A New Pro-competition Regime for Digital Markets[1]

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Compiled on behalf of the UK Computing Research Committee, UKCRC.

UKCRC is an Expert Panel of the British Computer Society (BCS), the Institution of Engineering and Technology (IET), and the Council of Professors and Heads of Computing (CPHC). It was formed in November 2000 as a policy committee for computing research in the UK. Members of UKCRC are leading computing researchers who each have an established international reputation in computing. Our response thus covers UK research in computing, which is internationally strong and vigorous, and a major national asset. This response has been prepared after a widespread consultation amongst the membership of UKCRC and, as such, is an independent response on behalf of UKCRC and does not necessarily reflect the official opinion or position of the BCS or the IET.

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Responses:

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?

> **The consultation document enumerates the benefits in a clear manner. If successful, this will create significant opportunities for growth and market development within the UK.**
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> **UKCRC promotes UK research in Computing Science. Our members are very familiar with long running and, often, subjective debates about the nature of innovation. It will be hard for the Digital Markets Unit to introduce legal definitions that distinguish innovation from incremental development if challenged by an SMS.**
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> **Innovation itself creates risk; there is a concern that the Digital Markets Unit may intervene to the detriment of an existing SMS in support of an innovation that ultimately is unsuccessful. The overall effect of this might be to place the UK in a worse position than if they had not intervened. Most regulatory intervention in other domains is based on established precedent (for instance, defining what is agreed to be unsafe or insecure practices). Market intervention to encourage innovation cannot easily follow such an evidence-based approach.**

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?

> **If, as seems sensible under the lean approach advocated in the consultation, the additional reference to "in the interests of the citizen" is dropped from the remit then it will be essential to engage in wider policy concerns. A key aim behind these measures is to intervene where the market fails to provide public good through the creation of oligopolies and monopolies.**

[1] https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets

Competition helps to ensure wider public good through market mechanisms, but most consumers lack perfect knowledge and there can be third party effects in digital markets which mean there is a need to look beyond competition to those outcomes, including privacy and lack of bias, that are important to the wider public.

Consultation question 3: Should we explore the possibility of reducing the cost of the Digital Markets Unit to the public sector through partial or full levy funding?

Yes but with the usual protections to ensure independence including not just funding but also recruitment of staff/external consultants with past links to SMS.

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?

Yes, there needs to be a lead agency responsible for the overall delivery of the objectives behind this consultation. They should be accountable for coordination and for the implementation of any interventions, in consultation with the other relevant regulatory authorities.

This could be achieved in two ways:

1. **A single lead agency such as the Digital Markets Unit acting to coordinate any intervention that requires a multi-agency approach. The scope, nature and responsibilities embedded within any cooperation should be clarified by individual letters of agreement between the regulatory bodies. A precedent for this would be the HSE leading in Health and Safety investigations but working with other regulatory bodies, for example with Ofgem, Office of Rail and Road etc. The benefit of this approach is transparency, but additional costs can arise from the need to duplicate expertise in the lead agency over a range of different sectors and regulatory regimes.**

2. **Context-dependent lead agency with letters of agreement specifying which regulator would lead under which circumstances – for example, the FCO leading where the SMS was primarily engaged in the provision of digital financial services. A precedent for this would be the US letters of agreement between NASA and the NTSB for responsibility in aviation or space. This maximises the reuse of existing regulatory resources and expertise but can lead to "turf wars" over cases that blur distinctions – for example over SMS vendors that also offer credit services.**

Some aspects of these approaches are already covered in the models within the consultation, but other lessons seem not to have been learned from the existing wider approaches to multi agency regulation. For instance, "the duty to consult" can be contrasted with the "right to participate" which has been adopted within UN agencies such as the ICAO – this is a key distinction because consultation does not necessarily imply an active role within any on-going action.

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

Depending on the organisational and regulatory model, develop shared processes and standards for information exchange – this is a significant opportunity to build on existing

standards for digital government in the UK; to reduce long term costs and increase effectiveness. Without this there is little hope that the different regulators will be able to detect and then mitigate the harmful behaviours described in the consultation. UKCRC members are willing to advise on leading edge technologies and techniques to minimise the work regulators must perform to share information with each other in a responsible and efficient way.

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

This monitoring role is essential – the CMA has already done very valuable work in bringing together a wide range of research studies into algorithmic harms. Unless they engage with and monitor these wider activities, including those of UKCRC members then it is unlikely they will intervene at an early stage when engagement may be more effective than subsequent enforcement.

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"?

The consultation document makes an excellent case for the proposed approach and leaving a degree of flexibility given the pace of change in the potential scope of the proposals. We agree with the concern that digital activities "could conceivably leave in scope many activities with digital components that are not central to the main business model but are nonetheless important to facilitating certain aspects of business operations". However, in such cases as concerns over algorithmic aspects of airline booking the DMU could support other regulatory and government bodies taking the lead.

One small concern is that many of the companies that might fall within the scope of the SMS now offer digital services embedded within a wide range of physical activities – these include a suit of in-vehicle applications but also domestic Internet of Things devices – it is a moot point whether such services have digital as "a" rather than "the" core component. It is very clear that these companies are influencing the nascent markets and are at the nexus of other government/DCMS consultations.

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

The proposed approach seems sound but must be balanced against the need to safeguard sufficient protection to those individuals, companies and Universities that create a strategic lead through investment in innovation. It may benefit the consumers in the short run to erode the benefits of being a market leader but there will be longer term disbenefits if the UK loses its position as a leader for digital innovation through erosion of IP protection.

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 is hard to be exhaustive given the evolving nature of the field, but the proposals seem well-considered and appropriate. There may be a case for indicative or predatory behaviours that could then be referred for investigation by a member of the public?

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?

Throughout the consultation, there is a lack of clarity about whether any reference can be made to the international dominance of an SMS. Appendix A helps but it could be tied to some of the proposals. Intervention by some countries within digital service provision has led to disbenefits for domestic consumers who are then denied access to products and services provided through the overseas operations of multi-national companies. This leads to a situation where consumers try to access PO boxes or alias IP addresses to fool SMS into providing them with access to services that they choose not to or are prevented from delivering within another country. It would be a useful exercise to go through each paragraph and consider what are the implications of a global marketplace – with two scenarios:

1. **A UK SMS which has raised concerns over their domestic position but for which there exist strong overseas competitors – would we weaken their position to compete overseas? Would we create opportunities that welcome increased domestic competition leading to the demise of the UK company with the corresponding public outcry?**
2. **An overseas SMS with international dominance entering the UK market but for which they do not yet (but shortly could) match the designation assessments?**

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 periods proposed including the interval before re-designation seems appropriate, but the consultation lacks clarity on what would trigger the assessment and whether any unique event (e.g. disinvestment of part of a business) could trigger a reassessment.

Part 4: An enforceable code of conduct

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

In the first instance, these objectives seem very appropriate. In addition, it might also be possible to consider what these objectives mean in the context of a global, digital marketplace? What does it mean to aspire to "fair trading" when UK consumers might seek goods and services provided by companies operating mainly outside of our borders?

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?

Option 3 seems the most attractive – option 1 suffers from the potential disbenefit of legal challenge by SMS who dispute the grounds on which the DMU applies a principle to one SMS and not another. Option 2 seems very inflexible. Option 3 offers the subsidiary powers to update provisions without the need for legislation and this would seem very relevant if consumers could petition the DMU if new concerns evolved over time.

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?

The utility of the principle relies on the ability to clearly identify "designated services" – over time it seems extremely likely that there will be a blurred distinction between the digital and wider components of a range of products and services. Our response to other questions has referred to the Internet of Things but other concepts such as Smart Cities and Ubiquitous Computing are also relevant here. UKCRC members have been active in all these areas and stand ready to provide a range of case studies that could be used to assess the applicability of principle 2e).

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 proposals are appropriate but there have been significant changes since the Cairncross review – for example in payments for news coverage by online platforms. There are significant opportunities to develop new regulatory models – including embedded staffing that go beyond the retrospective application of sanctions. Now is a very good time to engage in dialogue with platform providers through the consultative process to look less at specific areas of disagreement and these new models. The existing consultation seems slightly focussed on the application of previous and existing regulatory models?

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

Given the nature of the digital platforms, there will be significant issues in ensuring compliance with interim orders. For example, a company may face market damage through changes in the API introduced by a platform provider. Other companies that have subsequently moved to the new API would then be faced with significant additional costs for an interim order that forced a roll-back to the previous version. In other words, the intent of paras 100-101 seems laudable but the technical implications of enforcement seem to raise a host of more detailed concerns.

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?

It is hard to determine what would be appropriate here, but it seems likely that a lessons learned approach should be adopted – reviewing those PCI remedies used to determine which

were most effective – this is addressed in para 118. Equally, the US OSHA have created a regulatory regime based more on inspection that the post hoc effect of reported enfringements. This encourages a culture of working together with SMS – the frequency and depth of inspection is determined by evidence of good behaviours. These provide examples of the "working together" models that seem to be lacking now in many areas of regulatory intervention in digital markets.

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?

See previous response – the intervention and investigation models need to be balanced by encouragement to support behaviours in which competition also benefits the SMS – for instance through their own digital supply chain.

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?

This seems essential for the reasons discussed in previous sections of our response – especially in areas such as IoT, Ubiquitous computing etc where the distinction between digital and non-digital goods and services is extremely blurred.

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

The proposals seem appropriate but many different groups within DCMS and across government e.g., DHCLG and DfT are addressing the concerns over SMS activities in wider, non-designated services. The need for inter-departmental and inter-regulatory coordination outlines earlier in the consultation is reiterated in the concerns for this section of the consultation.

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

We agree that there should not be a fixed statutory deadline.

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?

The proposals seem very appropriate – especially the blend of enforcement and participation – as mentioned in more detail in previous areas of this response. There are many other examples of successful international cooperation in regulation and as noted some emerging consensus especially in Europe about the need for coordination, but the consultation lacks detail on the expectations of the DMU in this respect. Just as their might be expectations on the SMS, there should also arguably be clarity in the role of the DMU in engaging with similar regulatory organisations otherwise the domestic ambitions will be undermined through the global digital market places used by UK consumers.

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

Given the algorithmic complexity of some digital platforms, it seems clear that the ability to gather evidence is a very small component of a wider problem. Other regulatory bodies have already demonstrated that the issues lie more in the interpretation and analysis of that data once it has been obtained and the provision of appropriate safeguards for the IP of SMS companies.

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

Other regulatory bodies address the challenges of interpretation and of forensic analysis through expert panels that are called upon only when certain skills are required in an investigation. This would reduce the costs associated with building sufficient and widespread expertise within the DMU. UKCRC can supply this expertise if required.

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

This lies outside the core areas of expertise for UKCRC.

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

It is unclear in many instances how and to what extent consumers may have been affected by firms with SMS, similarly, redress for companies affected by firms with SMS often relies on counter factual arguments that typically are only resolved through extensive litigation. There is a danger that the DMU is dragged into prolonged court cases that blunt the effectiveness of their regulatory interventions so in practice the decision to pursue a particular case for public enforcement will be critical to the effectiveness of the DMU.

Part 7: Merger reform

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

The consultation arguably under values some of the synergies that can arise within the UK's digital eco-system between SMS firms and their supply chain. For example, some innovations require economies of scale before they can be realised; SMEs compete with other SMEs to deliver innovations that are then implemented by SMS-firms. In other cases, SMEs lack the financial and technical resources to fund sustained R&D which is provided by SMS-firms. Indeed, many of the UK's leading companies that started life as university spinouts relied on funding from the SMS to conduct the basic research. Active involvement of SMS-firms in a healthy digital pipeline and an appreciation of the consequences for competition from merger activity might be part of a more cooperative approach to regulation that ensures mutual benefits for all stakeholders and at the same time maximises support for the types of market structures that have been successful in the UK. Or put another way, if the SMS-firms are penalised from engagement with SMEs then they may lack the means to exploit their

innovations and there is also a real danger to the joint SMS-University funding that creates many of these spin-out innovations.

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?

Both seem appropriate – however, we have seen a number of speculative mergers and acquisitions, the ex ante case, where companies act to acquire and possibly also suppress a number of competing alternate technologies and infrastructures. It might also be possible for stakeholders to refer such activities to the CMA.

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?

There is good evidence for the effectiveness of this approach under GDPR with a small number of high-profile cases encouraging pre-emptive action for compliance by the majority of companies in the UK.

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?

This seems like an excellent approach – however, as the use of the Instagram case study shows, the effectiveness of any proposal should be regularly reviewed with insights derived not only from market behaviour in the UK but globally. UKCRC would especially welcome a comparative and evidence-based approach that assesses interventions made by the different regulatory authorities around the globe.

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?

We broadly welcome the proposals in the consultation and as the representative group for UK Computing Research across all the relevant professional bodies are keen to offer the technical assistance necessary to meet the objectives identified in this consultation.