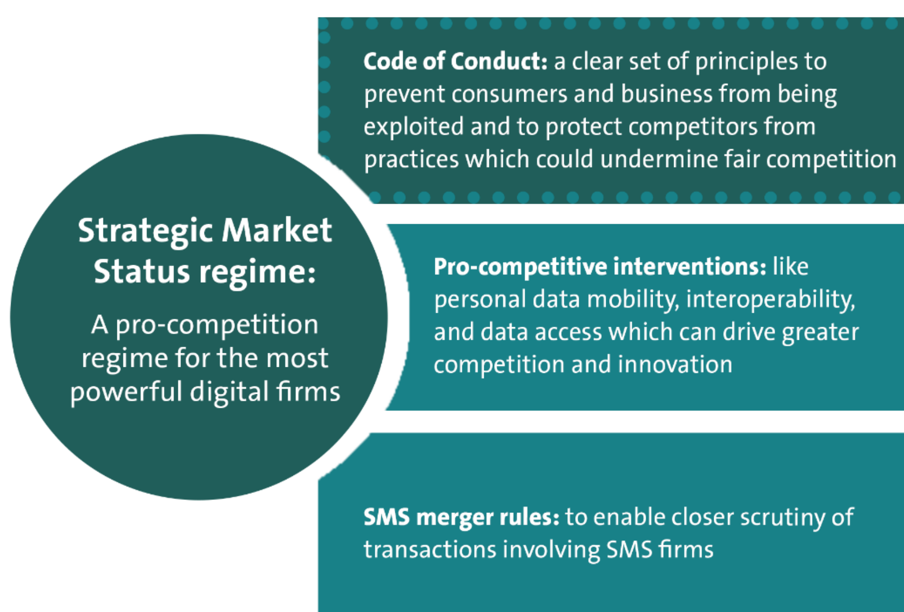
Appendix C: The SMS regime: the code of conduct

Overview

1. This appendix sets out in detail our proposals for the implementation of a code of conduct to apply to firms with strategic market status (SMS). Detail on the SMS test and designation process is set out in Appendix B, while our proposals for the other tools of the regime – pro-competitive interventions and SMS merger rules – are set out in Appendices D and F respectively. Appendix E sets out cross-cutting powers and procedures.

Figure C.1: overview of the SMS regime



2. The material in this appendix is set out in the following sections:

- **purpose of the code** – where we explain what the code should seek to achieve;
- **structure and form of the code** – where we consider whether the code should be rules-based, principles-based or outcomes-based;
- **content of the code** – where we describe how the content of the code should be determined;
- **scope of the code** – where we set out what activities within an SMS firm the code should apply to;

- **making the code** – where we explain the process for designing and implementing the code;
- **fostering compliance and preventing harm** – where we outline the measures that could be taken to encourage compliance with the code; and
- **monitoring and enforcing the code** – where we describe how we expect the DMU would monitor the conduct of SMS firms and ensure the code is complied with.

The purpose of the code

Recommendation 4: The government should establish the SMS regime such that when the SMS test is met, the DMU can establish an enforceable code of conduct for the firm in relation to its designated activities to prevent it from taking advantage of its power and position.

3. The purpose of the code is to prevent SMS firms from taking advantage of their powerful positions in the activities that give rise to their SMS designation. It will provide a set of clear, legally enforceable *ex ante* principles for SMS firms to follow, with the aim of preventing consumers and businesses from being exploited, and to prevent practices by the firm which could undermine fair competition.

4. Setting the 'rules of the game' in advance will influence firms' behaviour upfront, enabling it to be challenged and changed much more rapidly than is possible through existing laws, with the aim of preventing significant harm from materialising.

5. Our proposal is not for a voluntary code that firms can decide whether or not to adopt. It is pro-competition and pro-innovation regulation that SMS firms must comply with or face enforcement action. Whilst the focus of the regime is on getting firms to change their behaviour to comply with the code, the ability to force firms to comply, and to penalise non-compliance, will be essential in deterring firms from engaging in harmful behaviours.

6. In reaching our recommendations on the design and operation of the code, we have built on the work of the CMA's market study into online platforms and digital advertising[1] (referred to as 'the market study' throughout) and input provided by stakeholders to our call for information. Our recommendations

[1] CMA's market study into online platforms and digital advertising, final report.

have been shaped by the following factors which we (and stakeholders) consider are important if the code is to be effective:

- **predictability and legal certainty** – SMS firms need to understand the requirements of the code and be able to self-assess existing conduct and review new conduct for compliance. Stakeholders need to understand how the code will affect the behaviour of SMS firms, and the consequences for their own commercial strategies and investment;

- **flexibility** – the code needs to be capable of capturing a range of competition and consumer concerns and practices in markets that are constantly evolving; and

- **speed** – digital markets and technologies operate in real time, and the consequences of actions by SMS firms can be felt very quickly. The code needs to be able to deal with problematic conduct much more quickly than existing tools can.

7. These factors build on the key principles for the overarching regulatory approach set out in the main advice,[2] in particular the desire for an **evidence-based approach**, with interventions **targeted at addressing particular problems** rather than relying on 'one-size-fits-all' rules.

8. There are, however, trade-offs between these factors. Ensuring there is sufficient flexibility for the code to address future conduct is in tension with providing certainty for SMS firms about what the code could capture and the speed at which formal action could be taken. These trade-offs were recognised by a number of stakeholders and have informed our proposals for the code.

9. Our proposals in this appendix on the working of the code should be read alongside our proposals for the rest of the regime, and in particular the proposals on pro-competitive interventions (PCIs) in Appendix D. As described in the main advice, the code and PCIs should work together as complementary tools, capable of addressing different problems and having different effects.

[2] Key principles are: Evidence driven and effective; proportionate and targeted; open, transparent and accountable; proactive and forward looking; and coherent

Structure and form of the code

10. In this section we set out:

- the framework for the code (comprising objectives, principles and guidance) and the rationale for recommending a principles-based code; and

- how the code should be designed, including whether it includes a power to ban certain practices and who bears the burden of proving the code has been breached.

11. In the next section on the content of the code we set out how the content of codes would be determined and the degree to which codes may differ between SMS firms and activities.

Recommendation 4a: A code should comprise high-level objectives supported by principles and guidance.

12. We recommend the form of each code should comprise three elements: high-level objectives, supported by principles and guidance. This approach builds on that recommended by the market study.

- **Objectives** – these set out the objectives the code seeks to deliver. An example of such an objective is 'fair trading'.

- **Principles** – these set the standards as to how the SMS firm should behave, in order to achieve the objective. They provide a more detailed articulation of what a firm must or must not do. An example of such a principle is 'to trade on fair and reasonable contractual terms'.

- **Guidance** – this provides greater clarity to the SMS firm on how the principles should be interpreted, with specific examples of what conduct would be expected to breach the principles (although the examples would be non-exhaustive). An example of such guidance is 'in trading with small advertisers, a term may be unfair if it is applied by default and benefits the SMS firm by imposing costs on the advertiser by comparison to alternatives, unless there are offsetting benefits to advertisers from the default option'.

13. We believe this framework strikes the right balance between providing certainty for firms, whilst retaining a degree of flexibility for the DMU. Responses to our call for information strongly supported this approach and agreed it could work in digital markets other than those considered in the

market study.[3] Our view is the three elements taken together should deliver the benefits of a code while meeting the important criteria identified by stakeholders of certainty and flexibility. The objectives would define the scope of the code and be applicable across firms, thereby providing certainty. The principles and guidance would be firm- and activity-specific and flexible, and provide more detail about what is required. We set out here what each element would do and why it is necessary.

First element: Objectives

14. High-level objectives would provide the framework and scope for the issues the code can address. An example of an objective would be 'fair trading'. In this way, objectives will help ensure the code is clearly focussed.

15. Having a clear focus would provide firms with a degree of certainty about what the code can address. Clarity over the conduct covered by the code was a point raised by a wide range of stakeholders. This is important because there are a range of wider concerns about digital markets beyond a lack of competition, such as people's safety or emotional wellbeing online, the hosting or sharing of illegal content, and harmful or inaccurate information potentially undermining our democratic values. It might be argued that some of these should be dealt with by the DMU and through this pro-competition enforceable code where they arise in the context of SMS firms. By clearly defining through objectives what the code can address, it will provide clarity to firms that these wider issues are not in scope of the pro-competitive code.

16. The objectives would be common across all firms and set out in legislation. Further information on the content of the objectives is set out in the content of the code section below.

Second element: Principles

17. We recommend the objectives are supported by principles which set out further detail as to how the code will deliver the objective – for example the conduct required of firms to deliver 'fair trading.' Principles could only be included in the code if they address one of the overarching objectives.

[3] For example, Google stated in its response to our call for information that: 'We think the structure contemplated by the CMA in the market study is an appropriate basis to develop the Code. High-level objectives and principles are better suited to fast-changing digital services than prescriptive or rigid rules, which risk becoming quickly obsolete.' (Google's call for information response, page 12). Match stated in its response to our call for information that: 'We believe that a code of conduct incorporating high-level objectives, principles and supporting guidance would be an effective way of dealing with the issues raised in digital markets dominated by digital gatekeepers. The flexibility allowed by such a code of conduct will allow the authorities to not only tackle conducts that have been identified to have anticompetitive effects, but also to tackle conducts that may arise in the future – and which might not be envisaged at this time.' (Match's call for information response, paragraph 67).

18. We have considered different approaches as to how the main part of the code could be specified. In particular, we have considered:

- rules-based – a prescriptive approach which provides strict direction to firms on required and prohibited conduct – for example a rule might require a firm to present at least five options in any choice of services to purchase, and it might set out the information users must be provided with such as price or delivery format;
- principles-based – this approach sets out at a high-level what a firm must or must not do, but provides greater flexibility to firms as to how they comply than a rules-based approach – for example 'a firm must provide clear information to consumers in relation to the services they receive in an easily understandable format';
- outcomes-based – this approach sets the outcomes a firm should achieve, but leaves the greatest flexibility to firms as to how to achieve that outcome – for example 'users must be able to make informed decisions about the services they receive'.

19. In considering these different approaches[4] there is a trade-off between providing clarity to firms on the actions they must take in order to comply, and providing flexibility such that firms have discretion as to how they comply. Similarly, providing greater clarity and specificity is likely to mean a code is less future-proof and must be updated more regularly.

20. In relation to rules-based regulation:

- This provides clarity to firms on what they must do to comply.
- But if the rules are applied to a wide range of areas of conduct, then they tend towards a one-size-fits-all approach which is not tailored to where there is evidence of harm. It therefore risks over-intervention with associated unforeseen consequences such as reduced innovation.
- In addition, rules can be 'tick-box' in nature, leaving them open to circumvention, particularly if they are very granular. For example, a firm complies with a rule which prohibits a particular behaviour, but then engages in a slightly different behaviour (not explicitly covered by the rules) resulting in the same harmful outcome.

[4] The best approach for regulation will depend on its purpose. The discussion here is about the appropriateness of these forms of regulation for a pro-competitive code for digital markets.

- Similarly, rules will never be exhaustive, and given the pace with which firms' conduct evolves in digital markets, are likely to need frequent review and updating to remain effective. This may mean there is less predictability and certainty in practice, if rules are frequently being revisited. In addition, updating rules regularly is likely to be a resource-intensive process for both firms and the DMU.

21. In relation to outcomes-based regulation:

- This approach provides a firm with the greatest freedom to determine what it does to comply, so long as the result meets the desired outcome.

- However, the effective application of outcomes-based regulation rests on the DMU being able to measure and assess outcomes effectively. This may be possible, but will not always be straightforward and therefore there could be some ambiguity as to whether a particular action is compliant. This could have implications and create risk for firms if they are unable to self-assess whether they are compliant. It could also have implications for the DMU in being able to act swiftly to address harmful conduct.

22. Given these features of both a rules-based and outcomes-based approach, a primarily principles-based approach strikes the right balance between providing clarity and flexibility.[5] Principles provide:

- Clarity on how harmful conduct will be assessed, allowing the SMS firm to make an informed judgement as to whether conduct is likely to breach the code.

- Discretion to firms as to how they are met, providing firms with some flexibility in how they choose to comply.

- Flexibility to address conduct and practices that can change rapidly, or which may not yet be known. Given the rate of change in digital markets and technologies, as well as the complexity and diversity of activity that many digital firms engage in, this is an important feature to ensure that the code remains relevant and capable of addressing a wide range of harms.

23. 'Principles-based regulation' has been developed over recent years as a relatively flexible way to regulate firms. It is an approach taken in other

[5] It would be possible for certain principles to be drafted in a more rule- or outcomes-based way if the DMU judged that appropriate to the specific situation.

regulatory regimes to good effect – for example in financial services, energy, through the groceries code, and also in data protection.

24. Although rules still form part of financial services and energy regulation, regulators in these sectors are increasingly moving towards principles and outcome-based approaches, with associated guidance. These approaches put more responsibility on the firms to consider what they do and more scope for innovative approaches. These are in line with how we think the code should work for SMS firms. Further information on approaches in other sectors is set out in Box C.1 below.

25. A principles-based approach was proposed by the market study and strongly supported by stakeholders in response to our call for information. We note that no stakeholder responses to our call for information argued for a rules-based approach.

26. We envisage that some principles might be applicable to a range of SMS firms and designated activities,[6] whereas others may need to be more tailored to particular activities, conduct or behaviour. We discuss this further in the section on the content of the code.

27. After discussing the role of guidance, we provide further detail on how principles could be designed, including to what extent principles could prohibit certain forms of conduct. We then go on to discuss the content of the principles and the extent to which they are tailored to the particular activity, conduct or behaviour a code is intended to address.

[6] We explain what we mean by 'designated activities' in Appendix B.

Box C.1: Principles-based regulation and codes in other sectors

Energy

Ofgem has moved in recent years towards regulating suppliers of domestic energy using principles and customer outcomes, following previous findings that rules-based approaches led to companies following the letter of the rules, without delivering the customer outcomes that were intended.

In August 2013, Ofgem introduced enforceable Standards of Conduct that imposed certain high-level principles as obligations on suppliers.[7] In 2017, it replaced a number of rules on how suppliers trade with their retail customers with principles that place greater responsibility on suppliers for delivering positive consumer outcomes. For example, in trading fairly, Ofgem requires the following: 'The licensee must ensure that the structure, terms and conditions of its Tariffs are clear and easily comprehensible.'[8]

Ofgem's objective is for suppliers to rely more on general principles rather than detailed prescriptive rules[9] in determining how they run their businesses to meet regulatory requirements. It aims to put greater responsibility on suppliers to understand and deliver what is right and fair for their customers while allowing suppliers to innovate in how they reach those outcomes.[10]

Financial services

The FCA supervises nearly 60,000 firms. It uses judgment to supervise and enforce against a framework of principles and rules that represent minimum standards of conduct, supported by guidance.[11] Examples include: A firm must conduct its business with integrity (Principle 1); A firm must observe proper standards of market conduct (Principle 5); A firm must pay due regard to the interests of its customers and treat them fairly (Principle 6). The FCA expects firms and their employees to meet these standards and holds them to account when they fail to meet them.

Third element: Guidance

28. The third element of the code structure should be guidance. This should be tailored to each firm in relation to its designated activities in order to help it interpret the principles, and set out the kinds of practices it does or might undertake that would likely be captured by each principle. It could include

[7] Ofgem's Standards of Conduct in August 2013.
[8] Ofgem's decision on introducing principles on 'informed choices' for customers.
[9] Ofgem's approach maintained a role for prescriptive regulations alongside principles-based regulation, where more appropriate
[10] Ofgem's Future of Retail Market Regulation.
[11] The FCA has laid out the eight principles of good regulation and eleven principles for businesses. The FCA then elaborates on each of these principles in great detail in its Handbook.

examples of conduct that would be in line with or in breach of the principles, but any examples would be non-exhaustive. There may be some areas of commonality in the guidance for different firms and activities if they share some common principles. A number of responses to our call for information emphasised the importance of guidance in ensuring firms understood their obligations under the code.[12]

29. An example of the kind of content contained within guidance would be ‘in trading with small advertisers, a term may be unfair if it is applied by default and benefits the SMS firm by comparison to alternatives, unless there are offsetting benefits to advertisers from the default option’. Guidance might also give examples of particular terms which have been reviewed by the DMU and which appear to either represent examples of good practice or to breach the code.

30. In a legal sense, guidance would be non-binding, but the DMU would be expected to take relevant aspects of the guidance into consideration when assessing complaints about conduct and in decisions about enforcement action.

31. Guidance should be consulted on and further information on its content is set out in the following section on the content of the code.

32. In our view this proposed structure of objectives, principles and guidance balances predictability for firms with flexibility to address changing and emerging harms. We expect that the combination should provide clarity over both the concerns the code is intended to address and what types of conduct are prohibited or required by the code. On that basis, the DMU will be able to act more quickly to assess compliance of new issues that arise from changes in SMS firms’ conduct.

The DMU should be able to design and apply principles flexibly in order to best deliver the objectives of the code

33. In this section, we set out the importance of the DMU having discretion in designing principles, rather than their being set, for instance, in legislation. We consider whether it should be possible for the DMU to allow for exemptions to code principles, and if so where the burden of proof to determine that should fall.

---

[12] For example, Skyscanner stated in its response to our call for information that: ‘It would be highly advantageous to have thorough guidance documents alongside the code or regulation to provide greater detail on how it should be applied in practice, particularly on a more case by case basis’ (Skyscanner’s call for information response, page 5).

34. In the early stages of this new regime, the DMU will need to have discretion and use its judgment to determine the best approach to designing principles. This will be informed by a range of factors including how flexible and future-proof it wants the principles to be, how much certainty it is able to provide through the principles themselves (as opposed to the guidance) and how quickly it wants to be able to open an enforcement case (which we describe below) when it has a concern about a breach.

35. An important part of this discretion for the DMU should be that it can allow for 'exemptions' to principles. This would mean it had the power to adopt principles which prohibit SMS firms from prescribed conduct, except where specified conditions apply – for example that the conduct is necessary, or objectively justified, based on the efficiency, innovation or other competition benefits it brings. This is in recognition of the fact that conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits. We would anticipate guidance clarifying the circumstances when countervailing benefits might be accepted as a justification.

36. This is not unique – the Competition Act 1998 has a similar position. Agreements that restrict competition in the UK are prohibited,[13] but certain types of agreement are exempted as a block.[14] Further, individual agreements which provide countervailing efficiencies which are proportionate and shared with consumers may also be exempt from the prohibition. Where a firm wishes to establish that it is exempt from the general prohibition in this way, it is the firm 'claiming the benefit [that] shall bear the burden of proving that the conditions of that subsection are satisfied'.[15]

37. In the sections below, when describing how the code should be enforced, we recommend that the legal and evidential burden of proof for establishing a breach of the code should normally rest with the DMU.

38. If there are exemptions to certain obligations in the code because some conduct may produce mixed outcomes in different circumstances, there is a question as to who should be required to prove the exemption applies. This will depend on whether the risk should fall more on the SMS firm or its users, and who is best placed to get the necessary evidence.

39. We recommend that the DMU should have the power to specify who should bear the burden of proof for proving an exemption is engaged and what

---

[13] Section 2 Competition Act 1998.
[14] Section 3 Competition Act 1998.
[15] Section 9(2) Competition Act 1998.

evidence they need to provide. This is likely to be most important when there is not sufficient transparency about the actions of the SMS firm for the DMU to reasonably be able to monitor compliance with the relevant principle. The market study identified this lack of transparency as a primary source of concerns from firms that rely on the platforms for hosting content and for providing digital advertising services, and in that context it may be proportionate for the DMU to reverse the burden of proof in cases where a lack of transparency is a particular concern.

40. An example is if there were a principle that required SMS firms to give users fair notice, and no less than 28 days, of a deprecation or removal of an API relied on by users, unless objectively necessary to give less. If an SMS firm was of the view that it could not provide such notice before deprecating an API, the DMU could require the firm to bear the burden of proving it was objectively necessary to do so. For example, there may have been a serious and imminent risk to consumers' data that could not be remedied without deprecating the API. If the SMS firm did not, or could not, establish that there was an exceptional circumstance, it would have breached the code.

41. The appropriate allocation of the burden of proof for exemptions may facilitate prompt and effective enforcement. It provides a mechanism allowing the DMU to appropriately allocate risk between SMS firms and users and make sure the burden is with the entity best placed to address a point.[16]

42. When developing the code, if the criteria which would provide an exemption are not clear, or the evidence is not likely to be held by the SMS firm, it is unlikely to be right to place the burden on it.[17] However, where conduct can be expected to be problematic unless certain criteria apply, it is likely to be right that the burden of establishing it is an 'exemption' rests with the SMS firm. This is particularly the case when it will be well placed to gather the relevant evidence.

43. Box C.2 provides an example of how code principles and guidance would work in practice.

---

[16] This will also facilitate the DMU avoiding the need to adopt a blanket prohibition where this may not be necessary or desirable.

[17] We expect that as the DMU gains experience of operating the code and the competitive issues in these markets, it is more likely to be in a position to reverse the burden of proof in appropriate cases. If this recommendation were accepted a narrower use of this power in the first edition of the code should not necessarily be interpreted as the power being ineffective. Where the DMU had successively found that conduct breached a code principle (or objective) except in certain cases or situations, it may be appropriate to vary the code to prohibit that conduct unless specified exemptions applied.

Box C.2: Illustrative example – use of principles and guidance together to address concerns in specialised search

One of the concerns frequently raised in call for information submissions and submissions to the market study is in relation to 'specialised search' – where it is alleged that Google uses its position in general search to give it a competitive advantage in other online search markets (eg shopping and travel search).

The CMA proposed a code principle in the market study which should cover specialised search: 'Not to bundle services in markets where the SMS platform has market power with other services in a way which has an adverse effect on users'. This:

- identifies potentially problematic behaviour: bundling of services where the SMS platform has market power; and
- identifies a test for when the SMS should not do this: when the adverse effects for users, including making it harder to access alternatives and ultimately a reduction in competitors, outweigh the efficiency benefits for users, resulting in adverse effects.

The DMU could then consult on guidance as to:

1) how the scope of services which might be covered by this principle should be determined, with specific examples of services which the DMU considers should be explicitly covered by the principle, including specialised search;
2) what aspects of presentation of these services are to be regarded as 'bundling', rather than presenting own services on equal terms to third parties; and
3) what should be included when assessing whether there are adverse effects on users, including the benefits and the costs of bundling.

Based on this guidance, the DMU could assess any specific complaints that arise about particular products, or aspects of products, and can review outcomes as part of its monitoring regime discussed below.

Content of the code

44. In this section, we consider how the content of the code of conduct should be determined. In doing so we consider:

- How should the content of each of the objectives, principles and guidance be determined? We consider each element of the code in turn and recommend that the objectives of the code should be set out in legislation with the remainder of the content of each code to be determined by the DMU, tailored to the activity and conduct it is intended to address.

- How to ensure coherence between the content of the code of conduct and some of the recommendations from the Cairncross Review.

Recommendation 4b: The objectives of the code should be set out in legislation, with the remainder of the content of each code to be determined by the DMU, tailored to the activity, conduct and harms it is intended to address.

The code's objectives should be 'fair trading', 'open choices' and 'trust and transparency' and they should be set out in legislation

45. As described above, the purpose of objectives is to provide the framework for what conduct the code can address. An important reason for this is to give clarity about what the code can (and cannot) cover, thereby setting an outer limit on what it can address. We think this clarity needs to be provided upfront, at the outset of the new regime. This will help all stakeholders understand, broadly, what to expect. In this sense, the objectives are a key part of the design of the regime.[18]

46. We set out earlier that we consider the objectives should be common to all firms with SMS. We have considered what they should be. The market study proposed three objectives: 'Fair trading', 'Open choices' and 'Trust and transparency'. Fair trading was designed to deal with exploitative conduct; Open choices to deal with exclusionary conduct; and Trust and transparency to address the information asymmetry between platforms and users by ensuring sufficient information and clarity for users to make informed choices. These objectives would cover trading terms with business users that rely on the SMS firm, and also the terms on which consumers use the platform.

47. We have considered whether such objectives are likely to be appropriate for codes of conduct in relation to potential SMS firms active in other activities beyond digital advertising. Our conclusion is that they are, based on

---

[18] We do recognise there are alternative legislative models which would not so limit the scope of a regulator's discretion to make subordinate provision. For example, in its general rules the FCA is empowered so it 'may make such rules applying to authorised persons with respect to the carrying on by them of regulated activities, or with respect to the carrying on by them of activities which are not regulated activities, as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives' (s.137A FSMA2000). A similar open model could be adopted for the DMU allowing it to adopt any principle it judged expedient to advance its objectives. Nevertheless, for the reasons in this sub-section we believe there is merit in expressly framing the scope of the DMU's code making power in respect of 'objectives' in the legislation.

considering the potential concerns which might need to be addressed in other codes – for example the terms that users are required to accept to trade with a digital firm, the bundling of different products and services, the transparency of algorithms, and the clarity of information. The concepts they capture (exploitative and exclusionary conduct, and access to information to inform choice) are at the heart of competition and consumer law. This view was shared by a number of stakeholders responding to our call for information, who agreed these were appropriate for other digital markets as well as those considered in the market study.[19]

48. We think the purpose of the objectives need to be specified. We therefore recommend the following:

- **Fair trading:** users are treated fairly and are able to trade on reasonable commercial terms with the SMS firm.
- **Open choices:** users face no barriers to choosing freely and easily between services provided by SMS firms and other firms.
- **Trust and transparency:** users have clear and relevant information to understand what services SMS firms are providing, and to make informed decisions about how they interact with the SMS firm.

49. We consider that the objectives should be set out in legislation. This is because they are about the design of the regime, should be set out upfront to provide clarity, and are unlikely to need to change. The alternative would be for the DMU to be given a wide discretion to determine the scope of the code it adopted to achieve its statutory duties. This would mean there was less clarity at the outset of the regime as the DMU would also need to determine the appropriate objectives for the code.

50. Our view is that the powers associated with the code are intended to address the competition concerns motivating a firm's SMS designation. We therefore consider that there should be a clear link between the factors motivating the SMS designation – ie the existence of substantial, entrenched market power in an activity, providing the firm with a strategic position – and the objectives of the code. The code should be about managing the effects of the SMS firm's position, and the objectives should clearly relate to this aim. In the absence of specified objectives, the DMU is likely to face a number of calls for it to

[19] For example, a software developer stated in its call for information response: 'The objectives of 'Fair trading', 'Open choices' and 'Trust and transparency' are highly relevant to the problem behaviours exhibited by app stores. The majority of the principles are directly applicable'.
BT in its response said: 'The objectives of 'fair dealing', 'open choices' and 'trust and transparency' in the Code of Conduct are appropriate for tackling harm arising from market power in digital markets'.

address other wider concerns which may be unrelated to the factors motivating the SMS designation.

51. In our view, these wider concerns, for example in relation to hosting or failing to take reasonable steps to remove illegal content, should be addressed through wider reforms, not through the code. We discuss this further in Appendix G.

The principles and guidance should be developed by the DMU, tailored to the activity, conduct and behaviour they are intended to address

52. In contrast to the objectives, we think it is essential that the DMU has the power to set the targeted principles rather than principles being specified in legislation and uniform across firms and activities. There are two key reasons for this:

- to enable the code to be targeted at the particular activity, conduct or behaviour of concern; and
- to enable the code to be more easily updated over time to ensure it remains effective.

53. We now set out more detail on our thinking in relation to how we would expect the DMU to develop the code principles and guidance. As a public authority, the DMU's approach to exercising this power will be subject to the general principles of administrative law, such as fairness, rationality and proportionality, and be subject to appropriate checks and balances, including a right of appeal (set out in more detail in Appendix E).

Targeted intervention

54. SMS firms are expected to have a variety of business models and while the sources of market power may have similarities, the problems may show themselves in different ways. A 'one size fits all' approach is unlikely to be effective. Rather we propose the DMU adopts a targeted and evidence-led approach, with discretion to adopt principles depending on the activity, conduct or behaviour of concern. The need to target measures at specific harms was something a number of responses to our call for information emphasised. Furthermore, in order to be effective, both now and in the future, the code needs to be suitably flexible and forward-looking to target a range of possible behaviours and activities.

55. This targeted and evidence-led approach will need to strike a balance between common and bespoke principles and guidance. We propose the DMU is able to design a code for a particular firm and activity, drawing on a

set of common principles, supplemented by bespoke principles and guidance as required.

56. There are likely to be many instances where a degree of commonality between principles is justified and valuable – for example the use of common principles across SMS firms would mean that any enforcement action against one firm for a breach of one of those principles may be valuable in setting a precedent for other firms subject to the same principle. Over time, we would expect this to lead to greater certainty for firms, their competitors and users.

57. We expect that many of the market study principles could be applicable across SMS firms, for example requirements to trade on fair and reasonable terms, and not to impose undue restrictions on the ability of customers to use other providers that compete with the SMS platform or to compete with SMS platforms themselves. We also anticipate that a 'fairness by design' duty could apply across SMS firms. This places a duty on platforms to ensure that they are maximising users' ability to make informed choices about the use of their personal data and that the ways in which choices are presented to consumers (ie choice architecture) facilitate consumer choice.

58. The DMU should be able to combine common principles with bespoke principles and guidance as required. Examples of where additional or tailored principles and guidance may be required include:

- If providing an app store were to be a designated activity for an SMS firm, we expect this would be likely to require additional principles tailored to this activity, in particular to address the commercial relationship between the app store and the app provider. We agree with the submissions to our call for information that highlighted that some different principles to those proposed for digital advertising would be relevant to these activities, if they were to be designated by the DMU;

- In some cases, although the same principle could be applied across activities, it could be supported by bespoke guidance which is tailored to the activity each code is to be applied to. In respect of the example in Box C.2 on specialised search, the same principle could apply to bundling of services on Facebook's social media platform (were this to be a designated activity), which was also raised as a concern in the market study. If the DMU determined that these activities should also be covered by the code, firm-specific guidance targeted at these activities would need to be developed and consulted on, considering similar matters to those outlined in Box C.2.

Flexible and forward-looking

59. The DMU needs to be able to adapt, add to, or remove principles over time in light of new evidence. Moreover, several parties submitted that such flexibility should be an important part of an effective code.

60. As a result of these two factors – the need for targeted intervention and for principles to be updated over time – we recommend that code principles and guidance should be designed by the DMU. We expect the content of the code principles and guidance would be informed by the SMS assessment and from the consultation on the code during the designation process. The development of code guidance for each firm will reflect the DMU's ongoing work on monitoring and enforcement, and we would expect that guidance is more likely to be developed and expanded over time to reflect lessons learned by the DMU.

Recommendation 4c: The DMU should ensure the code addresses the concerns about the effect of the power and position of SMS firms when dealing with publishers, as identified by the Cairncross Review.

61. In this section we set out:

- the extent to which codes of conduct, applied to SMS firms in relation to digital advertising, could achieve the goals of the code proposed in the Cairncross Review, of rebalancing the relationship between publishers and the most powerful platforms; and

- how the code could apply to trading between SMS firms and publishers.

Relationship between the code and the Cairncross Review proposals

62. We consider that the code we are proposing in relation to SMS firms can capture key elements of the relevant substantive proposals for the relationship between platforms and publishers proposed by the Cairncross Review.

63. The Cairncross Review looked into the sustainability of high-quality journalism in the UK and, as part of that, investigated the role and impact of search engines and social media platforms. It reported in February 2019 and, among other recommendations, it proposed there should be new codes of conduct to rebalance the relationship between platforms and publishers. It proposed that these should be developed by the platforms themselves, with guidance from a regulator, and with the potential for that regulator to develop a statutory code if it did not consider those proposed by the platforms were sufficient. Similar

initiatives are being taken forward in other countries, including in France[20] and in Australia,[21] where the competition authority was asked to implement a code specifically targeted at the relationship between Google, Facebook and the news media.

64. The Cairncross Review identified specific pro-competitive principles which are comparable to those proposed in the market study principles and would specifically benefit press sustainability, including:[22]

- platforms not to impose their own advertising software on news publishers when they use platforms' publishing software – eg Accelerated Mobile Pages (AMP) and Instant Articles;
- platforms to give publishers early warning of changes to algorithms that may significantly affect the way in which their content is ranked; and
- platforms to provide transparent terms in relation to shares of online advertising revenues, and for these to be verified by third parties.

65. These principles were proposed by the Cairncross Review specifically for publishers as part of a voluntary code. Our proposals for an enforceable code for SMS firms covering, in particular, the objectives of fair trading and trust and transparency, would also be likely to cover these issues. We therefore consider that the code we are proposing can capture the relevant substantive proposals from the codes proposed by the Cairncross Review, and thus there would be no need for separate voluntary codes.[23]

66. Along with the overlap between the substantive provisions, we also think it would be confusing and unhelpful for platforms to be developing voluntary codes for aspects of their relationships with news publishers to a similar timeframe that the DMU is developing an enforceable code covering similar content and relationships. Notwithstanding the development timelines, once both types of code were in place it is hard to see how they could operate effectively and efficiently alongside each other. We therefore propose that it would be better for the DMU to be asked to implement the code in a way which is able to address the concerns identified by the Cairncross Review.

[20] Autorité de la concurrence (2020), Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP. The authority has required Google to negotiate with publishers and news agencies on the remuneration for the re-use of their protected contents.
[21] ACCC (2020), News media bargaining code.
[22] The Cairncross Review (2019), A sustainable future for journalism, page 93.
[23] This does not necessarily mean the code alone would be sufficient to address the concerns about press sustainability raised in the Cairncross Review and by the news media more widely.

How the code could apply to trading between SMS firms and publishers

67. We expect the DMU could set out in guidance how the code principles should apply to trading between SMS firms and publishers.

68. Under our proposed approach to the code, the terms on which publishers trade with SMS firms could be assessed through a principle under the fair trading objective. For example, the DMU could consider the extent to which it is reasonable for platforms to republish 'snippets' of content, and whether the terms on which they do this are fair.

69. We agree with the conclusions of the Cairncross Review that establishing a fair value exchange between two commercial parties would be difficult for a DMU or arbitrator to establish. The remedy powers associated with the code that we are recommending do not include direct outcome regulation, and would not enable the DMU to set prices. However, the code could allow the DMU to determine whether terms are fair and reasonable, taking into consideration the volume of content published, the price paid, and the service provided.

70. If the DMU had concerns that a term might breach the code and was not fair and reasonable, it would have a range of tools available to address this (set out further below). This could include by using a participative approach to engage constructively with the SMS firm and publishers to secure a change in terms, or by pursuing a formal code breach investigation which could result in the DMU requiring the firm to remove or amend the term such that they were no longer in breach of the code.

Scope of the code

71. As described above, the code of conduct will require SMS firms to comply with principles which have been designed to achieve the objectives of fair trading, open choices and trust and transparency. These principles should deliver benefits for those who rely on the SMS firms, but will impose some costs in restricting the SMS firm's actions with respect to the activities within the scope of the code. Therefore, it is important that (i) the code's principles apply only to those parts of the firm's business where they are justified, and (ii) the firm, the DMU and third parties understand upfront where the code of conduct applies. In this section we consider to which activities within a firm the code should apply.

Recommendation 4d: The code of conduct should always apply to the activity or activities which are the focus of the SMS designation.

72. We recommend that the code of conduct should always apply to the designated activities that satisfy the SMS test – ie the digital activity or activities in which the firm has substantial, entrenched market power, providing the firm with a strategic position (see Appendix B). The fact that a designated activity satisfies the SMS test provides the justification for applying the code of conduct to that activity.

73. Applying the code to the designated activity or activities will allow it to address two types of conduct that are key causes of concern. First, it will allow the code to address exploitative conduct in a designated activity. For example, the market study discussed how the code of conduct could be used to address concerns about the fairness and reasonableness of contract terms and the use of discriminatory terms, conditions and policies.[24]

74. Allowing the code to address exploitative conduct in a designated activity also includes instances where data, or another input, from a non-designated activity is used within a designated activity. For example, suppose that data collected via a consumer-facing product is used to target advertising sold in a designated activity. The code could be used to address competition concerns about how that data is used within the designated activity even if the consumer-facing product itself is not part of a designated activity and therefore is not covered by the code.

75. Second, a key concern motivating the SMS regime (and a factor we consider should contribute to the SMS assessment) is where a firm has the ability to use its position in a designated activity to extend its market power into other activities (see Appendix B). These concerns arise not merely due to the entry of a firm into a new area – such entry may in fact be disruptive and beneficial to consumers. Rather, concerns arise when a firm uses its position in one activity (its designated activity) to unfairly 'tip' competition in its favour to the long-term detriment of customers.

76. It is important that the code of conduct can address such behaviour. In our view this behaviour can be adequately addressed by applying the code of conduct to only the designated activity (Box C.3 provides an example to illustrate this).[25]

---

[24] For example, CMA's market study into online platforms and digital advertising, final report, Table 7.1.
[25] Google noted that this was the case in its call for information response (Google's call for information response, page 7): 'The provisions of the Code ought, therefore, only to apply to firms in their core markets where they are found to have SMS. This could, we think, include anti-competitive leveraging conduct in a core market'.

Box C.3: Using the code of conduct to address the extension of market power

As noted in Box C.2, a number of concerns have been raised concerning the potential for Google to extend its market power from Google Search into other specialised search products (e.g. Google Shopping, Google Flights etc). These concerns focus on how specialised search results are displayed within Google Search (eg the relative prominence of those results) and the ways in which consumers are directed to Google's specialised search results from Google Search. Since the concerns relate to the presentation of specialised search results within Google Search, they can be addressed by a code of conduct which applies only to Google Search. This has implications for Google's specialised search products, but it is not necessary to apply the code of conduct itself to Google's specialised search products to address this concern.

For the same reason this approach would allow a code of conduct applying to an online marketplace to address the presentation of a firm's own products on that marketplace when these products compete alongside those of third-party sellers. Similarly, it would allow a code of conduct applying to a social media platform to address how consumers are directed from the social media platform to other products (eg gaming) offered by the same firm.

Should the code, or elements of the code, apply more widely than the designated activities?

77. As discussed in Appendix B, an important concern motivating the SMS regime is when an SMS firm develops an ecosystem of related products that entrench its position in a designated activity. Therefore, it is appropriate that the code of conduct is able to address conduct in a firm's wider ecosystem which may entrench the position of its designated activity. However, while such conduct would directly affect competition in the designated activity, the action which would need to be addressed by the code would occur outside the designated activity. Therefore, using the code to address this conduct would require applying the code, or elements of it, more widely than the designated activity.

78. We consider it important that the entire code does not apply to a wide range of activities beyond a firm's designated activity or activities. Applying the code widely outside of the designated activity or activities which satisfy the SMS test would not be justified by the SMS assessment. A broad application of the code outside the designated activities which motivate the SMS designation

may also have significant adverse effects.[26] For example, as noted above, an SMS firm may be a disruptive entrant into areas outside of its designated activities and it would be inappropriate for the code to handicap such disruptive entry and expansion

79. We recommend that concerns about conduct in a firm's wider ecosystem which may entrench the position of its designated activity are addressed in a targeted way through a single standalone code principle. This principle should ensure that the firm cannot make changes to non-designated activities that further entrench the position of the SMS firm in its designated activity/activities unless the change can be shown to benefit customers.[27] Unlike the other code principles, this principle would apply to the conduct of the entire firm, ie to all of its activities. However, it would be tightly focussed on conduct that further entrenches the position of the SMS firm in its designated activity/activities – and would not affect any other conduct in the non-designated activities – and so would still be targeted at addressing the harms arising from market power in the designated activities.

80. Conduct in a non-designated activity, the sole effect of which is to further entrench a firm's position in a designated activity, would clearly be prohibited by the principle described above.[28] However, instances of such unambiguously anti-competitive behaviour are likely to be rare. In practice, in applying this principle the DMU will need to consider whether there are countervailing benefits for customers that are sufficient to offset any negative effects on competition in the firm's designated activity.[29, 30]

Identifying the boundaries of an activity

81. As noted, it is important that the SMS firm, the DMU and third parties understand the activities to which the code of conduct applies. An SMS firm is likely to undertake a wide range of activities beyond its designated activity or activities. Therefore, an implication of our recommendations is that the code of conduct is likely to apply to a subset of a firm's activities. Consequently, our recommendation regarding the scope of the code makes it important to

---

[26] This observation has been made by a number of stakeholders. For example, Facebook submitted that '[i]t is often the case that a company with market power in one market is a small, disruptive new entrant in another market. It is not clear why that new entrant in another market should be subject to the full substantive provisions of the Code based on the mere assumption that market power could be leveraged into this market.' (Facebook's call for information response, page 9).

[27] This principle could be part of the open choices objective.

[28] For example, where a firm removes access to a product relied on by competitors with no plausible benefits to customers.

[29] We would expect the SMS firm to be able to provide evidence to support any claimed countervailing benefits.

[30] As such, the application of this principle is the same as the application of any other principle with the DMU having the ability to allow for 'exemptions' to principles where specified conditions apply (see paragraphs 35-42).

understand how the boundaries of an activity are identified so that stakeholders clearly understand when the code applies.

82. As we described in Appendix B, an activity is a group of products or services provided by a firm that have a similar function or which, in combination, fulfil a specific function. We would expect the DMU to provide a description of the designated activity (or activities) to which the SMS assessment relates and to which the code of conduct applies. To provide further clarity to stakeholders, we would expect the DMU to provide examples illustrating the products and services it currently considers to be included and excluded from the designated activity based on a firm's current business model. The SMS firm (and other stakeholders) would need to assess the precise boundaries of the designated activity given the description provided by the DMU.

83. An important consideration underpinning our recommendation to identifying the boundaries of an activity is that once an SMS designation has been made it will have been shown that there is the potential for significant harm to arise. The code of conduct is an important means by which this potential for harm can be addressed and a means by which harms can be contained. Therefore, an element of flexibility is necessary to ensure that effective implementation of the code of conduct cannot be unreasonably frustrated by an approach that identifies activities excessively narrowly.[31] Our recommended approach to identifying activities would provide such flexibility while also providing clarity as to where the code of conduct applies and ensuring that the code of conduct cannot be unjustifiably applied to additional activities.[32,33]

Process for designing and implementing the code

84. In this section we describe the process for designing and implementing the code by considering:

- when and how the DMU should undertake the initial design of the code; and

[31] For example, the approach to identifying activities must be able to respond quickly to business model changes to avoid creating loopholes. Our recommended approach would mean that it would likely be unnecessary to update the description of the designated activity if new functionality were added or a new product was introduced with the similar functionality. This new functionality or product would automatically be included within the existing description of the activity.
[32] Specifically, this is done by allowing the DMU to group products and services together into an activity where it is 'reasonable' to do so.

- whether the DMU should be able to vary the code outside the designation review cycle.

Recommendation 4e: The DMU should consult on and establish a code as part of the designation assessment. The DMU should be able to vary the code outside the designation review cycle.

The initial code should be established as part of the designation assessment

85. The designation assessment will assess evidence of a firm's market power in an activity and the effects of that market power. In doing so it will identify the designated activity or activities to which the code will apply. The code is intended to prevent the misuse of that market power. Therefore, the SMS designation assessment and the design of the code are inherently interrelated. Consequently, we recommend that the DMU should consult on and establish a code of conduct as part of the designation assessment. This consultation process should also be followed if the DMU were to designate additional activities for a firm which had already been designated with SMS.

86. Bringing together the assessments of where the code should apply and what the code should contain will provide greater clarity. It also means that information gathering, analysis, and design and consultation on the code can be done in a more coherent and efficient way. This will result in a code being in place more quickly than if there was a two-stage process, thereby providing certainty earlier about what is required.[34]

87. An appropriate procedure for establishing the code (which could run alongside the designation process) would be:

    (a) The DMU has a duty, as part of the designation process described in Appendix B, to identify the activity or activities that give rise to SMS – ie the designated activities.

    (b) The DMU has powers to make code provisions in relation to these designated activities.[35]

---

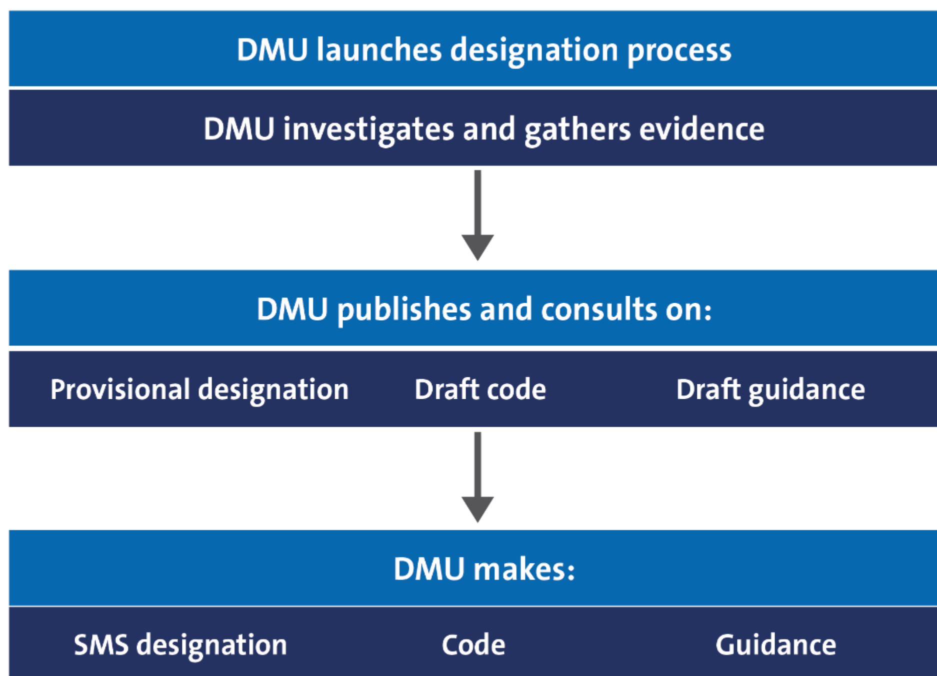
[34] This position is consistent with the CMA's advice in the market study, 'The development of the contents of the code would generally occur concurrently with the process of designating a firm, including consultation on initial guidance. The Taskforce will develop the CMA's advice in this area.' See CMA's market study into online platforms and digital advertising, Appendix U: supporting evidence for the code of conduct, paragraph 40.
[35] The DMU should have the power to make provision in the code in respect of what SMS firms must do, as well as what they must not do, eg it should be empowered to require SMS firms give reasonable notice prior to the deprecation of APIs. Whilst such obligations can be drafted as prohibitions, ie an SMS firm must not deprecate an API without reasonable notice, it is often less clear and unnecessarily artificial. As we explain in Appendix D, we judge it to be clear from the scheme of legislation we are recommending that material new obligations would need to be adopted via the mechanisms provided for pro-competitive interventions.

(c) The DMU has a duty to make and publish a code for each SMS firm which is effective and proportionate at remedying, mitigating or preventing the risks of the SMS firm misusing its market power in its designated activities.

(d) The DMU has a duty to publish and consult on a draft code.

(e) The DMU has a duty to publish the code.

Figure C.2: process for making the code.



88. Where appropriate, we would anticipate the DMU engaging with other regulators, in particular the FCA, the ICO and Ofcom, in the design of the code and guidance. This could be because, for example, activities of the SMS firm may also be regulated by another regulator, or an area of concern the code is seeking to address relates to the remit of another regulator.

89. We would expect it to be possible to have a code and guidance in place in a similar timeframe to the designation and that a unified process should be the DMU's ambition. However, it is possible that designing, developing and consulting on the appropriate principles and guidance to cover the breadth of trading relationships in the scope of the code could take longer than the time limit proposed for the designation process. For that reason, we do not consider it prudent to impose a statutory time limit for the development of the code, or the guidance.

90. When the guidance has been developed the DMU should consult on and publish it. A duty to do so would be in line with other aspects of the competition regime.[36]

The DMU should be able to vary the code outside of the designation review cycle

91. Once a code has been published, we would expect the DMU to have a duty to monitor the operation and effectiveness of the code. Such monitoring may reveal that it is necessary to update or clarify aspects of the code. This could be done in two ways: (i) by updating the guidance supporting the code or (ii) by updating the code's principles.

92. First, as we have indicated, guidance will be critical to the effectiveness of the code and the regime. The nature of guidance is that it is likely to change over time to incorporate evidence from the DMU's monitoring and enforcement work. The DMU may not be in a position to put in place guidance on all of the principles it includes in the code at the time of SMS designation. There may therefore be instances where it is necessary to update the guidance without updating the code. If the DMU does consider it necessary to update the guidance separately from updating the code, it should still be required to consult.

93. Second, we would expect the code's principles to remain generally stable within an SMS designation cycle and code variation to be relatively unusual. That is one of the benefits of the approach we have recommended. As such, we would anticipate that most clarifications to how the DMU would expect the code to operate in respect of a firm would occur via variation to the accompanying guidance, as a result of decisional practice following enforcement action, or through more informal regulatory statements, publications or speeches.

94. Nonetheless, it may be necessary to vary a code's principles outside the usual SMS designation or re-designation process (and it would be revisited at each re-designation process). A formal change to the code's content could be appropriate for different reasons, including to clarify the rules based on experience operating the code and the DMU's understanding of the markets, or due to changes in the technologies being used or the conduct or business

---

[36] See the similar duties created with the new competition regimes and legal tests envisioned in the Competition Act 1998 (s.52 & 31D) and the Enterprise Act 2002.

model of firms. In such cases, the code may need to be varied in order to address new ways the firm is able to exercise its market power.

95. We therefore think it is important that the DMU has the ability to vary a code's principles from time to time.[37] We do not recommend that there should be any condition precedent, or special legal test, such as a material change of circumstance, for the DMU to exercise this power. Rather, the DMU should keep the operation of SMS codes under review and ensure that the content of the code is effective and proportionate.[38] The exercise of this power will, of course, need to be rational and proportionate and be subject to the same duties to consult as when first making the code.

Fostering compliance and preventing harm

Recommendation 5: SMS firms should have a legal obligation to ensure their conduct is compliant with the requirements of the code at all times and put in place measures to foster compliance.

96. The motivation for establishing a new *ex ante* regime is to proactively shape the behaviour of SMS firms before harm occurs. The more this is achieved, the more successful the regime will be. We recognise that this may require a cultural shift within SMS firms, which may need to be developed and encouraged over time.

97. One way to support the aim of preventing harm from happening in the first place is if SMS firms have a legal obligation to ensure their conduct is consistent with the requirements of the code. Additionally, while the obligation to comply with the requirements of the regime will rest with the SMS firm, the DMU's approach will be important in encouraging and supporting compliance. Getting this approach right will be critical to the success of the regime. Below we discuss a number of measures that could support this process:

- providing **clarity of expectations** for SMS firms;
- **establishing constructive relationships** between the SMS firm and the DMU within a climate of greater transparency;

---

[37] Put another way, once a firm is designated we expect the code making power should be subject to the normal statutory presumption reflected in section 12 of the Interpretation Act 1978, ie 'that the power may be exercised, or the duty is to be performed, from time to time as occasion requires', rather than being a one off power only usable on designation. This is consistent with most regulatory regimes where the regulator can amend the rules but is different from the current situation for the CMA where it essentially has a one-off power to put in place a remedy following a merger or market inquiry.
[38] Where there has been a variation of a firm's SMS designation to add or remove a specified activity, it is likely there will also need to be consequential provision made to vary the code and the guidance.

- requiring **clear accountability** within SMS firms;
- supporting the development of **a culture of compliance within SMS firms**;
- the **ability of the DMU to take tough action where necessary**; and
- an approach that **learns from the experiences of other regulators**.

98. First, **clarity of expectations** from the DMU will be important in supporting SMS firms in understanding how to comply with the code. In addition to clear and consistent communication, guidance will play an integral role, explaining how particular elements of the code could apply, as well as setting out past relevant decisions and how these should be considered more broadly.

99. Second, **establishing constructive relationships** with dedicated UK representatives from the SMS firms will allow for more frequent, open, and constructive discussions. Open channels of communication would ensure that the DMU can follow up on or challenge matters as they arise, achieving rapid resolutions or clarifications where they are required. This could also provide the SMS firm with the opportunity to discuss and seek views on planned changes to its conduct to understand any risks this might create. To support this high-level aim, the SMS firm should have a legal obligation to cooperate with the DMU.[39] The DMU would need to balance the need for good relationships with the risk of regulatory capture and have mechanisms in place to prevent this (for example by rotating the staff who work with an SMS firm).

100. Third, **clear accountability** within the SMS firm will help to foster compliance within the firm 'from the top'. We recommend that SMS firms are required by law to identify appropriate individuals – senior staff members with authority over the services supplied to UK users – to take responsibility for compliance. Those individuals should be at a seniority level comparable to corporate boards and, most importantly, should have the capability to affect change in the services UK users receive. Such individual accountability will be crucial in affecting real change through the regime.

101. Fourth, the SMS firm should adopt **a culture of compliance, and ensure this is embedded** throughout the firm, such that when taking decisions, compliance with the code is considered from the outset rather than as an

[39] There is a similar requirement for firms regulated by the FCA. Principle 11 of its Principles for Business states: 'A firm must deal with its regulators in an open and cooperative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice'.

after-thought. Compliance with the code should not be side-lined but should be embedded throughout the firm's decisions.

102. To encourage compliance, the DMU could consider requiring SMS firms to produce compliance reports which could be published. The reputational impact of public disclosures of this nature could contribute to ensuring that compliance is a priority throughout the firm.

103. Fifth, we expect that, in time, SMS firms will recognise the advantages of cooperating with the DMU and proactively seeking to comply with the code of conduct. For instance, in avoiding reputational damage, increasing its regulatory certainty, developing and improving relationships with its customers and business users. However, these incentives will be insufficient on their own to achieve the necessary shift in SMS firms' behaviour – it will be essential that the DMU has **the ability to take tough action** to establish a clear and firm deterrent from breaching the code. Our recommendations for the tools that should be made available to the DMU in these circumstances are set out below.

104. Alongside taking tough action to enforce the code, the DMU may also be more likely to consider more far-reaching PCIs where the code is proving insufficient in managing the harmful effects of a firm's market power. Where the code is proving insufficient in addressing the most harmful conduct of the SMS firm, the case for transformative PCIs to tackle the source of the firm's market power will be strengthened. PCIs are discussed in Appendix D.

105. Finally, the DMU should seek to share experiences and join up with **other regulators** where relevant, such as the FCA, which has implemented initiatives to instil better cultures in the firms it regulates – see Box C.4. Likewise, accountability is one of the key principles in data protection law. The ICO has developed an Accountability Framework to support organisations with their obligations including sections on leadership and oversight, policies and procedures and breach response and monitoring among others.[40]

106. It is important that compliance does not require extensive bureaucracy and process which slows down decision-making in these fast-moving markets. That is not our intention. We would expect the DMU to work closely with the SMS firms and other affected parties to ensure this did not become the case.

Box C.4: Compliance culture in financial services

[40] ICO's Accountability Framework.

Financial services

As part of the FCA's approach to supervision,[41] the FCA seeks to gain a thorough understanding of the business models and strategies of the firms that they regulate together with assessment of the drivers of culture, with the aim of ensuring firms meet the required standards and thereby preventing/mitigating against harm. The largest, most impactful financial services firms (based on their business model/revenue) have a dedicated team of 'supervisors' within the FCA who meet with the firm regularly. In their work with these specific regulated firms they:

- Meet regularly with the firm's senior management to understand the firm's strategy and business model and any risks this might create for harm to consumers and markets.
- Provide clarity on how particular principles or rules should be interpreted and the expected standards.
- Undertake diagnostic work using thematic reviews for example to maintain consistency across the market, inform policy work and also consider whether the firm is complying with principles and rules in particular activities.

Monitoring and enforcing the code

107. The following sections outline how we expect the DMU to monitor the conduct of SMS firms and step in when it identifies problems. Whilst much of the focus is on monitoring and enforcement of the code of conduct, the same measures are also relevant to wider elements of the SMS regime (set out where relevant).

Recommendation 7: The government should establish the SMS regime such that the DMU can undertake monitoring in relation to the conduct of SMS firms and has a range of tools available to resolve concerns.

Monitoring

108. For the DMU to be able to act swiftly in relation to the conduct of SMS firms, before serious harm occurs, it will need to be able to identify where there are risks of potential problems, as well as where these risks have crystallised, and problems now exist.

109. We would expect the DMU to monitor the activities of SMS firms to identify breaches of the code. The DMU could also monitor for breaches of remedies

[41] FCA (2019), FCA Mission: Approach to Supervision.

imposed under code orders or PCIs. Monitoring might also inform future priorities for designation assessments, updates to the code, as well as where future PCI investigations may be needed.

110. The DMU could undertake monitoring activity through:

- gathering periodic and *ad hoc* information from SMS firms and other parties;
- requiring SMS firms to report particular information to the DMU as well as produce compliance reports, which the DMU could publish;
- conducting its own checks of conduct or carrying out reviews on practices across SMS firms;
- holding confidential discussions with stakeholders, and establishing a secure whistle-blower channel for employees of SMS firms; and
- reviewing complaints made to the DMU.

111. More information on the DMU's powers to gather such information is set out in Appendix E.

Enforcement

112. When the DMU identifies a concern, it should have a range of tools available to investigate, and where necessary to address the concern. The DMU should be able to choose the most appropriate approach depending upon the circumstances to ensure what it does is timely, efficient and proportionate. In this section we examine the different approaches the DMU will need to have available to it to resolve concerns. Specifically:

- **a participative approach** that can deliver fast and effective resolution; and
- **formal enforcement where necessary** – we recommend that the DMU is able to (i) open code breach investigations; (ii) impose interim measures where significant harm could arise; and (iii) undertake scoping assessments where it is concerned there is an adverse effect on competition or consumers.

113. We discuss each of these approaches and the relationship between them in the following sections.

Recommendation 7a: Where appropriate, the DMU should seek to resolve concerns using a participative approach, engaging with parties to deliver fast and effective resolution.

114. We would hope that a relatively high proportion of cases could be resolved using a participative approach. Under a participative approach the DMU would seek to engage constructively with the SMS firm and other affected parties to secure a change in the SMS firm's behaviour in order to resolve concerns without opening a formal investigation – although the option to open a formal investigation as necessary would remain. We note that several experts have advocated for similar forms of participative approaches to regulating digital markets.[42]

115. To achieve this, the DMU would need to be able to promote dialogue, ask questions to SMS firms and their users, and encourage the SMS firm and other stakeholders to find a resolution. The DMU will need to use channels of communication it will have built with the SMS firm so it can have open and frank discussions about concerns and action that needs to be taken. It would need to have confidence that the SMS firm took the discussions seriously and the means to ensure they acted on them. The DMU's ability to develop a participative approach will to some extent be dependent upon successfully developing a compliance culture within each SMS firm, as set out in recommendation 5.

116. We envisage that such a participative approach will be an essential feature of the success of the regime. This approach could achieve fast and effective resolutions without the need for more formal investigations. The participative approach could involve the DMU engaging with the SMS firm directly to resolve a concern, or the DMU supporting engagement between an SMS firm and third parties. Such engagement would take place in relation to concerns that the code had been breached and in supporting action to ensure firms' conduct complied with the code.

117. The DMU should be able to determine the most appropriate participative approach drawing on experiences from other sectors and regulators, in particular where there are power imbalances and dependencies between parties, tailored to the specific circumstances. One example is the Groceries Code Adjudicator which monitors and enforces against unreasonable terms

---

[42] For example, Quartz reported that the Nobel Laureate, Jean Tirole has suggested that regulators should develop "participative antitrust." He suggests the sector and other parties should work together to propose possible remedies on which the regulators would opine. This approach allows for some legal certainty without casting every rule in stone. Tirole suggests it will enable regulators to innovate and learn by doing. Also see, Journal of Antitrust Enforcement, 2019, Volume 8. Issue 1, March 2020, "Ensuring innovation through participative antitrust", where Oliver J. Bethell, Gavin N. Baird and Alexander M. Waksman describe participative antitrust in greater detail referring to Jean Tirole's research.

imposed by supermarkets on suppliers primarily through discussions among the parties, in cases of suspected breaches. Box C.5 describes the role of the Groceries Code Adjudicator.

Box C.5: The role of the Groceries Code Adjudicator in supporting negotiations between parties over breaches of the Groceries Code

The Groceries Code Adjudicator oversees a statutory code of conduct between large supermarkets (with revenue over £1 billion) and their suppliers, seeking to address an imbalance of power in determining the terms and conditions for supply of groceries.

The Groceries Supply Code of Practice (GSCOP) is a principles-based code, with a principle requiring supermarkets to trade fairly with their suppliers, and also a number of supporting principles which describe conditions of fair trading in respect of payment, promotions, and terms of trade. It was implemented to address concerns about the power that supermarkets have over their suppliers in what is a strategically important sector for the UK.

Although the backstop of enforcement is an essential part of the regime and getting firms to the table, the approach taken by the GCA has been one of seeking to ensure compliance with the code without resorting to formal enforcement. The GCA has only performed two enforcement cases and six arbitrations since 2013.[43] This is seen to be a success: the lack of enforcement reflects an increased willingness to negotiate and comply by the large firms. A recent review by government of the performance of the GCA praised and supported this as a 'modern regulatory approach'.[44]

118. Ofcom is another example – it has formal enforcement powers, but it may also seek to resolve issues through means other than formal enforcement action. For example, where the party offers Ofcom assurances that it is taking steps to address the concerns and Ofcom monitors compliance. Box C.6 sets out the tools Ofcom has available and its approach.

Box C.6: Ofcom's approach to enforcement

Ofcom has several tools available to foster compliance across its regulated sectors: informal engagement and advocacy; monitoring programmes; the use of cautionary tools such as warning letters; and dispute and regulatory investigations.

Ofcom takes decisions about whether to open formal investigations on a case-by-case basis. It has regard to its statutory duties and all the relevant matters of a case. It exercises discretion to target cases that are most likely to produce good outcomes for consumers.[45]

---

[43] Statutory Review of the Groceries Code Adjudicator: 2016-2019, paragraph 60.
[44] Statutory Review of the Groceries Code Adjudicator: 2016-2019, paragraph 61.
[45] Ofcom's Enforcement guidelines for regulatory investigations paragraphs 2.2-2.3.

In its management of both disputes and regulatory investigations, Ofcom will explore options for early or informal resolution:

- **Disputes**: the statutory and regulatory frameworks for telecommunications and post allow for certain compliance issues to be determined by Ofcom through a dispute resolution mechanism in respect of network access. Ofcom's determinations are binding on parties to a dispute and, generally, Ofcom must make those determinations within formal deadlines. Parties must provide evidence that they are in dispute and that they have made reasonable endeavours to enter into good faith negotiations to seek to resolve their differences before seeking Ofcom's involvement. If Ofcom considers that this is not the case, it will reject the dispute and require the parties to continue negotiations. Ofcom has published Dispute Resolution Guidelines which sets out its role in handling disputes.[46]

- **Regulatory investigations**: While Ofcom's regulatory investigations are frequently concluded by formal decision, Ofcom can decide to close an investigation due, for example, to a change in circumstances. Such circumstances could include accepting voluntary undertakings from the target of the investigation to change behaviours which are alleged to breach regulatory rules. Ofcom may then subsequently publish a statement clarifying why an investigation has been closed and the commitments made and any proposed on-going monitoring.

119. As part of its participative approach, the DMU could also consider supporting a process of quasi-arbitration or mediation between the SMS firm and its users, particularly when addressing alleged code breaches that involve one or a small number of companies. To do this the DMU would need to develop a framework to support commercial bilateral or multilateral negotiations with incentives to parties to reach an agreed outcome. There are different models for this and the Office of the Telecommunications Adjudicator (jointly funded by Ofcom and BT, the primary fixed Significant Market Power operator) may be a useful model.

120. Whether and when to pursue these mechanisms would be a matter of judgment for the DMU. It would need to consider the incentives of the parties to reach agreement, as well as the ability and willingness of third parties to engage in such a process (including resources and anonymity concerns). We recognise that in some cases third parties may not be willing to engage in such a process, given their reliance on the SMS firm and the potential for retaliation. A process of supporting quasi-arbitration or mediation is also likely to be less suited to issues affecting a large number of complaints and parties, although it might be possible for the DMU to establish a forum to gather

[46] Ofcom (2011), Dispute Resolution Guidelines.

evidence from smaller parties who then appoint a representative to the arbitration or mediation.

121. There could be a risk with a participative approach regarding a lack of transparency and a lack of clarity over what has been deemed acceptable or otherwise. It would therefore be important for the DMU to be as transparent (to the public and wider stakeholders) as possible in its participative approach with SMS firms, and also to have the appropriate safeguards in place to ensure the independence of its processes. In particular, the DMU should be cognisant of potential retaliation by SMS firms towards complainants. The DMU should not hesitate to take proactive steps to prevent retaliation and to penalise SMS firms that engage in such behaviour.[47] Additional measures that the DMU could take to enhance transparency include:

- Publishing a summary of the matters the DMU seeks to assess, a notice of the commencement of the participative approach, summarised formal meeting minutes and the outcome of the discussions, respecting confidentiality obligations.[48]

- Modifying the guidance for the SMS firm or the industry based on the outcomes from the participative approach.

- Including non-SMS stakeholders in the process and discussions. Greater transparency, including on the outcome of any quasi-arbitration or mediation processes where the DMU had a supporting role, would also encourage the DMU to balance its consultations and discussions with the SMS firms and their customers.

- Formalising the participative approach to the extent that it compels SMS firms to co-operate but also does so at speed. For example, the DMU should not hesitate to set out its expectations from the participative approach, use its information gathering powers, and change course rapidly to enforcement if the need arises.

122. Over the medium term, as the regime becomes established and the benefits of cooperation are well-understood, we expect that many changes made by SMS firms in response to DMU action could be achieved through this

[47] Whilst the principles to be adopted will be a matter for the DMU, we believe retaliatory action against a firm that had asserted its rights under the code is of the type that would breach the fair trading objective we have recommended, and is the sort of conduct that the DMU may wish to be clear would represent an intentional breach of the code.
[48] This summary could be similar in spirit to a statement of scope published at the start of market studies.

participative route. However, as we describe next, this will be more likely to materialise if there is a realistic prospect of formal enforcement.

Formal enforcement of the code

123. There will be instances where a participative approach is unsuccessful or inappropriate and where formal enforcement will be necessary. Additionally, the participative approach is likely to be more successful if it is known that formal enforcement is possible as a backstop. We describe how formal enforcement of the code should operate by considering:

- the role of code breach investigations;
- the need for fining powers;
- the need for interim measures;
- the role of scoping assessments; and
- the role of redress following a code breach.

Recommendation 7b: The DMU should be able to open formal investigations into breaches of the code and where a breach is found, require an SMS firm to change its behaviour. These investigations should be completed within a fixed statutory deadline.

124. Enforcement actions should not be the focus of the regime. However, they are a necessary feature to ensure compliance with the code. In this section we describe:

- a suitable process for code breach investigations – we expect that the DMU would publish the opening of an investigation and consult on a provisional decision;
- the importance of remedies to the code process – in particular the DMU should have the ability to require the SMS firm to change its behaviour to achieve compliance with the code and to test remedies;
- the process for making code orders – which should include a draft code order, the rationale for the proposed approach and allow for representations from parties;
- the role of 'commitments' by SMS firms – where we think it should be possible for a firm to formally offer to change its conduct thereby avoiding the need for a code breach investigation; and

- the appropriate timeframe for a code breach investigation (including the identification of remedies) – we recommend that the formal code breach investigations should be subject to a statutory deadline.

125. We have not prepared advice on the fine details of the process for code breach investigations. These should be a matter for the DMU which should consider what would work well for digital markets.[49] In designing a more detailed process, we believe that it would be appropriate for the DMU to:

- prioritise speed, simplicity and efficacy;
- ensure interested parties' procedural rights are protected and they have the opportunity to make their views known before decisions are made;
- ensure that non-SMS firms lacking significant regulatory affairs experience can have their interests effectively represented;
- consult with other regulators where a proposed remedy engages other regulatory objectives (eg data protection and e-privacy); and
- consider how regulators in other jurisdictions are approaching investigations in digital markets and to draw on lessons from sector regulators in the UK who have established detailed procedures and norms in enforcing codes of conduct or regulatory principles.[50]

126. We envisage the DMU publishing guidance on its approach to code breach investigations.

A process for code breach investigations

127. The DMU should have the power to open code breach investigations when it has reasonable grounds for suspecting a code breach.[51] It should not be a requirement for the participative approach to have been attempted before an investigation is launched. In a code breach investigation the DMU should be required to meet the legal and evidential burden of proving the code has been breached on the balance of probabilities.

---

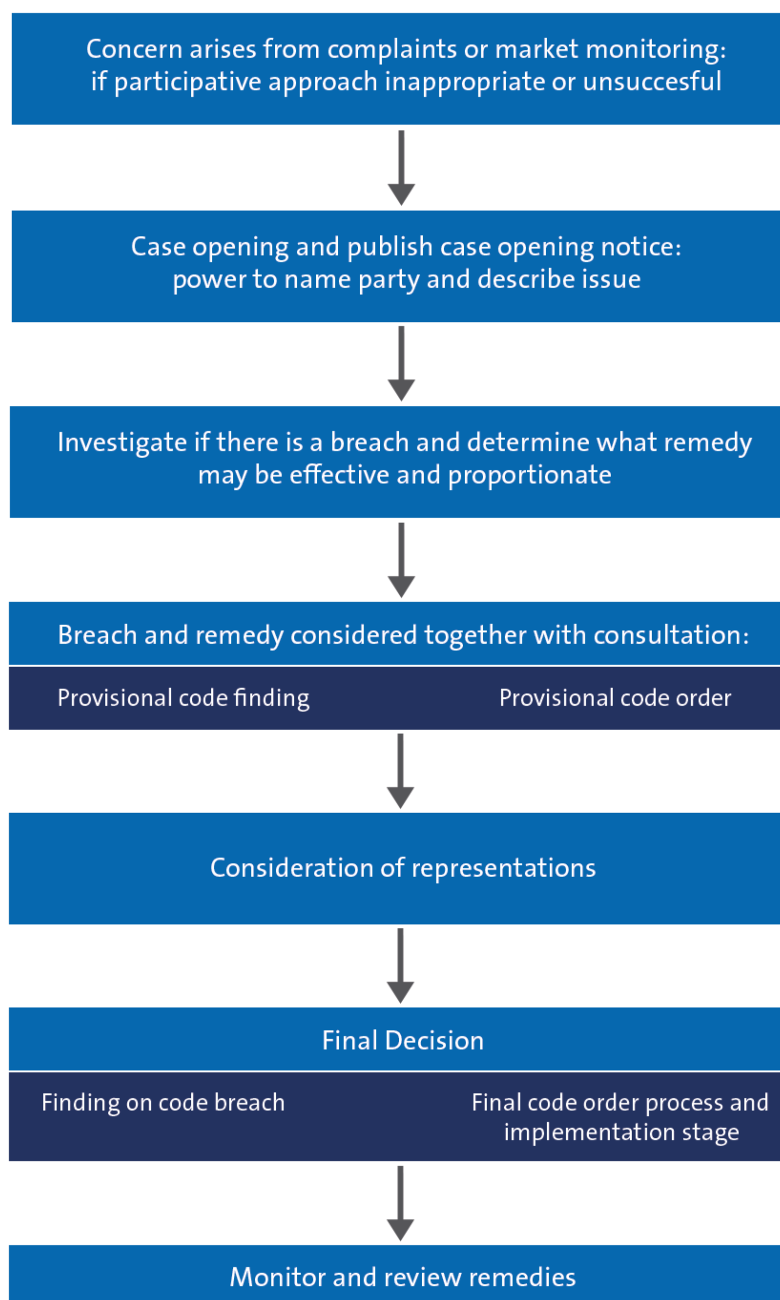
[49] As a new regulator, the DMU will have a significant advantage that its approach to investigations and regulation more broadly are not set by previous practice – it means that the route it chooses can be more dependent on prevailing conditions rather than consistency with past practice in other sectors.
[50] For example, the FCA has published an enforcement guide. Ofgem has published its approach to enforcement in Enforcement Guidelines published on 10 October 2017. Since then, Ofgem has been on a journey towards principles-based regulation. Ofcom has published guidelines for regulatory investigations in Enforcement Guidelines for regulatory investigations published on 28 June 2017.
[51] 'Reasonable grounds for suspecting' are the same low standard for suspicion adopted in CA98 to begin an investigation.

128. Much of the approach to code breach investigations described below would also apply in relation to investigations of breaches of PCI orders following a PCI investigation. PCIs are discussed in Appendix D.

129. In making our recommendations we have been particularly aware of the potential for code breaches to have significant implications for users. This indicates that code breach investigations should be comparatively quick. This, of course, needs to be balanced with the rights of defence for SMS firms and the DMU would need to gather sufficient evidence to determine first that there is reason to suspect a breach and therefore to open a case, and then whether there is actually a breach.

130. The following diagram summarises the key phases we would expect to form a code breach investigation.

Figure C.3: Expected phases in a code breach investigation



131. First, we expect the DMU would publish the opening of an investigation, name the SMS firm and describe the breach under investigation.[52] In addition to providing transparency to the enforcement process, we expect this public case opening may also facilitate the DMU gathering evidence from wider market participants.

[52] 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.

132. Second, the DMU will exercise information gathering powers to establish if the code has been breached. We describe the information gathering powers the DMU will require in more detail in Appendix E.

133. Third, if the DMU provisionally finds the SMS firm has breached the code we expect it would, in writing:

- give notice of its 'provisional code breach finding',
- the reasons for its provisional finding, and
- provide the SMS firm with an opportunity to make representations.[53]

134. Alternatively, if, following an investigation, the DMU finds there was not a code breach we expect it would publish an investigation closure notice, giving its reasons.

135. Fourth, if, following consultation, the DMU finds that the code has been breached, we expect it would publish its reasoned 'code breach decision'. Institutional design is outside the core scope of the taskforce's advice, we therefore consider that how such decisions are made is best left to the DMU to decide, in light of its institutional design, so as to achieve the benefits of effective administrative decision making. Any such decision-making model should ensure robust internal scrutiny of decisions.

Remedies should focus on requiring the SMS firm to change its behaviour to comply with the code

136. The purpose of a code breach investigation is to establish whether there has been a breach, and if so, to bring the SMS firm's conduct back into line with the code. As such, the DMU should be able to order the SMS firm to change its conduct to comply, and, if necessary, specify the steps it must take. Additionally, the DMU should have the ability to require trials and testing of particular remedies where appropriate, and to assess their effectiveness including by monitoring and requiring reporting of actual effectiveness.

137. As the market study noted, a focus on remedying the conduct rather than punishing the firm is an important distinction from enforcement under the Competition Act 1998. Whilst we expect the SMS firm would be closely involved in the design of a proportionate remedy, it is also important a remedy

[53] Subject to confidentiality considerations, the DMU should also have the power to invite representations from third parties.

is effective and addresses the breach as comprehensively as is reasonable and practicable. Remedies are not conditional on the SMS firm's 'consent'.

138. In operational terms, the DMU should have the power to make 'code orders' to remedy code breaches and SMS firms should have a duty to comply with 'code orders'.[54] Code orders would be the means by which the DMU can specify the conduct changes required by the SMS firm in order to comply with the code. This could include suspending, blocking or reversing conduct, as well as ordering specific conduct that would resolve the breach, for example to continue to provide a customer with access to an API, or to change the availability to different customer groups of an API to address concerns about discrimination between customers.

139. Code orders should be effective and proportionate to comprehensively remedy the breach that has been found. In many cases a breach of the code will be clear cut, as will the necessary remedy to end the illegality. In other cases, the precise change that would be effective and proportionate will be less clear. The DMU would in those cases be able to propose and consult on remedies to address a code breach. The DMU would be able to require the SMS firm through a code order to take action to address a code breach to the extent that it is proportionate, ie that it directly addresses the conduct that breaches the code. The DMU would not be able to impose remedies under the code which go beyond the conduct directly subject to the breach. If the DMU considered that more intrusive measures would deliver additional benefits to users over and above stopping the conduct, it would need to open a PCI investigation, as discussed in Appendix D.

140. The DMU should be able to test the likely effectiveness of remedies which could lead to a review and further modifications where appropriate. It should have the power to vary a code order either on its own initiative or on the application of an SMS firm or another person, to ensure or improve its effectiveness in remedying the breach.

141. In the following sections we describe (i) the process by which code orders could be made and (ii) the role of commitments.

---

[54] In the CMA's market study into online platforms and digital advertising the CMA stated: 'An advantage of the code over enforcement under the competition law prohibitions is that its main focus would be on changing behaviour – where this is in the interests of consumers – rather than penalising illegal conduct. The consideration of potential remedies and discussion of these with parties would be a key part of the investigation process throughout and the DMU would have much greater influence over the design of remedies through its order making powers than is the case in antirust cases.' (paragraph 7.37) and 'The code would therefore give the DMU the power to suspend, block and reverse decisions of SMS firms, and order conduct in order to achieve compliance with the code.' (paragraph 7.95).

The process for making code orders

142. To make a code order, we would expect the DMU to take the following procedural steps, in writing:

- issue a draft code order;
- set out the reasons for its proposed approach to remedying the code breach; and
- provide an opportunity for the SMS firm (and third parties where appropriate) to make representations.

143. We expect the DMU will often find it desirable, subject to confidentiality redactions, to consult more widely on remedies, particularly where there is a complainant, but we do not believe it should be subject to a duty to do so. As set out above, we do envisage that the DMU will consult with other regulators where remedies raise issues that cut across regulatory regimes.

144. As remedies are intended to be an integral part of code enforcement, it will be desirable for the DMU to give written notice of its proposed approach to remedying the code breach, draft code order, and provide an opportunity for stakeholders to make representations alongside its provisional decision on whether the code has been breached.[55] The DMU will take into account representations, as well as the outcomes from any testing of the proposed remedies, and then determine and make the final code order.

145. We expect the DMU would monitor and keep the appropriateness of code orders under review. If the DMU finds that a code order is not being complied with it may impose a penalty on the SMS firm (this is discussed further below). The DMU should normally be expected to include an end date (sunset) for some or all of the content of a code order. We expect that, at the point of re-designation of the SMS firm, if not before, the DMU would be expected to actively assess if any outstanding code orders are still required.[56]

146. The process for varying a code order should be consistent with the process for making the order, with the DMU required to provide the SMS firm in writing

[55] We are recommending that this practice is desirable, and likely to be best practice for many code breach investigations. However, we can see that in delivering potentially complex investigations at pace to a tough statutory deadline, in some cases it may be necessary for the DMU to focus on determining if the code has been breached, and if so then move on to adopting remedies sequentially which may need to be tested and trialled after the investigation is over (and the statutory deadline has been met), to determine what is most effective and proportionate mechanism to remedy the breach, eg the precise design of a new choice screen.

[56] Where the DMU decides that re-designation is appropriate, and that code orders are still required they should remain in force on re-designation.

with a draft code order variation, the reasons for it, and give it an opportunity to make representations prior to the adoption of the order.

The role of commitments

147. As we explain above, we expect that many potential issues with code compliance could be addressed with a participative approach without the need for formal enforcement action. However, where the DMU has prioritised opening a code breach investigation, we also consider there should be the opportunity for the SMS firm to formally commit to changing its conduct prior to the conclusion of the investigation or a formal decision by the DMU that the code has been breached. This might include committing to reverse a decision to implement a new term which has been subject to a complaint and consequently resulted in the DMU launching an investigation.

148. This is consistent with the regime’s focus on resolving potential issues at pace and less formally where appropriate. Therefore, there should be a mechanism to formally secure that commitment and it should allow for the adoption of a code order (enforceable in the normal way) prescribing the actions the SMS firm must take.

149. In deciding whether to accept a commitment, the DMU would need to balance the benefit of an earlier resolution of the issue against any potential downsides of not formally reaching a decision. This would be most likely to be where stopping the investigation early would mean not setting a precedent, and in some cases might mean not being able to deter SMS firms from similar conduct with a penalty. For the SMS firm, giving a commitment is likely to be better for its reputation than having a finding made it has acted unlawfully and the absence of a formal decision finding the SMS firm breached the code may reduce the likelihood of private action by firms who potentially suffered loss or damage.[57]

150. Consistent with the process in the Competition Act 1998,[58] once investigations have been formally opened by public notice, transparency in the use of commitments to end the investigation is desirable. We therefore recommend that, where the DMU is minded to accept a commitment to close

[57] The absence of a finding by the public authority that the law has been breached would not be a barrier to a private claimant seeking a private law remedy (eg damages) but it means they will not have a decision to base their claim on, and will need to evidence the code breach themselves to the requisite standard. Experience suggests that running such private ‘stand-alone’ cases can be more difficult than those private cases which ‘follow-on’ from public enforcement.
[58] See the Competition Act 1998 sections 31A to 31E.

a case, it should consult interested parties on the provisional order.[59] Such 'market testing' is desirable as those affected are best placed to inform the DMU if the proposed commitments address the relevant concerns of users.[60] The DMU should publish guidance on how it expects to operate the commitments process, and we would expect the timescales for the investigation to be adapted accordingly if a firm offers commitments.

Code breach investigations should be subject to a statutory deadline

151. As we have noted, it is important to achieve quick resolution of code breaches. To support in achieving this aim, we consider there is a strong argument that there should be a statutory deadline. A statutory deadline frames, more precisely than a duty of expediency alone, the nature of the work that can be expected and the outcomes that can be achieved. Requiring that a code breach investigation takes a set amount of time, gives a clear steer to all parties, including the courts, about what can be expected in terms of the depth of evidence gathering, the nature of analytical work, the period that should be given for representations, the depth of a decision, and what level of intervention can be warranted.

152. We have given initial consideration as to the length of this statutory deadline. We think the DMU should conduct code breach investigations expeditiously and normally expect to complete an enforcement case, including the design of remedies, around six months after formally launching. We recognise this is a compressed timeframe compared to existing competition and regulatory enforcement, but we think it is important so as to avoid protracted processes that leave users of SMS firms in limbo. Like other regulators, the DMU will need to have undertaken pre-launch work before deciding to formally initiate an investigation.

153. A comparatively short deadline, such as six months, necessarily means the timelines for submissions, information requirements and responses to the DMU's findings will be commensurately shorter than if there was no, or a longer, deadline. Periods for giving representations will be short but fair, and the scope of remedies more limited.

[59] The power to formalise a change in behaviour in a code order following commitments, should not prevent the DMU exercising its discretion to deprioritise a case without commitments if the SMS firm voluntarily changed its behaviour, e.g. where a SMS firm withdrew a proposed change following the opening of a code breach investigation.
[60] Having had regard to the consultation responses, the DMU may inform the SMS firm it needs to adjust its commitments to comprehensively address the DMU's concerns. If the SMS firm is minded to do that, then a further consultation may be needed, before the DMU decides whether to accept the commitments and close its investigation.

154. However, a comparatively short deadline may mean the DMU prioritises matters that it has greater confidence could be completed within the timeframe, which might lead to it not taking forward more complex cases of greater importance to the DMU's objectives. Further, there may be a risk that a code breach may not be remedied if the investigation could not be completed in time.

155. For these reasons, we are also proposing that the DMU has the ability to undertake scoping assessments (discussed below) for more complicated and contentious issues where the DMU may need more evidence before deciding whether there is evidence to open a case, and if so, depending on the nature of the conduct, whether to open a code breach investigation or a PCI investigation. We also suggest that it should be able to extend the timetable for code breach investigations in exceptional circumstances to avoid, for example, a situation where a code breach could not be remedied as the statutory deadline could not be met, or if it was necessary to consult again on a particular issue or remedy.[61]

156. On balance, we believe around six months from launching a case is likely to be an appropriate period, and recognise this will be subject to further consideration through the legislative process. We recognise that advising on an appropriate deadline for a new body using new tools is inherently complex and uncertain. It may be that longer is required for some of the most complex cases or whilst the DMU establishes itself.

157. If the deadline is a statutory deadline, this should be to cover the period from case opening on a particular potential breach to the decision on whether the SMS firm has breached the code in the way stated in the opening letter. This decision should also be accompanied by a consultation on a draft code order to remedy the breach. Given that we have identified above that in some cases the remedy may need to be tested or trialled, there would be risks in setting a final date for implementing the code order. The DMU should however be able to order an SMS firm which is found to have breached the code to comply with processes which it considers necessary to ensure that a draft order can be tested and finalised promptly.

---

[61] If our recommendation for a statutory deadline is accepted, we judge there is merit in allowing for similar processes as in the Enterprise Act 2002 to briefly extend an investigation in exceptional circumstance, where there are 'special reasons' for doing so, and mechanisms to 'stop the clock' where a firm under investigation does not comply with its obligations (eg to provide information) to minimise the risk of gaming the process.

Recommendation 7c: The DMU should be able to impose substantial penalties for breaches of the code and for breaches of code and PCI orders.

158. SMS firms will have a duty to comply with the code, and orders made under it. Breaching that duty, and in so doing acting unlawfully, should lead to the possibility of a penalty. The approach to penalties in respect of code breaches discussed below also applies in respect of penalties for breaches of code orders and PCI orders. PCIs are discussed in Appendix D.

159. As we have explained above, we believe the main focus of the regime should be on remedying conduct found to breach the code and stopping the harm from occurring, not issuing fines for breaches. However, we think it is important that the DMU has the power to issue financial penalties as a backstop. This deterrent is necessary given the significant advantages that could accrue to SMS firms from breaching the code, and to try to stop it happening in the first place. In the absence of any prospect for a financial sanction, there risks being an incentive problem in encouraging compliance.

160. Breaching the code should not automatically lead to a penalty. This should not be a 'strict liability' regulatory regime and financial penalties should not be a routine feature of the regime. The legal test should require that the breach is committed intentionally or negligently for a penalty to be imposed. The DMU should set out in guidance that the imposition of a financial penalty for a breach of the code would be exceptional and most likely for a serious breach that causes significant harm. This would be more comparable to the approach followed by the ICO when deciding whether to impose penalties for breaches of data protection legislation focusing on the most serious cases.[62]

161. We recognise there is a risk that the possibility of penalties becomes a dominant focus of the regime, and inhibits effective engagement between the DMU and the SMS firms. The code is designed to give *ex ante* clarity on what conduct is permissible and we expect SMS firms will generally seek to comply

[62] In this respect a contrast might be drawn between the CMA's current penalty guidance in antitrust where the CMA explains although it has a discretion on imposing penalties it 'intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets, other cartel activities and serious abuses of a dominant position.' (CMA73, Policy Objectives, paragraph 1.3), and consistent with that it is our normal practice to impose such a penalty for breaching competition law. The ICO in its Regulatory Action Policy explains it will consider whether to issue a penalty at all, and expects 'we will reserve our powers for the most serious cases, representing the most severe breaches of information rights obligations. These will typically involve wilful, deliberate or negligent acts, or repeated breaches of information rights obligations, causing harm or damage to individuals. In considering the degree of harm or damage we may consider that, where there is a lower level of impact across a large number of individuals, the totality of that damage or harm may be substantial, and may require a sanction. (Regulatory Action Policy, page 24).

with code requirements.[63] If that transpires, much of the DMU's formal enforcement work may be focused on resolving borderline cases that cannot be resolved informally and where there is genuine ambiguity as to how the code applies to a set of facts. In such cases, a penalty for breaching the code is less likely to be appropriate, and we think it will be undesirable for the DMU and the firm to have the possibility of substantial fines complicating their engagement. It may, therefore, be appropriate for the DMU to be able to indicate at the outset of a code breach investigation that it is deprioritising penalties, and running an investigation in a non-penalty track.

162. The level available as a penalty should be of a deterrent nature and commensurate with fines available in antitrust cases and to other regulators. A range of approaches have been adopted: in the case of the Competition Act 1998 the maximum penalty is set at 10% of worldwide turnover; for certain Communication Act 2003 breaches,[64] Ofcom can impose penalties of up to 5% of qualifying revenue; for breaches of the General Data Protection Regulation (GDPR), the ICO can impose up to 4% of annual worldwide turnover; and for certain breaches the FCA can impose an unlimited penalty. When deciding if a cap is appropriate, and at what level it should be set, it is important to have regard to the size of the firms likely to be designated with SMS. We therefore suggest it should be a maximum of 10% of the firm's worldwide turnover. The DMU should have the power to determine it as a fixed amount, an amount calculated by reference to a daily rate if the breach is ongoing, or both.

163. The intention of a statutory cap on penalties would be to set the outer limits of the penalty the DMU could adopt whilst recognising the need for deterrence. The statutory cap would not indicate the penalties it will be necessary or appropriate for the DMU to impose. The DMU will need to adopt penalties which are proportionate to the breach it has found.

164. We recommend the following process for the penalties:[65]

---

[63] We recognise that an SMS firm may not be content with its designation, or the obligations a code imposes on it. However we expect that in those cases SMS firms will have appealed against designation or the imposition of the elements of the code they disagree with, and resolved the disagreement via the appeals system, rather than generally setting out to deliberately breach the code they have either accepted and not appealed, or the courts have determined is lawful following a contested appeal process.

[64] As Ofcom observed in a consultation on an earlier edition of its penalties guidance, 1.4 to 1.5, 'The guidelines cover penalties imposed in relation to about 40 different types of contravention, ranging from breaches of the broadcasting code to failure to pay Ofcom's administrative fees… The statutory maximum penalty differs from contravention to contravention. For example, it is often the higher of a fixed sum or a percentage of the turnover or qualifying revenue of an enterprise (e.g. 3% or 10%). For other contraventions, it is simply a fixed sum, e.g. 1,000 or 2 million.'

[65] This applies to penalties for breaching the code, code orders, PCI orders and the DMU's other fining powers eg where information notices are not complied with.

(a) The DMU should have a duty to publish the guidelines it proposes to follow in determining the amount of penalties it will impose;

(b) Where the DMU proposes to impose a penalty it would: (i) give written notice of the proposed penalty and its reasons, and (ii) give the SMS firm an opportunity to make representations.

165. In relation to decisions on the imposition of penalties, 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 on the DMU's institutional design. We recognise the importance of these decisions and the need for sufficient internal scrutiny to ensure decisions are robust and objective. There are a range of ways this could be achieved and a variety of models which could be explored, taking lessons from existing regulatory regimes. For example, one way of achieving such scrutiny could be in the final decision maker on a penalty being a separate official from that who launched and conducted the investigation into the suspected breach.

166. The DMU may also need to impose penalties if an SMS firm is found to have not complied with a code order imposed following a code breach investigation. In those cases, the DMU has already found a breach of the code and the code order is designed to remedy that breach. Therefore, we would expect the code order to be complied with and, if it were not, a financial penalty would be imposed more commonly.

167. In addition, however, the DMU should have the power to apply to the courts for an order requiring the SMS firm, and its officers, to comply with a code order if it is or may not be complied with.[66] We would hope and expect such a route would never be necessary but do consider it is important the regime has a formal backstop, so that not complying with the law (ie the duty to comply with the code) and paying an administrative penalty cannot be rationally viewed as a cost of doing business. The advantage of a court ordering compliance with a code order, is that non-compliance with a court order will subject the firm (and if the court judged necessary its officers), to the ordinary inherent jurisdiction of the High Court or the Court of Session. This means it (and they) face the ordinary risks of the contempt of court including ultimately imprisonment and the potential for an unlimited fine.[67]

---

[66] 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.
[67] In a case where it had proved necessary, the DMU may judge that it is likely to be more effective in some overseas jurisdictions to enforce a court order rather than the underlying administrative order of the DMU. This is another reason to have a court backstop with its established mechanisms for enforcement of judgments.

Recommendation 7d: The DMU should be able to act quickly on an interim basis where it suspects the code has been breached.

168. Even the short timescale we have recommended for a code breach investigation could be too long for some consumers and businesses given the fast-moving nature of digital markets and the speed at which significant harm can materialise. For example, a change to an algorithm or to terms and conditions could extinguish a firm's business model in a matter of days. Therefore, it is essential that interim measures are available to the DMU. Interim measures would put on hold changes made by an SMS firm where these changes may not be compliant with the code and where these changes could result in significant damage, for example, putting another firm out of business. In this section we propose a process for implementing interim measures.

169. First, interim measures would be given effect to by interim code orders which would be adopted prior to a decision finding that the code has been breached. We think the DMU should have the same powers available in an interim code order as a final order, but its focus in the former should be on directing action to mitigate or prevent harm from a suspected code breach rather than to remedy it. An interim code order should specify what steps the SMS firm must take and may require the SMS firm to take positive action (ie change its behaviour), to, for example, continue to make an API available which it had deprecated. The interim code order may also include bespoke monitoring and reporting obligations.

170. Second, the power for interim measures, whilst clearly in the public interest, needs to be operated carefully with regard to the SMS firms' right to a presumption of innocence, right to operate its businesses and its rights of defence. We recommend the DMU should have the power to adopt an interim code order broadly where the DMU considers:

(a) it has reason to suspect that the code may be being breached; and

(b) it is appropriate for it to act on an interim basis:

(i) to prevent significant damage to a particular person or category of person;

(ii) to prevent action which might limit or mitigate the effectiveness of remedial measures in light of subsequent enforcement action; or

(iii) to protect the public interest.

171. This broadly reflects the test adopted in competition law, in which the CMA is required to have a reasonable suspicion the law is being breached, and there is a requirement that it is necessary to act on an interim basis to prevent significant damage or protect the public interest.[68] We recommend that an additional ground for the DMU (ie whether the actions risk making remedial action less effective) adds a useful and well understood element to the test. This factor (ii) above would be comparable to the test applied for interim action in respect of completed mergers, and although it would arguably have been captured in the other factors, we think it is important to be clear that the DMU can act on a precautionary basis.

172. Third, we recommend that the presumption should be that an interim code order is made on notice, with the SMS firm able to make representations prior to the issuing of the interim order. The DMU should provide the SMS firm in writing with a draft interim code order, the reasons for it, and give the firm an opportunity to make representations prior to the adoption of the interim order.

173. The duty to give reasons and an opportunity to make representations, will necessarily include a duty to give a fair description of the evidence relied upon and such disclosure as fairness requires. But it should not include an automatic 'access to file' process, which would be unnecessary for a fair process and inconsistent with the required pace.

174. However, recognising the fast pace in which these markets move, and the history of major changes made or announced without prior notice, the DMU should have the power to issue interim code orders without notice where necessary.[69] Where the DMU exercises the power in this way it should be under a duty to comply with the steps on seeking representations on the interim code order as soon as is practicable. Where this power is used, the DMU should also consider requests for urgent derogations from the interim code order (see below). This process is commonly followed in the merger regime, where interim orders are widely used to ensure that potential remedies can be implemented effectively at the end of the merger review.[70]

175. Fourth, given the need for action at pace the DMU should not be required to consult publicly prior to issuing an interim order, although we think it is important it is not constrained from doing so where it considers it appropriate. For example, where the DMU is acting on the basis of a complaint, it may

---

[68] Section 35, Competition Act 1998.

[69] This might arise when even a short period without a remedy would risk significant damage, make subsequent remedial action ineffective or operate against the public interest and a rapid and proportionate intervention could hold the field for the short period whilst any representations were considered.

[70] See CMA108: Interim measures in merger investigations for a description of the CMA's approach in mergers, to be read in conjunction with CMA2 Mergers: Guidance on the CMA's jurisdiction and procedure (currently subject to consultation).

wish to engage with the complainant on whether a proposed interim order is adequate.

176. Finally, the DMU should have a duty to keep the appropriateness of an interim order under review, with it remaining in force until released or superseded by a final code order, or the scoping assessment or code enforcement case is closed. The DMU should have the power to vary it, either on its own initiative or on the application of an SMS firm or another person.[71] The process for varying an interim order should be the same as for making the order.

Recommendation 7e: The DMU should be able to undertake scoping assessments where it is concerned there is an adverse effect on competition or consumers in relation to a designated activity. The outcome of such assessments could include a code breach investigation, a pro-competitive intervention investigation, or variation to a code principle or guidance.

177. The purpose of a scoping assessment is to consider whether particular conduct or behaviour by an SMS firm has an adverse effect which would justify DMU intervention. It could be used where:

- Conduct is covered by the code, but further assessment is necessary to consider whether the code has been breached, for example because the conduct also delivers efficiencies or benefits to other policy objectives like privacy.
- Conduct is not covered by the code but is still suspected to be harmful and where there may be a need for DMU intervention.

178. There may be instances where further assessment is necessary to consider whether the conduct is harmful or whether the conduct is covered by the code. For example, some conduct may deliver plausible efficiencies and benefits to competition or other policy objectives like privacy. Alternatively, there may be less immediate certainty over the facts of a case.

179. Such cases may require more detailed evidence gathering, more detailed consideration of the trade-offs and/or a more complicated remedy design. In such circumstances the DMU should be able to undertake a scoping assessment, the outcome of which could be a code breach investigation, a pro-competitive intervention investigation, or variation to a code principle or

[71] The DMU should have a general enabling power to grant a derogation from its orders without the need to vary the order, this is likely to be particularly important in cases where it adopts an interim order without notice.

guidance. It could also lead to action through the participative approach outlined above.

180. A scoping assessment would not be required for all preparatory work in advance of the use of formal tools but would allow the DMU formally to publish the opening of an assessment and to set out the issue it is considering. We would anticipate that a scoping assessment would be used where the DMU is seeking evidence and views on the issue to inform its assessment. The DMU would have its general information gathering powers available to conduct this assessment, and we would expect it to use them more intensively in a scoping assessment than it would whilst conducting market monitoring or looking into a matter informally.

181. We would expect scoping assessments to be normally completed within six months, including a decision on next steps. Given the motivations for scoping assessments (the need for more detailed analysis or assessment in the most complex cases) we do not recommend attaching a statutory deadline to the process. Given the motivation to gather additional evidence we would also expect that the DMU will make scoping assessments public, although it may not wish to do so.

The role of the DMU in supporting redress for those harmed by a code breach

182. The aim of the code is to prevent SMS firms from taking advantage of their powerful positions in the activities that give rise to their SMS designation. The DMU should aim to take swift action, before material harm occurs, including through code breach investigations coupled with an ability to impose interim measures. However, in some cases significant damage may occur very quickly. In a number of regulatory regimes there are mechanisms for a damaged party to receive redress. Redress was not a matter the terms of reference for the taskforce explicitly covered, but we have given initial thought to some of the issues that would need to be considered when assessing whether to make provision for it within the regime. Stakeholders, particularly in the media and publishing sectors, told us they support access to redress.

183. Below we outline two possible redress mechanisms: (i) empowering the DMU to require redress and (ii) follow-on private actions for damages. These approaches are not mutually exclusive.

Regulator-led redress

184. We have been asked, in particular in submissions from the news media, to consider whether the DMU should be able to require SMS firms to provide

redress if a code breach is found where there is strong evidence of financial loss.

185. In the UK, the FCA,[72] Ofcom[73] and Ofgem[74] are empowered to require redress for breaches of sector regulatory requirements. Ofgem and FCA may require redress for consumers and microbusinesses. Ofcom is able to require redress for an affected person: be they a consumer or business. These powers are flexible and can be used to restore affected parties to the position they would have been in absent the breach. This could be by requiring contract terms and conditions be restored or changed (which we envisage being possible in a code order), or by requiring monetary compensation for inconvenience, and/or for an estimated or quantifiable loss.

186. Enabling the regulator to require an SMS firm to pay redress, rather than requiring affected parties to seek this through the courts, could provide a cheaper and faster means of obtaining compensation for those seeking redress.[75] The potential requirement on an SMS firm to pay redress can also add to the deterrence effect and increase incentives to comply with the code.

187. However, regulator-led redress would also involve complexities and challenges which would need to be carefully considered in the context of the SMS regime. These include:

- Who would be entitled to redress under a regulator-led approach – for example whether this was limited to consumers and small businesses or also enabled access to redress for large businesses. We note that existing regulatory regimes generally expect large businesses to use private enforcement in circumstances where they suffer loss as a result of a breach of regulations.

- The level of compensation required – the use of redress orders would require the DMU to be able to understand the scale of redress required. While an SMS firm or third party could be required to estimate it and propose a means of distribution, the DMU would need to have some level of assurance that it was sufficient. Determining the level of harm may be

---

[72] The FCA's powers enable it to require redress for consumers and small/micro businesses. See the FCA's regulatory handbook section relating to consumer redress and the underpinning legislation.
[73] Section 151(7) of the Communications Act 2003, explains that an obligation on a communications provider to remedy the consequences of a contravention may include the requirement to compensate a person for loss or damages that they may have suffered due to the breach, or make a payment to a person to cover the inconvenience they may have experienced. See https://www.legislation.gov.uk/ukpga/2003/21/section/95 and https://www.legislation.gov.uk/ukpga/2003/21/section/151. Note this refers to "a person" which may be an affected consumer or business.
[74] Ofgem's powers enable it to require redress for consumers and micro businesses affected by a breach. Its approach is explained here.
[75] It would also be possible to enable the regulator to apply to the court to order redress – a power available to the FCA.

hard and time consuming, and the DMU should not be in a position of negotiating or arbitrating between parties around the levels of redress.

- The effect on the wider regime – It would be important that provision for regulator-led redress did not compromise the wider regime, for example by creating a litigious rather than collaborative culture to resolving disagreements on how the code applies and slowing down resolution of code breaches.

188. Whilst we have given initial consideration to this issue, we consider that further work is necessary to consider the relative merits of the DMU having a power to require SMS firms pay redress when the code is breached.

Private enforcement

189. We recognise that, in addition to public enforcement, the objectives of the code may be supported by the possibility of private actions, through the courts, for loss caused by a breach of that statutory duty by an SMS firm. As a starting point, our expectation is that unless expressly disapplied in legislation, a breach of the duty on SMS firms to comply with an enforceable code, could give rise to a private cause of action with associated remedies, including damages.[76] In this context, we do not consider legislation should be used to expressly give immunity from such potential private action to SMS firms who in breach of their statutory duty cause users to suffer loss or damage.

190. Nevertheless, we recognise, particularly in the early stages of the regime, the risk of potentially large private claims for breaches of the code may change the way SMS firms approach the regime or the DMU. Such claims at that point in time could distract from the work of the DMU to set the direction of the regime, make it more difficult to establish relationships with SMS firms, and make it more difficult for the DMU to take cases itself. We also recognise that the ability to directly act in respect of the code may create a litigious rather

---

[76] We note there are examples where such a potential common law claim has been expressly disapplied, see for example section 956 *No action for breach of statutory duty etc.* Companies Act 2006. In other cases, express provision is made for private claims, e.g. the Enterprise Act 2002 in s.94, s.95 and s.167; and the GDPR and Data Protection Act 2018 (s.167-169). In other regimes like competition law the position was initially left to common law to establish if a breach of statutory duty claim was available, e.g. in *Garden Cottage Foods v. Milk Marketing Board*, and later procedural provision was made to enable claims rather than expressly give the right to make them. Whereas in other regulatory regimes more mixed provision is made e.g. in the Financial Services and Markets Act 2000 (and subordinate legislation) breaches of FCA rules expressly give rise to a cause of action but the FCA is empowered to exclude certain rules from giving rise to a potential private claim (s.138D), in the Communications Act 2003, whilst certain claims are enabled, some are subject to Ofcom's consent.

than collaborative culture to resolving disagreements on how the code applies.[77]

191. With that in mind, we consider that the initial focus of the new SMS regime should be on public enforcement by the DMU. This means whilst parties should not be prohibited from pursuing private cases, including 'follow-on' claims;[78] developing the procedural infrastructure to encourage and facilitate such actions should not be an early priority. It is more important at the outset to make the regime work by establishing the most effective regulatory culture. In due course, perhaps as part of the planned post-legislative scrutiny government now conducts of the effectiveness of new legislation, that position should be revisited.[79] Making similar provision to that which has been made in recent years to enable effective competition law claims, for instance, collective action, fast-track procedures, and cost protection may be desirable at that point.[80] Any such review should also consider how other regulatory regimes have balanced the desirability of redress for those who are harmed by a breach of a duty which is meant to protect them, and effective public enforcement. For example:

- the provision in the Financial Services and Markets Act 2000, which gives the FCA the ability to specify certain rules are outside the scope of a private claim for breach of statutory duty;[81] or

- the provision in the Communications Act 2003, which requires claimants in certain cases, essentially where the claimant alleges a breach not previously established by Ofcom, to seek the consent of Ofcom to bring proceedings, and to comply with conditions Ofcom applies to any consent.

192. As this is an area where the potential for common law claims for breach of statutory duty is high, we think it is important that the legislation makes express provision either way on whether claims are permissible, and on what

---

[77] Albeit it was put to us that, notwithstanding our ambition for the DMU to be an expert regulator, where a business is pursuing enforcement of its rights privately, in a highly complex or technical area, it may be best placed to deploy the technical expertise and experience of the business in constructing and pursuing a targeted claim.

[78] By 'follow-on' we mean making express provision that where a DMU decision is final, courts may treat the relevant findings of breach as conclusive. This will enable claimants in cases where the DMU has found a breach to focus their claim on the damage suffered, rather than establishing a breach.

[79] Another inflection point suggested to us would be to conduct a review at the end of the first period of designation.

[80] The Consumer Rights Act 2015 made amendments to the Competition Act 1998 and the Enterprise Act 2002. As did the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

[81] Section 138D, sub-section (3) allows the FCA to vary the general provision that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty. For example, the FCA has exercised this power such that breaching the high level 'Principles for Businesses' standard does not give rise to a right of action (PRIN 3.4.4). An alternative approach is that adopted in respect of the PRA which allows it to decide which of its rules are actionable s.138D(1).

basis. The alternative of leaving private enforcement entirely to common law and breach of statutory duty claims is unlikely to be desirable, given the uncertainty it will create for the DMU, SMS firms and those who use their services.