**DCMS Consultation on a new pro-competition regime for digital markets**

**Comments from the BRC**

**(British Retail Consortium)**

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The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

The BRC has responded in detail to the BEIS Consultation on Competition and Consumer Protection, to which this is a complement. We have welcomed discussions with officials both on this consultation and on the steps leading up to it.

The BRC remains sceptical of the need for a separate competition regime for digital players. Regulation and enforcement should generally be technology neutral with the same regime across the board. Just because digital technology is relatively new is no reason in itself to abandon tried and tested and well understood competition procedures and concepts. There have always been large key players with strong market power in many sectors and the competition regime that has been developed over the years has in general managed to cope or been able to be adapted to cope. It would be unfortunate if the introduction of a new regime for digital technology alone were to be the result of a certain antipathy towards certain types of companies, many with overseas roots.

Competition is not an end in itself but the best means by which to deliver the widest possible range and choice of goods and services to consumers at every price level. An efficient and effective competition regime is, therefore, of huge importance in providing the framework within which fair competition can thrive and enable innovation to prosper.

Effective and efficient competition relies on a competition regulator being able to target its resources on an examination of the most important mergers and to undertake market studies in a timely manner to reveal any issues that might restrict the capacity of the market to serve consumers and to innovate – and to identify potential solutions.

The regime must also be future proofed so it is capable of adapting to rapidly changing market conditions. That is a further reason why we are of the view that the regime should cover all businesses and be technologically neutral or blind.

Our concern about a new ex-ante regime with new untested concepts and relating to only one technology -and indeed to only a few businesses within that technology - is that it sets up a disjointed system with different expectations and requirements depending on the technology of the business. Perhaps it also assumes that the digital technology businesses will never branch out into other technologies requiring an assessment of which regime should govern their activities. Moreover, if the regime is particularly successful or seen to be at the end of the day lighter touch than the existing, competitors to an SMS might feel they are at a disadvantage.

In addition, if the regime proposed for SMS digital companies is considered superior, one wonders whether it should be considered for general use. We note no such consideration has been made – at least in the public realm.

Having said that, if the proposal is to go ahead as it seems it almost certainly will, we are broadly supportive of the CBI comments in respect of the specific detailed operational proposals for the DMU which in summary are along the following lines:

* A participatory approach would enable the DMU to keep pace with the fast-evolving nature of digital markets
* The DMU must be a streamlined and co-ordinated regulatory framework with open communication at its core
* International coordination should be supported through these changes to facilitate futureproofed regulation
* A funding model which sufficiently resources the DMU while not disincentivising business investment is vital
* In line with the government’s ambition to create a pro-innovation regulatory system, businesses welcome proposals for the DMU to have regard for innovation Outline a clear and narrowly defined Strategic Market Status
* The code of conduct should provide businesses with clarity and its mechanisms should be fully utilised before escalation of issues occur
* Pro-competitive interventions must be proportionate and targeted
* Firms would value further clarification of the definition of technology as a ‘core component’ of a company’s activities, to better support firms to understand whether they will be in scope
* Enforcement should be driven by proportionality and transparency
* An active market monitoring role will be key to assessing competition issues
* Clarity and intelligence sharing should be at the heart of the approach adopted on monitoring & information gathering
* The appeals process should facilitate scrutiny and enable challenge
* Careful consideration should be given to the necessity of a separate merger regime

We note that the consultation presents a very detailed exposition of the way in which the DMU could operate and the legislative framework it wishes to see. As a new organisation with a new approach, we would suggest that some of its work at least will need to be based on its experience as it develops and that the legislative framework should not tie down too much its capacity to adapt.

We welcome the commitment to a participatory or co-operative approach to its enforcement role and to its engagement with SMS businesses. Given the nature, diversity and size of those businesses we believe that a co-operative approach is the key way to both enable the DMU to understand any individual business and to avoid considerable time and effort in formal investigation and enforcement either of the Code or PCIs. A co-operative approach is best placed to identify the real issue and targeted practical remedies that can be applied and are likely to be implemented constructively.

While we note that SMS status will apply to the whole business, we welcome the fact that most of the DMU work will be activity focused. We can see why mergers might need to apply across the whole firm in some circumstances but that should depend on whether the businesses being merged are both active in the activity for which SMS status has been designated. If it is in an activity that is not covered then there is no immediate reason why there should be a different regime for that business.

Retail activity is a clear example of why an activity focus is sensible.

Retail is a highly competitive sector.

In retail, it is clear that while the market was once divided into online challengers and face to face retailers, the situation has changed so that there is now one single market made up of pure online sellers, platforms and marketplaces where individuals and small (and sometimes larger) businesses can find a way to build and extend their market, omni-channel retailers, manufacturers selling direct to consumers both online and through retail outlets, and still some very successful face to face only retailers. Meanwhile consumers mix and match channels – often choosing a product in a physical store, then ordering it online and if necessary exercising their withdrawal rights in a physical store again. They do not distinguish between technologies in this sense and retailers have reacted by fine tuning their operations so there is in many cases a seamless experience with the same expanded rights in each channel regardless of the legal minimum.

We are of the view that this means that in competition terms retail and the retail elements of larger businesses that may have other interests as well should be seen as a whole, with no one element selected for different treatment from another just because it uses a different channel.

Retailers should be judged against other retailers in terms of mergers, market studies and other competition activity. To subject the retail operations of any retailer to a different regime with different requirements would require a very good evidence based reason - such as the very nature of its retail operation is such that it distorts competition to the detriment of consumers and this can only be corrected by a separate regime.

In our view the relevant market is not merely the online market or the online market of pure players but the overall retail market and for that reason SMS status in this retail case would almost certainly be unjustified.