Appendix E: The SMS regime: cross-cutting powers

Overview

1. This appendix sets out our recommendations for the powers and procedure that would be needed in relation to the Strategic Market Status (SMS) regime to support the Digital Markets Unit (DMU) in undertaking designation assessments, setting and enforcing the code of conduct and in relation to conducting investigations in relation to pro-competitive interventions. Detail on the SMS test and designation process is set out in Appendix B, while our proposals for the other tools of the regime – the code of conduct, pro-competitive interventions (PCIs) and SMS merger rules – are set out in Appendices C, D and F respectively.

2. This appendix considers the following powers and procedures:

    - **Monitoring and evidence gathering** – what information and evidence gathering powers will the DMU require?

    - **Appeals** – how should the appeals process work?

Monitoring and evidence gathering

3. 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 already exist.

4. We would expect the DMU to monitor the activities of firms to identify breaches of the code as well as breaches of remedies imposed under code orders or PCIs. The DMU's monitoring might also inform future priorities for designation assessments, updates to the code, where future PCI investigations may be needed.

Recommendation 8: The government should establish the SMS regime such that the DMU can draw information from a wide range of sources, including by using formal information gathering powers, to gather the evidence it needs to inform its work.

5. To do this the DMU will need to be **forward-looking** and have a range of tools to help it understand emerging issues. It will then need to deploy these tools in a **proportionate** and **targeted** manner. In practice, the DMU will need to use a combination of:

- proactive powers to require information; and
- information volunteered by stakeholders.

6. We discuss aspects of information gathering below.

The DMU should have a unified set of clear information gathering powers it can exercise across its work in relation to the SMS regime

7. As well as gathering information from a wide range of market participants voluntarily (set out below), the DMU will need strong information gathering powers to require information from SMS and other firms. Information gathering powers are necessary because:

   - The practices of interest are often inherently complex, opaque, and automated, for example machine learning algorithms.
   - Relevant information is unlikely to be in the public domain or offered voluntarily, for example internal strategy documents and communications, detailed accounting information, the results of A/B testing, internal papers informing choice architecture, or decisions (automated or otherwise) to target particular types of consumer.
   - The DMU will need full and accurate information to fully understand and consider issues and decide where action may be needed. This will ensure the DMU acts proportionately and swiftly in selecting sectors, firms, or practices for closer study or intervention.[1]
   - By reducing the imbalance of information between digital businesses and the DMU, the quality of work is increased and the risk of errors is reduced.[2]

8. The DMU should have a unified set of clear information gathering powers it can exercise across its work in relation to the SMS regime[3] to gather the evidence that is necessary for its work. A single unified set of powers will allow the regulator to develop expertise in using them eg single precedents, develop decisional practice and case law, and minimise the burden on firms via consistency (rather than a different power for each function).

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[1] For instance, it may be disproportionate to investigate a whole sector where information gathering on a more focused issue or unfair practice within that market could allow us to more effectively understand and assess issues (rather than necessarily launch a full study/investigation);
[2] CERRE report on economic regulation of platforms (2020) at pages 19-20.
[3] Ie across SMS designation; code development; code monitoring, investigation and enforcement of compliance; and investigation, adoption and monitoring of procompetitive interventions.

9. The DMU's information gathering powers will need to account for the way information is obtained, used and stored in the modern world (for example, data held in the cloud, often in different countries). The nature of information or evidence that the DMU will need to obtain will include:

- internal documents such as minutes of board meetings, business cases for decisions, internal emails, electronic chats, contracts with customers etc;
- regular periodic monitoring data relating to the SMS firm's activity, financial performance, pricing etc;
- ad hoc data, such as relating to the SMS firm's relationship and conduct towards a customer or business user over a specified time period; and
- technical information such as programming code, algorithms or input and output data (sometimes that might necessitate access to the firm's systems).

10. Therefore, the DMU should have the power to compel production of such evidence as is necessary to discharge its functions in relation to the SMS regime, including highly sensitive information relating to firms' future competitive strategies and private information relating to consumer behaviour. This should include requiring the production of documents and data, including algorithms, in the control of SMS firms and other market participants. These powers should include:

- statutory notices – to require the production of information (including programming code, data, documents, explanations, views, etc) for the purpose specified in the notice;
- inspections ('dawn raid') – the power to access premises and to search for information accessible from the premises (including remotely accessible storage);
- interviews – the power to require the attendance of persons to answer questions, for which the DMU should have the power to take evidence on oath (like section 174 EA02); and
- compelling evidence collection – the power to require SMS firms to collect data and report on their conduct and to create and keep information (ie produce material which is not yet in their possession or is not currently routinely kept, this includes 'version control' of algorithms, models, code and data).

11. When exercising its formal information gathering powers the DMU should be required to state the purpose for which it is exercising the power. This is a common provision adopted when legislating for information gathering powers, but will be an important feature of a unitary set of information gathering powers for all the DMU's functions.[4]

12. The DMU will therefore hold confidential information, which it must be under a duty to appropriately safeguard.

13. The DMU's information gathering powers will need to be accompanied with penalties for non-compliance, or for the provision of incomplete or misleading information. We expect an appropriate level would be:

    - penalties for the failure to provide complete information capped at 1% of worldwide turnover in the preceding financial year; and

    - daily penalties capped at 5% of the average daily worldwide turnover, with daily penalties imposable from the date the DMU puts the addressee on notice of its intention to impose such penalties.

14. Consistent with most regulatory regimes, the most serious forms of unacceptable behaviour in relation to information powers should be marked by a criminal backstop (eg document destruction or intentionally or recklessly providing false or misleading information to the DMU).

Sharing information with other regulators

15. Digital markets do not fall neatly into regulatory tramlines, and there are likely to be significant overlaps in regulatory responsibilities between the DMU and other public bodies. Regulation will be most effective and proportionate if regulators can work together to understand and address cross-cutting regulatory challenges. Enabling appropriate information sharing is a vital part of enabling such effective cooperation, for example to enable the DMU to seek sectoral expertise in relation to an issue, and for other regulators to be able seek expertise from the DMU.

16. We recognise the detail on how information sharing between the DMU and other regulators will operate must necessarily be considered in line with wider

[4] Like other regulators, where the DMU collects information for one purpose, eg reviewing whether to amend the code, it will be able to use it for another purpose if it reveals something of relevance, eg if that review revealed a breach of the code the DMU could use the material in a code enforcement case. This is the same as the CMA, eg where a merger inquiry reveals evidence of anticompetitive collusion, that material can be used in an antitrust investigation.

decisions on the DMU's institutional design and in turn will flow from it.[5] However, given the importance of the DMU being able to work with others, we believe it is imperative that the DMU should be able to share confidential information with other public bodies:[6]

- to support the DMU in discharging its own functions, for example so it can receive expert advice from that regulator; and
- to support another regulator UK or public body to discharge its functions, for example, if in its work, the DMU uncovered an issue with wider implications for data protection it should be able to share this with the ICO.[7]

17. This is likely to be facilitated by the DMU entering into, and publishing, 'Memoranda of Understanding' (MOUs) with other bodies setting out how it expects to exercise its powers with other bodies.[8]

18. As we describe under recommendation 15, it is important that the DMU have the power to share, and receive, confidential information from appropriate public bodies overseas, and to be able to institute arrangements to put in place the infrastructure to support that, although we recognise the detail will depend on the institutional design of the DMU.

19. As we explain in the main advice, we expect the DRCF to consider further the sorts of information which could be shared between regulators and any limitations to these arrangements under the current gateways.

The DMU must have jurisdiction to investigate extraterritorial conduct where there is sufficient connection to the UK

20. A key feature of digital markets is that many decisions with important impacts on UK users are not taken in the UK. SMS firms will operate across many jurisdictions and will often be based outside of the UK. Similarly, other

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[5] All the bodies that have participated in this work have appropriate safeguards on disclosing information, and subject to those the power to share information to support their own functions and the functions of other regulators, albeit they apply slightly different statutory tests; in essence for the CMA the rules on sharing information are set out in Part 9 of the Enterprise Act 2002, in addition to Part 9, Ofcom also has provision in section 393 of the Communications Act; and the ICO in sections 131 and 132 of the Data Protection Act 2018.
[6] There are likely to be other important domestic disclosure 'gateways' for which provision should also be made, for example where the owner of the information consents, where disclosure is necessary in support of civil or criminal litigation, or is in the public interest.
[7] Depending on institutional design, consequential changes may need to be made to other regulators legislation to make clear they can in turn disclose information to the DMU (see only by way of illustrative example the list of the frequently amended Schedule 15 'Enactments conferring functions' to the Enterprise Act 2002.
[8] See for example the ICO's Working with other bodies website where it lists the MOUs the ICO has entered into, for example the MoU between Ofcom and the ICO.

stakeholders who may be impacted or have relevant evidence may be based outside of the UK.

21. This has important implications for the DMU's jurisdiction, the conduct it must be able to review, and the powers it needs to be able to exercise to do that.

22. Dealing first with the scope of the conduct the DMU may investigate.[9] The nature of these markets means to be effective the DMU must have jurisdiction to review conduct which, although it occurs outside the UK, has an effect in the UK and/or impacts UK consumers or businesses. This is an essential feature of the regime we are recommending, as much of the conduct that has such an effect on UK consumers and businesses does not take place only in the UK (or any solely national market), but in interconnected regional or global digital markets.

23. We therefore recommend that the DMU must be able to review conduct which although it occurs outside the UK has an effect in the UK. Where the conduct is carried out, or implemented in, the UK by a firm or one of its subsidiaries, that should clearly be sufficient to establish that the DMU has jurisdiction to review the matter, even if the decision on the conduct, or some steps related to it, are taken outside the UK. This is likely to be the case in many relevant digital markets. Where conduct is not implemented or carried out in the UK, but it may have a sufficiently material effect on UK users, for example a new entrant firm was unfairly refused access to an API which would have enabled it to supply UK users, that should also be a sufficient connection to the UK to make it reviewable by the DMU.[10]

24. This approach is broadly consistent with the existing competition regime where the CMA reviews the impacts on competition from multi-national mergers or anticompetitive practices. To put the position of the DMU beyond doubt, we recommend that when legislating the DMU is expressly empowered to review conduct which occurs outside the UK.

25. Whilst it is essential that the DMU is given jurisdiction to empower it to investigate such matters, that is only part of the picture. To conduct such work, the DMU must have the power to compel the production of necessary evidence to investigate, and ultimately to impose legally binding obligations.

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[9] This is sometimes known as 'subject matter' jurisdiction, ie it is what sets the boundaries around what conduct it would be appropriate for the DMU to investigate. Where the conduct in digital markets has an effect in the UK it is right that the legislation makes clear that DMU has the competence to look into such matters.

[10] In competition law this is commonly known as the 'qualified effects doctrine', by analogy although none of the conduct which allegedly unfairly prevented the new entrant from supplying UK users may have happened within the UK, such conduct would have foreseeable, immediate and substantial effects on competition for UK users, such that it is right the DMU should be able to review it and take action.

We recommend that the DMU should be expressly empowered to do so where a person has a sufficient connection with the UK.[11] This should clearly be the case where a firm carries on its business in the UK either directly or via a subsidiary or business unit,[12] and should extend to where a firms conduct may be expected to have an effect in the UK.

26. Carrying on a digital business which is used by UK users should be sufficient to establish a 'sufficient connection' to gather information from those concerned with the carrying out of such business, and where such conduct is found to be unlawful, to impose remedies on such persons. This means firms who are based outside the UK but who carry on a digital business in the UK (for example, by directly or indirectly offering services to UK users),[13] or who have an effect on the supply of services to UK users (for example, by taking part in a supply chain that affects UK users), would be in scope of the DMU's powers.

27. We therefore recommend that the DMU needs:

- 'subject matter' jurisdiction, over conduct which is implemented in, or has an effect in, the UK; and
- 'personal' or 'enforcement' jurisdiction, over legal and natural persons who have a sufficient connection to the UK, which should include carrying on a digital business used by UK users or conduct which has effect in the UK.

Encouraging the voluntary provision of information from stakeholders

28. Stakeholders will be the first to be aware of, and be affected by, many potential code breaches and other relevant issues of which the DMU should be aware. Therefore, stakeholders are likely to be an essential source of information for the DMU. The DMU should seek to encourage stakeholders to provide such information voluntarily.

29. A challenge in achieving this is that some stakeholders will have reservations about coming forward for fear of retribution, especially where they are dependent on the SMS firm. Several stakeholders have emphasised the need for protection for complainants as far as is reasonably possible. At the same

[11] This is sometimes known as 'personal' or 'enforcement' jurisdiction, ie it is what sets the boundaries around where it would be appropriate for the DMU to exercise powers over a legal or natural person, such as evidence gathering or imposing a remedy.
[12] Given the nature of digital markets, 'carrying on business' should not require a physical presence of the firm or a subsidiary in the UK, although that factor would be likely to be strong, and often sufficient, evidence to show that a firm is carrying on business in the UK.
[13] This should include the case where a business carries on its business in the UK via a subsidiary it owns or controls.

time, there are arguments that in some cases the SMS firm should be able to know who is accusing it of a code breach to understand the concerns and, where appropriate, put forward its defence. An excessive reliance on anonymity might compromise the DMU's ability to do its work effectively and fairly.

30. Given both the importance of complaints to enabling the DMU to understand compliance with the code and the concerns about retaliation, we think it is important the regime emphasises anonymity protection. There should be a duty on the DMU to preserve the anonymity of complainants (where requested) to the greatest extent practicable. This should mean the DMU places due weight on the need to protect anonymity and does not disclose the identity of complainants unless it is necessary. This approach will give confidence to complainants to come forward, and thus enhance the effectiveness of the monitoring regime.

31. The DMU's duty to preserve anonymity while actioning a complaint should depend on the facts. If the complaint concerns a global change to a public API by the SMS firm, then there is less of a need to reveal the identity of the complainant. In contrast, if the complaint is alleging the SMS firm is discriminating against the individual complainant, it is difficult to see how the DMU could investigate the matter, or how the SMS firm could exercise its rights of defence to the allegation, without identifying the complainant. Such a system may therefore require a duty on the DMU to weigh the risks of harm against the necessity to disclose.

32. Another potential source of information could be a secure whistle-blower channel for the employees of SMS firms. The ability to access information from employees that are aware of any problems that arise in the SMS firms' internal processes could be particularly important to the DMU given the lack of transparency identified by the market study.[14] The DMU could consider blending a whistle-blowing policy into a formalised supervisory regime such as that used by the FCA and PRA. However, the DMU should consult on such a form of formal supervision or run pilot projects before full implementation to ensure that it remains consistent with the spirit of the code.

33. Finally, stakeholders may bring a wide range of issues to the DMU. However, the DMU will have finite resources and capacity constraints. The DMU will therefore need to prioritise where it focuses its attention, what information to request from the firms, and which complaints to follow up on. We expect the DMU should publish guidance on its prioritisation criteria.

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

Appeals

34. If the new regime is to work effectively and to command the confidence of consumers, SMS firms and the businesses that use them, it is essential that the process is fair and transparent, with effective rights of appeal to ensure that is the case. By holding public authorities such as the DMU to account for their decisions, appeals ensure that high standards of procedural fairness and analytical rigour are adhered to, and thereby build confidence in the system on the part of businesses and consumers.

35. Effective judicial scrutiny of how the DMU operates is likely overall to improve the quality of the DMU's original decisions and will promote legal certainty and provide confidence in the regime. In this section we set out our recommendations for appeals against the DMU's regulatory decisions.[15] This covers:

- Applying the principle of judicial review to the DMU's decisions.
- Effects of a successful appeal.
- High-level procedural recommendations.

Nature of review

36. We recommend that the DMU should be held accountable for its decisions, and that appeals should therefore be focused on the decision the DMU took. The DMU must publicly set out the detailed reasons for its decisions and the evidence on which it relies so that it can be subject to scrutiny.

37. On appeal, the DMU's decisions should be assessed using the same principles as would be applied by a court on an application for judicial review.

38. For the reasons described below, this standard should be applied across the DMU's regulatory decisions, and includes the DMU's decisions on

[15] In doing so, we have had regard to the government's most recent major consultation in this area 'Streamlining Regulatory and Competition Appeals Consultation on Options for Reform', including paragraph 4.3 and 4.4: 'There is a balance to be struck between enabling interested parties to have appropriate rights of appeal and ensuring that the system as a whole functions efficiently and enables the regulator or authority to take decisions in an efficient and timely way, to achieve its duties. A well designed and proportionate appeals process can contribute to the quality, predictability and certainty of the regulatory framework, by exposing regulatory decisions to additional scrutiny and, if necessary, correction. Conversely a poorly designed process can lead to lengthy delays and regulatory uncertainty. The grounds on which parties can appeal, and the standard of review to which regulatory decisions are subjected, are central to achieving this balance between appeal rights and effective regulatory decision-making. If there are wide grounds of appeal and the appeal body can subject regulatory decisions to very detailed scrutiny, this may affect both incentives to appeal and outcomes in some cases. On the other hand, the standard of review needs to provide appeal bodies with sufficient scope to properly scrutinise regulatory decisions and identify material errors.'

designation, the code, code compliance, pro-competitive interventions, remedies, remedy compliance, and financial penalties.[16]

39. We believe the application of judicial review principles is appropriate, as the focus of an appeal should be on the DMU's decision, rather than providing a fresh forum to determine what the appropriate decision should be.

40. A review focused on the DMU's decision, combined with other steps described below such as limiting the admissibility of new evidence and oral evidence to where essential will allow the appeal process to be a tightly controlled process, with shorter hearings which will avoid delaying the final resolution of the case.[17] This focus on the DMU's decision is vital to ensuring the regime operates end-to-end at the pace required in digital markets.[18]

41. Adopting a judicial review standard for a regulator's decision is consistent with the government's recent approach to other similar regimes. For example, in 2017, Ofcom's standard of review on appeal for certain telecoms cases was moved to one applying judicial review standards.[19] An appeal against a CMA markets or merger decision is made to the CAT which applies the same principles as would be applied by a court on an application for judicial review.

42. Judicial review of the regulatory decisions of public bodies rightly subjects those decisions to careful scrutiny, and where appropriate that review is intense. It is more than just a review of legality or checking the right procedural steps for making the decision have been met, and involves a review of the rationality and, in appropriate cases, proportionality of the regulator's decision. In recommending a judicial review standard is applied for all appeals against the decisions of the DMU we have carefully considered

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[16] For completeness we would expect this to cover all judicial challenges to the DMU actions, including challenges made to the legality or fairness of the process the DMU adopts.
[17] There is other provision, the detail of which is beyond the scope of this advice, which may assist ensuring appeals can be addressed at the pace needed in these markets. This may include the rules of the appeal body allowing for active case management, electronic filing, strict procedural rules with a focus on written procedure and compliance with deadlines for procedural steps.
[18] ''Streamlining Regulatory and Competition Appeals Consultation on Options for Reform', found 'cases heard on judicial review grounds appear to be resolved more quickly than full merits appeals. Between 2008 and 2012, appeals cases heard by the CAT on a full merits review lasted around 11 months on average. This compares with around 4 months for cases heard by the CAT on a judicial review standard over the same period. The standard of review will also have an impact the time spent in court. Data collected for this review indicates the average length of hearing for cases heard at the CAT on the merits is 6 days, while those heard under judicial review take on average 1.5 days. However, this data needs to be interpreted carefully. Many judicial review cases heard at the CAT relate to merger inquiries, and will tend to be completed relatively quickly as parties have a strong incentive to resolve the case as soon as possible.' Paragraphs 3.15-3.16.
[19] The explanatory notes to the Digital Economy Act 2017, paragraphs 46 to 49, give a concise explanation of the policy change, recording the government's view that a judicial review standard of appeal is appropriate and can ensure, were appropriate, that the merits of a decision are duly taken into account. It records other Ofcom decisions were already based on a judicial review standard such as section 57 of the Postal Services Act 2011. The same point can be made about Ofcom's decision to impose certain penalties, eg see *RT v Ofcom* [2020] EWHC 689 (Admin).

whether a different approach should be adopted for certain types of decisions, in particular those where the DMU finds the code has been breached and imposes a penalty. We do not believe this is necessary. The focus should be on the decision of the DMU and it should be accountable for it, and if it has got the penalty wrong either in approach or amount, the court should quash the decision and remit to the DMU to get it right.[20]

43. This is consistent with the approach the Government described in 'Streamlining Regulatory and Competition Appeals Consultation on Options for Reform', which states:

> '**The Government believes there should be a presumption that appeals should be heard on a judicial review standard unless there are specific legal or policy reasons for a different approach**. Judicial reviews generally strike an appropriate balance between enabling interested parties to have robust rights of appeal with ensuring that the system as a whole functions efficiently and enables the regulator to take decisions effectively. Judicial review is also a flexible standard as it is not defined in statute but is based on case law. Indeed, Lord Diplock stated at paragraph 410 in the well-known Council of the Civil Service Unions case: "further development on a case by case basis may … in course of time add further grounds". Therefore, judicial review may evolve over time. This also means that judicial review can adapt to the requirements of a particular case, so as to comply with EU law or European Convention on Human Rights obligations.' paragraph 4.19 (emphasis in original).

Effect of a successful appeal

44. Where the DMU's decision is found to be flawed we would expect the normal discretionary judicial review remedies to be available to the appeal body, including mandatory, prohibiting and quashing orders.

45. We would expect that where a DMU decision has been found to be flawed in a material way,[21] there would be a declaration to that effect in a judgment, and then the decision to be quashed in that respect, with the DMU able to reach a fresh decision on the matter having regard to the judgment. This conventional

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[20] In a judicial review the inherent flexibility of the standard means the court, acting as an independent and impartial tribunal, has full jurisdiction to review the administrative decision of the DMU and quash it if appropriate.
[21] We think it is sensible to make similar provision as section 31(2A) of the Senior Courts Act 1981 where if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred it does not grant relief. A consequence of such provision would be that where has been an error but correcting the error would not have any impact on the decision reached as regards the applicant, the court would not grant relief.

approach to judicial review remedies means that the appeal body will not be empowered to substitute its view on the appropriate outcome in place of the DMU.[22]

46. This may risk adding some time to the total end-to-end process for that case as the DMU's decision will need to be retaken on remittal and may potentially be subsequently appealed. However, we believe that this approach will deliver faster end-to-end certainty for the regime as a whole, rather than having a tribunal act as a 'second regulator' waiting in the wings to remake decisions. It also keeps the accountability for the regime rightly focused on the DMU.[23]

Forum

47. Parties affected by the DMU's decisions should have the opportunity to challenge them before an independent and impartial tribunal. We recommend that appeals are made to a judicial body with capacity to deal with what are likely to be complex appeals expeditiously and where procedural rules can be made to facilitate active case management to deliver appeals at pace.

48. We believe there is some merit in the same judicial body being responsible for all appeals that arise from the work of the DMU. We can see the merit of appeals from the DMU going to an established expert UK wide judicial body such as the Competition Appeal Tribunal, although we recognise that with suitable legislative provision judicial review of DMU decisions could also take place effectively in a specialist tribunal of the Upper Tribunal or the High Court and Court of Session.

New evidence and oral evidence

49. To incentivise appropriate and active engagement with the DMU process, and consistent with normal practice in judicial review cases, we recommend that the admission of new evidence in an appeal should be limited.[24] This will incentivise all parties to adduce all relevant evidence during the DMU's review

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[22] So for example, the appeal body will not have the CA98 power to 'give such directions, or take such other steps, as the CMA could itself have given or taken' or 'make any other decision which the CMA could itself have made' (Schedule 8, paragraphs 3(2)(d) and (e) to the CA98). However we do recognise that in an appropriate case the court when quashing a decision may give a firm steer in its judgment on the appropriate outcome, or in extremes if it was concerned about how the DMU was exercising its powers, it hypothetically might make a mandatory order on how the DMU should properly exercise its power lawfully.

[23] This is also consistent with the approach adopted in Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform, where the government observed in paragraph 4.18, 'The Government believes that appeals should focus on identifying material errors or unreasonableness in regulatory decisions, rather than providing for a second body to reach its own regulatory judgement. This preserves regulatory accountability and the rights of parties to challenge decisions, while ensuring the system is efficient and allows regulators to take timely decisions.'

[24] The limited circumstances in which fresh evidence may be admitted in judicial review proceedings were set out by the Court of Appeal in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584.

and is consistent with an appeal being focused on the decision that the DMU took.

50. Consistent with normal practice in judicial review cases, we recommend oral evidence and the need for cross-examination should be limited to the rare cases where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, for example because there is a dispute of fact which it is necessary to resolve to decide the case, rather than the default position being that all witnesses will be called to give oral evidence.

Standing

51. We recommend that standing to make an appeal should be available to those who have sufficient interest.[25] We would expect that appeals will be made by firms subject to a DMU decision, however we do not believe standing should be limited only to those designated, as third-parties may be significantly impacted by DMU decisions.[26]

Non-suspensory

52. An appeal against a DMU decision should not have the automatic effect of suspending the decision.[27] This is important to deliver regulatory certainty both for the firm subject to the decision, but also wider market participants who may need to adapt their behaviour in light of the decision.

53. If the SMS firm believes the decision is wrong and will cause irreparable harm to its business during the determination of appeal, it should have the right to seek interim relief from the court.

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[25] In any adversarial appeal system, it is natural the focus of an appeal is on the impact on the firm of challenging the decision. However, it is important that any appeal system adequate regard is also given to the interests of consumers, who are invariably not represented in the appeal even if hypothetically bodies acting on behalf of consumer could intervene. This is a challenge. An advantage of a judicial review model outlined in this advice is that it can be focused on whether the regulator in seeking to achieve the public interest duties Parliament had set it had acted reasonably in exercising its discretion. For more detail on the point, see the discussion in the government's, Streamlining Regulatory and Competition Appeals Consultation on Options for Reform, paragraphs 4.12 to 4.15 and a description of the Australian experience.

[26] We note if that were not the case such parties would need to make a conventional judicial review case in the administrative courts, which would undermine our recommendation that it is desirable all appeals against DMU decisions are heard by the same body.

[27] An exception to this general proposition might be for the payment of penalties. These could be suspended pending a determination of an appeal because such a suspension does not have an impact on third parties who need to be able to rely on a stable regulatory environment. This is consistent with the approach adopted in CA98, where an appeal does not suspend a CMA direction which remedies the infringement, but does suspend the obligation to pay a penalty pending the determination of the appeal.