



## Competition Law Association

British Group of the  
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### **Webinar: “CMA’s proposals for a Digital Taskforce”**

**Date:** Thursday 24 September 2020

**Speakers:** Catherine Batchelor, Lucy Barratt and James Hampson

#### ***Catherine Batchelor***

##### *(i) Overview of the Digital Taskforce*

- The Digital Taskforce was commissioned by the Government in March 2020 to provide advice to the Government on the potential design and implementation of pro-competitive measures for unlocking competition in digital platform markets. It is led by the CMA and benefits from expertise from Ofcom and ICO (as members of the Taskforce).
- The starting point for these pro-competitive measures is the recommendations set out in the Furman Review. The Furman review recommended that a subset of digital platforms should be designated as having strategic market status (SMS) and should have to adhere to a code of conduct. The report also recommended a Digital Markets Unit (DMU) to oversee the regime. It is the role of the Taskforce to flesh out what the regime could mean in practice.
- The Taskforce is considering what is meant by ‘SMS’, including questions of how firms could be designated this status, what would the code of conduct prohibit and allow, when would a digital market regulator be able to implement pro competition inventions, what wider considerations in practice would the regulator have to take into account, such as privacy?
- The CMA recently concluded their online platforms and digital advertising market study which started to answer some of these questions. The Taskforce builds on these recommendations but with a wider view for the whole of digital markets.
- The Taskforce is looking into wider areas including mergers and potential remedies beyond SMS. It has also been looking at how the regime would interact with other regulatory regimes already in place.

#### ***James Hampson***

##### *(ii) SMS designation*

- The process for designating a firm with a SMS will be evidence based.. Envisage it will involve opening a designation process, with rights of parties to engage through a consultation process and provisional decision. The parties will be allowed to give representations and appeal.
- The CMA welcomes engagement on whether the timetable should include a statutory deadline. Also would like feedback on the review of designation/re-designation.

##### *(iii) The Code*

- The code in this context is a mandatory, ex ante, obligatory of what firms’ conduct should be. As it is mandatory it should have an effective enforcement regime and that clarity will be the basis of this.

- The benefits of the code are set out in on page 10 of the accompanying slides.
- The code, if embedded in legislation, will be principled based so it can move with the fast changing market and additional guidance will allow the code to do this.
- The code will apply to SMS firms and the CMA believes Google and Facebook will have this designation, against any reasonable test. There still needs to be a discussion on what wider activities may or may not fit into the scope.
- In the Market Study, there are three broad objectives/principles that the code should address to deal with consequences of market power / dominance and SMS; 1) fair trading, 2) open choice 3) trust and transparency.
- Idea of integrating the two timetables of the code and SMS designations. Again that there needs to be mechanisms for code reviews, and like SMS designations it needs to be principled based but it still needs guidance on how it will apply.
- The Taskforce recognises that the enforcement of the code will need to be a quicker process than ones that are currently used. Possibly use of a steer or a statutory timetable. It is clear that due to the nature of digital markets, there is a need to be able to gather evidence based on where decisions are taken so the Taskforce is looking into extra-territoriality for both subject matter and enforcement jurisdiction. Again, with the fast moving nature of the market interim measures may need to be available. Also looking into enforcement by penalties.
- The Taskforce is looking for feedback on the potential role of private enforcement (including damages) arising out of causes of action for breach of statutory duty.

### **Lucy Barratt**

#### *(iv) Interventions beyond the code*

- 'Pro-competitive inventions' aim to tackle the source of the market power directly, and are intended to work in parallel with the code.
- The Market Study proposed the DMU should have power to introduce certain interventions which are set out on slide 16.
- On remedies for SMS firms beyond the code, the Taskforce has had a similar discussion as above re procedural aspects, with consideration that the right balance needs to be struck between the need for quick intervention at the right time before damage occurs but balanced against SMS firm's right to appeal and consultation. The Taskforce welcome thoughts on the issues on slide 17.

#### *(v) Cross cutting issues*

- Themes that apply across the remit of DMU include what information gathering powers it should have, including powers to gather information outside the territory and whether there should be the power to interview.
- On information sharing, we are interested in views on whether the DMU should/could share the evidence it gathers or its findings internationally?