

## A new pro-competition regime for digital markets

<b>Lead department</b>	Department for Digital, Culture, Media and Sport (with the Department for Business, Energy and Industrial Strategy).
<b>Summary of proposal</b>	The Digital Markets Unit within the Competition and Markets Authority to be given powers to implement pro-competitive interventions, including conduct requirements and additional merger requirements relating to firms with significant (digital) market power.
<b>Submission type</b>	Impact assessment (IA) – 9 June 2022
<b>Legislation type</b>	Primary legislation
<b>Implementation date</b>	2023
<b>Policy stage</b>	Final
<b>RPC reference</b>	RPC-DCMS-5078(2)
<b>Opinion type</b>	Formal
<b>Date of issue</b>	13 July 2022

### RPC opinion

<b>Rating<sup>1</sup></b>	<b>RPC opinion</b>
<b>Fit for purpose</b>	The Department has provided a satisfactory assessment against the framework pro-competition criteria. The indicative quantitative assessment of direct business impacts meets RPC requirements for primary legislation stage IAs. Small and micro businesses are exempt from the proposed regulation, but the IA provides a good discussion of indirect impacts on SMBs.

### Business impact target assessment

	<b>Department assessment</b>	<b>RPC validated</b>
<b>Classification</b>	Non-qualifying regulatory provision (pro-competition)	Non-qualifying regulatory provision (pro-competition)
<b>Equivalent annual net direct cost to business (EANDCB)</b>	Not quantified	Recommendation that an EANDCB figure be provided by the Digital Markets Unit (DMU) in

<sup>1</sup> The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

		its NQRP summary for transparency purposes
<b>Business impact target (BIT) score</b>	N/A	N/A
<b>Business net present value</b>	Not quantified	
<b>Overall net present value</b>	Not quantified	

## RPC summary

<b>Category</b>	<b>Quality<sup>2</sup></b>	<b>RPC comments</b>
EANDCB	<b>Green</b>	The Department has provided a satisfactory assessment against the framework pro-competition criteria. The IA provides an indicative quantitative assessment of direct business impacts, meeting RPC requirements for primary legislation stage IAs.
Small and micro business assessment (SaMBA)	<b>Green</b>	Although small and micro businesses are directly exempt from the proposed regulation, the IA provides a good discussion of pass-through and other indirect impacts on SMBs.
Rationale and options	<b>Good</b>	The IA provides a good demonstration of the rationale for government intervention. This includes both a theoretical basis and evidence of harm to the economy and consumers, including many illustrative cases. The IA includes a good discussion of three options but would benefit from providing further discussion of non-regulatory options considered.
Cost-benefit analysis	<b>Satisfactory</b>	The Department has provided a much more fully monetised section than that at consultation stage. The IA uses several sources to produce estimates, including a BEIS survey, CMA studies and information from the consultation, although there were only three responses to the IA survey.
Wider impacts	<b>Good</b>	The IA includes a particularly good assessment of innovation impacts. The IA also discusses potential trade impacts in some detail and monetises costs to the government of operating the pro-competition regime.
Monitoring and evaluation plan	<b>Good</b>	This IA sets out the process, impact and value-for-money evaluation questions to be addressed. Data sources, metrics/indicators and how they are linked to objectives are also discussed.

<sup>2</sup> The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. Please find the definitions of the RPC quality ratings [here](#).

## Background

This IA has been submitted at this time to assist pre-legislative scrutiny. The RPC understands that the proposal is to be included in a consumer and competition bill, alongside two BEIS proposals relating to ‘subscription traps’ and merger reforms. We also understand that these three proposals will be included in an overarching bill IA to be submitted for RPC scrutiny.

## Summary of proposal

The IA states that concentration of power amongst a small number of tech companies is considered to undermine effective competition, restrain growth and innovation, and cause harm to the consumers that rely on them. In 2019, the Digital Competition Expert Panel (‘The Furman Review’) proposed a new pro-competition regime for digital markets and its six strategic recommendations – including to establish a new Digital Markets Unit (DMU) – were accepted by the government in 2020. The DMU was established within the CMA in April 2021. The government outlined its proposed approach to establishing a new pro-competition regime for digital markets to be overseen by the DMU and consulted on this during July to September 2021. A consultation response was published in May 2022, setting out the finalised proposals for the new regime.

Under all ‘do something’ options, the DMU would be responsible for designating firms within scope, defined as having Strategic Market Status (SMS), against criteria including having revenues above a certain threshold. The expectation is that very few firms will be found to have SMS: the Department’s modelling assumes only four firms are in scope. Under options 2 and 3, the DMU will be able to set conduct requirements for SMS firms and impose enforcement orders on those not compliant. The DMU will also be able to make ‘pro-competitive interventions’, imposing specific behavioural and structural measures on SMS firms. Examples could include data-related interventions (e.g. personal data mobility, mandated data access) and measures relating to interoperability or consumer choice. Finally, under the preferred option 3 there will be increased merger transparency requirements for SMS firms that include submitting a light touch report (before completion), to the CMA, for all transactions which meet certain criteria.

The IA presents an indicative-only (the front page of the IA says ‘not quantified’) figure of £5.4 billion over ten years for the preferred option (option 3). Costs are estimated at £1.1 billion, consisting primarily of an annual £130 million cost to business associated with a ‘self-preferencing’ conduct requirement (table 16). Benefits are estimated at £6.5 billion, consisting primarily of a £635 million annual benefit to consumers of a conduct requirement relating to consumer choices around use of data (table 24) and the corresponding benefit to consumers of the self-preferencing’ conduct requirement noted above (table 22). The IA presents an indicative EANDCB figure of £104 million, consisting of the ‘self-preferencing’ conduct requirement cost noted above and other, much smaller, ongoing compliance and one-off (including familiarisation) costs.

## EANDCB

### *BIT classification*

The Department's assessment against the better regulation framework pro-competition criteria (section 7 and, especially, annex C) is sufficient and the RPC can confirm the proposal as non-qualifying against the BIT under this exemption. The Department notes correctly at paragraph 83 that, at this stage, the application of the pro-competition exemption applies only to the measures within this IA and not the whole bill. If the other (BEIS) proposals in the bill do not meet the pro-competition criteria then the bill would be qualifying against the BIT. However, it may still be possible, framework rules permitting, to exclude the direct impacts of the present DCMS proposal from the BIT as non-qualifying. This will be addressed as part of the RPC scrutiny of the overarching bill IA.

The IA and future assessments would benefit from making a clearer distinction between the creation of new powers and specific measures under those powers, and between pro-competition and any other additional objectives of those powers/measures. Only those measures that are in pursuit of pro-competition, and meet the framework criteria, would be non-qualifying under this exclusion.

The indicative EANDCB figure appears correctly to exclude the cost of the proposed levy on SMS firms to cover the cost to the DMU of operating of the pro-competition regime (paragraph 110), on the basis that it would fall under the BIT's tax exclusion.

### *Assessment of impacts at primary legislation stage*

The Department's indicative quantitative assessment of direct business impacts meets RPC requirements for primary legislation stage IAs.<sup>3</sup> The Department states that it will work with the regulator (DMU) to produce and submit a Business Impact Target (BIT) assessment following implementation to ensure impacts are captured (paragraph 85). However, as a non-qualifying measure the DMU will not be required to produce a BIT assessment. The RPC recommends that the DMU provides an EANDCB figure as part of its non-qualifying regulatory provisions summary document. The RPC would welcome the voluntary submission of this document and assessment underpinning the EANDCB figure for scrutiny.

### *Direct/indirect*

The IA appears to differentiate correctly between direct and indirect impacts on business. For example, the benefits from increased competitive pressure are appropriately described as indirect (paragraphs 212-213). The IA would benefit from discussing why it is important to differentiate between transfers and changes in deadweight loss, with the need to report the latter.

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<sup>3</sup> <https://www.gov.uk/government/publications/rpc-case-histories-primary-legislation-ias-august-2019>. The Department's assessment is consistent with 'scenario 2' in the guidance.

## SaMBA

The SAMBA notes that small and micro businesses are directly exempt from the proposed regulation. Nevertheless, the IA includes a detailed SaMBA (section 9, paragraphs 214-228) which provides a good discussion of pass-through and other indirect impacts on SMBs.

## Rationale and options

The IA provides good evidence and reasoning for government intervention. The IA discusses three key drivers of weak competition leading to suboptimal outcomes for consumers in some digital markets: market characteristics, firms' anti-competitive behaviour and ineffective regulation. The IA discusses in some detail how these result in the markets tending towards concentration, giving rise to poor consumer outcomes. The IA explains that neither the free market nor regulators (with their existing pro-competition tools) can be expected to address this effectively, given that existing powers are considered too narrow and enforcement of existing powers is considered too slow and spotty. The IA includes a section providing evidence of harm to the economy and consumers, in particular from market power, such as higher prices and reduced innovation, and includes a number of illustrative case studies throughout (pages 11-23).

The IA would benefit from considering further the benefits of network externalities and scale/scope economies, and literature suggesting that small numbers of firms or SMS do not necessarily result in higher prices and reduced innovation.<sup>4</sup> The IA could distinguish more fully between horizontal and vertical effects, and address any ambiguity in the implications of self-preferencing for consumer welfare.

The IA includes a good discussion of three options (pages 23-27), which are monetised in the summary sheets. The consultation stage IA included consideration of further options, including non-regulatory ones. The present IA would benefit from summarising the non-regulatory options considered and why they were discounted. The IA also seems to have considered the proposals applying either to SMS firms only or all digital market firms and would benefit from discussing whether there are scope options in between.

## Cost-benefit analysis

### *Evidence and data*

The Department has provided a much more fully monetised section than that at consultation stage. The IA uses a number of sources to produce estimates, including a BEIS survey asking business for information on impacts associated with different

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<sup>4</sup> On concentration vs. innovation, see Kuznets and more recently Aghion, etc, for example Aghion, P., Bloom, N., Blundell, R., Griffith, R. and Howitt, P., 2005. *Competition and innovation: An inverted-U relationship*. *The quarterly journal of economics*, 120(2), pp.701-728. Literature on self-preferencing includes: Caro de Sousa, Pedro, *What Shall We Do About Self-Preferencing?* (June 23, 2020), Competition Policy International, June Chronicle 2020; and Petit, Nicolas, *Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf* (April 29, 2015). *Competition Law & Policy Debate* 1 CLPD (2015).

stages of merger reviews and information from the CMA, in particular an online platform and digital advertising market study. The IA benchmarks some of its estimates against the European Commission's Digital Markets Act (DMA) Impact Assessment. The IA sets out how it has used the consultation responses. Although only three responses were received to the IA consultation survey, the final stage IA uses willingness to pay estimates provided relating to consumer choice over data to inform its quantification of benefits. These estimates drive the largest monetised benefit in the IA (£635 million per year as the potential value of the Choice Requirement Remedy). Since these estimates are provided by one organisation as part of the consultation, the IA should provide discussion around the reliability of the figures. The IA would benefit from analysing the reasons for the low engagement on the IA survey and the likely direction of any bias.

### *Assumptions*

The IA usefully sets out risks and assumptions at annexes A and B. The IA notes that there is no agreed legal definition of digital markets and that the definition in the IA is not widely agreed (paragraphs 10-11). The IA would benefit from discussing further the significance of different definitions of digital markets and the implications for the rationale and the impacts of the measure.

### *Risks to achievement of policy objectives*

The IA and future assessments would benefit from assessing the potential for the proposal to induce structural changes that could take businesses out of the SMS definition. Structural changes might include a shift of activities to contractual or market affiliates and vertical restraints short of M&A, implemented for example by interoperability and data-sharing requirements, (with the effect that a loose contractual network, rather than a single firm, has (collective) SMS.

### *Counterfactual*

The do-nothing option appropriately includes the already-established DMU but on a non-statutory basis and without additional powers. The IA would benefit from further clarity around what the DMU could/could not do in its current form. Although insufficient to achieve the desired policy outcomes, the IA would also benefit from providing greater clarity (for example at paragraph 57) that the 'do nothing' allows for the CMA to continue its recent pursuit of more 'forward-looking theories of harm' and to increase its scrutiny of mergers involving large digital firms (paragraphs 37-38). This might also include actions predicated on 'monopoly leverage.'

The IA would benefit from further consideration of the likely evolution of the affected sectors in the light of actions other than UK regulatory powers. This includes self- and co-regulation, direct encouragement of entry and development of competitors, and changes already occurring in other domains (US, EU) where the SMS firms are located. The IA and future assessments would also benefit from further analysing the consequences of divergence or convergence with the EU's Digital Services Act and Digital Markets Act and US, Australia and other countries' equivalents or proposals,

particularly as the EU measures have just been passed into law. This should consider the provisions in these measures, in particular the relation between this measure's definition of SMS and the DMA's definition of a 'gatekeeper'. On this, the IA could also discuss Germany's implementation of its own version of a gatekeeper provision.

#### *Methodology and presentation*

The IA would benefit from providing greater consistency around the base years, expected start date of the measure and the appraisal period used. Paragraph 86 indicates a price base of 2022, paragraph 103 suggests a start date of 2023 (giving a ten-year appraisal to 2022, inclusive) but the summary sheets use 2019 prices and 2020 present values. It therefore appears that the indicative EANDCB figure should be adjusted to 2019 prices; 2020 present value base year from a cost benefit analysis basis of 2022 prices and 2023 present value base year.

The IA would also benefit from presenting clearer information on which figures are annual vs over ten-years, discounted vs undiscounted etc.

## **Wider impacts**

The IA provides a good assessment of wider impacts. The Department has engaged with the Department for International Trade and provides a discussion of trade impacts, including around regulatory coherence and divergence (section 9b paragraphs 229-238). The assessment would benefit from some further consideration of the potential impacts of the UK diverging from other major countries/blocs in this area, for example in terms of inward investment by SMS firms. The IA could usefully explore international regulatory cooperation. The IA's assessment of risks at paragraph 235 would benefit from considering possible consequences for non-SMS firms that rely on SMS firms for market access, or whose terms & conditions are affected by SMS firms' compliance activities.

The IA includes a good and detailed assessment of innovation impacts (section 9d, paragraphs 243 to 260). This is informed by research into competition and innovation in digital markets undertaken by the University of East Anglia Centre for Competition Policy on behalf of BEIS. The IA would benefit from considering impacts on innovation in different parts of the digital market value chain, in particular whether, where competition is higher (e.g. those using SMS firms to reach large and contested markets), it could negatively impact innovation. The IA includes an assessment of the costs to government (paragraphs 109-11 and table 9) and impacts on the justice sector (page 70). The IA could usefully discuss why central estimate for the cost of operating the regime is at the top end of the range estimated at consultation.

## **Monitoring and evaluation plan**

The IA includes a good monitoring and evaluation plan (section 10, paragraphs 264 to 273). This sets out process, impact and value for money evaluation questions that will be addressed. Data sources, metrics/indicators and how they are linked to



objectives are also discussed. The plan is expected to be strengthened through commissioned external research to develop a framework for monitoring and evaluating the pro-competition regime for digital markets. Assessing whether the large consumer benefits indicated in the IA have been realised should be a priority for the evaluation.

## Regulatory Policy Committee

For further information, please contact [regulatoryenquiries@rpc.gov.uk](mailto:regulatoryenquiries@rpc.gov.uk). Follow us on Twitter [@RPC\\_Gov\\_UK](https://twitter.com/RPC_Gov_UK), [LinkedIn](#) or consult our website [www.gov.uk/rpc](http://www.gov.uk/rpc). To keep informed and hear our views on live regulatory issues, subscribe to our [blog](#).

One Committee member did not participate in the scrutiny of this case to avoid a [potential] conflict of interest.