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Which?, 2 Marylebone Road, London, NW1 4DF
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Consultation Response

DCMS and BEIS consultation on *A new pro-competition regime for digital markets*

Which? welcomes the opportunity to respond to this consultation. It is clear that there are a small number of digital markets in which a severe lack of competition is causing harm to consumers. For example, in its Market Study on online platforms and digital advertising, the CMA made an incontrovertible case that Google and Facebook are not subject to sufficient competitive pressure in the online search and display advertising markets. These and some other digital markets are characterised by having a single firm that not only has substantial market power, but its position in the market means that it acts as a gatekeeper between consumers and other businesses, giving it a strategic role in determining market outcomes.

The harms caused to consumers by a lack of competition in some digital markets include:

- higher prices, as the gatekeeper charges higher prices to other businesses and these are passed through to the prices paid by consumers;
- a lack of competition on quality;
- consumers giving up more personal data than they would like;
- reduced innovation, and ultimately lower economic growth through reduced productivity improvements.

These digital markets play an integral part in the lives of most consumers, and so intervention is needed to increase competition and deliver better outcomes for consumers. However, the current competition regime does not have sufficient powers to do this, which means that these harms grow all the while and economic damage becomes entrenched. We are therefore pleased that the government is consulting on a set of sensible and proportionate remedies to address the sources of market power and their consequent harms in these markets.

We support the principle of creating a bespoke regime for a very small number of the largest online platforms that are designated as having Strategic Market Status. We also agree that the right way to address the problem of limited competition in these markets is to create a specialist regulator within the CMA, the Digital Markets Unit (DMU), and to empower it to be able to intervene with remedies to increase competition. The DMU will need the authority to be able to apply a wide range of interventions so that it can create the conditions for competition to increase in these markets. Inevitably though, the nature of these markets means that some platforms will always have market power that will be open to abuse and so we agree there is a compelling case for an enforceable code of conduct to manage their behaviour ex ante. Clear ex-ante rules and guidance to provide clarity over what represents acceptable behaviour when

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interacting with consumers, other businesses and competitors will help to prevent and address harms to consumers and competition more rapidly.

While we agree with many of the specific proposals, there are three areas where we feel the government's proposals are likely to fall short, so that there will remain a substantial risk of consumer harm. These are:

1. ***An inadequate consideration of consumer harms***

We are concerned that the proposals to only allow the DMU to implement remedies for harms that arise directly from competition will reduce its potential effectiveness. The government is right that the focus of the DMU must be to improve the competitiveness of key digital markets, but we feel the proposed duty jeopardises the DMU's ability to fulfill its role and fails to take advantage of the opportunity to address a systemic weakness of the UK's consumer protection regime in digital markets.

The first problem is that a focus purely on competition harms will not allow the DMU to look at consumer harm in the round, making it unable to take a balanced view on issues where there may be a trade-off to consumers in benefits and costs. For example, pro-competitive interventions requiring the sharing of data held by SMS firms will also need to protect consumer privacy.

Further, the DMU is likely to uncover a range of harms during its investigations for SMS designations and pro-competitive interventions. Some will be competition harms, but others will be issues of consumer protection. An overly narrow duty would prohibit it from acting to address these. A long-standing failure of the UK's competition and consumer regimes is that public enforcement for consumer protection issues has been considerably weaker than for competition issues. The government's other consultation *Reforming competition and consumer policy* goes some way to address this, but still leaves the CMA with limited powers to address new and emerging consumer protection harms in digital markets. Empowering the DMU to be able to tackle consumer protection issues with SMS firms would go some way to addressing this shortcoming.

Finally, the overly narrow focus even risks the DMU being unable to protect consumers from harms that could be broadly interpreted as competition harms. We fear that the duty as currently suggested may leave an opportunity for SMS firms to challenge the decisions of the DMU in the courts on the basis that a harm may not be directly linked to a lack of competition.

We therefore recommend that:

- The DMU is given a duty that gives prominence to addressing competition harms, but which allows the DMU to look at consumer harm in the round. For example, a duty 'to further the interests of consumers in digital markets, in particular by promoting competition'.

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- The test for a pro-competitive intervention should be an adverse effect on competition or consumers (AECC), as recommended by the Digital Markets Taskforce.

2. ***Super-complaint powers***

To ensure that the regime is sufficiently accountable, designated bodies should have the power to make a super-complaint to the DMU on the basis that the conduct of one or more services meet the SMS test, and/or are in breach of the principles of the Code. Which? (The Consumers' Association) would expect to be made such a designated body equivalent to its status under the Enterprise Act 2002, and financial services legislation.

3. ***Not pushing ahead with reform of the mergers regime***

We agree with the government that the concentration of market power in SMS firms comes in part from their extensive acquisition of smaller companies, and that the nature of digital markets means that addressing this will require a bespoke merger regime that would only apply to firms designated with SMS.

However, we are concerned that the government's current preferred option, according to the Impact Assessment published alongside the consultation, does not include the creation of this bespoke merger regime. We fear that if the government fails to take this opportunity then the UK will be left with a merger regime that is inadequately designed for the demands of assessing acquisitions in digital markets. We risk being left behind other jurisdictions, with the consequence that UK consumers will continue to suffer harm from excessive concentration in some markets.

As we set out below in our answers to specific questions, we are deeply sceptical that the proportionate reform of the merger regime as described in the consultation could lead to a '*chilling*' of investment and innovation. The lack of intervention by competition authorities in digital mergers is well known. The consultation notes that the largest digital firms have collectively bought close to 300 companies over the past five years, of which only seven were reviewed by the CMA or European Commission and none to date have been blocked. Given this, it seems that only the most partial of commentators could argue that the bigger risk is over- rather than under-enforcement. The government should seize the opportunity to implement much-needed changes to the merger regime at the same time as enacting the other changes to empower the DMU.

Overall, we urge the government to push forward with this agenda at pace and to legislate to strengthen the competition regime for digital markets as soon as possible. The longer it takes to implement the proposed measures the greater the risk that the harms caused by the lack of competition will become irreversible and the UK's digital economy will be scarred by this. By contrast, swift action to improve competition in these markets would not only protect UK consumers, but could encourage greater investment from businesses seeking to compete on more even terms with the largest tech companies and be a boon to the UK economy.

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Answers to specific questions

Part 2: The Digital Markets Unit

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

We support the proposal for the DMU's duty not to include specific reference to promoting innovation. We feel that the duty to promote competition will be sufficient and will lead to the promotion of innovation.

There are circumstances in which innovation will not be helped by greater competition, but these are most likely to be in markets that already have high levels of competition and where the diffusion of innovation is rapid, so that firms cannot enjoy a return on their investment. However, by design, these are not the markets that the DMU will be regulating.

It has been argued that the DMU will need to weigh the potential benefits of short-term competition with longer term incentives to innovate. However, as we argue in our response to question 30 relating to the strengthening of the merger regime, we believe that is largely a false premise. Instead, longer term incentives to innovate will be greater in markets that are more competitive.

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?

The government is right to be clear that the core purpose of the DMU is to improve outcomes for consumers by promoting competition. However, this objective will interact with other policy issues - the government suggests data privacy and media plurality as two examples of these - and the success of the DMU will depend on how well it manages to promote competition in the context of these interactions.

Which? believes that many of the difficulties involved with the interaction between these policy objectives could be resolved if the DMU's duty is focussed explicitly on the outcome that we want to achieve - better outcomes for consumers - rather than just focus on the primary means with which it is to achieve this (ie by promoting competition). We would favour a duty that would allow the DMU to look at consumer harm in the round, rather than solely those harms that can be attributed only to a lack of competition.

We believe the benefits of this would be threefold. First, it would allow the DMU to take a balanced view on issues where there may be a trade off to consumers in benefits and costs. For

example, pro-competitive interventions requiring the sharing of data held by SMS firms will also need to protect consumer privacy. With a broader duty, the DMU would be better able to consider whether the benefits of the intervention were merited in the round.

Second, in undertaking its investigations for designation assessments the DMU may uncover some consumer harms which are not directly related to a lack of competition. An overly narrow duty would prohibit it from acting to address these. Such a regime for digital markets would fail to satisfy the principles of being agile and equipped to act swiftly, and create a serious risk that the harms go completely unaddressed. The harm would need to be passed back to the CMA to open a consumer enforcement case, but this may not be possible since the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) are not always sufficient to tackle new harms as they emerge in digital markets. We have seen this, for example, with the issue of fake reviews at online marketplaces which the CMA has been unable to satisfactorily deal with to date and hence the government is now proposing to amend the CPRs to add the commissioning of fake reviews to the list of unfair practices set out in Schedule 1. The DMU ought to be empowered to implement remedies against consumer harms both through its duty and by the ability to intervene on the basis of an adverse effect on competition or consumers (see question 18).

Third, a narrow duty even risks the DMU being unable to protect consumers from harms that could be interpreted as competition harms. We fear that the duty as currently suggested may leave an opportunity for SMS firms to challenge the decisions of the DMU in the courts on the basis that a harm may not be directly linked to a lack of competition. These are some of the world's richest and most litigious firms and a failure to draft the duty broadly enough risks the DMU being unable to adequately protect consumers.

Given all this, we believe the DMU should be given a broader duty to protect consumers. For example, to further the interests of consumers in digital markets, in particular by promoting competition.

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?

This isn't an area that Which? has looked at to provide a response

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?

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It is clear that for the DMU to be successful and for the UK to have a coherent regulatory landscape, there needs to be effective ways for the DMU to collaborate with other regulators. The UK's various regulators with an interest in digital markets need to be able to collaborate and bring their specialist skills and knowledge together. This is particularly vital when it comes to undertaking investigations regarding anti-competitive behaviour; data collection, use and breach; and the cross-cutting nature of online harms.

We welcomed the creation of the Digital Regulation Cooperation Forum. We believe that collaboration of this kind enables regulators to share knowledge and expertise, permits staff with specialist skills to be seconded in order to train other staff and learn from them and helps to foster improvements to the sharing of data, intelligence and information. It will be important that the Forum has sufficient resources to work effectively.

We are not well placed to prescribe what further steps need to be taken to ensure regulatory coordination and we are unclear as to the benefits of either a 'duty to consult' or a 'duty to cooperate' over memoranda of understanding.

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

We agree that effective information sharing is essential for an effective regulatory landscape when, as in this case, there are regulators with complementary responsibilities. Consumers expect regulators to work effectively together. To this end we would support the introduction of information-sharing gateways between regulators, subject to appropriate legal safeguards.

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

The government should consider whether the DMU has a role contributing to the State of Competition Reports that the government has proposed the CMA will produce regularly. Since the DMU is intended to have the foremost insight and expertise on competition in digital markets then it would make sense that it makes a contribution to these reports on this topic. In which case, the DMU would need to be empowered to gather information outside formal SMS investigations. This power should be equivalent to any new power given to the CMA to obtain the information it needs for the specific purpose of preparing its State of Competition reports.

Part 3: Strategic Market Status

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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"?

In defining the scope of activities the government needs to strike a balance between providing clarity of purpose, while being broad enough to be adaptable to the development of future business models and not making it possible for businesses to split their activities so that they can avoid being brought into the scope of the new regime.

We are concerned that the term 'core component' might place too high a legal standard on the scope and therefore suggest the use of 'significant component' of the products and services as an appropriate compromise between the government's preference and the recommendation of the Digital Markets Taskforce.

We agree that the use of 'digital platform activities' would be potentially problematic, not least because there is not yet a commonly accepted definition of the term 'platform'.

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 believe the proposed test is appropriate for the objective of designating a small number of the largest digital firms as having SMS.

We support the inclusion of an assessment of a strategic position and largely feel that the proposed criteria are correct for assessing whether a firm has a strategic position. However, we are concerned that the criteria may not capture a firm that has a strategic position for a particular consumer group, for example for young people or vulnerable consumers. We believe that even if a business is judged not to have a strategic position across all consumers, but it holds it for a sub-group of consumers then distributional concerns may be sufficient to designate it as having a strategic position overall. We encourage the government to consider how the criteria could be modified to allow for this, either by including the Digital Markets Taskforce's recommendation for a criterion that the activity has significant impacts on markets that may have broader social or cultural importance, or by some other means.

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?

We agree that an excessive focus on quantitative thresholds for specific indicators could lead to insufficiently nuanced designation assessments and that the DMU will need to use a range of

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qualitative and quantitative evidence to come to a judgement. We think this is compatible with providing predictability and clarity.

If set out in legislation, the criteria should not be exhaustive in order to give the DMU the flexibility to give appropriate consideration to new and emerging trends.

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

It is important that the DMU's prioritisation of designation assessments is focussed on the potential for it to reduce consumer harm. Primarily, this means focussing on the activities in which the scale of harm is likely to be greatest. This might include using a firm's revenue as a proxy for the scale of harm, but also looking at measures specific to an activity such as the number of consumers who make a particular transaction and the value of the transaction, or even the number of consumers who use a service.

We would also urge caution in considering whether a sector regulator is better placed to address the issue. There is an obvious danger in leaving other regulators to address issues where those other regulators may not have sufficient resources, enforcement powers, or rationale to prioritise those issues.

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 proposal that the SMS designation should apply to the whole corporate group is an important step to mitigate the risk of avoidance.

If the government intends to shorten the time frame for the DMU to make designation assessments then it should consider how this will affect the ability of third parties, which should include consumer organisations, to input into the process.

Part 4: An enforceable code of conduct

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

Yes, we believe that the three objectives would correctly provide the high-level scope needed for the code to manage the effects of an SMS firm's market power. These principles were identified by the CMA following its market study into online platforms and digital advertising, but we feel they will also be appropriate for other markets and other SMS activities.

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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?

On balance, we believe the best approach may be the government's preferred Option 3, to set high-level principles in legislation but to give the Digital Markets Unit powers to develop additional legally binding requirements in relation to those principles. This option would give the DMU necessary scope for discretion in designing a code of conduct that can be tailored to an SMS firm, while retaining the opportunity for appropriate checks and balances on the DMU.

We would not support Option 2, in which principles are set in legislation and applicable to all SMS firms. We believe a key strength of the proposed regime is the ability to tailor a code of conduct to an SMS firm. With the exception of search and social media markets, for which the CMA has already conducted a market study, we do not believe there is enough understanding or evidence of the harms caused by a lack of competition in these markets to be able to appropriately define an exhaustive list of these principles in legislation. We are also concerned that this option would compromise the speed and agility of the DMU to adapt its application of the code as markets develop.

We are also sympathetic to the government's concerns about Option 1, in which the principles would be developed by the DMU and not set in legislation. We recognise that for an ex-ante regulatory regime to work it is important for firms to have legal certainty, and this option may risk providing too little certainty with the consequence that the code becomes difficult to enforce.

Given this, we are minded to support Option 3, but the government needs to set out much more clearly how this would work in practice so that we can make a fuller assessment of whether the code will fully reflect the concerns of consumers. In particular, more clarity is needed on how the DMU will develop legally binding requirements in relation to the principles that have been put in legislation and the checks and balances that will be applied. We are particularly concerned that the DMU should not be subject to steers from Ministers or Parliament in its design of these requirements, as we fear this could present inappropriate lobbying opportunities and threaten the DMU's independence.

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?

We think it is essential that there be a principle, such as 2(e), that applies to the whole firm to prevent it from taking action in an adjacent market that would further entrench the firm's position in its designated activity.

The government should also consider whether a general principle against avoidance is necessary. For example, Article 11 of the EU DMA states that the implementation of gatekeeper obligations, '...shall not be undermined by any behaviour of the undertaking to which the gatekeeper belongs, regardless of whether this behaviour is of a contractual, commercial, technical or any other nature'.

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?

This isn't an area that Which? has looked at to provide a response.

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

We think the government is right to give the DMU the power to issue interim code orders. We believe this is in line with the powers of other regulators, for example the FCA, OFGEM and OFCOM, including in relation to draft provisions in the Online Safety Bill.

However, we think that the sole ground should be that it has reason to suspect that the code is being breached. We do not see the need for the other proposed grounds and fear these could lead to vexatious legal challenges.

Part 5: Pro-competitive interventions

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

We believe the DMU should be given broad discretion to design and implement a wide range of PCIs to allow it to determine the most appropriate intervention for the circumstance. We expect its options to include a large number of demand-side remedies, such as interventions to support consumer control over their personal data, to improve data mobility, and to support consumer decision making through fairer use of choice architecture and defaults. We believe such interventions could greatly reduce harm. For example, we have recently conducted research to explore the value of giving consumers greater control over their personal data that is collected by Google and Facebook to target adverts. This so-called Choice Requirement Remedy was proposed by the CMA in its market study on online platforms and digital advertising. We

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estimate that the value of such an intervention to UK consumers would be in the region of £1.1 billion every year.[1]

We also agree with the Digital Markets Taskforce that the DMU will need to make use of other interventions such as mandating interoperability and creating obligations to supply on fair, reasonable and non-discriminatory terms.

With regard to the question of whether the DMU should be empowered to impose ownership separation remedies, on balance we think the DMU should be given the power and responsibility for this. We note that this is not a power typically held by the UK's economic regulators who must make a market investigation reference to the CMA. An advantage of this is that an independent investigation group is convened from the CMA Panel. However, the DMU will not be constituted like other economic regulators as it sits within the CMA, and we wonder whether the government could give it powers to draw on the CMA Panel in a similar way for these circumstances. In that way the investigation group could be supported by staff from the DMU, with the expectation that some of them will have worked on earlier PCI investigations involving the same designated activity. This may have the advantages of: speed and efficiency, since a market investigation reference will not need to be made; retaining knowledge and expertise; and also avoid any potential bias in decision making in which the DMU might favour a remedy of operational over ownership separation to avoid making a market investigation reference.

The alternative to the broad discretion model would be to restrict the DMU to a narrower set of interventions set out in legislation, but we believe this would risk severely limiting its effectiveness. Such a list of interventions could not yet be correctly identified because detailed investigations into all of the potential SMS firms and activities have yet to be conducted. Beyond this, one of the advantages of the regime that the UK government has proposed, compared with some of those being developed in other jurisdictions, is that the DMU will have the ability to adapt and develop its interventions as digital markets and business models develop over time. Many of the markets in which the DMU will be promoting competition remain in an immature state, and so constraining the DMU to act only on the basis of what we know now about such markets is likely to result in it having powers that are either inadequate or may even cause damage to market competitiveness.

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?

We feel that an adverse effect on competition (AEC) test is not sufficient for the DMU to achieve its objectives. Instead we believe the test should be an adverse effect on competition or consumers (AECC), as recommended by the Digital Markets Taskforce.

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[1] Which? (2021) Value of the Choice Requirement Remedy

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As we set out in our answer to question 2, an overly narrow focus that only permits the DMU to intervene to tackle harms that can be proven to show that competition has been undermined risks the DMU being unable to address some consumer harms. There will be occasions when the link between competition and consumer harm is not clear cut, and any such uncertainty would allow the SMS firms to legally challenge the DMU's remedies. In such cases, the government's desire for the existing AEC test to "*be interpreted broadly to encompass harms to consumers, albeit through a competition lens*" will be frustrated.

The conception of what PCIs may be implemented is heavily influenced by the market study on online platforms and digital advertising. In that case, it largely transpired that the behaviour of the firms expected to be designated with SMS, Google and Facebook, led to consumer harms that were also competition harms. For example, the excessive collection of consumer data by Google and Facebook to target search and display advertising causes a direct (privacy) harm to consumers who feel disempowered by their lack of control over their personal data. As we explained above, the value of this direct harm is considerable.[2] In this case, the lack of consumer choice also weakens competition and a pro-competitive intervention, such as the choice requirement remedy proposed by the CMA, could be implemented that would address both the harm arising from the lack of competition and the direct privacy harm.

However, the government needs to futureproof the regime for circumstances in which the DMU discovers a consumer harm that it either cannot directly link to competition or where the link is ambiguous and the SMS firm may seek to vexatiously frustrate an intervention through legal challenge. The rapidly developing nature of digital markets means that we cannot predict what consumer harms will be discovered as the DMU undertakes its investigations to designate firms with SMS. We do not believe it is the intent of the government to design a regime that permits consumer harms to go unremedied, and the adoption of an AECC test is a proportionate safeguard with minimal, if any, risk of negative consequences.

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?

We expect that PCIs will mostly be targeted at the designated activities. However, there are clearly circumstances in which the leveraging of market power into adjacent markets means that a PCI will need to be applied outside of the designated activity, albeit the intervention will need to be related to a concern in a designated activity.

The Digital Markets Taskforce suggested three examples of why a PCI would need to be applied beyond a designated activity. These are: to address the sources of market power in a

[2] Which? (2021) Value of the Choice Requirement Remedy

designated activity; to address conduct which reinforces market power; and to address anti-competitive effects of market power, specifically exploitative and exclusionary behaviour. We agree that all three of these would be sufficient to merit a PCI being applied beyond a designated activity.

The consultation suggests the case of a voice assistant which, by default, directs consumers to the firm's designated activity (for example an online marketplace) as one in which the PCI might be applied to a non-designated activity. In that case it would be because the conduct reinforces market power. However, further examples might conceivably include operating systems and app stores or marketplaces and food delivery.

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

We believe the proposed flexibility mechanisms represent an appropriate balance to ensure that the DMU can intervene effectively. We think it is especially important that the DMU is able to amend remedies, either strengthening, weakening or removing them, following a review of their impact.

As part of the review of interventions, the DMU should consult the SMS firm and third parties with an interest, including consumer organisations. Further, consumer organisations should be regarded as an affected third party with the right to request the DMU reviews an intervention.

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

This isn't an area that Which? has looked at to provide a response.

Part 6: Regulatory framework

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?

We support the intention that the DMU will adopt a participative approach. However, it will still be necessary for it to have meaningful enforcement powers in the event of breaches of the code or pro-competitive interventions. In fact, the participative approach is likely to be more successful if SMS firms know that the DMU has strong enforcement powers.

We agree the DMU will need the power to impose financial penalties and we note that a maximum of 10% of a worldwide turnover is in line with certain breaches of the Competition

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Act 1998. It is also important that the DMU has the ability to apply for court orders so that the penalties associated with a contempt of court ruling can be applied if necessary. Finally, we welcome the proposal to hold senior managers liable for compliance as we feel this has been an effective measure for other UK regulators.

Given the nature of the businesses and activities that will receive SMS designation, the DMU needs to be able to investigate and enforce internationally and the government must legislate to facilitate this. We also agree that international co-operation is critical and reciprocity is an important principle.

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

It is essential that the DMU is given strong information-gathering powers including the ability to impose penalties if firms fail to comply with requests for information. We support the proposals in the consultation for the information-gathering powers to be given to the DMU and for it to be able to impose financial penalties for non-compliance as stated.

In addition to this, we recommend there be senior management criminal liability for failure to comply with information notices as we believe that this would act as a strong deterrent. There is no specific provision mentioned in the consultation for instances in which a business alters, suppresses or destroys a requested document or knowingly or recklessly provides false or misleading information. Consistent with the competition regime, we would expect this to be a criminal offence.

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

To ensure that the regime is sufficiently accountable, designated bodies should have the power to make a super-complaint to the DMU on the basis that the conduct of one or more services meet the SMS test, and/or are in breach of the principles of the Code. Which? (The Consumers' Association) would expect to be made such a designated body equivalent to its status under the Enterprise Act 2002, and financial services legislation.

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

We believe the government should apply a judicial review standard to all DMU decisions. We feel this is the best option to achieve the government's ambitions of having an appeals process that functions efficiently and in a timely manner to provide effective oversight and give robust

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quality assurance of the DMU's judgements with appropriate deference to the regulator's expertise.

The standard of judicial review is used for all CMA decisions taken in mergers and market investigations, and we do not think it is desirable to adopt a different approach for different types of DMU decisions, for example decisions to impose significant financial penalties. We recognise that a 'full merits' standard is used for competition cases, but are yet to be persuaded by any strong policy or legal reasons in favour of adopting this for some DMU decisions.

We are also concerned that different standards of review could lead to unintended consequences. First, it could disincentivise the DMU from making decisions that have a higher standard of review because it fears substantial resources could be tied up in a protracted 'full merits' review. Second, the DMU is going to be interacting with a small number of SMS firms across multiple activities. These wealthy firms should not be incentivised to enter protracted court proceedings, either to tie up DMU resources so that it must proceed more slowly with other activities or to influence future DMU decision-making.

Appeals are most likely to be made by firms subject to a DMU decision, but the government should ensure there is a right to appeal for interested third-parties significantly impacted by DMU decisions, and which includes consumer organisations.

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

We agree with the government that the focus of the DMU should be on public enforcement. However, effective redress mechanisms provide a clear deterrent to regulatory breaches and we do not agree that the focus on public enforcement should lead to a diminishing of this. Given the acknowledged consumer harm in some digital markets, it is important that the work of the DMU has a wide positive impact for consumers, and demonstrates that it is doing so as quickly as possible. Allowing for the possibility of consumer redress schemes will be necessary to achieve this.

We believe there should be provision for consumer redress analogous to those provided for in section 404 of the Financial Services and Markets Act. That provision allows the FCA to make rules for specific firms to compensate consumers for loss or damage that they have suffered. Similarly, the DMU should have the option of requiring 'enhanced consumer measures' as the CMA can do under the Enterprise Act. Such measures can, for example, require a firm to pay compensation, undertake changes in procedures to ensure future compliance or provide particular choices for, or information to, consumers.

In addition, we do not accept that the possibility of private actions for damages, or 'follow-on' procedures for acknowledged breaches of the law by SMS firms, would be problematic for the DMU. In contrast, developing a range of legal interventions and expertise to help enforce the

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law for the benefit of consumers could only be useful to the DMU in its work. Given the long lead-in times for cases to get through the courts, it would be inappropriate and unhelpful to consumers to defer the option of follow-on cases for at least 3-5 years.

Part 7: Merger reform

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

We support the introduction of an 'in advance' reporting requirement. A first step to stopping under-enforcement in mergers and acquisitions is for the CMA to be aware of all transactions, and for consumers to have confidence in the competitiveness of digital markets it must be clear that merger activity is not happening under the radar. The FTC's recent publication analysing the acquisitions made by the biggest digital platforms between 2021 and 2019 shows the large volume of these[3], and demonstrates how unreasonable and implausible it would be for the CMA to proactively seek information about them. The proposal of the Digital Markets Taskforce for a light-touch reporting mechanism would mitigate much of the risk that this would be overly burdensome for firms.

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

The existing jurisdictional tests are not adequate for digital markets as they mean the CMA is unable to review some mergers that are potentially harmful to consumers. For example, it is common for digital firms to offer their product for free while they build demand. Such businesses may have strategic value, but when this has yet to be monetised they would fail the turnover test. The use of transaction values would be a better proxy for whether an acquisition ought to be reviewed. We agree that a UK nexus test should be used so that the CMA only reviews transactions where there is a material impact on UK consumers.

We understand that the introduction of similar tests in Germany and Austria have not led to large numbers of additional cases in the technology sector, so we do not think they will prove to be overly burdensome nor introduce a risk of over-enforcement. On the contrary, it will be an important component of a package of merger reforms that are needed to safeguard against SMS firms making killer acquisitions that damage innovation in digital markets.

[3] Federal Trade Commission (2021) *Non-hsr Reported Acquisitions By Select Technology Platforms, 2010-2019.*

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

We are open-minded about the introduction of mandatory merger reviews but believe that the priority should be mandatory notifications as outlined in our response to Q27. This would enable the DMU to better decide which cases to review. However, in the absence of mandatory notifications then there is a stronger case for mandatory reviews to ensure consumer harms are not created which later need to be remedied.

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?

We believe the more material danger remains one of under-enforcement rather than of deterring innovation and investment, and that to address this it will be necessary to make changes to the substantive test probability standard used during phase 2 investigations.

We think that the allocation of the burden of proof should be changed so that SMS firms would be required to prove that the acquisition will not be anticompetitive. Concerns about reversing the burden of proof focus on the risk of putting too great a burden on the merging parties and hence creating a risk of over-enforcement. However, the small number of SMS firms to which this would apply are well placed to be able to meet this burden, whereas the issues of information asymmetry are particularly acute in these markets and put the CMA at a distinct disadvantage. We note that our position is supported by current proposals in both the United States and Australia to similarly change the burden of proof.

With the current allocation of the burden of proof, we believe the government's proposal to change the probability standard of the substantive test in phase 2 would be a minimum step to tackle under-enforcement. A move to a 'realistic prospect' of a substantial lessening of competition would help to tackle the difficulties created by the acute uncertainty about long-term outcomes that is common in digital markets. We think that in the small number of markets in which a handful of very large firms are able to shape the market, then the cautious approach is to take a tougher line when assessing whether their acquisitions are in the consumer interest.

The evidential standard of a realistic prospect of a substantial lessening of competition is well understood given its use in phase 1 investigations and we are sceptical of the arguments put up against moving to a realistic prospect standard. One argument is that it gives too much discretionary power to the CMA and that it might use this to unfairly prohibit SMS firms from making acquisitions. We believe this lacks credibility when set against the track record of the CMA's decision-making. The CMA is an expert, independent body and it needs to be able to operate within an institutional set up that empowers it to make the right judgement calls based on robust and rigorous evidence. Given the asymmetric information and resource disparity

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between the CMA and SMS firms, the current probability standard is too high and will continue to lead to under-enforcement in mergers and acquisitions.

Another argument is that it may inhibit SMS firms from moving into adjacent platforms and competing with other SMS firms. This creates a troubling vision of digital markets in which only a handful of the largest firms compete with each other across numerous markets and other businesses are squeezed out. It is a vision of competition that we should not entertain. Dynamic digital markets that encourage innovation and economic growth need to allow many businesses to flourish and the ambition should be that a combination of the DMU's pro-competitive interventions and a strengthened merger regime sufficiently levels the playing field in these markets to allow that to happen.

Finally, it has been argued that a tougher merger regime for SMS firms will inhibit investment in startups because acquisition by these firms is a profitable way to exit. We agree that the investment activity of these large firms can incentivise startups, but when this becomes the predominant way of exit then it skews the type of innovations that can attract funding. When an incumbent can too easily foreclose a potential competitor then there is little incentive to invest in innovations that are not complementary and disruptive innovation that would bring more choice for consumers is not supported. Innovation is better encouraged by having a wider range of businesses that could potentially acquire a growing firm or by having a market in which it is possible for the small firm to scale up into a viable competitor.

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?

No response.

About Which?

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

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Appendix A – Response to the Impact Assessment

Q6. Are you able to provide evidence of any additional direct or indirect benefits that may arise as a result of the proposed interventions that we have not captured in this subsection?

Which? agrees that consumers will benefit from greater control over personal data as a result of the actions of the Digital Markets Unit (DMU). This may happen directly because the DMU implements measures to increase consumer choices or indirectly as competitive pressures mean that businesses begin to compete on how much data they collect and the largest firms choose to collect less data.

To understand the scale of these benefits, we have undertaken work to estimate the value of a 'Choice Requirement Remedy' (CRR). The CRR would be a pro-competitive intervention that would require platforms to give consumers the choice not to receive targeted adverts and hence to choose for their data not to be collected for this purpose. It is an intervention that was recommended by the Competition and Markets Authority (CMA) in its Online platforms and digital advertising market study. It is expected that it would apply to Google and Facebook as they would be designated as having Strategic Market Status in the markets for search and display advertising.

In addition to the potential competition benefits that the CRR could bring, it would address the harm felt by consumers when they feel disempowered in their dealings with these platforms and when they feel too much of their personal data is being taken for what they receive in return. Which? research has consistently found that consumers feel disempowered in their dealings with digital firms because there is a lack of transparency about what data is collected and how. Consumers feel particularly strongly about the collection and use for targeting of third-party (or 'off-site') data, which is collected about a user from or through another organisation. (Which? 2020, 2021)

To investigate how much benefit the CRR would create for consumers, Which? worked with Accent and PJM Economics to conduct research to estimate the value that users of Google and Facebook would place on the ability to have greater control over their personal data that is used for targeted advertising.

In such cases in which there is no market value then so-called 'stated preference' studies allow a value of a policy or action to be estimated. These studies are an established alternative method to value non-market goods (HM Treasury, 2020). They can involve asking people either their willingness-to-pay or willingness-to-accept for a hypothetical option. In our study we used both willingness-to-pay and willingness-to-accept methods and asked people to make hypothetical choices between receiving targeted adverts and sharing their data or receiving

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generic adverts. In the willingness-to-pay scenario they were asked how much they would pay in the form of a small monthly fee to be able to only receive generic adverts, while in the willingness-to-accept scenario they were asked how much they would need to receive in monthly rewards to accept being served targeted adverts. Willingness-to-accept methodologies are less commonly used in valuation studies since people tend to be less sensitive to gains in money, like rewards, than to losses, like a subscription fee, and this tends to lead to higher estimated values. However, in this instance the willingness-to-accept rewards is a more plausible scenario than people paying a subscription fee to use Google or Facebook, and it is the scenario described by the CMA when it recommended the introduction of the CRR. Given this, we include both methods, but use the willingness-to-pay, fee scenario as the preferred, more conservative approach.

The research results support many of our findings from other work. More than 90% of Google and Facebook users know that the platforms collect data about them and that the advertising they see is targeted on the basis of this. Users varied in how useful they found the targeted adverts, but 50% of Facebook users and 45% of Google users said they were useful very or fairly often. Despite this, levels of comfort with sharing personal data with Google and Facebook for the purpose of targeted advertising remained fairly low. On a 1 to 10 scale in which 1 was not at all comfortable and 10 was completely comfortable, about two thirds of people were more uncomfortable than comfortable (ie chose 5 or less) and about a fifth said they were not at all comfortable (chose 1).

The consequence of this is that many users would prefer not to receive targeted adverts. In the absence of any financial incentive, only 27% of Google and Facebook users said they would prefer to receive targeted adverts. When a financial incentive is introduced to encourage users to choose targeted adverts then the proportion of people who do so increases markedly. Of those whose choice involved a fee to receive generic adverts only, the proportion choosing targeted adverts increased to 81%. For those offered a reward to receive the targeted adverts it increased to 55%. People were, unsurprisingly, more likely to choose targeted adverts when the financial incentive was larger.

Overall, these findings demonstrate the diversity in preferences across platform users. Some hold clear preferences either to always receive targeted adverts or to never share their personal data. However, there are many who are currently uncomfortable with the current situation, but who would be accepting of data collection for targeted advertising if a financial incentive made this a more equitable trade off.

In terms of how large this financial incentive would need to be, Google and Facebook users said they would be prepared to pay a fee of £1.09 per month on average to have the control offered by the CRR (with 95% confidence intervals giving a range of £0.95 to £1.23).

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Aggregating this estimate for all UK users of Google and Facebook for a full year gives a total annual estimate of the value of the CRR of £1.14 billion (with 95% confidence intervals of £989m - £1,283m).
To calculate this aggregate value, we estimate the total number of UK users aged over 18 to be 41.4 million for Facebook and 45.7 million for Google. This is based on the CMA's estimate of Google and Facebook's UK reach and ONS population estimates.

The rewards scenario, in which people were given the chance to receive financial compensation for accepting targeted adverts, gives even higher estimates of the value of the CRR. On average, the estimated monthly rewards for a person to choose to receive targeted adverts was £4.03 (with 95% confidence intervals of £3.26 - £4.79). Aggregated across the UK this gives an annual total estimated value of the CRR of £4.21 billion (with 95% confidence intervals of £3,409m - £5,009m).

We believe these are conservative estimates of the value that Google and Facebook users would place on the CRR because:

- The study assumes that users who have already reviewed their data settings would receive no additional benefit from the introduction of the CRR. 35% of Facebook users told us they had reviewed their data preference settings and 31% of Google users had done this. For all of these users we assume their individual value of the CRR will be zero. This is despite the CRR providing a more transparent, more accessible, and wider choice between data sharing options.
- Users aged under 18 were also given a zero valuation, but they are expected to value having greater control. In fact, the analysis indicates that younger users place a higher value on the CRR than users aged over 65, so users' valuation of the CRR may increase in the future.
- The survey sample was obtained from an online panel who, on account of having signed up to reveal information about themselves for small amounts of money, may be more likely than the general population of users to be willing to share their data.

The full research report Value of the Choice Requirement Remedy can be found at https://www.which.co.uk/policy/digital/8107/value-of-the-choice-requirement-remedy

References

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