

Questions

Responses

Part 1: Digital Markets Unit

Question 1: *The Digital Markets Unit's objectives and duties*

What are the benefits and risks of providing the Digital Markets Unit with a supplementary duty to give regard to innovation?

We agree that the duty and remit should be as lean as possible. However, if the aim of the DMU is to promote both competition and innovation then a duty to 'have regard to supporting innovation' would clarify the legal status of that overarching aim.

Question 2: *The Digital Markets Unit's objectives and duties*

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?

We believe that an additional statement referencing the interests of citizens would not be helpful, for the reasons expressed in the consultation document. In coming to this conclusion, we presume that the objective of promoting competition will refer to the 'benefit of consumers'.

Question 3: *Funding of the Digital Markets Unit*

Should we explore the possibility of reducing the cost of the Digital Markets Unit to the public sector through partial or full levy funding?

Yes.

Question 4: *Regulatory coordination and information sharing*

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?

We agree that information sharing will be key, and that the regulator most suited to the task should take the lead with respect to any particular regulated issue. We support the proposal for greater co-ordination and an information-sharing gateway between regulators, and the resultant reduced burden on those responding to investigations. We don't believe that joint powers would be the most efficient way forwards.

Question 5: *Regulatory coordination and information sharing*

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

We believe introducing a statutory duty to consult/co-operate as seen in the financial services sector would be effective.

Question 6: *Wider role for the Digital Markets Unit*

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

Whilst the DMU's focus should be on SMSs, given the expertise in digital markets that will be developed within the DMU, it should have the ability to raise concerns or provide information to other regulators if it deems fit.

Part 2: Strategic Market Status

Question 7: *Scope and purpose*

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

We agree that the regime should cover activities where digital technology is the 'core component', rather than 'material to'.

Question 8: *Strategic Market Status test and criteria*

What are the potential benefits and risks of our proposed Strategic Market Status test? Does it provide sufficient clarity and flexibility? Do you agree that designation should include an assessment of strategic position?

We believe that, in addition to firms with SMS, the DMU ought to be able to look at firms who are likely to become an SMS in the very near future (based on growth of market share, with reference to 'substantial'; or increasing barriers to entry, with reference to 'entrenched'). This would however need careful definition. We agree that strategic position should be included in the test.

Question 9: *The Strategic Market Status designation assessment*

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?

We agree that the assessment of 'substantial and entrenched market power' should closely follow the approach that the CMA takes in its market studies and investigations. With regard to 'strategic position', we believe clarity and specificity require the criteria to be exhaustive and set out in legislation. However we also believe flexibility is required and that the DMU should be able to take all four criteria into account in the round, rather than a binary yes/no based on whether particular thresholds are met. To give certainty, we also agree that the DMU should be required to publish guidance on its interpretation of those criteria.

Question 10: How the Strategic Market Status designation assessments will be prioritised

What are the potential benefits and risks of the Digital Markets Unit prioritising Strategic Market Status designation assessments based on the criteria in paragraph 77?

We don't agree that revenue is necessarily the best indicator of potential harm, as an SMS firm may achieve a dominant position in the market with respect to a particular digital activity without necessarily generating substantial revenue. Indeed, lack of early revenue generation and the need to invest to establish the activity may form a barrier to entry. We believe the scale and characteristics of the activity are a better indicator.

Question 11: The Strategic Market Status designation process

What are the benefits and risks of the proposed Strategic Market Status designation process? What are the benefits and risks of a statutory deadline of 9 months for Strategic Market Status designation?

It is currently unclear to us when the 9/12 month designation assessment timeline is intended to begin. Sufficient time will be required for the DMU to gather evidence, and we are unclear as to whether this could be done prior to commencing the assessment.

Part 3: An enforceable code of conduct

Question 12: Code objectives

Do these three objectives (fair trading, open choices, trust and transparency) correctly identify the behaviours the code should address?

Yes.

We note that proprietary lock-in provides a barrier to users from choosing freely between services. From a technology perspective, we would like to see the use of open APIs and open infrastructure to prevent this.

To be clear, the distribution of open technologies, often at zero cost, is not detrimental to competition. Whilst the provision of associated services could provide commercial lock-in, the nature of open source means that technical lock-in is not possible due to the ability to fork a project, subject to licence terms, to create a competing version. Therefore the use of open technologies is, broadly speaking, beneficial to competition.

Question 13: Code principles

Which of the options (pages 30-31) 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 consider a form of option 3 to be the most appropriate balance between certainty and flexibility. With principles set out in legislation, supported by guidance from the DMU, to give certainty; and flexibility given by DMU having the power to approve legally-binding requirements proposed by, and further developed with, the SMS firm.

Question 14: Code principles

What are your views on the proposal to apply proposed principle 2 (e) (see Figure 4 on page 32) to the entire firm? Should any explicit checks and balances be considered?

No response.

Question 15: Code case study (page 33)

<p>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 Competition and Markets Authority? Are any further remedies needed in addition to it?</p>	<p>Care needs to be taken to ensure sustainability of a free press reporting factual content, and the potential for abuse of online platforms' reach for disseminating 'fake news', misleading content, or content intended to unduly influence the reader. We would not wish to see malfeasors take advantage of code benefits.</p>
<p>Question 16: <i>Code orders</i> How can we ensure the appropriate use of interim code orders?</p>	<p>Interim code orders should be subject to a fast-track right of appeal.</p>
<p>Part 4: Pro-competitive interventions</p>	
<p>Question 17: <i>The designation and application of pro-competitive interventions</i> What range of pro-competitive interventions remedies should be available to the Digital Markets Unit? How can we ensure procedural fairness?</p>	<p>An increased understanding of the technology markets in which the DMU operates will be critical to determining what PCIs may be appropriate. We recommend further industry collaboration and development of deeper expertise not only in technology per se, but also in the business models and revenue generation/sharing across and between technology sectors. For example, browser revenue sharing. A deep understanding of the market is essential to developing appropriate interventions.</p>
<p>Question 18: <i>The designation and application of pro-competitive interventions</i> To what extent is the adverse effect on competition ("AEC") test for a pro-competitive interventions investigation sufficient for the Digital Markets Unit to achieve its objectives?</p>	<p>No response.</p>
<p>Question 19: <i>The designation and application of pro-competitive interventions</i> What are the benefits and risks associated with empowering the Digital Markets Unit to implement pro-competitive interventions outside of the designated activity, in the circumstances described (pages 37-38)?</p>	<p>We consider the benefits here outweigh the risks, given the potential for the ability to leverage strategic power of one technology market position to entrench in another. The digital lives of consumers are so integrated and dependent upon interoperability of technology that this can be used by dominant players to co-ordinate and achieve dominance in adjacent markets. A lack of openness in dominant technology platforms provides an immediate barrier to entry in any new technology markets that develop.</p>
<p>Question 20: <i>The designation and application of pro-competitive</i> How appropriate are the proposed flexibility mechanisms set out (pages 37-38)? Are there any associated risks?</p>	<p>The proposals appear appropriate.</p>
<p>Question 21: <i>The designation and application of pro-competitive interventions</i> What is an appropriate statutory deadline for a pro-competitive interventions investigation?</p>	<p>No response</p>
<p>Part 5: Regulatory Framework</p>	
<p>Question 22: <i>Enforcement mechanisms</i> 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?</p>	<p>No response</p>
<p>Question 23: <i>Monitoring and information gathering</i> What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively?</p>	<p>No response</p>
<p>Question 24: <i>Procedural fairness</i> Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?</p>	<p>No response</p>
<p>Question 25: <i>Appeals</i> What standard of review should apply to appeals of the Digital Markets Unit's decisions?</p>	<p>No response</p>

Question 26: *Redress*

What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with Strategic Market

No response

Part 6: Merger Reform

Question 27: *Proposed changes*

What are the benefits and risks of introducing an 'in advance' reporting requirement for all transactions by firms with Strategic Market Status?

We agree that in advance reporting requirements would provide an advantage to the CMA in assessing whether potential adverse competitive impacts may result. Care should be taken that any requirements are not overly burdensome as to provide a disincentive to engage in M&A activity.

Question 28: *Proposed changes*

What are the benefits and risks of clarifying and widening the Competition and Markets Authority's jurisdiction by introducing a transaction value threshold, combined with a 'UK nexus' test, for firms designated with Strategic Market Status?

OpenUK welcomes steps proposed to increase transparency and assessment of the investment and control of companies with a 'UK nexus' but would highlight the need to proceed in a manner that: (i) preserves the attractiveness of the UK as an investment location, including SMS investment; and (ii) therefore ensures continued incentive for early investors and founders to innovate and see rewards commensurate to risks taken.

A one-size-fits all transaction value threshold may overstate the influence an SMS could have on larger startups. The UK had 70 startups valued at \$1 billion as of 2019, with 30 more added over the course of the pandemic and 13 of those reaching the valuation in 2021. At a 10th of the value of those companies, the influence an SMS could have would greatly differ to that of a smaller company. A proportion could be introduced to address this (for example "£[X] AND greater than [Y]% of the total value of a target in an investment").

Question 29: *Proposed changes*

What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with Strategic Market Status?

The risks associated with this approach (namely, a stalling of commercial and transactional activity, and investment disincentive) could be offset if the changes to speed up merger reviews and facilitation of remedies are effectively implemented.

We are not clear what is intended by the term 'subset' in this context, unless the intent is to refer to a subset of all transactions, formed by those exceeding a particular size.

Question 30: *Proposed changes*

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 Strategic Market Status?

We feel that reducing the threshold for ex ante investigations would provide a disincentive to founders and may have a chilling effect on innovation. It may be that the CMA's powers to require separation of ownership may be a more appropriate solution, once it becomes apparent that harm will occur.

On the other hand, the UK's world-renowned engineering skills currently facilitate the growth of businesses worldwide, however this does not translate into equivalent growth within the UK economy as many businesses are acquired or move internationally (particularly to secure more readily-available investment). The evolution of UK companies is necessary to facilitate digital autonomy of the UK, and therefore there may be an argument to support CMA intervention in transactions where the scale of potential harm is large, even if the likelihood of harm is less than 50%, where the transaction would result in acquisition of control by international giants.

Question 31: Proposed changes

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

Putting in place restrictions on the ability for international giants to acquire control of scaling UK-based companies (particularly in the open space), thus encouraging their natural growth within the UK, and avoiding the current inevitability of international acquisition.

Do you have any other views/comments on the proposals set out in the consultation?