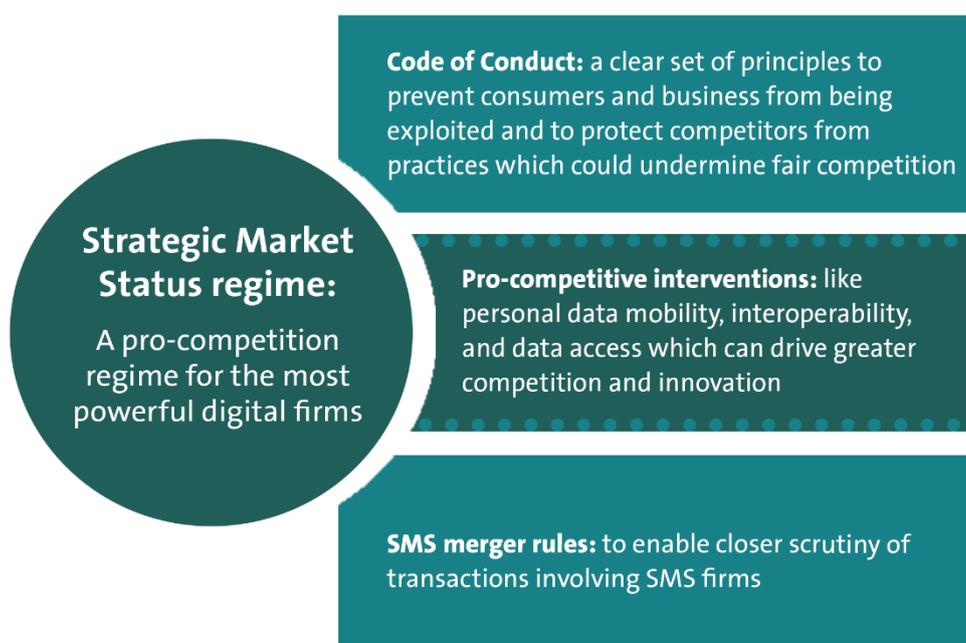


# Appendix D: The SMS regime: pro-competitive interventions

## Overview

1. This appendix sets out in detail our proposals for how pro-competitive interventions should apply to firms with Strategic Market Status (SMS) and why we believe these are a key pillar of the SMS regime. Detail on how SMS should be designated is set out in Appendix B, while our proposals for the other tools of the SMS regime – the code of conduct and SMS merger rules – are set out in Appendices C and F respectively. Appendix E sets out cross-cutting powers and procedures.

Figure D.1: overview of the SMS regime



2. The material in this appendix is set out in the following sections:
  - **the purpose of pro-competitive interventions** and why we believe these are a crucial part of the SMS regime;
  - **the range of interventions** that should be available to the DMU through this tool and the extent to which it should be limited to a prescribed set of interventions;

- **the scope of pro-competitive interventions:** on which activities, within an SMS firm's business, the DMU should have power to impose pro-competitive interventions;
- **the procedural steps** we envisage the DMU should take when investigating the case for and implementing pro-competitive interventions; and
- **the process for reviewing, monitoring and enforcing pro-competitive interventions** – to ensure they are complied with and remain effective.

## The purpose of pro-competitive interventions

**Recommendation 6: The government should establish the SMS regime such that the DMU can impose pro-competitive interventions on an SMS firm to drive dynamic change as well as to address harms related to the designated activities.**

3. Pro-competitive interventions (PCIs) are an important tool to enable the DMU to intervene in markets to promote dynamic competition and innovation. Whilst the code will seek to prevent SMS firms being able to take advantage of their powerful positions in the activities that give rise to their SMS designation, PCIs will seek to address the root cause of market power. Remedies like personal data mobility and interoperability cannot be achieved via the code but are critical in addressing features, such as barriers to entry, which prevent innovative new competitors driving greater competition and innovation. Powers to implement these types of remedies are essential if the DMU is to be able to drive long-term dynamic changes in markets, opening up opportunities for innovation to the benefit of consumers, businesses and the economy more widely.
4. The purpose of the PCIs is to **promote** competition – to create the conditions such that dynamic competition and innovation can flourish – and to further the interests of consumers. While the code seeks to prevent SMS firms from taking advantage of their powerful positions, for example by exploiting users or excluding competitors, it will not address the reasons why the firm has this powerful position in the first place, ie it will not address the root causes of the firm's market power. Without action, even with the code, there will continue to be a lack of effective competition. This matters; without effective competition, an SMS firm will face too little incentive to invest, to innovate, to offer lower prices or to improve quality, since there is little risk of it losing its position to a rival if it does not do so.

5. Most respondents to our call for information who addressed PCIs supported the DMU having powers to address the market power held by an SMS firm. Many argued that these powers are critical to the success of the regime.<sup>1</sup> There was particularly strong support for data and interoperability interventions, discussed in further detail below, to unleash the potential for new competition.
6. PCIs are not a new concept. Interventions of this sort have been used to great effect in markets like communications for many years. The closest parallel in economic regulation is Ofcom which, through the Significant Market Power (SMP) regime, has undertaken (and continues to undertake) a series of interventions to promote greater competition in communications.<sup>2</sup> This is a multi-decade programme focussed on supporting the growth of competition and supporting innovation by both the incumbent and new entrants. Examples are set out in Box D.1.
7. What is important is that PCIs are not designed to undermine the incumbents' ability to compete or benefit financially from the scale of their operations. What they offer is the ability to ensure that scale or exclusive access to customer groups cannot be used to exclude competitors and can offer a route to creating opportunities for competitors to emerge.
8. We believe PCIs are crucial to enable the DMU to effectively promote greater competition and innovation in the activities of SMS firms. The remainder of this section explains further how PCIs are an important complement to the code, and why existing competition tools are not, by themselves, sufficient to achieve these objectives.

**Box D.1: Case study – fixed telecoms pro-competition regulation**

In 2003, BT had a near monopoly in the provision of almost all fixed telecommunications services (for example domestic and business landline and broadband services) in the UK, both for consumers and businesses.

The objective of the newly formed Ofcom in the fixed telecoms market was to encourage the formation and growth of new service providers at a retail and wholesale level to promote consumer choice, value for money and innovation.

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<sup>1</sup> For instance, a digital platform submitted that 'effective competition in such markets can be restored only if the source of SMS is addressed as well as managing its effects. SMS, once achieved, need not be regarded as the end of competition, so long as the authorities are empowered to remedy ingrained structural issues in appropriate circumstances'.

<sup>2</sup> Ofcom, [Ongoing and previous regulation in the telecoms sector](#), including documents setting out the principles that are applied in market reviews to assess SMP.

Initial interventions were focussed on requiring BT to provide white label wholesale telephony services which could be purchased by potential entrants, branded and resold to retail customers. This was sufficiently successful that by 2009, BT faced sufficient competition in its retail telephony services, such that they were deregulated for the first time since the formation of the original state-owned business in the 1880s.

In parallel to this, more upstream access interventions focussed on the new broadband technology were put in place. In particular, an obligation was placed on BT to provide third parties with access to the copper wire connections from its exchanges to premises, such that third parties could offer services over these wires. This supported:

- Growth in broadband competition and in broadband provision. By 2011 78% of the UK had access to competitively provided broadband. By 2018, that figure was 99%.
- Competitive innovation, enabling third-party broadband providers to provide more advanced broadband standards – ie competitors were able to offer faster broadband than BT on BT's own copper wires.

The promotion of competition continued with interventions, discussed in Box D.5 below, to promote third party fibre investment through requiring BT to allow third party access to BT infrastructure.

### ***Relationship with the code***

9. As discussed in Appendix C, SMS firms will be subject to an enforceable code of conduct that will seek to prevent them from taking advantage of their powerful positions in the activities that give rise to their SMS designation. The code will set out the 'rules of the game' upfront, with the DMU taking action if it thinks the code may have been breached.
10. The remedies available under the code will be inherently limited, because they can only require firms to change their behaviour such that they are no longer in breach of the code. As such:
  - As explained above, the remedies available under the code cannot be used to implement specific remedies to address underlying competition problems – for example to address the sources of a firm's market power. Whilst a code breach could take action against an SMS firm who cut API access to a competitor, it generally could not require an SMS firm to proactively make a new service interoperable.

- There are also likely to be circumstances where the DMU identifies a specific remedy to a code breach which might go beyond what is required to meet the code, but would bring a greater level of benefits. The DMU could consider implementing such a remedy through a PCI. For example, the code could be used to stop an action by an SMS firm to limit the choice available to its customers, such as stopping an SMS firm from redirecting consumers to its other services in a misleading manner. By contrast, the DMU could consider using a PCI to require the SMS firm to implement choice screens for consumers on its devices and set rules regarding their design. This would be a more long-term solution to delivering consumer choice.
  - Lastly, in some circumstances, the PCI could enable a more pro-competitive remedy than is possible under the code. For example, an SMS firm may use data collected from its designated activity to provide it with an advantage in its other activities. The code could prohibit this practice. But a PCI could instead enable the firm's competitors in its other activities to have access to the same data, enabling any economies of scale and scope from these datasets to be shared more widely. This could bring benefits to consumers in quality and range of services.<sup>3</sup>
11. The DMU will need to consider the most appropriate tool to address a concern. Where conduct is covered within scope of the code, then we would expect the DMU to first consider whether the code is an appropriate tool to address the concern. However, PCIs will need to be available to the DMU when the issue lies outside the scope of the code or where the code clearly is, or proves to be, insufficient and there are steps that could be taken to better promote competition and innovation. This stepped approach to regulation highlights how PCIs would play a vital complementary role to the code of conduct to address these competition concerns.

### ***The need for pro-competitive interventions in addition to existing tools***

12. Although the majority of respondents to our call for information who addressed PCIs supported the DMU having these powers, some respondents raised the point that, if warranted, PCIs could be implemented by the CMA through the market investigation process.<sup>4</sup> They submitted that using the

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<sup>3</sup> As set out below, in undertaking such remedies the DMU would need to ensure compliance with data protection laws.

<sup>4</sup> Market investigations are detailed examinations carried out by the CMA into whether there is an adverse effect on competition in the market(s) under investigation. If competition concerns are identified, a wide range of legally enforceable remedies are available, aimed at making the market(s) more competitive in the future. The legal powers to undertake a market investigation are contained in the Enterprise Act 2002 as amended by the Enterprise and Regulatory Reform Act 2013. Further information regarding the CMA's market investigations guidelines are found [here](#).

market investigation process would ensure that a detailed assessment of the competition concerns was conducted, and that appropriate consideration would be given to the likely effectiveness and proportionality of any interventions.

13. We strongly agree that PCIs must result from a detailed assessment and understanding of competition concerns and for this assessment to consider the potential effectiveness and proportionality of any intervention. The PCI tool we are proposing is grounded in the need for such an assessment. However, we consider that our proposed approach of an ex-ante regulatory tool, rather than implementing these interventions through the markets regime has several key benefits. In particular:
- The markets regime is designed to be a one-off exercise. It is based on a snapshot of the market at one point in time and as such, any remedies will necessarily be limited to what can be specified at that time. It is not well-positioned to address problems that are expected to persist over time for example where market power is entrenched, as in the case for firms within the SMS regime, and where the competition concerns are not likely to be amenable to a fixed set of interventions. Having powers embedded in the SMS regime would provide the ability for the DMU to ‘layer’ PCIs over time, starting with smaller interventions and considering their effectiveness before considering more interventionist remedies where needed.
  - Linked to this, PCIs should be subject to ongoing monitoring, reviewing and updating to ensure they remain relevant as technologies and circumstances evolve. The manner in which consumers interact with these products and services may also change over time and it will be essential that these remedies can be adapted to ensure they remain effective. Under the markets regime it is significantly more challenging to re-open, review and amend remedies.<sup>5</sup>
14. As set out in Appendix G, we are proposing reforms to the markets regime which, in part, might help to address these factors. However, providing the DMU with the power to impose PCIs would enable these types of remedies to be implemented on SMS firms in a far more effective manner as part of a wider ex-ante framework. We note that sector regulators very seldom rely on the markets regime to undertake such interventions. Including these powers

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<sup>5</sup> For example, in the context of the [Open Banking remedy](#) implemented through the markets regime, updating the nature of the data available through open banking would require the CMA to re-open the market investigation, not just run a consultation on the proportionality of the incremental change.

within the SMS regime will enable these interventions to be implemented more effectively because:

- The DMU will have a detailed understanding of the activities for which a firm has been designated as having SMS, providing it with a more developed knowledge base when beginning an assessment. It should therefore enable concerns to be identified more swiftly and for more informed remedy design on the basis of existing knowledge and evidence.
- An *ex-ante* tool enables the DMU to consider decisions in relation to PCIs in a coherent way alongside wider regulation of an activity, including the code, ensuring that decisions in relation to PCIs are proportionate. As described above, the DMU could first consider whether the code could be used to deal with concerns. If the code proves to be insufficient or inadequate, PCIs could be adopted to address the concern.

## **The range of interventions**

**Recommendation 6a: With the exception of ownership separation, the DMU should not be limited in the types of remedies it is able to apply.**

15. The taskforce has considered the range of PCI remedies that should be available to the DMU in the context of the SMS regime and the extent to which the DMU should be limited to a prescribed set of interventions. In this section we cover:
  - the different types of PCI we expect the DMU is likely to require a power to implement;
  - whether the DMU should be able to implement full ownership separation remedies; and
  - whether the DMU should only be able to implement a prescribed set of PCIs or have more flexibility to consider alternatives.
16. Many of the interventions discussed in this section could be utilised across digital markets. However here we consider those remedies the DMU should be able to implement only in relation to SMS firms. How they could be used in relation to digital markets more widely is considered in Appendix G.

### ***What types of PCIs is the DMU likely to require?***

17. At a minimum, we consider that the DMU should be able to implement the following types of remedies through PCIs:

- **data-related interventions** – including interventions to support greater consumer control over data, mandating third-party access to data and mandating data separation/data silos;
  - **interoperability and common standards** – these can be important in data-related remedies, for example to support personal data mobility, but can also be used to ensure software compatibility or enable systems to work together;
  - **consumer choice and defaults interventions** – these remedies can be used to better enable effective consumer choice, for example to address concerns regarding how choices are presented to customers and the defaults that are selected which influence consumer decision making;
  - **obligations to provide access on fair and reasonable terms** – these remedies provide third parties with access to key facilities or networks in a non-discriminatory manner; and
  - **separation remedies** – which aim to address structural features of the market that inhibit competition, for example to ensure that different units within an SMS firm are operated independently of each other. As we note below, the DMU should not be able to implement full ownership separation.
18. We now provide an overview of each of these categories of remedy and explain how, and to what benefit, they could be used in relation to a range of digital activities, providing examples for illustrative purposes where helpful.
19. We note that for many of these remedies there is a scale as to how significant the remedy can be: a data access remedy can range from access to a discrete piece of data to an entire data-set; interoperability can range from making a single function interoperable to an entire service. Similarly, the method of implementation can greatly affect the intrusiveness and costs. We would expect the DMU to carefully consider the range of options and balance the potential benefits against the likely costs.<sup>6</sup>

### *Data-related interventions*

20. It is widely acknowledged that data plays a crucial role in the business models of many of the most powerful digital firms. Within the SMS regime, data-

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<sup>6</sup> For a discussion of challenges and opportunities for regulation of digital services, see Section 5 of Ofcom's paper, [Online market failures and harms](#).

related interventions could help overcome barriers created by unequal access to data and could take a variety of different forms. These include:

- **Consumer control remedies** – These enable consumers to better control their personal data, for example – by controlling the terms on which it is collected, how it is used, who it is shared with and facilitating consumer-led data mobility. They would complement existing data protection rights under the General Data Protection Regulation and the Data Protection Act 2018.
- **Data access remedies** – These enable third parties to access data held by SMS firms. They can be used where access to data is a key barrier to new entrants being able to develop new innovations in a market. Compliance with data protection laws will need to be considered where personal data is involved.
- **Data silo remedies** – These remedies limit how data can be shared and used between different business units within an SMS firm.

21. There are good examples of existing data-related remedies that have resulted in significant innovation for consumers and new opportunities for businesses. For example, the CMA’s Open Banking remedy (set out in further detail in Box D.2) has enabled consumers to better access, control and use their financial data. This initiative has created opportunities for businesses and innovators to develop new propositions for consumers utilising this data, whilst ensuring that trust, consent and privacy safeguards remain at the heart of the intervention.

#### **Box D.2: Case study – CMA Open Banking remedy**

In 2016, the CMA required the largest UK banks to implement Open Banking by early 2018, to enable personal customers and small businesses to share their data securely with other banks and with third parties. Open Banking enables consumers to compare products based on their own requirements and was designed to bring more competition and innovation to financial services.<sup>7</sup>

This initiative has supported the significant growth of the FinTech sector in the UK over recent years, leading to better quality existing services, as well as the development of entirely new services and propositions including more bespoke, tailored financial services products which are focussed on better serving vulnerable consumers.<sup>8</sup>

<sup>7</sup> CMA (August 2016), [CMA paves the way for Open Banking revolution](#).

<sup>8</sup> OECD (May 2019), [Digital Disruption in Financial Markets – Note by the United Kingdom](#).

The benefits created by this initiative, such as supporting customers to better understand their spending, manage their income and expenditure or access cheaper credit has led to fast growth in demand for services utilising open banking, with over two million customers making use of open banking-enabled products as of September 2020.<sup>9</sup>

22. We consider that the power to implement PCIs in the form of data-related remedies would be key to the DMU being able to promote competition and innovation where data plays a fundamental role in the business models of digital firms.
23. Many respondents to our call for information supported data portability and interoperability interventions as means of overcoming the barriers to entry created by network effects, to minimise switching costs and increase consumer control over their data.<sup>10</sup> We share this view and believe that such remedies would be vital for the DMU in being able to lower switching costs, enable users to move between ecosystems in a consumer-initiated manner and drive greater competition in relation to the activities of SMS firms where data is a key feature supporting their market power.
24. The CMA's market study into online platforms and digital advertising (referred to as 'the market study' throughout) found a strong case for several data-related interventions in relation to online platforms that are funded by digital advertising.<sup>11</sup> For example, it recommended that the DMU should have the power to introduce, if justified, the following:
  - A choice requirement remedy, which would require firms to give consumers the choice not to share their data for personalised advertising.
  - A requirement on Google to provide access to search data, such as click and query data, to third-party search engines, which could help them to overcome Google's scale advantages in respect of data and to develop competing products and services.
  - A requirement on Facebook to give its users the freedom to effectively utilise their data on competing products or share it with intermediaries to

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<sup>9</sup> Open Banking (September 2020), [Real demand for open banking as user numbers grow to more than two million](#).

<sup>10</sup> For instance, Vodafone submitted that 'Companies which are designated to hold SMS should be under a regulatory duty to ensure interoperability with rival services, and to provide open access to data and other key technical facilities, as a means of driving competition.'

<sup>11</sup> CMA market study into online platforms and digital advertising, [final report](#), paragraphs 7.110-7.113.

help reduce switching costs and therefore facilitate consumer choice and foster greater innovation in social media.

25. These remedies are designed to address underlying competition problems, including the sources of an SMS firm's market power, and as such, they would not be available under the code.
26. The importance of data mobility is also reflected in existing industry initiatives, such as the Data Transfer Project. This initiative, launched by several of the largest firms, including Apple, Google, Facebook and Microsoft, describes data mobility and interoperability as being central to innovation, facilitating competition and empowering individuals to try new services and choose the offering that best suits their needs.<sup>12</sup> Whilst we are supportive of the principle of the Data Transfer Project, the market study found that the current use cases in this project were unlikely to address the key features and barriers identified as limiting the direct competition to the contributors of the project. As such, we believe it will still be important for the DMU to possess the ability to target interoperability and data mobility measures in these markets to promote innovation and competition.

#### *Interoperability and open standards*

27. Interoperability and open standards remedies include requiring systems and devices to 'talk' to each other using open, standardised formats. In practice, this could enable interaction between users on different messaging apps, social media sites, or video calling software. Therefore, whilst interoperability can be necessary to facilitate data-related interventions, such as data mobility, it can also have benefits in other forms, such as ensuring software compatibility and enabling systems to work together.
28. There are examples of interoperability and open standards across digital markets. Key examples are the Internet and email services, outlined further in Box D.3 below.

#### **Box D.3: Case study – open standards behind the Internet and email services**

Open standards are generally seen as the necessary building blocks for enabling interoperability, compatibility and consistency across digital services and technology where promoting such characteristics can unlock powerful network effect benefits for industry and consumers.<sup>13</sup>

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<sup>12</sup> Data Transfer Project, [About](#).

<sup>13</sup> Furman Review (2019), [Unlocking Digital Competition](#), Chapter 2.

Systems built using open standards refer to those built using technical specifications that are agreed in common and freely available. Open standards are developed via processes that are transparent and open to broad participation from industry. Examples of open standards and the benefits they bring are:

- the Hypertext Transfer Protocol (HTTP), which is used to transmit web content. It is open and free for anyone to use and makes it possible for anyone to share a webpage or launch web-based services, unleashing innovation and growth of online services.
- Email standards: Simple Mail Transfer Protocol (SMTP) and Internet Message Access Protocol (IMAP) enable email messages to be transmitted over the Internet. It is now inconceivable that a consumer could only send emails to individuals or organisations who use the same email provider as them.

29. We consider that the power to implement interoperability and open standards remedies is important for the DMU if it is to lower barriers to entry created by network effects and limit the ability of SMS firms to engage in potentially abusive behaviours, such as differentiating the level of access provided to third parties based on their perceived competitive threat. The use of these types of remedies was supported by respondents to our call for information.<sup>14</sup>
30. The market study highlighted the potential for interoperability remedies in its proposal to enable increased interoperability with Facebook's large network of users. This includes requiring Facebook to enable competitors to interoperate with specific features of its current network, for example the ability to identify and make contact with friends from other social media platforms, the ability to post content across several platforms simultaneously, and the ability to view posts from friends on other social media platforms.<sup>15</sup>
31. There are many examples where interoperability could be valuable, such as direct messaging. The DMU could assess whether there would be consumer benefits associated with direct messaging services being interoperable and the extent to which privacy and security-related concerns could be addressed. We note that Facebook has already integrated its Facebook and Instagram

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<sup>14</sup> For example, the Electronic Frontier Foundation recommended the use of "interoperability itself to act as a competitive pressure on companies" and described themselves as "strong believers in interoperability, especially adversarial interoperability, as a force to tackle market dominance". In their paper '[Adversarial Interoperability](#)' they describe adversarial interoperability as: 'when you create a new product or service that plugs into the existing ones *without the permission* of the companies that make them. Think of third-party printer ink, alternative app stores, or independent repair shops that use compatible parts from rival manufacturers to fix your car or your phone or your tractor.' Similarly, Qustodio submitted that 'mandating an open but also a common API to device features would help eliminate market barriers and allow the entry of new competitors while preventing potential abusive behaviours.'

<sup>15</sup> CMA market study into online platforms and digital advertising, [Appendix W: assessment of pro-competition interventions in social media](#)

direct messaging services to deliver cross-app communication.<sup>16</sup> This initiative enables users to connect across Instagram and Messenger by using either app to send messages and join video calls.

32. Interoperability remedies are also likely to be effective in markets with strong indirect network effects, such as operating systems and computer software which are designed to interact with other products and require a minimum level of interoperability in order to reach consumers. One example in relation to app stores might be an interoperability remedy that ensures that third-party app developers are able to access the same features on a user's device as apps provided by the operating system provider, allowing third parties to access consumers and compete effectively to meet their needs.
33. Since interoperability involves some form of standardisation, there is a potential cost to mandating interoperability, as well as a benefit. In relation to costs, interoperability may mean there is potential for reduced innovation and variety in respect of the functionality that is standardised. We consider that the case for interoperability is likely to be greater in respect of functionality which is directly helpful in overcoming identified network effects, not highly innovative (or not recently innovative), and in respect of which privacy and security concerns can effectively be managed.
34. We consider interoperability is a key tool the DMU could use to significantly improve opportunities for competition and innovation in relation to the activities of SMS firms. As with all PCIs, any intervention of this kind would need to be carefully considered, taking account of the risks of unintended consequences.

#### *Consumer choice and defaults remedies*

35. The setting of defaults can have a powerful effect on consumer decision making across a range of industries, such as mobile phones, savings plans and websites.<sup>17</sup> In turn, this can be exploited by the firms that set and control these default settings, for example in the apps which are pre-installed on a mobile device. Consumer choice and default remedies aim to support customers in making effective choices and seek to overcome consumer inertia. Examples include:

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<sup>16</sup> Facebook (September 2020), [Say !\[\]\(0b2d75b7f3fd0efc098bb21eb0dee90f\_img.jpg\) to Messenger: Introducing New Messaging Features for Instagram](#).

<sup>17</sup> Sunstein, R (2013), [Deciding by default](#).

- **Restrictions on default agreements** – measures implemented through PCIs could restrict agreements where the setting of a default is found to be a key factor supporting a firm’s market power.
- **Choice screens** – this is a remedy tool which seeks to overcome consumer inertia and default bias by providing users with a menu of options and asking them to make an active choice regarding their service provider, rather than being defaulted to a specific provider.

36. These types of remedies have been used for some time by competition authorities. For instance, the European Commission has adopted choice screens as an antitrust remedy on at least two occasions<sup>18</sup> in digital markets to provide users with the opportunity to make an active choice regarding their service provider. We outline an example of this in Box D.4.

#### **Box D.4: Case study – Microsoft choice screens for web browsers**

In 2009, Microsoft entered into commitments with the European Commission to address concerns that Microsoft had tied its web browser Internet Explorer to the Windows PC operating system in breach of EU rules on abuse of a dominant market position.<sup>19</sup>

As part of this agreement, Microsoft committed to automatically prompt its users to choose a browser if their computer came with Internet Explorer and ensure that the design and presentation of options would be free from bias and would allow users to download and install additional browsers, including rivals of Microsoft’s own products.

This choice screen was made available on Windows devices between 2010-2014 and was reported as having been a success, leading to a significant uptake in the downloading of non-Microsoft browsers.<sup>20,21</sup> At the time of the decision, Internet Explorer’s market share stood at 46%. A year after the decision, Firefox’s market share had already overtaken Internet Explorer’s in Europe (37% vs. 36%). Internet Explorer’s share then fell to around 30% by January 2012 and in June 2016 it was below 10%.<sup>22</sup>

<sup>18</sup> In addition to the Microsoft example referred to in Box D.4, in 2019, Google announced that it was introducing a choice screen to address the concerns identified following the European Commission’s July 2018 Android decision. See [Google announcement](#).

<sup>19</sup> European Commission (December 2009), [Press release regarding commitments it entered into with Microsoft](#).

<sup>20</sup> BBC article (2014), [Deal forcing Microsoft to offer browser choices ends](#).

<sup>21</sup> Walker, M (2017), [Behavioural economics: the lessons for regulators](#).

<sup>22</sup> Statcounter, [Browser market share in Europe 2010-2020](#)

37. Given that consumers can be highly influenced by default settings, we consider there to be clear benefits to the DMU in having the power to intervene to ensure users are able to make an active choice regarding their service provider, where it finds that these defaults are distorting competition and outcomes in these markets. Such a power would also enable the DMU to amend and update the design of the remedy to reflect changes to technology and market conditions.
38. The market study recommended that the DMU should have the power to introduce a range of remedies to address Google's powerful position as the default search engine on most devices and browsers.<sup>23</sup> These could range from the implementation of choice screens to restrictions on which positions Google can hold or pay for (for example stopping Google paying to be a pre-installed or default app on the mobile phones of a manufacturer which reinforces their market power by removing the incentive or ability for consumers to make an active choice).

*Obligations to supply on fair, reasonable and non-discriminatory terms*

39. We consider that the power to oblige firms to supply access on fair, reasonable and non-discriminatory terms will be an important part of the DMU's remedy toolkit. This remedy would enable the DMU to require an SMS firm to provide access, for example to an infrastructure or a service, and to set the terms on which that access is provided.
40. Obligations to supply access on fair, reasonable and non-discriminatory terms are central to telecoms regulation where Ofcom requires an incumbent provider to allow other communications providers access to the copper wires, fibre links or even the ducts and poles necessary to be able to compete or provide ancillary services in the provision of communications services. An example is provided in Box D.5.

**Box D.5: Obligations to supply in telecoms regulation**

Access requirements are a key component of promoting network-based competition. It is through access regulation that regulators like Ofcom were able to intervene in wholesale products and promote competition in retail markets. This model has been very successful, allowing for reduced regulation in a range of

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<sup>23</sup> CMA market study into online platforms and digital advertising, [Appendix V: assessment of pro-competition intervention in general search](#).

retail telecoms markets and consumers benefitting from increased innovation, better choice, quality and value for money.<sup>24</sup>

A recent example of access regulation aimed at promoting network-based competition comes from Ofcom's 2019 review of the physical infrastructure market (PIMR), where it introduced unrestricted access for all telecoms providers to the ducts and poles owned by BT and operated by Openreach.<sup>25</sup>

The objective of this access requirement was to address the advantage of BT's market position in its ownership of ducts and poles. By opening up access to these assets, it ensured other providers could build new high capacity networks for homes and businesses far more economically, spurring BT to invest more heavily in such networks to preserve its market position.

The suite of remedies introduced by the review includes a range of requirements on BT, such as: (i) to provide network access on reasonable request; (ii) not to unduly discriminate against operators requesting access and to provide them with all necessary information; (iii) to publish and operate requests for new forms of network access; and (iv) to notify changes to charges, terms and conditions and technical information.

41. Whilst there are important differences between the telecommunications sector and digital markets, these markets do exhibit some similar features that can inhibit competition, such as network effects and economies of scale. Consequently, the telecoms sector can offer some useful examples which illustrate how effective interventions, such as obligations to supply key services in which the dominant firm has a strong or unique advantage, can create opportunities for competition to emerge and to sustain and encourage greater competition and innovation. This is all without undermining the incumbents' ability to compete or benefit financially from the scale of their operations.
42. An obligation to supply could be important in relation to a range of activities where SMS could be found. This type of remedy has been adopted by the European Commission with respect to operating systems in another Microsoft case. The European Commission required Microsoft to provide information to third parties on reasonable and non-discriminatory grounds which would enable their products to interoperate with the Windows operating system.<sup>26</sup>

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<sup>24</sup> The standard broadband and land-line bundle prices fell by 18% between 2015 and 2018. See [Ofcom's Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets – Introduction](#).

<sup>25</sup> Ofcom (June 2019), [Ofcom's review of the physical infrastructure and business connectivity markets](#).

<sup>26</sup> EUR-Lex (2007) *Microsoft v. Commission*, 2007 Case T-201/04.

This intervention was an example of combining both obligations to supply and interoperability requirements.

43. Obligations to supply were also considered as part of the market study which found that due to scale advantages in data and the significant economies of scale in web-crawling and indexing, syndication agreements have been the primary route to market for most smaller search engines in the UK. Syndication agreements here refer to where a third-party has an agreement with a search engine to incorporate its search results and adverts into the third party's own search engine product, under its own branding. We also found that the terms in these agreements were constraining the ability of these rival search engines to compete effectively.<sup>27</sup>
44. Although we concluded that other pro-competitive measures should be explored before resorting to this intervention, the CMA recommended that the ability to impose an obligation to supply access on fair and reasonable terms should form part of the DMU's powers.<sup>28</sup> The purpose of this access remedy would be to address the scale advantages of the incumbents and enable smaller rivals to differentiate and promote their services. This type of remedy received a lot of support from market participants who are reliant on Google and Microsoft search results to be active in this market. Furthermore, the CMA concluded that the terms of any obligation to supply could be designed in a manner that provided the suppliers of search results with appropriate returns on their investments, whilst ensuring that the recipients would continue to be incentivised to invest in their own upstream services.
45. We recognise that obligations to provide access can potentially harm incentives to innovate (for example because a firm may have less incentive to build an asset if it could be required to share that asset with competitors). Such an intervention would therefore require a careful assessment of its benefits and potential adverse effects. As set out above, there will be a range of possible remedies and whilst obligations to provide access can risk undermining the incentive on competitors to invest in competing assets or the investment in the service by the regulated firm, this can be addressed through the terms of the access provision (ie the regulated firm can still make a reasonable return on the service and a competitor can benefit from having access to the services which it can rely on to innovate and create new cost-effective competitive offerings to consumers).

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<sup>27</sup> CMA market study into online platforms and digital advertising, [final report](#), Chapter 3.

<sup>28</sup> See for example the CMA's market study into online platforms and digital advertising, [final report](#), from paragraph 8.44 – 8.46.

## *Separation remedies*

46. Separation remedies aim to address structural features of the market that inhibit competition. Separation remedies are often considered in the context of highly concentrated markets, with the purpose of creating or supporting the establishment of new horizontal competitors. However, they can also be adopted to eliminate the ability or incentive for the business or function to trade in a way that favours its own related services. They can also create independent incentives to innovate in new products or new technologies.
47. For instance, if a digital platform was also active downstream, a separation remedy could eliminate its incentive to foreclose downstream rivals and ensure their continued access to key services. It also reduces the need for further interventions and focuses monitoring onto ensuring that the separation obligations are being adhered to.
48. Certain stakeholders strongly advocated separation remedies, noting concerns that other interventions might not be sufficient in circumstances where the SMS firm has complementary and interconnected activities.<sup>29</sup>
49. Separation remedies can take two very different broad forms:
  - Operational separation remedies – where the affected businesses within the firm operate separately and independently from each other but are still owned by and remain under the overarching control of the same firm. Operational separation remedies would require ongoing monitoring.
  - Ownership separation – which prohibits a single firm from having control through ownership of businesses which operate the distinct functions subject to separation. This is a far more significant level of intervention than operational separation.
50. Separation remedies have been used by regulators on an infrequent basis, but to powerful effect, for example in telecoms in the case of Openreach's operational separation from BT in 2005 and its subsequent creation as a wholly owned subsidiary in 2019.

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<sup>29</sup> Referring to when an SMS firm has complementary and interconnected activities, a digital platform submitted that 'a more structural solution is also required, for example, functional or operational separation of complementary and interconnected technologies' to address the practices that SMS firms could engage in, in particular in relation to conferring 'a material competitive advantage on other parts of its business at the expense of rivals'. A software developer also suggested a separation remedy could be effective at 'preventing the myriad forms of self-preferencing that companies with SMS apply to favour first party services over third party services.'

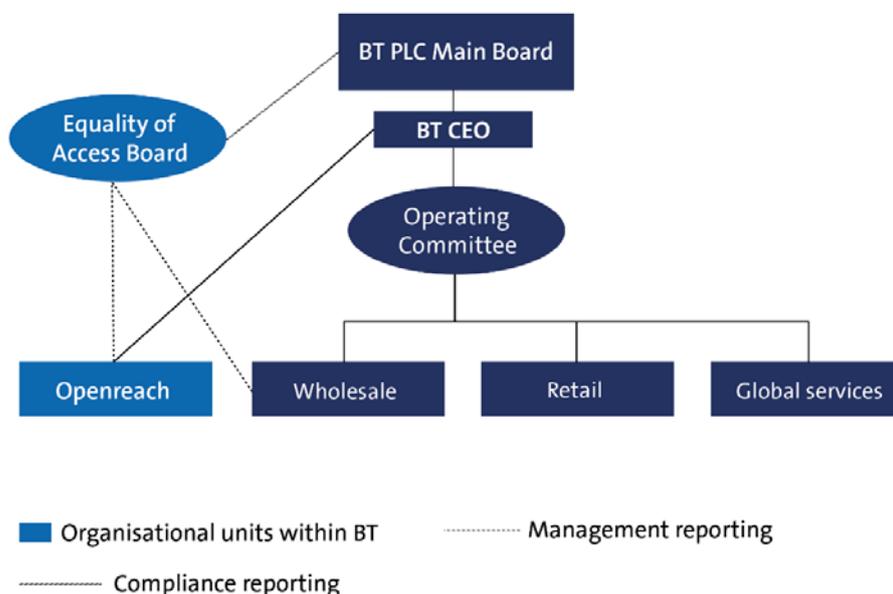
### Box D.6: Case study – separation of Openreach within BT

Following the Telecommunications Strategic Review (TSR), in September 2005 British Telecommunications plc (BT) signed undertakings with Ofcom to create a separate division, for the purpose of providing equal access to BT's network needed to support telephony, broadband and business services (including support for mobile networks)<sup>30</sup>.

Ofcom found that BT had significant market power in a number of telecommunications markets, specifically in residential voice services, business retail services, leased lines, wholesale international services, and wholesale broadband and fixed narrowband services. To address this, Ofcom required BT to provide access to its copper and fibre networks on regulated terms. However, Ofcom was concerned that if these access services were provided within the existing management structure there would be a natural advantage to BT which could not easily be overcome.

Ofcom could have made a Market Investigation Reference to the Competition Commission (the CMA's predecessor) to consider the case for full ownership separation. However instead, BT offered to create Openreach as a fully separate division with separate information systems which would deal with all requests for service, internal (BT) or external, on an equality of input basis. This meant that every order for service from internal or external customers would be managed in the same manner and Openreach staff would be incentivised purely based on Openreach, not wider BT, performance.

Figure D.2: Organisation chart of BT after functional separation<sup>31</sup>



<sup>30</sup> Ofcom (September 2005), [Ofcom accepts undertakings from BT on operational separation of Openreach](#).

<sup>31</sup> Provided to the Taskforce by Ofcom

The creation of Openreach supported a boom in competitive service provision with, for example, third party residential broadband provided over BT's network growing from 200,000 lines in 2005 to over 10 million by 2015.

The success of the UK approach was recognised in Europe with operational separation subsequently becoming an endorsed SMP remedy.

More recently in 2019, BT voluntarily moved Openreach to become a wholly owned subsidiary of BT<sup>32</sup>, in response to discussions with Ofcom following the Digital Communications Review in 2015.<sup>33</sup> This was to ensure that Openreach was better placed to respond independently to all its wholesale customers in terms of managing the investment priorities for the roll-out of fibre all the way to households and business premises, in line with the Government's ambition for gigabit capable services to the whole UK.

51. The market study found that Google's strong position in the open display advertising market led to a number of conflicts of interest. To address these concerns, the market study considered various separation options along the ad tech value chain. It concluded that, whilst the costs and benefits varied based on the different separation options under consideration, there could be significant net benefits if there were more formal separation between different Google businesses with market power in ad tech, both in publisher-facing functions and in advertiser-facing functions.
52. We consider that operational separation remedies will be an important tool for the DMU in creating the conditions for greater competition in designated activities and limiting the potential for conflicts of interest to lead to harmful behaviour. For the reasons set out below, we believe the DMU's powers should not include the ability to impose full ownership separation.

*Should the DMU be able to implement full-ownership separation remedies?*

53. The power to order a divestiture is seen as a particularly intrusive remedy, and as a result is not generally within the powers of the economic regulators. In the UK, these powers are currently reserved for the CMA's market investigation process. If other UK competition regulators consider that structural separation would be an appropriate course of action, they are required to make a reference to the CMA which will appoint an independent panel to consider the case for divestiture remedies alongside other remedies.<sup>34</sup>

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<sup>32</sup> BT (March 2019), [BT gives commitments to provide strategic independence for Openreach to address Ofcom's competition concerns](#).

<sup>33</sup> Ofcom (February 2016), [Initial conclusions from the Strategic Review of Digital Communications](#)

<sup>34</sup> CMA panel [members](#) and their [code of conduct](#).

54. As set out above, we propose that the DMU should have the power to impose other forms of separation such as operational separation. These types of remedies could bring significant benefits in promoting greater competition in relation to the activities of SMS firms and could be monitored and changed over time. Should the DMU conclude that these remedies are insufficient to address concerns it has identified, we recommend that it should, like other regulators, be able to make or recommend a reference to the CMA for an independently led market investigation, which will provide a fresh review before concluding on the proportionality of any divestiture remedies.

*Should the DMU be limited to only certain types of PCIs?*

55. We have considered two models for the range of different types of PCIs available to the DMU:

- Where the range of different types of PCIs available to the DMU is not constrained, aside from ensuring that a remedy is targeted, reasonable and practicable.
- Where there are a fixed set of types of PCIs the DMU can implement listed in legislation.

56. Under the Enterprise Act, in market investigations the CMA is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent the adverse effect on competition identified.<sup>35</sup> To fulfil this requirement, the CMA will assess the effectiveness and practicability of various remedy options, as well as their reasonableness and proportionality. The CMA may choose to implement a package of remedies and this assessment criterion will apply to the individual measures, as well as the package of measures taken as a whole. But the nature of the remedy options available to the CMA, where it has identified an adverse effect on competition, is very wide.

57. By contrast, we note that the range of remedies available to Ofcom to address competition concerns is more limited in nature as they have been developed to focus on one specific sector and competition problem – namely the opening up of competition to a dominant network incumbent.<sup>36</sup> Ofcom is limited to imposing regulation under the following categories:

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<sup>35</sup> CMA, [Guidelines for market investigation: Their role, procedures, assessment and remedies](#).

<sup>36</sup> [Communications Act 2003, SMP services conditions](#).

- obligations to provide access to the SMP operator's network on fair and reasonable terms and on a non-discriminatory basis;
  - transparency obligations and obligations for accounting separation;
  - price control and cost accounting obligations; and
  - operational separation.
58. This set of remedies was based on a detailed study of what was necessary to promote competition in telecoms services where competition is constrained by the existence of a dominant operator. Accordingly, it does allow a range of interventions which has supported the emergence of diverse and innovative service and network competition in the UK. However, SMP conditions are not suitable to address all possible competition concerns even in telecoms. For example, Ofcom has also had to rely at times on separate, non-SMP, powers to promote interoperability and number portability to promote competition more broadly.
59. Given the breadth of activities for which the DMU may need to use PCIs to intervene, we recommend a model where the DMU is not constrained in the choice of PCI available (with the exception of full ownership separation as set out above). Whilst we can see that the approach available to Ofcom provides more clarity as to the types of remedies which can be pursued, we do not consider, at this point in time, we can recommend what the full set of interventions available to the DMU should be.
60. The SMS regime could capture many diverse activities of SMS firms, both now and in the future. During our engagement with stakeholders, it was highlighted that it would be incredibly challenging to take a view now on all the conceivable concerns which may arise in relation to these activities, and the remedies which could be needed to address these concerns, particularly given markets will evolve.<sup>37</sup> We agree that limiting the DMU in its choice of interventions risks it not being able to address concerns effectively, either by not acting at all, or by using a less appropriate remedy.
61. Rather, to ensure the regime is forward looking and provides flexibility to address concerns as markets evolve, we recommend the DMU should not be limited in its choice of remedies other than through established remedy assessment criteria, such as the reasonableness, effectiveness, practicability and proportionality of a proposed intervention.

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<sup>37</sup> For instance, in its response to our call for information, Vodafone told us that 'it would be inadvisable to try to define a closed list of remedies that comprehensively address all the competition concerns in the digital sphere'.

62. The DMU could look to provide greater clarity and certainty as to the types of PCIs it would consider, by issuing guidance setting out the nature of the PCIs it would likely seek to implement (ie of the kind discussed above) and the circumstances in which it might consider this choice to be reasonable.

## The scope of pro-competitive interventions

### **Recommendation 6b: The DMU should be able to implement PCIs anywhere within an SMS firm in order to address a concern related to its substantial entrenched market power and strategic position in a designated activity.**

63. We consider that the justification for the DMU having the power to implement PCIs stems from the need to tackle the sources and effects of an SMS firm's market power and position in a designated activity – ie a digital activity in which the firm has substantial, entrenched market power, providing the firm with a strategic position (see Appendix B). The use of such remedies by the DMU should be in line with this aim.
64. Therefore, whilst we recommend that the DMU should be able to implement PCIs anywhere within an SMS firm, we consider that the competition or consumer concern they are being used to address should be **related** to a designated activity. We would expect this to include:
- to address the market features or factors which lead to the firm to have substantial, entrenched market power in its designated activity;
  - to address anti-competitive conduct which reinforces the SMS firm's position in its designated activity, wherever in the SMS firm this conduct occurs; and
  - to address anti-competitive effects which arise from a firm's position in a designated activity, wherever in the SMS firm these are felt.
65. These examples are explained further below.
66. Constraining the use of PCIs to concerns related to the designated activity will mean the DMU is only likely to be able to use PCIs in circumstances where it is already likely to have a significant and detailed understanding of the activity from the SMS assessment. It will therefore be well placed to understand and address competition concerns swiftly on the basis of this understanding.
67. We recognise that competition concerns may still arise in other areas of the SMS firm which are unrelated to the designated activities. We believe these should be regarded in line with the approach to competition concerns across digital markets more widely, explored in Appendix G.

*To address the sources of market power in a designated activity*

68. We consider that the DMU should be able to implement PCIs to address the factors which lead to an SMS firm having substantial entrenched market power and a strategic position in relation to a designated activity. This might be for example to address factors such as network effects and scale advantages which create barriers to new firms being able to compete in these activities. We recommend that the DMU be able to implement PCIs to address such features and drive greater competition in relation to designated activities.

*To address conduct which reinforces market power*

69. Large ecosystems provide firms with an ability to engage in behaviours that consolidate and reinforce their market power. For example, if an SMS firm operates an activity (for example a voice assistant) which, by default, directs consumers to the firm's designated activity (for example an online marketplace), this is likely to reinforce the firm's market power in its designated activity. We recommend that the DMU should be able to implement PCIs to address such behaviours.
70. The code principle which ensures that the firm cannot make changes to non-designated activities that further entrench the position of the SMS firm in its designated activity/activities, could be an effective tool to address some of these concerns.<sup>38</sup> However, as discussed above, the remedies available under the code are inherently more limited and as such, a PCI is likely to be needed if the intervention requires more significant and detailed remedy consideration and design.

*To address anti-competitive effects of market power*

71. We consider that the DMU should be able to implement PCIs to address exploitative and exclusionary behaviour, for example where an SMS firm seeks to extend its market power in a designated activity into other activities. For example, an SMS firm might look to use data collected from its designated activity (for example online search) to provide it with an advantage in its other activities (for example comparison shopping).
72. Although such an activity could be addressed through the code, for example by preventing the firm from being able to use data collected from users in its designated activity in relation to its other activities, PCIs could provide a more pro-competitive solution offering greater consumer benefits. For example,

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<sup>38</sup> See the 'scope of the code' section of Appendix C.

instead of prohibiting this data being used in the firm's other activities, a data access remedy could be used to ensure the firm's competitors in its other activities also have access to the same data. Any data remedies of this kind would need to comply with data protection and e-privacy laws. But opening-up access to this data might provide greater long-term benefits for competition, consumers and innovation, than the remedy available under the code.

## **The procedural steps associated with pro-competitive interventions**

73. In this section we set out the process we recommend the DMU should follow in order to implement a PCI.
74. PCIs are a powerful tool, with the potential to be transformational in nature and to create new forms of competition. However, given that they may include significant interventions, the process we are proposing ensures that they would only be introduced after careful consideration, including of potential costs, proportionality and the potential for unintended consequences. Our process for PCIs therefore allows for proper consultation with affected parties, as well as other regulators,<sup>39</sup> detailed remedy design and sufficient timescales for evidence gathering, analysis and transparent decision-making.
75. Below we set out the following aspects of the proposed procedure for implementing PCIs:
  - What legal test should the DMU use for implementing a PCI? We recommend the test should be to rectify an adverse effect on competition or consumers.
  - How should the PCI investigation process be run? We recommend the process should be open and transparent with consultation on provisional decision prior to finalisation of the investigation.
  - Who should the decision maker be? – We recommend decisions relating to PCIs, including breach investigations and penalties, should be for the DMU.
  - Should the PCI investigation should be subject to statutory deadlines? – We recommend that it should and suggest 12 months is an appropriate timeframe.

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<sup>39</sup> For example, with the ICO in relation to data remedies involving personal data.

- Should the DMU should be able to trial remedies? – We recommend that it should to ensure their effectiveness.
- What should the appeals process be? – decisions in relation to PCIs should be judicially reviewable on ordinary judicial review principles and the appeals process should deliver outcomes quickly.

**Recommendation 6c: In implementing a PCI the DMU should demonstrate that it is an effective and proportionate remedy to an adverse effect on competition or consumers. A PCI investigation should be completed within a fixed statutory deadline.**

***The legal test: adverse effect on competition or consumers***

76. The DMU should have an explicit legal test it must meet in order to implement a PCI. The legal test would be the basis for justifying and explaining the rationale for intervention, as well as for framing the evidence necessary to support it.
77. We recommend that the DMU is able to implement a PCI in order to rectify an adverse effect on competition or consumers (AECC) in activities in which the firm operates, which relate to the firm’s market power and strategic position in a designated activity.
78. The DMU would provide guidance on the circumstances in which an AECC might arise, for example as a result of:
- Market features like the presence of network effects, economies of scale, a lack of transparency, the use of defaults and unequal access to data which could lead to a firm having substantial entrenched market power such that new entrants cannot compete.
  - Practices by an SMS firm which reinforce its market power and position.
  - Practices by the SMS firm which result in harm to consumers and business customers, such as exploitative or exclusionary practices.
79. This legal test is similar to the current AEC test used in the market investigations regime by the CMA<sup>40</sup> but we recommend the specific formulation of this test encompasses an explicit element of consumer harm so that the DMU can intervene to address the harm to consumers without always

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<sup>40</sup> CMA, [Guidelines for market investigation: Their role, procedures, assessment and remedies](#), see part 3.

needing to show that competition has been undermined.<sup>41</sup> This should better allow the DMU to act in cases where the link between competition and consumer harm is less clear-cut. For example, the DMU may wish to address practices by an SMS firm which it considers do not provide consumers with a clear choice as to the collection of their data. This practice undermines competition, since it undermines the incentives and ability of competitors to compete on privacy. But equally it may also result in a direct harm to consumers.

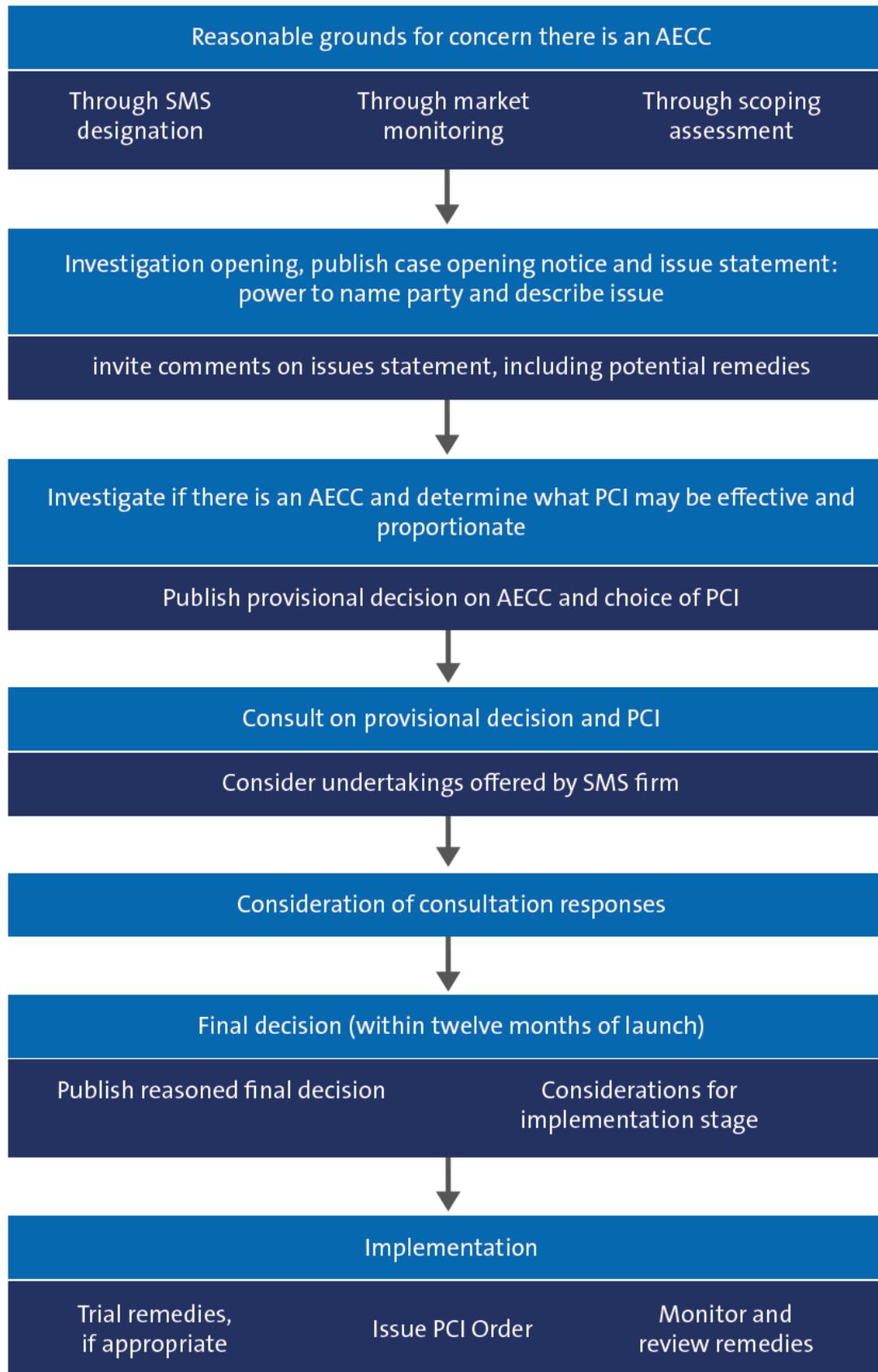
### ***Key steps within the pro-competitive intervention investigation***

80. We set out below the procedure we expect that the DMU should follow when it comes to examining the case for, the design of, and implementation of PCIs. We expect the DMU would produce guidance on its process.

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<sup>41</sup> As discussed in Advice Chapter 5, the CMA has previously recommended reform to the CMA's markets regime that would enable intervention through a market investigation in relation to an adverse effect on consumers, not just an adverse effect on competition. See further [Letter from Lord Andrew Tyrie to the Secretary of State for Business Energy and Industrial Strategy, February 2019](#).

**Figure D.3: key steps within the PCI investigation.**



## Case opening

81. Where the DMU considers there to be reasonable grounds for concern that there is an AECC in relation to a designated activity of an SMS firm, the DMU may initiate a PCI investigation and publish a case opening notice. This would be accompanied by an issues statement setting out the issues it is investigating and inviting comments from the firm and public. This should include an indication of the potential basis for an AECC finding.
82. PCI investigations could potentially be initiated at any point in response to AECCs which have been identified:
- **In the course of the designation assessment**<sup>42</sup> – we expect that as part of the SMS assessment, the DMU will build up a detailed understanding of the activity which is the focus of the assessment.<sup>43</sup> This would support the DMU in identifying potential AECCs which will not be addressed through the code of conduct.
  - **In response to AECCs identified after designation** – The DMU should also be able to address AECCs which have been identified or arisen subsequent to designation, for example due to changes in behaviours by consumers or the SMS firm, or available technology. In this context, the DMU may need to spend more time on formulating its understanding of the AECC and gathering information, prior to opening a PCI investigation. PCI investigations may result from:
    - Scoping assessments – As described in recommendation 7e, scoping assessments could consider whether a potential competition concern could be appropriately addressed through code enforcement or whether it would be more appropriate to consider a separate PCI investigation given the nature of the issues or the intervention required.<sup>44</sup> Any subsequent PCI investigation would follow the steps described above and would require the identification of an AECC to justify an intervention.

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<sup>42</sup> Ofcom identifies potential interventions in response to market reviews in which firms have been found to have significant market power. While for new markets the market assessment precedes the assessment of potential interventions Ofcom usually consults on its provisional SMP assessment at the same time as its provisional view on interventions.

<sup>43</sup> The CMA identified several potential PCIs as part of its online platforms and digital advertising market study, such as the mandating of interoperability, restricting the use of default positions, mandating data silos within an SMS firm, structural separation, increasing consumers' control of their data, and giving competitors access to SMS firms' data.

<sup>44</sup> Scoping assessments are described in further detail within Appendix C.

- Ongoing market monitoring – The case for PCIs may also emerge as a result of the ongoing market monitoring by the DMU of the SMS firm, including engagement with stakeholders.

83. We recommend the DMU:

- publish a notice opening the PCI investigation,
- publish and consult on a provisional decision, specifying the proposed range of PCIs to remedy the (provisional) AECC and any relevant proportionality considerations, and
- publish a final decision on the AECC and the preferred PCI(s), specifying whether there should be any trialling of the PCI, and the reasons for the decision.

84. We recommend the DMU be required to publish guidance on how it will operate its PCI process, and on how it expects to conduct investigations. This should seek to ensure clarity regarding DMU processes and offer a degree of certainty for SMS firms and stakeholders. It should cover how the DMU will approach PCIs, including guidance on how it will apply the AECC test and the range of PCIs it envisages using in particular circumstances.

#### *Conduct of the investigation and information gathering powers*

85. Once the case has been initiated, the DMU should investigate whether there is an AECC and also what PCIs may be available to remedy the AECC, including what would be proportionate and effective in the circumstances.

86. We recommend the DMU be empowered to use its general information gathering powers, as described in Appendix E, to collect the necessary evidence to inform its PCI decision. The DMU is likely to need wide powers (as the CMA has under the Enterprise Act 2002) to require persons to attend to give evidence and to require a business or individual to provide documents and other information. This is likely to apply to both the SMS firm itself and relevant third parties. This power may also need to extend to requiring third parties to keep or produce information they ordinarily do not, in order for the DMU to make use of it. This may be particularly relevant when assessing the efficacy of a PCI.

87. In order to make sure that its decisions are transparent, effective and proportionate we would expect the DMU to produce a provisional decision setting out its proposed findings, and then consult publicly on that provisional decision, subject to the necessary confidentiality redactions. The DMU would take account of all relevant submissions in its decision making.

88. Following the consultation period, the DMU would publish its final decision on the PCI, setting out its reasoning in detail regarding the AECC test and the PCI to be imposed. If the DMU decides to trial interventions, it should have the power to direct the conduct of a trial. Once the preferred intervention is settled upon – following a trial or, if no trial is used, after the final decision – the DMU should publish and consult on the binding PCI order, which would be the legal instrument implementing the final decision. This instrument should set out the obligation on the SMS firm and, as described below, would be varied, renewed or revoked as appropriate.

#### *The ability to accept and enforce undertakings*

89. We recommend the DMU should be able to accept undertakings, either at the end of the PCI investigation or part-way through. These enable the SMS firm to offer a legal commitment to implement a particular remedy, rather than the DMU having to require it. Undertakings can provide the advantage of faster and more effective remedies by allowing the DMU to take advantage of the SMS firms' expertise while encouraging the industry to engage in the process.
90. A potential drawback of accepting undertakings is the risk that information asymmetries could allow the SMS firm to offer undertakings in relation to remedies which are ineffective, or worse have opposite to the intended effect. This would need to be mitigated through an open consultation process on the proposed undertakings.

#### ***DMU decision making for pro-competitive interventions***

91. We recommend it should be for the DMU to decide whether, and how, to implement a PCI.<sup>45</sup> This should be viewed as the exercise of an independent expert regulatory judgment by the DMU, both as to whether the criterion for a PCI is met and whether it is appropriate to implement a remedy.
92. In discharging that decision making we recommend that the DMU bear the evidential and legal burden of establishing that there is an AECC and that a PCI is a relevant and proportionate remedy to impose on the SMS firm, and discharge that burden to the ordinary civil standard, on the balance of probabilities.
93. We have not specified how and at what level within the DMU decisions should be made, since we believe this is best considered in line with wider decisions

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<sup>45</sup> Ofcom and the Financial Conduct Authority (FCA) could also make relevant decisions if the DMU's powers are shared between regulators where the designated activity is in a regulated sector. This is set out further in chapter 6 of the main advice.

on the DMU's institutional design. However, we consider that the expertise of the DMU, built and enhanced over time as it investigates markets, is a key feature of the new regime. This expertise will enable the relevant decision maker within the DMU to form a view more swiftly and allow the implementation process to be streamlined, whilst still ensuring sufficient internal scrutiny to ensure robust and objective decision-making.

### ***Statutory deadline***

94. We recommend the DMU should be subject to a statutory deadline for conducting PCI investigations. We believe statutory deadlines provide certainty for parties and force a discipline in scope and process of investigation.
95. We consider a statutory deadline of 12 months from commencing a PCI investigation to the DMU issuing a final decision would be appropriate in order to balance the requirement to ensure robust and evidence-based decision-making and the desire to be swift in reaching decisions in order to remedy harm. We believe 12 months would provide sufficient time for the DMU to collect evidence to understand the competition or consumer problem it is looking to address and to design and consult on an appropriate remedy. The statutory deadline would cover the point up to which a final decision on the remedy is made.

### ***Trialling the effectiveness of remedies***

96. We recognise that the effectiveness of interventions, particularly demand-side interventions, may depend on consumers' engagement and behaviour. As such, the DMU may choose to trial certain interventions and assess the effectiveness of different versions of the PCI. These trials could be undertaken post final decision, prior to their implementation. The trials could result in changes to the way in which the interventions are implemented, but they would not revisit the main findings in the final decision.
97. The decision to trial interventions is consistent with the approach adopted by other regulators, such as Ofgem which has sought to apply behavioural insights into policy and service design.<sup>46</sup> Similarly, Ofcom is currently consulting on a new rule which would enable it to require providers to participate in trials of customer engagement remedies.<sup>47</sup>

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<sup>46</sup> Ofgem (September 2019), [Insights from Ofgem's consumer engagement trials](#)

<sup>47</sup> Ofcom consultation (September 2019), [Trialling consumer remedies](#)

## **Appeals**

98. As discussed further in Appendix E, an effective system of appeals against decisions of the DMU will be necessary for there to be confidence in the regime by the public, users and SMS firms.
99. Consistent with our recommendations on SMS designation and the code, we recommend there should be an effective system of appeals against DMU decisions on PCIs to an impartial and independent court with full jurisdiction to judicially review those decisions. This would include decisions in respect of the remedies and associated administrative penalties and investigations into breaches of PCI orders.

## **The process for reviewing, monitoring and enforcing pro-competitive interventions**

100. In this section we outline:
- how long PCIs should be implemented for before being reviewed; and
  - the process for monitoring compliance with PCI remedies and enforcing where an SMS firm is not complying with the implementation order.

### **Recommendation 6d: PCIs should be implemented for a limited duration and should be regularly reviewed.**

101. We recommend that PCIs are set for a limited period and that the DMU has discretion to set the duration of this period, taking into account the intended purpose of the PCI and the period required to implement or embed the intervention. The period adopted would need to balance the time required before the effectiveness of a PCI can be judged, with the dynamic nature of digital markets.
102. Furthermore, it may be desirable to ‘test-and-evolve’ a PCI to respond to changes in technologies, as well as to react to any unforeseen unintended consequences. An iterative approach should result in gradual improvements over time and ensure that the PCIs remain effective and adapt to evolutions in the manner in which consumers interact with these products and services.<sup>48</sup>

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<sup>48</sup> Where the DMU considers a design variation is necessary (eg to alter the number of options on a choice screen) to improve the effectiveness of the PCI, it should be required to provide the SMS firm in writing with a draft PCI order variation, the reasons for it, and give it an opportunity to make representations prior to the adoption of the order.

103. At the end of the fixed period the DMU would need to consider whether a PCI should be removed, re-imposed or modified. Such a review would also occur within the fixed period if triggered by specific, pre-determined situations, such as:
- a) Material change in circumstance such that the PCI is no longer effective or proportionate. This would allow the DMU to ensure the PCI is effective and does not need to be adapted or cancelled.
  - b) Material change in SMS designation. This would cover situations where the SMS firm is de-designated or where the scope of its designation is changed, such that the PCI is no longer effective or is no longer required.
104. The DMU could receive a request to review a PCI under the situations at (a) or (b) above from the relevant SMS firms or from a third party. However, when a request is received or a review is otherwise triggered, the DMU would have discretion on whether to review the PCI so as to limit the possibility of frequent or unmeritorious challenge. The exercise of this discretion could be clarified by the DMU issuing guidance. The DMU should in addition be empowered to initiate a review in the absence of request, at any time it considers necessary.
105. As part of the aim of a PCI is to address the sources of market power, we consider it important to ensure the DMU may review any relevant PCIs when there is a change in a firm's SMS designation. However, we do not recommend that PCIs automatically expire at the point a firm is de-designated as the de-designation may have resulted from the effectiveness of the PCI. For example, if an interoperability remedy is particularly effective in addressing network effects and promotes greater competition and consumer choice, the DMU may wish to consider requiring that interoperability remains even if the SMS firm is no longer designated.

### ***Enforcement and monitoring of pro-competitive interventions***

106. The design of the PCI enforcement and monitoring processes are an important factor in enabling the DMU to respond to market developments. The DMU will need to monitor compliance with PCI orders, as well as to ensure the PCI continues to meet its stated aims, is effective and remains proportionate. This is similar to our recommendations in Appendix C regarding enforcement of the code and code orders.
107. We consider that it is important for the DMU to have the power to directly enforce PCI orders to ensure that firms comply with PCI decisions and the consequences of a breach are of sufficient deterrent effect.

108. A case for enforcement may arise during the DMU's monitoring program or the DMU may receive complaints from the public or from other market participants that a firm subject to a PCI does not appear to be complying with the final published decision. The DMU should have discretion to launch a PCI breach investigation on reasonable suspicion of a breach, including discretion as to whether to impose a penalty if a breach has been found. The exercise of such discretion would be informed by the DMU issuing guidance.
109. Our advice in relation to PCI breach investigations and penalties is consistent with that for enforcement of the code. We believe similar processes, powers and penalties are appropriate given the need to ensure compliance with PCI remedies in the same way as compliance with the code. Further information on the details of these proposals is set out in Appendix C. We do not repeat that advice, or the rationale behind it here but provide a short summary of key elements. These include:
- A discretionary power to fine in the event of a breach of the regulatory conditions imposed by a PCI order – we consider this discretion would be exercised only in the circumstance of an intentional or negligent breach or where the harm accruing is significant.
  - Similar processes – the DMU should be required to publish the opening of an investigation, name the SMS firm and describe the breach under investigation.<sup>49</sup> The DMU should investigate the alleged breach, publish a provisional decision and give the SMS firm the opportunity to make representations. If the DMU finds a PCI order has been breached, it should publish a reasoned 'PCI breach decision'. If no breach was found, the DMU should publish a case closure notice. Where the DMU proposes to impose a penalty, it should give written notice of the proposed penalty and its reasons and give the SMS firm an opportunity to make representations. We do not recommend a statutory deadline for completing PCI breach investigations.
  - The same cap on penalties - we believe the same level of fine should be available to the DMU for breaches of PCI orders as we recommend for breaches of the code and code orders – a maximum of 10% of worldwide turnover, set as a fixed amount or an amount calculated by reference to a daily rate if the breach is ongoing, or both.<sup>50</sup>

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<sup>49</sup> Consistent with other public bodies with similar duties this early transparency duty may need to be enabled by an appropriate statutory exclusion of defamation claims.

<sup>50</sup> 10% of daily turnover.

110. In addition to directly enforcing its PCI orders, we consider it important for the DMU to have the power to apply to the courts for the court to require the SMS firm, and its officers, to comply with the PCI order if it is not or may not be complied with.<sup>51</sup> We are recommending a similar system for enforcement of code orders, see Appendix C. As we state in Appendix C, we would hope and expect such a route would rarely, if ever, be necessary but do consider it is important the regime has a formal backstop, not least so that not complying with the law (ie the duty to comply with the PCI order) cannot be rationally viewed as a cost of doing business. The advantage of a court ordering compliance with a decision of the DMU, is that non-compliance with a court order will subject the firm (and if the court judged necessary its officers), to the jurisdiction of the High Court or the Court of Session. This means it (and they) face the ordinary risks of contempt of court including ultimately imprisonment and the potential for an unlimited fine.

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<sup>51</sup> See for similar examples section 34 of the Competition Act 1998, sections 94 and 167 of the Enterprise Act 2002, and section 380 of Financial Services and Markets Act 2000.