit new entrants and smaller market participants to devise and promote new business models. Any proposed interventions arising from this review should focus on those firms who have achieved SMS. Wide-ranging solutions focused on all market participants risk discouraging innovation and investment, and adding an unnecessary administrative and cost burden on smaller market participants. As the CMA's report indicated, respondents identified other non-dominant entities such as Twitter as having a unique ability to compete with Google and Facebook, as it is able "to reach niche and highly relevant audiences through . . . a range of ad solutions that are different to others." New obligations would have a disproportionate impact on smaller companies, reducing their ability to compete.

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. See comments above in which Twitter addresses the need for standards and objectives with which to measure conduct by a firm with SMS, and the need for remedies that are specifically tailored to the issue. And, of course, in this industry where there is constant innovation, speed is a must for regulatory intervention to be relevant and not harmful. Digital markets are characterized by speed - intervention must be just as responsive.

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.?

See comments above.

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)?

Industry-wide regulation creates the risk of increasing operating costs for businesses, which is particularly challenging for new entrants, as well as small-to-mid-sized firms seeking to compete with those entities that are dominant and/or have SMS. Regulations that are inherently complex in application and subject to further rulemaking, advisory opinions, guidance, and the potential for penalties, can have the cumulative effect of creating barriers to entry and further entrenching dominant players. Complexity and uncertainty gives dominant companies a distinct advantage as they have the financial resources to comply with a fragmented regulatory landscape, while small and mid-sized companies struggle with constantly increasing regulatory compliance costs. This takes away money and resources that smaller companies might otherwise devote to

innovating and improving products to compete with the larger competitors. Therefore, any new rules should apply only to entities designated as having SMS.

As noted above, in the next 12 months in the U.K., we will see the introduction of the Digital Services Tax, the Age Appropriate Design Code and the Online Harms regulation and voluntary codes. We would welcome further clarity in how the Government plans to align this work with the development of a pro-competitive agenda.