BBC RESPONSE TO THE BEIS-DCMS CONSULTATION ON THE DIGITAL MARKETS PRO-COMPETITION REGIME

Executive Summary

For the media sector, we are now operating in a global, dynamic, fast-paced digital marketplace which we welcome. This gives consumers unprecedented choice and continuing innovation. However, our regulatory systems have been based on old, linear models where regulatory interventions can be slow and long-drawn out. We welcome Ofcom's recent review into Public Service Broadcasting which recognised there was an urgent need for the Government, policymakers and regulators to recognise these new market conditions and frame legislation and regulatory interventions accordingly.

A clearer focus on digital regulation is critical to the success of the media sector. Given the fast moving nature of digital markets, it is vital that a new pro-competition regime is both flexible and future proof – a regulatory regime where competition works for consumers as well as the UK's innovation and creative sectors.

The Digital Markets Unit will have a very important role to play in ensuring that large, global technology players who act as the gatekeeper for consumers in a variety of ways do not end up as monopoly providers, restricting consumer choice of media. If left unchecked the overall impact will be to reduce the democratic, cultural and economic benefits for UK citizens from smaller British media providers in the market place.

Whilst the BBC, and the other players in the UK market are highly consumed – the BBC reaches over 90% of adults and 80% of young people weekly – it is vital that the UK consumer can access all our services and other UK media providers in an open and transparent way which enables media providers to have the prime relationship with the consumer rather than for it to be mediated or distorted by digital players.

Ensuring that there is effective regulation in place is critical to support that consumer choice. For example, Ofcom's PSB review highlighted the value audiences consistently place on high-quality trustworthy and accurate news. In the first week of the Covid-19 pandemic, the percentage of people who said they trusted information from the public service channels was over 80%, compared to 30% for trust in news from websites/apps of online news organisations.[1] Prior to the pandemic, the UK's creative industries were growing faster than the UK economy overall.[2] And the BBC's role in the creative economy is vital – accounting for 13% of media sector GVA and working with over 14,000 suppliers, three quarters of which are SMEs, and with a greater level of investment outside of London than any other broadcaster.

Many sectors are already experiencing challenges in securing fair value in their exchanges with digital platforms which is impacting on outcomes for consumers. The

[1] Ofcom (July 2021), Small Screen Big Debate: recommendations to Government on the future of Public Service Media

[2] O&O (2018) The contribution of the UK-based film, TV and TV related industries to the UK economy, and growth prospects to 2025

way in which audiences seek to access content is changing rapidly, with platforms now acting as both direct competition in media services and as a gateway for other media organisations, including the BBC, to reach audiences. The vertical integration of digital platforms across the media value chain provides them with significant market power and bargaining power, tipping outcomes in their favour which can be to the detriment of consumer choice. For example search results on TV platforms or on voice assistant often self-preference the downstream content of the platform provider instead of offering consumers a choice of providers. We are concerned that large digital platforms do not gain the position where they will have the ability to reduce that choice, potentially by creating entire closed media ecosystems that may eventually drive out UK players and the unique value they can deliver to UK audiences.

Overarching statutory duty and citizen welfare

We support the recommendations previously made by the Digital Markets Taskforce that the DMU's overarching statutory duty should include a reference to the interests of citizens, given the strong overlap between the interests of citizens and consumers in digital markets and the consequent need to take into account the impact beyond that on the individual consumer.

Scope of the pro-competition regime

We agree with the consultation that the scope of the new pro-competition regime should be limited to activities and markets where digital technologies are a core component of the services and products provided by firms. This would avoid the net being cast too widely, for example by including businesses or activities where digital technologies are present but not core to their value creation.

The strategies of firms likely to be deemed to have Strategic Market Status (SMS) in activities or markets where digital technologies are a core component are often characterised by vertical and horizontal integration. This means that it is possible for them to take market power from one market into an adjacent or vertical digital market. The DMU should therefore be given the power to intervene if they find that a firm with SMS in one digital market is using that in a related digital market, even if they do not yet have SMS in that second market. This is particularly important for the media and broadcasting sector where vertical integration is an increasing feature of the way in which digital platforms engage in this market.

Working with sectoral regulators with parallel duties

We welcome the consultation's recognition of the need to avoid overlapping and duplicative regulation by the DMU and sector regulators. We believe the DMU should work with sector regulators with parallel duties, including more formal collaboration where market investigations have significant overlap with the responsibilities of sector regulators. In order to achieve this, further specific legal duties to cooperate should be considered for regulators, as envisaged by the Digital Regulation Cooperation Forum. This will ensure best use of resources, as well as assisting with legal certainty and giving businesses confidence that regulators will coordinate their approaches. Moreover, formal coordination between regulators is essential if the DMU is to take into account wider considerations beyond a narrow view of competition parameters. However given

the fast-paced nature of a global digital market this would need to be stream-lined, with clear time limits as otherwise the larger players could secure too much, possibly irreversible market power and influence.

Code of Conduct

The code of conduct put forward in the consultation is a welcome first step towards redressing the bargaining imbalance between platforms and users, businesses and consumers. In order for the code to work to best effect it should apply to all arrangements involving SMS firms, whether or not there are formal contracts in place. This is important within the media and broadcasting sector where the nature of the relationship between media organisations and platforms is complex and can differ by platform and content type. The code should include:

- Guaranteed and significant attribution for content providers – in the BBC's case this is key, so that licence fee payers recognise and attribute fair value to the BBC and other PSBs as originators of the content;
- Transparent and complete access to audience/user data, including data on the usage of services that compete with the platform's own as well as contextual data; and
- prohibit online platforms self-preferencing their own downstream services as defaults on upstream operating systems and hardware.

In particular we believe that specific data access conditions should be mandated as part of the code. This would form a baseline against which specific further interventions (perhaps on a sector-specific basis) could be evaluated for implementation as Pro-Competitive Interventions (PCIs). This is vital given that (1) the use of data by the large online platforms is a fundamental reason for their ability to maintain their SMS and to leverage their SMS into new markets; (2) relegating access to data to PCIs would be less efficient as separate PCIs would be required for each SMS firm and potentially each issue arising in the different sectors in which they operate; and (3) we see no reason why standard access to data principles cannot be built into the standard code of conduct so that consumers and businesses, including content providers, have a basic minimum standard for data sharing which can be built upon by negotiation or PCI as necessary.

Pro-Competitive Interventions (PCIs)

We support the proposal that an extensive range of Pro- Competitive Intervention remedies should be available to the DMU. The DMU should not in any way be constrained to only considering PCIs if the code of conduct turns out not to address all of the relevant issues arising from the SMS-designated activities. In particular, it is clear that the code of conduct is primarily concerned with addressing the adverse effects of an SMS firm's substantial and entrenched market power, but is not likely to address the roots of an SMS firm's market power (which arises, in part, from their vertical integration). It is therefore essential that the DMU should have the power to consider PCIs alongside the code of conduct.

As regards PCIs, and in line with the recommendations of the Digital Markets Taskforce, we believe that the DMU should be able to impose, amongst other remedies:

- data-related remedies, such as increased consumer control over data and data mobility, as well as mandated interoperability, third party access to data and data siloes;
- consumer choice and default remedies, including restricting the ability of platforms to purchase search default positions and the introduction of choice screens.

We agree that the DMU should also be empowered to impose ownership separation in the most serious circumstances and as an option of last resort.

The BBC Group

The BBC is the UK's leading public service broadcaster, used by 90% of British adults and 80% of young people each week, and one of the most recognised British brands around the world. The BBC has over almost a century built up significant knowledge with regards to developing high quality and distinctive public service content and services on TV and Radio platforms. In recent decades, this knowledge has extended to digital content and – critically – digital services where UK audiences can get the full range and breadth of BBC content and best value from the BBC. Around half of the average person's daily viewing is now spent on on-demand and online content and estimates suggest online platforms could account for 35-40% of all live radio listening by 2035. BBC services include the BBC iPlayer, BBC Sounds, BBC websites and mobile apps such as BBC News and BBC Sport. BBC content and services are also available on or discoverable through the products offered by large online platforms such as Amazon, Apple, Facebook and Google. However, the BBC also competes with the downstream services of these large online platforms (for instance, BBC iPlayer competes with Amazon Prime Video on Amazon's Fire TV, whilst BBC Sounds competes with Amazon Music on Amazon's Echo smart speakers).

In the remainder of this response we set out detailed comments on the relevant 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?

We believe that innovation should already be covered by a duty to promote competition in digital markets for the benefit of consumers for a number of reasons and therefore, there is no need for the DMU to be provided with a separate duty on innovation.

Firstly, innovation is a standard feature of competition law and merger control analysis. For instance, in assessing whether a merger leads to a substantial lessening of competition, the theories of harm which the CMA will consider include whether the merger will reduce innovation efforts at one or more of the pre-merger businesses.[3]

Secondly, it is widely considered that the current consumer welfare standard used in competition policy should consider the dynamic as well as static impact of markets on

[3] CMA *Merger Assessment Guidelines*, CMA129, 18 March 2021, paragraph 2.17.

consumers. By taking into account dynamic impacts (i.e. the impact of action now on future market outcomes) weight is given to the welfare of future consumers who will be the primary beneficiaries of investment in innovation undertaken today.

This view is reflected in comments made by the Digital Competition Expert Panel:

> "The consumer welfare standard can and should be considered dynamically. Many of the critics' concerns about protecting potential competition or anti-competitive behaviour can be included by considering cumulative consumer welfare over time."[4]

> "Consumer welfare is the appropriate perspective to motivate competition policy and a completely new approach is not needed. This approach is flexible and can take into account broader considerations than price, narrowly defined, and also include choice, quality and innovation, among other areas."[5]

In digital markets taking into consideration broader considerations of consumer welfare is particularly important as direct pricing to consumers can often be zero, making price a poor metric of consumer welfare. Therefore, although we do not believe a separate specific duty regarding innovation is needed, the DMU should in its evaluations be able to apply the consumer welfare standard to its assessments using the approach envisaged by the Digital Competition Expert Panel.

Finally, we note that online platforms often claim that regulatory intervention risks stifling innovation. Innovation in of itself is a means to an end and therefore to give the DMU a duty on innovation that is separate from the consideration of its impact on consumer welfare would not be appropriate and risks undermining the role of the DMU.

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?

To succeed the DMU will need to be able to act quickly and adapt as digital markets change over time (in particular those that would result in the swift exclusion of smaller players from the market). A narrow view of competition concerns risks rendering the DMU incapable of addressing certain harms (for example the loss of societal benefits of curation by PSBs). This is likely to be a particular problem where companies do not compete on price.

Therefore, we believe the DMU should be able to take wider policy issues into account where appropriate and necessary.

This could be achieved through an additional reference to the "interests of citizens" within the DMU's overarching statutory duty in order to ensure that other concerns can be addressed as part of the regulatory regime.

[4] Report of the Digital Competition Expert Panel "*Unlocking Digital Competition*" (March 2019), p.87, §3.21.
[5] Report of the Digital Competition Expert Panel "*Unlocking Digital Competition*" (March 2019), p.5.

In the media and broadcasting sector this additional duty might be used for example to take into account citizen concerns such as the incentive to invest in content that serves niche audiences or the benefit of content curation by PSBs. These are potentially within the skillset of the DMU, although clearly advice may be sought from Ofcom and DCMS (see our response to question 4 below). For instance, we note that the CMA already has a function of advising the Secretary of State on mergers that might raise public interest considerations such as the need for accurate presentation of news and free expression of opinion in newspapers, even though it is a competition and consumer agency.

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?

Given the fast-paced nature of a global digital market, the DMU and other regulators need to be able to work together at pace. This means a streamlined coordination process is essential to ensure the larger players are prevented from securing too much, possibly irreversible market power and influence.

This is a critical point when considering further specific legal duties, which we believe would be beneficial (and which were as envisaged by the Digital Regulation Cooperation Forum.)[6]

This type of formal coordination between regulators will be essential – especially if the DMU is to take into account wider considerations beyond a narrow view of competition parameters. In particular, if issues of media plurality and fair attribution of content are to be considered, then the DMU will need to have formal coordination duties with Ofcom in order to carry out its duties more effectively. In particular:

- Regulators should be able to share information to reduce the costs and administrative burden on market participants of having to address the same or similar information requests;
- Where there are strong overlaps between the roles and responsibilities of different regulators, they should be under a duty to cooperate. For instance, if the DMU were to use its new regulatory powers to investigate online news publishing which necessitates consideration of the impact on the media ecology, then they should notify and collaborate with Ofcom;
- This duty of cooperation should ideally extend to regulators being under a duty to refer issues which also fall within another regulator's remit to that other regulator. For example, this could involve Ofcom being under a duty to refer matters to the DMU and vice versa.

[6] Digital Regulation Cooperation Forum Policy Paper, "*Embedding coherence and cooperation in the fabric of digital regulators*", 10 May 2021 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982898/DRCF_response_to_DCMS__PDF.pdf

Although the DRCF has not mentioned specific time limits in relation to the duties of consultation and cooperation, time limits would clearly be crucial to the effectiveness of any enhanced duties of consultation and cooperation. For instance, we note that the CMA expects that agreement between regulators on which regulator will apply competition powers in a particular case should usually be reached promptly and in any event no more than two months after receipt of the complaint by the first authority to receive it.[7] The underlying Regulation on Concurrency sets out that any disputes between regulators should be resolved "within a reasonable time".[8] Ideally, however, time limits should be set out in the underlying legislation. For example, the 40 working day time limit for the CMA to make decisions on merger references is set out in legislation.[9]

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

As above, the information sharing gateways should be reviewed along the lines envisaged by the Digital Regulation Cooperation Forum.[10]

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

Given that the DMU will build up an extensive knowledge of digital sectors, we agree that the DMU should have some limited wider monitoring powers. However, these should be used in a way which is complementary to those of other regulators. For example, in the media sector Ofcom already conduct and publish extensive market research, which involves gathering information from market participants, including the BBC. The DMU should utilise the research and knowledge of existing regulators and not impose additional duplicative data gathering burdens on businesses.

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"?

We agree that the scope of the regime should be limited to activities where digital technologies are a core component. Digital technologies are increasingly used in every sector of the economy from hospitality to retail to manufacturing. The intention of the DMU is clearly to address gaps in the current competition and regulatory framework where digital markets require a new approach due to their unique structure. Therefore to extend the regime further would risk including activities where digital technologies are important but not core to value creation, spreading the DMU's resources too thinly and

[7] CMA guidance "Regulated Industries: Guidance on concurrent application of competition law to regulated industries", CMA 10 (March 2014), paragraph 3.24
[8] Competition Act 1998 (Concurrency) Regulations 2014, regulation 5
[9] Enterprise Act 2002, section 34ZA
[10] Digital Regulation Cooperation Forum Policy Paper, "*Embedding coherence and cooperation in the fabric of digital regulators*", 10 May 2021 above.

duplicating powers already covered by competition law alone or specific sector regulation.

However, equally, a narrower scope/definition, such as “digital platform activities”, would be too restrictive and may lead to less effective regulation hampered by protracted debates on the definition of a platform and a lack of legal certainty. A narrower definition could mean that the DMU is unable to take action in certain areas where competition issues in the digital sphere may arise such as the interaction between hardware and operating systems in relation to, for example in-car infotainment systems and smart speakers.

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?

We agree that SMS should revolve around a finding of substantial and entrenched market power, including a finding that the firm occupies a strategic position based on the four factors outlined at paragraph 68 of the consultation.

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?

It will be important that the strategic position criteria can adapt as digital markets do. Precise criteria defined too tightly in legislation risks ruling out other relevant factors that may emerge in the future. For the DMU to succeed a degree of flexibility will be required e.g. in the weight attached to relevant factors and in the possibility for other factors to be taken into account. A future-proof regime could be achieved by requiring the DMU to publish guidance setting out specifically what they will take into account. Guidance could then of course be more easily updated in the event that new factors emerge which need to be taken into account.

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?

We agree with the prioritisation criteria outlined in paragraph 77 of the consultation. In respect of the revenue criteria, global revenue is the better option. Using only UK revenue as the criteria could mean that a firm which is the target of the regulatory regime could avoid SMS designation of its activities if it does not account for its revenues in the UK. In addition to the prioritisation criteria outlined, consideration should be given to an additional factor (related to the characteristics of the activity) concerning the seriousness of the issues raised from a consumer welfare and citizen interest perspective. For example, the relationship between digital platforms and news providers is at a point where regulatory intervention is urgently needed to prevent long term damage to the sector.

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?

The SMS designation process should be as streamlined as possible and completed within a reasonable timeframe. Given the fast pace at which digital markets move, we are in favour of SMS designation assessments having a statutory deadline of 6 months.

We agree that the SMS designation should last for 5 years prior to review. This is reasonable given that part of the definition of SMS is entrenched market power which can be expected to last on a medium to long-term basis.

Part 4: An enforceable code of conduct

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

The three objectives rightly target exploitative and exclusionary conduct, as well as facilitating transparency. However, we think that the proposed code should apply to the substance of all economic relationships between customers and a firm's designated SMS activities, rather than only applying to the relevant formal contractual relationships. This is because many businesses (including the BBC) often do not have formal contractual arrangements in place with the online platforms who are likely to be the subject of SMS findings.

For instance, the BBC does not have any agreements in place with search providers in respect of results, and yet given that news, in particular, is a major driver of search traffic, we would want to ensure that any code of conduct applies to ranking of search results on providers found to have SMS status. Furthermore, there are mechanisms such as RSS feeds which are deliberately designed to be open and accessible. However, RSS feeds can nonetheless be exploited by firms with SMS if they use them to access content without agreeing terms with content creators and distributors which reflect fair value exchange. In terms of content, this could, for example, include podcasts which are distributed via RSS.

Moreover, even if an agreement is in place between content creators and platforms, this is often in the simple form of having accepted standard terms and conditions which have been imposed by the online platforms themselves. Again, it is important to ensure that standard terms imposed by the online platforms are subject to the code of conduct, in the same way as bespoke agreements are.

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?

We agree that Option 3 is on balance the best compromise in terms of flexibility, legal/commercial certainty and proportionality. In particular, the principles should be set out in legislation in broad terms given the variety of situations to which they will need to

apply. It is then critical that the DMU should have powers to develop firm-specific legally binding requirements. Option 2 would be too inflexible in this respect and the DMU could end up in a position of applying principles with no ability to tailor their application to the specific issue at end with the effect of blunting the effectiveness of the regulation.

We have doubts as to whether the code of conduct will be capable of covering all the areas of concern to media providers and PSBs in particular. Specifically, the code should include:

- requirements to promote fair attribution to content providers;
- a prohibition on self-preferencing, so that the SMS firms must treat their own services no more favourably than the services of third parties. In particular it should be clarified that platforms must not self-preference their own services in the ranking and display of services (including display, installation, activation and default settings).[11]
- mandated access to data on the usage of content providers own services on the platform. Whilst we note that data interventions are explicitly referred to as potential pro-competitive interventions (PCIs), we consider that access to data should be mandated as part of the code. This would form a baseline against which specific further interventions (perhaps on a sector-specific basis) could be evaluated for implementation as PCIs. This is vital since:
    - the large online platforms build their businesses on their ability to secure data about individuals from multiple products and use it to make increasingly accurate predictions about behaviours and preferences. Given that the large online platforms also have downstream products and services competing directly with businesses which do not have access to this data (such as the BBC and other third party content providers), these third parties are at a systematic disadvantage;
    - relegating access to data to PCIs would be less efficient as separate PCIs would be required for each SMS firm and potentially each issue arising in the different sectors in which they operate. This would represent a significant burden on the DMU's time and resources, and would also inevitably lead to delayed implementation of access to data in circumstances where action needs to be taken without delay;
    - we see no reason why standard access to data principles cannot be built into the standard code of conduct so that consumers and businesses, including content providers, have a basic minimum standard for data

[11] This may require a clarification that fair trading principle (b) (not to apply unduly discriminatory terms, conditions or policies to certain users) and open choices principle (a) (not to unduly influence competitive processes or outcomes in a way that self-preferences or entrenches the firm's position) cover a full prohibition on self-preferencing

sharing which can be built upon by negotiation or PCI as necessary. This minimum standard of access to data should include a presumption that businesses such as content providers should have access to the same level of usage data on their own service as the large online platforms, subject to consistency with GDPR principles. We note the ongoing cooperation and work between the CMA, Ofcom and the ICO and that it should be possible to ensure access to data in a manner which is GDPR compliant.

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?

It is essential that firms designated with SMS cannot make changes to non-SMS designated activities that further entrench the firm's market position in its SMS designated activities. For example, a firm with SMS in search should not be able to self-preference their downstream services in order to keep consumers (and their data) within a walled garden, that further entrenches thei advantage in search by having sole access to data on a wide variety of consumer online behaviour. We therefore agree with the proposal to apply principle 2(e) to the entire firm that is designated with SMS. The condition proposed, that such changes may be permitted if the change can be shown to have significant benefits for users, seems reasonable.

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?

The proposed code of conduct regime is an important first step in levelling the playing field between key platforms on the one hand and news publishers on the other hand. If the changes we recommend to the code in response to question 13 are accepted, we believe the code of conduct regime could reduce self-preferencing by online platforms, for example. The issues we highlight in response to question 13 were echoed in the findings of the Cairncross review.

However, as set out in the consultation document, the code has been designed to be sector agnostic and therefore is unlikely to be sufficient to fully address the impacts of the unbalanced relationship between gatekeeper platforms and news publishers like the BBC. For example, algorithmic changes by platforms which aggregate news content can have a significant adverse effect on the performance of news publisher's content and as highlighted by Cairncross there is often very little or no warning provided of these changes.

Given issues are likely to persist beyond those which the code can reasonably address the DMU should have the ability to deploy pro-competitive interventions (PCIs) to ensure that the impact of the current bargaining imbalance is fully addressed.

A broader concern with the code of conduct as currently described in the consultation is that it lacks absolute clarity on who is intended to benefit from it. Whilst the code applies to SMS firms, the DMU has duties with regards to consumers (and we argue, citizens in response to Q2) but the code itself also refers to customers and users. In some cases it seems like these three terms are used interchangeably. The code should be clear about the difference between these terms.

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

Given the fast changing nature of digital markets and the potential scale of the damage which SMS-designated firms could cause to businesses and ultimately to consumers and citizens, interim code orders are clearly required. It is essential that there are clear processes in place for reporting issues which require immediate attention so that interim code orders can be considered. The DMU should then be under an active duty to respond to these reports and to clarify why an interim code order has been made or alternatively why an interim code order has not been imposed. Overall, we believe that the conditions set out in paragraph 100 of the consultation are sufficient to ensure that interim code orders are not misused.

More broadly, we believe there is merit in ensuring that there is a dispute resolution system regarding disputes over the implementation of the code of conduct. It seems likely that the code will be interpreted differently by online platforms on the one hand and customers, consumers and users on the other hand. A dispute resolution mechanism would be an interim step available to the parties prior to identification of a code breach and implementation of a code order. This would allow for disputes to be settled prior to completing the process for identifying a code breach and so reserve the DMU's limited resources for the most difficult cases. The dispute resolution mechanism could be in the form of an arbitration by an independent expert, and could be supplemented by the possibility of putting clarificatory questions to the DMU.

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?

Pro-competitive interventions should be available to the DMU alongside the code of conduct. The code of conduct is primarily concerned with addressing the adverse effects of an SMS firm's substantial and entrenched market power. However, it is not likely to address the roots of an SMS firm's market power - PCIs could be a key tool to ensure the DMU has the powers it needs to be effective.

In line with the recommendations of the Digital Markets Taskforce, we think the DMU should be able to impose, amongst other remedies:

- data-related remedies, such as increased consumer control over data and data mobility, as well as mandated interoperability, third party access to data and data siloes;

- consumer choice and default remedies, including restricting the ability of platforms to purchase search default positions and the introduction of choice screens.

The DMU should also be empowered to impose ownership separation in the most serious circumstances and as an option of last resort. Continuing to reserve this option purely to the CMA following a market investigation would potentially mean that two regulatory processes have to be gone through to achieve the same ultimate end.

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?

The AEC test is not sufficient in that there are consumer harms which take place even in the absence of an AEC. For instance, the European Commission has recognised that in certain circumstances a less efficient competitor may exert a constraint which should be taken into account when considering whether particular price-based conduct by a dominant company leads to anti-competitive foreclosure, since in the absence of an abusive practice such a competitor may benefit from demand-related advantages, such as network and learning effects, which will tend to enhance its efficiency.[12] We therefore agree that an AECC test should be adopted, and suggest that this is extended to include addressing harm to individuals as citizens as well as consumers (in line with our view that the regime should have an overarching statutory duty to protect the interests of citizens).

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?

A key concern is online platforms with SMS in one area (e.g. search, online retail) leveraging that position into new areas where they may not yet have market power. SMS firms can – and do – exert market power in their "home" markets (i.e. the markets in which they have been designated as having SMS) as well as in parallel markets together with markets up or down the value chain. This will become increasingly common as SMS firms are increasingly characterised by significant vertical integration. Moreover, SMS firms are continuously and rapidly developing new products and services across different content sectors, and their standard contract agreements often secure the use of content in future products which are not yet developed. It is therefore crucial for the DMU to be able to act swiftly, even outside of the SMS designated activities, to address any significant shift which may result from these developments. We therefore strongly support the DMU being empowered to implement PCIs outside of the designated activity in order to address the extension or entrenchment of market power.

[12] Commission Communication *"Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings"* (2009/C 45/02), paragraph 24

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

PCIs certainly need flexibility mechanisms given the fast-paced nature of digital markets. We agree with the main mechanisms set out in paragraph 118. However, if the flexibility mechanisms are too broad, there is a risk to legal certainty and a risk that repeated reviews and appeals may inadvertently water down the effectiveness of the PCIs. That said, we suggest that PCIs can be reviewed after 2 or 3 years in order to ensure that they are being effective in achieving their aims. The legal threshold for these reviews should set at a level which is sufficient to deter vexatious or unnecessary initiation of reviews.

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

The deadlines should allow for the complexity of the markets concerned, but also the need to take swift action in fast-moving digital markets. The standard statutory deadline should therefore be six months (rather than nine months), with an extension of up to three months in exceptional circumstances only.

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?

Given the global nature of digital markets it is essential that the DMU can effectively investigate and enforce against conduct in the UK and oversees.

We agree with the maximum level of financial penalties, which reflects the position under UK competition law. Regarding further enforcement mechanisms, paragraph 128 refers to senior management liability. Given that the CMA is making more use of its powers to impose director disqualification orders, we suggest that similar director disqualification orders could be used in the context of implementing senior management liability for breaches of the digital markets pro-competition regime.

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

The DMU should have the extensive information gathering powers set out in Annex E to the Digital Markets Taskforce's Advice.[11] In particular, given that decisions affecting UK digital markets will often be taken outside of the UK, it will be important that the DMU should have jurisdiction to review conduct which, although it occurs outside the UK, has an effect in the UK and/or impacts UK consumers or businesses. In order to enforce this jurisdiction, and to address issues in digital markets in the UK, the DMU will need to have robust information gathering powers which extend beyond the UK and we therefore support the following recommendation of the Digital Markets Taskforce that the DMU "should be expressly empowered to do so where a person has a

sufficient connection with the UK. This should clearly be the case where a firm carries on its business in the UK either directly or via a subsidiary or business unit, and should extend to where a firm's conduct may be expected to have an effect in the UK."[12]

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

While an appeals framework will be needed, it will be important to ensure that companies with access to enormous financial and administrative resources cannot avoid regulatory oversight through endless appeals.

We are concerned that well-resourced platforms will have every incentive under a merits appeals regime to pursue protracted litigation as a way of disrupting enforcement or at least dissuading the DMU from taking necessary and timely action in the relevant specific case or the future. This is a particular risk where appeals are available on the merits, for example of Chapter I and Chapter II decisions under the competition law regime.

Nevertheless, an appeals framework is essential, both for those who are designated with SMS and those businesses who are the beneficiaries of regulatory intervention. We agree that the judicial review standard is the appropriate standard of review for appeals of the DMU's decisions. As pointed out, this is consistent with the merger control and market investigations regimes as well as ex ante regimes such as Ofcom's SMP regime.

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

We agree that the priority should be on public enforcement rather than redress at this stage. However, SMS firms should not be able to game the system by pricing into anti-competitive strategies the potential penalties for such conduct. Regulators should therefore have clear freedom to fine up to 10 per cent of worldwide turnover (as in competition law investigations) and there should be senior management liability in the form of director disqualification orders. Once the regime has had an opportunity to operate, it would be appropriate to consider how the regime could be designed to encourage private follow-on actions.

<u>Part 7: Merger reform</u>

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

The main risk is that the CMA may have to divert resources from other cases (where it may have a discretion to investigate) to reviewing the transactions which are reported to it under a mandatory system of reporting for firms with SMS designated activities. However, we believe that the benefits outweigh the risks.

Current merger control regimes have failed to examine "killer acquisitions" by Apple, Amazon, Facebook and Google closely, and that such acquisitions have ended up

reinforcing the market power of these online platforms. The CMA market study into online advertising demonstrated that Whatsapp and Instagram are important elements in reinforcing Facebook's market power, and yet Facebook's acquisitions of Whatsapp and Instagram were both cleared by the European Commission and the OFT respectively.[1]

We therefore think that mandatory "in advance" reporting is essential so that the CMA is appraised of any merger activity being contemplated by a company with activities designated as having 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?

We support a transaction value threshold for mergers involving firms with SMS. This would ensure that acquisitions which could potentially distort competition, but which involve the acquisition of firms with a low turnover or do not increase a market share, would be within the CMA's jurisdiction. The lower of the two transaction thresholds suggested (i.e. £100m.) should be used. A transaction value threshold would go some way to addressing the concerns we set out in answer to question 27. We also agree that a UK nexus test would ensure that this would be a proportionate expansion of the CMA's jurisdiction.

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?

We do not consider that mandatory merger reviews are necessary given the potential for the (inadvertent) misallocation of the CMA's limited resources. Rather, the system of mandatory reporting, together with the expansion of the CMA's jurisdiction, should be sufficient to allow the CMA to assert its jurisdiction to examine the cases which could lead to the greatest harm to competition.

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?

Whilst we are not opposed to a balance of harms test concerning acquisitions by firms with SMS, we recognise that it may be difficult in practice to estimate whether the benefits outweigh the potential harms. The revised probability standard takes into account the fact that the significant damage to competition that acquisitions by firms with SMS may lead to often has a lower than 50% probability of occurring. Given the scale of the harm which could take place, this seems a reasonable adjustment to make to the standard for phase 2 investigations into mergers by firms with SMS.

[1] See the Commission's decision in Case M.7217 *Facebook/Whatsapp* of 3 October 2014 and the OFT's decision in *Facebook/Instagram* of 14 August 2012.

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?

The changes under consideration should be sufficient to address the previous concerns with merger control enforcement relating to acquisitions by firms with SMS.