

Digital Markets Taskforce

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Advice can be accessed [here](#)

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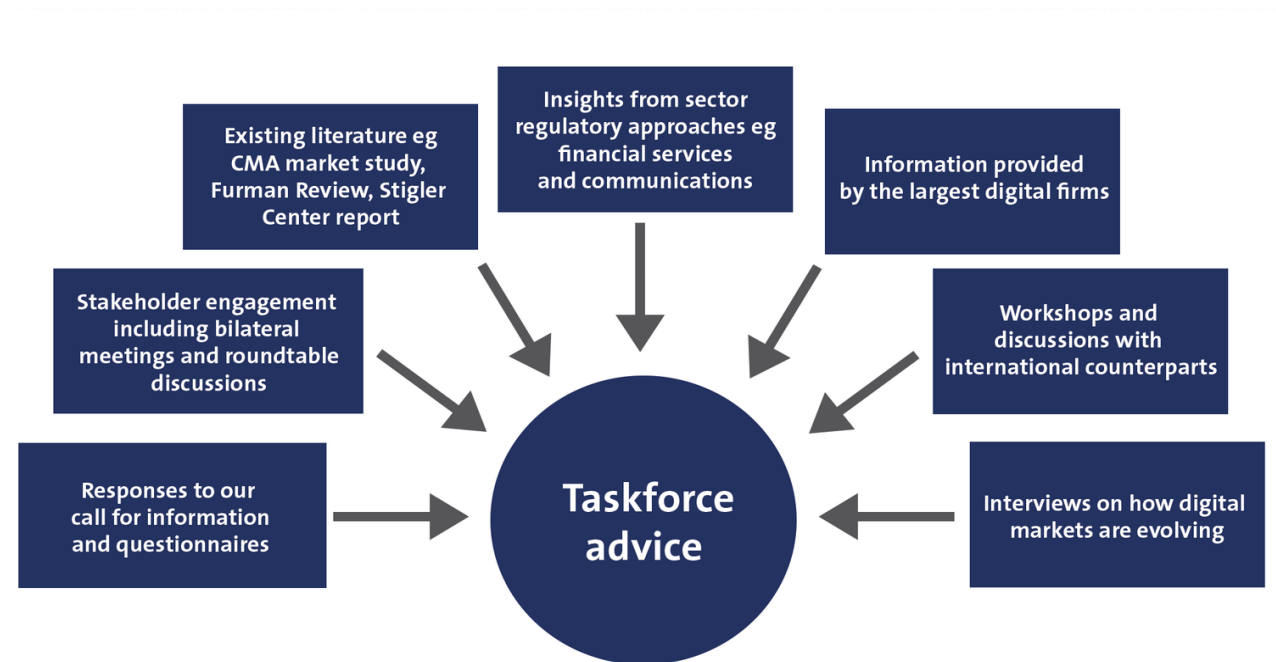


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Overview

- In March 2020, the CMA was asked to lead a Digital Markets Taskforce, working closely with Ofcom and the Information Commissioner's Office (ICO), to provide advice to the government on the design and implementation of a pro-competition regime for digital markets.
- The work complements and builds on the outputs of the Furman Review and the CMA's market study into online platforms and digital advertising.
- To inform the advice we gathered information from a wide range of sources:



The case for change

Powerful digital firms and the risks to competition

- Digital markets deliver substantial benefits for consumers, businesses and the economy more widely.
- However the dynamics of digital markets have changed hugely, and what were once the 'scrappy, underdog startups' are now amongst the most powerful global firms.





Lack of effective competition is often a result of specific market features:

- Network effects and economies of scale
- Consumer decision making and the power of defaults
- Unequal access to user data
- Lack of transparency
- The importance of ecosystems
- Vertical integration, and resultant conflicts of interest

Firms also use mergers and acquisitions to build-up a strong position and reinforce it:

- Powerful digital firms use acquisitions to strengthen their 'ecosystems' of complementary products and services around their core service, insulating their core service from competition.
- Powerful digital firms may also use acquisitions to buy nascent competitors and shut these down.

The accumulation and strengthening of market power by a small number of digital firms has the potential to cause significant harm:

- A poor deal for consumers and businesses – worse terms, higher prices
- Innovative competitors face an unfair disadvantage
- A less vibrant digital economy

Existing tools are poorly placed to address these problems.

- They are too slow, remedies are backwards looking and case-specific, and are largely static, one-time interventions focused on addressing past poor conduct, rather than shaping future action.
- An ex ante approach is needed to proactively shape the behaviour of powerful digital firms and prevent harm arising.
- In addition, there should be stronger merger control requirements for acquisitions by these powerful digital firms, to proactively address the risk of consumer harm.

Wider competition and consumer concerns in digital markets

- Some concerns in digital markets are not confined only to the most powerful digital firms, and therefore are not addressed through proposals for an SMS regime. In particular:
 - Consumers face barriers to effective and informed decision making
 - Activity or content hosted on platforms can lead to economic detriment for consumers and businesses
 - Consumers face barriers to switching and multi-homing
 - Coordination failures result in firms not taking actions which would deliver benefits for customers
- Much of the existing legislative framework pre-dates modern digital markets. Our experience has demonstrated a need for reform of existing competition and consumer laws to address these challenges.



The Digital Markets Unit (DMU)



We recommend Government establish a DMU to further the interests of consumers and citizens in digital markets by promoting competition and innovation.



The DMU should be a centre of expertise and knowledge in relation to competition in digital markets.



We recommend the DMU should oversee a regulatory framework for the most powerful digital firms – the Strategic Market Status (SMS) regime, with SMS merger rules overseen by the CMA.



We also recommend the DMU undertake monitoring in relation to digital markets more widely.



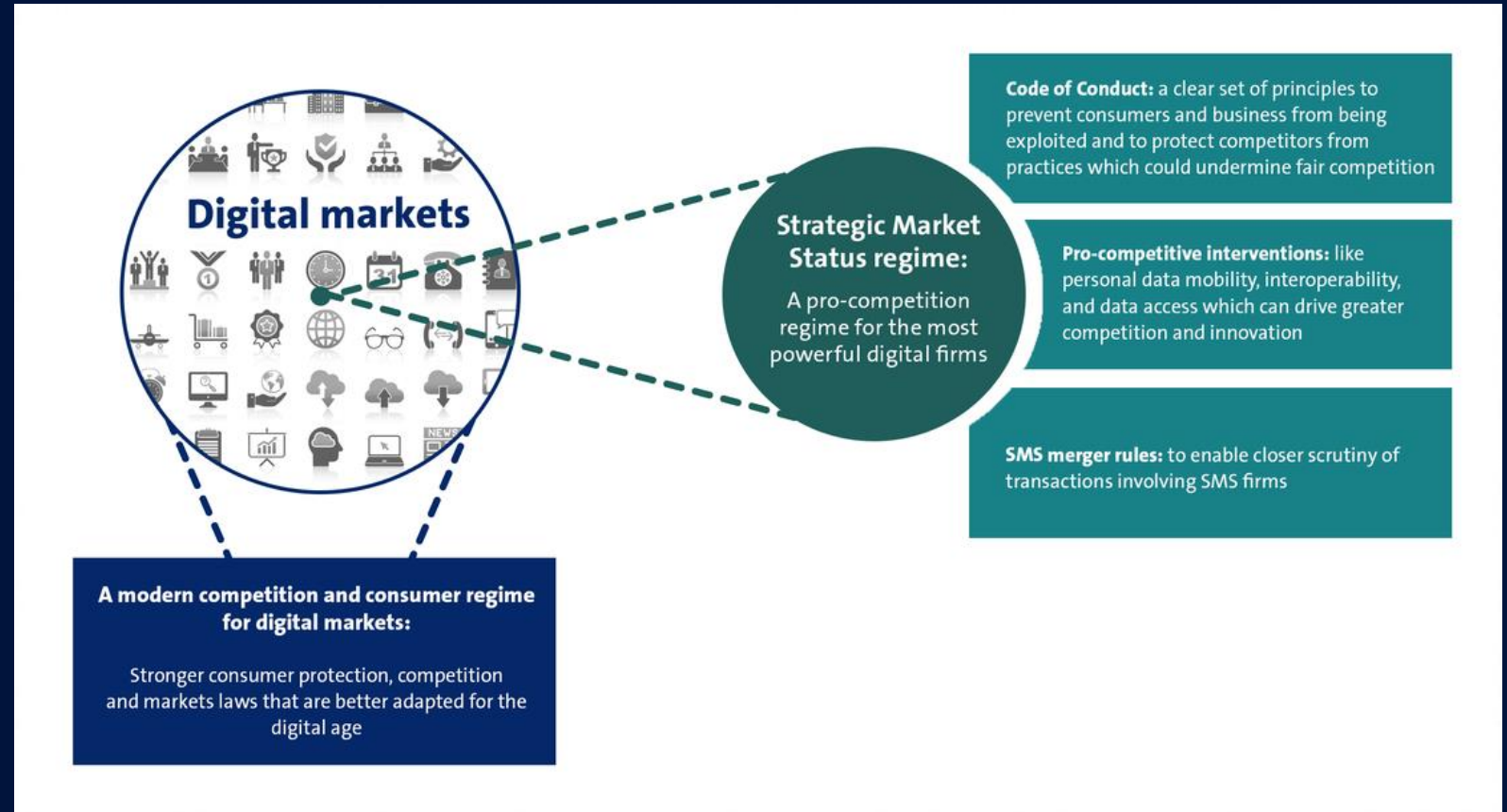
The CMA would continue to enforce competition and consumer protection rules in digital markets, alongside sector regulators.

Government has announced it will establish the DMU within the CMA from April 2021

Our proposals – Summary

Key principles informing the design of the regulatory framework:

- Evidence driven and effective
- Proportionate and targeted
- Open, transparent and accountable
- Proactive and forward-looking
- Coherent



SMS Regime – The SMS test

SMS should require a finding that a firm has substantial, entrenched market power in at least one digital activity, providing the firm with a strategic position.



Assessing substantial entrenched market power

- Market power that is expected to persist over time and is unlikely to be competed away in the short term.
- Should focus on direct evidence of market power, specifically evidence of substitutability, competitive rivalry and barriers to entry and expansion.



Strategic position

- SMS is motivated not just by market power, but the implications of that market power being particularly widespread or significant. This is what is meant by a firm having a "strategic position".

Considerations relevant to whether a firm has a strategic position

- A firm's **size or scale** in an activity
- Important (i) access point to customers or (ii) an important input to a **diverse range** of businesses
- An activity's role in allowing a firm to **extend or protect** its market power
- Using an activity to **determine the rules of the game**
- Effects on **socially or culturally** important markets



These factors are likely to be important to varying extents in different cases.

The DMU would publish guidance to further clarify how it would assess whether a firm has a strategic position.

The SMS test: Procedural aspects



DMU should set out in formal guidance its prioritisation rules for designation assessments. These should include:

- the firm's revenue (globally and within the UK);
- the activity undertaken by the firm; and
- a consideration of whether a sector regulator is better placed to address the issues of concern.



The designation process should be open and transparent with a consultation on the provisional decision and the assessment completed within a statutory deadline.



A firm's SMS designation should be set for a fixed period before being reviewed.



When a firm meets the SMS test, the associated remedies should apply only to a subset of the firm's activities, whilst the status should apply to the firm as a whole.

SMS Regime – The Code

Purpose

- When the SMS test is met, the DMU should establish a **legally enforceable** code of conduct for the firm, in relation to its **designated activities**.
- The purpose of the code is to prevent SMS firms from taking advantage of their powerful positions. It will provide a clear set of ex ante principles for SMS firms to follow, with the aim of preventing consumers and businesses from being exploited and prevent practices by firms which could undermine fair competition.
- Setting the ‘rules of the game’ in advance will **shape** firm behaviour, helping to avoid the emergence of concerns in the first place.
- A code will allow more **rapid** action to tackle problematic behaviour than is possible under existing laws, preventing significant harm from materialising.



Structure and Form

- Each code will provide a set of ex ante principles the firm must follow.
- The content of the code should be tailored for each firm based on its activities and business model.

Objectives

- objectives the code seeks to deliver, contained in legislation
- provide the focus for what the code can (and therefore cannot) deal with
- common across SMS firms and activities

e.g. 'fair trading'

Principles

- set the standards as to how the SMS firm should behave, in order to achieve the objective they support
- provide a more detailed articulation of what a firm must or must not do
- tailored to the firm and activity on which they are to be applied

e.g. to trade on fair and reasonable contractual terms

Guidance

- provides greater clarity to the SMS firm on how the principles should be interpreted, with specific, non-exhaustive examples of what conduct would be expected to breach the principles
- developed by the DMU

e.g. 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'

Content

- The objectives for the code should be set in legislation to provide the framework for what the code can cover and to provide upfront clarity. They are unlikely to need to change over time. We proposed three objectives:

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

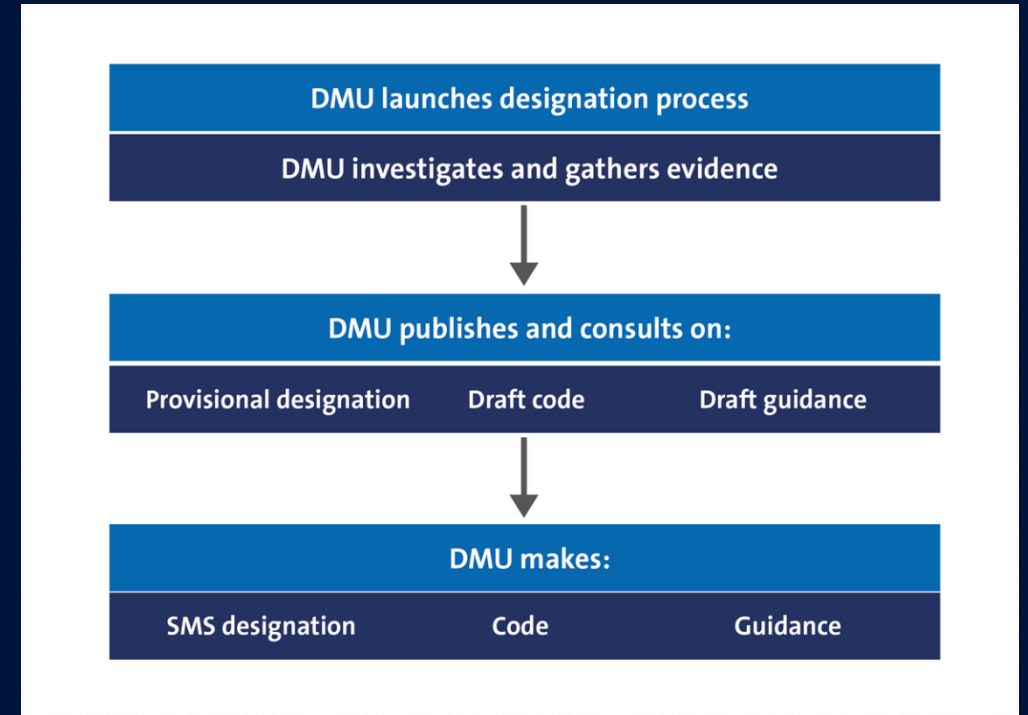
Content

- We proposed the DMU should have discretion to design the principles and guidance necessary to deliver on these objectives. This will ensure the principles are evidence-based and targeted at the particular activity, conduct and harms they are intended to address. It will also ensure the code is forward-looking and can be adjusted over time.
- In setting principles, the DMU should be able to allow for 'exemptions' to principles, for example where conduct is necessary, or objectively justified, based on the efficiency, innovation or other competition benefit it brings.
- Whilst many principles could be common across codes, the DMU should be able to set principles which are bespoke where necessary.



Procedure

- The DMU should consult on and establish a code as part of an SMS designation assessment.
- Developing the code alongside the designation assessment enables the DMU to carry out information gathering, analysis, design and consultation in a more coherent and effective way.
- There should also be scope for the DMU to make alterations to the code outside of this designation cycle to ensure the DMU can keep pace with changes in the technologies being used or the conduct or business model of firms.



Fostering compliance

- SMS firms should have a legal obligation to ensure their conduct is compliant with the requirements of the code and put in place measures to foster compliance. Although the obligation to comply with the requirements of the regime rests with the SMS firm, the DMU's approach will be important in encouraging and supporting compliance.

SMS Regime – Pro-competitive interventions

Purpose

- Pro-competitive interventions (PCIs) will **seek to address the root cause of market power**. These remedies are critical to addressing market features (like barriers to entry) which prevent innovative new competitors driving greater competition and innovation.

PCI remedies

- Data-related interventions
- Interoperability and common standards
- Consumer choice and defaults interventions
- Obligations to provide access on fair and reasonable terms
- Separation remedies



An abstract background on the left side of the slide. It features a blurred image of a computer keyboard at the bottom. Overlaid on this are numerous glowing white icons connected by thin, curved lines. The icons include a Wi-Fi symbol, a smartphone, a globe, a person silhouette, a dollar sign, a bar chart, a speech bubble, a magnifying glass, and a document. The overall effect is one of digital connectivity and data flow.

Procedure

- We recommend the DMU be able to implement a PCI to rectify an adverse effect on competition or consumers, in activities in which the SMS firm operates, which relate to the firm's market power and strategic position.
- The DMU would announce when it is initiating a PCI investigation and conduct these in an open and transparent manner.
- The DMU would need to ensure PCIs are likely to be effective and proportionate, without causing significant adverse consequences for the firm's wider business.
- A PCI investigation could be run in the course of or shortly after a designation assessment. It could also initiate a PCI at any other time, for example off the back of a complaint. They should be completed within a statutory deadline.
- PCIs should be implemented for a limited duration and should be regularly reviewed. The ability of the DMU to 'layer' PCIs over time, starting with smaller interventions and considering their effectiveness before considering more interventionist remedies is a key advantage to embedding this tool within an ongoing regulatory regime.

SMS Regime – Monitoring and enforcement

- The DMU should undertake monitoring in relation to the conduct of SMS firms.
- Where the DMU identifies potential non-compliance, it should have a range of tools available to address that problem, combining a participative approach with use of formal powers including:



The DMU should seek to resolve concerns informally using a **participative approach**, engaging with parties to deliver fast and effective resolution.



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.

SMS Regime – Monitoring and enforcement



The DMU should be able to **impose substantial penalties** for breaches of the code and for breaches of code and PCI orders.



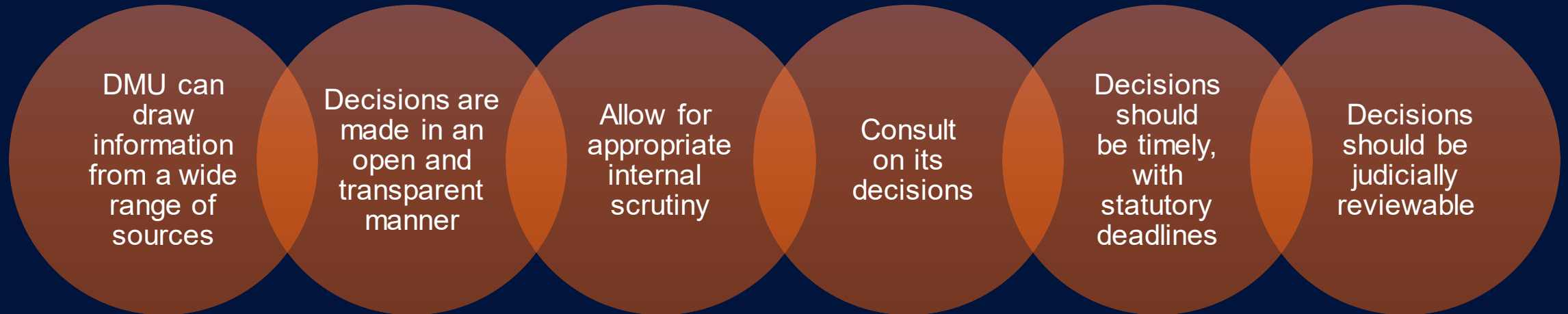
The DMU should be able to **take action quickly on an interim basis** where it suspects the code has been breached.



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.

SMS Regime – The DMU's powers, processes and decisions

- The DMU should be able to 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.
- DMU decisions should be made in an open and transparent manner and it should be held accountable for them.



SMS Regime – Rationale for a distinct merger control regime

We recommend that acquisitions that are entered into by SMS firms receive additional scrutiny in the form of a distinct merger control regime.

- There are widely-held concerns that historic underenforcement against digital mergers has allowed powerful digital firms to develop and entrench their strong market positions and limit sources of potential challenge by new entrants.
- For the CMA to block a merger or impose remedies, it has to find that it is 'more likely than not' that the merger would lead to a substantial lessening of competition. The CMA cannot impose remedies (including blocking a merger) where the magnitude of harm might be high but the likelihood of it occurring is or will be lower than 50%.
- Mergers involving powerful digital companies often raise issues around losses of potential competition (ie competition that the target could have provided against the acquirer once it had developed further). Digital markets can also be fast-moving and less predictable.
- There is a risk that the CMA would be unable to show that a merger will result in a substantial lessening of competition to a 'more likely than not' standard, meaning that that the CMA may not have the power to remedy potentially harmful mergers (including by blocking them). This could allow powerful digital firms to further entrench their market power.
- Potential limitations of the existing jurisdictional tests (ie the tests that govern when the CMA can investigate a merger) may also further limit the CMA's ability to investigate mergers by powerful digital firms.
- The voluntary nature of UK merger control raises the risk that integration of mergers involving powerful digital firms might be particularly difficult to unwind. Because the commercial value of these firms often lies in their IP rights, data, algorithms etc., the competitive strength of a target can be irreversibly damaged as soon as an acquirer takes control of these assets.

SMS Regime – Merger proposals

Reporting

- SMS firms to be required to make the CMA aware of all transactions

Notification

- Mandatory suspensory notification for transactions that meet certain bright-line thresholds
- Mandatory notification would apply only to acquisitions of clear-cut control
- Simplified review for transactions unlikely to raise concerns
- CMA to retain ability to call in transactions that do not meet mandatory notification thresholds

Substantive assessment

- Competition concerns assessed using existing substantive test (substantial lessening of competition framework)
- CMA to retain burden of proof
- Standard of proof to be lowered to more cautious “realistic prospect” threshold
- Non-competition concerns to continue to be assessed by other regulators under existing frameworks

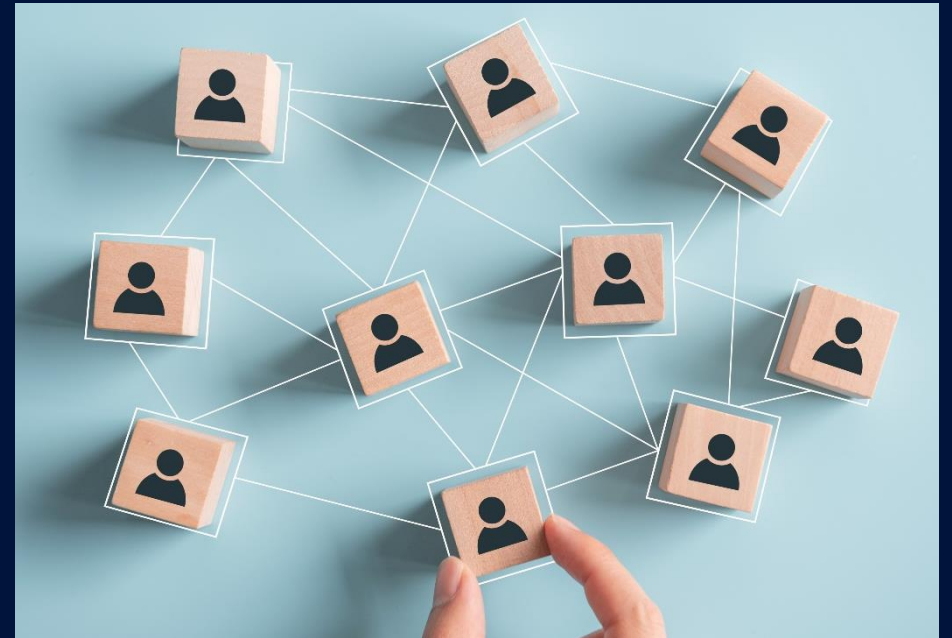
Wider proposals - A modern competition and consumer regime for digital markets

- Alongside our proposals in relation to the SMS regime, we also made recommendations to strengthen existing competition and consumer protection laws to make them better adapted for the digital age. These build on the CMA's reform proposals.



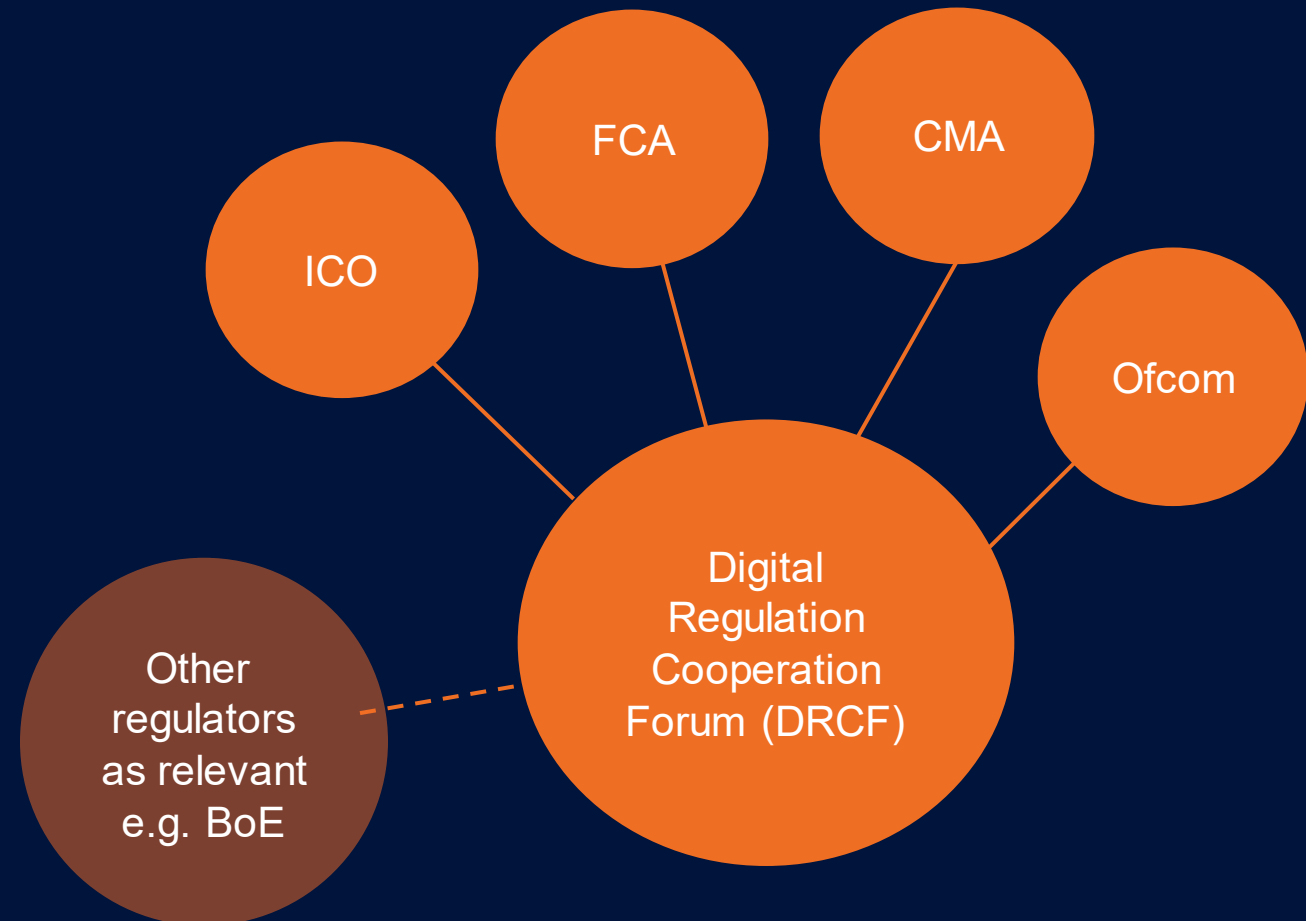
A coherent regulatory landscape

- The new pro-competition regulatory framework will need to be joined-up and coherent with the wider regulatory landscape, in particular sectoral regulation, data protection regulation and the new online harms regime.
- We recommend the DMU should be able to work closely with other regulators with responsibility for digital markets, in particular Ofcom, the Financial Conduct Authority (FCA) and the ICO.
- The DMU should be able to share information with other regulators and seek reciprocal arrangements.
- The Government should consider whether the DMU's powers in relation to the SMS regime should be shared with Ofcom and the FCA, with the DMU as the primary authority.



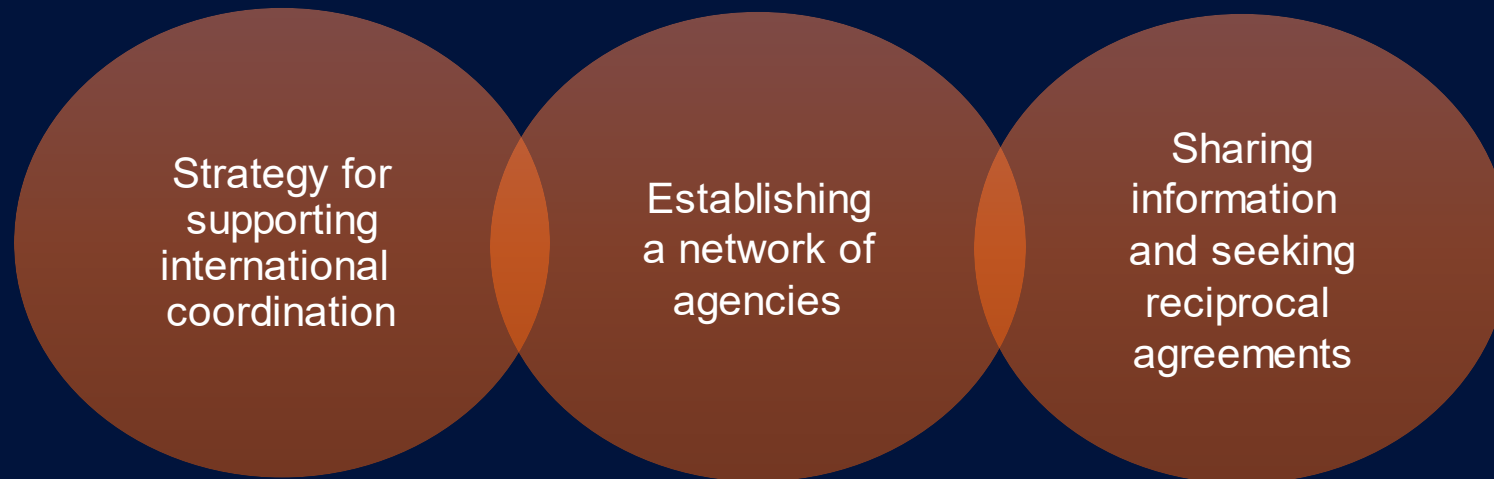
The Digital Regulation Cooperation Forum (DRCF)

- The Digital Regulation Cooperation Forum (comprising CMA, Ofcom, ICO and FCA) is already working to deliver greater coordination and cooperation between regulators in digital markets.
- The DRCF is working with Government to consider the steps which should be taken to ensure adequate coordination, capability and clarity across the digital regulation landscape.



International coordination

- The most powerful digital firms operate across multiple jurisdictions globally and regulators in many jurisdictions are investigating and addressing very similar challenges. There are likely to be significant efficiencies from regulators working together to understand the issues and to devise solutions.
- We recommend the DMU should be able to work closely with regulators in other jurisdictions to promote a coherent regulatory landscape.



Next steps

Government has committed to:

- Establishing and resourcing a new Digital Markets Unit (DMU) from April 2021, housed in the CMA, to build on the work of the Taskforce and begin to operationalise the key elements of the regime.
- Consulting on proposals for the new pro-competition regime in early 2021.
- Legislating to put the DMU on a statutory footing when parliamentary time allows.

Work for the CMA:

- Supporting in preparing for and operationalising the DMU and the new regulatory regime
- Supporting and advising Government on the regulatory framework as it develops its consultation and legislation
- Evidence gathering on digital markets
- Engaging with stakeholders (in particular DRCF and international counterparts).