

# THE INTERPRETATION OF A 'STRATEGIC MARKET STATUS'

A RESPONSE TO THE PUBLIC  
CONSULTATION BY  
THE UK GOVERNMENT ON  
'A NEW PRO-COMPETITION  
REGIME FOR DIGITAL MARKETS'

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## Introductory note

On 1 October 2021, the UK Government's consultation on 'a new pro-competition regime for digital markets' closed. In this consultation, the government set out its proposals for new regime applicable to digital markets and sought feedback on these proposals. Under the proposed new regime a 'Digital Markets Unit' (DMU) within the Competition and Markets Authority (CMA) would strive to promote competition, including competitive outcomes,<sup>1</sup> in digital markets. To achieve this aim, the regime would target firms and activities which are considered to cause the greatest harm, the so-called digital firms with a 'Strategic Market Status' (SMS). In the first instance, the DMU would identify firms with SMS, who would then be subject to a code of conduct. The DMU could also intervene, where necessary, through 'pro-competition interventions'. The Government is also considering the introduction of a merger regime specific to digital firms with SMS.

Through this consultation, the Government sought the views of the public on a range of elements of the proposed regime. It identified a series of questions under specific themes: 'the Digital Markets Unit', 'Strategic Market Status', 'an enforceable code of conduct', 'pro-competitive interventions', 'regulatory framework', and 'merger reform'.

Dr Magali Eben, Competition Lead at CREATE, submitted a response to the UK Government's consultation. In her submission, she focused on the proposals related to the identification of firms with a 'Strategic Market Status', reflecting indirectly on the questions raised by the UK Government and providing further consideration of issues not directly raised in the Government's list of questions. It is essential that the notion of a 'Strategic Market Status' (SMS) be more clearly defined, and its relationship to the notion of dominance in competition law expressly set out, for the regime to be effective.

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<sup>1</sup> See Executive Summary of the Consultation Document, 'A new pro-competition regime for digital markets', July 2021, para 5.

# **The interpretation of a ‘Strategic Market Status’: A response to the public consultation by the UK Government on ‘A new pro-competition regime for digital markets’**

Dr Magali Eben<sup>2</sup>

The introduction of a Digital Markets Unit (DMU), within the CMA, is to be welcomed, and its emphasis on digital firms with a ‘Strategic Market Status’ has the potential to focus its activities in a meaningful manner. In order to achieve this, some of the suggestions in the Consultation Document merit further consideration, needing to be either clarified or revised. This submission hopes to prompt such reconsideration. As such, the submission will reply to some of the questions identified and will also raise some further questions requiring an answer in order to ensure an effective pro-competition regime, whose value is not merely to replicate the existing regime.

In its current formulation, it is unclear whether ‘Strategic Market Status’ is distinct from a dominant position. It replicates its substance (and thus perhaps its challenges in the digital economy) while foregoing the elements which make a dominance assessment more robust both from a formal and legal perspective. Consequently, it is unclear from the Consultation Document what the added value is of the Strategic Market Status (SMS), since there are questions with regard to its substance and method:

- Substance of a SMS: what type of economic power is it meant to cover?
- Substance of a SMS: what is its relationship with market power concepts, such as dominance and Significant Market Power (SMPS), and with relative economic power concepts, such as dependence or superior bargaining position?
- Methods for identifying a SMS: if the DMU will not engage in formal market definition, what alternatives will it use, and how will it ensure coherence and legitimacy?
- Methods for identifying a SMS: the ‘activities’ terminology is valuable, but what will it entail? How do ‘alternatives’ differ from ‘substitutes’?

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- Methods for identifying a SMS: since the challenges to identify ‘activities’, ‘alternatives’ and digital ‘core components’ are similar to those currently discussed in market definition in competition law enforcement, will the DMU have regard to or inspire these developments?

### **Substance of a Strategic Market Status**

The Furman Report stated that it is necessary to develop, and carefully design, a legal test for the characteristics of a company’s position – strategic market status – above which intervention is appropriate.<sup>3</sup> It is not clear from the Consultation Document that there is, as of yet, such a clear and carefully designed test.

First, the nature of SMS remains unclear. It is not evident whether ‘strategic market status’ is a) a new type of economic power, distinct from traditional market power, b) a higher threshold of market power beyond dominance, or c) merely another way of understanding or identifying (traditional) market power, such as dominance.

Second, the method to identify SMS needs further development. The Consultation Document indicates a desire to forego ‘formal’ market definition, while at the same time referring to concepts very akin to the steps usually taken in market definition (activities – products, alternatives – substitutes). The desire not to be bogged down in formalism is understandable, but the process and criteria to find a SMS need to be clarified, both from the perspective of legal certainty as from a desire to enhance the credibility and effectiveness of the activities of the DMU.

It is natural that such questions arise at this stage, and the CMA is in an excellent position to answer them and lead the way in developing the approach to digital markets on a global stage.

#### **Market power or another type of economic power?**

In its current forms, it is not sufficiently clear what type of power SMS is supposed to cover: whether it is a form of market power (the traditional concepts of dominance or significant market power (SMP) or a new threshold or conceptualisation of market power) or a different type of economic power (such as relative economic power). This is an important question to answer since the market failures and harms are likely to vary with the power at hand.<sup>4</sup> In the first

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<sup>3</sup> ‘Unlocking Digital Competition’ (March 2019) Report of the Digital Competition Expert Panel (‘Furman Report’), para 2.116.

<sup>4</sup> See Brook, O. and Eben, M. ‘Abuse Without Dominance and Monopolisation Without Monopoly’ in Akman, Brook, Stylianou (eds.) Research Handbook on Abuse of Dominance and Monopolization (Edward Elgar Publishing, forthcoming), available on [ssrn: https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3859916](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3859916). In its Advice, the Digital Markets

instance, the DMU should clarify the type of power covered by the SMS concept, and in the longer term it would be beneficial if it could clarify how that power relates to the market failures and harms the new regime is meant to address.

The regulation of digital markets is occurring in different jurisdictions, which are helpfully summarised in Annex A of the Consultation Document. The new systems proposed or in place in these jurisdictions aim to tackle, as the Annex observes, 'the powerful position of a small number of key digital firms'.<sup>5</sup> The Annex does not specify how the regulators in other countries have understood this 'powerful position', yet this matters, because some have adopted concepts which focus less on the market as a whole and more on relative/vertical relationships where digital firms have economic power in relation to other (specific) market participants. Indeed, the attention to the concepts of 'dependence' or 'superior bargaining position' has increased, as the concern about the 'gatekeeping' position of digital firms has grown. Relative economic power concepts deviate from traditional market power concepts,<sup>6</sup> thus requiring different assessments. For example, an assessment of economic dependence identifies whether (particular) trading partners can viably buy from or sell to another undertaking.<sup>7</sup> This means that the focus is not on substitutes to specific products but alternatives to one market participant from the perspective of another market participant.

It seems, at first glance, that the system in the UK will *not* be centred on concepts of relative economic power, but remain anchored on the more familiar premise of market power. Yet the Furman Report and the CMA's Final Report of the Market Study on Online Platform and Digital Advertising all make reference to concepts of relative economic power. The Furman report referred to dependence: 'dominant platform has such a strategic market status, with buyers or sellers *dependent* on them in some form'.<sup>8</sup> It seemed particularly concerned with this 'dependence' problem as the harm to be remedied,<sup>9</sup> but also as a factor to be 'considered for

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Taskforce acknowledged this importance: 'The key principle underpinning our advice is that the SMS test must provide sufficient justification for the application of an SMS regime (involving (1) a code of conduct, (2) pro-competitive interventions, and (3) SMS merger rules) to a specific firm.' (Annex B, para 4).

<sup>5</sup> Consultation Document p.57.

<sup>6</sup> See Brook, O. and Eben, M. 'Abuse Without Dominance and Monopolisation Without Monopoly' in Akman, Brook, Stylianou (eds.) Research Handbook on Abuse of Dominance and Monopolization (Edward Elgar Publishing, forthcoming), available on SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3859916](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3859916). See also the working paper by Lianos and Carballa Smichowski, setting out a possible ontology of different categories of economic power: 'Economic Power and New Business Models in Competition Law and Economics: Ontology and New Metrics' (April 2021), available on SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3818943](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3818943).

<sup>7</sup> See the provisions on abuse of economic dependence in French and German competition law.

<sup>8</sup> CMA, Final Report of the Market Study on Online Platform and Digital Advertising (July 2020) para 1.117, emphasis added.

<sup>9</sup> Furman Report para 2.17: 'Setting a code of conduct for companies whose position means other markets depend on them: agreeing across the sector acceptable norms of competitive conduct on how firms with

incorporation in the assessment'.<sup>10</sup> Other references to relative economic power included the 'strong negotiation position' of digital firms the 'imbalances in power'.<sup>11</sup> It is not clear from the Consultation Document to which extent such notions of relative economic power are relevant to the Strategic Market Status concept ultimately to be adopted.

The CMA's Final Report of the Market Study on Online Platform and Digital Advertising describes the SMS as 'a position of enduring market power or control over a strategic gateway market with the consequence that the platform *enjoys a powerful negotiating position resulting in a position of business dependency*'.<sup>12</sup> It is unclear how the 'market power' and the powerful negotiation position/dependency are related. Yet this is a fundamental question, since these are two different concepts, which may overlap but whose identification is based on different methods.

A possible interpretation of the SMS designation assessment set out in Consultation Document<sup>13</sup> is that the SMS assessment will be a two-fold process, which may start with a more traditional assessment of market power but be supplemented with other considerations of economic power. First, the DMU would establish that there is substantial and entrenched market power, based on the traditional concepts (and methods, but see below) of market power; then, the DMU would assess in a second step whether there is a strategic position, an analysis which may include concepts of relative power. For a digital firm to be designated as having SMS in a particular activity, it would first have to be shown that it had market power (dominance or SMP, see below), as an essential but insufficient condition; and then that it was in a position to exercise relative economic power over other market participants. This approach would fit with the reflections in the Advice of the Digital Markets Taskforce that relative power (dependence) could be an element of the SMS rather than the whole test,<sup>14</sup> while recognising that market power and relative economic power are not the same and making it clearer how this could be implemented. The criteria listed in the Consultation Document evoke this possibility ('important access point/input for a diverse range of other businesses', 'determine the rules of the game for businesses in the wider market', ') but it is not explicit that this two-fold assessment is indeed the intended approach.

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strategic market status should act with respect to smaller firms and consumers.' The report saw the code of conduct as addressing issues arising from imbalances in power, in a way akin to the P2B regulation at EU level (para 2.31).

<sup>10</sup> Furman Report para 2.117.

<sup>11</sup> Furman Report, paras 2.26, 2.28.

<sup>12</sup> CMA, Final Report of the Market Study on Online Platform and Digital Advertising (July 2020), para 7.55, emphasis added.

<sup>13</sup> Consultation Document, paras 71-76.

<sup>14</sup> 'A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, paras 81-84.

## Significant Market Power?

The Furman Report suggested that the 'Significant Market Power' (SMP) test in telecommunications regulation could be a good starting point for the SMS assessment.<sup>15</sup> This is a concept 'equivalent to dominance' in competition law assessments, defined as 'a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.<sup>16</sup> Market shares are a key structural characteristic upon which findings of SMP are based, though they are considered cautiously and in light of other factors (as should also be done in competition law assessments). Barriers to entry are a particularly important factor to take into account, including technological and economic advantages, as well as countervailing buyer power.

Interestingly, Article 14(3) of the EU Framework Directive *in theory* provides a basis for establishing SMP in one market based on a finding of SMP in another market, through a 'leveraging' theory: 'Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.' This does not seem to have been straightforward to use in practice, but is particularly interesting for the purposes of the DMU. In the Consultation Document, the 'strategic' element of the SMS is based on four (alternative) criteria, one of which contains 'whether the firm can use the activity ... to extend its market power into a range of other activities'. The SMP leveraging-idea may provide inspiration for how to understand this criterion, but it would still require the 'traditional' assessment of market power in another market/activity.

Another element of the SMP assessment which may inspire SMS designations is that of essential facilities. Though underdeveloped in this context, the idea that access over an input provides power is familiar to competition authorities and could provide inspiration for 'access over a gateway to other markets' as a factor of power. It could be used to identify that there is a strategic position. This would align with the concern in the Furman Report that a few digital firms have power over a 'bottleneck'.<sup>17</sup>

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<sup>15</sup> Furman Report, para 2.117.

<sup>16</sup> Oftel's market review guidelines: criteria for the assessment of significant market power (2002) 1.6, p.5; Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002) para 70.

<sup>17</sup> Furman Report, para 2.10: The unit's approach should combine participation and consultation with the scope for regulatory enforcement that will be necessary to overcome incentives against compliance and make its solutions operate effectively and quickly. It should only intervene where doing so is effective and proportionate to achieve competitive aims. And to avoid burdens on smaller companies, its enforcement

## Need for clarification

The Consultation Document is to be commended for providing a clear focus in the objectives pursued by the DMU and providing clarity on the types of actions it envisages. It is crucial to have equal clarity on the understanding of the SMS and the methods which will be used to assess it. The replicability and coherence of the process are necessary preconditions for the rule of law. This coherence would need to come, first, from clarity on the concept of SMS – whether it is market power or a different type of economic power, and how that should be understood. This is not currently the case, but could be easily remedied through further, more comprehensive guidance on the DMU’s understanding of the SMS. In addition, coherence needs to come from the methods deployed to identify that such power exists. The Consultation Document’s discussion of methods is sparse and confusing. This submission turns to this question now.

## **Methods to establish market power**

The Consultation Document indicates that ‘a range of qualitative and quantitative evidence’ will be used in the SMS designation, although there is a concern that ‘excessive focus on quantitative thresholds for specific indicators such as market share, revenue or number of users could lead to insufficiently nuanced designation assessments’ and thus will not be used in isolation. Although it is commendable that the challenges in using such tools in digital markets are acknowledged, the Consultation Document does not clarify precisely which other measures will be used to complement these quantitative thresholds. As a whole, the Consultation Document does not provide much indication on the methods to be used in the SMS assessment, beyond indicating a reluctance to adopt formal market definition.

Flexibility in the designation is useful and justified in an ex ante system designed to make the market work well, but even then clarity on the possible methods is necessary, both to enable firms to understand whether they might be subject to the regime and for the efficiency and reliability of the activities of the DMU as a whole. See, in that regard, also Appendix B of the Digital Markets Taskforce Advice.<sup>18</sup>

Which methods are to be used will depend in the first instance on the understanding of SMS. If it includes an element of relative economic power, the assessment will have to include an evaluation of alternatives from the perspective of the (allegedly) dependent market

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powers should be focused on companies with ‘strategic market status,’ those in a position to exercise market power over a gateway or bottleneck in a digital market, where they control others’ market access.’

<sup>18</sup> ‘A new pro-competition regime for digital markets’ (December 2020) Advice of the Digital Markets Taskforce, Appendix B, paras 5-7.

participants. The experience of other countries, such as France, Germany, Italy, Japan, might be a starting point in the development of specific methods.

If market power is to form the basis for SMS, as seems likely, then traditional methods of competition law or telecommunications regulation could be replicated and adapted to the context of digital markets<sup>19</sup>. However, the Consultation Document's stance on market definition, or the alternatives to market definition, is unclear.

### No formal market definition?

The Consultation Document expresses a preference not to engage in formal market definition.<sup>20</sup>

The Digital Markets Taskforce also argued for a move away from (formal) market definition for three reasons: 1) that market definition creates unnecessary duplication and inefficiency because the same question is answered when defining the relevant market as when assessing the position of a firm within that market; 2) that it is not necessary to draw 'bright-lines' to assess the available evidence on things such as substitutes and customer switching; and 3) that market definition encourages a narrow approach which focuses on a product without considering its interactions within an ecosystem of products.<sup>21</sup> The first argument is a concerning one, since it downplays the different purposes of market definition beyond merely market power assessment<sup>22</sup> while at the same time conflating the difference between the market definition and the identification of the players on the market. Perhaps this is because the hypothetical monopolist test is the primary approach considered by the Digital Markets Taskforce. The second and third argument point to the apparent challenges for market definition in digital

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<sup>19</sup> The Furman Report suggested that the 'Significant Market Power' test in telecommunications regulation could be a good starting point for the SMS assessment. ... In its guidelines, Ofcom, previously as Oftel, stated that '[a]n overall analysis of the economic characteristics of the relevant market is necessary before concluding the existence of SMP'. Ofcom also refers to the European Commission guidelines on significant market power, which makes it clear that '[u]nder the regulatory framework, markets will be defined and SMP will be assessed using the same methodologies as under competition law' but on a 'forward-looking basis' with a different starting point (not the conduct and harm alleged, but an overall forward-looking examination of the structure and functioning of the market). This means that the principles of market definition align between telecom regulation and competition law, but more weight may be given if relevant to factors such as supply-side substitution (instead of the focus on demand-side substitution in ex post unilateral conduct cases), technology migration, chain substitution, emerging product markets, and the relationship between related markets (wholesale/retail) or the leveraging-potential. To some extent, these are factors which may be relevant to the ex-ante assessment of power of digital firms as well. Whatever factors are added to the assessment, however, it is clear that a SMS-concept inspired by the SMP-test would entail market definition.

<sup>20</sup> Consultation Document, para 54.

<sup>21</sup> A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, paras 33-34.

<sup>22</sup> See Eben, M. 'The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process' (2021) 17(3) Journal of Competition Law and Economics 586-619.

markets, yet do not acknowledge that these are the result of the narrow manner in which market definition has been performed in practice rather than indicating an unsurmountable issue with market definition itself.

There are valid concerns related to market definition in digital markets, which have prompted ongoing discussion about the relevance and methods to define relevant markets for competition law assessments. Although this may appear to justify moving away from market definition, these debates in competition law are actually beneficial, since they are moving the identification of relevant markets and analysis of market power forward, both in digital markets and beyond.

Identifying a relevant market, including the focal product and substitutes and other factors which constrain the manner in which that product is offered, will remain necessary to enable a credible analysis of market power and conduct. Indeed, the Consultation Document does put forward certain steps in the designation of SMS which amount to the definition of a relevant market, in other terms: 'activities' instead of 'products', 'alternatives' instead of 'substitutes'. This is in line with the Advice of the Digital Markets Taskforce which had 'emphasise[d] that our recommended approach does not mean that questions that are usually addressed as part of a formal market definition exercise should not be addressed at all. E.g. it would still be necessary to consider the competitive constraint from other forms of advertising (e.g. television advertising) on an advertising funded social media platform.'

It is important, then, for clarification to be given on how and why this would be different from 'formal market definition'. If the concern of the CMA is with a requirement of market definition which becomes too formalistic and stringent, not accounting for the variety of factors and business models existing in digital markets, then this is a concern shared by the author of the submission. If the DMU were bound by too stringent a process and methodology, without the ability to update its methodology to changing economic evidence, the effectiveness of its activities could be hampered. However, two comments can be made in this regard. First, that market definition methods and tools are being updated for competition law assessments in light of digital markets, and that the DMU could take the lead in this development. Second, that the level of formalism required depends on the statutory framework in place, and the level of transparency and certainty that the regime provides to companies. It is no doubt crucial that the regime comes with certain guarantees of objectivity. Market definition can be used to

achieve objectivity, while also providing flexibility.<sup>23</sup> Moreover, it plays an important role in ensuring the legitimacy of the regime.

The Digital Markets Taskforce stated in its Advice, Appendix B, that 'For example, internal documents discussing competitors, views from customers or competitors on substitutes and evidence of customer switching can be analysed without having defined the relevant market', referring to the CMA's practice in market studies, including in the final report in the market study on online platforms and digital advertising, not to engage in formal market definition.<sup>24</sup> It is worth noting that assessing such documentation does involve a definition of the relevant market, but in a more flexible manner. This possibility, as already mentioned above, is the consequence of a choice in the regime adopted. More importantly, however, it is necessary to reflect on the differences between market studies on the one hand and assessments of market power which would justify the imposition of (ex-ante) obligations on the other hand. A market study is an information gathering exercise which may lead to further action being taken (including market investigation references to assess adverse effects on competition and possible remedies) but does not in itself directly entail intrusive intervention in the way a company runs its business. It is the further actions, such as market investigation references or decisions on abuse of dominance, which can entail the imposition of changes to a company's conduct, and are therefore subject to more stringent requirements to ensure adherence to the rule of law, including a reasonably objective and consistent market definition process. It can therefore be justified to take a looser approach in market studies to formal steps such as market definition than in market investigation references<sup>25</sup> or decisions on abuse of dominance. It cannot be argued that the regime proposed for digital markets does not entail the imposition of intrusive intervention in the business of a digital firm. Once a digital firm is designated as having a SMS, it is subject to a code of conduct, which can have far-reaching consequences for the way it operates (indeed, if this were not the case, the effectiveness of the regime ought to be called into question). As such, it is not as straightforward to adopt the same approach to market definition as in market studies, from the perspective of the legitimacy and effectiveness of the regime.

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<sup>23</sup> See Eben, M. 'The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process' (2021) 17(3) *Journal of Competition Law and Economics* 586-619.

<sup>24</sup> See CMA, *Final Report of the Market Study on Online Platform and Digital Advertising* (July 2020), para 3.25; 'A new pro-competition regime for digital markets' (December 2020) *Advice of the Digital Markets Taskforce*, Appendix B, para 32.

<sup>25</sup> See the guidelines on market definition in market investigation references: e.g. CMA, *Market studies and investigations – guidance on the CMA's approach CMA3*, para 3.50; Competition Commission, *market investigation guidelines CC3* (April 2013), para 26; Office of Fair Trading, *Market investigation reference – Guidance about the making of references under Part 4 of the Enterprise Act OFT511*, 4.9.

As stated above, the steps formulated in the Consultation Document are reformulations of the steps of market definition in competition law assessments. As such, they face some of the same challenges, which we set out in the following.

### Definition of 'digital activities'

The Consultation Document proposes that the DMU define 'digital activities'.<sup>26</sup> Observations can be made on both elements of this concept: 'digital' and 'activities'.

First, the notion of 'activities'. The Document states that the definition of these 'activities' would be an 'alternative' to formal market definition. Nonetheless, their description seems to correspond to focal products in market definition: 'group certain products, services and processes into a single activity if they all can be described as having a similar function of, if in combination, can be described as fulfilling a specific function'.<sup>27</sup> The use of the terminology 'activity' rather than 'product' is likely chosen because of the apparent challenges in identifying products for digital firms and/or a concern that 'product' is too narrowly defined based purely on demand-side considerations. Though understandable concerns, most of the situations given in the Advice of the Digital Markets Taskforce in which certain services can be grouped together into one activity<sup>28</sup> correspond to situations that have arisen or are being explored in market definition as well, such as cluster markets, platform markets, ecosystems, upstream markets, research markets. These are developments both in (EU/US) decisional practice and scholarship, including by the author of this submission.

The terminology 'activity' is therefore very useful for both the new regime and competition law assessments. The identification of 'activities' by the DMU can be inspired by the ongoing developments within market definition in competition law cases, while competition law enforcement could learn from the manner in which activities are identified by the DMU.

Second, the notion 'digital'. The decision not to focus on 'platform' terminology is commendable since, as noted in the Consultation Document, there is no uniform definition of the term. The Consultation Document suggests that activities are 'digital' if digital technologies are a 'core component' of the services provided.<sup>29</sup> This is a move away from the 'material to'-language that had been proposed by the Digital Markets Taskforce. This is a sensible approach, making the remit of the regime more precise. It raises a question, however, as to what can be considered a 'core component' of the product. This is a similar question to one that the author of this

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<sup>26</sup> Consultation Document, paras 51-54.

<sup>27</sup> Consultation Document, para 52.

<sup>28</sup> Consultation Document, paras 16-20.

<sup>29</sup> Consultation Document, para 59.

submission is considering in her book in progress: when is a service a feature of a product rather than the product itself? Yet, it has an added dimension, since it asks to which extent the 'digital' aspect is an essential characteristic of the product – a question which is not straightforward at a time when businesses are moving increasingly online. This will require further analysis, and future guidance by the DMU.

### Identification of 'good alternatives'

The Consultation Document suggests, as did the Advice of the Digital Markets Taskforce<sup>30</sup>, that there is substantial market power 'when users of a firm's product or service lack good alternatives to that product or service'.<sup>31</sup> This seems to correspond to the identification of substitutes in market definition, as evidenced by the Taskforce's reference to the ability of users to switch.<sup>32</sup> The intended difference with a traditional market definition may lie in the suggestions by the Taskforce to identify alternatives for all the user groups in an activity, where the activity groups together different products and different customer groups, and consider the interactions between the different products.<sup>33</sup> This is commendable and mostly aligns with the developments of market definition in competition law enforcement, which enforcers and researchers are currently exploring, mentioned above. It would be important to provide guidance as to how market power can be assessed for a *group* of products and their substitutes, particularly what the role is of quantitative evidence such as market shares and pricing trends. This is the same question both in this new regime and in competition law enforcement.

### Conclusion

There are clear merits to the new approach advocated in the Consultation Document, but there remain gaps to be filled and concepts to be clarified. The type of power covered by the SMS and the methods to identify it need further exposition. This submission sets out what needs to be explained and provides some suggestions to explore. The author of this submission is working, in her own research, on all of the questions set out above, and would gladly provide further explanations or suggestions.

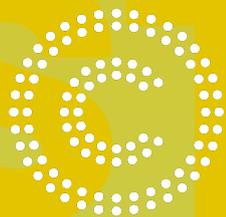
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<sup>30</sup> 'A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, para 25.

<sup>31</sup> 'A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, para 61.

<sup>32</sup> 'A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, para 25.

<sup>33</sup> 'A new pro-competition regime for digital markets' (December 2020) Advice of the Digital Markets Taskforce, Appendix B, para 31.



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