

IAB UK response to DCMS consultation on a new pro-competition regime for digital markets

30 September 2021

Background

IAB UK is the trade association for digital advertising, made up of over 1,200 of the UK's leading media owners, advertising technology providers, agencies and brands. We have a [Board](#) comprised of 25 leading businesses in the sector. Our purpose is to build a sustainable future for digital advertising, a market that was worth £16.47bn in the UK in 2020.

The IAB is actively engaged in working towards the optimal policy and regulatory environment to support a sustainable future for digital advertising. We also develop and promote good practice to ensure a responsible medium.

Industry engagement

- All relevant aspects of the new regime, such as interim Code orders and pro-competition interventions, should be subject to wide industry engagement and prior consultation to ensure fully informed decision making. In particular, the DMU should make efforts to consult non-SMS firms, and firms that operate as customers of the SMS firms ahead of key decisions about the new regime are made. This will allow the DMU to ensure competition impacts and possible outcomes are fully understood, and that the DMU delivers the objectives of the regime.
- A significant rise in the number of regulatory consultations and Requests for Information (RFIs) for companies operating in the digital advertising ecosystem has also increased burdens for these businesses. We welcome the proposal to require the DMU to use its information gathering powers in a proportionate and targeted way. The DMU should be mindful of the volume and timing of RFIs, particularly to the wider industry and other non-SMS stakeholders.
- The confidentiality protections afforded to organisations sharing information with the DMU should be strengthened, so that organisations can be confident that data or information shared will be treated confidentially and not be subject to disclosure, whether this be as part of the DMU's efforts to demonstrate accountability for its decisions, responses to Freedom of Information requests, or any other reason.

DMU approach

- The Digital Competition Expert Panel's [report](#) and CMA's [market study](#) into online platforms and digital advertising both included a vision of a participative approach to competition regulation in the digital economy, envisaging a relationship of fast and detailed information sharing between the regulator and organisations operating in the industry. This dialogue-led approach is sensible in a complex and fast-moving industry and would allow for issues and solutions to be explored quickly, effectively and with agility, alongside the formal regime of the proposed Code of Conduct and pro-competitive interventions. Government published the [Digital Regulation Plan](#) in July 2021 which sets out its vision for innovative approaches to regulation, including in relation to stakeholder engagement and evidence-gathering, and that principle should likewise be applied to the design of the DMU and its processes.

DMU duties and responsibilities

- The consultation document suggests that the DMU should not be given a specific duty to consider innovation. However, prior CMA work, including its market study, noted that competition problems can impact innovation among competing firms and therefore choice for consumers and business users. Government should therefore reconsider the inclusion of innovation – which the ad-funded open web is a key driver of in the global technology sector – in the DMU’s duties.
- The [Digital Regulation Plan](#) set out how the Government will drive a proportionate and agile regulatory approach to digital services and tech, helping to achieve an open and competitive market in the UK. Government should consider a role for the DMU in assessing the competitive impact of new policy proposals as a key step in the policy-making process to avoid conflicts between future policy and the goals of the new pro-competition regime.
- Relatedly, the consultation considers how the Digital Regulation Cooperation Forum should support the regime. A duty on all the regulators to cooperate is crucial and will pave the way for closer joint working and clearer regulatory environment for companies operating in digital markets.

Code of Conduct principles

- The consultation document requests views on which options for the form of the Code would best achieve the objectives of the pro-competition regime. The options most conducive to an effective and long-term regulatory environment would be those that allow for flexibility, in what the consultation document recognises is a highly innovative and fast-moving industry. Opting to implement an entirely prescriptive approach to the Code (as set out in option 2), and doing so exclusively through legislation, would make the new regime reliant on regulators’ or policymakers’ foresight of new technologies and business models that may emerge – something unlikely to yield effective results. It would also limit the DMU’s ability to develop novel approaches, in response to individual circumstances.
- Government should further consult industry stakeholders on the options for the form of the Code once the principles are closer to being finalised, as the specifics of these principles are likely to significantly impact views on which option is considered best for achieving the regime’s objectives.

Activities in scope

- The consultation document acknowledges the challenges surrounding how best to define the scope of the new pro-competition regime, with key questions remaining over how the DMU will define the SMS ‘activities’ that will fall inside its scope.
- Clarity will be required for industry on the question of how ‘activities’ in scope will be defined and interpreted, and specific criteria and/or official guidance from the DMU on this will be welcome once decisions have been made.

SMS criteria

- Companies of all sizes operating within the digital advertising industry are keen for greater clarity on how the new regime is expected to impact different companies, directly and indirectly, but most pressing in regard to the designation criteria of ‘Strategic Market Status’. Direct, bilateral engagement from the DMU would be particularly valued by some smaller platforms operating in the industry and the government should ensure that it engages directly with companies both likely and not likely to be designated as having SMS to ensure that the expected impact of the SMS provisions on them is well-understood.

- We agree that size and scale is not sufficient to assess market status and that a more sophisticated and nuanced approach is needed.

Mergers and acquisitions

- The consultation document proposes a collection of measures that would enable the CMA to intervene in SMS firms' mergers and acquisitions, to ensure consumers benefit from effective competition. Restricting the options for UK start-ups – most obviously those ad tech intermediary companies creating innovative tools and services within the industry – to be acquired by SMS firms may make both those start-ups, and the UK market more broadly, less attractive to potential investors. With this in mind, consideration of these proposals needs to take into account any wider impact that the Government's proposed measures could have on innovation and competition in the relevant markets.

Scope for collaboration

- More thought should be given to how organisations operating within the digital ad ecosystem could explore collaboration on projects aiming to enhance competition and innovation in the market, with safe harbour from competition laws in order to this. The CMA does currently have scope to allow collaboration of this kind if it is judged to be positive for market competition and innovation, but this approval is only given after any collaborative work is carried out, with the chance of significant legal costs if the work is deemed harmful to market competition making too high to make the initial work a viable risk. Efforts to consider and address this would be welcome.