



HM Government

# A new pro-competition regime for digital markets

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# A new pro-competition regime for digital markets

Presented to Parliament  
by the Secretary of State for Digital, Culture, Media &  
Sport  
and the Secretary of State for Business, Energy and  
Industrial Strategy  
by Command of Her Majesty

July 2021



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## Table of contents

Joint Ministerial foreword	6
Executive summary	9
Part 1: Introduction	14
Part 2: The Digital Markets Unit	24
Part 3: Strategic Market Status	39
Part 4: An enforceable code of conduct	59
Part 5: Pro-competitive interventions	76
Part 6: Regulatory framework	89
Part 7: SMS merger reform	107
Conclusion and next steps	130
Annex A: International approaches to competition	132
Annex B: How to respond to the consultation	142
Annex C: Privacy Notice	148



# Joint Ministerial foreword



The UK is home to one of the world's strongest economies and to leading tech and innovation ecosystems. We have created 100 tech companies with valuations over \$1 billion - more than France, Germany and the Netherlands combined. We are at the forefront of emerging industries such as artificial intelligence, cyber security and fintech, and tech has created some 2.93 million jobs across the country in the last two years alone.<sup>1</sup>

But this is just the beginning. We are unashamedly pro-tech and want to be the most innovative, pro-enterprise government ever, unlock a new era of digital-driven growth that will fuel our recovery, help us build back better from the pandemic, and level up the entire UK.

Competition is the key to this vision. The healthiest economic environment is the most competitive one: one that inspires companies and entrepreneurs to keep

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<sup>1</sup> Tech Nation (2020). UK Tech For a Changing World: Tech Nation Report 2020.  
CP 489

innovating and improving their products and services, and one that incentivises them to provide better deals and drive down costs for their consumers.

However, there is a growing international consensus that the concentration of power in a handful of the largest digital companies is crowding out competition by erecting entry barriers for other firms. That is bad for digital markets, it is bad for businesses, and it is bad for consumers.

So today we are taking action to open competition in digital markets to make it fairer for smaller businesses, entrepreneurs, and the British public.

Our new pro-competition regime will help prevent abuses of power – unleashing a wave of innovation. It will make sure smaller firms are not unfairly pushed out of the market, so that they can grow and compete. It will give consumers more choice and support a wide range of valuable sectors, including our news industry, which plays a vital role in our democracy. And by making sure regulation is not overly burdensome and supports responsible innovation, we will secure our status as one of the most attractive places in the world to start and grow a business.

We are already experiencing a golden age for tech in the UK. Our new pro-competition regime will enable us

to cement our position as a global digital leader, achieve the ambitions set out in our upcoming innovation strategy and drive a new era of long-term growth, prosperity, and opportunity for every corner of our country.



**Rt Hon Oliver Dowden**  
**CBE MP**  
Secretary of State for  
Digital, Culture, Media and  
Sport

**Rt Hon Kwasi Kwarteng**  
**MP**  
Secretary of State for  
Business, Energy and  
Industrial Strategy



# Executive summary

- 1. The digital economy makes an incredible contribution to our lives and economy.** The digital sector<sup>2</sup> contributes over £150 billion to the UK economy, with growth outpacing most other sectors.<sup>3</sup> Digital technologies are positively transforming the way we work, access information and stay in touch with loved ones. A thriving digital economy is at the heart of the government's vision for long-term economic growth, as set out in the Plan for Growth.<sup>4</sup>
- 2. However, the unprecedented concentration of power amongst a small number of digital firms is holding back innovation and growth.** The size and presence of 'big' digital firms is not inherently bad. Nonetheless, there is compelling evidence<sup>5</sup> that the features of digital markets<sup>6</sup>, in the UK and internationally, often lead them to 'tip' in favour of a single incumbent. This can be

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<sup>2</sup> Page 11 of the [DCMS Sectors Economic Estimates 2018 \(2020\)](#) defines the 'digital sector' in accordance with the definition developed by the OECD using the UN Standard Industrial Classifications (SICs). The definition includes a series of sub-sectors that mainly create value through the direct use of digital technologies.

<sup>3</sup> DCMS, 2020. [Sectors Economic Estimates 2019 \(provisional\) Gross Value Added](#).

<sup>4</sup> H.M. Treasury, 2021. [Build Back Better: plan for growth](#).

<sup>5</sup> Digital Competition Expert Panel, 2019. [Unlocking digital competition, Report of the Digital Competition Expert Panel](#); Competition and Markets Authority (CMA), 2020. [Online platforms and digital advertising: market study final report](#).

<sup>6</sup> The term 'digital markets' is difficult to define given the increasing rate of adoption of digital technologies by businesses in all sectors of the economy. For the purposes of this consultation, we understand digital markets to broadly encompass markets where digital technologies are a core component of the business models of firms active in those markets. The term 'digital firms' refers to the firms that produce or trade products and services in digital markets.

difficult to reverse and can lead to higher prices, barriers to entry for entrepreneurs and less choice and control for consumers. Governments and regulators across the world are starting to take action to address these issues.<sup>7</sup>

3. **Competition is key to unlocking the full potential of the digital economy.** Vibrant digital markets, with competition between firms, will drive innovation, increase productivity and deliver better quality services for consumers, with greater choice and lower prices.
4. **We are establishing a world-leading pro-competition regime for digital markets.** The UK's competition regime and institutions are highly regarded but not equipped to tackle the unique challenges of fast-moving digital markets. This consultation follows and builds on recommendations by the Digital Competition Expert Panel, chaired by Professor Jason Furman.<sup>8</sup> Our detailed proposals are informed by advice from the Digital Markets Taskforce ("the Taskforce").<sup>9</sup>

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<sup>7</sup> See Annex A for further detail on the action taken by governments and regulators internationally.

<sup>8</sup> Digital Competition Expert Panel, 2019. [Unlocking digital competition, Report of the Digital Competition Expert Panel.](#)

<sup>9</sup> Digital Markets Taskforce, 2020. [A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce.](#)

5. **Central to the new approach will be the creation of a Digital Markets Unit in the Competition and Markets Authority (CMA).**<sup>10</sup>  
The unit will be forward-looking and equipped to act swiftly in response to rapidly-evolving digital markets. Its core purpose will be to promote competition (which includes promoting competitive outcomes) by addressing both the sources of market power and the economic harms that result from the exercise of market power.
6. **The regime will be proportionate and targeted towards those firms and activities where the risk of harm is greatest.**<sup>11</sup> An evidence-based assessment will be used to identify those firms with substantial and entrenched market power, in at least one digital activity, providing them with a strategic position. This includes where the effects of the firm’s market power are likely to be widespread or significant. These firms will be designated with Strategic Market Status (SMS) by the Digital Markets Unit and will be subject to the new regime.
7. **Firms with SMS will be subject to an enforceable code of conduct that will set out**

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<sup>10</sup> This new regulator has already been established in a non-statutory “shadow” form within the CMA.

<sup>11</sup> Proportionality is key to delivering good regulation, according to the Taskforce for Innovation, Growth and Regulatory Reform (TIGRR). [TIGRR independent report](#), 2021.

**how they are expected to behave.** The code will promote fair trading, open choices and trust and transparency, shaping firms' behaviour to prevent bad outcomes before they occur. It will protect the full range of businesses and consumers that rely on firms with SMS.

8. **The Digital Markets Unit will have powers to introduce interventions designed to open up digital markets to greater competition.** These 'pro-competitive interventions' will address the root causes of substantial and entrenched market power in digital markets. This could include data-related remedies and measures to enhance consumer choice.
9. **The Digital Markets Unit will have a range of powers to monitor and enforce the new regime.** The focus of the regime will be on resolving concerns through constructive engagement with firms. However, the Digital Markets Unit will require robust powers to deter and tackle non-compliance. Procedural fairness will be embedded within the regime, with clear processes for holding the Digital Markets Unit to account for its decisions.
10. **The government is also considering new merger rules for firms with SMS.** These rules

would aim to ensure merger activity is more proactively monitored and that harmful mergers are blocked where they further enhance or entrench the powerful positions of firms with SMS. We envisage that any new rules would be overseen by the CMA.

11. **This consultation seeks your views on the new pro-competition regime for digital markets.** It sets out the government's proposals for the new regime in more detail. It complements our separate consultation, 'Reforming Competition and Consumer Policy', which considers broader competition reforms.<sup>12</sup> After the consultation has closed, the government will carefully consider responses and take them into account when finalising proposals. We will publish a response to the consultation before introducing legislation to put the regime on a statutory footing.

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<sup>12</sup> Department for Business, Energy and Industrial Strategy (BEIS), 2021. [Reforming Competition and Consumer Policy](#).

# Part 1: Introduction

## The characteristics of digital markets

12. The digital economy is transforming our economy and society. It is opening up new markets for business and enabling us to keep up with news, share creative content and connect with people around the world. The COVID-19 pandemic has resulted in widespread adoption of digital technologies, which are now seen as critical business infrastructure.<sup>13</sup>
13. However, there is growing evidence that competition in some digital markets is weak. The strategic market position of a small number of key digital firms is leading to higher prices and barriers to entry and growth for entrepreneurs. This can result in less innovation, lower productivity and less choice and control for consumers. This is a global issue and governments across the world are becoming alert and taking action. For example, the International Monetary Fund found that market concentration in the tech industry increased by over 10% and markups<sup>14</sup> increased by over 30% globally over a

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<sup>13</sup> Confederation of British Industry (CBI), 2020. [Tech Tracker 2020: the innovation imperative](#).

<sup>14</sup> A markup is the difference between the cost to produce a good or service and its selling price.

twenty-year period.<sup>15</sup>

14. The size and presence of ‘big’ digital firms is not inherently bad. In fact, the prospect of temporary market power can act as an important incentive to innovate and invest. However, once a digital firm’s market power becomes entrenched, potential competitors may struggle to enter the market, holding back innovation and reducing choice for consumers. Incumbents face a limited prospect of losing their position to a competitor, which dampens their incentive to innovate, improve the quality of their offer or reduce prices. With digital technologies increasingly underpinning business activity,<sup>16</sup> the quality of the technology has broader implications for growth and productivity.
15. While digital markets vary considerably, some share a combination of characteristics that can cause the market to ‘tip’ in favour of one, or a few, firms. This can be difficult to reverse and may result in poor outcomes. The CMA identified some of these characteristics in its market study into online platforms and digital advertising:<sup>17</sup>

- **Network effects and economies of scale – a**

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<sup>15</sup> International Monetary Fund (IMF), 2021. [Staff Discussion notes: Rising Corporate Market Power: Emerging Policy Issues](#).

<sup>16</sup> CBI, 2020. [Tech Tracker 2020: the innovation imperative](#).

<sup>17</sup> CMA, 2020. [Online platforms and digital advertising: market study final report](#), and in the accompanying Impact Assessment. [Impact assessment - a new pro-competition regime for digital markets](#).

digital platform's value to its users<sup>18</sup> increases as the total number of users rises, which can make it extremely challenging for new entrants and innovators to enter a digital market once a firm reaches a certain size and scale.

- **Unequal access to user data** – digital platforms collect vast quantities of unique user data, which gives them a significant competitive advantage when providing data-driven services such as targeted online advertising<sup>19</sup> and entering new markets.
- **Consumer decision making and the power of defaults** – a digital platform's control over default settings can act as a barrier to entry and expansion for competitors by influencing a consumer's use of particular services, and influencing the platform's ability to collect users' data.
- **Lack of transparency around complex decision-making algorithms** – algorithms can be used to personalise services, rank search results and change the way third party products are displayed on a website. Lack of transparency makes it difficult to understand

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<sup>18</sup> For the purposes of this consultation, a user is a person who uses a particular product. This includes consumers and business users.

<sup>19</sup> CMA, 2020. [Online platforms and digital advertising: market study final report](#).



how these algorithms are used.

- **The importance of ecosystems** – some firms have built large ‘ecosystems’ of integrated complementary products and services around their core service. These products and services are designed in a way that favours the firm’s own services over those of a competitor, which means that users are kept on their network. This can give rise to conflicts of interest and the potential for these firms to undermine competition by leveraging power between markets.<sup>20</sup>

## **The case for a new pro-competition regime**

16. The UK’s existing competition regime is highly regarded across the world.<sup>21</sup> However, existing competition tools are not designed to address the systemic harms associated with the substantial and entrenched market power held by a small number of digital firms. Competition enforcement cases are slow and take many years to conclude.<sup>22</sup> By the time competition concerns are identified and addressed, a digital firm’s market

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<sup>20</sup> For example, a firm can use its voice assistant to, by default, direct consumers to another part of its business, such as an online marketplace or search engine, thus giving preference to its own products. Contestability in all of these markets may be reduced as a result.

<sup>21</sup> In 2018, the [CMA was awarded the GCR Award for Enforcement Agency of the Year](#) (Europe), in recognition of its work across various regulatory tools.

<sup>22</sup> For example, of those cases that have been brought by the European Commission against Google in recent years, *Android* took more than five years, *Shopping* took more than seven years and *AdSense* took nine years, excluding respective appeal processes. [CMA Market Study](#), 2019, paragraph 7.33.

power in a fast-moving market can become even more entrenched and the economic damage irreversible.<sup>23</sup>

17. The government has therefore decided to set up a new pro-competition regime which will proactively shape the behaviour of digital firms with significant and far-reaching market power, by making clear how they are expected to behave. The regime will actively boost competition and innovation by tackling the sources of existing and future strategic market power.<sup>24</sup> It will protect smaller businesses, consumers and competition by governing the relationship between users and key digital firms. The regime will be implemented and enforced by a dedicated Digital Markets Unit.
18. The government is not alone in reassessing its approach to competition in digital markets. Governments and regulators across the world are taking action to ensure their regimes are capable of addressing the unique challenges posed by the largest digital firms and fast-moving markets. Annex A sets this out in more detail.

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<sup>23</sup> For example, the CMA estimated that Google's *Search* profit margins were still consistent and highly profitable even taking into account the impact of a fine imposed by the European Commission, and that its position had only been further entrenched during the investigation period (in other words, no further entry and expansion into the search market by competitors, nor lower prices or enhanced service). [CMA Market Study Appendix D](#), 2019, paragraph 75.

<sup>24</sup> The Taskforce on Innovation, Growth and Regulatory Reform (TIGRR), recommended that the UK's approach to regulation should have three aims in mind: boosting productivity, encouraging competition and stimulating innovation. [TIGRR independent report](#), 2021.

## The government's ambition for competitive digital markets

19. The proposed pro-competition regime will drive competition between digital firms and open up opportunities for innovative start-ups to compete with incumbents. This will result in better quality services, greater choice and lower prices. Its design and implementation will minimise burdens on business, spurring investment and economic growth.
20. In order to meet these objectives, the government has considered the principles below in designing the proposed framework:
  - **Evidence-driven and targeted** – the regulator must target specific problems in a proportionate way based on evidence. In doing so, it should minimise burdens and the risk of any possible unintended consequences.
  - **Lean, agile and equipped to act swiftly** – digital markets and technologies are dynamic, and the consequences of actions taken by some key digital firms materialise rapidly. The regulator needs to be able to deal with problematic conduct much more quickly than is possible with existing tools and not impede business operations with lengthy deliberations.

- **Open, transparent and accountable** – the regulator should be open and transparent across all its work. It should consult a wide range of parties, articulate its reasoning and be accountable for its decisions.
- **Forward-looking** – the regulator should act proactively to assess and manage risks to competition and innovation. It should do this without impeding growth.
- **Coherent** – the regulator should seek and promote coherence with other regulatory regimes both domestically and internationally. These issues are global and there is growing international consensus on the need for action. The regulator should work with international partners to find solutions where possible.

21. There are natural tensions between some of these principles, as in any regulatory regime. By carefully balancing these principles, the government will ensure effective action that minimises and removes unnecessary burden on businesses.

### **Interaction with wider government initiatives**

22. This consultation sets out the government's proposals for a new pro-competition regime for

digital markets. It builds on the vision set out in the Plan for Growth and broader legislation including the National Security and Investment Act 2021, complementing the government's work in a range of areas, including:

- **Modernising the UK's competition and consumer landscape** – the government is consulting on proposals to update the existing competition and consumer protection framework.<sup>25</sup> Proposals include measures to tackle fake online reviews and subscription traps, and new powers for the CMA to make markets more dynamic and innovative by leveraging the UK's competition regime, promoting growth across the economy.<sup>26</sup>
- **Digital regulation** – the government's Digital Regulation Plan sets out three objectives for digital regulation: promoting competition and innovation in the digital economy; ensuring digital technologies are safe and secure online; and shaping a digital economy that promotes a flourishing, democratic society. The new pro-competition regime will

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<sup>25</sup> BEIS, 2021. [Reforming Competition and Consumer Policy](#).

<sup>26</sup> The consultation covers several recommendations put forward by the Digital Markets Taskforce. As part of their advice to the government, the Taskforce suggested strengthening the Platform to Business Regulation. Given the regulation has been in force for less than a year, the government is not proposing any amendments at this time.

complement other digital reforms such as the government's new online safety framework<sup>27</sup> and its Online Advertising Programme.<sup>28</sup>

- **The National Data Strategy** – the National Data Strategy outlines the government's vision to make the UK the world's number one data destination. It was published in September 2020 and sets out plans for a data regime that supports vibrant competition and innovation, building trust and maintaining high data protection standards without creating unnecessary barriers to data use.
- **The Innovation Strategy** – this was announced in the 'Plan for Growth'. The Innovation Strategy will outline our vision for the UK to become the world's most innovative and R&D-focused economy - placing innovation at the centre of everything our nation does. This includes ensuring the UK maintains world-class rules, regulations and frameworks capable of effectively supporting innovation in the UK.

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<sup>27</sup> The new online safety framework will be overseen by the Office of Communications (Ofcom). The [Online Safety Bill](#) aims to keep users safe and build public trust in digital services, while maintaining a thriving democracy and society where users' rights, including freedom of expression, are protected online.

<sup>28</sup> The government's Online Advertising Programme represents the government's commitment to foster fair, transparent and ethical online advertising that works for everyone, including ensuring that consumers are protected from harmful or misleading advertising. The government will consult on this area towards the end of 2021.

- **The UK's G7 presidency** – the government will continue to work with other countries to develop a coherent global approach to the regulation of digital markets that benefits consumers, businesses and society as a whole. We have convened international partners to share best practice and identify opportunities for long-term coordination and cooperation.
- **Press sustainability** – the government has taken forward a number of recommendations from the Cairncross Review<sup>29</sup>, including tax measures and innovation funding. The interaction between the pro-competition objectives of the Cairncross Review and the proposals in this consultation are explored further in Part 4.

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<sup>29</sup> The Cairncross Review, 2019. [The Cairncross Review, A Sustainable Future for Journalism](#). CP 489

## Part 2: The Digital Markets Unit

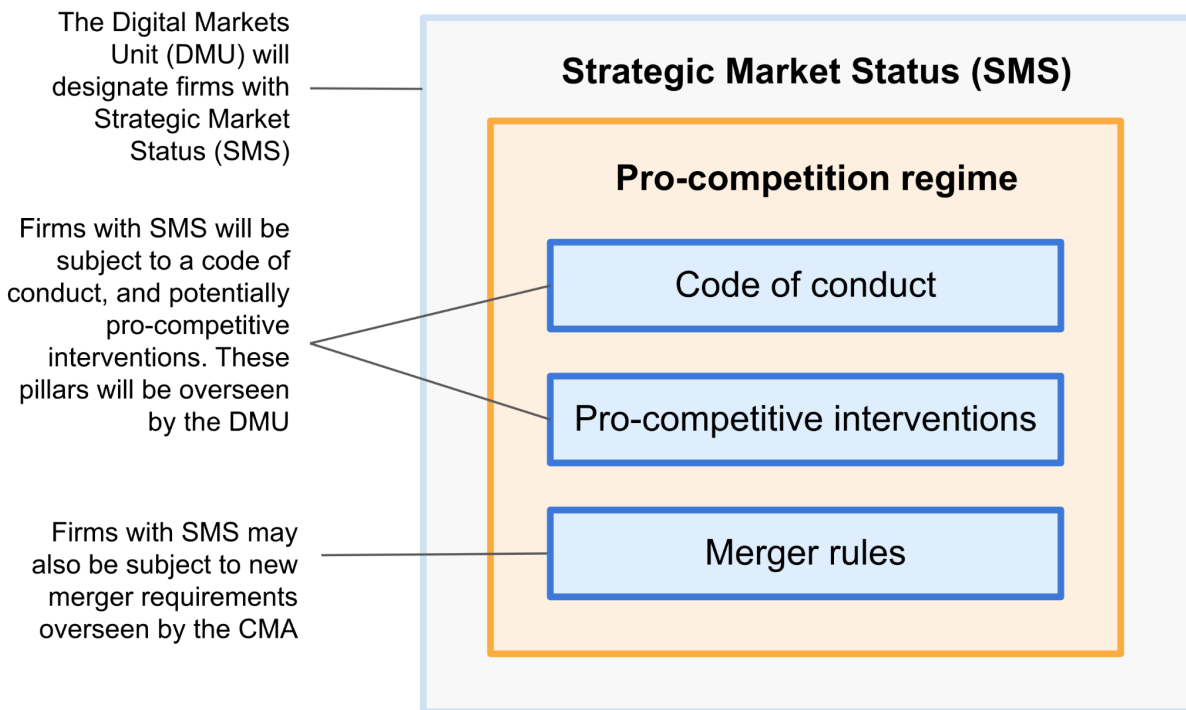
23. Last year, the government committed to establishing a dedicated Digital Markets Unit to implement and enforce the new pro-competition regime for digital markets. This was a key recommendation from the Furman Review.<sup>30</sup> The statutory Digital Markets Unit will be responsible for designating firms with SMS, overseeing a mandatory code of conduct for those firms and implementing pro-competitive interventions. Like any other regulator, the Digital Markets Unit will need to be independent and credible, with sufficient powers and clear objectives in order to deliver the aims of the new regime.

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<sup>30</sup> Digital Competition Expert Panel, 2019. [Unlocking digital competition, Report of the Digital Competition Expert Panel.](#)



## Figure 1: The pro-competition regime



24. The Digital Markets Unit will be a part of the CMA.<sup>31</sup> This will allow the Digital Markets Unit to harness the CMA’s existing competition expertise and reputation while developing new, specialist capabilities needed to deliver a forward looking, pro-competition regime. The Digital Markets Unit was set up in a non-statutory form within the CMA in April 2021 to support the rapid establishment of the statutory regime.
25. The non-statutory Digital Markets Unit will undertake a range of preparatory work, including building teams with relevant capabilities, gathering evidence on digital markets and

<sup>31</sup> Establishing the DMU within the CMA was a key recommendation of John Penrose MP’s report; [Power to the people: independent report on competition policy](#), 2021.

engaging stakeholders across industry, academia and other regulators.<sup>32</sup> The government will provide the Digital Markets Unit with a strategic steer, issued once per parliamentary term.<sup>33</sup>

## **The Digital Markets Unit's objectives and duties**

26. The purpose of the Digital Markets Unit should be to promote competition and competitive outcomes by addressing both the sources of market power and the economic harms that result from the exercise of market power. Its overarching statutory objectives and duties will define the fundamental purpose of the Digital Markets Unit and provide the legal basis for all of its actions.
27. The Taskforce proposed that the overarching statutory duty of the Digital Markets Unit should be “to further the interests of consumers and citizens in digital markets, by promoting competition and innovation”. This is in contrast to the statutory duty of the CMA, which is “to promote competition, both within and outside the United Kingdom, for the benefit of consumers”.
28. It is our view that the statutory duty of the Digital Markets Unit should be to promote competition (which includes promoting competitive outcomes)

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<sup>32</sup> Its Terms of Reference are available [here](#).

<sup>33</sup> This will form part of the government's wider strategic steer to the CMA.

in digital markets for the benefit of consumers. Competitive markets drive better services, greater choice and lower prices for individuals and businesses. The Digital Markets Unit should not simply promote rivalry between firms for its own sake, but pursue competition for the benefit of consumers. This is in line with the tried and tested statutory duty of the CMA.<sup>34</sup>

29. It is also our view that the Digital Markets Unit should support innovation when promoting competition. The promotion of innovation and competition often go hand in hand. Competitive pressures spur firms to innovate, while innovation itself can intensify competition in a market. However, there may be cases where the Digital Markets Unit may need to weigh up the potential benefits of short-term competition against longer-term incentives to innovate. Although it is our intention that the Digital Markets Unit should give appropriate regard to innovation and impacts on the economy and market, we do not currently consider it necessary to explicitly include innovation in the Digital Markets Unit's core duties, given that it is already encompassed by competition. We are keen to seek views about

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<sup>34</sup> [Enterprise and Regulatory Reform Act 2013](#), Section 25(3).  
CP 489

whether an additional supplementary duty to have regard to innovation would be helpful in strengthening the Digital Markets Unit's ability to make these assessments.

30. The Taskforce proposed an additional reference to 'the interests of citizens' within the Digital Markets Unit's overarching statutory duty, in order to strengthen its ability to make decisions that take wider policy concerns into account. We recognise that competition in digital markets has deep interactions with a range of other issues, such as data privacy and media plurality.
31. Our view, however, is that the Digital Markets Unit's statutory duty should be as lean and as simple as possible. We do not agree with the Taskforce's proposal to include a reference to citizens in the Digital Markets Unit's duties. There is a risk that this could reduce clarity around the Digital Markets Unit's core purpose of promoting competition.
32. A duty to promote competition for the benefit of consumers can encompass a broad range of consumer benefits, as the CMA's existing approach demonstrates. We are considering whether there would be any benefit in additional measures to further empower the Digital Markets

Unit to consider other factors when exercising its functions, without compromising the focus, speed and agility of the regime. This could include supplementary duties that reference policy issues with which the Digital Markets Unit has discretion to engage when using specific powers or discharging specific duties. This could be supplemented with a duty to consult other regulators or a duty to cooperate with other regulators, or both.

**Consultation question 1: What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?**

**Consultation question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?**

## **Funding of the Digital Markets Unit**

33. In order to meet the challenges of promoting competition in digital markets, the Digital Markets Unit will need to be properly resourced, while being lean, efficient and offering good value for money.

34. In line with the government's guidance on Managing Public Money,<sup>35</sup> there are several options for possible Digital Markets Unit funding models:
- **Exchequer funding** – under this model, the Digital Markets Unit's work would be directly funded through the CMA's departmental budget. At present the non-statutory Digital Markets Unit, established in April 2021, is funded in this way.
  - **Full or partial levy funding** – an alternative would be to consider covering the Digital Markets Unit's running costs through fees, charges or a levy so that it is cost-neutral to the public sector. The majority of regulators, including the new Online Safety function in Ofcom, are funded in this way. This could fund the full range of the Digital Markets Unit's activities or could be supplemented by Exchequer funding. Further work would be undertaken to determine who should pay this levy.

### **Consultation question 3: Should we explore the possibility of reducing the cost of the Digital**

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<sup>35</sup> HM Treasury, 2021. [Managing Public Money](#). CP 489

## **Markets Unit to the public sector through partial or full levy funding?**

### **Regulatory coordination and information sharing**

35. A number of existing regulators already play a role in regulating digital markets.<sup>36</sup> This includes the Information Commissioner's Office (ICO) in relation to data rights for individuals, the Office of Communications (Ofcom) in relation to online and media content, media plurality and communications and the Financial Conduct Authority (FCA) in relation to payment services. Ofcom and the FCA have a specific role in promoting competition and have a range of existing powers to do so. They work closely with the CMA which has a role in addressing harm to competition in digital markets under the existing competition regime.
36. This creates important interactions between existing regulatory regimes and the new pro-competition regime, which may grow as digital firms expand into new markets with existing regulators. These interactions and the

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<sup>36</sup> It is not uncommon for regulators' remits to overlap, whether horizontally, when a service falls in or on the edges of one or more regulators' sectoral remit, or vertically, when regulators of different kinds overlap for example when one has an economy-wide remit. A number of existing mechanisms are in place in the UK to ensure good working between regulators (for example, memoranda of understanding and groups such as the [UK Regulators Network](#) and [UK Competition Network](#)).

establishment of the Digital Markets Unit raise two key issues:

- How we ensure that the regime is as streamlined and simple as possible, with effective coordination across regulators regulating firms with SMS; and
- Whether existing regulators with competition objectives need new powers so that they can deliver elements of the new regime, where they are best placed.

37. The Digital Markets Unit should consider whether other regulators are better placed to act, for example when it considers whether to undertake an SMS assessment. This might mean either deprioritising cases where another regulator is already active, working with other regulators to design and enforce remedies, or handing over to other regulators issues it has identified.
38. This approach would allow the Digital Markets Unit to focus its work where it could have the highest impact. More broadly, it should ensure the regulatory landscape is streamlined and effective, minimising unnecessary burden.
39. We are assessing a range of mechanisms that could support coordination across regulators. Our



starting point is to examine what role certain non-statutory arrangements could play, such as memoranda of understanding and voluntary groups such as the Digital Regulation Cooperation Forum (DRCF)<sup>37</sup> or the UK Competition Network. These are commonly used to support regulatory engagement, coordination and knowledge exchange at a strategic level.

40. We think effective information sharing is key to an agile and lean regulatory landscape. We are examining the case for new information-sharing gateways between regulators to support coordination and minimise the risk of similar information requests from different regulators to the same firms.<sup>38</sup> This would allow one regulator to make a request and then share relevant information with the other, subject to appropriate legal safeguards.
41. We are also assessing whether to give the Digital Markets Unit a ‘duty to consult’ and / or ‘duty to cooperate’ with other key regulators (Ofcom, the ICO and the FCA). This would formalise

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<sup>37</sup> The CMA (including the non-statutory Digital Markets Unit), the ICO, Ofcom and the FCA have together formed a [Digital Regulation Cooperation Forum](#) to support cooperation and coordination on online regulatory matters and enable coherent, informed and responsive regulation of the UK digital economy. Their objectives include collaborating to advance a coherent regulatory approach, informing regulatory policy making and strengthening international engagement. The DRCF is a non-statutory, advisory body.

<sup>38</sup> The [DRCF](#) recommended a review of information-sharing gateways – alongside strengthened duties to consult and to cooperate, and an increase in regulatory transparency and accountability – as potential routes to strengthen digital regulatory cooperation in their paper: Digital Regulation Cooperation Forum, 2021. [Embedding coherence and cooperation in the fabric of digital regulators.](#)

regulatory coordination and ensure it remains an ongoing priority. A statutory reciprocal “duty to consult” would place an obligation on regulators to engage early in the regulatory process in relevant areas, while a statutory reciprocal “duty to cooperate” would mandate cooperation on relevant regulatory interactions. There is already a similar mechanism which supports coordination between regulators in financial services.<sup>39</sup>

42. The Taskforce recommended that the government empower Ofcom and the FCA, the digital regulators with existing competition remits, with full concurrent powers with the Digital Markets Unit in relation to the pro-competition regime.<sup>40</sup> This model would assign new pro-competition powers to Ofcom and the FCA, going further than informal arrangements or a duties model by giving sectoral regulators a delivery role in the new pro-competition regime.
43. Our view is that in cases where functions are inherently cross-economy, such as SMS designation, there may be inefficiencies in sharing

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<sup>39</sup> The [Financial Service and Markets Act 2000](#) 3D and 3Q embeds cooperation at the heart of financial services regulation by creating statutory requirements for the [FCA](#), [Prudential Regulation Authority](#) and [Bank of England](#) to cooperate in respect of their regulatory activities.

<sup>40</sup> Under the current competition regime, all regulators with concurrent competition powers (referred to in the legislation as “competent persons”) have to agree which of them is to exercise their powers under the [Competition Act 1998](#). Under the Competition Act (Concurrency) Regulations 2014 no competent person can use their powers before such agreement has been reached and, once agreement has been reached, no other competent person can use their competition powers in relation to that issue (Regulation 6).

pro-competition powers across each of the regime's functions. It may also add to complexities across the landscape at the early stages of establishing the new regime, potentially introducing uncertainty for business. We are therefore not minded to pursue full concurrency for the SMS regime.

44. An alternative approach would be for the Digital Markets Unit to share a limited set of joint powers with other regulators in instances where they may have sectoral expertise, the issues being considered interact with their sector competition duties and they are best placed to act. Sector regulators could, for example, play a targeted role in elements of the regime, such as informing and enforcing code remedies or pro-competitive interventions. This option could address coordination challenges for the Digital Markets Unit, Ofcom and FCA by mandating a structured process for early engagement while establishing the Digital Markets Unit as the lead regulator, and could also provide additional resources for the regime. However, it may introduce complexities in the landscape or uncertainty for stakeholders regarding regulators' responsibilities which could be mitigated through a formal process and publicly available guidance.

## *International coherence*

45. International cooperation will become an important and effective tool for the Digital Markets Unit. Other jurisdictions are beginning to introduce similar legislation to address concerns across digital markets (see Annex A). The ability to share information with equivalent regulators internationally will be valuable in fostering international cooperation and developing global solutions to global issues.<sup>41</sup>
46. We note that the CMA has strong relationships and formal cooperation agreements in place with international competition authorities. As part of the UK's G7 Presidency, the government has asked the CMA to lead discussions with G7 competition authorities on deepening cooperation on digital competition. The Digital Markets Unit should take a leadership role internationally, driving forward and supporting international dialogue on digital competition.

**Consultation question 4: Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the**

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<sup>41</sup> In his [report on competition policy](#), John Penrose MP recommended that the government should pursue cooperation arrangements to allow for safe information exchange between international regulators.

**best use of sectoral expertise, and why? Do we have the correct regulators in scope?**

**Consultation question 5: How can we ensure that regulators share information with each other in a responsible and efficient way?**

### **Wider role for the Digital Markets Unit**

47. The Taskforce advice suggested that the Digital Markets Unit would be well placed to identify competition concerns in digital markets outside the scope of the SMS regime and could provide support for industry initiatives. This broader market monitoring could involve the power to gather information outside a formal investigation.
48. Whilst this could allow the DMU to contribute to wider competition policy development and monitoring, we are mindful of the principles of proportionality, burdens on business and the scope of this power. We are also cautious about duplicating responsibilities and associated powers and activities of other regulators. We would welcome views from stakeholders on the appropriate scope of a broader monitoring function.

**Consultation question 6: What are your views on the appropriate scope and powers for the Digital Markets Unit's monitoring function?**

## Part 3: Strategic Market Status

### Scope and purpose

49. The purpose of the new pro-competition regime is to unlock the benefits of competition in digital markets and tackle the strategic market position of a small number of key digital firms. The regime will need to be proportionate, evidence-driven and carefully targeted at those digital firms and activities where the risk of harm is greatest.
50. We propose to achieve this by focusing the regime on firms which the Digital Markets Unit designates with Strategic Market Status (SMS). To designate a firm with SMS, the Digital Markets Unit will be required to test and conclude that a firm has substantial and entrenched market power in at least one activity, providing it with a strategic position. The elements of this test are explained below.

### *Definition of activities*

51. Firms with SMS are likely to undertake a range of activities. They may have substantial and entrenched market power in some of these activities but not others. The Digital Markets Unit should focus its assessment on whether a firm has SMS in respect of *particular* activities, rather

than all of its activities. Focusing the designation assessment on specific activities will ensure that the SMS designation assessment avoids unnecessary burdens on firms. It also ensures the Digital Markets Unit can focus on the parts of a potential SMS firm's business model which pose the greatest risk to competition.

52. The Digital Markets Unit should be able to group certain products, services and processes into a single activity if they all can be described as having a similar function or, if in combination, can be described as fulfilling a specific function.
53. Examples of potential activities, based on the CMA's market study into online platforms and digital advertising,<sup>42</sup> include:
  - **Google Open Display** – the products provided by Google to manage the buying, selling and selection of advertisements for display on websites; and
  - **Facebook's social media platforms** – the products provided by Facebook that allow users, advertisers and publishers to interact and communicate with each other.

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<sup>42</sup> Digital Markets Taskforce, 2020. [A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce: Annex B.](#)  
CP 489



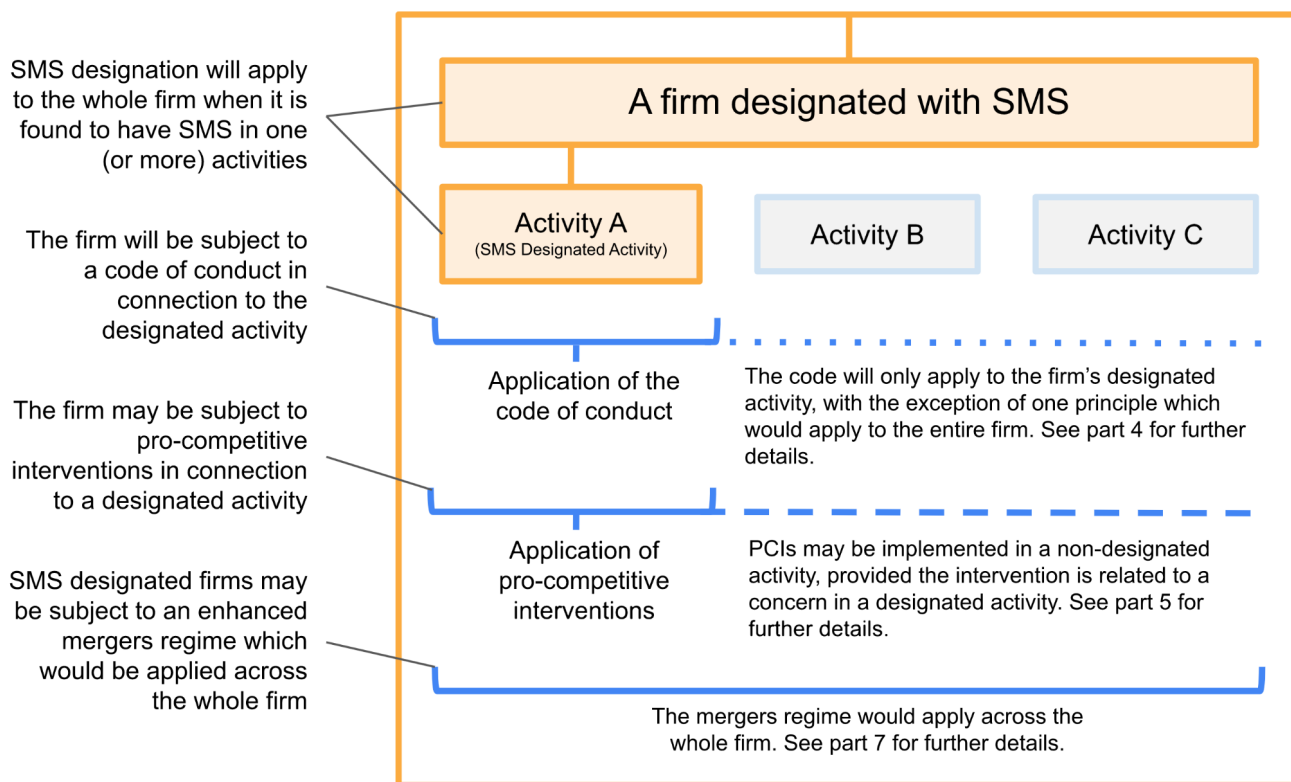
54. An alternative to this ‘activities’ focus would be for the Digital Markets Unit to formally define relevant markets, as occurs in Competition Act 1998 cases. Formal market definitions require setting boundaries to determine which products are ‘in’ and which products are ‘out’. In our view, requiring formal market definition is not necessary for a robust assessment of market power and would result in a less efficient designation process. For example, relevant evidence (such as internal documents) can be interpreted without formally defining a relevant market. Likewise, market shares can be interpreted without undertaking the formal step of settling on a single market definition.<sup>43</sup> The CMA’s market study into online platforms and digital advertising provided a robust assessment of market power in the digital advertising sector without formally defining markets.<sup>44</sup>

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<sup>43</sup> Ibid. See in particular paragraphs 33-34 for further discussion of the role of market definition.

<sup>44</sup> Competition and Markets Authority, 2020. [Online platforms and digital advertising market study](#).

**Figure 2: How the pro-competition regime applies to firms with SMS**



### *Activities in scope*

55. The purpose of the regime is to address competition concerns arising from the strategic position of a small number of key digital firms. The scope of the regime should therefore be designed so that it focuses on digital activities where competition concerns are most likely to arise. The scope must also be sufficiently flexible to allow the Digital Markets Unit to respond to new business models where competition concerns may arise in future.

56. Firms with strategic market positions tend to emerge in digital markets that have a combination of certain characteristics, including network effects, economies of scale and scope, and high fixed costs of market entry. To ensure that the regime is targeted and proportionate, our view is that the scope should be limited to activities where these characteristics are most likely to be present. However, we recognise that it is challenging to define the scope using abstract characteristics, such as network effects, which are themselves not easily definable or measurable.
57. The Digital Markets Taskforce proposed that the government should restrict the scope of the regime to “digital activities”. This would include any activity where digital technologies are “material to” the products or services provided as part of the activity.<sup>45</sup> Our view is that this could make the scope of the regime too broad and provide insufficient clarity for stakeholders. Although this approach would rule out activities with no digital component, we are concerned that it could conceivably leave in scope many activities with digital components that are not central to the main business model, but are nonetheless

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<sup>45</sup> Digital Markets Taskforce, 2020. [A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce.](#)

important to facilitating certain aspects of business operations. This might include airlines offering online booking for flights or companies that use websites to provide information about their services. It is not our intention for these activities to be in scope of the new pro-competition regime. Additionally, this definition could result in a significantly expanded scope for the regime as firms in different sectors of the economy continue to adopt digital technologies.

58. We have also considered narrowing the scope of the regime to “digital platform activities”. This term has been widely used to describe the activities of key digital firms.<sup>46</sup> However, we recognise that there is not yet a consistent, commonly accepted definition of “digital platforms”, and different products and services can therefore be characterised as platforms in different jurisdictions and environments. We see risks associated with narrowing the scope of the regime to “digital platform activities” as this could rule out circumstances where there are competition concerns that would best be addressed by this regime.

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<sup>46</sup> For example; the Digital Competition Expert Panel, 2019. [Unlocking digital competition: Report of the Digital Competition Expert Panel](#), Stigler Centre Committee on Digital Platforms, 2019. [Stigler Centre Committee on Digital Platforms: Final Report](#), Subcommittee on Antitrust Report, 2020. [Investigation of Competition in Digital Markets](#).

59. The government's preferred approach is to limit the scope of the regime to activities where digital technologies are a "core component" of the products and services provided as part of that activity. Our view is that this strikes a balance between flexibility and the need for the regime to be focused and proportionate. The requirement that digital technologies be "a core component of", rather than just "material to" the activity, would rule out of scope activities which have a digital component but are essentially non-digital, while preserving flexibility to respond to new digital business models where firms with SMS could emerge.

**Consultation question 7: What are the benefits and risks of limiting the scope to activities where digital technologies are a "core component"? What are the benefits and risks of adopting a narrower scope, for example "digital platform activities"?**

### **SMS criteria and test**

60. We propose that a firm must have substantial and entrenched market power in at least one activity<sup>47</sup> to be designated with SMS, and this market

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<sup>47</sup> As per discussion above, the type of activities that will be in scope of potential SMS designation assessment is to be determined.

power must provide the firm with a strategic position.

### *Substantial market power*

61. Substantial market power arises when users of a firm's product or service lack good alternatives to that product or service, and there is a limited threat of entry or expansion by other suppliers. This reduces incentives for innovation and may lead to harm to consumers by allowing firms to charge higher prices and offer lower quality services than if there were greater competition. Tackling the harms caused by market power and unlocking the benefits of competition are the primary motivations for the new regime, and substantial market power must therefore play a key role in SMS designation.
62. Including substantial market power as a necessary condition for designation also removes the risk that firms that face effective competition are brought within scope of the regime. Digital firms may have significant size or scale or have many business and consumer users, but that does not in itself indicate a competition problem.

### *Entrenched market power*

63. The potential to obtain a position of market power provides a strong incentive for firms to invest and innovate. The incentive to capture large market shares likely played a role in driving the disruptive innovations that have transformed digital sectors including ride-hailing, online marketplaces and social media. Applying the regime to address transitory instances of substantial market power would reduce this incentive, potentially resulting in a less dynamic digital sector.
64. However, there are significant concerns about instances in which market power has become entrenched – in other words, once a firm’s market power is expected to persist over time and is unlikely to be competed away in the short or medium-term. It is when market power becomes entrenched that the SMS regime is justified, as there is little prospect of competitive entry. In this circumstance it is likely that prices will be persistently higher and that quality, investment and innovation will be persistently lower.
65. Therefore, our view is that the designation of a firm with SMS should require a finding of both substantial *and* entrenched market power. In other words, an SMS firm’s position must be

established and unlikely to change in the foreseeable future.

### *Strategic position*

66. While substantial and entrenched market power should be necessary conditions for designation, our view is that they are not sufficient. To justify a firm's inclusion in the regime, we propose that a firm's substantial and entrenched market power must provide it with a "strategic position" – in other words, a position where the effects of its market power are likely to be particularly widespread or significant.
67. This will ensure the regime is proportionate. While any digital firm with substantial and entrenched market power has the potential to cause harm through exploitative or exclusionary conduct, in many cases existing competition tools will be a more proportionate way of addressing this than those of the new pro-competition regime. It would therefore be disproportionate to include all digital firms with substantial and entrenched market power in the regime.



68. Our view is that the Digital Markets Unit should take account of the following four criteria when assessing whether a firm has a strategic position:
- **Whether the firm has achieved very significant size or scale in an activity** – for example, where a product is regularly used by a very high proportion of the population or where the value of transactions facilitated by a product is large;
  - **Whether the firm is an important access point to consumers** (or, in other words, a gateway) for a diverse range of other businesses or the activity is an important input for a diverse range of other businesses;
  - **Whether the firm can use the activity to further entrench or protect its market power in that activity, or to extend its market power into a range of other activities; or**
  - **Whether the firm can use the activity to determine the ‘rules of the game’ for those users of the firm’s own ecosystem and also set practice for those businesses in the wider market.**<sup>48</sup>

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<sup>48</sup> The CMA’s online advertising market study highlighted potential examples of this criteria: the influence of Google’s ad server on the rules followed by other intermediaries in the advertising chain, such as rules CP 489

69. The Digital Markets Taskforce also proposed that in assessing whether a firm has a strategic position the Digital Markets Unit should consider whether an activity has significant impacts on markets that may have broader social or cultural importance. Our view is that, in assessing whether the effects of a firm's market power are likely to be particularly widespread or significant, the Digital Markets Unit should focus on the above four criteria, given its focus on competition.
70. We welcome input from stakeholders on whether the proposed criteria in paragraph 68 provide sufficient clarity on the circumstances that the Digital Markets Unit should consider when assessing whether a firm has a strategic position.

**Consultation question 8: What are the potential benefits and risks of our proposed SMS test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?**

### **The SMS designation assessment**

71. The Digital Markets Unit will be responsible for assessing if a firm meets the SMS test. It will use a range of qualitative and quantitative evidence to

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covering the sequencing by which different intermediaries receive information pre-auction; and requirements that publishers use specific mobile friendly formats to benefit from advantageous distribution via Google Search and Facebook's Social Media platforms.

ensure designation decisions are appropriate and justifiable. Such an approach is in line with approaches to assessment of market power used in existing competition law.

72. We have considered the alternative of a mechanistic approach to the SMS assessment based on quantitative thresholds for specified indicators like revenue. However, we are concerned that excessive focus on quantitative thresholds for specific indicators such as market share, revenue or number of users could lead to insufficiently nuanced designation assessments. While indicators of size, scale and market share are likely to be used as part of SMS designation assessments, they are unlikely to provide a complete picture. They could also result in overly burdensome processes, for example by requiring a formal market definition.

### *Assessing substantial and entrenched market power*

73. Market power assessments are a common feature of existing competition law. We propose that assessment of whether a firm has substantial and entrenched market power should closely follow the approach that the CMA takes in its market studies and investigations. For the relevant digital activity, the Digital Markets Unit would assess the

quality and range of alternatives available to users of products or services, and the possibilities for entry and expansion. The Digital Markets Unit would use a range of evidence for this assessment, including on competitive interactions between firms, customer switching and behaviour, shares of supply or market shares, and barriers to entry.

### *Assessing strategic position*

74. In making its assessment of a firm's strategic position, the Digital Markets Unit should consider whether the effects of a firm's market power in the relevant activity are likely to be particularly widespread or significant, taking account of the criteria set out in paragraph 68. The assessment should be evidence-based and consider the extent to which these criteria are met with respect to the relevant activity.
75. The precise relevance of each of these criteria will differ from case to case. In some cases a single criterion alone will be sufficient, while in others it may be necessary for a combination of criteria to be present in order to conclude that a firm has a strategic position. We propose that the Digital Markets Unit should assess the evidence "in the round" to come to a reasoned judgement on

whether a firm has a strategic position. We recognise the importance, however, of providing clarity as to how these criteria will be interpreted. The Digital Markets Unit should therefore be required to set out guidance on how it will assess each of the criteria.

76. We also recognise that the strategic position assessment needs to be sufficiently predictable for stakeholders. We therefore propose to set out in legislation the definition of “strategic position” and the criteria that the Digital Markets Unit should consider when undertaking strategic position assessments. We welcome views from stakeholders on whether this approach appropriately balances predictability and flexibility.

**Consultation question 9: How can we ensure the designation assessment provides sufficient flexibility, predictability, clarity and specificity? Do you agree that the strategic position criteria should be exhaustive and set out in legislation?**

**How SMS designation assessments will be prioritised**

77. The Digital Markets Unit will need to prioritise which cases to assess, exercising its discretion to focus on digital activities where there is the

highest risk of competition concerns and the strongest case for intervention. To ensure that it does so while providing clarity and transparency to stakeholders, we propose the Digital Markets Unit must have regard to the following factors when prioritising designation assessments:

- **A firm's revenue** – a firm's revenue provides an indication of the scale of harm that could result from a firm's market power, so is a useful proxy when prioritising designations. Prioritising based on a firm's revenue would also provide additional clarity to firms – particularly smaller digital firms – on whether they are likely to be assessed for designation. Prioritisation decisions could be based on a firm's UK or global revenue. We welcome views from stakeholders on which would be most appropriate.
- **The characteristics of the activity** – the Digital Markets Unit should prioritise designation assessments for activities where there are likely to be significant network effects, economies of scale and scope, and/or there are high fixed costs to entering the market. These are the activities most likely to tend towards concentration and entrenched

market power, and therefore where potential SMS firms could emerge and which are most likely to require the tools of the new regime.

- **Whether a sector regulator is better placed to address the issue of concern** – the Digital Markets Unit should deprioritise designation assessments for activities where an existing regulatory regime is better placed to address the harm.

### **Consultation question 10: What are the potential benefits and risks of the Digital Markets Unit prioritising SMS designation assessments based on the criteria in paragraph 77?**

#### **The SMS designation process**

78. The government's views on additional features of the SMS designation process are set out below:
- **Timelines** – the Taskforce proposed a statutory deadline for designation assessments of 12 months. We are considering whether this could be shortened (for example, to 9 months). We recognise that the statutory deadline will need to balance ensuring the robustness of the designation process with its efficiency and speed, and we

welcome views and evidence on the appropriate timescale.

- **Consultative process** – the Taskforce also proposed that the Digital Markets Unit should be required to publicly consult on an initial designation decision 9 months after beginning the designation assessment process, with the opportunity for the potential SMS firm and third parties to input, before a final decision is made. As above, our view is that this could potentially be shortened to 6 months. We welcome views and evidence from stakeholders on this proposal.
- **Application of SMS status** – we propose that SMS designation should apply to the whole corporate group forming the firm, not just to the part of the corporate group currently undertaking specific activity or activities assessed. This would ensure that firms are not able to circumvent remedies by moving activities to different parts of their corporate group. This does not imply, however, that the Digital Markets Unit would be able to apply remedies at its discretion across the whole corporate group. Remedies via the code of conduct and pro-competitive interventions



(PCIs) would be targeted to address competition concerns relating to the firm's designated activity or activities, and so would apply only in relation to those parts of the corporate group undertaking the activity or activities. Merger requirements would apply to all mergers undertaken by the SMS firm.

- **Length of designation** – SMS designation should last for 5 years before being reviewed. This reflects the finding that the firm has entrenched market power and that a threshold for establishing a period of stable regulatory intervention has been met. Our provisional view is that following the fixed designation period the Digital Markets Unit should have discretion to undertake a further SMS designation assessment. We welcome views from stakeholders on whether repeat assessments should be streamlined (e.g. subject to a 6-month statutory deadline).
- **Firm representations** - we propose that an SMS firm should be able to make representations to the Digital Markets Unit if there has been a material change in circumstance relating to its designated activity (or activities) meaning the SMS designation is

no longer appropriate. We propose that the Digital Markets Unit should have discretion as to whether to remove a firm's SMS designation before the end of the proposed fixed designation period, following representations from firms with SMS. To avoid public resources being unduly diverted into considering frequent requests, we propose that the Digital Markets Unit would not reconsider a request to review a designation within 12 months of declining a previous request. We welcome views from stakeholders on the design of the process for making representations.

- **Appeals** – the Digital Markets Unit's decisions on designation should be appealable to a court or tribunal. More detail on appeal processes can be found in Part 6.

**Consultation question 11: What are the benefits and risks of the proposed SMS designation process? What are the benefits and risks of a statutory deadline of 9 months for SMS designation?**

## Part 4: An enforceable code of conduct

### The case for a code of conduct

79. The Furman Review identified the need for a code of conduct to manage the effects of an SMS firm's market position relative to its users (e.g. the businesses and consumers that rely on the SMS firm's products and services). The Cairncross Review also recommended a code of conduct to address the ability of certain firms to impose terms on news publishers that limit the ability of those news publishers to monetise content.
80. Last year, the government accepted the case for an enforceable code of conduct for firms with SMS.<sup>49</sup> The code of conduct will manage the effects of market power by setting out how firms with SMS are expected to behave. It will offer clarity to both users and firms with SMS, aiming to influence the SMS firm's behaviour in advance to prevent negative outcomes before they occur.<sup>50</sup> The code would apply to the activity (or activities) that led to a firm being designated with SMS.
81. We propose that the code would consist of high-level objectives and principles that specify the

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<sup>49</sup> DCMS & BEIS, 2020. [Response to the CMA's market study into online platforms and digital advertising](#).

<sup>50</sup> In his [report on competition policy](#), John Penrose MP called for a code of conduct which gives smaller players and incumbents more certainty on the 'rules of the game'.

behaviour expected of firms to comply with the code. There are various options for implementing the principles, which are set out below. Under every option the code should be supported by firm-specific guidance that sets out how the principles should be applied within a specific business model (see figure 3 below).

## **Code objectives**

82. The aim of the code is to manage the effects of an SMS firm's market power. It should help to change behaviour by anticipating and preventing practices which exploit consumers and businesses or exclude innovative competitors, such as:
- **Entrenching and protecting market power** – where a firm uses contractual terms or its wider ecosystem of products to unreasonably restrict the ability of others to compete;
  - **Extending market power** – where a firm uses its position in its designated activity to unfairly extend its market power into related activities;
  - **Exploitative conduct** – for example, where a firm uses unfair or unreasonable contract terms; and

- **Unreasonably restricting customer choice**  
– for example, where a firm uses default settings unreasonably or provides insufficient information to enable informed and open decision making by users.

83. The objectives would set out the overarching aims and scope of the code. The three objectives proposed by the CMA (Fair Trading, Open Choices and Trust and Transparency), which we support, outline the types of pro-competitive behaviour the code would seek to promote:

- **Fair Trading** – users are treated fairly and are able to trade on reasonable commercial terms with firms with SMS. This aims to prevent exploitative conduct.
- **Open Choices** – users face no barriers to choosing freely and easily between services provided by firms with SMS and other firms. This aims to prevent exclusionary conduct, for example, the entrenchment, protection or extension of market power.
- **Trust and Transparency** – users have clear and relevant information to understand what services firms with SMS are providing, and to make informed decisions about how they

interact with the firm. This aims to promote informed and effective choices.

**Consultation question 12: Do these three objectives correctly identify the behaviours the code should address?**

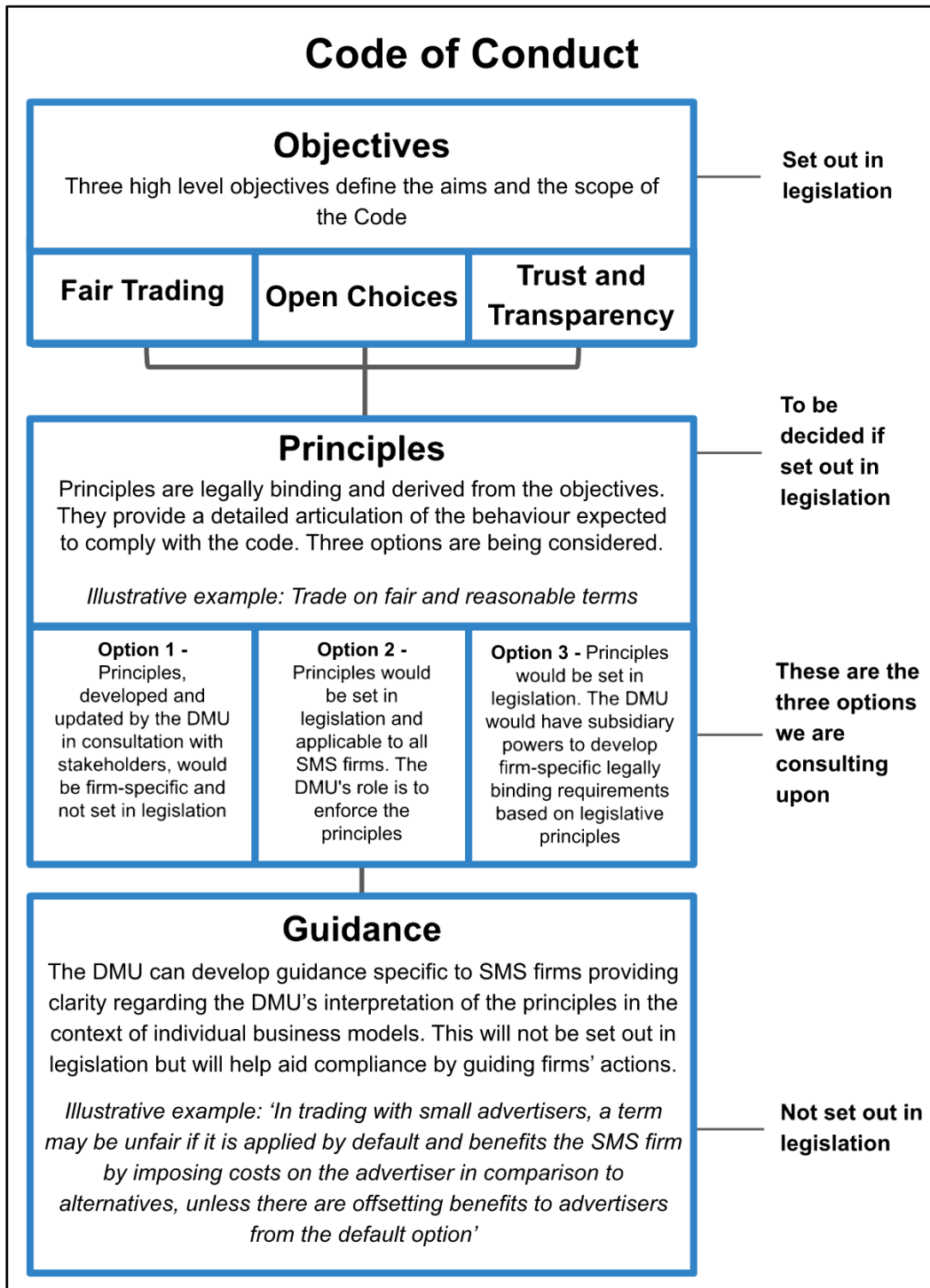
**Code principles**

84. The legally binding principles (illustrated in Figure 4 below) would be derived from the objectives and define the behaviour expected of firms with SMS to comply with the code.
85. The code's principles should be evidence-driven and targeted, preventing harmful behaviour without limiting positive or benign behaviour. They should also provide clarity and consistency, minimising complexity and burden on stakeholders. Moreover, they should be flexible and forward-looking in order to adapt to digital markets, which evolve rapidly over time, without dampening innovation.
86. The Taskforce proposed that the Digital Markets Unit should: (i) have the power to design, apply and update the code's principles; and (ii) be able to tailor code principles for each SMS activity. They proposed that each code's principles should be developed with stakeholder participation, as

part of the SMS designation process. The Digital Markets Unit would need to show that the proposed principles were effective and proportionate in meeting at least one of the objectives, and firms with SMS would be able to appeal the Digital Markets Unit's decisions on this basis.

87. This approach (Option 1) would allow legally binding obligations to be tailored to the SMS firm, recognising that behaviour which is harmful in some circumstances may be acceptable – or even desirable – in others. The principles could be adjusted to address the specific behaviour and harm associated with an SMS firm's individual activities. The principles could also be adapted by the Digital Markets Unit over time in response to shifts in the market. This will help ensure the code is effective and proportionate. However, this approach may lead to a greater number of more specific obligations on firms with SMS, with different requirements across different firms and activities.

**Figure 3: Overview of the proposed code of conduct**





88. A contrasting approach (Option 2) would be to specify, in primary legislation, a single set of high-level principles for all SMS-designated firms. This approach offers consistency and simplicity for stakeholders up front and has some parallels with the approach proposed for the EU's Digital Markets Act. The Digital Markets Unit's role would be to enforce the principles laid down by Parliament.
89. Under Option 2, there may be less clarity over whether and how each principle applies to an individual firm's business model. Updating legislation would be the only way to amend the code. Any updates to legislation would naturally take time, and there is a risk that firms with SMS could be subject to unnecessary requirements. In that situation, the Digital Markets Unit could exercise discretion in its enforcement and seek to mitigate uncertainty for firms through non-statutory guidance.
90. Finally, we could set high-level principles (as well as objectives) in legislation but, where appropriate, give the Digital Markets Unit powers to develop additional legally binding requirements in relation to those principles (Option 3) to the extent needed. Under this option, the subsidiary

requirements would be tailored to the harms specific to each SMS activity, making use of the evidence gathered during designation. In this model, the Digital Markets Unit would need to show that the legal requirements it develops are effective and proportionate in addressing one of the legislative principles. This option has some similarities to the approach taken by Germany in their recent amendment to their Competition Act. It would provide greater upfront clarity to firms which could be designated with SMS about what behaviour would be expected of them, while still allowing for more detailed aspects of code requirements tailored to different business models.

91. We believe this final option strikes the right balance between flexibility to take account of different business models and upfront clarity for firms with SMS.

### *Scope of the principles*

92. Digital firms can entrench, and take advantage of, their strategic position by creating an ‘ecosystem’ of accompanying products and services that expands into new markets and undermines their competitors. We recognise that leveraging is not inherently problematic or anticompetitive. A firm

that has a strong position in one market may present a healthy disruptive force to an adjacent market in which a different incumbent has market power. The Digital Markets Unit should not stand in the way of this disruptive entry.<sup>51</sup> The Digital Markets Unit should, however, be able to prevent a firm using its position in its designated activity to unfairly ‘tip’ competition in its favour to the long-term detriment of its users.

93. As well as preventing extension of market power from the designated activity to other activities, the code should also prevent actions taken elsewhere in the firm being used to further entrench the firm’s position in its designated activity.<sup>52</sup> To do this, we propose that while most principles would apply only to designated activities, one principle would apply to the entire firm. This principle would require the firm not to make changes to non-designated activities that might further entrench the firm’s position in its designated activity/activities, unless that change can be shown to deliver significant benefits. The scope of these principles, which could apply under option 2 or option 3, is illustrated in Figure 4 below.

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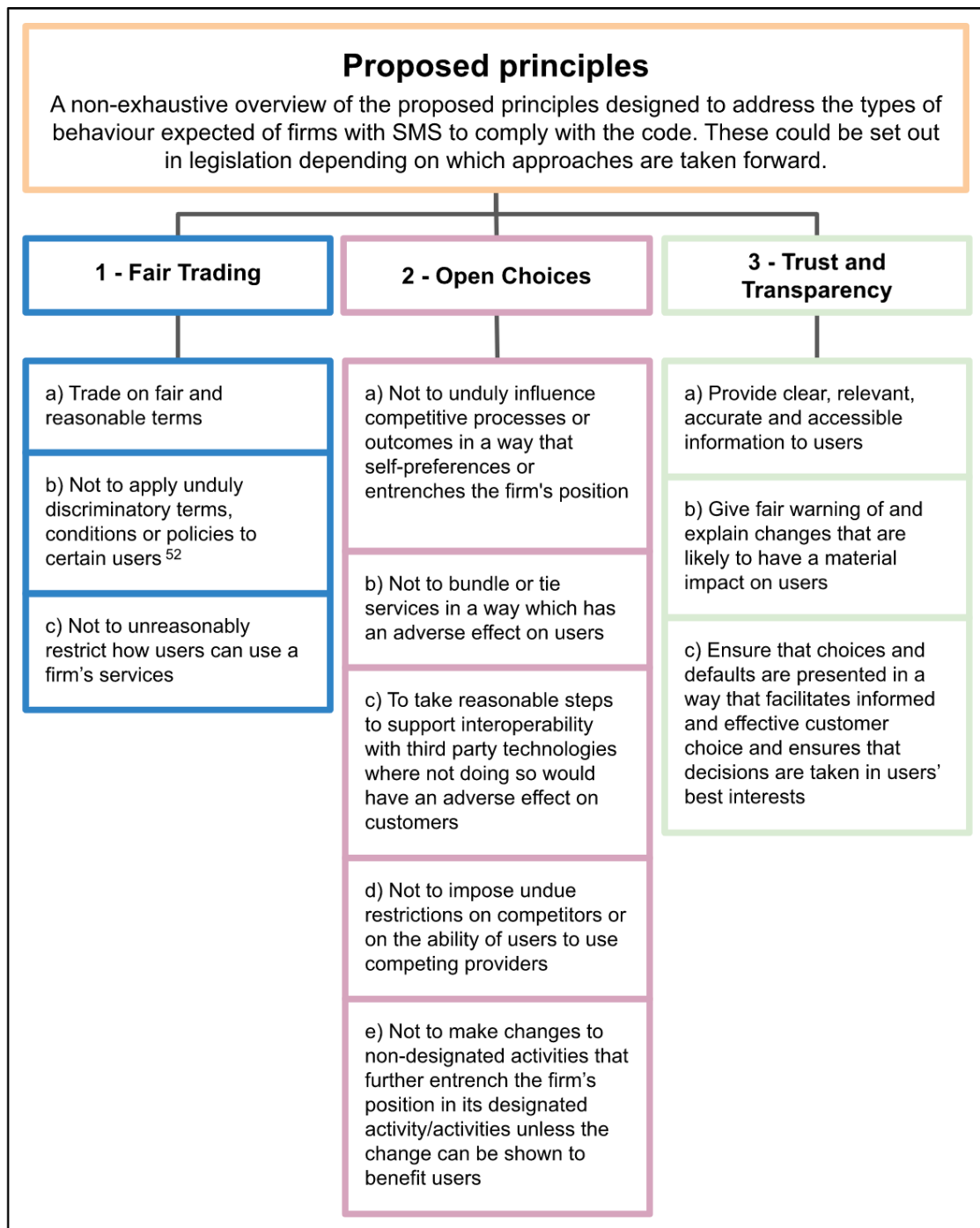
<sup>51</sup> Such as deterring an SMS firm from introducing a new product which would act as a disruptive entrant in an area outside of its designated activity.

<sup>52</sup> For example, where an SMS firm removes interoperability with an important complementary product which enables competitors to compete with the firm’s designated activity.

**Consultation question 13: Which of the above options for the form of the code would best achieve the objectives of the pro-competition regime, particularly in terms of flexibility, certainty and proportionality? Why?**

**Consultation question 14: What are your views on the proposal to apply principle 2(e) (see Figure 4 below) to the entire firm? Should any explicit checks and balances be considered?**

**Figure 4: Proposed principles<sup>5354</sup>**



<sup>53</sup> This conduct has been identified on the basis of the CMA's [Online Platforms and Digital Advertising market study](#) and legislative proposals in other countries.

<sup>54</sup> For the purposes of this consultation, a user is a person who uses a particular product. This includes both consumers and business users.

## *Developing and updating the code*

94. If the Digital Markets Unit were to have the power to develop or tailor the code's legal requirements, it would gather the evidence required to do so during the SMS designation process.
95. Occasionally it may be necessary to update the code's requirements between designations, to reflect technological or market developments and to address instances where the code's current scope is unable to, or no longer needs to, address a particular issue. If, as we propose (under Option 3), the Digital Markets Unit has the power to update the code's legal requirements itself, the Digital Markets Unit should be required to consult with stakeholders before updating the code. Due to the fast-moving nature of digital markets, if the code's principles were set out in legislation (Option 2 and 3) we consider that it would be necessary to include a power in legislation allowing amendment of the principles through secondary legislation so that they do not become out-dated over time.

## **Code guidance**

96. We propose that the Digital Markets Unit should have the ability to develop guidance specific to

firms with SMS, to outline its view on how the code's legal requirements apply to that firm. The guidance could include specific instances of behaviour that may breach the code, in order to clarify what is expected of the SMS firm.

97. The guidance should aid compliance but would not be legally binding and cannot require the firm to change its behaviour.

### **Case study: Press Sustainability**

The code will support the sustainability of the news publishing industry, helping to rebalance the relationship between publishers and the online platforms on which they increasingly rely.

Fair and competitive digital markets are an important part of the government's strategy on press sustainability. In 2019, the Cairncross Review concluded that online platforms (particularly Google and Facebook) are able to impose unfair terms on publishers, which limits publishers' ability to monetise their content and threatens the sustainability of the press.

The central recommendation from Cairncross was for new government regulation of digital markets, specifically designed to rebalance the relationship

between key platforms and the news publishers that rely on them. This was confirmed by the CMA in their market study into digital advertising, which found that greater competition and transparency in these markets could address the bargaining power of platforms and so make an important contribution to the sustainability of the press.

The government accepted the rationale for intervention in our response to the Cairncross report in early 2020. We confirmed in our response to the CMA Market Study that the enforceable code would govern the relationships between online platforms and news publishers.

We have asked the non-statutory Digital Markets Unit to work with Ofcom to look specifically at how a code would govern the relationships between platforms and content providers such as news publishers, including to ensure they are as fair and reasonable as possible. This will provide clarity and maximise operational readiness of the Digital Markets Unit in time for the implementation of legislation.

**Consultation question 15: How far will the proposed regime address the unbalanced relationship between key platforms and news**



**publishers as identified in the Cairncross Review and by the CMA? Are any further remedies needed in addition to it?**

## **Code orders**

98. Given the fast-moving nature of digital markets and the speed at which harm can occur, we propose to give the Digital Markets Unit the power to issue both code orders and interim code orders to address breaches of the code, where appropriate and proportionate.
99. Code orders would specify behaviour changes required of firms with SMS to comply with the code, following an investigation and finding of a code breach. As set out in the Taskforce advice, this could include requiring suspension, total cessation or reversing of harmful behaviour. A code order could also specify the steps necessary to resolve the breach; for example, to continue to provide a customer with access to an Application Programming Interface (API), or to change the availability to different customer groups of an API to address concerns about discrimination between users. We are inclined to impose a statutory deadline for code breach investigations and will consider the appropriate length, taking into

account the Taskforce's proposal of a 6-month deadline.

100. Interim code orders would allow the Digital Markets Unit to intervene before irreversible change occurs and ensure that options to restore competitive conditions are maintained.<sup>55</sup> Interim code orders could be introduced more quickly than code orders, to address potential code breaches that may cause immediate harm, but would be restricted to pausing or reversing behaviour only. Our view is that the Digital Markets Unit should have the power to introduce interim code orders when:
- It has reason to suspect that the code may be being breached; and
  - It is appropriate for it to act on an interim basis:
    - i. To prevent significant damage to a particular person or category of person(s);
    - ii. To prevent action which might limit or mitigate the effectiveness of remedial measures in light of subsequent enforcement action; or,

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<sup>55</sup> There is increasing international recognition of the importance of interim measures in digital markets, demonstrated by their inclusion within the European Commission's proposed [Digital Markets Act](#) and the recent reduction in the threshold for the use of [interim measures by the Bundeskartellamt](#) in Germany.  
CP 489

iii. To protect the public interest.

101. The Digital Markets Unit will need powers to enforce the code, including code orders and addressing instances of non-compliance. The powers proposed are described in more detail in Part 6.

**Consultation question 16: How can we ensure the appropriate use of interim code orders?**

## Part 5: Pro-competitive interventions

### The rationale for PCIs

102. Pro-competitive interventions (PCIs) are measures which aim to open up markets to greater competition. They are designed to address the root causes of substantial and entrenched market power in digital markets. Used effectively, they will encourage dynamic, pro-competitive change in digital markets, and create opportunities for innovation and economic growth. In our response to the CMA's market study into online platforms and digital advertising, the government agreed in principle to giving the Digital Markets Unit the powers to implement PCIs.<sup>56</sup>
103. In Part 1, we set out the combination of characteristics that can undermine effective competition in digital markets and lead to poor outcomes for consumers and society. While many of these features are not problematic in and of themselves, together they can act as barriers to entry or expansion in digital markets, preventing

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<sup>56</sup> DCMS & BEIS, 2020. [Response to the CMA's market study into online platforms and digital advertising](#). CP 489

new entrants from bringing innovations to market.<sup>57</sup>

104. The Digital Markets Unit will need the power to implement PCIs, following a targeted, evidence-driven investigation, to tackle the sources and effects of an SMS firm's market power.<sup>58</sup> This could include measures to overcome network effects and barriers to entry/expansion through mandating interoperability, third-party access to data or certain separation measures. It could also include measures that increase consumer control over data. These measures have the potential to fundamentally shift the structure of digital markets, by addressing the unique characteristics in these markets that lead to weak competition.

*The need for both pro-competitive interventions and the code*

105. PCIs are required alongside the code of conduct to meet the government's growth and innovation objectives. The enforceable code of conduct will seek to prevent the harms that may result from the strategic market position of firms with SMS, by setting out the 'rules of the game' in advance.

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<sup>57</sup> See the 'Market characteristics' subsection of the 'Problem under consideration and rationale for intervention' section of the accompanying Impact Assessment for more detail.

<sup>58</sup> In his [report on competition policy](#), John Penrose MP recommended using pro-competitive interventions to address the root cause of poor competition.

PCIs will, by contrast, enable the Digital Markets Unit to implement measures that address the root causes of a firm's substantial and entrenched market power. These measures have the potential to positively shift the structure of digital markets and drive greater competition.

106. For example, as currently envisaged the code would allow corrective action against an SMS firm which suddenly restricts a third party's access to key data, but could not be used to proactively require significant new interoperability to be introduced. Equally, the code could require that an SMS firm does not unduly self-preference its own services, but a PCI would be required if a functional separation remedy was considered necessary to remove the underlying incentive for such preferencing.

*The need for PCIs as part of the new ex ante regime*

107. The CMA already has the powers to implement interventions that drive up competition through the market investigation process,<sup>59</sup> which is well-established and respected internationally.<sup>60</sup> However, these existing tools are designed for

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<sup>59</sup> [Enterprise Act 2002](#), Part 4.

<sup>60</sup> A market investigation is an in-depth investigation led by the CMA, which can result in structural or behavioural remedies being imposed to address competition problems in a market. It can be launched where the referring body (the CMA or concurrent regulators) finds reasonable grounds to suspect that any feature, or combination of features, of the market under scrutiny prevents, restricts or distorts competition.

one-off interventions and are not well suited to tackling entrenched market power in digital markets, where the market characteristics mean that competition problems are expected to persist over time and require ongoing and proactive oversight.

108. In contrast to the existing market investigation process, we propose that the Digital Markets Unit should have the flexibility to implement remedies in an incremental, proportionate and coherent way. For example, the Digital Markets Unit would start by making smaller interventions and considering their effectiveness before implementing more interventionist remedies where needed to address an adverse effect on competition. Subject to the appropriate procedural safeguards, the Digital Markets Unit would then monitor, review and amend remedies to ensure they remain fit for purpose over time.
109. In addition, PCIs would be focused on investigating a competition concern in relation to a designated activity through a firm-specific lens. In contrast to the market investigation process, the DMU would already have a detailed understanding of the activities for which a firm has been designated with SMS. This would provide it

with a more developed knowledge base when beginning a PCI investigation. As well as offering a swifter and more targeted process, this approach would enable the Digital Markets Unit to address concerns associated with ecosystems which span multiple markets, across which an SMS firm can leverage its market power.

110. Finally, the Digital Markets Unit would use its dedicated expertise and resources when designing PCIs. The Digital Markets Unit would engage stakeholders and consider decisions on PCIs in a coherent way alongside other regulatory activity, including the code.

## **The design and application of PCIs**

### *Range of PCI remedies available to the Digital Markets Unit*

111. The Digital Markets Unit should have a broad level of discretion in designing and implementing PCIs. This would ensure that it can implement the most effective remedy to address the harm identified, provided it is proportionate and practicable. It would also enable the Digital Markets Unit to respond quickly to harms in new and evolving digital markets and technologies. We propose that the Digital Markets Unit is granted a



similar level of discretion to implement a wide range of competition remedies as the wider CMA has following a market investigation.<sup>61</sup> We have not yet formed a view on whether certain interventions, including ownership separation, should be excluded from the Digital Markets Unit's toolkit.

112. Under this “broad discretion” model, the Digital Markets Unit should provide general guidance on the types of PCIs it may consider, and the circumstances in which they would be used. There will need to be a fair and robust process in place to ensure that remedies are evidence-based, targeted, proportionate, and subject to appropriate legal safeguards. These safeguards are set out in the Procedural Fairness section of Part 6: Regulatory Framework.
113. An alternative approach would be to constrain the Digital Markets Unit to a specific list of remedies in legislation, with the option to add to this list via secondary legislation. This approach was rejected by the Taskforce and, in our view, does not take account of the breadth of digital markets and the pace at which they evolve. Constraining the Digital Markets Unit to a narrow list of specific

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<sup>61</sup> Orders made by the CMA under Section 161 of the [Enterprise Act 2002](#) to remedy an adverse effect on competition may contain anything permitted by Schedule 8 to the Act.

remedies in legislation, in contrast to the broad range covered under existing CMA powers following a market investigation,<sup>62</sup> would compromise its agility and ability to act as best suited to the individual case, and its toolkit could quickly become out of date.

114. In its advice, the Taskforce suggested that the Digital Markets Unit should not be empowered to impose ownership separation (including any divestment or transfer of assets or technology), recommending that this power should be reserved for the CMA following a market investigation reference. We welcome views on whether this remedy or any others should be excluded from the Digital Markets Unit's toolkit.

### *Legal test*

115. We propose that the Digital Markets Unit must prove that there exists an adverse effect on competition ("AEC") in order to implement a PCI. This is in line with the legal test in the existing market investigation regime.<sup>63</sup>
116. The Taskforce recommended adding "consumers" to the AEC test to create an AECC test and enable the Digital Markets Unit to address

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<sup>62</sup> [Enterprise Act 2002](#), Schedule 8.

<sup>63</sup> Section 134 of the [Enterprise Act 2002](#) sets out the questions to be answered on market investigation references.

consumer harm without always needing to show that competition has been undermined. Our view is that the existing “AEC” test can and should already be interpreted broadly to encompass harms to consumers, albeit through a competition lens. This should allow the Digital Markets Unit to intervene to give consumers more choice and control over their data, and to pursue competitive outcomes for the benefits of consumers. The existing test is therefore consistent with the Digital Markets Unit’s objective of furthering consumer interests by promoting competition.

**Consultation question 17: What range of PCI remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?**

**Consultation question 18: To what extent is the adverse effect on competition (“AEC”) test for a PCI investigation sufficient for the Digital Markets Unit to achieve its objectives?**

### *Flexibility*

117. The Digital Markets Unit will need to ensure that interventions remain effective in addressing persistent and evolving competition problems within firms with SMS. PCIs will need to be agile

and flexible to keep pace with fast-moving and dynamic digital markets.<sup>64</sup>

118. We therefore propose to empower the Digital Markets Unit to:

- **Monitor, review and amend PCI remedies** – this would ensure that they are as effective as possible in meeting their intended objectives. PCI remedies should be open to review on the grounds that they are ineffective, or no longer proportionate, in addition to a change in circumstances.<sup>65</sup> The Digital Markets Unit could initiate a review itself, or a review might be requested by the SMS firm or affected third parties. PCI enforcement orders should also apply for a fixed period, determined by the Digital Markets Unit, at the end of which they should be reviewed and either remain or be removed or modified. This fixed period would ensure that, in the event no earlier review is initiated, remedies still remain up-to-date and proportionate as markets evolve over time.
- **Strengthen remedies**, as well as de-escalate or terminate them. This would encourage a

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<sup>64</sup> We are consulting separately on reforms to the markets regime to encourage greater use of the CMA's market study and investigation powers. While these reforms may help address some of the aspects around speed and flexibility referenced above, we believe that the best outcomes will be delivered by the Digital Markets Unit employing an agile PCI tool as part of the pro-competition regime.

<sup>65</sup> In the existing markets regime, the CMA must consider whether 'by reason of any change in circumstances' an enforcement order is no longer appropriate or needs to be varied or revoked (section 162).

considered and proportionate approach to interventions, by providing the option to first implement less significant measures with the potential to adjust following ongoing monitoring and review.

- **Trial remedies** prior to implementing a final PCI order. This would ensure evidence-based intervention and would be an important part of testing effectiveness, particularly for remedies where success is dependent on consumer behaviour.
- **Accept voluntary, enforceable undertakings** from firms with SMS during the course of an investigation. This reflects our proposed participative approach to resolving concerns set out in Part 6, and may lead to swifter action to address issues.
- **Use powers of direction to enforce the PCIs**, similar to those given by the CMA in the Enterprise Act 2002<sup>66</sup> and Ofcom in the Communications Act 2003.<sup>67</sup> Powers of direction would allow the Digital Markets Unit to direct firms with SMS to take or refrain from

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<sup>66</sup> [Enterprise Act 2002](#), Section 87.

<sup>67</sup> Section 45 of the [Communications Act 2003](#) outlines the power of Ofcom to set conditions as part of the Strategic Market Power (SMP) regime.

specified actions in order to ensure compliance with PCI orders.

119. This flexibility will not come at the expense of appropriate procedural safeguards, which should be in place to ensure the process is fair and robust. Any trials, undertakings, and amendments would be subject to due process as set out in Part 6.

### *Prompt intervention*

120. The Digital Markets Unit will need to react swiftly to competition concerns in digital markets in which market power can quickly become further entrenched. Since an in-depth market investigation in the existing competition regime can be completed to a high standard within 18 months, and the Digital Markets Unit will have developed expertise during the SMS designation process and oversight of the code of conduct, a PCI investigation into a single firm should be achievable in a shorter time frame.
121. The Taskforce has proposed a 12-month statutory deadline for a PCI investigation. We agree that there should be a statutory deadline, which must balance the requirement for robust and evidence-based decision making and the need to address competition concerns swiftly. We are seeking

views on the appropriate duration of the investigation period in this consultation, including whether a shorter deadline (for example, 9 months, with an optional 3-month extension for particularly complex remedies) could be appropriate.

122. A statutory deadline would apply to the investigation only, and not to the trialling or implementation of any remedies after the final decision. Since PCI remedies will be very different from each other, and many are likely to be complex and require close work with firms with SMS, we do not believe fixed statutory timelines for implementation are appropriate.

### *Targeted intervention*

123. Digital firms can entrench, and take advantage of, their strategic position by creating an ‘ecosystem’ of accompanying products and services that expands into new markets and undermines their competitors. In cases where leveraging does result in anticompetitive effects, the Digital Markets Unit will need the power to implement a PCI outside of the designated activity to address the extension or further entrenchment of market power. Therefore, the Digital Markets Unit should be able to implement PCIs anywhere within an

SMS firm, providing the intervention is related to a concern in a designated activity. For example, if an SMS firm operates a voice assistant which, by default, directs consumers to the firm's designated activity (for example an online marketplace), this is likely to reinforce the firm's market power in its designated activity.<sup>68</sup>

**Consultation question 19: What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity, in the circumstances described above?**

**Consultation question 20: How appropriate are the proposed flexibility mechanisms set out above? Are there any associated risks?**

**Consultation question 21: What is an appropriate statutory deadline for a PCI investigation?**

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<sup>68</sup> Digital Markets Taskforce, 2020. [A new pro-competition regime for digital markets, Advice of the Digital Markets Taskforce: Annex D.](#)  
CP 489



## Part 6: Regulatory framework

### Enforcement mechanisms

124. The Digital Markets Unit should ensure that firms with SMS comply with the regime by combining a participative approach with the use of formal powers.
125. Through a participative approach, the Digital Markets Unit will engage constructively with all affected parties, resolving issues through advice and informal engagement. This will often achieve a fast and effective resolution and avoid unnecessary regulatory burdens associated with formal enforcement. This approach is taken by several domestic regulators, including Ofcom, the Groceries Code Adjudicator, and the Payment Systems Regulator.
126. However, in some cases, an investigation combined with formal enforcement tools may be the most appropriate way to resolve a concern, and may also give rise to a greater compliance and deterrent effect. We intend to give the Digital Markets Unit discretion to decide when it is appropriate to rely on a participative approach, and when to open a formal investigation. The Digital Markets Unit should publish general

guidance which sets out its approach to investigating compliance and to enforcement of regulatory requirements.<sup>69</sup>

### *Financial penalties*

127. The Digital Markets Unit will need to be able to impose penalties for code breaches and failure to comply with code or PCI orders. To act as an effective deterrent, such penalties should be substantial and commensurate with fines available in antitrust cases and in other regulatory regimes.<sup>70</sup> We propose that penalties must be of an amount that the Digital Markets Unit considers to be appropriate and proportionate to the harm caused by the breach or failure to which the penalty relates. However, we also propose to place a statutory cap on financial penalties for a breach at a maximum of 10% of an undertaking's worldwide turnover from the previous year. We intend to require the Digital Markets Unit to publish general guidelines setting out how it will determine the level of penalties it may be minded to impose.<sup>71</sup>

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<sup>69</sup> For example, see Ofcom's [Enforcement Guidelines](#) for regulatory investigations.

<sup>70</sup> In his [report on competition policy](#), John Penrose MP called for penalties for non-compliance to be strengthened and brought into line with international norms.

<sup>71</sup> For example, see [Ofcom's penalty guidelines](#).

## *Further enforcement mechanisms*

128. To incentivise compliance, we are considering a number of additional enforcement mechanisms, including:

- **Court orders** – the Taskforce recommended that the Digital Markets Unit 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 or a PCI. Failure to do so would place a firm in contempt of court. We note that this is in line with the CMA’s powers under the Competition Act 1998 and the Enterprise Act 2002, which enable the CMA to enforce directions or orders through civil proceedings.<sup>72</sup>
- **Senior management liability** – the Taskforce recommended that firms with SMS should be required to identify appropriate individuals to take responsibility for compliance. We are considering whether enabling the Digital Markets Unit to hold senior managers liable for compliance with the regime would help incentivise compliance. We note that various forms of senior management liability are

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<sup>72</sup> For example, Section 34 of the [Competition Act 1998](#) and Sections 94(6) and 167(6) of the [Enterprise Act 2002](#).

available to regulators in other regimes, in particular for information request breaches. The CMA can currently apply to the court to disqualify a person from holding company directorships, if a company of which he or she is a director has breached competition law.<sup>73</sup>

### *International enforcement*

129. Firms with SMS will often operate across many jurisdictions and not be domiciled or have any significant physical presence within the UK. As such, key decisions that affect UK markets and consumers may be made, at least in part, overseas. Similarly, stakeholders who may be impacted or have relevant evidence may be based outside the UK. We consider it is essential that the Digital Markets Unit is able to require provision of information stored overseas as well as to investigate and enforce against conduct occurring overseas where there is sufficient connection to the UK. We intend to legislate to facilitate this.
130. As other countries introduce legislation to increase competition across digital markets, international cooperation will become an

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<sup>73</sup> And where the court considers that the person's conduct as a director makes them unfit to be concerned in the management of a company. See section 9A(1) to (3) of the Company Directors Disqualification Act 1986. CP 489

increasingly important and effective tool for the Digital Markets Unit. The government expects the Digital Markets Unit to work with equivalent organisations internationally to help foster collaboration and effective outcomes.

**Consultation question 22: What powers and mechanisms does the Digital Markets Unit need in order to most effectively investigate and enforce against conduct occurring both domestically and overseas?**

### **Monitoring and information gathering**

131. The Digital Markets Unit will investigate issues that are complex and where evidence may not be publicly available. It will need access to the necessary information to prioritise and carry out future SMS designation assessments, as well as to monitor compliance with and investigate potential breaches of the legal requirements. Furthermore, the Digital Markets Unit may need to collect evidence before deciding whether a particular practice or behaviour is or is not likely to be harmful and if so, which tool will be most suited to address it.
132. This means it will need to draw information from a wide range of sources, including firms which have

not been designated with SMS. We are therefore minded to give the Digital Markets Unit the powers necessary for it to gather the information it needs to make effective, evidence-based decisions.

133. We propose that the Digital Markets Unit's information-gathering powers should be similar to those available to Ofcom and the CMA. Specifically, the Taskforce advised that these powers should include the ability to:

- Require the production of information,<sup>74</sup> such as data, internal documents and written explanations;
- Require attendance of persons to answer questions through interviews;<sup>75</sup>
- Inspect and search premises for information available from the premises;<sup>76</sup> and
- Compel evidence collection,<sup>77</sup> requiring firms to collect, create and store information, such as A/B testing<sup>78</sup> results, 'version control' for

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<sup>74</sup> See for example, s26 of the Competition Act 1998 and s135 of the Communications Act 2003

<sup>75</sup> See for example, s26A of the Competition Act 1998

<sup>76</sup> See for example, s27-28A of the Competition Act 1998

<sup>77</sup> See for example, s137A Communications Act 2003

<sup>78</sup> A/B testing is an experiment whereby alternative versions of a website or application are presented to users to assess their impact on decision making.

algorithms and information in relation to their conduct.

134. The use of information-gathering powers will need to be proportionate, targeted and subject to procedural safeguards. The Digital Markets Unit should use its statutory information-gathering powers only to the extent necessary to carry out its functions effectively, and should be required to state the purpose of all statutory information requests.
135. Given the importance of information-gathering powers to the Digital Markets Unit's ability to exercise its functions, we intend to legislate to give the Digital Markets Unit the ability to impose penalties for non-compliance with requests for information. We propose to give the Digital Markets Unit the power to impose:
- A penalty for the failure to provide complete information capped at 1% of the undertaking's worldwide turnover in the preceding financial year; and
  - A daily penalty for continuing failures to provide information capped at 5% of the average daily worldwide turnover, calculated on a daily basis from the date the Digital

Markets Unit puts the addressee on notice of its intention to impose such penalties.

136. The above maximum levels of penalty are consistent with those in the European Commission's proposed Digital Markets Act.<sup>79</sup> These will represent a maximum level of penalty. It may not be appropriate for the Digital Markets Unit to impose a penalty in all cases of non-compliance, and the level of any penalty the Digital Markets Unit does impose will need to be proportionate.

### **Consultation question 23: What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?**

#### **Procedural fairness**

137. In order to be effective, it is essential that the pro-competition regime provides proportionality, accountability and transparency.

#### *Proportionality*

138. The government is committed to ensuring that interventions strike the right balance between promoting competition and innovation, and minimising burdens on business. This principle is embedded in the scope of the regime: the Digital

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<sup>79</sup> Articles 26 and 27 of the European Commission's [proposed Digital Markets Act](#).



Markets Unit will only be able to designate firms with SMS if they meet clearly defined criteria, and codes and PCIs will be targeted at activities in respect of which designations have been made.

139. In addition, we will require the Digital Markets Unit to ensure that all of the specific requirements in its codes and PCIs are objective, proportionate and evidence-based. The requirement to act in a proportionate manner will ensure that the Digital Markets Unit's interventions are no more intrusive than is necessary to achieve the desired outcome.
140. We are considering empowering the Digital Markets Unit to monitor, review and update its codes and any PCIs it imposes over time. This would ensure that the regime remains proportionate and responsive to rapidly evolving digital markets.

### *Accountability and transparency*

141. It is important that the Digital Markets Unit is accountable for its decisions, and that its decision-making processes are facilitated by a model which ensures clarity and consistency of decisions. We will work with the CMA to ensure that the Digital Markets Unit's decision-making processes are fit for the demands of its functions. We also intend to require the Digital Markets Unit

to explain its decision-making processes in published guidance, to provide clarity and consistency to stakeholders.

142. Public and external scrutiny are important ways to hold the Digital Markets Unit to account for its decisions. To enable this scrutiny, we will require the Digital Markets Unit to be transparent in its decision making, including by notifying stakeholders of the opening of cases, and publishing reasoned final decisions, redacted as appropriate. Furthermore, we will require the Digital Markets Unit to consult stakeholders on all key regulatory decisions, publish any formal consultation responses and explain how it has taken account of submissions in its final decisions.
143. Where an SMS firm alters its behaviour following informal engagement with the Digital Markets Unit, the Digital Markets Unit should be open and transparent about its engagement. Where appropriate, the Digital Markets Unit should publish details of the steps that the SMS firm has taken to address the concerns, to explain why there is no need for further action. However, we would not expect any informal action to involve

the Digital Markets Unit deciding whether the code or order was breached.

144. In addition to the safeguards outlined above, parties will have the right to appeal the Digital Markets Unit's decisions. Further information is provided below.

**Consultation question 24: Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?**

## **Appeals**

### *Standard of review*

145. The government is committed to ensuring the Digital Markets Unit takes appropriate account of submissions and evidence from stakeholders. The rights of appeal against the Digital Markets Unit's decisions will also constitute a critical part of a fair procedure. The opportunity to challenge the Digital Markets Unit's decisions before an independent court or tribunal will give businesses confidence that decisions will face an appropriate level of scrutiny and were taken via a fair process and on a proper interpretation of the law.

146. In particular, the government believes that the scrutiny and powers exercised by the courts should ensure that:
- The appeals framework respects the rights of businesses and provides effective oversight of the decision-making process;
  - The courts provide robust quality assurance of the Digital Markets Unit's judgement and discretion in the exercise of its powers and objectives;
  - The courts give appropriate deference to an expert regulator's decisions on matters of technical judgment and specialist expertise; and
  - The pro-competition regime, as applied to firms with SMS, functions efficiently, minimising delays to the final resolution of cases and ultimately tackling harms arising from a lack of competition in digital markets.
147. The Taskforce advice set out that the Digital Markets Unit's decisions should be judicially reviewable on ordinary judicial review principles. Judicial review generally involves a court reviewing a decision of a public body to determine whether that decision was lawful. The focus of the

appeal is whether the public body has acted within its powers, applied proper reasoning, and followed due process in coming to its decision, rather than the appeal body re-hearing the case afresh.

148. The rationale for this proposal was that it would allow for a more focused appeal process, resulting in a more streamlined approach, and support delivery of robust outcomes at pace. The advice highlighted that application of judicial review standards by courts and specialist tribunals provides detailed scrutiny of decisions whilst allowing the administrative body an appropriate level of discretion for an expert regulator.
149. This approach would be consistent with approaches taken in other *ex ante* regimes,<sup>80</sup> and in the merger control and market investigation regimes,<sup>81</sup> through which remedies can be implemented that are comparable to those proposed for the new pro-competition regime.
150. The government recognises that as a specialist regulator, the DMU will need discretion to

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<sup>80</sup> For instance, regulatory decisions made under the SMP regime by Ofcom are subject to judicial review (see s192 and s194A Communications Act 2003), although the merits may also be taken into account in certain cases.

<sup>81</sup> Sections 120(4) and 179(4) respectively of the [Enterprise Act 2002](#). Both sections provide that in determining an application for review of a decision under the relevant regime, “the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review”.

exercise its expertise and judgement to shape the new digital markets regime. It must be able to act quickly to provide certainty and keep pace with changes in digital markets. However, it is also important that the Digital Markets Unit's decisions are subject to an appropriate level of judicial scrutiny.

151. We are therefore minded to agree with the Taskforce that it would be appropriate for the Digital Markets Unit's decisions to be reviewable on judicial review principles. We consider that a judicial review standard of appeal would ensure appropriate deference is given to the Digital Markets Unit's position as an expert regulator, as well as ensuring appeal processes are as agile as possible. It is also the approach most commonly applied in relation to regulatory decisions.
152. In some circumstances, it may be appropriate or necessary for the courts to go further than merely reviewing the legality, reasonableness, or fairness of the process for a decision taken by the Digital Markets Unit.<sup>82</sup> This is likely to be the case in appeals against decisions to impose significant financial penalties, such as those proposed as part of the new regime. In these circumstances,

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<sup>82</sup> In particular, to ensure compliance with the right to a fair trial under [Article 6 of the European Convention on Human Rights](#).

the court would be able to take into account the merits of the case in question and quash the Digital Markets Unit's decision on questions of fact and law.

153. The government has not yet reached a firm view on the appropriate appeals standard for the full range of the Digital Markets Unit's decisions and would welcome views on the appeal standard which would be most effective to ensure a balance of accountability, agility and effectiveness.

**Consultation question 25: What standard of review should apply to appeals of the Digital Markets Unit's decisions?**

*Appeal forum*

154. We consider that the Competition Appeal Tribunal would be an appropriate forum for appeals of the Digital Markets Unit decisions. The Competition Appeal Tribunal is a specialist judicial body with a track record of active case management and cross-disciplinary expertise in law, economics and business. It is therefore well placed to carry out robust consideration of complex issues at pace to provide certainty to the regime and its wider participants. We consider that this is crucial for

ensuring predictability and continued investment and innovation in the UK.

### *Non-suspensory appeals*

155. Appeals of the Digital Markets Unit's decisions should not have the automatic effect of suspending the decision or requirement to comply with any associated remedies. Non-suspensory appeals would improve regulatory certainty, which is important for the firm subject to the decision, as well as for wider market participants who may need to adapt their behaviour as a result. Suspensory appeals could also increase incentives to appeal, providing a means of delaying the implementation of a remedy. However, where an SMS firm believes the decision is wrong and will cause irreparable harm to its business during the determination of the appeal, it should have the right to seek interim relief from the court.
156. The suspension of penalties would not affect the Digital Markets Unit's ability to remedy concerns. For that reason it would not be detrimental to the regime if they were an exception to the otherwise non-suspensory nature of appeals. Therefore, it may be appropriate for appeals of enforcement



decisions to mean automatic suspension of any requirement to pay a financial penalty.

157. This approach would be consistent with the approach adopted in Competition Act 1998 cases, 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.<sup>83</sup>

## Redress

158. The Digital Markets Unit should take swift action when it identifies harm resulting from breaches of obligations imposed through the SMS regime. However, in some cases damage may arise before the Digital Markets Unit is able to take action and there may be a case for redress. Possible mechanisms include empowering the Digital Markets Unit to require redress, or private actions for damages.<sup>84</sup>
159. We agree with the Taskforce's view that the initial focus should be on public enforcement, led by the Digital Markets Unit. This will support the Digital Markets Unit's ability to control and steer the regime in its infancy allowing for the creation of a

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<sup>83</sup> Section 46(4) of the [Competition Act 1998](#).

<sup>84</sup> Private actions can take the form of follow-on claims, where claimants seek damages for a breach established by the DMU, or stand-alone claims where claimants do not have a DMU decision to base their claim on and will need to evidence the breach themselves.

stable, focused and targeted regime. We are considering the merits of empowering the Digital Markets Unit to require redress from firms with SMS and the various associated complexities, for example in quantifying the appropriate level of redress.

160. Whilst we are not proposing to stop or curb an individual's right to pursue a private law action, we do not intend for the regime to prioritise private follow-on claims. This is to ensure that the initial focus remains on public enforcement. However, we recognise that once the regime is settled, policies that streamline follow-on cases may complement the effect of public enforcement, both by increasing deterrence through raising the cost of infringement to business and by providing redress to injured parties. Such policies also have the potential to assist the public enforcement system by sharing caseload.
161. We expect to revisit whether to enable the Digital Markets Unit to facilitate private follow-on actions at post-legislative scrutiny of the legislation (usually 3-5 years after Royal Assent) or at the end of the first period of designation.

**Consultation question 26: What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with SMS?**

## Part 7: SMS merger reform

### The rationale for intervention

162. The government wants to ensure that there is proportionate visibility and assessment of merger activity by firms with SMS. The right system will foster competition, promote innovation and protect consumers and businesses from anti-competitive activity.
163. Governments and regulators across the world are starting to consider how to address the concentration of power amongst a small number of digital firms which are engaging frequently in mergers and acquisitions (M&A). Mergers involving these powerful firms can have particularly significant economic impacts on competition, making it harder for competitors to emerge and changing the incentives for smaller firms.
164. Many start-ups (and their early investors), for example, aspire to be acquired or funded by large digital firms. This prospect can be important for these firms to grow to a sufficient scale to challenge others in the market. Large digital firms' investment activity may also incentivise start-ups to enter the market, which could provide

consumers with greater choice. The government recognises the key role large digital firms play in the business ecosystem.

165. However, this activity can also create perverse incentives by deterring firms from developing disruptive innovations that would be beneficial to consumers. Instead, many start-ups gear their approach towards products that are complementary to the large digital firms, rather than seeking to compete through potentially transformative innovations.<sup>85</sup> M&A can also be used to entrench digital firms' market positions, resulting in higher barriers to entry for entrepreneurs and a reduction in competition.
166. The largest digital firms have collectively bought close to 300 companies over the past five years.<sup>86</sup> Despite the high number of mergers, there has been limited scrutiny of these acquisitions by competition authorities globally. Only seven have been reviewed by the CMA or European Commission in the past five years<sup>87</sup> and none to

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<sup>85</sup> Stigler Centre Committee on Digital Platforms, 2019. [Stigler Centre Committee on Digital Platforms: Final Report](#), Stigler Centre Committee on Digital Platforms, 2019. [Market structure and antitrust committee report](#) and Deller, Doan, Mariuzzo, 2021. Competition and innovation in digital markets. Report by University of East Anglia Centre for Competition Policy on behalf of BEIS.

<sup>86</sup> [Merger Market Data](#) Google, Amazon, Facebook, Apple and Microsoft made 296 acquisitions collectively between January 2016 and December 2020.

<sup>87</sup> Prior to 1 January 2021, the European Commission would have had exclusive jurisdiction over certain cases instead of the CMA. The cases included in the count are: [Microsoft/LinkedIn](#), [Apple/Shazam](#), [Microsoft/Github](#), [Amazon/Deliveroo](#), [Google/Looker](#), [Google/Fitbit](#), and [Facebook/GIPHY](#).

date have been blocked. This is despite evidence from several expert reports<sup>88</sup> which have found that this extensive M&A activity is having a negative impact on competition.

167. We are concerned that some mergers undertaken by large digital firms could reduce overall levels of innovation. This includes when innovative firms are acquired and shut down by the acquiring firm,<sup>89</sup> or where the acquiring firm replaces investment in its own innovation activities with spending on acquiring innovative firms.<sup>90</sup> These circumstances can result in a net loss of innovation. This means that consumers lose potential benefits from new higher quality products or services, lower costs or greater choice.

168. The Furman Review and the Taskforce both recommended changes to the UK merger regime.<sup>91</sup> In March 2020, the government

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<sup>88</sup> This includes the [Furman Review](#), the [Lear Report](#), the [Stigler Centre Report on Digital Platforms](#), the [European Commission expert report on digital markets](#) and the CMA's [Digital Advertising market study](#).

<sup>89</sup> For example, Facebook has acquired and then shut down other social networks including Parakey (2007), FriendFeed (2009), Nextstop (2010), Divvyshot (2010), Beluga (2011), Gowalla (2012) and Lightbox (2012), a London-based photo sharing start-up. Facebook has purchased and then shut down 39 companies – nearly half of its acquisitions. Wu, Tim & Thompson, Stuart A, The New York Times, 2019. [The roots of Big Tech run disturbingly deep](#).

<sup>90</sup> Lina Khan documented that some startups have felt pressure to agree acquisitions with large digital firms. For example, Quidsi was one of the world's fastest growing e-commerce sites and rejected an acquisition offer from Amazon. Shortly after, Amazon cut the prices of products sold by Quidsi and rolled out a new service aimed at the same customer group at a large loss. Once Amazon managed to acquire Quidsi, it then raised its prices and scaled back the discounts available under the membership service. Khan, Lina, Yale Law Journal, 2017. [Amazon's Antitrust Paradox](#).

<sup>91</sup> Action on digital mergers is also being proposed and implemented internationally. Senator Klobuchar has proposed a substantial overhaul of USA merger control in the [Competition and Antitrust Law Enforcement CP 489](#)

accepted the Furman Review's recommendation that the CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare. In our view, the specific competition concerns linked to the most powerful digital firms could merit the introduction of separate rules for those firms.

169. The government is mindful of the need for a proportionate approach. The regulatory burden on businesses should be minimised and limit any unintended chilling of investment and innovation. Any changes should ensure the regime is efficient and not slow down the regulatory process. This is in line with the approach taken in our consultation, 'Reforming Competition and Consumer Policy', which sets out broader consumer and competition reforms, including to the UK's wider merger control regime.

### *Why changes may be needed to the current merger regime*

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[Reform Act of 2021](#). Similarly the European Commission has recently indicated a [tougher stance on digital mergers including introducing reporting requirements for gatekeeper firms](#), and wider use of the Article 22 referral mechanism. There have also been calls for tougher merger control reform in digital markets by other European competition authorities [for example in France, Germany and the Netherlands](#).

170. Under the UK's current merger regime, notifications of mergers are voluntary.<sup>92</sup> The CMA has jurisdiction to review a merger when:
- Two enterprises 'cease to be distinct'; and,
  - Either:
    - i. The target business has UK turnover exceeding £70 million; or,
    - ii. The result of the merger is that the merged firm would supply or acquire 25% or more of a certain type of good or service in the UK and there is an increment to this 'share of supply' as a result of the merger.<sup>93</sup>

171. The CMA process has two phases. The first phase (phase 1) is a shorter review to assess whether the merger has a 'realistic prospect' of leading to a substantial lessening of competition. If this threshold is met, a second phase is triggered (phase 2).<sup>94</sup> The purpose of the phase 2 investigation is to assess whether the merger has resulted in, or is 'more likely than not to result' in,

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<sup>92</sup> The CMA has the discretion to 'call in' mergers for investigation even if these are not notified to it voluntarily. More information on the UK's merger process can be found in CMA's [merger guidance](#) documents.

<sup>93</sup> Section 23 ("Relevant merger situations") of the [Enterprise Act 2002](#) sets out the jurisdictional tests that must be met. There are slightly different tests where a "relevant enterprise" (within the meaning of either subsection (2) or (3) of section 23A) is involved.

<sup>94</sup> Sections 22 and 33 of the [Enterprise Act 2002](#), in relation to completed and anticipated mergers respectively. See also paragraphs 2.33 and 2.34 of the CMA's Merger Assessment Guidelines CP 489



a substantial lessening of competition.<sup>95</sup> While this process is seen as largely fit-for-purpose, there are some limitations which may have allowed large digital firms to entrench their market power in digital markets.<sup>96</sup> These are discussed in the following section.

172. The CMA has increased its scrutiny of mergers involving digital firms since the Furman Review called for a ‘reset’ of merger assessment in digital markets.<sup>97</sup> It has also developed updated merger assessment guidelines that reflect learning from recent digital cases.<sup>98</sup> However, it is not clear that these recent changes will ensure effective merger control for mergers involving firms with SMS, given that the underlying law has not changed and was written twenty years ago.

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<sup>95</sup> Sections 35 and 36 of the [Enterprise Act 2002](#), in relation to completed and anticipated mergers respectively. See also paragraph 2.36 of the [CMA's Merger Assessment Guidelines](#).

<sup>96</sup> As noted above, the [Reforming Competition and Consumer Policy consultation](#) includes the following changes to the CMA's jurisdictional tests under the current merger control regime: raising the UK turnover threshold from £70m to £100m, creating a safe harbour for mergers between small businesses, and removing the need for an increase in the ‘share of supply’ test for transactions where one company already has a 25% ‘share of supply’ and the parties have a combined UK revenue of £100m. If these proposals are taken forward then there would be a greater chance that transactions involving large digital firms would be captured routinely.

<sup>97</sup> [Google/Looker](#) 2019, [Amazon/Deliveroo](#) 2019 and [Facebook/GIPHY](#) 2021.

<sup>98</sup> [CMA Merger Assessment Guidelines](#).

## Proposed changes

173. We envisage that a bespoke merger regime would be administered by the CMA and proposals would only apply to firms designated with SMS.<sup>99</sup>
174. The SMS merger proposals under consideration would provide the CMA with greater scope to scrutinise mergers by firms with SMS and to intervene if necessary to protect consumers from potential harm. The proposed measures are (see Figure 5 for an illustration):
- A new reporting requirement on firms designated with SMS, to inform the CMA of all mergers;
  - A broader and clearer jurisdiction for the CMA to review SMS mergers, through the introduction of:
    - i. A transaction value threshold; and
    - ii. An accompanying UK nexus test;

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<sup>99</sup> Other concerns that may arise from a merger, including public interest or data protection, are better considered and assessed by other regulators. As is currently the case, other regulators such as the [ICO](#) and [Ofcom](#) will continue to consider public interest or data protection concerns, which may typically arise in digital mergers.

- A subset of the largest transactions by firms with SMS to potentially undergo a mandatory merger review prior to completion;<sup>100</sup> and
- Changing the threshold at which the CMA can intervene in a merger, by amending the probability threshold used in the phase 2 investigation.

*A reporting requirement on firms with SMS to give 'advance notice'*

175. Historically, the largest digital firms have not ordinarily informed the CMA of transactions. This creates a burden on the CMA which must proactively seek information relating to these mergers. It also delays the assessment of whether certain transactions meet the jurisdictional tests and may be reviewed.
176. The Furman Review proposed that firms with SMS should be required to make the CMA aware of all intended acquisitions. The Taskforce suggested this could be achieved via a simple form providing basic information to the CMA. This would increase the transparency of mergers involving firms with SMS and would be less

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<sup>100</sup> Mandatory merger review would involve submitting a merger notification to the CMA. The CMA would then be obliged to conduct a merger investigation before the transaction could legally 'complete'.

burdensome than a merger notification, which would automatically trigger a merger review.

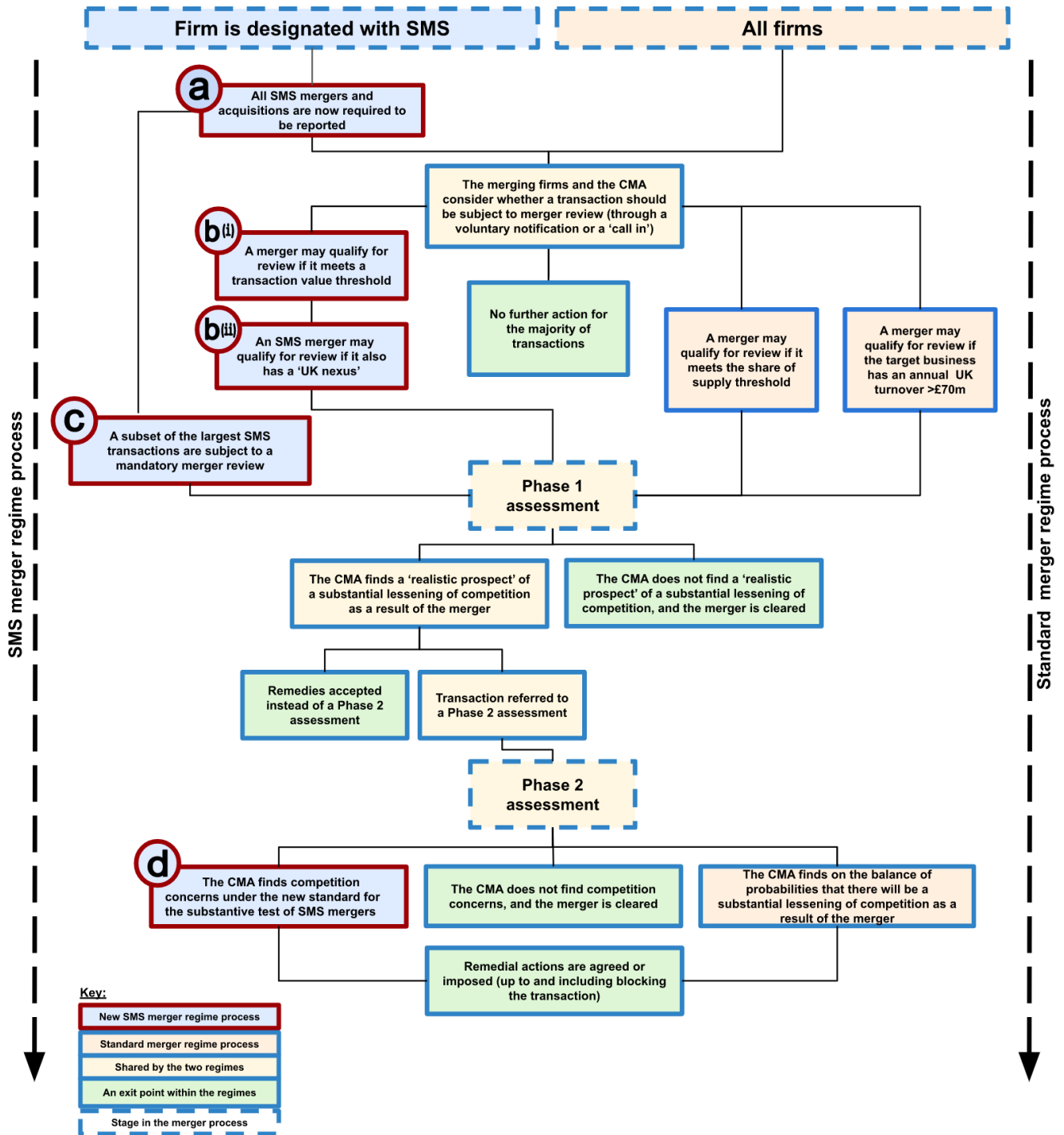
177. We are minded to introduce an ‘advance notice’ reporting requirement relating to all imminent merger activity by firms with SMS. Firms with SMS would have to send a report to the CMA before the completion of a transaction.<sup>101</sup> This would give the CMA a short time to determine whether to investigate the transaction before it completes. We are considering whether reporting could also occur a short time after the completion of the transaction and are interested in views on this point.

**Consultation question 27: What are the benefits and risks of introducing an ‘in advance’ reporting requirement for all transactions by firms with SMS?**

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<sup>101</sup> This could work similarly to the ‘waiting period’ under the [Hart-Scott-Rodino Act](#) 1976 in the USA.  
CP 489

# Figure 5: SMS merger regime process highlighting the proposed changes



## *Introducing a transaction value threshold for jurisdiction over SMS mergers*

178. The CMA does not currently have the ability to review potentially harmful transactions unless they meet one of the existing jurisdictional tests (see paragraph 170). Scenarios that could be excluded under current rules include:

- Acquisitions of firms that have strategic value in the market before they develop and reach scale, or who are expanding and yet to monetise. These types of mergers may not meet either the turnover or share of supply test.
- Mergers where the relationship between the target and acquirer is purely vertical, or purely in related markets, may not be captured by the share of supply test, depending on the nature of the goods or services supplied. This includes:
  - i. Acquisitions of firms in related markets which allow the firm to become present at multiple levels of the supply chain, giving rise to conflicts of interest and self-preferencing, as well as the ability to

foreclose competitors through being active across the supply chain.<sup>102</sup>

- ii. Acquisitions of firms in adjacent or complementary markets to help firms construct large ‘ecosystems’ and acquire new customers and data, insulating their core services from competition by creating a ‘moat’.

179. In the digital context, the current jurisdictional tests do not give the CMA jurisdiction to review some mergers involving new or innovative business models, which could cause significant detriment to competition.

180. To address these limitations, we propose to expand the CMA’s jurisdiction to review mergers involving firms with SMS. This could be achieved by introducing a transaction value threshold for mergers involving these firms.<sup>103</sup> The effect of this change would be to capture competitively significant mergers (as signalled by having a high transaction value) which may otherwise not have met the turnover or share of supply test. In order

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<sup>102</sup> For example, this was seen to happen after Google acquired DoubleClick, which allowed it to expand vertically within the advertising technology supply chain. Both the [CMA’s Digital Advertising market study](#) and the recent [European Commission expert report on the Digital Market Act](#) comment on the negative effects of this merger.

<sup>103</sup> The transaction value refers to the price paid by the acquirer to buy the business or a share in the business.

to ensure proportionality and jurisdiction, the merger would also need to have a material impact on the UK, established through a 'UK nexus test'.<sup>104</sup> A transaction value threshold would provide a clear and objective threshold for businesses and the CMA to assess whether a merger would qualify for review under the SMS merger regime.

181. The threshold for review should be set at a level so that only larger and more competitively significant acquisitions are subject to review. Indicative analysis, of transactions by the largest digital firms between 2016 and 2020, indicates that if the transaction value threshold was set at £100m or £200m, this would likely automatically exclude between 50% and 70% of transactions from the revised jurisdiction threshold.<sup>105</sup> The application of a UK nexus test would further reduce this number. A transaction value threshold in the region of £100m or £200m is similar to that used elsewhere internationally,<sup>106</sup> and appears to strike a reasonable balance between capturing

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<sup>104</sup> This would ensure the CMA only reviews transactions where there is a material impact on UK consumers. A 'UK nexus' could be established by reference to certain conditions such as the target business having either assets or revenues, users, employees, R&D activities or legal presence in the UK. The extent to which meeting these would establish a 'UK nexus' is still to be determined.

<sup>105</sup> BEIS analysis of [Merger Market](#) data. Transaction values were available for 173 of the 296 acquisitions that were identified over the period.

<sup>106</sup> In Germany and Austria, the notification thresholds are €400 million and €200 million respectively, however, these thresholds apply economy wide rather than targeted at particular industries or firms.



important transactions and filtering out those less likely to raise competition concerns. We welcome stakeholder views on how a transaction value threshold, with an accompanying UK nexus test, can be designed to balance these considerations and provide legal clarity.

**Consultation question 28: What are the benefits and risks of introducing a transaction value threshold, combined with a ‘UK nexus’ test, for firms designated with SMS?**

*Introduction of mandatory merger review for a subset of SMS transactions*

182. The Taskforce proposed that a subset of mergers by firms with SMS should be subject to mandatory merger review, with completion of the transaction prohibited until after it had been reviewed by the CMA. This requirement would only apply to a subset of the largest SMS transactions that meet a transaction value threshold and meet the ‘UK nexus test’ (discussed in footnote 103). This mandatory merger review threshold would be set at a higher level than the proposed jurisdiction threshold.
183. Requiring that certain mergers be reviewed before they complete could allow the CMA to ensure any

competition issues are identified before integration occurs. Reversing a merger or imposing remedies once firms have integrated can be difficult, especially in digital markets where integration can be achieved quickly. The CMA's current process for imposing interim measures, which seek to prevent integration prior to the CMA's review, can be resource intensive and time consuming for both the CMA and the merging firms.<sup>107</sup> Mandatory merger reviews for the largest SMS mergers could allow resources to be reprioritised to assess the substance of the case. They could also remove the risk of disruption to businesses of the CMA requiring a completed merger to be unwound if competition concerns were found. For firms with SMS, this approach could also offer legal certainty about when they need to submit their transactions for merger review.

184. Introducing a requirement for mandatory merger review could, however, impose additional costs on businesses and make the CMA process more burdensome. If the merger meets the mandatory review threshold, additional information would be required by the CMA from the merging parties, in

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<sup>107</sup> Facebook's recent submission to the [Competition Appeal Tribunal](#) highlighted that Facebook's external lawyers spent more than 3,000 hours dealing with Interim enforcement Order issues between June and October 2020 on the [Facebook/Giphy](#) case.

excess of the proposed reporting requirement. An initial phase 1 investigation would also be required, regardless of whether the CMA considers there to be any competition issues. One option to reduce this burden is to introduce a fast-track system for acquisitions that clearly do not raise competition concerns.<sup>108</sup>

185. Whilst we see benefits to imposing mandatory merger reviews for the largest transactions involving firms with SMS, we also recognise the additional burden on resources that this may impose on businesses. Another option would be for the SMS merger regime to operate purely as a voluntary regime (as per the existing merger regime), where the CMA has the power to ‘call in’ for review, any mergers which meet the jurisdictional tests.
186. To assist the development of the government's decision we welcome views and evidence on the proportionality and potential burden of a new mandatory merger review process for a subset of the largest transactions involving firms with SMS.

## **Consultation question 29: What are the benefits and risks of introducing mandatory merger reviews for**

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<sup>108</sup> This type of approach is used in other mandatory regimes, such as that operated by the [European Commission](#), which operates a ‘simplified procedure’ for acquisitions meeting certain criteria.

## **a subset of the largest transactions involving firms with SMS?**

### *Changes to the substantive test*

187. Evidence can be hard to gather in an ex-ante regime, when the regulator is seeking to act in anticipation of a substantial lessening of competition. This may be even harder in digital markets as they can move quickly and less predictably than other markets. This problem - of potentially large but also uncertain harm - may be particularly acute for mergers involving firms with SMS because of the size and importance of the activities these firms are engaged in, their existing entrenched market power and the high number of young, early-stage businesses they acquire.
188. These challenges may make it difficult for the CMA to prove it is 'more likely than not' (the current probability threshold used for the second phase in-depth review) that harm could arise, and so affects its ability to intervene in mergers involving firms with SMS. As a result, under the current threshold, some mergers would almost certainly be cleared despite being potentially harmful to competition. This can be seen by the historic lack of intervention in large mergers

involving key digital firms in the UK and internationally.

## **Case study: the impact of lowering the phase 2 probabilistic standard**

The CMA cannot intervene in a merger where the likelihood of harm is less than 50%, even if the scale of that potential harm is very large. As an example, the CMA may be limited in its ability to block a merger like the 2012 \$1.0 billion acquisition of Instagram by Facebook, even if it occurred today, taking into account the CMA's increased understanding of digital markets and revised approach to evidence gathering.

- Facebook was already a large social media company,<sup>109</sup> but was buying, at the time, a small photo-sharing company with 13 employees and no revenues.
- Despite Instagram's small size at the time, the total and average minutes spent on the application by users was similar to those of Twitter, indicating an attractiveness to users and advertisers.<sup>110</sup>
- Evidence<sup>111</sup> indicated there was a realistic but uncertain chance (i.e. likely less than 50%)

<sup>109</sup> According to the CMA's 2012 investigation of [Facebook/Instagram](#), across 2011 Facebook earned revenues of US\$3.7 billion from advertising and sales of digital goods.

<sup>110</sup> Lear Report, 2019. [Ex-post Assessment of Merger Control Decisions in Digital Markets](#).

<sup>111</sup> For example, in 2020 [the Independent](#) reported on emails that reveal Mark Zuckerberg bought Instagram as it 'can hurt us'.

that Instagram would grow and compete with Facebook, with the Furman Review noting ‘the scope for Instagram to grow into a competitor to Facebook as a social network was uncertain, and the authority may have struggled to demonstrate that this outcome was more likely than not to occur.’<sup>112</sup>

Instagram’s success absent the merger may have generated significant consumer benefits and provided real competition to Facebook in social media and digital advertising, where Facebook holds a powerful entrenched position. The proposed changes to introduce an SMS merger regime are expected to enable the CMA to intervene in similar acquisitions and ensure consumers benefit from effective competition.

189. The Furman Review recommended that a change should be made to legislation to allow the CMA to use a ‘balance of harms’ approach in merger cases. This would take into account the scale of potential harm, in addition to the likelihood of harm occurring. The Taskforce proposed keeping the existing substantial lessening of competition test<sup>113</sup> used in current UK merger control.

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<sup>112</sup> Digital Competition Expert Panel, 2019. [Unlocking digital competition: Report of the Digital Competition Expert Panel](#), paragraph 3.84.

<sup>113</sup> Set out in paragraph 171 of this document.

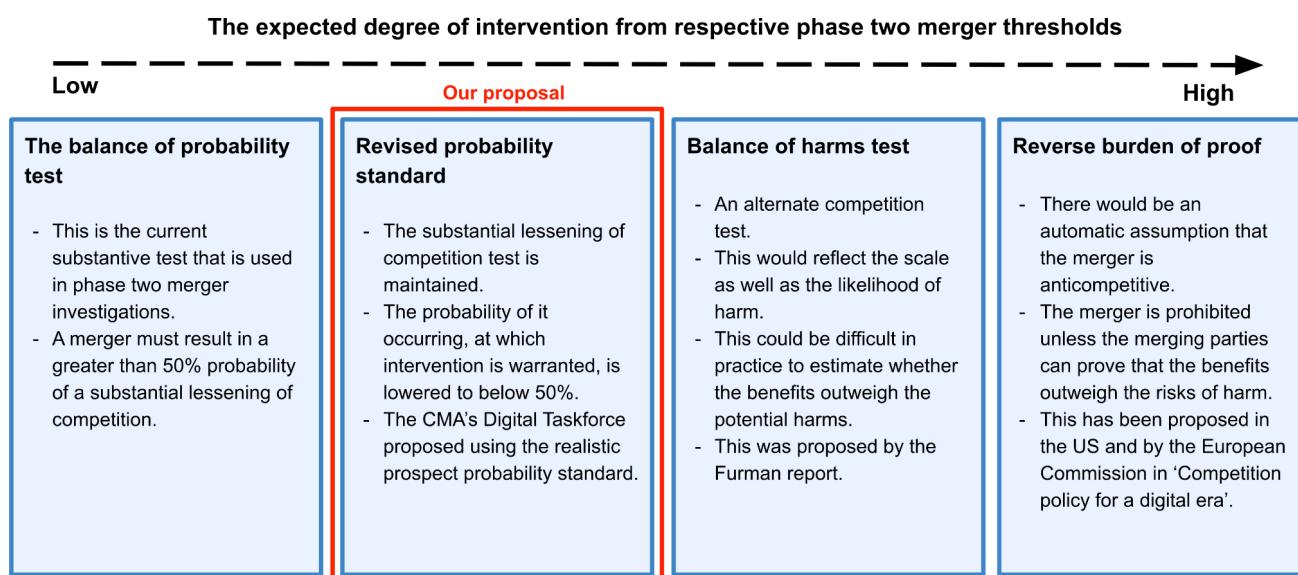
However, it proposed lowering the probability threshold at which the CMA could intervene as part of the second, in-depth, review phase. It proposed changing the assessment from whether a substantial lessening of competition is 'more likely than not' to occur to whether there is a 'realistic prospect' of a substantial lessening of competition as a result of the merger, similar to the standard of proof required at phase 1 of the existing mergers regime. Both the Furman and Taskforce proposals would allow the CMA to intervene in a wider number of cases e.g. if they assess the likelihood of a substantial lessening of competition to be lower than 50% but where the impact of any harm would be high.

190. Any change to the substantive test will need to be carefully considered, but we believe it would be beneficial. Under the current merger regime, only a small percentage of mergers meet the 'realistic prospect' standard used during the first phase investigation, with only a handful of mergers being subject to a phase 2, in-depth review each year. We are not proposing changes to the phase 1 investigation under the SMS merger regime, so we anticipate that amending the probability threshold at the second phase would only affect a

small number of mergers. We believe that this approach would also not be as interventionist as alternatives that have been suggested (see figure 6). Despite the threshold for intervention being lower, the same process, including checks and balances, would continue to apply at phase 2 under the SMS merger regime.



## Figure 6: Our proposed SMS merger regime within a wider body of options



191. For the reasons set out above, the government is minded to lower the phase 2 threshold for intervention in mergers involving firms designated with SMS. We are attracted by the 'realistic prospect' approach recommended by the Taskforce (which is consistent with goals of the Furman Review approach). That said, we recognise the importance of adjusting the threshold to the right levels to ensure intervention is proportionate. We are therefore interested in views from stakeholders on how best to achieve this including other options.

**Consultation question 30: What are the benefits and risks, particularly with regard to innovation and investment, of amending the substantive test probability standard used during in-depth phase 2 merger investigations to enable increased intervention in potentially harmful mergers involving firms with SMS?**

**Consultation question 31: What alternative proposals should the government be considering to improve UK merger control for firms with SMS in a way that is proportionate, effective and minimises any risk of chilling investment or innovation?**

## Conclusion and next steps

192. This consultation sets out the government's proposed approach to legislating for a new pro-competition regime for digital markets.
193. Our proposals have the potential to transform the digital and wider economy by driving growth and innovation, and enhancing choice. While the regime itself will be targeted at a small number of the key digital firms, the potential implications will be felt throughout the economy.
194. We are therefore seeking views on these proposals from the widest possible audience. We are particularly interested in views from large and small tech firms, investors, academics, legal experts, SMEs that rely on firms that will potentially be designated with SMS, and from advertisers and publishers. We are also seeking evidence on the expected costs and benefits of the proposals set out in this consultation. We welcome any views on the analysis and questions presented in the accompanying Impact Assessment (IA).<sup>114</sup>
195. This consultation will close 10 weeks after it opens, on 1st October 2021. During the

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<sup>114</sup> [Impact Assessment - a new pro-competition regime for digital markets](#). The questions can be found in Annex F of the Impact Assessment.  
CP 489

consultation period, officials will engage with a range of stakeholders, including businesses, representative organisations and consumer groups to ensure that a wide range of views are gathered. We will then publish a summary of responses on the gov.uk website. More information on how to respond to the consultation is set out in Annex B.

# Annex A: International approaches to competition

## International approaches to digital competition

1. There is a growing global consensus that action is needed to address the powerful position of a small number of key digital firms. Governments and regulators around the world have begun reassessing existing competition frameworks to ensure that they can keep pace with the fast-moving, fluid and ever-evolving digital markets landscape.
2. Given the global reach of big tech firms, domestic approaches to tackling a lack of competition in digital markets needs to be complemented with international cooperation to ensure coherence and mitigate the risks of regulatory divergence and arbitrage. Under the UK's G7 Presidency this year, digital competition was a policy priority for the Digital and Tech Ministerial Track where G7 countries agreed to work closer together to tackle this issue. Regulators and policymakers from G7 countries will meet separately in Autumn 2021 to discuss how we will achieve this enhanced collaboration. As we develop our domestic regime, we will continue to engage with international partners to share best

practice and build consensus towards a coherent approach.

3. An overview of international developments on digital competition is provided in Table 1.

**Table 1: Overview of international approaches to digital competition.**

Country or bloc	Key developments and publications	Description of proposals
EU	<ul style="list-style-type: none"> <li>● <b>Dec 2020:</b> Publication of the Digital Markets Act, the EU’s legislative proposal for regulating digital markets<sup>115</sup></li> <li>● <b>Apr 2021:</b> European Commission rules that Apple distorted competition in the music streaming market, abusing its dominant position for the distribution</li> </ul>	<ul style="list-style-type: none"> <li>● Published in a package alongside the Digital Services Act, the Digital Markets Act sets out the European Commission’s proposal for a new ex ante regime to regulate digital markets and tackle harms associated with digital competition.</li> <li>● The regime would apply obligations to key ‘gatekeeper’ companies - which</li> </ul>

<sup>115</sup> European Commission, 2020. The [Digital Markets Act](#)

Country or bloc	Key developments and publications	Description of proposals
	<p>of music streaming apps through its App Store</p> <ul style="list-style-type: none"> <li>● <b>Jun 2021:</b> European Commission launches a market investigation into Facebook to determine if Facebook's use of customer data violates antitrust law</li> </ul>	<p>other businesses rely on to reach their consumers - and prohibit anti-competitive behaviour.</p>

<p><b>US</b></p>	<ul style="list-style-type: none"> <li>● <b>Oct 2020:</b> House Judiciary Antitrust Subcommittee report published,<sup>116</sup> ‘Investigation of competition in digital markets’</li> <li>● <b>Oct 2020:</b> Department of Justice files complaint against Google for violating antitrust law (and State Attorney General’s suit)</li> <li>● <b>Aug 2020:</b> Epic Games files lawsuit in the Northern California District Court on Aug. 13, accusing Apple of anti-competitive practices related to its App Store</li> <li>● <b>Dec 2020:</b> FTC and State Attorney Generals files antitrust suit against Facebook</li> </ul>	<ul style="list-style-type: none"> <li>● The House Judiciary Antitrust Subcommittee (Democrat-backed) report details allegations of anti-competitive abuses by the big tech companies (specifically Amazon, Apple, Facebook and Google), and made recommendations relating to digital platforms, both emphasising that tougher action and specific legislative reforms are needed to address competition concerns.</li> <li>● The report proposes broad changes to antitrust law. To address conflict of interest, it recommends that online marketplaces should be independently run, or</li> </ul>
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<sup>116</sup> Subcommittee on Antitrust Report, 2020. [Investigation of Competition in Digital Markets](#).

	<ul style="list-style-type: none"><li>● <b>February 2021:</b> Competition and Antitrust Law Enforcement Reform Act introduced in the senate</li><li>● <b>Mar 2021:</b> Journalism Competition and Preservation Act reintroduced to the Senate</li></ul>	<p>that there should be rules established on how they can be organised. It also suggests blocking platforms from giving themselves preferential treatment, i.e. placing their own products at the top of search results. The report also recommends requiring interoperability between social networks so that users can communicate cross-platforms and carry their data from one to another. On acquisitions, it suggests directing antitrust enforcers to assume an acquisition is anticompetitive unless proven otherwise. There is also a proposal to increase resourcing and funding to antitrust</p>
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		<p>enforcers, namely the FTC and the Dept of Justice who both have jurisdiction in this area.</p> <ul style="list-style-type: none"><li>● The report was issued without bipartisan backing and it is unlikely it will be implemented in its entirety, though some members of Congress could choose to introduce legislation on the back of some of the recommendations.</li><li>● The Competition and Antitrust Law Enforcement Reform Act could help to strengthen prohibitions against anticompetitive mergers (including reversing the burden of proof and amending the competition test) as well as prevent harmful dominant firm conduct.</li></ul>
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		<ul style="list-style-type: none"><li>● The Journalism Competition and Preservation Act which has recently been reintroduced to the Senate could allow news publishers to collectively negotiate with Google and Facebook to establish distribution and payment deals.</li></ul>
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Country or bloc	Key developments and publications	Description of proposals
<p><b>Germany</b></p>	<ul style="list-style-type: none"> <li>● <b>Jan 2021:</b> 10th Amendment to the German Competition Act “amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 and amending other competition law provisions (“GWB Digitalisation Act”)”<sup>117</sup> entered into force</li> </ul>	<ul style="list-style-type: none"> <li>● The Digital Competition Act extends the scope of German antitrust law to tackle presumed enforcement challenges in the digital economy and raises merger control thresholds across all industries. Notable changes include: regulatory tools to prohibit certain conduct patterns of platforms on multi-sided markets and networks and conduct that may amount to a tipping of the market, as well as higher merger control thresholds.</li> </ul>

<sup>117</sup> Bundeskartellamt, 2021. [Act to Amend the Competition Act to Achieve a Focused, Proactive, and Digital Competition Law 4.0 and Other Provisions.](#)

Country or bloc	Key developments and publications	Description of proposals
Australia	<ul style="list-style-type: none"> <li>● <b>Jul 2019:</b> Publication of the Digital platforms inquiry - final report<sup>118</sup> and establishment of a digital competition unit, the Digital Platforms Branch, in the ACCC</li> <li>● <b>Dec 2019:</b> Australian government response to the Digital Platforms Inquiry report published<sup>119</sup></li> <li>● <b>Feb 2021:</b> News Media and Digital Platforms Mandatory Bargaining Code Bill legislation introduced in</li> </ul>	<ul style="list-style-type: none"> <li>● Following an inquiry into digital platforms by the Australian Competition and Consumer Commission (ACCC), the Australian government has established a special unit within the ACCC to proactively enforce, monitor and investigate competition and consumer protection in digital platform markets.</li> <li>● It has also passed the News Media and Digital Platforms Mandatory Bargaining Code into legislation which will introduce a binding code requiring designated digital</li> </ul>

<sup>118</sup> Australian Competition and Consumer Commission, 2019. [Digital platforms inquiry - final report](#).

<sup>119</sup> Department for Infrastructure, Transport, Regional Development and Communications, 2019. [Government response to ACCC Digital Platforms Inquiry](#)

Country or bloc	Key developments and publications	Description of proposals
	Australia	platforms to negotiate payment for news content from publishers.
Japan	<ul style="list-style-type: none"> <li>● <b>2019:</b> New Headquarters for Digital Markets Competition established</li> <li>● <b>Feb 2021:</b> the Act on Improving Transparency and Fairness of Specified Digital Platforms took effect<sup>120</sup></li> <li>● <b>May 2021:</b> Publication of the Evaluation of Competition in the</li> </ul>	<ul style="list-style-type: none"> <li>● The publication of Japan's Evaluation of Competition in the Digital Advertising Market Final Report sets out proposals to introduce new regulatory obligations on digital platforms in the online advertising market, including new transparency reporting obligations on firms.</li> </ul>

<sup>120</sup> Ministry of Economy, Trade and Industry, 2021. [Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving Transparency and Fairness of Digital Platforms](#)

Country or bloc	Key developments and publications	Description of proposals
	Digital Advertising Market Final Report <sup>121</sup>	

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<sup>121</sup> Digital Market Competition Council, 2020. [Interim Report on the Evaluation of Competition in the Digital Advertising Market.](#)



# Annex B: How to respond to the consultation

We are inviting individuals and organisations to provide their views by responding to the questions set out in this consultation. The questions are listed below.

The consultation will be open for 10 weeks, until 1st October 2021.

You can respond online via the following link: [A new pro-competition regime for digital markets](#).

## Consultation questions

### Part 2: The Digital Markets Unit

Consultation question 1: What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to have regard to innovation?

Consultation question 2: What are the benefits and risks of giving the Digital Markets Unit powers to engage, in specific circumstances, with wider policy issues that interact with competition in digital markets? What approaches should we consider?

Consultation question 3: Should we explore the possibility of reducing the cost of the Digital Markets

Unit to the public sector through partial or full levy funding?

Consultation question 4: Is there a need to go beyond informal arrangements to ensure regulatory coordination in digital markets? What mechanisms would be useful to promote coordination and the best use of sectoral expertise, and why? Do we have the correct regulators in scope?

Consultation question 5: How can we ensure that regulators share information with each other in a responsible and efficient way?

Consultation question 6: What are your views on the appropriate scope and powers for the Digital Markets Unit's monitoring function?

### *Part 3: Strategic Market Status*

Consultation question 7: What are the benefits and risks of limiting the scope to activities where digital technologies are a “core component”? What are the benefits and risks of adopting a narrower scope, for example “digital platform activities”?

Consultation question 8: What are the potential benefits and risks of our proposed SMS test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?

Consultation question 9: How can we ensure the designation assessment provides sufficient flexibility, predictability, clarity and specificity? Do you agree that the strategic position criteria should be exhaustive and set out in legislation?

Consultation question 10: What are the potential benefits and risks of the Digital Markets Unit prioritising SMS designation assessments based on the criteria in paragraph 77?

Consultation question 11: What are the benefits and risks of the proposed SMS designation process? What are the benefits and risks of a statutory deadline of 9 months for SMS designation?

#### Part 4: An enforceable code of conduct

Consultation question 12: Do these three objectives correctly identify the behaviours the code should address?

Consultation question 13: Which of the above options for the form of the code would best achieve the objectives of the pro-competition regime, particularly in terms of flexibility, certainty and proportionality. Why?

Consultation question 14: What are your views on the proposal to apply principle 2(e) (see Figure 4 below) to the entire firm? Should any explicit checks and balances be considered?

Consultation question 15: How far will the proposed regime address the unbalanced relationship between key platforms and news publishers as identified in the Cairncross Review and by the CMA? Are any further remedies needed in addition to it?

Consultation question 16: How can we ensure the appropriate use of interim code orders?

### Part 5: Pro-competitive interventions

Consultation question 17: What range of PCI remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?

Consultation question 18: To what extent is the adverse effect on competition (“AEC”) test for a PCI investigation sufficient for the Digital Markets Unit to achieve its objectives?

Consultation question 19: What are the benefits and risks associated with empowering the Digital Markets Unit to implement PCIs outside of the designated activity, in the circumstances described above?

Consultation question 20: How appropriate are the proposed flexibility mechanisms set out above? Are there any associated risks?

Consultation question 21: What is an appropriate statutory deadline for a PCI investigation?

## Part 6: Regulatory framework

Consultation question 22: What powers and mechanisms does the Digital Markets Unit need in order to most effectively investigate and enforce against conduct occurring both domestically and overseas?

Consultation question 23: What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?

Consultation question 24: Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?

Consultation question 25: What standard of review should apply to appeals of the Digital Markets Unit's decisions?

Consultation question 26: What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with SMS?

## Part 7: Merger reform

Consultation question 27: What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with SMS?

Consultation question 28: What are the benefits and risks of introducing a transaction value threshold, combined with a 'UK nexus' test, for firms designated with SMS?

Consultation question 29: What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with SMS?

Consultation question 30: What are the benefits and risks, particularly with regard to innovation and investment, of amending the substantive test probability standard used during in-depth phase 2 investigations to enable increased intervention in harmful mergers involving firms with SMS?

Consultation question 31: What alternative proposals should the government be considering to improve UK merger control for firms with SMS in a way that is proportionate, effective and minimises any risk of chilling investment or innovation?

# Annex C: Privacy Notice

## **Purpose of this Privacy Notice**

This notice is provided within the context of the changes required by the Article 13 & 14 of UK General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA). This notice sets out how we will use your personal data as part of our legal obligations with regard to Data Protection.

Our personal information charter explains how we deal with your information. It also explains how you can ask to view, change or remove your information from our records.

This notice only refers to your personal data (e.g. your name, email address, and anything that could be used to identify you personally) not the content of your response to the survey.

### *Why are we collecting your personal data?*

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes such as to ensure individuals and organisations cannot complete the survey more than once.

### *What personal data do we collect?*

We collect the following information:

- Personal identifiers

- Contacts and characteristics (for example, name, contact details and name of organisation if relevant)

*With whom we will be sharing your personal data?*

Copies of responses may be published after the survey closes. If we do so, unless you indicate otherwise, we will ensure that neither you nor the organisation you represent are identifiable, and any responses used to illustrate findings will be anonymised.

Qualtrics is the online survey platform used to conduct this survey. They will store the data in accordance with the controller's instructions and their privacy policy

*For how long we will keep your personal data, or criteria used to determine the retention period?*

Your personal data will be held for two years after the survey is closed. This is so that the department is able to contact you regarding the result of the survey following analysis of the responses.

## **Our legal basis for processing your personal data**

The Data Protection Legislation states that, as government departments, the departments may process personal data as necessary for the effective performance of a task carried out in the public interest (i.e. a consultation).

We will not:

- Sell or rent your data to third parties



- Share your data with third parties for marketing purposes
- Use your data in analytics

We will share your data if we are required to do so by law – for example, by court order, or to prevent fraud or other crime.

## **Survey privacy statement**

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Departments.

## **Your rights, e.g. access, rectification, erasure**

The data we are collecting is your personal data, and you have considerable say over what happens to it.

You have the right:

- To see what data we have about you
- To ask us to stop using your data, but keep it on record

- To have all or some of your data deleted or corrected
- To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law

You can contact the ICO at <https://ico.org.uk>, or phone 0303 123 1113. ICO, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

- Your personal data will not be used for any automated decision making
- Your personal data will be stored in a secure government IT system and the survey companies secure system

We are committed to doing all that we can to keep your data secure. We have set up systems and processes to prevent unauthorised access or disclosure of your data – for example, we protect your data using varying levels of encryption.

We also make sure that any third parties that we deal with keep all personal data they process on our behalf secure.

### *Changes to this policy*

We may change this privacy policy. In that case, the 'last updated' date at the bottom of this page will also change. Any changes to this privacy policy will apply to you and your data immediately.

If these changes affect how your personal data is processed, the controllers will take reasonable steps to let you know.

Updated:30/06/21

## **How to contact us**

*The identities of the independent data controllers and contact details of our Data Protection Officers*

The Data Controllers are listed here:

The Department for Digital, Culture, Media & Sport (“DCMS”). The Data Protection Officer can be contacted at [dcmsdataprotection@dcms.gov.uk](mailto:dcmsdataprotection@dcms.gov.uk)

Government Digital Service (GDS)  
[DPO@cabinetoffice.gov.uk](mailto:DPO@cabinetoffice.gov.uk).

The Department for Business, Energy and Industrial Strategy (BEIS) [dataprotection@beis.gov.uk](mailto:dataprotection@beis.gov.uk)

You can find out more here: [Personal information charter](#)

The contact details for the data controller's Data Protection Officer (DPO) are:

DPO

The Department for Digital, Culture, Media & Sport  
100 Parliament St,  
London  
SW1A 2BQ

Email: [DCMSdataprotection@dcms.gov.uk](mailto:DCMSdataprotection@dcms.gov.uk)

## *How to contact the appropriate authorities*

If you believe that your personal data has been misused or mishandled, you can make a complaint to the Information Commissioner, who is an independent regulator. The Information Commissioner can be contacted at:

You can contact the ICO, or telephone 0303 123 1113. ICO, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF.

<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/>



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