A new pro-competition regime for digital markets

techUK’s response to the UK Government’s consultation on A new pro-competition regime for digital markets

September 2021

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK’s leading technology membership organisation, with more than 850 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

**Introduction:**

The UK is one of the world’s breakout successes when it comes to starting and scaling new tech companies. The UK is now home to more than 100 tech unicorns as well as hosting 12 $10bn plus valued ‘decacorns’[[1]](#footnote-1) with companies in both of these categories within techUK’s membership.

These companies have been able to grow and scale due to a highly competitive and open market within the UK that has been able to support increase in both domestic and foreign direct investment into the tech sector since 2011, a significant feat despite uncertainties caused by prolonged negotiations over the UK’s relationship with Europe and the impact of the COVID-19 pandemic.

Ensuring the UK remains an attractive destination for investment will be vital to the economic recovery from the COVID-19 pandemic. This comes alongside major changes in the way the UK treats investors with changes to the CMA’s merger assessment guidelines published in March 2021, a new National Security and Investment regime due to go live from early 2022 and significant changes being proposed to the UK’s competition policy mean this is a very active space with both techUK members and investors looking closely at the UK’s next steps.

This is a global conversation with the US and the EU pursuing reforms to achieve similar goals. The UK therefore has a real opportunity here to set out an early stall and lead this global discussion due to a highly respected regulator, a robust evidence base and deep understanding of digital markets.

However, the Government must bear in mind that UK digital policy is currently a hugely busy field and there is an open question as to whether a large range of major changes to policy can be successful absorbed by the business community at once. That does not just include the aims of this consultation but also wider reforms to competition and consumer policy planned by BEIS, as well as a new National Security and Investment Regime, the impact of the Online Safety Bill and proposed changes to the UK’s data protection framework. As the Government moves head with these reforms, we strongly encourage Ministers consider sequencing these changes to smooth the implementation and reduce burdens to businesses.

The opportunity is there to get this right, and as the Government develops a new pro-competition regime for digital markets to establish an agile Digital Markets Unit (DMU) that is able to provide targeted and proportionate regulation will be vital to the UK setting the standard internationally for competition in digital markets.

Reflecting on the Government’s principles in in the Plan for Digital Regulation*, actively promote innovation, achieve forward-looking and coherent outcomes and exploiting opportunities and address challenges in the international arena[[2]](#footnote-2)* we make a number of suggestions which we believe will help the Government get the right balance to preserve investment in UK tech as well as taking a leadership role in the global debate on digital competition.

**The Digital Markets Unit:**

**The DMU’s objectives and duties:**

**An innovation principle:** Generally, techUK members have been open to the concept of providing the DMU with a supplementary duty to take regard for innovation. We agree with the Government that competitive and well-functioning markets support innovation, and such a principle could add additional useful duties for the DMU if tightly crafted. In particular, it would allow the DMU to consider the loss of innovation to businesses competing with SMS firms which arises from competition constraints. These could also include increasing the scope for where non-regulatory actions are considered and creating an additional duty to consider the impacts of wider regulatory action on innovation in digital markets.

If the Government chooses to add such a supplementary duty it should be guided by the following principles:

* **Be tied closely to the consumer benefit objective:** innovation for the purposes of the DMU should be linked strongly to consumer outcomes and align with the competition objective of driving better services, greater choice and lower prices for individuals and businesses.
* **Remain open to non-regulatory interventions:** support the objective of the Government’s Plan for Digital Regulation and leave open the use of non-regulatory interventions which could meet the competition objectives of the proposed regime such as seeking to encourage firms to innovate and update the product to address competition issues identified by the DMU before taking enforcement action.
* **Create a duty to consider the wider impacts of action on the innovation landscape in digital markets:** due to the specific remit of the DMU to cover digital markets the innovation duty should encourage the DMU to engage with market participants and consider the possible unintended impacts on innovation on both SMS and non-SMS firms within the UK market of regulatory action or pro-competition intervention (PCI) and set out its view of the likely impacts.

**Wider powers beyond competition:** The DMU should remain focused on addressing competition issues in digital markets. The UK digital economy is a busy space for regulatory action and one of the benefits of the DMU proposals are its specificity and focus, with other regulators better placed to take decisions on other areas of digital policy. However, we believe that there are two points worth mentioning to better understand the wider effects beyond competition of the DMU:

* Government should undertake impact assessments of new digital policy to ensure that it supports the pro-competition regime and drives towards the same goals.
* We also believe is important to consider occasions when competition might be in conflict with other policy areas, such as privacy, safety or security. It will be important that these policy objectives are surfaced at an appropriate point, including through inter-regulator consultation, to ensure a competition intervention causes minimal policy issues elsewhere.

**Funding of the Digital Markets Unit:** because the DMU is likely to focus on a small group of firms, particularly in its initial stages as it begins to assign Strategic Market Status (SMS), we believe the DMU should be funded as it currently is from the Exchequer. Moving to a full or partial levy funding could create perverse incentives, distorting the market and, if applied to a broad base, could bear unfairly on competitor and small firms.

**Regulatory coordination, information sharing and concurrency:** We support the Government’s view that the DMU take an approach that allows it to focus its work where it could have the highest impact ensuring the regulatory landscape is streamlined and minimising unnecessary burden, matching the objectives of the Government’s Plan for Digital Regulation.

techUK and our members encourage allowing the DMU to take part in groups such as the Digital Regulation Cooperation Forum (DRCF) in order to facilitate regulatory coordination. We see strong coordination becoming increasingly important over time to provide clarity in areas where the market needs a single, coherent view between regulators. A statutory reciprocal duty to consult should be considered as part of the evolution of the DRCF.

Effective information sharing between regulators is also important and can prevent inefficiencies as well as regulatory overlap. However due to the sensitivity of information that is shared between regulators, particularly when it comes to competition investigations, we would encourage the Government to consult separately on schemes for information sharing to ensure that the correct thresholds and safeguards are introduced alongside any plans for information sharing requests. Submissions from companies contain sensitive commercial information and the companies concerned must be involved in decisions about sharing between UK regulators and onward sharing to their international counterparts.

We agree with the Government that assigning other regulators such as Ofcom and the Financial Conduct Authority (FCA) concurrent powers to the DMU could create inefficiencies and regulatory overlaps. We believe the SMS regime is best handled by the DMU as the lead regulator and creating strong channels of information sharing such as through MoUs and the DRCF is the best way to enable co-ordination between regulators.

**Wider monitoring powers for the DMU:** We agree with the Government that providing wider monitoring powers for the DMU could duplicate the responsibilities and associated powers and activities of other regulators and that the powers proposed would be sufficient. Where the DMU needs to use information gathering powers for this purpose, it should be directed to use them in a targeted and proportionate way and be mindful of over-burdening particular market segments or types of companies.

**Strategic Market Status**

**Scope and purpose of activities under consideration for SMS status:** we support the Government’s aim to limit the scope of the activities under consideration to areas where digital technologies must be “a core component of”, rather than just “material to” the activity, considering, however, that the DMU should provide more information and guidance about what this actually will mean in practice. This is important for ensuring that the DMU remains on mission and does not capture firms with a digital component but are effectively non-digital. Considering the expansion of digital technologies to virtually every product and service in the economy, reducing the scope to “a core component of” the activity seems a necessary and sensible step. The DMU should, however, have flexibility to interpret in response to specific situations.

We believe when examining the scope of SMS status it is crucially important that the Government keeps the SMS designation tightly focused around particular activities, rather than capturing multiple arms of a firm when assigning SMS status. There is a concern thought that definitions of ‘social media’ or ‘digital advertising’ could be used to capture an overly broad range of products and activities being carried out by one firm because of their association with the target activity of ‘social media’ or ‘digital advertising’. We would therefore appreciate more detail from the Government around how the DMU plans to identify associated activities particularly when it comes to these broad categories of activities.

Another concern related to SMS designation activities is the rapid pace of change in today's digital technologies, digital services are launched every day, and today's SMS activities are potentially tomorrow's legacy. Therefore, the activity designation system must be flexible and constantly revised to keep up with new emerging technologies.

**SMS test criteria:** the three SMS test criteria provide a sufficiently clear and high threshold for assigning SMS. We recommend that the criteria for determining a “strategic” position be based on existing competition law precedents, such as cumulative assessments, and that the definition be broad and legally defined to give legal clarity.

**Assessing firms against the SMS criteria:** we do not in principle oppose any of the methods set out in the consultation to determine SMS under the criteria of substantial and entrenched market power and strategic position. We would urge the DMU and the Government to consult and engage with all market participants when determining the guidance for how each of the above criteria will be assessed and when setting out in legislation the definition of “strategic position” and the criteria that the DMU will use when undertaking strategic position assessments.

**The SMS designation process:** we broadly support the proposed designation process but would encourage government to refine the approach to address the following:

* **Gaps between firms being designated SMS status:** where possible the Government should seek to apply SMS status to firms at the same time. It is possible in the initial rollout of SMS status competitors in one market or designated activity will each be assigned SMS status in a separate market or designated activity. Due to some of the cross-firm proposal suggested in this consultation, such as on mergers, this could see one firm face a competitive disadvantage for a significant period of time (9 -12 months or longer) while its competitor is still being assessed. Competition between firms with SMS status brings benefits for consumers and the UK should aim to ensure that where this takes place outside of SMS designated activities this is on a level playing field.
* **Length of the assessment period:** considering the detail to which the DMU will need to go to assess firms for SMS status we support the Digital Market Taskforce’s recommendation of a statutory deadline for designation assessments up to 12 months. A full 12-month designation process should be the norm, however we note that the DMU would be free to designate within a shorter timeframe and that the initial designations are expected to be decided more quickly because of the work already begun by the non-statutory DMU.
* **Conditions for SMS designation being removed:** in addition to the proposals listed here the DMU should, similar to how it plans to prioritise firms for SMS assessments set out criteria or guidance for the removal of SMS status if there is a major and rapid change in the market. The Government notes throughout the consultation the speed at which digital markets can move and the need for flexibility. Subsequently the DMU should set out guidance for what it would consider as a likely substantial and material change to a firms SMS status. This will help guide firms in the use of firm representation.

**An enforceable code of conduct**

**Objectives of the code of conduct:** we believe the three objectives fair trading, open choices, trust and transparency provide a fair identification of the behaviours the code should seek to address.

**Code principles:** of the three options set out techUK supports a model based on option 3. However, we believe to achieve the aims of the DMU option 3 should only involve setting legislative proposals as high-level guiding principles, similar to those set out in the objectives of the code with the vast majority of the legally binding principles should be developed by the DMU at the individual firm level. This will allow the system to function effectively in line with the DMU's objectives while also providing adequate flexibility and proportionality.

Primary legislation providing the DMU the ability to develop legally enforceable, firm-specific code of conduct standards is necessary for this, while secondary legislation should be required to update the code of conduct's overarching principles set in the legislation. The Government should run an open consultation process on the development of the primary legislation.

techUK is opposed to option 2 which we believe would not provide the level of flexibility and proportionality the Government wants to achieve. Nor would option 2 likely provide certainty as there would inevitably be discrepancies over how legislation is applied to particular business models with this only like to get worse as new SMS firms develop over time.

**Applying principle 2(e) to the entire firm:** techUK is unclear how the application of this principle would be measured across the entire firm and believe it’s likely that its application would lead to firms with SMS status scaling back investment and innovation in activities where they are the new entrant or are seeking to disrupt the existing market. Restricting this kind of activity could have broad negative consequences for innovation with some of the most successful applications of digital services applying at the boundaries of different sectors. For example, in fintech, healthtech etc.

Therefore, our recommendation is to remove Principle 2(e). We do not see leveraging as inherently problematic and it can even promote competition in markets where a SMS company operates. The Digital Markets Unit should not stand in the way of this kind of disruptive entry.

However, if the government chooses to pursue a firm-level principle such as 2(e) or an equivalent, it must narrow the formulation of the principle in order to focus on the DMU's specific practises of concern, we believe in this way it may reduce some of the risks that arise from this proposal or, at least, that provides more clarification of the proposal that SMS firms could be required to make changes to non-designated activities *“unless that change can be shown to deliver significant benefits”* and how this would be assessed including impacts on other market participants.

**Interim code orders:** we support the use of interim code orders in principle, however the thresholds for triggering their use should be high and we would consider it only correct for interim code orders to be used in extreme situations under the specific circumstances set out in the consultation. The use of interim code orders must also be subject to appeal and redress if used incorrectly.

**Pro-competitive interventions**

**How should Pro-competitive interventions be applied fairly:** techUK agrees with previous assessment in the Furman review, the CMA’s Online platforms and digital advertising market study, and the overall industry that PCIs are extreme measures that should be used with caution. Therefore, we recommend the DMU take a scalable approach to PCIs with these being held in reserve by the DMU as an intervention of last resort. PCIs, particularly first instance PCIs, should be narrow in scope focused on reducing the harm caused and should be based on large amounts of evidence.

The onus should rely on the DMU to prove the need for using and escalating the scope of PCIs with the most significant interventions only used where the DMU can demonstrate repeated attempts to circumnavigate PCIs.

**To what extent is the adverse effect on competition (“AEC”) test for a pro-competitive interventions investigation sufficient for the Digital Markets Unit:** techUK believes that the correct approach is for the DMU to prove that there exists an AEC in order to implement PCI. However, due to the highly interventionist nature of PCIs, we recommend that this process be evidence-based and with adequate timeframes for conducting the investigation. To achieve this, we believe that the DMU can rely on the existing AEC guidance, rather than a more extensive modified test.

**Implementing PCI’s outside of the designated activity, in the circumstances described (pages 37-38):** PCIs are designed to “*address the root causes of substantial and entrenched market power in digital markets*”, therefore, PCIs should be addressed only to the activities where the firm is found to have SMS, consistent with the aim of increasing competition in an area where the designated firm has such power.

If the government wants to continue with the alternative of implementing a PCI outside of the designated activity of an SMS firm, this should be subject to an extremely high test and wide consultation, in our view should only be undertaken whether the DMU can demonstrate a flagrant violation of the objectives of the code of conduct (Fair Trading, Open Choices, Trust and Transparency). Any application of PCIs outside of the designated activity should be subject to appeal.

**How appropriate are the proposed flexibility mechanisms set out (pages 37-38)? Are there any associated risks:** It is important that PCIs will need to be flexible to keep pace with fast-moving and dynamic digital markets and are able to be reviewed where they are used.

The process to monitor, review and amend PCI remedies is hugely important and should not just come from the DMU itself, but allow for SMS firms, affected or interested third parties to request a review of the effectiveness of these interventions. Such a review should serve to assess the effectiveness of the PCI, whether circumstances have changes and whether the PCI remains proportionate to the anti-competitive behaviour it was instigated to address or needs to be modified or added to.

techUK supports the proposed ideas of having a proportionate approach to interventions, by "providing the option to first implement less significant measures with the potential to adjust following ongoing monitoring and review" and of having trial remedies before implementing a final PCI order.

PCI enforcement orders should be required to be reviewed at least every 12 months.

**An appropriate statutory deadline for a pro-competitive interventions investigation:** Conversations with the sector have flagged that the proposed 12 months are insufficient to carry out an investigation that allows evidence-based decision making, in the highly complex cases where a significant PCI may be used. This is due to the complexity of digital markets and their impacts on other markets; the diversity of companies likely to be assigned SMS status the activities they perform; and the variety and uncertainty of the impact of significant PCIs.

As stated in the consultation document an "in-depth market investigation in the existing competition regime can be completed to a high standard within 18 months". Considering the significant nature of a PCI we would suggest a statutory deadline of 12 months with the possibility of extension up to 18 months where a major intervention is being proposed.

**Regulatory Framework**

**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 DMU should rely on a participative approach which involves regular market monitoring and engagement with all firms in the market in question and other relevant stakeholders. Use of DMU’s information gathering powers should be carefully targeted to avoid over-burdening particular segments of a market or types of companies. The DMU should have flexibility to select the enforcement action that best delivers the desired behavioural change.

**What information-gathering powers will the Digital Markets Unit need to carry out its functions effectively:** similar to the Government we believe the DMU should have information gathering powers equivalent to Ofcom and the CMA.. As noted above, use of DMU’s information gathering powers should be carefully targeted to avoid over-burdening particular segments of a market or types of companies. The DMU should have sufficient resources to undertake independent market analysis and research.

 **Is there anything further the government should consider to ensure that the regime is proportionate, accountable and transparent?**

We agree with the government that the legitimacy of the new regime, which will have ramifications well beyond the UK's borders, will be dependent largely on the perceived fairness of the DMU’s procedures. techUK members welcome the Government's position that the DMU must ensure that all of its measures are "objective, proportionate, and evidence-based". However, the risk here is that there is no clarity about how the Government intends to require the DMU to adopt these procedural safeguards. We, therefore recommend the following:

* The Government should hardwire these safeguards into legislation to ensure that the DMU sees them as an essential component of the regulatory regime as it gets established.
* One step to bolster that perception of fairness might be to separate those in the DMU who commence a PCI investigation or make a designation, from those who take the final decision to implement PCI remedies. This would reduce any perception of confirmation bias.
* To ensure that the process is evidence-based we recommend conducting mandatory impact assessments before implementing codes of conduct or PCIs.
* The DMU should create opportunities for informal engagement and consultation throughout its designation, investigation and enforcement processes. This consultation must be timely and provide parties with a meaningful opportunity to input to the design and scope of DMU interventions.
* Government should introduce a mechanism to assess the DMU’s performance and its delivery on the objectives of the

**What standard of review should apply to appeals of the Digital Markets Unit’s decisions:** The decisions undertaken by the DMU will have significant impacts not just on firms designated with SMS but the markets they participate in. It will be exercising entirely new powers in a new way, which could have substantial ramifications not only for the UK economy but for markets overseas as well. Moreover, the DMU is likely to be granted a large amount of discretion.

Therefore, a mistaken judgement by the new regime can have serious consequences for the competition and innovation of the whole sector, the DMU's enforcement decisions should not be underestimated. We believe to achieve the Government's appeals regime objectives, the appeal body must be able to examine the appropriateness of the DMU's judgements and outcomes, not merely the procedure used to get them. This demands that the appeal body be allowed to evaluate the decision's merits.

Given the potential far reaching implications of the regime, as well as the fact that the regime is novel and untested, we think having a **full merits review standard** is fundamental to ensuring the regime is proportionate, and perceived as fair by the industry.

**What are the benefits and risks of giving the Digital Markets Unit the power to require redress from firms with Strategic Market Status?**

The DMU should prioritise public enforcement. There already exist avenues for private action and at this point adding yet more complexity to the regime would not be helpful. techUK agrees with government’s proposal to consider this at a later stage when there is more evidence as to how the new framework will operate.

**Merger Reform:**

Ensuring the UK remains an attractive destination for investment will be vital in the upcoming years, as the UK must send strong signals that it is open for business.  Big risk is that as the economic recovery gets underway the UK there is hesitancy around investing in the UK. This is particularly risky to tech as Deloitte’s CFO survey shows firms are focused on investment in tech and digital and M&A activity as key to accelerating growth over the next three years.

We understand and share the idea that any anti-competitive behaviour in digital markets should be addressed. We also recognise that mergers and acquisitions (M&A) can be a significant component of market concentration in particular situations, requiring the development of appropriate regulatory frameworks to tackle down these specific situations. However, members have raised concerns that the measures described in the consultation document may not have the desired effect on market competition, while leading to a reduction of M&A for the UK economy, particularly when considered alongside changes to the CMA’s merger assessment guidelines published in March 2021, a new National Security and Investment regime due to go live from early 2022.

The proposals presented in this consultation has been a source of concern to some in the tech sector, particularly among start-ups, which find it more difficult to realise their investment if their ability to sell their projects diminishes. A [Coadec](https://coadec.com/news/the-digital-markets-unit-on-the-side-of-startups/)survey on the state of the UK's competition environment and future regulations for start-up investors concluded that:

* 70% of investors believe that when developing competition regulations in the UK, regulators solely consider huge incumbent companies, not start-ups or future innovators.
* According to 90% of start-up investors, the possibility to be acquired is crucial for the health of the start-up ecosystem.
* And 92.5% of investors believe that funding in UK start-ups will decline if their ability to exits markets decrease.

Global market investment and access is key for the start-up ecosystem. Start-ups born in the UK almost always have their sights set on international markets and investors, the UK market is big but not global, and digital and cloud services are, after all consumable globally in a ‘click’. Many start-ups have an exit or growth strategy that is predicated on investment or buy out, we believe this cannot be excessively constrained otherwise it can limit innovation.

**What are the benefits and risks of introducing an ‘in advance’ reporting requirement for all transactions by firms with SMS:** techUK believes that this proposal would need to be carefully targeted to manage the CMA's regulatory burden and avoid a very large number of reports from SMS companies, even on deals that pose limited risk to competition. This decrease in efficiency will have an impact on the welfare of both consumers and taxpayers.

The CMA would therefore need to carefully design criteria to select those SMS transactions that most merit review in order to ensure a manageable workload for the CMA and avoid disproportionate burdens on market participants, including the acquiring/selling/merging entities, investors and impacted competitors.

This burden may be exacerbated by the fact that the CMA will only have a short time to decide whether to investigate the transaction either before it completes, or as set out as an option slightly afterwards, as stated in the consultation. We have reservations about the CMA's ability to review a large number of reports in a short period of time without negatively impacting taxpayers.

**The benefits and risks of clarifying and widening the Competition and Markets Authority’s jurisdiction by introducing a transaction value threshold, combined with a ‘UK nexus’ test, for firms designated with Strategic Market Status:** We believe that expanding the CMA’s jurisdiction to review mergers involving firms with SMS will be too wide and the general vision is that it will undoubtedly affect more deals than projected in the consultation document.

Regarding the proposed transaction value threshold of £100m or £200m, considering the nature and the size of transactions conducted in digital markets, the proposed threshold seems to be low and will impact most acquisitions. For example, the notification threshold of the German regulation for the overall economy is €400m (close to £340m). However, the size of the UK start-up and scale-up ecosystem (valued at 585 billion) is twice that in Germany and contains a greater number of large transactions[[3]](#footnote-3), therefore, the transactions are likely to be higher, and they will have to be much larger than German ones to affect competition. Consequently, we recommend increasing the threshold value to at least £350m.

We also believe that keeping a low threshold could lead to further market distortions as transactions will attempt to stay below the threshold. This could generate negative incentives of big companies to offer less than the market value to buy a start-up, which could even more greatly impact the incentives for start-up founders in the UK.

Similarly, we believe that the "UK Nexus" category, which is currently proposed as deals with "either assets or revenues, users, employees, R&D activities, or legal presence in the UK", broadens the number of potentially pro-competition deals that will be reviewed. This is due to the nature of digital markets, which do not have the physical barriers of the other markets, making it very easy to be assigned in the "UK nexus" category.

Overall, we believe that the objective of the policy should not be to review all M&A, as this may generate inefficiencies and distortions to the markets. For the wellbeing of consumers, taxpayers and companies, the aim of the proposal should be to review only the deals that pose real risks to competition in digital markets and in their current form the proposals do not strike this balance.

**What are the benefits and risks of introducing mandatory merger reviews for a subset of the largest transactions involving firms with Strategic Market Status:** Adding a requirement for mandatory merger review will increase business costs and make the CMA process more difficult. As a result, this process is unlikely to be less “resource intensive and time consuming for both the CMA and the merging firms", as the consultation document suggests, because an initial phase 1 investigation would be required, regardless of whether the CMA considers there to be any competition issues.

This will not only affect large companies, as it has been demonstrated that the more difficult it is to sell, the greater the impact on start-up profits. Furthermore, this will also affect start-ups more proportionally as they typically have lower budgets to deal with legal issues than large companies. This has been reported by members and the risk is the UK to become a more difficult place to do business.

Finally, the options of a fast-track system for acquisitions that clearly do not raise competition concerns are a good idea and worth continuing to discuss. However, we consider that the best approach is the option that the SMS merger regime operates purely as a voluntary regime (as per the existing merger regime), where the CMA has the power to ‘call in’ for review according to some set of criteria, making sure the deal poses a real risk to competition.

**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 Strategic Market Status:** Currently, the CMA system works in a two-phase process, applying a different threshold to the likelihood of a substantial lessening of competition (SLC) in each stage. In the first phase, if the CMA finds a ‘realistic prospect’ of an SLC as a result of the merger, the process is designated to the phase two assessment. In that stage, the CMA can only intervene in a merger where the likelihood of harm is more than 50% (that is, on the ‘balance of probabilities’).[[4]](#footnote-4)

The current system ensures that the CMA proves that it is ‘more likely than not’ that harm could arise from the deal. Reducing this likelihood opens the door for the CMA to cancel deals that are unlikely to have an impact on competition. This is perceived by the sector as a considerable measure of power and discretion for an entity over the market.

The effects of this measure will impact investment, where companies will be discouraged from investing due to the possibility of cancelling agreements even when there is no great possibility of affecting competition.

Also, there are two arguments proposed in the document that we believe are unlikely to happen in practise. First, it is stated that, because there are no changes in phase one, the proposed modifications “would only affect a small number of mergers”. This is obviously something that will not happen in practice, because the whole process is designed so that the M&A of the SMS firms reach phase 2. Report in advance, low transaction value threshold, combined with a 'UK nexus, and mandatory merger review for a subset of SMS transactions will increase the number of deals that go to phase 1, which will inevitably lead to a greater number of deals that go to phase 2 because the conditions of phase 1 are not modified. Once in phase 2, the probability that the deals will be cancelled is increased (even with less than 50% probability of affecting the competition). As a result, the overall number of cases that will be cancelled by the CMA will increase considerably.

Second, the proposal is considered to be “not as interventionist” as other alternatives, but more interventionist that the current system. However, we believe that the current powers of the CMA are sufficiently interventionist and any drift towards more interventionism in M&A is likely to negatively affect the market.

The current increase in CMA interventions in M&A suggests that this entity has already sufficient mechanisms and powers to enforce in cases where there is likelihood of SLC. While from 2003 to 2017 only 50% of deals referred for in-depth scrutiny were blocked, abandoned, or required remedies, this number has risen to 81% since the beginning of 2019[[5]](#footnote-5). In the current system there is already a high risk of over-enforcement.[[6]](#footnote-6)

1. [After raising ‘astonishingly high’ investment, UK tech scaleups must now consider their future impact](https://technation.io/news/uk-tech-scaleups-must-decide-on-their-future-impact-after-astonishing-vc-growth-in-2021/) – tech nation 2021 [↑](#footnote-ref-1)
2. [Digital Regulation: driving growth and unlocking innovation](https://www.gov.uk/government/publications/digital-regulation-driving-growth-and-unlocking-innovation/digital-regulation-driving-growth-and-unlocking-innovation) – DCMS 2021 [↑](#footnote-ref-2)
3. Tech Nation report 2021. [↑](#footnote-ref-3)
4. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/970333/CMA18\_2021version-.pdf [↑](#footnote-ref-4)
5. Platypus: UK Merger Control Analysis, available at: <https://www.linklaters.com/en/>insights/publications/platypus/platypus-uk-merger-control-analysis/ [↑](#footnote-ref-5)
6. https://www.tenentrepreneurs.org/research/conflicting-missions-the-risks-of-the-digital-markets-unit-to-competition-and-innovation [↑](#footnote-ref-6)