

FSB Response to CMA Call for Information on the Digital Markets Taskforce

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the CMA's Call for Information on the Digital Markets Taskforce ('DMTF').

The Federation of Small Businesses (FSB) is the UK's leading business organisation. Established over 40 years ago to help our members succeed in business, we are a non-profit making and non-party political organisation that's led by our members, for our members. Our mission is to help smaller businesses achieve their ambitions. As experts in business, we offer our members a wide range of vital business services, including legal advice, financial expertise, access to finance, support, and a powerful voice in government. FSB is the UK's leading business campaigner, focused on delivering change which supports smaller businesses to grow and succeed. Our lobbying arm starts with the work of our team in Westminster, which focuses on UK and English policy issues. Further to this, our expert teams in Glasgow, Cardiff and Belfast work with governments, elected members and decision-makers in Scotland, Wales and Northern Ireland.

CMA Online Platform and Digital Advertising Report

The FSB welcomes the CMA's 'Online Platforms and Digital Advertising' Final Report and supports its primary recommendations which we hope will be implemented by the government at the earliest opportunity.

The regulation of online trading platforms, search engines, online advertising and the use of data by online intermediation services is extremely important to the many SMEs who rely on sales via the internet, and it is important that those activities can take place on a fair and level business playing field. FSB published a report into online trading titled 'Destination Digital: How Small Firms Can Unlock the Benefits of Global E-commerce', which concerned the effectiveness of e-commerce platforms for SME trading. Our research found that the three primary problems experienced by smaller firms when trading on digital marketplaces are malicious and fake reviews, sudden changes to trading terms and conditions and infringement of intellectual property rights. These challenges are a result of unfair competition practices. Online sales activity has expanded considerably due to the Coronavirus pandemic, and that increase is likely to continue after the pandemic has passed. Fair competition is also in the interests of consumers and tends to generate innovation and diversity which in turn benefits the UK economy.

The CMA recommendations for a new regulatory approach, including proposals for appointing a dedicated regulator and setting up a Digital Markets Unit with powers to enforce a code of conduct, are welcomed. It is however suggested that these initiatives present a necessary opportunity to consider a broad range of issues appertaining to online platforms and trading so that regulatory outcomes may efficiently and cost effectively address all related issues.

Response to Questions

The CMA's Call for Information raises thirteen questions split into three broad categories as listed in Appendix A.

Scope of New Approach – Questions 1 to 4 -

With regard to question 1, FSB are content for the DMFT to follow the Furman Review recommendations with regard to 'Strategic Market Status'. The two most important criteria are 'significant market power' and 'economic dependence'. SME businesses rely on and use sales

platforms where the rules are set by the platform owner without regulation or consultation, and powers of suspension or termination have to date been uncontrolled.

We are entering the initial period of the coming into effect of the EU Online Intermediation Services Regulation 2019 (EU 2019/1150 – ‘the Regulation’) and the UK Statutory Instrument - Online Intermediation Services for Business (Enforcement) Regulations 2020 (SI 2020/609 – ‘the SI’) which enables parts of the Regulation. There do however remain a number of obstacles for SME online traders in respect of the Regulation as implemented in the UK by the SI, which may have a significant impact on the fairness of competition and the ability to effectively resolve disputes. If a new regulator is created, it must guarantee the establishment of affordable and effective adjudication or mediation of online trading issues which may not be effectively addressable via the Regulation and SI.

In relation to the questions concerning how criteria or terms should be interpreted, in most cases it will be clear what powers and controls the platform operator possesses from its terms of business and objective evidence as to how they are applied. The relationship between online platform operators and the consumers and businesses which use them is rather different to the relationship between telecoms providers and their users, but the broad regulatory principles stipulating clarity, fairness and the availability of effective dispute or complaint resolution procedures will be the same.

With regard to the evidence required when assessing whether criteria have been met, there are two points. First, any single infringement of regulatory provisions may have a significant and sometimes fatal effect on the business of an SME, and so some effective and affordable individual remedies must be available to any business affected. Secondly, in terms of wider regulatory considerations and deployment of powers, there must be a higher threshold in order to justify action, but defining when the appropriate threshold has been reached is difficult, so there will inevitably have to be flexibilities in the application of the overarching principles that are set down.

With regard to question 2, assuming SMS designation criteria are flexible enough to enable all present operators and future as yet unknown platform services to be embraced and guard against avoidance by commercial fragmentation, we would support the concepts that there should be remedies available beyond a code of conduct, and that the activities of the whole of a corporate group should potentially be embraced. Confining controls to only a subset of an operator’s activities may be problematic if drafted too narrowly, and future developments in digital commerce may be very different from those known at present, so the regulation must be wide and flexible enough to embrace all of those activities which are unfair and anti-competitive.

Question 3 raises potentially wide issues. Whilst there is EU Unfair Commercial Practices law protecting consumers, to date the UK has not felt it necessary to codify or expand controls on unfair commercial practices so far as they affect other businesses. Perhaps the time has come for that to be changed. Certainly, a pro-competition approach moves in that direction and should rebalance the relative positions of the major market players and SMEs. Similarly, whilst treating SMEs (or some classes of SME such as micro businesses) as if they were consumers has been considered by the EU from time to time, no action has yet been taken. Perhaps now is the time for change in this respect as well. The criteria relating to any pro-competition obligation or duty of care imposed on operators need to embrace both B2C and B2B agreements and transactions.

With regard to question 4, it is overwhelmingly clear that many SMEs have adapted to the COVID-19 pandemic by expanding their online offerings, many of which are via online

platforms and rely upon online intermediation services to achieve prominence/profile within their market.

Remedies for addressing harm – Questions 5 to 9 -

First, it is imperative that the mechanisms for enforcement of whatever regulatory regime is put in place are accessible to individual businesses and are clear, quick, simple and affordable. Whilst a Code of Conduct would be welcomed, the world of online trading is a fast-moving river of commerce in respect of which, the absence of a quick lifeboat procedure being available to business to resolve user issues, may be extremely damaging or fatal. Enforcement of a Code of Conduct by a regulator is usually a slow moving and evidence accumulative process. SME businesses need clear rights and clear and affordable avenues for their enforcement.

In relation to dispute resolution generally, we have suggested elsewhere that it is a matter of urgency that the UK government look at the whole of the current dispute resolution landscape so far as SMEs and lower value disputes are concerned, both with regard to online trading related issues and generally. Dispute resolution processes for all businesses must be fit for digital commerce in the 21st Century. Long established formal processes are no longer fast enough, affordable or appropriate. A root and branch review should include consideration of a wide range of options including available or desirable ombudsman and regulator possibilities.

There are many anti-competitive circumstances arising in respect of online platforms, the most obvious of which is the behaviour of platform operator's sister operations competing with its business users on its own platform. This possibility is enabled by use of platform sales data informing sister company product decisions. Otherwise, aspects of platform dispute resolution procedures have often favoured larger and sometimes global companies whose lawyers or brand management agents have successfully suppressed competition. The context of this letter does not permit space for detailed elaboration.

We agree that a Code of Conduct is a necessary tool and it must contain high level objectives and principles that are sufficient to embrace all 'bad actors' and any future developments in the digital commercial world. Supporting guidance will be essential to clarify what is expected of those whose activities are embraced and regulated, and also those who are affected by infringements and as to how they may obtain redress. Certainly, scrutiny of consolidatory mergers in the relevant sectors is essential, as is surveillance of 'significant control' of fragmented and apparently unrelated operations if in fact they behave in concert.

The most important aspect from the SME business standpoint is the provision of effective and affordable remedies in respect of breaches of fair-trading requirements and resolution of disputes. Many online trading disputes will not be resolved by the complaints or mediation procedures set out in the EU Regulation. Online platforms may suspend or terminate listings rather than preserve the status quo on the basis that if they do not, they might potentially be held liable to any valid complainant whose rights are alleged to have been infringed (whether that be true or not). This effectively gives the party making the complaint the benefit of a quasi-injunction without having to go to court.

The EU Regulation says nothing about preserving the status quo pending the outcome of complaints or mediation and SMEs will therefore be left with the court option which they cannot afford. If parties to a dispute continue to disagree after following the Regulation's complaints and mediation procedures, preservation of the status quo thereafter would oblige the party making the allegation to resort to the court process, and if successful will be entitled injunction and compensation. If they are unsuccessful, the other party will not suffer any loss and

damage which would arise from suspension or de-listing. Provision could be made for online platforms to be absolved from liability when parties are deadlocked and the status quo is preserved pending external resolution, which would be less damaging to SMEs than the current 'presumed guilty until proven innocent' approach, which tends to favour larger businesses including global corporations who are often the complainants trying to exterminate competition.

With regard to the question on market power, platform operators must not be permitted to share detailed user sales data in a manner which enables unfair competition, whether by their own sister operations or otherwise. That sales data should as a default position be confidential to the user/seller. Platforms must be forbidden from obliging users to allow detailed data sharing, though it may be possible to frame rules which allow anonymised aggregate data sharing provided commercially sensitive information is not thereby disclosed. Question 9 refers at the third bullet point to 'consumer' control of data (presumably personal data). There should also be reference to platform business user's ability to control use of 'commercially sensitive data'.

The last bullet point of question 9 addresses the role of open or common standards. We have touched upon the possibility of 'unfair commercial practices' or 'SMEs treated as consumers' above.

Of course, tools are required to tackle competition issues, and the ability to take pre-emptive action in specified circumstances where a fair market risked being significantly undermined would seem reasonable and necessary, although the detail will require careful drafting to ensure certainty and enforceability.

Procedure and structure of new pro-competition approach – Questions 10 to 12 -

The question 10 characteristics of speed, flexibility, clarity and certainty are, as we have observed above, essential. To those characteristics we would add simplicity and affordability, in particular with regard to remedies and enforcement mechanisms. If a new regulatory regime does not enable SMEs, who form well over 90% in number of UK businesses and who are increasingly relying on trade online, to effectively and affordably address business related issues arising from online trading, then that regime will significantly harm the prospects of those SMEs and the UK economy.

Additional points

With regard to matters not specifically raised with the Call for Information questions, FSB take the view that the EU Regulation and UK implementing Statutory Instrument, although new and untried, could be improved. It is unclear to what extent the DMTF exercise involves incorporation of the requirements outlined in the EU Regulation. The most important aspects of online intermediation services usage by SMEs are that the terms are fair (especially in relation to Search Engine ranking) and that there is an efficient and cost-effective dispute resolution mechanism. Many disputes can be very damaging to SMEs, but do not justify expensive court action to resolve them, which would be disproportionate and therefore not commercially viable. The Statutory Instrument could irrespective of the DMTF mission usefully be amended and expanded to increase the matters falling within the newly created 'breach of duty' provision, and by prescribing effective and affordable ADR options.

Next steps

FSB would be happy to expand upon any of the above-mentioned points and elaborate other online trading issues, if that would be helpful. Compelling fair commercial behaviour and

enabling effective and affordable dispute resolution for SMEs in relation to online trading and intermediation services is essential for commercial success as we emerge from the current economic turbulence, and it is important that UK SMEs are not disadvantaged when compared with the competition from overseas and other regulatory regimes.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via my colleague Damilola Ojuri, Senior Policy Advisor, on 0207 592 8127 or at Damilola.Ojuri@fsb.org.uk.

Yours sincerely,

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Federation of Small Businesses