

# Digital markets competition regime guidance

**CMA194con DRAFT**

**Guidance on the digital markets competition regime  
set out in the Digital Markets, Competition and  
Consumers Act 2024**

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# 1. Introduction

## Overview

- 1.1 This guidance sets out how the CMA will approach its functions under the digital markets competition regime established by Part 1 of the Digital Markets, Competition and Consumers Act 2024 (the '**Act**').<sup>1</sup>
- 1.2 The guidance is structured as follows, covering both substantive and procedural matters:
  - (a) Chapter 2 explains the statutory test for an undertaking to be designated as having strategic market status ('**SMS**') in respect of a digital activity and how the CMA will approach this assessment. It also explains the procedural steps of both an initial and a further SMS investigation.
  - (b) Chapter 3 explains the analytical and procedural approach the CMA will take when imposing conduct requirements ('**CRs**') on undertakings that have been designated as having SMS ('**SMS firms**') and when varying or revoking CRs.
  - (c) Chapter 4 explains pro-competition interventions ('**PCIs**'). This includes how the CMA will assess whether there is an adverse effect on competition ('**AEC**'), and how it will impose effective and proportionate PCIs (which can take the form of a pro-competition order ('**PCO**') and/or a recommendation to another public authority) and the procedural steps of a PCI investigation.
  - (d) Chapter 5 explains the investigatory powers that the CMA may use in carrying out its digital markets functions. This chapter also explains the CMA's approach to information handling and its powers to provide investigative assistance to overseas regulators.
  - (e) Chapter 6 explains the CMA's approach to monitoring compliance, effectiveness and whether to change or revoke the competition requirements imposed on firms.
  - (f) Chapter 7 sets out the CMA's approach in relation to breaches of competition requirements under the regime, including investigations in relation to such breaches. It also sets out the CMA's approach to certain matters specific to enforcement of CRs, namely interim enforcement

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<sup>1</sup> This consultation is in accordance with section 114(4) of the Act.

orders ('**IEOs**'), the countervailing benefits exemption (the '**CBE**'), commitments, enforcement orders ('**EOs**') and the final offer mechanism (the '**FOM**').

- (g) Chapter 8 explains the CMA's approach to imposing penalties for breaches of competition requirements.
- (h) Chapter 9 sets out the CMA's approach to the administration of the digital markets competition regime, including decision-making; extensions to statutory deadlines; coordination with relevant regulators; the CMA's approach to consultations; and its power to charge a levy.

- 1.3 This guidance should be read alongside the Act and the following CMA guidance, insofar as applicable to the digital markets regime: Administrative Penalties: Statement of Policy on the CMA's approach (CMA4), Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) and the CMA's Prioritisation Principles (CMA188).<sup>2</sup>
- 1.4 The CMA has separate guidance on merger reporting requirements for SMS firms.<sup>3</sup>

## **Legal framework**

- 1.5 This guidance provides details of how the CMA will apply the legal framework set out in the Act.
- 1.6 In addition to the requirements in the Act, the CMA is required to carry out all of its functions and make decisions in a procedurally fair manner according to the standards of administrative law. In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the Human Rights Act 1998.
- 1.7 While the CMA will have regard to this guidance in undertaking its digital markets functions, it will apply this guidance flexibly and may depart from the approach described where there is an appropriate and reasonable justification for doing so. It is likely that as the CMA's experience of operating the new regime evolves, so too will its practice.

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<sup>2</sup> The CMA will be consulting in due course on an updated version of CMA4 that, among other things, sets out the CMA's approach to penalties for breaches of certain of the Act's digital markets provisions. The CMA is currently consulting on an [updated version of CMA6](#).

<sup>3</sup> Draft [guidance on the mergers reporting requirements for SMS firms](#).

## 2. Strategic Market Status

### Introduction

- 2.1 Strategic market status (**SMS**) designation is the gateway into the digital markets competition regime – only an undertaking<sup>4</sup> designated as having SMS in respect of a digital activity will be within the scope of the regime.
- 2.2 For the CMA to designate a firm as having SMS in respect of a digital activity it must undertake an investigation to assess whether the four tests for SMS are met (an **SMS investigation**).
- 2.3 This chapter explains the conditions for a firm to be designated as having SMS and is structured as follows:
- (a) Section 1 explains how the CMA will identify a digital activity.
  - (b) Section 2 explains the jurisdictional and turnover conditions for SMS.
  - (c) Section 3 explains the substantive SMS conditions, which are that a firm must have substantial and entrenched market power and a position of strategic significance in respect of a digital activity (together referred to as the **SMS conditions**) and how the CMA will assess them.
  - (d) Section 4 explains the procedural steps of an SMS investigation.
  - (e) Section 5 explains the purpose and procedure in respect of a further SMS investigation.

### Identifying a digital activity

- 2.4 Firms are designated as having SMS in respect of a digital activity. The concept of a digital activity therefore sets the scope for designation.

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<sup>4</sup> 'Undertaking' has the same meaning as it has for the purpose of Part 1 of the Competition Act 1998 '**CA98**' (section 118 of the Act). The term covers any natural or legal person engaged in an economic activity regardless of its legal status and the way in which it is financed. Multiple persons (such as a parent company and its subsidiaries) will usually be treated as a single undertaking if they operate as a single economic entity, depending on the facts of each case. This will be the case where one entity can and does exercise decisive influence over another; for example, a parent company which decides the commercial policy of its subsidiaries. In this guidance, the term 'firm' is synonymous with the term 'undertaking' as defined in the Act, and these terms are used interchangeably.

2.5 This section explains what a digital activity is and how the CMA may approach the identification of digital activities.

### ***What constitutes a digital activity***

2.6 Under the Act, the following are 'digital activities':

- (a) the provision of a service by means of the internet, whether for consideration or otherwise;
- (b) the provision of one or more pieces of digital content, whether for consideration or otherwise;
- (c) any other activity carried out for the purposes of an activity within paragraph (a) or (b).<sup>5</sup>

2.7 The definition of digital activities captures the provision of services and digital content regardless of whether they are purchased or delivered free of charge to users. It therefore includes, for example, social media platforms and e-commerce platforms.

2.8 'By means of the internet' includes services provided by the internet as commonly understood, as well as services provided by a combination of the internet and electronic communication services as defined in section 32(2) of the Communications Act 2003.<sup>6</sup> For example, a service which is partly made available over the internet and partly by routing through the public switched telephone network would count as a service by means of the internet. This includes services accessed by a mobile phone application as well as those accessed via an internet web browser.

2.9 'Digital content' means data which is produced and supplied in digital form.<sup>7</sup> For example, this includes software, music, computer games and applications (or apps).<sup>8</sup>

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<sup>5</sup> Section 3(1) of the Act.

<sup>6</sup> Section 3(2) of the Act. Section 32(2) of the Communications Act 2003 defines 'electronic communications service' as meaning a service of any of the types specified in subsection (2A) provided by means of an electronic communications network, except so far as it is a content service. The types of services specified in subsection (2A) are (a) an internet access service; (b) a number-based interpersonal communications service; and (c) any other service consisting in, or having as its principal feature, the conveyance of signals, such as a transmission service used for machine-to-machine services or for broadcasting. Subsection (2B) defines 'internet access service' as meaning a service that provides access to the internet and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.

<sup>7</sup> Section 329 of the Act.

<sup>8</sup> This is consistent with Chapter 3 of the Consumer Rights Act 2015.



## ***The CMA's approach to identifying digital activities***

- 2.10 In identifying a digital activity and considering which of the firm's products it may comprise, the CMA will typically look at how these products are offered and consumed. For example, the CMA may consider how the potential SMS firm<sup>9</sup> structures itself and its business model, how businesses and consumers<sup>10</sup> use and access its products and any interlinkages among them.<sup>11</sup> In practice, this will largely focus on factual information and will not require an assessment of the competitive constraints on the firm. This is distinct from a formal market definition exercise and the CMA is not required to define a relevant market when assessing SMS.
- 2.11 Identifying digital activities is a case-specific assessment and the CMA may vary its approach between investigations depending on the particular circumstances of a case.
- 2.12 One firm may be subject to multiple SMS designations in respect of distinct digital activities, provided that the SMS conditions are met in respect of each relevant digital activity.

### *Grouping several of a firm's activities into a single digital activity*

- 2.13 The CMA may treat two or more of the potential SMS firm's digital activities and the products within those as a single digital activity where either of the following conditions is satisfied: (a) these have substantially the same or similar purposes or (b) these can be carried out in combination to fulfil a specific purpose.<sup>12</sup> This grouping exercise is not a separate step but is rather embedded in the identification of a digital activity.
- 2.14 The CMA will decide on the facts of each case whether or not to treat two or more of the potential SMS firm's digital activities and the products within those as a single digital activity for designation purposes. In doing so, the CMA will interpret the conditions set out in the preceding paragraph broadly. For example, the concept of purpose may refer to any relevant aspect of how the

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<sup>9</sup> A 'potential SMS firm' is a firm that is the subject of an SMS investigation.

<sup>10</sup> Section 118 of the Act. A 'consumer' has the meaning given by section 129(1) of the Enterprise Act 2002 ('EA02'). A 'consumer' means any person who is (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them; and who does not receive or seek to receive the goods or services in the course of a business carried on by him.

<sup>11</sup> Interlinkages could materialise in relation to how various products are used and accessed but also supplied, including, for example, when the monetisation of one relates to (or relies on) the monetisation of another.

<sup>12</sup> Section 3(3) of the Act.

products are made, marketed, sold, accessed, or consumed, and may therefore relate to customer needs or preferences rather than technical complementarity.

- 2.15 Where the CMA groups two or more of the potential SMS firm's activities and the products as within those into a single digital activity, the SMS assessment will relate to the grouped activity as a whole.

## **Jurisdiction and turnover**

- 2.16 This section explains how the CMA will assess the jurisdictional and turnover tests required for a firm to be designated as having SMS in respect of a digital activity.

### ***Link to the United Kingdom***

- 2.17 Digital firms often operate different elements of their service from different jurisdictions, serving users and customers in different countries. The key aim of the digital markets competition regime is to tackle effects on competition which may give rise to harm to UK businesses and consumers. For this reason, the Act provides that the digital activity under investigation must be linked to the United Kingdom.
- 2.18 A digital activity carried out by a firm is linked to the United Kingdom if one or more<sup>13</sup> of the following criteria applies:
- (a) the digital activity has a significant number of UK users;
  - (b) the undertaking that carries out the digital activity carries on business in the United Kingdom in relation to the digital activity; or
  - (c) the digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom.<sup>14</sup>
- 2.19 Each of the criteria is explained further below.

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<sup>13</sup> Where the CMA finds that one of the criteria has been met in respect of a particular digital activity, it will not necessarily go on to consider whether the other criteria would also be met.

<sup>14</sup> Section 4 of the Act.

*The digital activity has a significant number of UK users*

- 2.20 A 'UK user' is any user of the relevant service or digital content, including consumers or business users who it is reasonable to assume (a) in the case of an individual, is normally in the United Kingdom, and (b) in any other case, is established in the United Kingdom.<sup>15</sup>
- 2.21 The assessment of whether the number of UK users is 'significant' is context specific. There is no quantitative threshold for how many users can be considered significant; the CMA's assessment may consider the firm's absolute position and/or the number of UK users it has relative to other undertakings.

*The undertaking that carries out the digital activity carries on business in the United Kingdom in relation to the digital activity*

- 2.22 'Carrying on business' in the UK captures a wide range of activity that has an impact on the UK. It does not require the undertaking to have a place of business in the UK.<sup>16</sup>
- 2.23 For present purposes it includes, for example, where:
- (a) an undertaking supplies goods or services (directly<sup>17</sup> or indirectly)<sup>18</sup> in the UK;
  - (b) the goods and services supplied by an undertaking have UK users;
  - (c) an undertaking makes provision of intangible assets relating to a digital activity, such as the creation or provision of rights (eg intellectual property rights), available to UK users;
  - (d) an undertaking does not directly sell goods or services in the UK but provides a key input or component for a good or service that is ultimately supplied in the UK (eg software chosen on the basis of UK customers/consumers' preferences which is integrated in a platform providing services in the UK).

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<sup>15</sup> Section 118 of the Act.

<sup>16</sup> The concept of 'carrying on business' in the UK is a familiar legal concept from the EA02 and case law. See *Akzo Nobel N.V. v Competition Commission & Ors*, (2014) EWCA Civ 482, at paragraphs 30–38.

<sup>17</sup> Eg through employees based in the United Kingdom.

<sup>18</sup> Eg through a subsidiary or agent.

*The digital activity or the way in which the undertaking carries on the digital activity is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom.*

2.24 This criterion allows the CMA to consider conduct relating to the digital activity occurring outside of the UK, but which nonetheless is likely to have an immediate, substantial and foreseeable effect on trade in the United Kingdom.

### ***The turnover condition***

2.25 For an undertaking to be designated as having SMS in respect of a digital activity, the turnover condition must be met.<sup>19</sup>

2.26 The turnover condition is met in relation to an undertaking if the CMA estimates that:

- (a) the total value of the global turnover of an undertaking or, where the undertaking is part of a group, the global turnover of that group in the relevant period exceeds £25 billion; or
- (b) the total value of the UK turnover of an undertaking or, where the undertaking is part of a group, the UK turnover of that group in the relevant period exceeds £1 billion.<sup>20</sup>

2.27 Only one of these thresholds need apply for the turnover condition to be met.

### *How the CMA will estimate the relevant turnover*

#### *Relevant turnover*

2.28 The relevant turnover of an undertaking or group in the relevant period is that arising in connection with any of its activities,<sup>21</sup> which may include turnover arising from non-digital activities.

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<sup>19</sup> The CMA understands that the government intends to consult on, and make, Statutory Instruments for the purposes of calculating turnover for the turnover condition of the SMS test under section 8 of the Act. Once the government consultation has concluded and the Turnover SIs have been finalised, the CMA will consider and reflect them as necessary in the final digital markets competition regime guidance.

<sup>20</sup> Section 7(2)(a) and (b) of the Act.

<sup>21</sup> Section 8(2) and (3) of the Act.

- 2.29 If the undertaking is part of a group, then the turnover of the whole group should be considered.<sup>22</sup>
- 2.30 The CMA's starting point for assessing relevant turnover in the context of the turnover conditions will usually be the undertaking's latest published accounts. However, there may be instances where the CMA uses a different figure, for example, where there have been significant changes since the accounts were prepared. Where company accounts do not provide a relevant figure, including where the accounts do not provide a suitable geographic breakdown of turnover, the CMA may use its investigatory powers to obtain relevant data from the undertaking.

*The relevant period*

- 2.31 For the purposes of estimating the relevant turnover of the undertaking or group, the CMA will consider the undertaking or group's most recent period of 12 months ('**period A**'), in respect of which the CMA considers that it is able to make an estimate of the total value of the relevant turnover of the undertaking or group.<sup>23</sup>
- 2.32 The CMA expects that the most recent period of 12 months in respect of which it is able to make an estimate of the total value of the relevant turnover of the undertaking or group will in most instances be the 12-month period covered by the undertaking or group's most recent published accounts. If the undertaking or group has not filed published accounts, the CMA will consider the most recent period of 12 months ending with the date of issue of the SMS investigation notice.<sup>24</sup>
- 2.33 The CMA's default approach will be to use period A. However, if the CMA estimates that the relevant turnover of the undertaking or group in the period of 12 months ending immediately before period A was higher than the relevant turnover of the undertaking or group in period A, the CMA will use that earlier period of 12 months.<sup>25</sup>

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<sup>22</sup> Section 8(2) and (3) of the Act. An undertaking is part of a group if one or more bodies corporate which are comprised in the undertaking are members of the same group as one or more other bodies corporate. Two bodies corporate are members of the same group if – (a) one is the subsidiary of the other, or (b) both are subsidiaries of the same body corporate (section 117 of the Act).

<sup>23</sup> Section 7(6)(a)(i) of the Act.

<sup>24</sup> If an undertaking or group files published accounts during the course of an SMS investigation, the CMA reserves the right to consider the most recent published accounts when estimating relevant turnover.

<sup>25</sup> Section 7(6)(a)(ii) of the Act.

### *Circumstances where the undertaking's turnover is less clear*

- 2.34 There may be particular circumstances where the amount of turnover for an undertaking is less clear. In these circumstances the CMA may undertake additional investigation and make adjustments to the treatment of the undertaking's reported accounting data in order to estimate a relevant turnover figure which more accurately reflects the underlying activities in which the undertaking is engaged.

## **The Strategic Market Status conditions**

### ***Summary of key statutory requirements***

- 2.35 Where the jurisdictional and turnover tests are met, the CMA will consider whether the substantive SMS conditions are met. The SMS conditions are that the firm (a) has substantial and entrenched market power and (b) a position of strategic significance, both in respect of the digital activity.
- 2.36 In order to assess whether a firm has substantial and entrenched market power in respect of a digital activity the CMA must carry out a forward-looking assessment of a period of at least five years, taking into account developments that:
- (a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity; and
  - (b) may affect the undertaking's conduct in carrying out the digital activity.<sup>26</sup>
- 2.37 A firm has a position of strategic significance in respect of a digital activity where one or more of the following conditions is met:
- (a) the undertaking has achieved a position of significant size or scale in respect of the digital activity;
  - (b) a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business;
  - (c) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities;

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<sup>26</sup> Section 5 of the Act.

(d) the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise.<sup>27</sup>

2.38 Both SMS conditions need to be satisfied for the undertaking to be designated as having SMS. The following two sections describe the two SMS conditions in turn. While the SMS assessment will reflect the specifics of each case, the third section explains the CMA's general approach to assessing evidence in relation to the SMS conditions.

### ***Substantial and entrenched market power***

2.39 The following sections describe the role of market power in the SMS conditions and the CMA's approach to assessing substantial and entrenched market power.

#### *The role of market power in the SMS conditions*

2.40 Market power arises where a firm faces limited competitive pressure and individual consumers and businesses have limited alternatives to its product or service or, even if they have good ones, they face barriers to shopping around and switching.<sup>28</sup> Therefore, an assessment of market power is largely an assessment of the available alternatives and the extent to which they are substitutable for that product or service. This includes alternatives available in the present and possibilities for entry and expansion.

2.41 Evidence relevant to market power may include indicators such as the level and stability of shares of supply, the number and strength of competitive constraints to incumbent firms, profitability levels and levels of customer switching. The CMA will also consider evidence on the sources of market power, examples of which may include supply side factors such as network effects, economies of scale and scope, high fixed costs, data advantages, integration into wider ecosystems<sup>29</sup> or control of intellectual property, as well as demand side factors, such as switching costs, behavioural biases, or the role of brand and reputation. Paragraphs 2.63 to 2.67 describe how the CMA may assess such evidence.

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<sup>27</sup> Section 6 of the Act.

<sup>28</sup> While market power is often thought of in the context of raising prices profitably, it can also relate to worsening quality, service, business models and innovation, among others. As such, market power is relevant even where customers or users face a zero price.

<sup>29</sup> The word 'ecosystem' is used to refer to a set of interrelated products and/or services offered by a single firm.

- 2.42 The mere holding of market power is not in itself sufficient for an undertaking to meet the first SMS condition which requires that market power is 'substantial' and 'entrenched'. 'Substantial' and 'entrenched' are distinct elements and each needs to be demonstrated. However, they are not entirely separate as the assessment of each will typically draw on a common set of evidence on market power. 'Substantial' refers to the extent of market power, while 'entrenched' is intended to ensure that a firm is not designated where its market power is only transient.
- 2.43 As described above, assessing substantial and entrenched market power does not require the CMA to undertake a formal market definition exercise which often involves drawing arbitrary bright lines indicating which products are 'in' and which products are 'out'. Instead, the CMA's assessment will focus more broadly on the competitive constraints applying to the potential SMS firm in respect of a digital activity, including for example evidence of substitutability, competitive rivalry and barriers to entry and expansion.<sup>30</sup>
- 2.44 As described at paragraph 2.15 above, where the CMA groups two or more of the firm's digital activities and the products within them into a single digital activity, the SMS assessment will relate to the grouped activity as a whole. In practice, the CMA may consider evidence relevant to market power of individual products and whether and how any interlinkages between these may contribute to market power across the digital activity, for example whether the firm's position in one activity in the group reinforces its position in another.
- 2.45 Substantial and entrenched market power is a distinct legal concept from that of 'dominance' used in competition law enforcement cases, reflecting the fact that the digital markets competition regime is a new framework with a different purpose. As a result, the CMA will not typically seek to draw on case law relating to the assessment of dominance when undertaking an SMS assessment.<sup>31</sup>

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<sup>30</sup> This is consistent with the CMA's approach in market studies under the EA02, including for example, the [Online platforms and digital advertising market study](#) and [Mobile ecosystems market study](#).

<sup>31</sup> However, the CMA may have regard to the underlying evidence and analysis from the CMA's investigations under the CA98 (or the CMA's other tools) to the extent it is relevant to the extent and persistence of the potential SMS firm's market power (rather than any specific finding of 'dominance').



### *The forward-looking assessment of substantial and entrenched market power*

- 2.46 The CMA's assessment of whether an undertaking has substantial and entrenched market power must be forward-looking, over a period of at least five years – the length of the SMS designation.<sup>32</sup>
- 2.47 The CMA's starting point will be market conditions and market power at the time of the SMS investigation. From that starting position, the CMA will consider the potential dynamics of competition over the next five years, taking into account any expected or foreseeable developments that may affect the firm's conduct in respect of the digital activity if the firm was not to be designated.
- 2.48 As with any ex ante assessment, there will necessarily be some uncertainty as to the future evolution of a sector. However, such uncertainty does not preclude the CMA from finding substantial and entrenched market power based on the evidence available to it when making its assessment. If post-designation developments or new evidence indicate that a firm's market power has – contrary to the CMA's expectations in its initial assessment – been significantly diminished, the CMA is able to revisit its previous assessment and can consider whether to revoke the SMS designation.<sup>33</sup>
- 2.49 When carrying out its assessment, the CMA will consider developments that may affect the firm's market power, including:
- (a) market developments such as emerging technology, innovation or new entrants. Evidence may include, for example, a firm's internal documents, business forecasts, or industry reports. Paragraphs 2.63 to 2.67 below describe how the CMA may assess such evidence.
  - (b) regulatory developments, including regulation by the CMA that does not depend on the designation (for example CRs relating to a different digital activity), intervention by another regulator, or the introduction of other legislation.<sup>34</sup>

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<sup>32</sup> Section 5 of the Act.

<sup>33</sup> See section on 'further SMS investigations' below at paragraphs 2.94–2.100.

<sup>34</sup> Where an undertaking is already designated in respect of a digital activity and the CMA is conducting a further SMS investigation to determine if that designation should be renewed, varied or revoked, the CMA will also consider what would happen if existing regulation relating to that designation was to be revoked.

- 2.50 In considering these developments, the CMA will not seek to make precise predictions about the likely development of the industry.<sup>35</sup> Instead the CMA will consider whether relevant developments are likely to be sufficient in scope, timeliness and impact to eliminate the firm's substantial market power.
- 2.51 In doing so, the CMA will consider what the sources of the firm's market power have been, and whether these are likely to remain in the future. The CMA may consider the extent to which the firm's market power has persisted in the past, including whether that market power has endured through previous market developments. A position of market power that has been acquired more recently may also be entrenched if the sources of that market power are likely to endure.
- 2.52 As such, where the CMA has found evidence that the firm has substantial market power at the time of the SMS investigation, this will generally support a finding that market power is entrenched, where there is no clear and convincing evidence that relevant developments will be likely to dissipate the firm's market power.

### ***Position of strategic significance***

- 2.53 The second SMS condition is that the undertaking has a position of strategic significance in respect of the digital activity. To assess this, the CMA needs to consider the four conditions set out in the Act, at least one of which must be met. Where it establishes that a condition has been met, it is not necessary for the CMA to go on to consider whether the other conditions would also be met.
- 2.54 Each condition is described below in turn. Any examples included in each subsection are not exhaustive, and the CMA's assessment will reflect the specifics of each case.

### ***The firm has achieved a position of significant size or scale in respect of the digital activity***

- 2.55 This condition covers the potential SMS firm's size or scale in respect of the digital activity and can be assessed by looking at a wide range of metrics, not

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<sup>35</sup> For instance, when assessing the likelihood that one undertaking will enter or significantly expand, the CMA will not necessarily conclude on the precise characteristics of the product or service or the level of sales it would achieve.

all of which will be relevant in every case. Examples of metrics the CMA may consider include:

- (a) the firm's number of users within the digital activity;
- (b) metrics of usage of products within the digital activity, such as time spent using the product or frequency of use;
- (c) the number of purchases or transactions made through the digital activity;
- (d) the amount of data being gathered or accessed via the digital activity; or
- (e) the revenue a firm generates from the digital activity.

2.56 The most appropriate metric (or combination of metrics) is likely to depend on the specific context.

2.57 There is no quantitative threshold for when size or scale of the potential SMS firm can be considered as significant, and this may be assessed in terms of the firm's absolute position and/or relative to other relevant firms.<sup>36</sup>

*A significant number of other firms use the digital activity as carried out by the firm in carrying on their business*

2.58 This condition covers instances where the digital activity as carried out by the potential SMS firm plays an important role in the day-to-day business or critical operations of a significant number of other firms. Relevant evidence may include, for example:

- (a) the number of businesses making transactions through the potential SMS firm's platform(s);
- (b) the number and potentially the range of distinct products or services offered by other businesses the potential SMS firm hosts on its user-facing platform;
- (c) the proportion of other firms' sales it facilitates; or

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<sup>36</sup> A position of significant size or scale may also depend on the firm's size relative to the potential number of users of the digital activity. For example, if the total number of potential users of a digital activity is small (because the activity is relevant to businesses in a particular sector only) but the firm captures a large proportion of those users, it could be considered that the firm has achieved a position of significant scale in respect of the activity.

(d) evidence of the effects of customers being unable to access the potential SMS firm's product or service.

2.59 As with the assessment of a firm's size and scale, there is no quantitative threshold for when the number of other firms using the digital activity to carry on their business can be considered as significant, and this may be assessed in terms of the firm's absolute position and/or relative to other firms. Further, the most appropriate metric (or combination of metrics) is likely to depend on the specific context.

*The firm's position in respect of the digital activity would allow it to extend its market power to a range of other activities*

2.60 This condition covers circumstances in which the potential SMS firm could use its position to leverage its market power or expand it into other activities. These can either be activities where the firm would be a new entrant or activities where the potential SMS firm is already present.

2.61 The assessment is aimed at evidencing the potential SMS firm's status, rather than predicting its current or future conduct. Therefore, it will be purely an assessment of the potential SMS firm's ability and the CMA will not undertake an assessment of, or seek to predict, the firm's current or potential future incentives to extend its market power into other activities. Examples of potentially relevant evidence may include:

(a) the fact that the potential SMS firm controls access to a product or service which is important for other firms to compete in another area and which the firm could refuse to provide or provide on disadvantageous terms.

(b) the potential SMS firm's presence in certain digital activities which makes its entry or expansion into new areas possible or easier. For example, this could be the case when the potential SMS firm's presence in a given digital activity gives it access to a rich dataset or relates to products or services which are complementary to others, or which it may be commercially sensible to offer jointly.

(c) any past incidents of the potential SMS firm managing to successfully extend its market power, for example by using it to enter a new area or reinforcing its presence in one where it was already present.

*The firm's position in respect of the digital activity allows it to determine or substantially influence the ways in which other firms conduct themselves, in respect of the digital activity or otherwise*

2.62 This condition covers scenarios where the potential SMS firm's position enables it to determine or substantially influence how other firms operate. It can be met in a variety of ways. Examples of when this could be the case may include:

- (a) when the potential SMS firm has a major role in setting standards, including de facto ones, for instance because it offers many successful and inter-related products that other firms have a strong incentive to ensure compatibility with;
- (b) when the potential SMS firm makes decisions which relate to the application of regulatory frameworks which impact other relevant firms or when its interpretation of these becomes the prevailing one in the market;<sup>37</sup>
- (c) when the potential SMS firm operates a platform where it performs a content moderation or curation role, effectively determining which rules other firms should abide by if they want to be present on the platform or what information and content is accessed by users.

### ***The CMA's approach to assessing the SMS conditions***

#### *How the CMA assesses evidence*

2.63 The CMA does not have a prescriptive list of evidence that it will take into account in its SMS assessment and may rely on a range of quantitative and/or qualitative evidence, with the balance between the two varying across investigations. As explained above, the SMS assessment will reflect the specifics of each case. Therefore, the evidence used will depend on factors such as the firm's business model, the characteristics of the sector, the nature of competition and what relevant evidence is available (taking into account the statutory time limit within which an SMS investigation must be completed). These factors may vary greatly depending on the sector and the firm under investigation.

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<sup>37</sup> For example, when the ways in which a firm complies with certain regulation (including by modifying its products) influences how other relevant firms comply.

- 2.64 The CMA will decide the weight it is appropriate to place on a particular piece of evidence, taking into account, for example, its relative quality. There is no set hierarchy between quantitative evidence, such as consumer surveys or econometric analysis, and qualitative evidence, such as internal documents or statements of relevant firms. Further, there are no quantitative thresholds for when the two SMS conditions are met. The CMA may use different methods and approaches depending on the specific circumstances and the form, depth or complexity of the analysis may vary across investigations, even in the same industry.
- 2.65 During the SMS assessment, the CMA may rely on relevant evidence gathered and analysis carried out in other cases, including for example market studies involving potential SMS firms, or other cases under its digital markets functions or its other tools, where relevant. In doing so, the CMA will be mindful of when and for what purpose the evidence was initially gathered and consider the weight it should be given and the extent to which it should be updated or corroborated.
- 2.66 As previously noted, the two SMS conditions are separate and will require separate assessments and findings. However, there may be evidence that is relevant to both; therefore, the assessment of each may inform the other. For example, shares of supply may be informative of whether a firm has substantial and entrenched market power in respect of a digital activity as well as whether it has significant size or scale in the same activity.
- 2.67 The CMA will assess whether a firm has substantial and entrenched market power and a position of strategic significance in relation to a digital activity on the balance of probabilities, and based on an in-the-round assessment of the evidence available to it.

## **Procedure of a Strategic Market Status investigation**

### ***Basis for launching an SMS investigation***

- 2.68 The CMA may begin an initial SMS investigation where it has reasonable grounds to consider that it may be able to designate an undertaking as having SMS in respect of a digital activity in accordance with the Act.<sup>38</sup> To assess whether the threshold is met the CMA may use its statutory powers to gather

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<sup>38</sup> Section 9(1) of the Act. To assess whether this threshold is met the CMA may use its power to require information under section 69 of the Act, which can be used for the purposes of exercising, or deciding whether to exercise, any of its digital markets functions.

information.<sup>39</sup> The CMA may also decide to begin an SMS investigation on the basis of:

- (a) its own research and market intelligence, for example through its digital markets horizon scanning and monitoring work;<sup>40</sup>
- (b) evidence gathered through other CMA workstreams, such as the CMA's markets or enforcement functions;
- (c) information from another regulator, including from Ofcom, the Information Commissioner, the Financial Conduct Authority ('**FCA**'), the Prudential Regulation Authority or the Bank of England;<sup>41</sup> or
- (d) a recommendation from Ofcom or the FCA under section 108 of the Act.<sup>42</sup>

2.69 The CMA will have regard to its Prioritisation Principles<sup>43</sup> when considering which firms and digital activities to prioritise for SMS investigations.

### *Launch of an SMS investigation*

2.70 After the decision has been taken to open an SMS investigation, the CMA will issue an investigation notice to the potential SMS firm to which the investigation relates (an '**SMS investigation notice**').<sup>44</sup>

2.71 The SMS investigation notice must state, in the case of an initial SMS investigation:

- (a) the reasonable grounds on which the CMA considers that it may be able to designate the firm as having SMS in respect of a digital activity;<sup>45</sup>
- (b) that the CMA may close an initial SMS investigation without making a decision on whether the firm has met the SMS conditions. In this case, the CMA must give a notice to the firm to that effect, setting out the reasons

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<sup>39</sup> See Chapter 5 of this guidance for further information on the CMA's investigatory powers.

<sup>40</sup> See Chapter 6 of this guidance for further information on the CMA's approach to monitoring.

<sup>41</sup> In respect of these regulators, section 107 of the Act requires the CMA to consult the relevant regulator in particular circumstances, before it opens an SMS investigation, before making a decision to designate a firm as having SMS and before revoking a designation.

<sup>42</sup> Section 108 of the Act sets out a formal mechanism for the FCA or Ofcom to make a recommendation to the CMA for it to exercise a regulatory digital markets function, including the discretionary opening of an SMS investigation. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>43</sup> [CMA Prioritisation Principles](#)

<sup>44</sup> Section 11(1) of the Act.

<sup>45</sup> Section 11(2)(a)(i) of the Act.

for its decision and publish the notice as soon as practicable thereafter.<sup>46</sup>  
The CMA will publish this notice on its website.<sup>47</sup>

2.72 Further, in the case of both initial and further SMS investigations, the SMS investigation notice must state:<sup>48</sup>

(a) the purpose and scope of the SMS investigation, including a description of the firm and digital activities to which the investigation relates.<sup>49</sup> It follows that, before opening an investigation, the CMA will take a preliminary view of the firm's products that may be likely to be identified as digital activities where the firm has SMS, based on factors such as where the firm is active and what products it offers. This may be further refined during the SMS investigation.

(b) the period by the end of which the CMA must give the firm a notice setting out its decisions as a result of the investigation;<sup>50</sup> and

(c) the circumstances in which that period may be extended.<sup>51</sup>

2.73 In any notice or other document that the CMA is required to give or publish during the SMS investigation, the CMA may describe a digital activity by reference to the nature of the activity, brand names or both.<sup>52</sup>

2.74 The description of the digital activity to which the SMS investigation relates will be relatively brief and will set out the overall purpose of the products included in it. The CMA may provide the firm with examples illustrating which products it currently considers to be included and excluded from the digital activity based on its current business model. However, reflecting in particular the fact that a firm may adapt its products over time and/or introduce new ones, this will not be an exhaustive list of products, and the firm will need to assess on an ongoing basis which of its products fall within the digital activity in question, given the description provided.

2.75 Similarly, the description of the firm will also be non-exhaustive given that the entities included within an undertaking can vary over time (eg as a result of

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<sup>46</sup> Sections 11(2)(a)(ii) and 12 of the Act.

<sup>47</sup> Section 113(3) of the Act provides that (3) 'the CMA must comply with any duty to publish a notice or any other document under this Part by publishing the notice or document online, having regard to any need to keep information confidential.'

<sup>48</sup> A 'further SMS investigation' is defined at section 10(3) of the Act and is explained further in paragraphs 2.94–2.100 of this guidance chapter below.

<sup>49</sup> Section 11(2)(b) and section 11(3) of the Act.

<sup>50</sup> Section 11(2)(c) and section 14(2) of the Act.

<sup>51</sup> Section 11(2)(d) and section 104 of the Act.

<sup>52</sup> Section 3(4) of the Act.



corporate restructurings and acquisitions). Therefore, where an undertaking comprises multiple companies, the CMA will usually seek to identify in the notice the parent company and the main subsidiaries responsible for carrying on the digital activity, rather than providing an exhaustive list of the entities making up the undertaking at that point in time.

- 2.76 The CMA can begin assessing a firm's activity (or activities) by publishing a notice at any time, regardless of whether or not the firm is already designated in another activity or is already the subject of another ongoing designation assessment.
- 2.77 The CMA must give the firm one or more revised versions of the SMS investigation notice if it changes its view of the purpose and scope of the investigation.<sup>53</sup>
- 2.78 As soon as reasonably practicable after giving an SMS investigation notice or a revised version of an SMS investigation notice to the firm, the CMA must:
- (a) publish the SMS investigation notice on its website, and
  - (b) give a copy of the statement to the FCA, Ofcom, the Information Commissioner, the Bank of England and the Prudential Regulation Authority.<sup>54</sup>

### *The statutory timetable*

- 2.79 All SMS investigations will have a nine-month statutory deadline, commencing on the day on which the SMS investigation notice is given to the potential SMS firm.<sup>55</sup>
- 2.80 As explained in Chapter 9, the CMA can extend the timetable for such investigations in certain circumstances.<sup>56</sup>

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<sup>53</sup> Section 11(4) of the Act. Section 14(3) of the Act provides that the giving of a revised version of an SMS investigation notice under section 11(4) does not change the day on which the SMS investigation period begins.

<sup>54</sup> Section 11(5)(a) and section 11(5)(b) of the Act.

<sup>55</sup> Section 14(2) of the Act. This is subject to the CMA's power to extend the deadline in the circumstances set out in section 104 of the Act.

<sup>56</sup> See paragraphs 9.2–9.9 of Chapter 9 of this guidance.

## *Information gathering and engagement*

- 2.81 Chapter 5 of this guidance sets out the investigatory powers the CMA may use for the purpose of information gathering, including during the course of an SMS investigation.
- 2.82 At the outset of an SMS investigation, the CMA will publish an invitation to comment which will set out the main avenues of investigation and invite submissions of evidence on topics where it would welcome views. This will allow the CMA to gather evidence and perspectives from, among others, small and challenger businesses and consumer groups, as well as the larger technology firms. Responses to an invitation to comment will be required during a specified timeframe. The CMA will typically publish a summary of responses or non-confidential versions of submissions received.

## ***Consultation on proposed decision***

- 2.83 The CMA will set out its interim analysis and emerging views in its proposed decision. The proposed decision will provide sufficient explanation of the CMA's underlying reasoning for the firm subject to the SMS investigation and third parties to be able to make informed submissions and representations on the CMA's proposed decision.<sup>57</sup> The firm subject to the SMS investigation will also have the opportunity to make oral representations on the findings set out in the proposed decision.
- 2.84 The CMA must publish any proposed decision it is considering making as a result of an SMS investigation for public consultation.<sup>58</sup>
- 2.85 The consultation on any proposed decision to designate a firm that the CMA is considering making as a result of an SMS investigation may be carried out at the same time as the consultation in relation to the imposition of a CR.<sup>59</sup>
- 2.86 Chapter 9 sets out the CMA's approach to consultations.<sup>60</sup>

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<sup>57</sup> The CMA will set out in its proposed decision the 'gist' of the case, and have regard to its statutory obligations under the EA02 which impose a general restriction on the disclosure of specified information. Further information on the CMA's approach to protecting confidentiality under the digital markets competition regime is set out in Chapter 5 of this guidance at paragraphs 5.84–5.91.

<sup>58</sup> Section 13(1) of the Act. As noted in footnote 41 above, section 107 of the Act also requires the CMA to consult relevant regulators in particular circumstances before making a decision to designate a firm as having SMS.

<sup>59</sup> Section 24(3) of the Act. Further information on the procedure relating to CRs is set out in Chapter 3 of this guidance.

<sup>60</sup> See paragraphs 9.10–9.15 in Chapter 9 of this guidance for information on the CMA's approach to consultations.

## ***Outcome of SMS investigations***

2.87 The CMA must inform the firm of the outcome of an SMS investigation by providing a notice setting out its decision (an '**SMS decision notice**').<sup>61</sup> The SMS decision notice will be addressed to a non-exhaustive list of the legal entities which form part of the undertaking to which the designation applies.<sup>62</sup>

### *Decision not to designate*

2.88 Where the CMA decides as a result of an initial SMS investigation not to designate a firm as having SMS in respect of a digital activity, the CMA must set out in the SMS decision notice the reasons for its decision.<sup>63</sup>

### *Decision to designate*

2.89 Where the CMA decides to designate a firm as having SMS in respect of a digital activity following its investigation the SMS decision notice must state the following information:

- (a) A description of the designated undertaking.<sup>64</sup>
- (b) A description of the digital activity with respect to which the designation applies<sup>65</sup> (the '**relevant digital activity**') which as described at paragraph 2.74 above will be relatively brief and will not, for example, list exhaustively all of the products included within that digital activity.
- (c) Where the decision to designate has been made following a further SMS investigation, any provision that the CMA has decided to make in respect of existing obligations including CRs or PCOs.<sup>66</sup>
- (d) The CMA's reasons, in the case of an initial SMS investigation, for deciding to designate the undertaking as having SMS in respect of the digital activity.<sup>67</sup> Alternatively, in the case of a further SMS investigation,<sup>68</sup> the reason for designating the undertaking again in respect of the particular digital activity, or where relevant, the reason for designating an

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<sup>61</sup> Section 14(2) of the Act.

<sup>62</sup> This will be similar to the non-exhaustive description of the firm in the relevant SMS investigation notice – see paragraph 2.75.

<sup>63</sup> Section 15(1) of the Act.

<sup>64</sup> Section 15(3)(a) of the Act.

<sup>65</sup> Section 15(3)(b) of the Act.

<sup>66</sup> Section 17 of the Act.

<sup>67</sup> Section 15(3)(d) of the Act.

<sup>68</sup> See further information below on 'further SMS investigations' at paragraphs 2.94–2.100.

undertaking in respect of a digital activity that the CMA considers to be similar or connected to the relevant digital activity, whether instead of, or in addition to, the relevant digital activity.<sup>69</sup>

- (e) A statement of the period for which the designation has effect (the ‘**designation period**’).<sup>70</sup>
- (f) A statement of the circumstances in which the designation period may be extended.<sup>71</sup>
- (g) A statement of the circumstances in which the designation may be revoked before the end of the designation period.<sup>72</sup>

2.90 The SMS designation will take effect from the day after the CMA gives this notice to the firm. All designations are for a period of five years, save where extended under section 104 of the Act.<sup>73</sup>

2.91 As soon as reasonably practicable after issuing an SMS decision notice, the CMA must publish the notice on its website.<sup>74</sup>

#### *Closing an SMS investigation without a decision to designate*

2.92 The CMA may close an initial SMS investigation at any time before it has reached a final view on whether or not a firm should be designated.<sup>75</sup>

2.93 Should this be the case, the CMA must give the firm to which the investigation related a notice to that effect which sets out the CMA’s reasons for closing the investigation.<sup>76</sup> This could, for example, cover a situation where the CMA decides that an investigation no longer merits the continued allocation of resources because it no longer fits within the CMA’s priorities, having regard to its Prioritisation Principles.<sup>77</sup> It may also include where the evidence it has gathered is insufficient to demonstrate that a firm has SMS or indicates that one of the conditions may not be satisfied, and the CMA decides that further

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<sup>69</sup> See section 14(1)(b), 10(3) and 10(4) of the Act.

<sup>70</sup> Section 15(2)(e) and 18 of the Act.

<sup>71</sup> Section 15 (3)(f) of the Act.

<sup>72</sup> Section 15(3)(g) of the Act.

<sup>73</sup> Section 18(1) of the Act. See further guidance on extension periods at paragraphs 9.2–9.8 in Chapter 9 of this guidance.

<sup>74</sup> Section 15(6) of the Act. The CMA will consider its statutory obligations to protect confidential information when publishing its SMS decision notice. See Chapter 5 of this guidance for further information on the CMA’s approach to protecting confidential information.

<sup>75</sup> Section 12(1) of the Act.

<sup>76</sup> Section 12(2) and 12(3) of the Act.

<sup>77</sup> [CMA Prioritisation Principles](#)

investigation is not warranted. The CMA may take this decision at any stage of the investigation. As soon as reasonably practicable after informing the firm, the CMA must also publish the notice on its website.<sup>78</sup> The closure of a particular SMS investigation does not preclude the CMA from opening another SMS investigation at a later point. If it does so, the CMA will issue a new SMS investigation notice in line with the procedure set out above.

### ***Further SMS investigations***

2.94 A 'further SMS investigation' relates to an existing SMS designation in respect of a digital activity. It can be an investigation into whether to:

- (a) designate the SMS firm again in respect of that digital activity.
- (b) designate the SMS firm in respect of a digital activity that the CMA considers to be similar or connected to the relevant digital activity, whether instead of, or in addition to, the relevant digital activity.
- (c) revoke the SMS firm's designation in respect of the relevant digital activity.<sup>79</sup>

2.95 It is mandatory for the CMA to conduct a full reassessment of a firm's designation before the end of the designation period of five years, allowing for the nine-month statutory review period.<sup>80</sup>

2.96 Where the CMA decides as a result of a further SMS investigation to re-designate or designate an SMS firm in respect of a different digital activity, the CMA will consider whether existing obligations, including CRs or PCOs should be continued or revised to ensure they reflect any revised designation.<sup>81</sup>

### ***Conduct of a further SMS investigation***

2.97 The CMA will conduct a further SMS investigation following the procedural framework set out in the Act and described above at paragraphs 2.70 to 2.91. In practice, the CMA may be able to conduct a further SMS investigation at a faster pace and complete it ahead of the statutory deadlines due to the

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<sup>78</sup> Section 12(4) of the Act.

<sup>79</sup> Section 10(3) and 10(4) of the Act. Section 107 of the Act requires the CMA to consult certain regulators (Ofcom, the Information Commissioner, the FCA, the Prudential Regulation Authority and/or the Bank of England) on a proposal to exercise a regulatory digital markets function, including a decision to re-designate a firm as having SMS in respect of a digital activity or to revoke an SMS designation, in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>80</sup> Section 10(2) of the Act.

<sup>81</sup> Section 10(3)(b) of the Act.

information it will already have available as a result of the initial SMS investigation and ongoing monitoring.<sup>82</sup>

- 2.98 If the CMA is carrying out a further SMS investigation and there is a need to extend the timetable beyond nine months for either special reasons or because there has been a failure to comply, the CMA may extend the SMS designation period to match the extended length of the SMS investigation period to ensure that the firm does not fall out of the regime before the CMA has reached its decision.<sup>83</sup>
- 2.99 If the extension to the timetable is made because there has been a failure to comply in respect of an information notice or in relation to the CMA's power to interview, an extension to the SMS designation period can only be made if the person not complying is, or is connected to, the designated undertaking in question.<sup>84</sup>
- 2.100 During a further SMS investigation, the firm under investigation will still be required to comply with any existing requirements (eg CRs, PCIs and merger requirements).

#### *Decision to revoke a designation*

- 2.101 Where the CMA decides, as a result of a further SMS investigation, to revoke an SMS designation in respect of a digital activity, the SMS decision notice must provide for the revocation of the existing designation to have effect at the end of the day on which the notice is given, or to have effect from such earlier time as the CMA may specify in the notice.<sup>85</sup>
- 2.102 The SMS decision notice must also include:
- (a) any provision that the CMA has decided to make in respect of existing obligations;<sup>86</sup> and
  - (b) the CMA's reasons for its decision to revoke the designation.<sup>87</sup>

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<sup>82</sup> See Chapter 6 of this guidance for further information on the CMA's approach to monitoring.

<sup>83</sup> Section 104(7) of the Act. Further information on extension periods is provided at paragraphs 9.2–9.9 of Chapter 9 of this guidance.

<sup>84</sup> See section 118(3) of the Act for when a person is 'connected to' an undertaking. Further information on extension periods is provided at paragraphs 9.2–9.9 of Chapter 9 of this guidance.

<sup>85</sup> Section 16(2) of the Act.

<sup>86</sup> Section 17 of the Act.

<sup>87</sup> Section 16(3)(b) and section 14(1)(b) of the Act.

## *Existing obligations*

2.103 Where the CMA decides, as a result of a further SMS investigation, to revoke an SMS designation, the CMA may make transitional, transitory or saving provision in respect of any existing obligations imposed on an SMS firm.<sup>88</sup>

2.104 An 'existing obligation' includes any of the following:

- (a) CRs;
- (b) EOs;
- (c) Commitments;
- (d) Final offer orders; or
- (e) PCOs.<sup>89</sup>

2.105 The CMA may only make such provision for the purpose of managing the impact of the revocation on any person who benefited from the existing obligation, and in a way that appears to the CMA to be fair and reasonable.<sup>90</sup> For example, the CMA may consider it to be appropriate for an existing obligation, or parts of that obligation, to remain in force for a specific period of time after a designation is revoked, in order to mitigate the impact on third parties who had relied on that obligation.

2.106 Where the CMA decides as a result of a further SMS investigation to (a) designate an SMS firm again in respect of a relevant digital activity, or (b) designate the SMS firm in respect of a different digital activity that the CMA considers to be similar or connected to the relevant digital activity (whether instead of, or in addition to, the relevant digital activity),<sup>91</sup> the CMA will take the following approach to existing obligations:

- (a) the CMA may apply any existing obligation, with or without modification, to the SMS firm in respect of the new designation; and/or
- (b) the CMA may make transitional, transitory or saving provision in respect of any existing obligation.<sup>92</sup>

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<sup>88</sup> Section 17(1) of the Act.

<sup>89</sup> Section 17(6) of the Act.

<sup>90</sup> Section 17(2) of the Act.

<sup>91</sup> Section 17(4)(a) and (b).

<sup>92</sup> Section 17 (5)(a) and (b).

2.107 Any provisions relating to existing obligations must be included in an SMS decision notice detailing the outcome of the further SMS investigation.<sup>93</sup>

### *Early reassessment*

2.108 The CMA has discretion to decide whether to bring forward a further SMS investigation ahead of the mandatory deadline and can begin a further SMS investigation at any time during the designation period.<sup>94</sup>

2.109 An SMS firm may experience a material change of circumstance which indicates to the CMA that the original SMS designation decision may no longer be appropriate, or that the firm no longer meets the SMS conditions. For example, this could be the case where an SMS firm may:

- (a) be subject to new legislation or regulation (beyond any obligations imposed by the CMA under the digital markets competition regime) which changes the way the firm conducts a relevant digital activity in the UK or impacts its degree of market power in that activity;
- (b) be impacted by such significant market changes that the CMA considers that its prior substantial and entrenched market power assessment may have been materially affected;
- (c) engage in the divestiture of part of a relevant digital activity which may change the nature of how it is carried out and as such impact whether the firm continued to meet the SMS conditions;
- (d) undergo a change in its financial position, meaning it falls below the turnover condition thresholds and is out of scope of designation.

2.110 Similarly, there may be developments that indicate to the CMA that, for example, changes to the definition of the relevant digital activity or activities in respect of which the existing designation has been made (ie the boundary of the firm's designation) need to be made.

2.111 As set out in Chapter 6, the CMA will undertake ongoing monitoring of relevant digital markets. Through this process, the CMA may become aware of potential reasons to undertake an early reassessment of an SMS designation. This may be as a result of submissions from a firm, or through its more general monitoring activities. The CMA will in each case consider whether to exercise its discretion to carry out an early reassessment. Where a

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<sup>93</sup> Section 17(7) of the Act.

<sup>94</sup> Section 10(1) of the Act.



firm has made representations to the CMA that it should undertake an early further SMS investigation, the CMA will inform the firm whether or not it will do so, based on the evidence submitted.

2.112 In order to appropriately manage resources, the CMA will not consider evidence submitted by a firm within 12 months of declining a previous request.

## 3. Conduct requirements

### Introduction

- 3.1 Once a firm is designated as having SMS in respect of a digital activity, the CMA may impose one or more conduct requirements (**CRs**) on the designated firm (**SMS firm**) to guide how it should conduct itself in relation to that digital activity.
- 3.2 CRs are intended to guide the practices of an SMS firm in ways that address not only existing issues in relation to a relevant digital activity, but also protect against the risk that the firm seeks to take advantage of its substantial and entrenched market power in respect of that digital activity and position of strategic significance in ways that could exploit consumers and businesses or undermine fair competition.
- 3.3 This chapter is structured as follows:
- (a) Section 1 explains the approach the CMA will take when imposing CRs, including:
    - i. the key statutory requirements relating to imposing CRs;
    - ii. the CMA's analytical approach; and
    - iii. the procedural steps the CMA will follow in imposing CRs.
  - (b) Section 2 explains the approach the CMA will take to varying and revoking CRs.
- 3.4 Chapter 7 sets out the CMA's approach to enforcement of CRs.

### Imposing conduct requirements

#### *Summary of key statutory requirements*

- 3.5 CRs are requirements as to how the SMS firm must conduct itself in relation to a relevant digital activity.<sup>95</sup> The Act provides the CMA with the power to impose a CR or combination of CRs on an SMS firm where the CR(s) meet certain legislative requirements, as summarised below.

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<sup>95</sup> Section 19(3) of the Act.

### *CRs must be proportionate*

3.6 The CMA may only impose a CR or a combination of CRs on an SMS firm if the CMA considers it would be proportionate to do so for the purposes of one or more of the following objectives which are set out in the Act, having regard to what the CR or combination of CRs is intended to achieve:<sup>96</sup>

- (a) **Fair dealing:** users or potential users of the relevant digital activity are treated fairly, and able to interact, whether directly or indirectly, with the SMS firm on reasonable terms.
- (b) **Open choices:** users or potential users of the relevant digital activity are able to choose freely and easily between the services or digital content provided by the SMS firm and services or digital content provided by other firms.
- (c) **Trust and transparency:** users or potential users of the relevant digital activity have the information they require to enable them to understand the services or digital content provided by the SMS firm through the relevant digital activity, including the terms on which they are provided, and make properly informed decisions about whether and how they interact with the SMS firm in relation to the relevant digital activity.

### *CRs must be of a permitted type*

3.7 In addition, the CMA may only impose a CR which is of a permitted type.<sup>97</sup> The Act specifies an exhaustive list of permitted types, which are:<sup>98</sup>

- (a) Requirements for the purpose of obliging an SMS firm to:
  - i. trade on fair and reasonable terms;
  - ii. have effective processes for handling complaints by and disputes with users or potential users;
  - iii. provide clear, relevant, accurate and accessible information about the relevant digital activity to users or potential users;

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<sup>96</sup> Section 19(5)–(8) of the Act.

<sup>97</sup> Section 19(9) of the Act.

<sup>98</sup> Section 20 of the Act.

- iv. give explanations, and a reasonable period of notice, to users or potential users of the relevant digital activity, before making changes in relation to the relevant digital activity where those changes are likely to have a material impact on the users or potential users; and
- v. present to users or potential users any options or default settings in relation to the relevant digital activity in a way that allows those users or potential users to make informed and effective decisions in their own best interests about those options or settings.

(b) Requirements for the purpose of preventing an SMS firm from:

- i. applying discriminatory terms, conditions or policies to certain users or potential users or certain descriptions of users or potential users;
- ii. using its position in relation to the relevant digital activity, including its access to data relating to that activity, to treat its own products more favourably than those of other undertakings;
- iii. carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity;
- iv. requiring or incentivising users or potential users of one of the designated undertaking's products to use one or more of the undertaking's other products alongside services or digital content the provision of which is, or is comprised in, the relevant digital activity;
- v. restricting interoperability between the relevant service or digital content and products offered by other undertakings;
- vi. restricting whether or how users or potential users can use the relevant digital activity;
- vii. using data unfairly; and
- viii. restricting the ability of users or potential users to use products of other undertakings.

3.8 A CR must fall within one or more of the permitted types listed above. The permitted types of CRs include those for the purpose of obliging particular

conduct<sup>99</sup> and those for the purpose of preventing particular conduct.<sup>100</sup> Any CR imposed by the CMA may be framed as either an obligation or a restriction irrespective of which permitted type they fall within. For example, a CR for the purpose of preventing an SMS firm from using data unfairly<sup>101</sup> may be drafted to prevent an SMS firm from using data in a particular (unfair) way, or alternatively it may be drafted to require the firm to use data in a particular (fair) way.

- 3.9 The Secretary of State may amend by regulation the list of permitted types of CRs.<sup>102</sup>

### *Consumer benefits*

- 3.10 Before imposing a CR or combination of CRs on an SMS firm, the CMA must have regard to the benefits for consumers that it considers would likely result (directly or indirectly) from the CR or combination of CRs.<sup>103</sup> A benefit may result indirectly from the CR or combination of CRs, for example where the CR(s) is likely to give rise to benefits for business users of a relevant digital activity and/or increase competition in a relevant digital activity, which may then result in benefits for consumers in the form of lower prices, higher quality goods and services and/or a greater range of products and services.

### ***The CMA's analytical approach***

#### *Deciding to impose CRs*

- 3.11 The CMA will have regard to its Prioritisation Principles<sup>104</sup> when considering whether and how to address issues in relation to a relevant digital activity.
- 3.12 The CMA may consider whether to impose or vary a CR (or combination of CRs) to address an issue and/or whether to launch a PCI investigation.<sup>105</sup> In such cases, the CMA will select what it considers to be the most appropriate tool(s) having regard to all the relevant circumstances. This may include considering the nature and scope of the issue(s) under consideration, the

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<sup>99</sup> Section 20(2) of the Act.

<sup>100</sup> Section 20(3) of the Act.

<sup>101</sup> Section 20(3)(g) of the Act.

<sup>102</sup> Section 20(4) of the Act.

<sup>103</sup> Section 19(10) of the Act.

<sup>104</sup> [CMA Prioritisation Principles](#)

<sup>105</sup> The CMA may also consider whether it is appropriate to use its other tools, for example, by opening a case under the CA98 or using its consumer protection enforcement powers.

nature, scope and purpose of potential interventions, and the statutory conditions that must be satisfied in relation to each tool.<sup>106</sup>

### *CRs applying to non-designated activities*

- 3.13 Section 20(3)(c) of the Act allows the CMA to impose a CR that applies to an SMS firm's conduct in an activity other than the relevant digital activity. Under this permitted type, the CMA may impose CRs for the purpose of preventing an SMS firm from carrying on activities other than the relevant digital activity in a way that is likely to materially increase the SMS firm's market power or materially strengthen its position of strategic significance in relation to the relevant digital activity. This would include requirements to prevent the SMS firm from carrying out non-designated activities in a way that is likely to reinforce or embed such market power and/or position of strategic significance.
- 3.14 In carrying out its assessment of whether to impose a CR that applies to an activity other than the relevant digital activity, the CMA will focus on whether an SMS firm designs or operates any other products in a way that is likely to increase its substantial and entrenched market power and/or strengthen its position of strategic significance in relation to the relevant digital activity (including by reinforcing or embedding its market power and/or position of strategic significance). This might occur through conduct that is likely to raise barriers to entry or expansion or prevent the lowering of such barriers. For example, this could be the case where the non-designated activity redirects users to the relevant digital activity or where compatibility with products of other firms that compete with the SMS firm in the relevant digital activity is removed or restricted.
- 3.15 CRs within permitted types other than that in section 20(3)(c) may also have implications for how an SMS firm operates other activities beyond the relevant digital activity. For example, a CR permitted under section 20(3)(b) for the purpose of preventing self-preferencing within a relevant digital activity may impact activities outside the relevant digital activity. Similarly, under section 20(3)(d) of the Act, the CMA may impose a CR for the purpose of preventing an SMS firm from requiring or incentivising users of one of the firm's products

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<sup>106</sup> Relevant factors that the CMA may take into account when considering whether to impose CR(s) and/or launch a PCI investigation include, but are not limited to: (a) whether the CMA considers there is likely to be a factor or combination of factors relating to the relevant digital activity having an adverse effect on competition; and (b) whether any potential interventions would fall within the statutory objectives and permitted types of CRs.

to use one or more of its other products alongside services or digital content the provision of which is, or is comprised in, the relevant digital activity.

### *Designing effective and proportionate CRs*

3.16 The CMA will consider the imposition of CRs on SMS firms on a case-by-case basis having regard to the facts and circumstances pertaining to each relevant digital activity.

3.17 In brief, the CMA's approach to imposing CRs will be as follows:

(a) **Step 1:** The CMA will identify what the CR is intended to achieve. CRs must be imposed for the purpose of one or more of the objectives set out in legislation and will typically be intended to ensure that SMS firms do not take advantage of their powerful positions in ways that could exploit consumers or businesses or undermine fair competition.

(b) **Step 2:** The CMA will consider CRs within the permitted types set out in legislation to identify CRs or combinations of CRs that would be effective in achieving the CMA's aim in relation to a particular issue. As part of this, the CMA will consider both the content and form of CRs – including outcome-based CRs, action-focused CRs, higher-level CRs and more detailed CRs (see further paragraphs 3.24 to 3.26 below).

(c) **Step 3:** The CMA will consider the proportionality of any CRs that it proposes to impose.

3.18 More detail on how the CMA will typically approach each of these steps in practice is set out below. The precise nature and depth of the CMA's analysis when deciding in a given case whether to impose a CR or combination of CRs will vary according to the characteristics of the CR(s) under consideration. These may include, for example, the content and form of the CR, its degree of onerousness, the specificity of any obligations to be imposed on an SMS firm and the scope the CR provides for an SMS firm to comply in a number of ways.<sup>107</sup>

#### *Step 1: Identify the aim of a CR*

3.19 The CMA's starting point in imposing a CR will be to identify what it wants the CR to achieve. The CMA must impose CRs for the purpose of one or more of

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<sup>107</sup> For example, where the CMA is considering imposing a higher-level CR which gives an SMS firm discretion in how to comply with the CR, the likely costs of the CR will be inherently less certain and depend to a large extent on the SMS firm's compliance choices.

the statutory objectives (fair dealing, open choices, and/or trust and transparency). However, the aim of a CR will typically be more specific than the overarching statutory objective(s) for which it is imposed.

- 3.20 To provide an illustrative example, to address an SMS firm having an advantage over competitors and potential competitors due to its unique access to data, the CMA may decide to impose a CR or combination of CRs on the SMS firm intended to ensure that the SMS firm uses data fairly.<sup>108</sup> This would be consistent with the ‘fair trading’ objective but more specifically targeted at the issue the CMA is seeking to address.
- 3.21 The CMA’s aim in imposing CRs will be to set standards of conduct to ensure positive outcomes for businesses and consumers. This could be by ensuring that SMS firms do not take advantage of their powerful positions in ways that could exploit consumers and businesses or undermine fair competition. CRs are a forward-looking intervention which the CMA may use to remedy and mitigate existing issues, or prevent potential future issues.
- 3.22 The factors that informed the CMA’s decision to designate a firm as having SMS in respect of a relevant digital activity, including its size, market power, and strategic significance, will often be highly relevant in identifying issues that could cause harm to businesses or consumers which the CMA may wish to remedy, mitigate or prevent through the imposition of CRs.
- 3.23 In considering what a CR or combination of CRs is intended to achieve, the CMA will have regard in particular to achieving benefits for consumers.<sup>109</sup> As noted in paragraph 3.10 above, a CR may benefit consumers directly (eg by requiring an SMS firm to conduct itself in a certain way in relation to consumers) or indirectly (eg by giving rise to benefits for business users which are likely to be passed on to consumers, or requiring an SMS firm to conduct itself in a way which facilitates increased competition for the benefit of consumers).

#### *Step 2: Consider potential CRs*

- 3.24 Once the CMA has determined what it wants to achieve by imposing a CR, it will consider potential CRs or combinations of CRs within the permitted types

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<sup>108</sup> In such a case, the CMA may publish interpretative notes providing additional information on what may constitute ‘fair’ use of data under the CR. For more information on interpretative notes see paragraphs 3.53–3.58 below.

<sup>109</sup> Before imposing a CR or a combination of CRs on an SMS firm, the CMA must have regard in particular to the benefits for consumers that the CMA considers would likely result (directly or indirectly) from the CR or combination of CRs (section 19(10) of the Act).



set out in paragraph 3.7 above to identify CRs that would likely be effective in achieving this aim. As part of this, the CMA will consider both the content and form of potential CRs.

- 3.25 CRs may take various forms. A CR may specify the outcome the SMS firm must achieve (outcome-focused CR) or include actions the firm must take to achieve that outcome (action-focused CR). CRs may also vary in their level of detail. For example, they may be set as higher-level requirements, with which SMS firms may be able to comply in a number of ways, or contain more detailed and directive requirements.
- 3.26 In determining the appropriate form of a CR, the CMA will consider what is most likely to be effective having regard to what the CMA wants the CR to achieve. To ensure a coherent approach, the CMA will apply the following four principles:
- (a) **Principle 1:** Where a CR is intended to achieve an outcome that is measurable, and compliance with that outcome will be relatively easy for the CMA and third parties to assess, the CMA will be more likely to impose an outcome-focused CR. This will provide the SMS firm with a clear outcome it must achieve, while allowing the firm to determine for itself how to do so.
  - (b) **Principle 2:** Where an outcome-focused CR may not be effective in achieving its intended aim, including because compliance against the relevant outcome cannot be clearly assessed, the CMA will typically instead impose a CR or combination of CRs specifying the actions a firm must take to achieve that outcome. In these circumstances, such an action-focused CR may provide greater certainty to both the SMS firm and other market participants as to what precisely the firm must do to comply with the CR.
  - (c) **Principle 3:** When setting action-focused CRs, the CMA will typically impose higher-level requirements, based on the permitted types set out in the legislation. Higher-level requirements will allow for greater flexibility in the specific steps the firm needs to take to comply, which may support innovation and involve less risk of unintended consequences.
  - (d) **Principle 4:** Where necessary for CR(s) to be effective in achieving their intended aim, the CMA may also set out more detailed requirements. The CMA will be more likely to impose more detailed CRs where a firm has failed to comply effectively with higher-level requirements and/or in circumstances where the CMA has identified clear and persistent existing

issues which need to be corrected, and specific steps the SMS firm needs to take to do this.

- 3.27 The CMA will apply these principles flexibly. In some cases, it may be that higher-level CRs need to be supplemented over time with more detailed requirements – depending on how effectively SMS firms comply with higher-level requirements. Whilst in some cases it may be appropriate to move sequentially through the principles set out above, there may be situations where a more directive approach is merited from the outset.
- 3.28 When assessing whether a potential CR or combination of CRs is likely to be effective in achieving its intended aim, the CMA will have regard to a number of factors, including but not limited to:
- (a) the likely impact of the CR(s) in addressing the concern identified by the CMA, including benefits for consumers that are likely to result (directly or indirectly) from the CR(s);
  - (b) the timescale over which the CR(s) is likely to have effect (ie how timely its impact will be);
  - (c) the risk of the CR(s) not achieving its intended aim and/or giving rise to unintended consequences;
  - (d) practical considerations associated with the CR(s), including relating to effective implementation, monitoring and enforcement of the CR(s); and
  - (e) the extent to which the CR(s) is sufficiently flexible to achieve its aims, having regard to changing business practices and technologies, and not to be rendered ineffective by reasonably foreseeable market developments.
- 3.29 The CMA will also have regard to the extent to which the CR or combination of CRs is coherent with any other CRs imposed on the SMS firm or on other SMS firms operating in the same or similar digital activities. The CMA may also consider, as appropriate, coherence with interventions under other CMA tools, such as CA98 cases and requirements imposed by other UK regulators. In addition, the CMA may take into account actions by other regulators or legislators internationally.

*Step 3: Consider the proportionality of CRs*

- 3.30 Having decided which CR(s) or combination(s) of CRs would be effective in achieving their intended aim, the CMA will then consider whether the CR(s)

that it proposes to impose on an SMS firm would be proportionate. A proportionate CR or combination of CRs is one that:

- (a) is effective in achieving its intended aim (see Step 2, above);
- (b) is no more onerous than it needs to be to achieve its intended aim;
- (c) is the least onerous CR(s), where the CMA has identified multiple equally effective options that would achieve the intended aim; and
- (d) does not produce disadvantages that are disproportionate to its aim.

3.31 The CMA's assessment of these criteria will take into account the potential effects – both positive and negative – of a CR or combination of CRs on those most likely to be affected by it. Depending on the specifics of the CR(s) in question, these may include:

- (a) effects on the SMS firm, including the extent to which the SMS firm will need to make changes to its technical systems and/or business model, and whether this is the result of the SMS firm's previous conduct or decisions;
- (b) effects on third parties (for example, competitors, potential competitors, customers and/or suppliers) likely to be affected by the CR(s), including those resulting from changes third parties may need to make to their own systems to benefit from the CR(s);
- (c) effects on consumers and business users (eg on the safety or privacy of users or innovation in the digital activity), including the loss of any benefits that may be generated by the conduct which the CR(s) is directed at; and
- (d) wider effects, including risks of market distortions or unintended consequences and implications for the CMA (eg costs of monitoring the effectiveness of any CR(s)).

3.32 The CMA will not typically seek to quantify these effects precisely, but will consider their magnitude in the round, having regard, as relevant and appropriate in each case, to the quantitative and/or qualitative evidence available. In some cases, the CMA's assessment will necessitate weighing effects of the CR(s) expected to be felt in the short term (eg upfront costs), against others expected to arise in the future (eg benefits from innovation). In these circumstances, the CMA will take into account the likelihood and magnitude of each and assess them accordingly.

- 3.33 In all cases, the CMA expects the SMS firm and/or other relevant third parties to identify the likely effects of CRs and provide the CMA with evidence of these. Parties will have the opportunity to do this when the CMA issues any invitation to comment early in the CR design process and/or when the CMA consults on proposed CRs (see further paragraphs 3.41 to 3.47 below). The CMA will assess submissions provided by all relevant parties in this regard and weigh these submissions having regard to the strength of evidence supporting them.

### ***Procedure for imposing CRs***

#### *Timing*

- 3.34 The CMA may impose CRs on an SMS firm at any point during the designation period and there is no statutory timetable for imposing CRs. The development of CRs, including information gathering and consulting, can run in parallel with and/or follow an SMS investigation or a PCI investigation.
- 3.35 The CMA will typically impose an initial set of CRs as soon as practicable following an SMS designation decision.
- 3.36 The CMA may impose additional CRs and/or vary or revoke CRs during the designation period. For further information about the CMA's approach to varying and revoking CRs, see Section 2 below and paragraphs 6.77 to 6.88 in Chapter 6 on Monitoring.
- 3.37 Where appropriate, the CMA may reapply one or more CRs from a previous designation period in respect of the same or similar digital activity (see further paragraph 3.75 below).

#### *Information gathering before imposing a CR*

- 3.38 There are a number of ways that the CMA may identify issues relating to a relevant digital activity which it may consider should be addressed through CRs. This may include through evidence obtained during an SMS or PCI investigation, in response to an invitation to comment, as part of its market monitoring and intelligence gathering work (including assessing complaints received from third parties), or through work under its other powers, including market studies and investigations, CA98 investigations and consumer protection investigations.
- 3.39 The CMA may publish an invitation to comment inviting evidenced submissions on issues which might be addressed through CRs and how CRs might best address these. When appropriate, any invitation to comment may

be aligned with an invitation to comment inviting written submissions as part of a SMS investigation (see paragraph 2.82 in Chapter 2) or PCI investigation (see paragraph 4.54 in Chapter 4). The CMA will typically publish a summary of responses or non-confidential versions of submissions received.

- 3.40 When considering imposing a CR or combination of CRs, the CMA may draw on a range of different evidence sources. The precise nature and extent of information the CMA seeks to gather to support imposing a CR will vary depending on the particular issue. Further information on the CMA's approach to information and evidence gathering is provided in Chapter 5.

### *Consultation*

- 3.41 The CMA will seek input from a wide range of stakeholders before imposing CRs.<sup>110</sup> The CMA may seek input in a variety of ways, including through bilateral and multilateral engagement with relevant stakeholders and through formal public consultation.
- 3.42 The CMA has a statutory duty to carry out a public consultation before imposing, varying or revoking a CR.<sup>111</sup> The CMA may consult on more than one proposed CR at the same time. The proposed decision will provide sufficient explanation of the CMA's underlying reasoning for the SMS firm and third parties to be able to make informed submissions and representations on the CMA's proposed decision.<sup>112</sup>
- 3.43 To bring any consultation in respect of a proposed CR(s) to the attention of such persons as it considers appropriate,<sup>113</sup> the CMA will publish details of the consultation on its website, together with a draft version of the proposed CR(s). The CMA will also inform the relevant SMS firm of the consultation directly.
- 3.44 Chapter 9 sets out the CMA's approach to consultations.

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<sup>110</sup> Section 107 of the Act requires the CMA to consult certain regulators (Ofcom, the Information Commissioner, the FCA, the Prudential Regulation Authority and/or the Bank of England) on a proposal to exercise a regulatory digital markets function, including imposing or revoking a CR, in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>111</sup> Section 24 of the Act.

<sup>112</sup> The CMA will set out in its proposed decision the 'gist' of the case, and have regard to its statutory obligations under the EA02 which impose a general restriction on the disclosure of specified information. Further information on the CMA's approach to protecting confidentiality under the digital markets competition regime is set out in paragraphs 5.85–5.91 of Chapter 5 of this guidance.

<sup>113</sup> Section 24(1)(b) of the Act.

- 3.45 Where appropriate, a consultation on a proposed CR(s) may be carried out at the same time as a consultation in relation to the proposed SMS designation.<sup>114</sup> This makes it possible for the CMA to impose CRs at the same time as issuing an SMS designation decision or shortly afterwards. The CMA will also carry out subsequent consultations during the designation period where it is considering imposing additional CRs, or varying or revoking existing CRs.
- 3.46 As part of the consultation, the CMA may seek input from stakeholders on the appropriate length of any implementation period (see further paragraphs 3.59 to 3.63 below) and the information that an SMS firm should be required to provide in compliance reports (see further paragraphs 3.64 to 3.67 below).
- 3.47 The CMA will invite written responses to its consultation on a proposed CR(s). In addition, the CMA may hold bilateral meetings with relevant parties and/or host workshops or industry roundtables to gather views on the proposed CR(s). For information on how the CMA will manage confidential information received in consultation responses see paragraphs 5.85 to 5.91 in Chapter 5.

#### *CR imposition*

- 3.48 When imposing a CR on an SMS firm, the CMA must give the SMS firm a notice containing certain information specified in the Act ('**CR notice**').<sup>115</sup>
- 3.49 A CR notice must include the following information:<sup>116</sup>
- (a) the CR and the relevant digital activity to which it relates;
  - (b) the CMA's reasons for imposing the CR, including:
    - i. the objective for which the CMA considers it proportionate to impose the CR;
    - ii. the benefits that the CMA considers would likely result from the CR; and
    - iii. the permitted type to which the CMA considers the CR belongs;
  - (c) when the CR comes into force;

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<sup>114</sup> Section 24(3) of the Act. Further information on the procedure relating to SMS designations is set out in Chapter 2 of this guidance.

<sup>115</sup> Section 19(1) of the Act.

<sup>116</sup> Section 21 of the Act.

- (d) the last day of the designation period for the designation to which the CR relates; and
  - (e) how the CR interacts with any other CR that has been imposed on the SMS firm.
- 3.50 As part of setting out the CMA's reasons for imposing the CR under paragraph 3.49(b) above, the CMA will also identify the intended aim for which it considers it proportionate to impose the CR.
- 3.51 A notice imposing a CR may include transitional, transitory or saving provision.<sup>117</sup> For example, the CMA may provide that a CR comes into force on a particular date, but that certain aspects of the CR have effect from a later date, to smooth the transition of the CR coming into effect for the benefit of the SMS firm and other relevant third parties.
- 3.52 As soon as reasonably practicable after giving a CR notice to an SMS firm, the CMA must publish the notice on its website.<sup>118</sup>

#### *Interpretative notes*

- 3.53 The CMA may publish interpretative notes to accompany a CR or combination of CRs. The purpose of interpretative notes will be to provide additional information about the CR(s), for the benefit of both the SMS firm and other industry participants.
- 3.54 Interpretative notes will provide greater clarity over the CMA's interpretation of a CR, including how a CR may apply in particular circumstances. Interpretative notes may provide illustrative examples of types of conduct that the CMA considers would likely comply with a CR and types of conduct that the CMA considers would be unlikely to comply with a CR.
- 3.55 Although interpretative notes will provide information about the CMA's interpretation of a CR, it will be open to the SMS firm to take a different approach where the SMS firm is able to demonstrate to the CMA that its approach complies with the terms of the CR.
- 3.56 The CMA may update interpretative notes as appropriate while a CR is in force. For example, the CMA may update interpretative notes to reflect changing circumstances, including changes to technology. The CMA will

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<sup>117</sup> Section 23(1) of the Act.

<sup>118</sup> Section 19(4) and section 113(3) of the Act.

typically engage with the relevant SMS firm and other stakeholders before updating interpretative notes.

- 3.57 Where the CMA is planning to publish interpretative notes in relation to a proposed CR, the CMA will typically also publish a draft version of the interpretative notes at the same time as consulting on the proposed CR to aid parties' interpretation of the proposed CR.
- 3.58 At the same time as giving an SMS firm a CR notice, the CMA will provide the SMS firm with a copy of any interpretative notes in respect of that CR. The CMA will also publish any interpretative notes on the CMA's website.

### *Implementation period*

- 3.59 The CMA will determine when a CR comes into force.<sup>119</sup> Although some CRs may come into force immediately, where appropriate to do so, the CMA may provide for a period of time between the date that it imposes a CR and the date the CR comes into force. In this guidance, the CMA refers to the time period between the date it issues a CR notice and the date a CR comes into force as the CR's 'implementation period'.
- 3.60 The CMA must specify the date a CR comes into force in the CR notice it gives an SMS firm (see paragraph 3.49 above). As stated in paragraph 3.51 above, the CMA may also include transitional provision in a CR notice specifying that different obligations in respect of the CR come into effect at different times.
- 3.61 Any implementation period will primarily be for the purpose of allowing the SMS firm sufficient time to make necessary changes to its technical systems and/or business practices to comply with the CR. Where the CMA imposes multiple CRs on an SMS firm at the same time, different CRs within the package may come into effect at different times.
- 3.62 As noted in paragraph 3.46 above, the CMA will typically consult on the appropriate length of any implementation period at the same time it consults on a proposed CR. The appropriate length of an implementation period will depend on a number of factors including the complexity of the CR and any changes the SMS firm is likely to need to make to its technical systems and/or business practices to comply with the CR.

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<sup>119</sup> Section 19(11(a)) of the Act.



3.63 Where a CR has an implementation period, the CMA expects the SMS firm to work constructively with the CMA during this period to assist the CMA to understand the SMS firm's plans for compliance. During this period, the CMA also expects the SMS firm to engage with relevant third parties who may be impacted by the CR. The CMA may ask an SMS firm to provide it with a written plan on how it intends to comply with a CR in advance of the CR coming into force.

#### *Notice specifying compliance report requirements*

3.64 An SMS firm is required to provide the CMA with periodic compliance reports in relation to each CR to which it is subject (see further paragraphs 6.40 to 6.55 in Chapter 6).<sup>120</sup> As noted in paragraph 3.46 above, the CMA may consult on the substance of compliance reporting obligations as part of its consultation on a proposed CR.

3.65 At the same time as imposing a CR on an SMS firm, the CMA must give a notice ('**compliance reporting notice**') to the SMS firm specifying:<sup>121</sup>

(a) the manner and form of the compliance report to be provided in relation to the CR; and

(b) the reporting period for the CR.

3.66 The CMA will publish the compliance reporting notice, along with the CR notice and any interpretative notes on its website.<sup>122</sup> This will allow third parties who may be impacted by the CR to understand the information that the SMS firm is required to provide to the CMA to assist the CMA to monitor the SMS firm's compliance with the CR.

3.67 The CMA may amend compliance reporting requirements in respect of a CR by giving the SMS firm a further notice ('**further compliance reporting notice**').<sup>123</sup> The CMA may amend compliance reporting requirements in respect of a CR for a number of reasons, including where the nature and extent of information provided by an SMS firm in previous compliance reports has not been adequate to allow the CMA to effectively monitor compliance with the CR. The CMA may engage informally with the relevant SMS firm and

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<sup>120</sup> Section 84(1) of the Act.

<sup>121</sup> Section 84(3) of the Act.

<sup>122</sup> This is in accordance with section 113(3) of the Act whereby the CMA must comply with any duty to publish a notice or any other document under Part 1 of the Act by publishing the notice or document online, having regard to any need to keep information confidential.

<sup>123</sup> Section 84(4) of the Act.

other stakeholders before amending the compliance reporting requirements in respect of a CR. The CMA will also publish any further compliance reporting notices on its website.<sup>124</sup>

### *CR comes into force*

- 3.68 A CR will come into force on the date specified in the CR notice.<sup>125</sup> Where a CR notice contains transitional provisions, different obligations under the CR may come into effect at different times (see paragraph 3.51 above).
- 3.69 The CMA expects an SMS firm to be able to demonstrate to the CMA that it is complying with a CR from the date the CR comes into force. As noted above, the CMA expects to have discussions with the SMS firm during any implementation period before the CR comes into force regarding the SMS firm's plans for compliance with the CR.
- 3.70 An SMS firm must have in place a nominated officer with responsibility for each CR to which it is subject.<sup>126</sup> More information on the responsibilities of the nominated officer is provided in Chapter 6 on Monitoring.
- 3.71 From the date that a CR is in force, the CMA has the power to enforce compliance with the CR, including through opening a conduct investigation where it has reasonable grounds to suspect that a firm has breached the CR.<sup>127</sup> More information on the CMA's approach to enforcing CRs is provided in Chapter 7.

### *Expiry of CRs*

- 3.72 Unless it is revoked by the CMA prior to the end of a designation period,<sup>128</sup> a CR will generally expire at the point that the SMS firm's designation ceases to have effect.<sup>129</sup> A designation ceases to have effect:

(a) at the end of the five-year designation period (see paragraph 2.90 in Chapter 2 on SMS designation); or

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<sup>124</sup> Section 113(3) of the Act.

<sup>125</sup> Section 21(c) of the Act.

<sup>126</sup> Section 83(1) of the Act.

<sup>127</sup> Section 26(1) of the Act.

<sup>128</sup> See paragraphs 3.83–3.91 below.

<sup>129</sup> Section 19(11)(b) of the Act.

- (b) when the CMA decides, following a further SMS investigation, to revoke an SMS firm's designation in respect of a relevant digital activity (see paragraphs 2.101 to 2.102 in Chapter 2 on SMS designation).
- 3.73 Where the CMA decides, as a result of a further SMS investigation, to revoke an SMS firm's designation in respect of a relevant digital activity, the CMA may make transitional, transitory or saving provision in respect of any existing obligation, including a CR.<sup>130</sup> This must be for the purpose of managing the impact of the revocation on any person who benefited from the CR in a way that appears to the CMA to be fair and reasonable.<sup>131</sup>
- 3.74 The fact that a CR ceases to have effect (either because the CR has expired, or because the CR has been revoked by the CMA) does not affect the exercise of any digital markets functions in relation to a breach or possible breach of that CR.<sup>132</sup> This enables the CMA to investigate and enforce against historic breaches of CRs.

### *Reapplication of CRs*

- 3.75 Where the CMA decides, as a result of a further SMS investigation, to designate an SMS firm in respect of the same, similar or connected digital activity, the CMA may apply an existing obligation, including any CR(s), with or without modification to the SMS firm in respect of the new designation.<sup>133</sup> This allows for a CR or combination of CRs to be carried across to the new designation, without a gap in compliance. The CMA may also make transitional, transitory or saving provision in respect of a CR in these circumstances.<sup>134</sup>

## **Varying and revoking conduct requirements**

- 3.76 The CMA has a duty to consider, on an ongoing basis, in respect of each SMS firm:<sup>135</sup>
- (a) whether to impose, vary or revoke a CR;

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<sup>130</sup> Section 17(1) of the Act. For more information on transitional, transitory or saving provision see paragraphs 2.103–2.107 of Chapter 2 of this guidance.

<sup>131</sup> Section 17(2) of the Act.

<sup>132</sup> Section 23(2) of the Act.

<sup>133</sup> Section 17(4)–(5) of the Act.

<sup>134</sup> Section 17(5)(b) of the Act. For more information on transitional, transitory or saving provision see paragraphs 2.103–2.107 of Chapter 2 of this guidance.

<sup>135</sup> Section 25 of the Act.

- (b) the extent to which the SMS firm is complying with each CR to which it is subject;
- (c) the effectiveness of each CR to which it is subject; and
- (d) whether to take enforcement action in respect of any breaches or suspected breaches of a CR.

3.77 This section describes the CMA's approach to varying and revoking CRs. The CMA's approach to keeping CRs under review more generally, including monitoring compliance with CRs and their effectiveness is explained in Chapter 6.

### ***Varying or revoking CRs***

#### *Varying CRs*

3.78 The CMA may vary any CR it has imposed on an SMS firm.<sup>136</sup>

3.79 The same requirements that apply where the CMA imposes a new CR on an SMS firm also apply where the CMA varies an existing CR.<sup>137</sup> In particular, the CMA may only vary a CR if the CMA considers that the varied CR is:

- (a) proportionate for one or more of the statutory objectives, having regard to what the CR is intended to achieve;<sup>138</sup> and
- (b) of a permitted type.<sup>139</sup>

3.80 As a forward-looking intervention, CRs are intended to be flexible and capable of being updated over time. This ability to vary CRs provides the CMA with the power to proactively iterate interventions, where appropriate to do so, in order to ensure that they continue effectively achieving their intended aim. The circumstances in which the CMA may vary a CR are explained further in paragraphs 6.81 to 6.83 of Chapter 6.

3.81 In assessing whether and how to vary a CR, the CMA will adopt a similar analytical approach as set out above in relation to imposing CRs. In particular, the CMA will consider whether a proposed CR as varied would be effective in achieving its intended aim, before going on to consider the proportionality of

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<sup>136</sup> Section 19(2) of the Act.

<sup>137</sup> Section 19(3) of the Act.

<sup>138</sup> Section 19(5) of the Act.

<sup>139</sup> Sections 19(9) of the Act.

the varied CR. The analytical approach the CMA will apply in undertaking this assessment reflects the approach set out in paragraphs 3.16 to 3.33 above. In particular, when considering the proportionality of a varied CR, the CMA will apply the criteria listed in paragraph 3.30 and have regard to the effects of the variation on all relevant market participants, including the SMS firm and third parties. The complexity of analysis required when considering whether and how to vary a CR will depend on the nature and significance of the proposed variation.

- 3.82 The CMA recognises the importance of providing both the SMS firm and other market participants with regulatory certainty. In imposing CRs, the CMA will seek to ensure they are sufficiently flexible so as not to be rendered ineffective by reasonably foreseeable market developments (see paragraph 3.28(e) above). When considering the effects of a proposed variation on SMS firms and third parties, the CMA may take into account investments that such firms have made in reliance on the previous CR.

### *Revoking CRs*

- 3.83 The CMA also has the power to revoke any CR(s) it has imposed on an SMS firm.<sup>140</sup>
- 3.84 The CMA may revoke a CR in response to changes in the market (including changes in technology) or other circumstances which it considers mean the CR is no longer appropriate having regard to its intended aim – and where it considers that varying the CR would not to be an appropriate means to resolve these concerns. The circumstances in which the CMA may revoke a CR are explained further in paragraphs 6.81 to 6.83 of Chapter 6.
- 3.85 In considering whether to revoke a CR, the CMA will consider not only the effects of retaining the CR on the SMS firm and on third parties, but also the likely effects of revoking it. This may include, for example, having regard where appropriate to investments that firms and relevant third parties may have made in reliance on the CR.

### *Procedure for varying and revoking CRs*

- 3.86 Before commencing the formal process to vary or revoke a CR, the CMA may engage informally with the relevant SMS firm and other stakeholders to understand their views as to whether it is necessary or desirable for a CR to be varied or revoked. More detail about the process by which SMS firms or

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<sup>140</sup> Section 22 of the Act.

third parties may request the CMA to consider variations or revocations of CRs is provided in Chapter 6.

- 3.87 The CMA must carry out a public consultation before varying or revoking a CR.<sup>141</sup> This will provide both the SMS firm and third parties an opportunity to input into the CMA's decision-making process.
- 3.88 Where the CMA decides to vary a CR, it must give the SMS firm a revised version of the CR notice.<sup>142</sup> The CMA will give the SMS firm such notice in accordance with the process set out in paragraphs 3.48 to 3.52 above, including publishing the revised CR notice on the CMA's website as soon as practicable after it has given the notice to the SMS firm.
- 3.89 Where the CMA decides to revoke a CR, it must give a notice to the SMS firm.<sup>143</sup> The notice must specify the date from which revocation is to have effect.<sup>144</sup> When determining the date from which revocation is to have effect, the CMA will have regard to all relevant factors, including considering the impact revoking the CR may have on both the SMS firm and third parties.
- 3.90 A notice varying or revoking a CR may include transitional, transitory or saving provision.<sup>145</sup> This allows the CMA to specify that different obligations under the CR come into or cease to have effect from different dates, to ensure a smooth transition for the SMS firm and other market participants including users of the relevant digital activity.
- 3.91 As soon as reasonably practicable after it has given the SMS firm a notice revoking a CR, the CMA must publish the notice on the CMA's website.<sup>146</sup>

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<sup>141</sup> Section 24(1) and (4) of the Act. As noted in footnote 110 above, section 107 of the Act requires the CMA to consult certain regulators (Ofcom, the Information Commissioner, the FCA, the Prudential Regulation Authority and/or the Bank of England) on a proposal to exercise a regulatory digital markets function, including imposing or revoking a CR, in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>142</sup> Section 19(2) of the Act.

<sup>143</sup> Section 22(2) of the Act.

<sup>144</sup> Section 22(2) of the Act.

<sup>145</sup> Section 23(1) of the Act.

<sup>146</sup> Section 22(3) and section 113(3) of the Act.

## 4. Pro-competition interventions

### Introduction

- 4.1 The CMA can impose pro-competition interventions ('**PCIs**') in relation to a firm designated as having SMS where, following a PCI investigation, it finds that a factor or combination of factors relating to a digital activity is having an adverse effect on competition (an '**AEC**'). A PCI can be used to remedy, mitigate or prevent the AEC.
- 4.2 This chapter is structured as follows:
- (a) Section 1 explains how the CMA will assess whether there is an AEC. This is the substantive test the CMA must meet in order to impose a PCI.
  - (b) Section 2 explains how the CMA will identify PCIs to remedy, mitigate or prevent an AEC and how it will ensure PCIs are proportionate.
  - (c) Section 3 explains the procedure the CMA will follow in PCI investigations.
  - (d) Section 4 explains the approach the CMA will take when replacing, revoking and reviewing PCIs.
- 4.3 There are some parallels between the legal tests and procedures which apply when the CMA is considering whether to make a PCI and those which apply when it is considering whether to make an intervention under the market investigation regime. In particular, the concept of an AEC is common to both. However, there are also differences between the legal tests and procedures which apply in both regimes. Therefore, while the CMA's approach to making PCIs may be similar in some respects to its approach under the market investigations regime, there will also be areas of divergence.

### Assessing whether there is an adverse effect on competition

- 4.4 Under the Act, the CMA may make PCIs in relation to an undertaking designated as having SMS where, following a PCI investigation, it considers that a factor or combination of factors relating to a relevant digital activity – ie a digital activity in respect of which a firm has been designated as having

SMS – is having an AEC.<sup>147</sup> This is the case where such factor or combination of factors prevents, restricts or distorts competition in connection with the relevant digital activity in the United Kingdom.<sup>148</sup>

### ***A factor or combination of factors***

- 4.5 The CMA has the flexibility to investigate a wide range of possible factors relating to a relevant digital activity, each of which may have effects on different aspects of competition.
- 4.6 A factor or combination of factors giving rise to an AEC can be related to an SMS firm's conduct, and include an action or failure to act, whether intentional or not, as well as any agreements between the SMS firm and other businesses. A factor or combination of factors giving rise to an AEC may also not be caused by the SMS firm's conduct – for example, it may be a structural characteristic of a sector such as high levels of market concentration or high barriers to entry or expansion.
- 4.7 The CMA will consider and seek to assess the factors giving rise to an AEC through the PCI investigation. The CMA is not required to state whether particular factors are to be considered structural or related to a firm's conduct, provided that they fall within at least one of these categories. Further, the CMA can consider a combination of different types of factors.

### ***The AEC finding***

- 4.8 The meaning of 'prevents, restricts or distorts competition' in the Act is a broad concept, covering any adverse effect on competition in connection with the relevant digital activity in the UK, whether actual competition or potential competition. The CMA will therefore consider factors that affect potential competition (for example, by preventing entry and/or expansion) as well as current competitive conditions.
- 4.9 The assessment of whether there is an AEC does not require the CMA to define a relevant market. Instead, the CMA's assessment will focus more

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<sup>147</sup> As explained further below (see paragraph 4.42), a PCI investigation may relate to one or more designated undertakings and multiple relevant digital activities. Throughout the guidance, the term 'SMS firm to which the PCI investigation relates' is used to mean all the SMS firms to which it relates (when more than one).

<sup>148</sup> As explained further below (see paragraph 4.42), the CMA may launch a PCI investigation where it has reasonable grounds to consider that such factor or combination of factors relating to a digital activity may be giving rise to an AEC. When opening such an investigation, the CMA makes no presumption that those factors are in fact giving rise to an AEC however, and may find at the end of its investigation that there are no such factors.



broadly on the impact of the factor or combination of factors on the overall competitive process.<sup>149</sup> In practice, while the CMA will seek to describe the products that are impacted by the AEC and the nature of the competition that is being adversely affected,<sup>150</sup> it will not seek to engage in a detailed exercise of delineating the precise boundaries of this effect.

- 4.10 The Act does not specify a theoretical benchmark against which to measure an AEC. In assessing whether there is an AEC, the CMA will in practice focus on whether the factor or combination of factors prevents, restricts, or distorts in some way the effective interaction of demand and supply or if there are ways in which it considers current competition could work more effectively absent the factor(s).<sup>151</sup> In doing so the CMA will not however seek to describe, in detail, the competitive conditions that could prevail in those circumstances.
- 4.11 The precise focus of the CMA's analysis will depend on the specifics of the case and, in particular, the nature of the factors identified. For example, certain factors may be intrinsic to some extent, such that the relevant digital activity cannot realistically be envisioned without them or there are no interventions that could directly address the factor itself. In such situations the CMA may focus more on what competition in relation to the activity may look like absent the effect of the factor rather than absent the factor itself.<sup>152</sup>
- 4.12 Typically, however, the indicators that the CMA will consider may include (but are not limited to) whether:
- (a) SMS firms' profits reflect a reasonable rate of return based on the nature of competition;
  - (b) the competitive positions of SMS firms and their rivals are based on the merits of their respective offerings;
  - (c) SMS firms and their competitors flex parameters of competition in response to rivals and wider developments;

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<sup>149</sup> This includes for example evidence of substitutability, competitive rivalry and barriers to entry and expansion. This is consistent with the CMA's approach in market studies under the EA02, including for example, the [Online platforms and digital advertising market study](#) and [Mobile ecosystems market study](#).

<sup>150</sup> This may include for example outlining the main set of relevant competitors.

<sup>151</sup> The CMA will not therefore, seek to compare the prevailing circumstances with an idealised scenario of perfect competition.

<sup>152</sup> Where such competition is affected by an intrinsic factor, this may also influence the CMA's subsequent assessment of whether to impose a PCI and/or the form or content of that PCI. See paragraphs 4.16 and following below.

- (d) SMS firms' users and customers can make effective decisions between a range of alternatives and are able to switch between these;
  - (e) SMS firms and their competitors are rewarded for operating efficiently, innovating and competing to supply the products that users and customers want; and/or
  - (f) competitors and potential competitors to SMS firms face limited barriers to entry and expansion.
- 4.13 When assessing whether a factor or combination of factors is having an AEC, the CMA will also consider in its assessment any competition-enhancing efficiencies that have resulted, or may be expected to result, from such factor(s).
- 4.14 In order to assess whether any such efficiencies may outweigh the anti-competitive effects of the factor(s) under assessment and so prevent an AEC, the CMA will consider:
- (a) whether the efficiencies would strengthen competition between the SMS firm and its rivals;
  - (b) whether the efficiencies would impact the same competitive process, customers and users that are being adversely affected by the specific factor(s); and
  - (c) whether there are other (potentially less restrictive) ways these efficiencies could be achieved.<sup>153</sup>
- 4.15 Finally, the CMA's assessment of whether there is an AEC will have regard to requirements that are already in place on the relevant SMS firm or soon to be implemented and the extent of their effectiveness in impacting any potential AEC. This includes for example any CRs on the SMS firm, interventions following from other PCI investigations as well as any requirements imposed under the CMA's other powers or the powers of other regulators.

### ***Scope of a PCI***

- 4.16 The CMA may make a PCI where a factor or combination of factors relating to a relevant digital activity is having an AEC – meaning that it is preventing,

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<sup>153</sup> Where such competition-enhancing efficiencies are not considered sufficient to prevent an AEC, they may, where appropriate, still be considered as benefits to UK users or customers relevant to the CMA's subsequent assessment of whether to make a PCI, and if so, the form or content of any such PCI. See paragraphs 4.37 and following below.

restricting or distorting competition in connection with the relevant digital activity. The CMA may make a PCI in any part of an SMS firm's business to address such an AEC.

4.17 Factors giving rise to an AEC may relate to a relevant digital activity both when they are within the relevant digital activity itself, or when they are outside of it, provided that they are connected to such digital activity. Similarly, the AEC may occur within the relevant digital activity itself, or outside of it, provided that the impact on competition is connected to such activity. This connection could take a variety of different forms, including but not limited to the following:

(a) When a product which is not part of the relevant digital activity contributes to reinforcing or protecting the SMS firm's position in the relevant digital activity. For example, the outside product is an important input for, is bundled with or works as an access point to a product within the relevant digital activity.

(b) When a product which is part of the relevant digital activity contributes to reinforcing or protecting the SMS firm's position outside of the relevant digital activity. For example, the product within the relevant digital activity allows the firm to extend its market power into a new area connected to the relevant digital activity.

4.18 Factors that are unrelated to a relevant digital activity, and competition concerns arising from the conduct of an SMS firm that are unrelated to the relevant digital activity, are not appropriate for consideration through a PCI investigation but, depending on the relevant circumstances, could be explored and addressed using the CMA's other powers.

### ***The CMA's approach to assessing whether there is an AEC***

4.19 The CMA does not have a prescriptive list of evidence that it will take into account when assessing whether there is an AEC and its methods and approaches will reflect the specifics of each case. Therefore:

(a) the evidence used will depend on factors such as the SMS firm's business model, the characteristics of the sector, the nature of competition and what relevant evidence is available (taking into account the statutory time limit within which a PCI investigation must be completed).<sup>154</sup>

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<sup>154</sup> These may vary greatly depending on the sector and the firm under investigation.

- (b) the CMA will decide what weight it is appropriate to place on a particular piece of evidence, taking into account, for example, its relative quality. There is no set hierarchy between quantitative and qualitative evidence<sup>155</sup> and the form, depth or complexity of the CMA's analysis may vary across investigations, even in the same sector.
- (c) the CMA may rely on relevant evidence gathered and analysis carried out in other cases, including for example market studies involving SMS firms, SMS investigations and conduct investigations.<sup>156</sup>

## Identifying an appropriate pro-competition intervention

4.20 Under the Act, the CMA may make PCIs where it would be proportionate for the purposes of remedying, mitigating or preventing the AEC. The CMA's approach will follow three steps:

- (a) Identify the purpose of the PCI – the purpose of a PCI must be to remedy the AEC, to mitigate it (for example where the CMA considers that remedying the PCI would not be practicable), and/or to prevent the AEC from recurring in future.
- (b) Identify effective PCIs – the CMA will then identify and assess those PCIs which it considers would be effective in achieving the identified purpose or purposes. The CMA can implement a PCI in relation to any part of the SMS firm's business, either by imposing requirements on the SMS firm via a pro-competition order ('**PCO**'), or by making non-binding recommendations to another body exercising functions of a public nature.
- (c) Assess proportionality – lastly, the CMA will ensure that the PCI is proportionate.

### *The PCI's purpose*

4.21 As a first step, the CMA will determine the purpose of the PCI (or a set of PCI options) including whether it is seeking to remedy, to mitigate and/or to prevent an AEC, depending on the relevant circumstances. The CMA may additionally use the PCI to remedy, mitigate or prevent any detrimental effects

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<sup>155</sup> Such as consumer surveys or econometric analysis (quantitative) and internal documents or statements of relevant firms (qualitative).

<sup>156</sup> In doing so, the CMA will be mindful of when and for what purpose the evidence was initially gathered and consider what weight it should be given and the extent to which it should be updated or corroborated.

on UK users and customers which have resulted, or may be expected to result, from the AEC.

### ***Identifying effective PCIs***

- 4.22 The CMA can implement a PCI either by imposing requirements on the SMS firm in the form of a PCO, or by making non-binding recommendations to other persons exercising functions of a public nature (for example government or another independent regulator) on steps they should take. The CMA may choose to make recommendations if it considers those persons are better placed to act, for example, by way of statutory powers or expertise. For example, if the AEC found by the CMA falls wholly or partially within a regulated sector, the CMA may consider that the relevant sectoral regulator may be in a better position to act to address the AEC.
- 4.23 The CMA can implement any such PCI in relation to any part of the SMS firm's business, where the CMA decides that such requirements or non-binding recommendations would address the competition problem. Furthermore, as mentioned above, a PCI can be composed of a package of several different remedies, meaning that it does not need to only contain a single intervention.

### ***Choice of remedies***

- 4.24 A PCI may implement the same remedy options as those available to the CMA where it carries out a Market Investigation using its existing powers under the EA02.<sup>157</sup> These may include (but are not limited to):
- (a) general restrictions on conduct (eg a prohibition on combining user data collected from different activities that the SMS firm carries out);
  - (b) general obligations to be performed (eg a requirement to make a service interoperable with a competitor's);
  - (c) acquisitions and divisions (eg a requirement to divest an aspect of the business);
  - (d) supply and publication of information (eg a requirement to supply a competitor with user data).

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<sup>157</sup> The Act expressly references Schedule 8 of the EA02 which sets out a non-exhaustive list of structural and behavioural remedies.

- 4.25 In designing an appropriate PCI, the CMA maintains broad discretion on the type of remedy which it chooses to impose.<sup>158</sup> Through PCOs, the CMA can impose both structural and behavioural remedies. The appropriate form of the PCI will be dependent on the specific facts and context of the PCI investigation. This includes, but is not limited to, the nature of the AEC which has been identified, the relevant digital activity and nature of competition therein and the organisational structure of the SMS firm(s) subject to the PCI investigation.
- 4.26 Structural remedies will typically seek to address competition problems by changing structural aspects of a sector and/or the lack of rivalry resulting from those aspects. A divestiture is an example of a structural remedy.
- 4.27 Divestitures can involve the sale of a part of the SMS firm's business or some of its assets and can be to a new entrant or to an existing rival. Divestitures to new entrants will typically seek to create a new source of competition to the SMS firm, whereas divestitures to an existing rival that is independent of the SMS firm (or firms), will typically seek to strengthen an existing source of competition.
- 4.28 Behavioural remedies are designed to regulate or constrain the behaviour of a firm in a sector and/or empower customers to make effective choices. They may vary in form and can be used as a main remedy or as an adjunct to other measures (eg structural measures). In some cases for example, an effective structural remedy such as a divestiture may require supplementary behavioural measures for an interim period in order to ensure the competitive capability of the divested business or assets in the hands of the new purchaser. Such behavioural measures could include the supply of an input or service from the divesting party to the divested business, for example, by providing access to the SMS firm's data or providing transitional technical support and expertise.
- 4.29 Behavioural remedies may include interventions requiring the SMS firm to license its intellectual property or provide rivals with access to parts of its business or measures aimed at removing or reducing barriers to entry, expansion or switching. Non-exhaustive examples of behavioural remedies the CMA may impose include:

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<sup>158</sup> Subject to the fact that a PCI implemented via a PCO may include any provision that may be included in an enforcement order under section 161 of EA02 (final orders following market investigation references; and see section 161 and 164 of and Schedule 8 to EA02 on the provision that may be included).

- (a) prohibiting the SMS firm from combining user data collected from different products and/or activities that it carries out;
- (b) requiring the SMS firm to provide rivals with access to its data, its infrastructure, some of its products or services, including new releases or upgrades to its proprietary technology on fair, reasonable and non-discriminatory (FRAND) terms;
- (c) requiring the SMS firm to ensure that its products, applications and services are interoperable<sup>159</sup> with those of other firms. This may include, for example, requiring that the SMS firm creates a new product or functionality, exposes some of its Application Programming Interfaces (APIs) or builds new APIs;
- (d) requiring the SMS firm to be more transparent in its operations, including by providing customers and/or consumers with information to help them make informed choices and thereby increase competitive pressure on the SMS firm;
- (e) remedies aimed at restricting any adverse effects of vertical relationships and mandating operational separation, including restriction of access to data and confidential information (firewall provisions);
- (f) remedies aimed at controlling outcomes in order to prevent the exercise of market power, for example, a price cap or supply commitments.

4.30 The distinction between structural and behavioural remedies is not always clear-cut, and the CMA may rely on a mix of behavioural and structural measures in designing a PCI to remedy, mitigate or prevent the AEC which it has identified, as well as any detrimental effects on users and customers resulting from the AEC.

#### *Assessing effectiveness of the PCI*

4.31 To assess whether a PCI would be effective in meeting the purpose described above, the CMA will have regard to a range of factors, including:

- (a) the PCI's likely impact on the AEC and, in addition, any detrimental effects, either already arising or expected to arise from it;

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<sup>159</sup> Interoperability refers to the ability of different devices, applications, systems and platforms to communicate with each other and exchange information and data effectively.

- (b) the timescale over which the PCI is likely to have effect (ie how timely its impact is expected to be);
  - (c) the risk of the PCI not meeting its intended purpose and/or giving rise to unintended consequences; and
  - (d) practical considerations associated with the PCI, including relating to effective implementation, monitoring and enforcement of the PCI.
- 4.32 The CMA will not seek to quantify precisely the effects of imposing any PCI it is considering. Rather, it will use this step to identify the PCI options which would be effective in achieving the CMA's specific intended purpose before assessing these in greater depth.
- 4.33 The CMA may test or trial PCIs to gain evidence on the effectiveness of different options. The CMA's use of testing and trialling in the context of PCIs is discussed at paragraphs 4.65 to 4.69 below.

### ***The proportionality assessment***

- 4.34 Having decided which of the PCI options would be effective in remedying, mitigating or preventing the AEC and, potentially, any detrimental effects from it, the CMA will then consider whether the PCI(s) it proposes to impose would be proportionate. A proportionate PCI is one that:
- (a) is effective in achieving its intended purpose of remedying, mitigating or preventing the AEC and, potentially, any detrimental effects from it;
  - (b) is no more onerous than it needs to be to achieve its intended purpose;
  - (c) is the least onerous remedy, or package of remedies, where the CMA has identified several equally effective measures; and
  - (d) does not produce disadvantages which would be disproportionate to its intended purpose.
- 4.35 The CMA's choice of remedy will depend on the specific circumstances of the case. As is the case when assessing the proportionality of potential CRs (see Chapter 3), the CMA will:



- (a) take into account the potential effects – both positive and negative – of the proposed PCI on those most likely to be affected by it.<sup>160</sup>
- (b) consider those effects in the round, rather than seeking necessarily to quantify them precisely.

4.36 The CMA will encourage SMS firms to which the PCI investigation relates to engage on potential PCI options as early as possible and identify those that they consider most appropriate and/or least onerous on them, while explaining why these options would be effective in addressing the AEC.

### ***Assessing benefits resulting from factors giving rise to the AEC***

4.37 The Act makes clear that, when assessing whether to make a PCI and when considering the form and content of any PCI, the CMA may have regard to any benefits to UK users or UK customers that have resulted or may be expected to result from the factor or factors which are giving rise to the AEC.<sup>161</sup>

4.38 Examples of user or customer benefits that the CMA may consider in this regard include (but are not limited to) lower prices, higher quality (including in terms of parameters such as privacy, security and accessibility of products) or greater choice and innovation.

4.39 Where the CMA is satisfied that a factor giving rise to an AEC has resulted or may be expected to result in benefits, it will consider in deciding between different potential PCIs whether some PCIs could preserve these benefits while still being effective in their purpose, and may choose a different PCI as a result. It is possible that some benefits are of such significance compared with the extent of the AEC that the CMA may decide not to impose a PCI. This might occur if no PCIs are identified that are able to preserve the benefits while also remedying or mitigating the AEC.

4.40 The CMA will consider user and customer benefits on a case-by-case basis. To the extent SMS firms and/or third parties consider benefits to be relevant in a specific case, they should submit evidence as early as practicable during a PCI investigation. These submissions should be supported by relevant evidence and should clearly articulate the party's view of the nature and

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<sup>160</sup> Including for example, the SMS firm, third parties (eg competitors, potential competitors, customers and/or suppliers), consumers or business users.

<sup>161</sup> See section 46(2) of the Act.

extent of the benefits, how they arise from the factor giving rise to the AEC and their implications for the PCI's proportionality.

## **Pro-competition intervention procedure**

### ***Basis for launching a PCI investigation***

- 4.41 The CMA will have regard to its Prioritisation Principles<sup>162</sup> when considering whether and how to address issues in relation to a relevant digital activity.
- 4.42 The CMA may launch a PCI investigation where it has reasonable grounds to consider that a factor or combination of factors relating to a relevant digital activity may be having an AEC. A PCI investigation may relate to one or more designated undertakings and multiple relevant digital activities.
- 4.43 The CMA does not have a prescriptive list of evidence that it will take into account when deciding whether this threshold is met. The CMA may, for example, decide to open a PCI investigation<sup>163</sup> on the basis of:
- (a) its own research and market intelligence;
  - (b) information gathering powers provided under the Act;
  - (c) evidence gathered through other CMA workstreams, such as SMS investigations, designing or monitoring CRs, and CMA's markets functions;
  - (d) a recommendation from the FCA or Ofcom;<sup>164</sup>
  - (e) other publicly available information or information from external sources (including third parties).

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<sup>162</sup> [CMA Prioritisation Principles](#)

<sup>163</sup> See further guidance in respect of the opening of a 'further SMS investigation' at paragraphs 2.94 and following of Chapter 2 of this guidance.

<sup>164</sup> Section 107 of the Act sets out a formal mechanism for the FCA or Ofcom to make a recommendation to the CMA for it to exercise a regulatory digital markets function, including the discretionary power to make, replace or revoke a PCI. This mechanism could, for example, be used in cases where the FCA or Ofcom identify a potential competition concern specifically in digital markets, for which the CMA is considered to have the most suitable powers to take action. The CMA must respond to the relevant regulator within 90 days setting out what action, if any, it has taken or intends to take including the reasons for its decision. A summary of the CMA's response must also be published.

4.44 The CMA may use its investigatory powers to gather evidence in order to decide whether it may begin a PCI investigation. Further information on the CMA's investigatory powers is set out at Chapter 5.

### ***Launch of a PCI investigation***

4.45 When the CMA begins a PCI investigation it must give the designated SMS firm to which the investigation relates a notice ('**PCI investigation notice**').<sup>165</sup> This must set out:<sup>166</sup>

- (a) the reasonable grounds by which the CMA considers that a factor or combination of factors relating to a relevant digital activity may be having an AEC;
- (b) the purpose and scope of the PCI investigation;
- (c) the period by the end of which the CMA must give the undertaking a notice setting out its decision as a result of the investigation; and
- (d) the circumstances in which that period may be extended.

4.46 The CMA may give the SMS firm to which the investigation relates one or more revised versions of the PCI investigation notice if it refines its view of the purpose and scope of the investigation, provided that the purpose and scope remains substantially the same.

4.47 As soon as reasonably practicable after giving a PCI investigation notice (or a revised version of such a notice) to the SMS firm to which the investigation relates, the CMA must publish the notice (or revised notice) on its website.<sup>167</sup>

### ***The statutory timetable***

4.48 PCI investigations will be subject to a nine-month statutory deadline, which will start on the day on which the PCI investigation notice is given to the SMS firm to which the investigation relates.<sup>168</sup>

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<sup>165</sup> Section 48(1) of the Act.

<sup>166</sup> Section 48(2) of the Act.

<sup>167</sup> Section 48(4) of the Act.

<sup>168</sup> This is subject to the CMA's power to extend the deadline in the circumstances set out in section 104 of the Act. See paragraphs 9.2-9.9 of Chapter 9 of this guidance for further details.

- 4.49 The CMA must give the SMS firm to which the PCI investigation relates a notice of the PCI decision (**'PCI decision notice'**) resulting from the investigation on or before the last day of the nine-month period.<sup>169</sup>
- 4.50 As explained in Chapter 9, the CMA can extend the timetable in certain circumstances.
- 4.51 Given the relatively short timeline for a PCI investigation, as set out above, the CMA anticipates that it will need to consider potential remedies from the outset of the investigation, alongside assessing whether there is an AEC. This is not to prejudge the AEC assessment, and such remedies discussions will be held without prejudice to any AEC finding.
- 4.52 The CMA expects parties to engage with its remedies work throughout the PCI investigation. This will inform the CMA's thinking and help to ensure any remedies it decides to introduce are effective and it would be proportionate to make them. A lack of sufficiently early engagement on remedies may mean the CMA is unable to properly assess within the statutory timeframe whether any alternative remedies proposed will be effective. For example, if an alternative, potentially less onerous remedy were proposed late in the investigation, the CMA may be unable to impose it unless it has sufficient time to assess and ensure it is effective in remedying, mitigating or preventing the AEC.

### ***Information gathering and engagement***

- 4.53 As described in Chapter 5, the CMA may use its investigatory powers set out under the Act in the course of a PCI investigation. The scope of these powers is set out in Chapter 5 of this guidance. Again, as described in Chapter 5, the CMA may draw on a range of different evidence types to inform its investigation.
- 4.54 At the outset of a PCI investigation, the CMA will publish an invitation to comment. This will set out the scope of the investigation and seek views and evidence on the CMA's areas of concern related to the potential AEC. It may also set out potential remedies and seek views and evidence on their effectiveness and proportionality.

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<sup>169</sup> Section 50(1) of the Act.

## ***Consultation on proposed decision***

- 4.55 The CMA has a statutory duty to carry out a public consultation on any decision it is considering making as a result of a PCI investigation.<sup>170</sup> The CMA will therefore publish its proposed decision setting out its emerging findings and a description of any PCO (see below) it proposes to make. It may also publish a draft of any PCO it proposes to make. These will be made available on the CMA's website.
- 4.56 The proposed decision will provide sufficient explanation of the CMA's underlying reasoning for the SMS firm and third parties to be able to make informed submissions and representations on the CMA's proposed decision.<sup>171</sup> The CMA will consider written representations received. Furthermore, the CMA will typically offer the SMS firm and key third parties likely to be impacted by the proposed decision the opportunity to make any representations orally, unless it considers there is a reason not to do so.

## ***Outcome of PCI investigations***

### *PCI decision*

- 4.57 The CMA must give the SMS firm to which the PCI investigation relates a PCI decision notice within nine months of giving it a PCI investigation notice.<sup>172</sup> The decision notice must set out the CMA's findings as a result of the PCI investigation (which could include no finding of an AEC), describe any PCI (whether it be a PCO and/or a recommendation) which the CMA intends to make, and include reasons for the CMA's findings and decision.<sup>173</sup> If the CMA intends to make a PCO (see below), a draft of the PCO may be consulted on at this stage.
- 4.58 As soon as reasonably practicable after giving the PCI decision notice to the SMS firm to which the investigation relates, the CMA must publish a copy of

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<sup>170</sup> Section 49 of the Act. Section 107 of the Act requires the CMA to consult certain regulators (Ofcom, the Information Commissioner, the FCA, the Prudential Regulation Authority and/or the Bank of England) on a proposal to exercise a regulatory digital markets function, including making, replacing or revoking PCIs, in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>171</sup> The CMA will set out in its proposed decision the 'gist' of the case, and have regard to its statutory obligations under the EA02 which impose a general restriction on the disclosure of specified information. Further information on the CMA's approach to protecting confidentiality under the digital markets competition regime is set out in Chapter 5 of this guidance at paragraphs 5.85–5.91.

<sup>172</sup> Section 50(1) of the Act. See Chapter 9 of this guidance for information on reasons for extensions.

<sup>173</sup> Section 50(2) of the Act.

the notice on its website.<sup>174</sup> Chapter 5 explains the CMA's approach to disclosure and the treatment of confidential information.

- 4.59 If the CMA decides to make a PCI, the PCI must be made within four months of giving the SMS firm the PCI decision notice.<sup>175</sup> This period can be extended by two months if there are special reasons. 'Special reasons' is explained in Chapter 9.

## **Imposing, reviewing, replacing and revoking pro-competition orders**

### **PCOs**

- 4.60 As described above, a PCI can take the form of a PCO imposing requirements on the SMS firm as to how it must conduct itself. This can be in relation to the relevant digital activity or otherwise.
- 4.61 A PCO can contain any provision that may be included in an order under section 161 of the EA02.<sup>176</sup> These are the final orders that can be imposed following a market investigation reference. Schedule 8 of the EA02 contains a non-exhaustive list of remedies that can be implemented through a final order, which applies to PCOs.
- 4.62 A PCO comes into force at such time as the CMA may specify in the order.
- 4.63 The CMA must publicly consult on the terms of a PCO before making it.<sup>177</sup> This duty to consult may be satisfied by consultation on the proposed PCI decision where it contains a draft PCO, provided that the CMA proposes to make a PCO on the same or materially the same terms as the draft PCO.<sup>178</sup> The CMA will typically engage with the SMS firm and any key third parties on the design and terms of the PCO, potentially in advance of the public consultation.
- 4.64 As soon as reasonably practicable after making a PCO, the CMA must publish the PCO on its website.<sup>179</sup>

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<sup>174</sup> Section 50(7) of the Act.

<sup>175</sup> Section 50(4) of the Act.

<sup>176</sup> Section 51(1) of the Act.

<sup>177</sup> Section 54(1) of the Act. As noted in footnote 170 above, section 107 of the Act requires the CMA to consult certain regulators before making a PCI in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>178</sup> Section 54(1)–(2) of the Act.

<sup>179</sup> Section 51(6) of the Act.

## **Testing and trialling PCOs**

- 4.65 The CMA may include specific provisions within a PCO imposing requirements to test and trial different remedies or remedy design options (on a time limited basis) before imposing any PCI on an enduring basis.<sup>180</sup>
- 4.66 Such a time-limited PCO may include provisions requiring the SMS firm to act differently in respect of different users or customers (including subsets of users or customers).<sup>181</sup> Trials can be into different types of remedies at the same time or of different versions of the same type of remedy.
- 4.67 When assessing whether to impose requirements on a trial basis, the CMA will consider the expected value of the proposed test or trial, its feasibility and its proportionality. More specifically, the CMA will consider the following:
- (a) Whether the proposed test or trial is expected to provide valuable additional evidence, beyond information that can be obtained in other ways, from either the SMS firm or a third party. As a result, the CMA will assess the extent to which any PCOs are likely to benefit from practical evidence on their effectiveness. This may sometimes be the case, for example, for interventions which require the SMS firm or third parties to develop new features or functionalities or remedies involving design choices which require behavioural insight.
  - (b) Whether a test or trial is feasible from a technical or practical perspective, meaning the extent to which a test or trial of a remedy under consideration can be designed and engineered. This may be informed by, for example, whether a firm has established testing and trialling capabilities, whether any test or trial could be designed to meet a specific objective, delivered with a clear methodology and against clear metrics, the trial remedy's reversibility and how quickly it needs to be in place.
  - (c) How to ensure a proportionate approach to the exercise of its testing and trialling power, in line with general principles of public law. In practice, the CMA's approach will be informed by a number of factors, including whether the evidence sought with a test or trial could be obtained in other ways, and whether the value expected from it outweighs its overall cost to the CMA and affected firms.<sup>182</sup> The CMA may also consider whether the test or trial can be imposed so as to impact as small a part of the firm's

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<sup>180</sup> See sections 51(3)–(4) of the Act.

<sup>181</sup> Section 51(4) of the Act.

<sup>182</sup> For example, costs could include the time spent, and monetary cost in preparing and running the test or trial.

business as practicable to provide the CMA evidence on the remedy's effectiveness (eg by using a sandbox for example).

- 4.68 Not all potential remedies or cases will be suitable for testing and trialling. The CMA will therefore determine whether it is appropriate to test or trial particular remedies on a case-by-case basis, engaging with relevant stakeholders as appropriate.
- 4.69 By definition, a trial will be time-limited. A PCO imposing requirements on a trial basis must also identify a date by which point the PCO is reviewed.<sup>183</sup>

### ***Duty to review PCOs***

- 4.70 The CMA has a duty to review any PCO to determine whether to revoke or replace it.<sup>184</sup> Each time the CMA makes a PCO, it must identify a date by which it will review the PCO and the PCO itself must state the date by which such a review will take place.<sup>185</sup> By that date, the CMA must carry out a review of the PCO (including a replacement PCO) to determine whether to replace it or to revoke it without replacing it. This applies to PCOs and replacement PCOs.
- 4.71 As well as the review of each PCO described above, the CMA also has a general duty to keep PCOs under review to consider:<sup>186</sup>
- (a) the effectiveness of a PCO;
  - (b) the extent to which a firm subject to a PCO is complying with it; and
  - (c) whether to take enforcement action in relation to a breach of a PCO.<sup>187</sup>

### ***Replacing PCOs***

- 4.72 Where the CMA has made a PCO following a PCI investigation, it is able to replace that PCO where it considers that it is appropriate to do so. In assessing whether replacing a PCO would be appropriate, the CMA will have regard in particular to:<sup>188</sup>

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<sup>183</sup> Section 55(2) and 55(3) of the Act.

<sup>184</sup> Section 55(1) of the Act.

<sup>185</sup> Section 55(2) and 55(3) of the Act.

<sup>186</sup> The CMA's approach to monitoring compliance with, and effectiveness of PCOs is explained in Chapter 6 of this guidance.

<sup>187</sup> Section 55(4) of the Act.

<sup>188</sup> See section 52(1) of the Act.



- (a) the effectiveness<sup>189</sup> of the PCO (either as a whole, or in relation to particular provisions of the PCO) in achieving its intended purpose;<sup>190</sup> and
- (b) any change of circumstances which has occurred.

- 4.73 This ability to replace PCOs provides the CMA with the power to proactively iterate remedies, where appropriate to do so, in order to ensure that its remedies continue effectively addressing the AEC identified through the PCI investigation.
- 4.74 Replacement of PCOs is particularly relevant in the context of the CMA's testing and trialling powers, and the CMA is able to replace aspects of a PCO on a trial basis. For example, the CMA may consider it necessary to change certain parameters of a trial previously imposed via a PCO (eg number of users targeted, the duration of the trial or the design of the trial itself), and it would do this by replacing the previous PCO and putting a new one in place setting out the new requirements of the trial. The CMA is also able to replace a PCO which imposes certain requirements on an SMS firm on a trial basis with a PCO designed to address the concerns identified during the CMA's PCI investigation, on a permanent basis. In designing the replacement PCOs in these circumstances, the CMA can take into account any evidence which it has gathered in the interim period, including the outcome of other trials which the CMA has conducted, even if the trial was conducted with another SMS firm.
- 4.75 Any replacement PCO must be consulted on before the CMA makes it, unless the CMA considers it is not materially different from the PCO it replaces.<sup>191</sup>

### ***Revocation of PCOs***

- 4.76 In certain circumstances, the CMA may consider it necessary to revoke a PCO entirely without replacing it. The CMA can exercise this power where it considers it appropriate to do so, having regard, in particular, to any change of circumstances since the PCO was made.<sup>192</sup> For example, the CMA may

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<sup>189</sup> See Chapter 5 of this guidance for further information on the CMA's approach to monitoring the effectiveness of PCOs.

<sup>190</sup> Ie remedying, mitigating or preventing the AEC and (if applicable) any detrimental effects on UK users or UK consumers arising from it.

<sup>191</sup> Section 54 of the Act. As noted in footnote 170 above, section 107 of the Act requires the CMA to consult certain regulators before varying a PCI in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>192</sup> Section 53(3) of the Act.

consider it appropriate to revoke a PCO where new legislation comes into force which affects the PCO and related requirements on the SMS firm.

- 4.77 A PCO will cease to have effect if it is revoked by the CMA or if the SMS firm to which it relates ceases to be designated as having SMS, subject to any transitional, transitory or saving provision made in respect of any PCI obligations.<sup>193</sup> Where a firm is designated in respect of the same or a similar/related digital activity, its PCI obligations can be re-applied with or without modification.<sup>194</sup>
- 4.78 Before revoking a PCO, the CMA must publicly consult on the proposed revocation, bringing it to the attention of such persons as it considers appropriate.<sup>195</sup>
- 4.79 If the CMA decides to revoke a PCO, it must give a notice to that effect to the SMS firm to which the PCO relates.<sup>196</sup> The notice can contain transitional, transitory or saving provisions.<sup>197</sup> As soon as reasonably practicable after giving the notice to the SMS firm, the CMA must publish the notice on its website.<sup>198</sup>
- 4.80 If the CMA revokes but does not replace a PCO, a new PCO cannot subsequently be made that relies on the same PCI investigation.<sup>199</sup> A new PCO could be made as a result of a new PCI investigation.
- 4.81 The CMA may exercise its digital markets functions in relation to potential and actual breaches of a PCO even where the order is no longer in place.<sup>200</sup> This enables the CMA to investigate and enforce against historical breaches.

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<sup>193</sup> Section 53(2) of the Act. See paragraphs 2.103–2.107 in Chapter 2 of this guidance on existing obligations, including PCOs, in the event an SMS firm’s designation is revoked.

<sup>194</sup> Section 17 of the Act. As noted in footnote 164 above, section 107 of the Act requires the CMA to consult certain regulators before revoking a PCI in particular circumstances. See Chapter 9 of this guidance for further information on how the CMA works with other regulators.

<sup>195</sup> Section 54(3) of the Act.

<sup>196</sup> Section 53(4) of the Act.

<sup>197</sup> Section 53(5) of the Act.

<sup>198</sup> Section 53(6) of the Act.

<sup>199</sup> Section 53(7) of the Act.

<sup>200</sup> Section 53(8) of the Act.

## **Commitments**

### *Introduction*

- 4.82 The CMA may accept commitments: legally binding promises from an SMS firm as to its future conduct. A commitment can be structural or behavioural in nature, or a combination of both. It is open to the SMS firm offering a commitment to do so in any form it chooses, including in relation to all of, or only part of, the AEC.<sup>201</sup>
- 4.83 The CMA may accept an ‘appropriate’ commitment from an SMS firm as to its conduct in respect of an AEC or a detrimental effect on UK users or UK customers that the CMA considers has resulted, or may be expected to result, from an AEC. The Act provides that a commitment is appropriate where the CMA considers that compliance with the commitment by the SMS firm would contribute to, or otherwise be of use in, remedying, mitigating or preventing the AEC, or the detrimental effect on UK users or UK customers.<sup>202</sup>
- 4.84 The CMA will have discretion to determine which cases are suitable for commitments, and the circumstances in which an appropriate commitment will be accepted.
- 4.85 The acceptance of an appropriate commitment in relation to a PCI investigation will provide the CMA with the flexibility, where it considers it appropriate, to conclude or change the scope of an investigation where one has begun. The CMA may also accept a commitment from an SMS firm before it has launched a PCI investigation. The acceptance of a commitment does not prevent a PCI investigation from continuing so far as it relates to conduct other than that to which the commitment relates.<sup>203</sup>
- 4.86 However, a commitment cannot be unilaterally varied by the CMA once accepted. The CMA must therefore be satisfied that any proposed commitment is well-specified and clearly effective in addressing all or part of the AEC without the need for further investigation. To be confident that accepting the proposed commitment would be preferable to continuing with a PCI investigation, this means that in practice, the CMA is likely to require a

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<sup>201</sup> A commitment may be characterised as ‘partial’ where it seeks to address only part of an AEC, or where it seeks to only mitigate an AEC (rather than to prevent or remedy the AEC). The CMA will assess whether a partial commitment is appropriate in light of the specific circumstances of the case.

<sup>202</sup> Section 56(2) of the Act.

<sup>203</sup> Section 56(5)(a) of the Act.

more extensive remedy than might be needed if the CMA were to impose a PCO at the end of a PCI investigation.

#### *Assessing the acceptability of a proposed commitment*

4.87 In deciding whether or not to accept a proposed commitment, the CMA will assess:

- (a) the effectiveness of the proposed commitment; and
- (b) the effects of the proposed commitment on relevant third parties.

#### *Effectiveness*

4.88 To assess whether the proposed commitment will be effective in contributing to, or otherwise being of use in, remedying, mitigating or preventing the AEC, or the detrimental effect resulting, or expected to result from the AEC, on UK users or UK customers, the CMA will have regard to a range of factors, including:

- (a) the likely impact of the proposed commitment on the AEC, or on any detrimental effects, either already arising or expected to arise from it;
- (b) the timescale over which the proposed commitment is likely to have effect (ie how timely its impact is expected to be);
- (c) the risk of the proposed commitment not being effective and/or giving rise to unintended consequences; and
- (d) practical considerations associated with the proposed commitment, including relating to effective implementation, monitoring and enforcement of the commitment.

#### *Effects of the proposed commitment on relevant third parties*

4.89 Where the CMA considers that the proposed commitment will be effective, the CMA will take into account the potential effects, both positive and negative, of the proposed commitment on those most likely to be affected by it, including for example, other market participants (eg competitors, potential competitors, customers and/or suppliers), consumers or business users. The CMA will consider those effects in the round, rather than seeking necessarily to quantify them precisely.

4.90 As explained above, the decision to accept a proposed commitment will be at the CMA's discretion, and will depend on the facts and circumstances of each case and the detail of the proposed commitment, for example:

- (a) the scope of the proposed commitment, and whether and how it addresses the AEC;<sup>204</sup>
- (b) whether the proposed commitment is capable of being negotiated and implemented within a short timeframe;
- (c) the timing of the commitment offer in the context of the investigation (see section below on timing of commitment discussions);
- (d) the need to test, trial and potentially iterate remedies, which may be more practically managed by imposing a PCO; and
- (e) whether the proposed commitment includes an offer to appoint a Monitoring Trustee to oversee compliance by the SMS firm with the commitment.

#### *Timing of commitment discussions*

4.91 While it will be open to an SMS firm to offer a commitment to the CMA either prior to, or at any stage of a PCI investigation, the appropriate timing of any commitment discussions will be determined on a case-by-case basis in light of the specific facts of each case.

4.92 The CMA expects that in most cases, it will not accept a commitment offered at a late stage of an investigation.

4.93 Where an SMS firm intends to offer a commitment, it should inform the CMA of this intention as promptly as possible, and should contact the case team in the first instance. The CMA may set a time limit within which any discussions on the proposed commitment must be concluded.

4.94 Should the CMA consider the proposed commitment is not appropriate and decides to reject the proposed commitment, it will communicate this to the SMS firm. Where the CMA considers that, subject to consultation, a proposed commitment is appropriate and it is minded to accept the proposed

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<sup>204</sup> When a partial commitment is offered to address some, but not all, of the conduct which is the subject of the investigation, the CMA will need to consider the interaction between the commitment and other remedies which it may wish to impose to address the AEC at the end of a PCI investigation.

commitment (having carried out the assessment explained above), it will engage with the SMS firm to communicate its view.

### *Consultation and third party engagement*

- 4.95 Before accepting a proposed commitment, the CMA must publicly consult on its intention to do so. The CMA must: (a) publish a notice<sup>205</sup> and (b) consider any representations made in accordance with the notice and not withdrawn.<sup>206</sup> Such a notice will be published on the CMA's website.
- 4.96 Following the CMA's consideration of the representations made on its notice proposing to accept a commitment, the CMA may meet with the SMS firm to indicate the CMA's view on whether any modifications to the commitment will be required. Where the CMA considers that extensive modifications to the commitment are required in order for it to accept the commitment, and discussions with the SMS firm become protracted as a result, the CMA may choose to exercise its discretion to reject the commitment at this stage.
- 4.97 Where, following consultation, the CMA considers that a proposed modification to a commitment is required, the CMA must consult on the modification<sup>207</sup> unless it does not consider it to be material.<sup>208</sup> In these circumstances, the CMA must publish a notice,<sup>209</sup> which it will publish on its website.
- 4.98 The CMA must then consider any representations made on the notice and not withdrawn<sup>210</sup> (in line with the procedure outlined above).
- 4.99 The CMA may engage with relevant third parties on their response to the consultation. Whether or not such engagement with third parties is appropriate or required will be decided on a case-by-case basis.

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<sup>205</sup> Paragraph 2(1)(a) Schedule 1 of the Act. In accordance with paragraph 2(2) of Schedule 1 of the Act, the notice must include: (a) the commitment that the CMA proposes to accept, (b) the actual or suspected AEC to which the commitment relates, (c) the CMA's reasons for its proposed decision, and (d) the period within which representations may be made in relation to the proposed commitment.

<sup>206</sup> Paragraph 2(1)(b) Schedule 1 of the Act.

<sup>207</sup> Paragraph 3(1) Schedule 1 of the Act.

<sup>208</sup> Paragraph 5 Schedule 1 of the Act.

<sup>209</sup> Paragraph 3(1)(a) Schedule 1 of the Act. In accordance with paragraph 3(2) Schedule 1 of the Act, the notice must include: (a) the proposed modifications, (b) the reasons for them, and (c) the period within which representations may be made in relation to them.

<sup>210</sup> Paragraph 3(1)(b) Schedule 1 of the Act.

### *Decision to accept a commitment*

4.100 Following the consultation, the CMA must publish a notice of its decision on whether to, and the form in which it will, accept a commitment, as soon as reasonably practicable.<sup>211</sup> Where a commitment has been accepted, the CMA may also provide the SMS firm with a notice that it is: (a) ending a PCI investigation (if it has begun one) without making a PCI decision, or (b) changing the scope of a PCI investigation.<sup>212</sup> Where such a notice has been provided to the SMS firm, as soon as reasonably practicable after giving the notice, the Act requires the CMA to publish a statement summarising the contents of the notice.<sup>213</sup> The CMA will publish this on its website.

### *Duration of a commitment*

4.101 A commitment will come into force when a notice of its acceptance is published by the CMA.<sup>214</sup> Following the acceptance of a commitment by the CMA as to the conduct of an SMS firm, the SMS firm that gave the commitment must comply with it at all times when it is in force.<sup>215</sup>

4.102 A commitment will cease to have effect:

- (a) subject to any provision made under section 17 of the Act:<sup>216</sup>
  - i. in accordance with any terms of the commitment about when it is to cease to have effect;<sup>217</sup>
  - ii. when the designation to which the commitment relates ceases to have effect;<sup>218</sup> or
- (b) when the SMS firm is released from the requirement to comply with the commitment<sup>219</sup> (in accordance with the procedure set out in paragraphs 4.106 to 4.110 below).

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<sup>211</sup> Paragraph 4 Schedule 1 of the Act.

<sup>212</sup> Section 56(3)(b) of the Act.

<sup>213</sup> Section 56(4) of the Act.

<sup>214</sup> Section 56(6) of the Act. While the commitments come into force on this date, the commitments may also include provisions that set an implementation date (or dates) by which particular obligations agreed to in the commitments must be met.

<sup>215</sup> Section 56(3)(a) of the Act. Where a firm fails to comply with a commitment, without reasonable excuse, the CMA may impose a penalty under section 85(2)(d) of the Act.

<sup>216</sup> Section 56(7)(a) of the Act. For further information regarding the provision that the CMA may make under section 17 of the Act, see paragraphs 2.103–2.107 of Chapter 2 of this guidance.

<sup>217</sup> Section 56(7)(a)(i) of the Act.

<sup>218</sup> Section 56(7)(a)(ii) of the Act.

<sup>219</sup> Section 56(7)(b) of the Act.

### *Varying a commitment*

- 4.103 The SMS firm subject to an existing commitment may make a request to the CMA to vary the commitment. The CMA may, by notice, accept a variation to a commitment from time to time provided the commitment as varied would still be appropriate.<sup>220</sup> Please refer to Chapter 6 on Monitoring for more information on the circumstances in which the CMA may vary a commitment.
- 4.104 If the CMA proposes to accept the requested variation to the commitment, it must publicly consult on its intention to do so, and must (a) publish a notice on its website,<sup>221</sup> and (b) consider any representations made in accordance with the notice and not withdrawn.<sup>222</sup> Where, following consultation and having considered any representations made during the consultation period, the CMA decides to accept the variation, it must publish on its website a notice of its decision on whether to, and the form in which it will accept a requested variation as soon as reasonably practicable.<sup>223</sup>
- 4.105 Where, following such consultation, the CMA considers that a modification to the requested variation is required, the CMA must consult on that modification<sup>224</sup> unless it does not consider it to be material.<sup>225</sup>

### *Releasing a commitment*

- 4.106 The CMA may release an SMS firm from the requirement to comply with a commitment where it considers that it would be appropriate to do so.<sup>226</sup>
- 4.107 Depending on the facts and circumstances of each case, this could be a release from the commitment in its entirety, or discrete aspects of the commitment.

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<sup>220</sup> Section 56(8)(a) of the Act.

<sup>221</sup> Paragraph 3(1)(a) Schedule 1 of the Act. In accordance with paragraph 3(2) Schedule 1 of the Act, the notice of the requested variation to the commitment must include the following information: (a) the requested variation to the commitment that the CMA proposes to accept; (b) the actual or suspected AEC to which the variation relates; (c) the CMA's reasons for its proposed decision; and (d) the period within which representations may be made in relation to the requested variation.

<sup>222</sup> Paragraph 3(1)(b) Schedule 1 of the Act.

<sup>223</sup> Paragraph 4 Schedule 1 of the Act.

<sup>224</sup> Paragraph 3(1) Schedule 1 of the Act.

<sup>225</sup> Paragraph 5 Schedule 1 of the Act.

<sup>226</sup> Section 56(8) of the Act (and section 36(8) of the Act where commitments are given in a conduct investigation, as described in Chapter 7 of this guidance).



- 4.108 Before releasing an SMS firm from a commitment, the CMA must publish a notice on its website, and consider any representations made in accordance with the notice and not withdrawn.<sup>227</sup>
- 4.109 The CMA must publish on its website a notice of its decision on whether to release an SMS firm from a commitment as soon as reasonably practicable.<sup>228</sup>
- 4.110 The fact that a commitment ceases to have effect does not affect the CMA's exercise of any functions in relation to a breach or suspected breach of the commitment (while it was in force).<sup>229</sup>

*Launching a new investigation where a commitment has previously been accepted*

- 4.111 The acceptance of a commitment does not prevent the CMA beginning a new PCI investigation in relation to the conduct to which the commitment relates where it has reasonable grounds:<sup>230</sup>
- (a) to believe that there has been a material change of circumstances since the commitment was accepted.<sup>231</sup> This may result in the CMA considering that the commitment which is in force is no longer appropriate (and needs to be released or varied),<sup>232</sup> or that the commitment should remain in place regardless of the material change of circumstances;
  - (b) to suspect that the SMS firm has not complied with one or more of the terms of the commitment. This is likely to come to light in the course of the CMA's duty to keep compliance with commitments under review (see Chapter 6 on Monitoring). While the CMA may open a new PCI investigation in these circumstances, it may also impose a penalty on the SMS firm for a breach of the commitment, and/or apply for a court order to enforce compliance with the commitment;<sup>233</sup> or

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<sup>227</sup> Paragraph 6(1) Schedule 1 of the Act. In accordance with paragraph 6(2) Schedule 1 of the Act, the notice must include: (a) that the CMA proposes to release an SMS firm from the commitment, (b) the reasons for the CMA's proposal, and (c) the period within which representations may be made in relation to the proposal.

<sup>228</sup> Paragraph 7 Schedule 1 of the Act.

<sup>229</sup> Section 56(8) of the Act (and section 36(9) of the Act where commitments are given in a conduct investigation, as described in Chapter 7 of this guidance).

<sup>230</sup> Section 56(5)(b) of the Act.

<sup>231</sup> Section 56(5)(b)(i) of the Act.

<sup>232</sup> The CMA is unable to vary commitments unilaterally and any such variation would need to be proposed by the SMS firm.

<sup>233</sup> Section 56(5)(b)(ii) of the Act.

- (c) to suspect that information which led the CMA to accept the commitment was incomplete, false or misleading in a material particular.<sup>234</sup> The CMA may impose a penalty on a person for providing false or misleading information in connection with the CMA's digital markets functions.<sup>235</sup>

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<sup>234</sup> Section 56(5)(b)(iii) of the Act.

<sup>235</sup> Sections 87(1)(b) and (c) of the Act. See further *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4). The intentional or reckless provision of false or misleading information is also a criminal offence (section 94 of the Act).

## 5. Investigatory powers

### Introduction

- 5.1 The Act provides the CMA with a range of investigatory powers which it may use when administering and enforcing the digital markets competition regime.
- 5.2 This chapter is structured as follows:
- (a) Section 1 explains the investigatory powers that the CMA may use to carry out its digital markets functions.
  - (b) Section 2 explains the CMA's approach to information handling.
  - (c) Section 3 explains the CMA's powers to provide investigative assistance to overseas regulators.

### Investigatory powers

#### *Power to require information*

- 5.3 The CMA may issue a written notice (an '**information notice**') requiring any person to provide specified information where it considers that the information is relevant to a digital markets function.<sup>236</sup> The CMA may do so when exercising a digital markets function, or when deciding whether to exercise a digital markets function.
- 5.4 The CMA may send an information notice to any person, which may include, for example, a firm that is the subject of an SMS investigation, an SMS firm, as well as its competitors, customers, complainants and suppliers.<sup>237</sup>
- 5.5 The information notice must tell the recipient the time and place at which the information must be given to the CMA, the manner and form in which the

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<sup>236</sup> Section 69 of the Act.

<sup>237</sup> An information notice may be sent to an individual as well as bodies corporate. Such information requests may be served in the following ways: delivering it to the person to whom it is addressed; leaving it at their proper address; sending it by post to that address; or sending it by email to the person's email address.

information should be provided<sup>238</sup> and information about the possible consequences of not complying with the information notice.<sup>239</sup>

- 5.6 Information may include documents,<sup>240</sup> whether in draft or final form, as well as data, code, algorithms, estimates, forecasts, returns, explanations, or information in any other form.<sup>241</sup>
- 5.7 The power to require a party to give information to the CMA includes the power to:
- (a) take copies or extracts from information;
  - (b) require a party to obtain or generate information;
  - (c) require a party to collect or retain information that they would not otherwise collect or retain;
  - (d) if specified information is not given to the CMA, require a party to state, to the best of their knowledge and belief, both where that information is and why it has not been shared with the CMA.<sup>242</sup>
- 5.8 For example, the CMA may include in an information notice a requirement that a firm create, gather, aggregate or combine specific financial information in a way which may be different to its existing internal practices, should this be required to inform its investigations.
- 5.9 The CMA may also require a firm to obtain or generate information as to how its algorithmic code has changed over time, including through version control.

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<sup>238</sup> For example, a notice might specify the format in which a dataset should be provided and how it should be transferred (eg the means by which information should be provided to the CMA by uploading it to a secure server).

<sup>239</sup> Section 69(3)(c) of the Act. A person could face penalties or prosecution for failing to comply with the requirements of an information notice. Further detail on penalties is provided in [Administrative Penalties: Statement of Policy on the CMA's approach](#) (CMA4).

<sup>240</sup> This covers documents in electronic as well as physical form, and, in addition, as well as letters, emails, reports or similar, includes, for example, text messages or other electronic communications such as instant messaging through any digital platform. To the extent that documents are stored electronically, information recorded also includes meta data associated with that document such as the date of creation, modification, author, date of sending etc.

<sup>241</sup> Section 118 of the Act.

<sup>242</sup> Section 69(4) of the Act.

### *Varying conduct or performing a demonstration or test*

- 5.10 For the purposes of requiring a party to obtain or generate information, the CMA may include in an information notice a requirement for a person to:
- (a) vary their usual conduct, whether in relation to some or all users of any service or digital content that they provide; and/or
  - (b) perform a specified demonstration or test.<sup>243</sup>
- 5.11 The CMA may rely on these powers for the purposes of information gathering across its digital markets functions, for example to:
- (a) gain the technical understanding required to assess whether an SMS firm is compliant with a CR or a PCO;
  - (b) gather evidence to assess the merits of any theory of harm;
  - (c) assess the effectiveness of a CMA intervention.
- 5.12 For example, the CMA could require a firm to demonstrate a technical process with examples, such as how an algorithm operates, or to undertake testing or field trials of its algorithms and report the outcomes.
- 5.13 Another potential example of when the CMA may require a firm to vary its usual conduct is when it may be necessary to assess the effect of different choice architecture and assess compliance with particular CRs.
- 5.14 The CMA is likely to consider three overarching factors when considering whether to require a firm to vary conduct or perform a demonstration or test for information gathering purposes. These factors are:
- (a) **Value:** The CMA will consider whether a requirement for a firm to vary its usual conduct or to perform a test will provide important evidence to support analysis of an issue.
  - (b) **Feasibility:** The CMA will consider in practical terms whether it is feasible for a firm to vary its usual conduct or perform a specified demonstration or test. For example, the CMA may consider whether a firm has established testing capabilities and infrastructure and as such could reliably carry out the requirements; whether a test can be designed with a clear

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<sup>243</sup> Section 69(5)(a) and (b) of the Act.

methodology to meet the specific objective; and if outcomes can be assessed against clear metrics.

(c) **Proportionality:** The CMA will take a proportionate approach to the use of its power to require a firm to vary its usual conduct or conduct a specified demonstration or test for the purpose of information gathering. For example, the CMA may consider the cost and impacts, in terms of time and resource, both for the CMA and the firm subject to the requirement.

5.15 The CMA may give an information notice to a person outside the United Kingdom subject to the provisions of the Act in respect of extra-territorial application.<sup>244</sup> The powers conferred by section 69 of the Act are exercisable in relation to information whether it is stored within or outside the United Kingdom.

#### *Responding to information notices*

5.16 The CMA recognises that when making information requests, this will impose an impact on the recipient, particularly on smaller firms or consumer organisations. While formulating an information notice, the CMA will strive to avoid imposing unnecessary burden on such persons while also considering the need for the CMA to operate efficiently and effectively.

5.17 In appropriate cases, the CMA will seek to give recipients of information requests advance notice so that they can manage their resources appropriately. In certain circumstances, where it is practicable and appropriate to do so, the CMA may also send an information notice in draft for discussion with the party. The CMA can then consider comments on the scope of the request, the actions that will be needed to respond, and the deadline by which the information must be received. The timeframe for comment on the draft will depend on the nature and scope of the request.

5.18 The CMA expects recipients to comply fully with any information request within the given deadline. This is especially the case where the CMA has engaged with them on the scope and purpose of the request and the proposed deadline for completion.

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<sup>244</sup> Section 111 of the Act. See further information on extra-territorial application in Chapter 9 of this guidance at paragraphs 9.40–9.41

- 5.19 The CMA may send out more than one request to the same person or firm. For example, the CMA may ask for additional information after considering material submitted in response to an earlier request.
- 5.20 Any queries about the scope of a request set out in an information notice or the time given to respond should be raised with the CMA<sup>245</sup> as soon as possible.
- 5.21 The CMA may impose a penalty on any person who it considers has, without reasonable excuse, failed to comply with an information notice, or who has provided false or misleading information, either to the CMA, or to another person knowing that the information was to be used for the purpose of giving information to the CMA.<sup>246</sup>
- 5.22 Where an SMS firm or a firm that is the subject of a breach investigation<sup>247</sup> has not complied with the requirements of an information notice, the CMA may also exercise its power of access,<sup>248</sup> its power to interview<sup>249</sup> and its power of entry<sup>250</sup> as described below.

#### *Requirement to name a senior manager*

- 5.23 The CMA may include in an information notice a requirement for a firm to name an individual who it considers to be a senior manager and who may reasonably be expected to be in a position to ensure compliance with the requirements of the information notice.<sup>251</sup>
- 5.24 This requirement may apply in respect of an information notice which is sent to an SMS firm, a firm which is subject to existing obligations under section 17(1)<sup>252</sup> or a firm previously designated as having SMS which is the subject of a breach investigation.

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<sup>245</sup> Contact details for those with whom such issues should be raised will be included with the information notice.

<sup>246</sup> Section 87 of the Act. Further detail on penalties is provided in [Administrative Penalties: Statement of Policy on the CMA's approach](#) (CMA4)

<sup>247</sup> In accordance with section 118 of the Act, 'breach investigation' means an investigation (including a conduct investigation) into whether an undertaking is breaching or has breached a requirement imposed on the undertaking under Part 1 of the Act by virtue of the undertaking being, or having been, a designated undertaking.

<sup>248</sup> Section 71(1)(a) of the Act.

<sup>249</sup> Section 72 of the Act.

<sup>250</sup> Section 74 and section 75 of the Act.

<sup>251</sup> Section 70(1) of the Act.

<sup>252</sup> Section 17(1) of the Act provides that where the CMA decides, as a result of a further SMS investigation, to revoke a designated undertaking's designation in respect of a relevant digital activity, the CMA may make transitional, transitory or saving provision in respect of any existing obligation. Further information on section 17(1) is provided in Chapter 2 of this guidance, paragraphs 2.103–2.107.

- 5.25 An individual can be considered to be a senior manager of a firm if the individual plays a significant role in –
- (a) making decisions about how the undertaking’s relevant activities are to be managed or organised, or
  - (b) managing or organising the undertaking’s relevant activities.<sup>253</sup>
- 5.26 The CMA considers that a senior manager is likely to be an individual who is a senior executive or executive Board member, or an equivalent level of seniority in an organisation. The individual should have the necessary expertise, oversight and responsibility for the issue which is the subject matter of the particular information notice.<sup>254</sup>
- 5.27 Where the CMA requires a firm to name a senior manager, the information notice must require it to inform the individual of the consequences for the individual of any failure by the firm to comply with the notice.<sup>255</sup>
- 5.28 Where the CMA considers that the senior manager has failed, without reasonable excuse, to prevent certain failures or actions of the firm (relating to non-compliance with the information notice and/or to the provision of false or misleading information),<sup>256</sup> the CMA has the power to impose a penalty both on the individual named as a senior manager, as well as on the firm itself.<sup>257</sup>

### **Power of access**

- 5.29 The CMA may exercise its power of access in order to:
- (a) supervise the obtaining, generation, collection or retention of information by the undertaking;
  - (b) observe the undertaking’s conduct in relation to users; or
  - (c) observe a demonstration or test performed by the undertaking.<sup>258</sup>

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<sup>253</sup> ‘Relevant activities’ are defined in section 70(4) of the Act as activities relating to the undertaking’s compliance with requirements imposed on it by or under Part 1 of the Act.

<sup>254</sup> The CMA may send an information notice to a senior manager outside the United Kingdom by virtue of section 111(2) and 111(4)(a) of the Act.

<sup>255</sup> Section 70(2) of the Act.

<sup>256</sup> Section 87(1) of the Act and [Administrative Penalties: Statement of Policy on the CMA’s approach](#) (CMA4).

<sup>257</sup> Section 87(2) of the Act and [Administrative Penalties: Statement of Policy on the CMA’s approach](#) (CMA4).

<sup>258</sup> Section 71(2) of the Act.



- 5.30 In exercising this power, the CMA may access business premises,<sup>259</sup> equipment, services, information or individuals. The CMA could, for example, require that it supervise a test being carried out in the presence of a firm's engineers, either at the firm's business premises or remotely.
- 5.31 The power of access is available where the CMA considers that an SMS firm, a firm that is subject to existing obligations under section 17(1) of the Act,<sup>260</sup> or a firm that is the subject of a breach investigation:
- (a) has not complied with the requirements of an information notice described at paragraphs 5.3 to 5.15 above; or
  - (b) has not complied with the duty to assist a skilled person with the preparation of a report, described at paragraphs 5.65 to 5.73 below.<sup>261</sup>
- 5.32 The CMA may exercise this power for the purpose of securing compliance with these requirements, or to verify any reasons for non-compliance.
- 5.33 This might include, for example, situations where a firm has failed to provide the information requested or has not carried out the request in the way specified in the information notice, or where information provided is incomplete or inaccurate.
- 5.34 Where the CMA intends to exercise its power of access, it must give the firm a notice specifying the access it requires, a date by which access must be provided and the manner in which the access must be given.<sup>262</sup>
- 5.35 The power of access is not exercisable in relation to premises, equipment or individuals outside the United Kingdom. However, the powers are exercisable in relation to information and services whether stored or provided within or outside the United Kingdom.<sup>263</sup>

### ***Power to interview***

- 5.36 Where the CMA considers that an individual has information relevant to a digital markets investigation,<sup>264</sup> it has the power to require that individual to

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<sup>259</sup> Section 71(7) of the Act provides that 'business premises' means premises (or any part of premises) not used as a dwelling.

<sup>260</sup> See paragraphs 2.103–2.107 in Chapter 2 of this guidance for information on section 17 of the Act.

<sup>261</sup> Section 71(1) of the Act.

<sup>262</sup> Section 71(3) of the Act.

<sup>263</sup> Section 71(5) and (6) of the Act. Eg information stored remotely on a cloud server.

<sup>264</sup> In accordance with section 118 of the Act, a 'digital markets investigation' means – (a) an SMS investigation; (b) a breach investigation (including a conduct investigation); (c) a PCI investigation.

attend an interview and answer questions for the purposes of that investigation. A statement made under interview is known as a '**section 72 statement**'. For the purpose of conducting an interview the CMA, or any person nominated by it, may take evidence in answer to questions under oath.<sup>265</sup>

- 5.37 To exercise this power, the CMA will give a notice to the individual, specifying the place or manner in which the interview will be conducted (which could be held remotely)<sup>266</sup> and the time of the interview, which may be held immediately on receipt of the notice. The notice must include details about the digital markets investigation and the possible consequences of not complying with the notice.<sup>267</sup>
- 5.38 Where an individual is connected<sup>268</sup> to a firm which is the subject of a digital markets investigation, the CMA must also give a copy of the notice to the firm.<sup>269</sup>
- 5.39 The power to interview is not exercisable in relation to an individual outside the United Kingdom.<sup>270</sup>

#### *Conduct of an interview and legal representation*

- 5.40 Ordinarily interviews will be recorded, but in circumstances where this is unnecessary or impracticable a contemporaneous note will be taken of the questions and the interviewee's response. The interviewee will be asked to read through and check any transcript of the recording or the questions and answers in the note and to confirm, in writing, that they are an accurate account of the interview.<sup>271</sup> The CMA will not seek comments on accuracy and representations on confidentiality of the transcript (or note) of the interview until it is satisfied that it can do so without risk to the investigation.

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<sup>265</sup> Section 72(5) of the Act.

<sup>266</sup> Eg via video link or similar technology.

<sup>267</sup> Section 72(1) and (2) of the Act.

<sup>268</sup> Section 118 (3) of the Act provides that a person is 'connected' to an undertaking if that person (a) is concerned in the management or control of the undertaking (b) is employed by the undertaking, or (c) works for the undertaking in any other capacity.

<sup>269</sup> Section 72(3) and (4) of the Act. The CMA must give notice to the undertaking at the time the interview notice is given to the individual or, where that is not practicable, as soon as reasonably practicable after the notice is given to the individual.

<sup>270</sup> Section 72(6) of the Act.

<sup>271</sup> Where the firm has been provided with a copy of the notice under section 72(3) of the Act, because the interviewee is connected to (see section 118(3) of the Act) that firm, the CMA may also send a copy of the transcript or note to the firm to allow it to make confidentiality representations to the CMA. Further information on the CMA's approach to the handling of confidential information can be found in Chapter 5 of this guidance.

5.41 Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. While the CMA recognises that the interview power may be used in a range of circumstances, the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview. The CMA also considers that in certain circumstances there may be a risk that the presence at the interview of a legal adviser only acting for the business will prejudice the investigation, for example, if their presence reduces the incentives on the individual being questioned to be open and honest in their account. In cases where the CMA wishes to question a person having entered into premises as described at paragraphs 5.44 to 5.64 below, the questioning may be delayed for a reasonable time to allow the individual's legal adviser to attend. During this time, the CMA may make this subject to certain conditions for the purpose of reducing the risk of contamination of witness evidence. Such conditions could include requesting that a CMA officer accompanies the individual in the period before the interview takes place and/or suspending the individual's use of electronic devices, including telephones.

#### *Use of interview statements in prosecution*

5.42 A section 72 statement taken under formal interview may not be used as evidence against the individual who gave it in any criminal proceedings, except where that individual is being prosecuted for destroying or falsifying information<sup>272</sup> or for providing false or misleading information<sup>273</sup> under the Act.<sup>274</sup>

5.43 The section 72 statement may be used as evidence in a prosecution for any other criminal offence, but only where that individual gives evidence or asks questions about the section 72 statement, or this is done on their behalf, and the individual makes a statement which is inconsistent with the section 72 statement.<sup>275</sup>

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<sup>272</sup> See section 93 of the Act.

<sup>273</sup> See section 94 of the Act.

<sup>274</sup> Section 73(1) of the Act.

<sup>275</sup> Section 73(2) of the Act.

## **Power to enter business premises without a warrant**

- 5.44 The CMA has the power to enter business premises without a warrant for the purposes of a breach investigation.<sup>276</sup>
- 5.45 In order to exercise this power, the CMA must have reasonable grounds to suspect that information relevant to the breach investigation can be accessed from or on the premises.<sup>277</sup>
- 5.46 A CMA officer (**'an investigating officer'**) who is authorised by the CMA in writing to enter premises but does not have a warrant may enter business premises for the purposes of a breach investigation if they have given the premises' occupier at least two working days' written notice.<sup>278</sup> This notice must describe the subject matter and purpose of the breach investigation and include information about the possible consequences of not complying with the notice.<sup>279</sup>
- 5.47 In certain circumstances, the CMA is not required to give advance notice of entry. This applies where the CMA has a reasonable suspicion that the premises are, or have been, occupied by the undertaking which is the subject of the breach investigation, or the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so.<sup>280</sup>
- 5.48 An investigating officer may, in addition to entering the premises:
- (a) take necessary equipment with them;
  - (b) require any person on the premises to give information relevant to the investigation to the investigating officer, which may include being required to explain relevant information;
  - (c) require any person to state, to the best of their knowledge and belief, where information may be found, in cases where that person does not give information to the investigating officer;
  - (d) take copies of, or extracts from, any information given to them; and/or

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<sup>276</sup> Sections 74 of the Act. A breach investigation means an investigation (including a conduct investigation) into whether an undertaking is breaching or has breached a requirement imposed on the undertaking under Part 1 of the Act by virtue of the undertaking being, or having been, a designated undertaking (section 118(1) of the Act).

<sup>277</sup> Section 74(1) of the Act.

<sup>278</sup> Section 74(2) of the Act.

<sup>279</sup> An individual could be subject to penalties or prosecution for obstructing an officer exercising their power of entry under section 87(4) and section 95 of the Act.

<sup>280</sup> Section 74(3) of the Act.

(e) take any steps which appear to be necessary for the purpose of preserving or preventing interference with any information which the officer considers relevant to the breach investigation.<sup>281</sup>

5.49 Any information given to an officer must be provided in a form in which it can be taken away and either is, or can easily be made, visible and legible. This includes the ability for the CMA to require information to be provided in electronic form.<sup>282</sup>

5.50 The power to enter business premises without a warrant under section 74 of the Act is not exercisable in relation to premises outside the United Kingdom. However, the powers under section 74 are exercisable in relation to information whether it is stored within or outside the United Kingdom. A CMA investigating officer who has entered a business premises may therefore require information regardless of where it is physically stored, for example, information accessible on a remote server.

### ***Power to enter premises under a warrant***

5.51 The CMA can apply to the court<sup>283</sup> or the Competition Appeal Tribunal ('**CAT**') for a warrant to enter and search any premises, including business and domestic premises,<sup>284</sup> without notice and using reasonable force, for the purposes of a breach investigation.<sup>285</sup> The CMA would usually seek a warrant to search premises where the CMA suspects that the information relevant to an investigation may be destroyed or otherwise interfered with if the CMA requested the material via a written request.

5.52 The court or the CAT may issue a warrant if it is satisfied that –

(a) there are reasonable grounds for suspecting that there is information on or accessible from any premises which is relevant to the breach investigation (**'information of the relevant kind'**), and

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<sup>281</sup> Section 74(5) of the Act.

<sup>282</sup> Section 74(6) of the Act.

<sup>283</sup> The High Court in England and Wales or Northern Ireland; or the Court of Session in Scotland.

<sup>284</sup> Section 75(7) of the Act provides that 'domestic premises' means premises (or any part of premises) that are used as a dwelling and are – (a) premises also used in connection with the affairs of an undertaking or, where the undertaking is part of a group, a member of that group, or (b) premises where the information relating to the affairs of an undertaking or, where the undertaking is part of a group, a member of that group, is located.

<sup>285</sup> Section 78 of the Act provides that the CMA must follow the respective rules of the High Court, the Court of Session or the CAT when making an application to one of those courts for a warrant to exercise its power to enter premises under section 75.

(b) one or both of the following applies –

- i. the exercise by the CMA of another digital markets investigation power has not resulted in the CMA being given the information of the relevant kind; and/or
- ii. there are reasonable grounds for suspecting that there is no other digital markets investigation power the exercise of which would result in the CMA being given the information of the relevant kind.<sup>286</sup>

### *What will happen upon arrival*

- 5.53 Where the CMA has obtained a warrant, the CMA officer will produce it on entry.<sup>287</sup>
- 5.54 The warrant will list the names of the CMA officers authorised to exercise the powers under the warrant and will state the subject matter and purpose of the breach investigation and describe the criminal offence that may be committed if a person fails to cooperate.<sup>288</sup>
- 5.55 If there is no one at the premises when the CMA officers arrive, the officers must take reasonable steps to inform the occupier that the CMA intends to enter the premises. Once the CMA has informed them or taken such steps as it is able to inform them, the CMA must allow the occupier or their legal or other representative a reasonable opportunity to be present when the CMA carries out a search under the warrant.<sup>289</sup>
- 5.56 If CMA officers have not been able to give prior notice, the CMA must leave a copy of the warrant in a prominent place on the premises.<sup>290</sup> If, having taken the necessary steps, the CMA has entered premises that are unoccupied, upon leaving those premises the CMA must leave them as effectively secured as they were found.<sup>291</sup>

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<sup>286</sup> Section 75(1) of the Act.

<sup>287</sup> Section 76(2) of the Act. Section 75(5) of the Act provides that a warrant under this section continues in force until the end of the period of one month beginning on the day on which it is issued.

<sup>288</sup> Section 76(1) of the Act. Section 95 of the Act provides that a person commits an offence if they intentionally obstruct an officer of the CMA acting in the exercise of the officer's powers under (a) section 74, or (b) a warrant issued under section 75.

<sup>289</sup> Section 76(3) of the Act.

<sup>290</sup> Section 76(4) of the Act.

<sup>291</sup> Section 76(5) of the Act.

### *Entering and searching premises with a warrant*

- 5.57 Where an inspection is carried out under a warrant, CMA officers are authorised to enter premises using such force as is reasonably necessary.<sup>292</sup>
- 5.58 The warrant may also authorise people who are not employees of the CMA to accompany and assist CMA officers.<sup>293</sup> For example, this might include individuals who have expertise that is not available within the CMA but is required to fully carry out the terms of the warrant, such as technical or IT experts.
- 5.59 The warrant also authorises CMA officers to:
- (a) take onto the premises such equipment as appears to be necessary;
  - (b) operate equipment found on the premises for the purpose of producing information;<sup>294</sup>
  - (c) require any person on the premises to provide assistance and explanations (including providing passwords or encryption keys and operating equipment on the premises);
  - (d) require any person on the premises to give information;
  - (e) require any person on the premises, to state, to the best of their knowledge and belief, where information appearing to be of the relevant kind may be found;
  - (f) require the production of any information which is accessible from the premises, including material stored remotely or online in electronic form.
  - (g) take copies or extracts from, any information appearing to be information of the relevant kind;
  - (h) take possession of any information appearing to be information of the relevant kind that is produced as a result of operating equipment found on the premises under point (b) above, or which is given to an authorised officer under point (d) above;

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<sup>292</sup> Section 75(2) of the Act.

<sup>293</sup> Section 75(4) of the Act

<sup>294</sup> For example, this power could be used to operate equipment so that electronic information can be transferred securely to CMA devices or where an undertaking or its employees cannot or will not produce the required information in such a form.

- (i) take possession of any other information appearing to be information of the relevant kind if such action appears to be necessary for preserving the information or preventing interference with it; or it is not reasonably practicable to take copies of the information on the premises;
- (j) take any other steps which appear to be necessary for the purpose of preserving any information appearing to be of the relevant kind or preventing interference with it.<sup>295</sup>

5.60 In addition to the CMA's powers described above, the warrant also authorises CMA officers to search the premises for information appearing to be information of the relevant kind. The search may cover, for example, offices, desks, filing cabinets, electronic devices such as computers, mobile phones and tablets, as well as any information, on, or accessible from, the premises. The CMA can also take away from the premises:

- (a) any information, or copies of it, to determine whether it is relevant to the investigation, when it is not practicable to do so at the premises. If the CMA considers later on that the information is outside the scope of the investigation, the CMA will return it;<sup>296</sup>
- (b) any relevant information, or copies of it, contained in something else where it is not practicable to separate out the relevant information at the premises. As above, the CMA will return information if it considers later on that it is outside the scope of the investigation; and/or
- (c) copies of computer hard drives, mobile phones, mobile email devices and other electronic devices.

5.61 Any information given to an officer must be provided in a form in which it can be taken away; and which is visible and legible, or from which it can be readily generated in a visible and legible form. This includes the ability for the CMA to require information to be provided in electronic form.<sup>297</sup>

5.62 The power to enter premises under a warrant under section 75 of the Act is not exercisable in relation to premises outside the United Kingdom.<sup>298</sup> However, these powers are exercisable in relation to information whether it is

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<sup>295</sup> Section 75(2) of the Act. In addition, section 77 of the Act amends certain provisions of the Criminal Justice and Police Act 2001 to provide for additional powers under Part 2 of the CJA to seize information and take copies of, or extracts from, information when the CMA exercises its power to enter premises under a warrant.

<sup>296</sup> However, the CMA may retain all of the material if it is not reasonably practicable to separate the relevant information from the irrelevant information without prejudicing its lawful use, for example, as evidence.

<sup>297</sup> Section 75(3) of the Act.

<sup>298</sup> Section 76(6) of the Act.



stored within or outside the United Kingdom.<sup>299</sup> A CMA officer may therefore access information regardless of where it is physically stored, for example, information accessible online or on a remote server.

- 5.63 Any information which the CMA obtains under section 75(2) of the Act may be retained for a period of three months.<sup>300</sup>

### ***Legal representation***

- 5.64 An occupier may ask legal advisers to be present during an inspection, whether the inspection is carried out without a warrant or under a warrant. If the occupier has not been given notice of the visit, and there is no in-house lawyer on a premises, CMA officers may wait a reasonable time for legal advisers to arrive. During this time, the CMA may take necessary measures to prevent tampering with relevant information.

### ***Reports by skilled persons***

- 5.65 The CMA may require a skilled person to report to it on a matter relevant to the operation of the regime.<sup>301</sup> A skilled person could be any external third party with relevant expertise, such as an accounting firm, management consultancy or an individual with technical expertise such as a software engineer.
- 5.66 The CMA may exercise the power to require a report by a skilled person in relation to an SMS firm, a firm that is the subject of a breach investigation or a firm that is the subject of an SMS investigation, for the purpose of exercising, or deciding whether to exercise, any of its digital markets functions.<sup>302</sup>
- 5.67 The CMA may require a skilled person report, for example:
- (a) Where the CMA requires specific expertise, for example, in relation to a technical matter, including as part of a compliance review or breach investigation.
  - (b) Where the CMA considers it necessary and/or beneficial for a third party to provide an independent assessment of a particular issue. For example, where it is necessary for a third party to verify particular data.

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<sup>299</sup> Section 76(7) of the Act.

<sup>300</sup> Section 75(6) of the Act.

<sup>301</sup> Section 79 of the Act.

<sup>302</sup> Section 79(1) of the Act.

- (c) In limited cases, where a report is necessary for evidence gathering purposes, for example, in order to assess whether enforcement action is required.
- 5.68 Where the CMA appoints a skilled person to provide it with a report, the CMA must give notice of the appointment and the relevant matters to be included in the report, to the firm in question.<sup>303</sup>
- 5.69 The CMA's usual approach will be to give notice to the firm requiring it to make the appointment of the skilled person. In this circumstance, the CMA may give notice to the firm setting out the relevant matters to be included in the report and that the firm may not make the appointment until the CMA has approved in writing:
- (a) the identity of the skilled person, and
  - (b) the terms on which they will be appointed, including in relation to their remuneration and expenses.<sup>304</sup>
- 5.70 The following steps will be taken when the CMA requires a firm to appoint a skilled person to conduct a report:
- (a) The CMA will issue a notice requiring a firm to appoint a skilled person and specifying the scope and deadline for the report.
  - (b) The firm should identify a shortlist of potential skilled persons (most likely three alternative providers) who will be subject to a tender process, which will be subject to CMA approval.
  - (c) If the CMA approves the options, the firm shall review the proposals received from each and choose which provider is their preferred choice. If the CMA rejects the proposed providers, the firm may submit alternatives for consideration or the CMA may choose a provider directly.

### *Remuneration of skilled persons*

- 5.71 A notice informing a firm that the CMA is appointing or requires a firm to appoint a skilled person to produce a report may make provision for the firm to be liable for payment directly to the skilled person.<sup>305</sup>

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<sup>303</sup> Section 79(3) of the Act.

<sup>304</sup> Section 79(5) and 79(6) of the Act.

<sup>305</sup> Section 79(8)–(10) of the Act. Payment due to the skilled person from an undertaking under subsection 79(4) or 79(6)(b) can be recovered through the courts.

### *Duty to assist a skilled person*

- 5.72 It is the duty of the firm and any person connected with<sup>306</sup> the firm to give all such assistance as the skilled person may reasonably require to prepare the report.<sup>307</sup> This may include providing access to business premises, equipment, services, information or individuals, as required. This duty extends to providing access to information and services whether stored or provided within or outside the United Kingdom.<sup>308</sup>
- 5.73 A failure to comply with this duty may result in the CMA imposing a penalty in accordance with section 87 of the Act.<sup>309</sup>

### *Transparency*

- 5.74 The CMA will publish on its website on an annual basis the number of times it has required firms to appoint a skilled person to prepare a report.

### ***Duty to preserve information***

- 5.75 A person has a legal duty to preserve evidence which is relevant to a digital markets investigation,<sup>310</sup> a compliance report by a firm or where the CMA is providing assistance to any overseas regulator, in the following circumstances:
- (a) where a person knows or suspects that a breach investigation or a PCI investigation is being, or is likely to be, carried out in relation to an undertaking;<sup>311</sup>
  - (b) where a person is, or is connected to, an undertaking that is not a designated undertaking and knows that the undertaking is the subject of an initial SMS investigation;<sup>312</sup>
  - (c) where a person is, or is connected to, a designated undertaking and knows that (a) the undertaking is required to produce a compliance report

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<sup>306</sup> Section 117(3) of the Act defines how a person can be connected to an undertaking.

<sup>307</sup> Section 79(12) of the Act. Section 79(13) of the Act provides that this duty does not include a duty to give access to premises, equipment or individuals outside the United Kingdom.

<sup>308</sup> Section 79(14) of the Act.

<sup>309</sup> See [Administrative Penalties: Statement of Policy on the CMA's approach](#) (CMA4).

<sup>310</sup> I.e. an SMS investigation; a breach investigation (including a conduct investigation); or a PCI investigation.

<sup>311</sup> Section 80(2) of the Act.

<sup>312</sup> Section 80(3) of the Act.

under section 84 of the Act, or (b) the undertaking is the subject of a further SMS investigation;<sup>313</sup>

(d) where a person is, or is connected to, an undertaking and knows or suspects that the CMA is assisting or is likely to assist an overseas regulator in carrying out, in relation to the undertaking, any of its functions which correspond or are similar to the digital markets functions of the CMA.<sup>314</sup>

5.76 Where this duty applies, a person must not, without reasonable excuse (a) destroy, otherwise dispose of, falsify or conceal, or (b) cause or permit the destruction, disposal, falsification or concealment of, relevant information.<sup>315</sup>

5.77 Relevant information is information which the person knows or suspects is or would be:

(a) relevant to the types of investigation listed in paragraph 5.75 above;

(b) used by an undertaking to produce the compliance report; or

(c) relevant to the provision of assistance to the overseas regulator.<sup>316</sup>

5.78 The CMA will typically consider a person to know that one of the circumstances listed in paragraph 5.75 is applicable if the CMA has delivered any form of notification, orally or in writing, or if the person has received information through any other forum indicating that one of the circumstances may apply. For example, a person will have knowledge where the CMA is in informal dialogue with a firm in respect of potential non-compliance or has sent a request for information regarding a firm's compliance and the firm knows discussions could progress to a more formal investigation stage.

5.79 In relation to a person suspecting that an investigation is, or is likely to be, carried out by the CMA, the CMA considers that the person does not need to have actual knowledge or otherwise be certain that the CMA is carrying out an investigation, or is likely to. The CMA considers that whether a person can be said to suspect that a breach investigation or PCI investigation is being or is likely to be carried out, will depend on the circumstances of a given case.

5.80 As a matter of good practice, in any of the above circumstances when the duty to preserve information applies, a person should take a broad view of

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<sup>313</sup> Section 80(4) of the Act.

<sup>314</sup> Section 80(5) of the Act.

<sup>315</sup> Section 80(1) of the Act.

<sup>316</sup> Section 80(6) of the Act.

relevant information for these purposes and ensure preservation. For example, the CMA would expect a person to suspend routine document destruction in respect of information and documents which they know or suspect are or would be relevant. The CMA is unlikely to regard automatic destruction of relevant documents under such a programme as a 'reasonable excuse' for the purposes of any penalty that might be applicable for failure to comply with the duty to preserve information.

### ***Privileged communications***

- 5.81 The CMA cannot require a person to produce, generate or give to the CMA (or an officer of the CMA) a 'privileged communication' (ie information subject to legal professional privilege or, in Scotland, confidentiality of communications)<sup>317</sup> when exercising its digital markets investigatory powers under the Act.<sup>318</sup>
- 5.82 This limitation also applies to producing, taking possession of, taking copies of, or extracts from, a privileged communication.<sup>319</sup> However, the CMA has separate powers to seize material (including privileged material) under Part 2 of the Criminal Justice and Police Act 2001. Those powers would apply where the CMA exercises its power to enter business and domestic premises under a warrant under section 75 of the Act.<sup>320</sup>
- 5.83 If there is a dispute during an inspection as to whether communications, or parts of communications, are privileged, a CMA officer may request that the communications are placed in a sealed envelope or package. The officer will then discuss the arrangements for the safe-keeping of these items by the CMA pending resolution of the dispute.

## **Information handling**

### ***Information sharing within the CMA***

- 5.84 The CMA may share and use any information that it obtains for the purposes of facilitating the exercise of any of its statutory functions. Accordingly, information obtained in one context (for example, as part of a CMA market

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<sup>317</sup> The term 'privileged communication' is defined in section 81(3) and (4) of the Act.

<sup>318</sup> Section 81(1) of the Act.

<sup>319</sup> Section 81(2) of the Act. This section also clarifies that this limitation does not apply to or affect the CMA's other powers to seize material which are contained in Part 2 of the Criminal Justice and Police Act 2001. Those powers are described in this paragraph.

<sup>320</sup> Section 77 of the Act amends certain sections of the Criminal Justice and Police Act 2001 to enable the CMA to seize information and take copies of, or extracts from, information when exercising its power under section 75.

study) can be shared and used for the purposes of exercising its digital markets functions. This position is subject to the duties set out under Part 9 of the EA02, further described below.

### *Protecting confidential information*

5.85 In carrying out its digital markets functions, the CMA expects it will be necessary to request information from firms or individuals which may be of a confidential nature. The CMA understands that how it protects and handles confidential information will be an important consideration for those who engage with the regime.

5.86 Part 9 of the EA02 governs the extent to which the CMA is permitted to disclose information received by it in the course of exercising its digital markets functions.<sup>321</sup> This imposes a general restriction on the disclosure of information which the CMA obtains during the exercise of its digital markets functions (referred to as 'specified information') to other persons. The restriction applies during the lifetime of an individual or while the undertaking continues in existence. Only disclosure falling within one of the 'information gateways' set out in Part 9 is permitted.<sup>322</sup>

5.87 It is a criminal offence to disclose or use information to which section 237 applies unless that disclosure or use is permitted by Part 9 of the EA02.<sup>323</sup>

5.88 The CMA follows established procedures to identify and protect confidential information across all of its tools in line with its statutory duties.<sup>324</sup> In protecting confidential information acquired through its digital markets functions it may, for example:

- (a) ask respondents to provide confidential and non-confidential versions of any submissions;
- (b) ensure that information which must be shared with a third party or in the public domain is non-attributable;
- (c) take steps to redact, anonymise or aggregate confidential information, such as providing ranges in relation to market share data.

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<sup>321</sup> Section 109 of the Act extends the provisions of Part 9 of the EA02 to the CMA's digital markets functions under Part 1 of the Act.

<sup>322</sup> Section 239–243 EA02.

<sup>323</sup> Section 245 EA02.

<sup>324</sup> The CMA's approach to identifying confidential information is set out in paragraphs 4.12–4.17 of [Transparency and disclosure: Statement of the CMA's policy and approach](#) (CMA6).

- 5.89 The CMA will take such steps as it considers reasonable and practicable in the circumstances of the case to seek further views on confidentiality from the party claiming confidentiality, or the party to whom the information relates, where it intends to disclose information. Where the CMA gives advance notice of such a disclosure, the CMA may provide details of the information it proposes to disclose relevant to the person concerned, for example by way of a description, inventory or draft of the proposed disclosure. The CMA might choose not to do so if, for example, it considers that the party has already had sufficient opportunity to submit confidentiality claims, or if the CMA has sought to protect the information to be disclosed (for example, by anonymising or aggregating data).
- 5.90 If the CMA considers that it is required by law to disclose confidential information it would consider the most appropriate mechanism for such disclosure. For example, the CMA may consider the use of a confidentiality ring and would engage with parties in advance prior to disclosing information in this way.
- 5.91 Additional information in respect of disclosure relating to specific enforcement action is set out at Chapter 7 of this guidance.

### *Complaints and whistleblowers*

- 5.92 Complaints and whistleblowers will be an important source of information for the CMA to monitor digital markets – see Chapter 6 for more information.

### **Investigative assistance**

- 5.93 Where the CMA assists an overseas regulator in carrying out any of its functions which correspond or are similar to the digital markets functions of the CMA,<sup>325</sup> the CMA may publish a notice of its decision to do so, which may, in particular:
- (a) identify the overseas regulator concerned;
  - (b) summarise the matter in respect of which the assistance is requested; and/or
  - (c) identify the undertaking in respect of which the assistance is requested.<sup>326</sup>

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<sup>325</sup> Under Part 1 of the Act.

<sup>326</sup> Section 82 of the Act. Note: section 82(2) and 112 of the Act does not apply to a notice under subsection (1) to the extent that it includes information other than information mentioned in that subsection.

## 6. Monitoring

### Introduction

- 6.1 Monitoring will be a key part of the CMA's role in overseeing the digital markets competition regime. It will allow the CMA to respond quickly where firms fail to comply with competition requirements under the regime, and to identify where new or varied competition requirements may be necessary.
- 6.2 The CMA will monitor competition requirements, to ensure that they are effective, avoid unintended consequences and are targeted to those areas that are the most impactful.
- 6.3 **'Competition requirements'** are the requirements imposed on SMS firms under the Act. These are:
- (a) conduct requirements (**'CRs'**);
  - (b) requirements imposed by interim enforcement orders (**'IEOs'**);
  - (c) requirements imposed by enforcement orders (**'EOs'**);
  - (d) requirements imposed by final offer orders;
  - (e) requirements imposed by pro-competition orders (**'PCOs'**);
  - (f) requirements to comply with commitments; and
  - (g) merger reporting requirements.<sup>327</sup>
- 6.4 There are three key areas of monitoring:
- (a) Monitoring SMS firms' compliance with competition requirements and the appropriateness of taking further action (for example enforcement action).<sup>328</sup>
  - (b) Monitoring the effectiveness of existing competition requirements to determine if they are having the intended impact.

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<sup>327</sup> These requirements are referred to in section 85 of the Act (penalties for failure to comply with competition requirements). Note that in this chapter, monitoring of merger reporting requirements is not covered. For more information on merger reporting requirements, please see the [CMA's Guidance on the merger reporting requirement for SMS firms](#).

<sup>328</sup> The CMA's approach to enforcement of CRs is set out in Chapter 7 (enforcement of competition requirements) and Chapter 8 (penalties) of this guidance.



- (c) Monitoring to assess whether evidence suggests that competition could be strengthened, or harms prevented, by launching new SMS investigations or imposing new CRs or pro-competition interventions ('PCIs') and whether there is a need to vary or revoke existing competition requirements.

6.5 This chapter is structured as follows:

- (a) Section 1 sets out how the CMA will approach evidence gathering for the purposes of monitoring.
- (b) Section 2 sets out how the CMA will monitor compliance with competition requirements.
- (c) Section 3 sets out how the CMA will monitor effectiveness of competition requirements.
- (d) Section 4 sets out how the CMA will monitor whether to impose, vary or revoke competition requirements.

6.6 The procedural steps for imposing, varying and revoking competition requirements are set out in the respective section of the guidance for each competition requirement.

## **Evidence gathering**

6.7 This section sets out the CMA's approach to evidence gathering for the purposes of monitoring, including:

- (a) the types of evidence the CMA will monitor;
- (b) the role of complaints; and
- (c) the role of whistleblowers.

### ***Types of evidence***

6.8 The CMA will monitor a range of quantitative and qualitative evidence related to the three areas in paragraph 6.4 above.

6.9 In addition to specific case-by-case information that the CMA will consider depending on the issue in hand, there is some general information it expects to monitor on an ongoing basis. The CMA may gather information from SMS firms or other organisations using its statutory information gathering powers.

More information on how the CMA may use these powers is in Chapter 5 of this guidance.

6.10 A non-exhaustive list of information sources includes:

- (a) outputs of the CMA's horizon scanning work which will help inform a view on mid to long term potential future developments in digital markets. The horizon scanning process is likely to involve collecting and collating trends from a variety of sources, including engaging with experts from a broad range of fields and expertise, and primary scanning of news sources and reports;<sup>329</sup>
- (b) other market intelligence, market/financial data, and research such as consumer surveys;
- (c) submissions from SMS firms (for example on proposed changes to competition requirements);
- (d) submissions and feedback from third parties including challenger businesses (for example on effectiveness of competition requirements or their experience engaging with SMS firms);
- (e) SMS firms' compliance reports (see paragraph 6.40 below); and
- (f) complaints and information from whistleblowers (see paragraphs 6.15 to 6.22 below).

6.11 SMS firms and third parties may wish to provide submissions or complaints to the CMA on several issues that it is monitoring, such as:

- (a) SMS firms' compliance with competition requirements;
- (b) effectiveness of competition requirements; and
- (c) whether to vary or revoke competition requirements.

6.12 In providing such submissions to the CMA, SMS firms and third parties may wish to provide comments/views on the following questions, as relevant:

- (a) which specific competition requirement is the subject of the submission and an explanation of what the issue is;

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<sup>329</sup> For example, see [Trends in Digital Markets](#).

- (b) what (if anything) has changed since the competition requirement was imposed;
- (c) what (if any) changes should be made to the competition requirement (eg to make it more effective)<sup>330</sup> and whether any changes to other competition requirements should be considered in parallel (for example where a package of competition requirements has been designed and imposed to address a specific concern);
- (d) why the suggested changes to the competition requirement would not lead to harm/unintended consequences;
- (e) whether any transitional, transitory or saving provisions should apply; and
- (f) whether the request is being raised to avoid a breach of the competition requirement (only relevant to SMS firms providing submissions).

6.13 Submissions should be reasoned and, where possible, accompanied by supporting evidence. This will assist the CMA in deciding which issues to prioritise for further review.

6.14 The CMA has discretion in determining the appropriate course of action or response to submissions received from SMS firms and third parties on the competition requirements, including whether any changes need to be made to the competition requirement or whether any other action should be taken (eg enforcement action). Following receipt of a submission, when assessing whether to undertake further review, the CMA may take account of factors including:

- (a) the materiality of change being suggested or requested;
- (b) the scale of harm indicated in the submission;
- (c) the quality and extent of supporting evidence; and
- (d) the CMA's Prioritisation Principles.<sup>331</sup>

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<sup>330</sup> For example, where changes to a PCO are suggested, the submission could include comments on whether the CMA should trial the suggested changes and if so, what the design of the trial might look like (format, length of trial, number of users etc).

<sup>331</sup> [CMA Prioritisation Principles](#)

## Complaints

- 6.15 Complaints will be an important source of information for the CMA when it is monitoring digital markets. For instance, complaints will assist the CMA in monitoring compliance and could help to identify potential breaches of competition requirements. More generally, complaints will allow the CMA to become aware of competition and consumer protection issues in relation to digital activities that may be of concern.
- 6.16 The CMA encourages businesses and consumers to contact the CMA to provide information on issues which fall within the remit of its digital markets functions. Information about how to contact the CMA is available on the CMA's website.<sup>332</sup>
- 6.17 The CMA will consider all complaints it receives in relation to its digital markets functions. However, it may not be able to respond to each individual complainant or investigate every complaint. The CMA will assess whether to progress a matter for further investigation in accordance with its Prioritisation Principles.<sup>333</sup>
- 6.18 The CMA understands that individuals and organisations may want to ensure that details of their complaints are not made public. If a complainant has specific concerns about disclosure of its identity or its commercially sensitive information, it should let the CMA know at the same time as submitting its complaint. Complainants can also make a complaint anonymously, although this may limit the extent to which the CMA is able to investigate the complaint if the CMA is not able to verify information in the complaint or contact the complainant to request more information.<sup>334</sup>
- 6.19 The CMA will take all reasonable steps to protect the identity of complainants and the confidentiality of any information they provide. As noted in paragraph 5.86 of Chapter 5, the CMA is under statutory obligations to protect the confidentiality of information relating to individuals and businesses where that information comes to it in connection with the exercise of its statutory functions. In some circumstances, the CMA may be required by law to disclose information relating to a complaint. In these instances, and where

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<sup>332</sup> The CMA also welcomes complaints about any other suspected breaches of competition and consumer law not relating to its digital markets functions, or issues with markets more generally. For more information about how to contact the CMA, see: [Contact the CMA](#).

<sup>333</sup> [CMA Prioritisation Principles](#)

<sup>334</sup> Even where the CMA is not able to investigate anonymous complaints on an individual basis, such complaints may nonetheless be useful for intelligence gathering and assisting the CMA to determine compliance monitoring priorities. The CMA therefore welcomes all information that may be relevant to its digital markets functions, whether on an identified or anonymous basis.

possible, the CMA will seek to put in place measures to mitigate the risks of disclosure.

### **Whistleblowers**

- 6.20 Employees and former employees of a firm that is subject to competition requirements under the regime may provide the CMA with information and/or raise a concern about the firm's compliance with those requirements.
- 6.21 Whistleblower provisions in the Employment Rights Act 1996 apply to qualifying disclosures made to the CMA by a whistleblower relating to a designated undertaking's compliance with the digital markets competition regime.<sup>335</sup> The Employment Rights Act 1996 provides protection for workers who may suffer a detriment as a result of whistleblowing by making a qualifying disclosure (including protection against retaliation by their employer such as dismissal or demotion).
- 6.22 For further information about whistleblower protections, including the process the CMA will follow when a whistleblower makes a report refer to the CMA's Guidance on whistleblowing.<sup>336</sup>

### **Monitoring compliance**

- 6.23 This section explains how the CMA will monitor SMS firms' compliance with competition requirements under the regime. It sets out:
- (a) the CMA's approach to monitoring compliance;
  - (b) the role of nominated officers and their statutory functions;
  - (c) compliance reporting obligations applying to SMS firms; and
  - (d) the CMA's approach to resolving compliance concerns outside of enforcement action.

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<sup>335</sup> Section 115 of the Act provides that disclosures made by a whistleblower relating to a designated undertaking's compliance with the digital regime, are considered qualifying disclosures for the purposes of the whistleblower provisions in the Employment Rights Act 1996 under the entry for the Competition and Markets Authority in the Public Interest Disclosure (Prescribed Persons) Order 2014.

<sup>336</sup> [CMA Guidance on whistleblowing](#)

## ***The CMA's approach to monitoring compliance***

- 6.24 It is the responsibility of SMS firms to comply with all requirements under the regime and the CMA expects firms to be able to demonstrate their compliance.
- 6.25 Under the Act, the CMA must keep under review the extent to which each SMS firm is complying with the competition requirements to which it is subject, including, as relevant:
- (a) CRs;<sup>337</sup>
  - (b) EOs and IEOs;<sup>338</sup>
  - (c) commitments it has given the CMA;<sup>339</sup>
  - (d) final offer orders;<sup>340</sup> and
  - (e) PCOs.<sup>341</sup>
- 6.26 The CMA must also keep under review whether to take enforcement action in relation to breaches or suspected breaches of these requirements.<sup>342</sup> The CMA's approach to enforcement action in relation to competition requirements is explained in Chapter 7 (enforcement of competition requirements) and Chapter 8 (penalties).<sup>343</sup>
- 6.27 As set out at paragraph 6.10 above, the CMA expects to gather information from a wide range of sources to inform its compliance monitoring work, including from complaints and whistleblowers. The CMA encourages individuals and organisations to contact it in relation to any concerns about an SMS firm's compliance with requirements under the regime. The CMA may also use its statutory information gathering powers (see Chapter 5), as necessary or appropriate.

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<sup>337</sup> Section 25(b) of the Act.

<sup>338</sup> Section 35(a) of the Act.

<sup>339</sup> Section 37(b) of the Act.

<sup>340</sup> Section 45(a) of the Act.

<sup>341</sup> Section 55(4)(b) of the Act.

<sup>342</sup> Sections 25(d), 35(e), 37(c), 45(d) and 55(4)(c) of the Act.

<sup>343</sup> The CMA's policy in relation to administrative penalties for failures under section 85(2) (IEOs only), 85(4) and 87 is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

## ***Nominated officer***

- 6.28 A firm that is subject to certain competition requirements (**‘relevant competition requirements’**) under the regime is required to have in place a nominated officer in respect of each relevant requirement.<sup>344</sup>
- 6.29 The relevant competition requirements (referred to in the Act as ‘digital markets requirements’) are CRs, a requirement imposed by virtue of a PCO, or a requirement to comply with a commitment under section 56 of the Act.<sup>345</sup>
- 6.30 A nominated officer in relation to a relevant competition requirement must fulfil the following functions:
- (a) monitoring the SMS firm’s compliance with the relevant competition requirement and all related requirements;<sup>346</sup>
  - (b) cooperating with the CMA for the purposes of securing that the SMS firm complies with the relevant competition requirement and all related requirements to the satisfaction of the CMA; and
  - (c) securing that the SMS firm complies with the requirements in relation to compliance reports (see paragraphs 6.40 to 6.55 below).<sup>347</sup>
- 6.31 The requirement to appoint a nominated officer applies from the date a firm becomes subject to the relevant competition requirement. A firm becomes ‘subject to’ a competition requirement from the date the CMA imposes the requirement on the SMS firm, or in the case of commitments, the date the CMA accepts the commitment offered by the SMS firm.<sup>348</sup> This is the case

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<sup>344</sup> Section 83(1) of the Act.

<sup>345</sup> Section 83(3) of the Act.

<sup>346</sup> As defined in section 83(4) of the Act, ‘related requirements’ include: (a) in respect of CRs, a requirement imposed by virtue of an EO, IEO, a commitment, or a final offer order; and (b) in respect of PCOs, a requirement in a direction under section 87 of EA02 (delegated power of directions). This means, for example, that if an individual is appointed as a nominated officer in respect of a CR, they are responsible for any subsequent EOs, IEOs and commitments made in connection to it.

<sup>347</sup> Section 83(2) of the Act.

<sup>348</sup> In relation to CRs, an SMS firm is subject to a CR from the date that the CMA gives the SMS firm a CR notice under section 19(1) of the Act (see paragraphs 3.48–3.52 in Chapter 3 of this guidance). In relation to PCOs, an SMS firm is subject to a PCO from the date that the CMA makes a relevant order under section 51 of the Act (see paragraphs 4.60–4.64 in Chapter 4 of this guidance). In relation to commitments, an SMS firm is subject to a commitment from the date that the CMA publishes a notice of its acceptance of the commitment under section 56(6) of the Act (see paragraph 7.86 in Chapter 7 of this guidance).

even where the CMA specifies that the competition requirement ‘comes into force’ on a future date.<sup>349</sup>

### *Identity of nominated officer*

- 6.32 An SMS firm may only appoint an individual as a nominated officer in relation to a competition requirement if they meet the requirements set out in the Act. The individual must be someone who the SMS firm considers to be a ‘senior manager’ within the meaning of section 70(3) of the Act (see paragraphs 5.25 to 5.26 of Chapter 5) and who the SMS firm reasonably expects to be in a position to fulfil the statutory functions of the nominated officer set out in paragraph 6.30 above.<sup>350</sup>
- 6.33 An individual appointed as a nominated officer should have sufficient visibility and control over operational decisions in respect of the relevant digital activity to be able to effectively fulfil their statutory functions. This is particularly the case given the consequences for the individual (and the SMS firm) that may result from a failure to fulfil their statutory functions. In particular, as set out below, a nominated officer may be subject to a penalty where they fail, without reasonable excuse, to prevent the SMS firm from failing to comply with a compliance reporting requirement. The firm that appointed the individual as nominated officer may also be fined in these circumstances.<sup>351</sup>
- 6.34 It will be the responsibility of the relevant SMS firm to appoint an individual with sufficient seniority to fulfil the functions of a nominated officer. To be able to fulfil their statutory functions, the CMA considers that a nominated officer is likely to need to be a senior manager with operational responsibility for the SMS firm’s business model, product design and/or strategy in relation to the relevant digital activity.
- 6.35 The SMS firm may appoint the same person as nominated officer in relation to multiple competition requirements. For example, an SMS firm may appoint the same person as nominated officer for all relevant competition requirements applying to a particular digital activity. It is also open to an SMS firm to appoint different nominated officers in relation to different competition requirements (for example, where a firm is subject to multiple CRs, the firm may appoint different nominated officers for each CR).

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<sup>349</sup> For example, where the CMA gives an SMS firm a CR notice under section 21 of the Act which specifies that the CR comes into force on a future date (see section 21(c)), or where the CMA makes a PCO under section 51 of the Act that comes into force on a future date (see section 53(1)).

<sup>350</sup> Section 83(5) of the Act.

<sup>351</sup> Section 87(3) of the Act.



- 6.36 As soon as reasonably practicable after an SMS firm becomes subject to a relevant competition requirement, the SMS firm must inform the CMA of the identity of the nominated officer in relation to that competition requirement.<sup>352</sup> The SMS firm should provide the CMA with contact details for the nominated officer, including their postal address, email address and telephone number.
- 6.37 If an SMS firm appoints a replacement nominated officer in relation to a competition requirement, the SMS firm must inform the CMA of the identity of the replacement nominated officer as soon as reasonably practicable after they have been appointed.<sup>353</sup>

#### *Role of nominated officer*

- 6.38 Consistent with the statutory functions of the nominated officer as set out in paragraph 6.30 above, the CMA's expectations of an individual appointed as a nominated officer in relation to a competition requirement include that they should:
- (a) Be responsive to requests by the CMA to discuss compliance issues in respect of the competition requirement, including ensuring the SMS firm responds comprehensively and in a timely manner to CMA requests for information regarding any compliance concerns.
  - (b) Ensure the SMS firm complies with its obligations in relation to compliance reports, as set out in paragraphs 6.40 to 6.55 below, and be prepared to discuss the contents of compliance reports with the CMA.
  - (c) Proactively inform the CMA of any issue(s) relating to the SMS firm's compliance with the competition requirement as soon as practicable after they become aware of any such issue(s) and explain the steps the SMS firm has taken or will take to address the compliance issue(s).
  - (d) Engage as reasonably appropriate with relevant stakeholders (including users of the relevant digital activity to which the digital markets requirement relates) about the firm's compliance plans and any concerns about the SMS firm's compliance with the competition requirement.
- 6.39 Where there is an implementation period between the date the CMA imposes a competition requirement on an SMS firm and the date the competition

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<sup>352</sup> Section 83(6) of the Act.

<sup>353</sup> Section 83(6) of the Act.

requirement comes into force,<sup>354</sup> the CMA expects the nominated officer in relation to that requirement to work with the CMA during this period to assist the CMA to understand the SMS firm's plans for compliance with the requirement and the SMS firm's progress against those plans.

### **Compliance reports**

- 6.40 An SMS firm that is subject to a relevant competition requirement must provide the CMA with periodic compliance reports in respect of that requirement (**'compliance reports'**).<sup>355</sup>
- 6.41 A compliance report must set out:<sup>356</sup>
- (a) the extent to which the nominated officer for the relevant competition requirement considers that the SMS firm has complied with the competition requirement and each related requirement during the reporting period;
  - (b) how the SMS firm has complied, and intends to continue to comply, with the relevant competition requirement and each related requirement; and
  - (c) such other information as the CMA may direct in relation to compliance with the relevant competition requirement and each related requirement.
- 6.42 As explained above, the nominated officer for a relevant competition requirement is responsible for compliance reports in relation to that requirement and related requirements.<sup>357</sup> A nominated officer may delegate responsibility for drafting all or part of a compliance report. However, the CMA expects a nominated officer to take all steps reasonably necessary to satisfy themselves that the information in a compliance report is complete, accurate and not misleading.<sup>358</sup>

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<sup>354</sup> See paragraphs 3.59 –3.63 in Chapter 3 of this guidance in relation to CRs. See paragraph 4.62 in Chapter 4 of this guidance in relation to PCIs.

<sup>355</sup> Section 84(1) of the Act.

<sup>356</sup> Section 84(2) of the Act.

<sup>357</sup> 'Related requirements' are defined in section 83(4) of the Act. See also footnote 346 above.

<sup>358</sup> As noted in paragraph 6.55, a nominated officer may be personally liable for a penalty where the CMA considers that the individual has failed, without reasonable excuse, to prevent the SMS firm from failing to comply with a compliance reporting requirement in relation to that digital markets requirement (section 87(3) of the Act).

## *Compliance reporting notice*

- 6.43 At the same time as imposing a relevant competition requirement on an SMS firm, the CMA must give the SMS firm a notice (**'compliance reporting notice'**) specifying:<sup>359</sup>
- (a) the manner and form of the compliance report to be provided in relation to that competition requirement; and
  - (b) the reporting period for that competition requirement.
- 6.44 The CMA will specify in the compliance reporting notice when compliance reports should be submitted, what information they should contain, and what form they should take. The information that the CMA requires SMS firms to provide in compliance reports is likely to vary across competition requirements.
- 6.45 Reporting periods may also vary across competition requirements. In determining the frequency of reporting in relation to a competition requirement, the CMA will consider what is appropriate in the circumstances. It may take into account a range of factors, such as the complexity of the competition requirement, and the type of information the CMA considers that it requires to be able to effectively monitor compliance. The CMA will also have regard to its duty to keep under review the effectiveness of, and the firm's compliance with, competition requirements.<sup>360</sup>
- 6.46 The CMA will typically consult on the substance of compliance reporting obligations before imposing a relevant competition requirement. This consultation may take place at the same time that the CMA consults on the proposed competition requirement,<sup>361</sup> or separately. The CMA will typically seek views from relevant stakeholders (including users of the digital activity to which the requirement relates) on the information that an SMS firm should be required to provide in compliance reports, so that the CMA can effectively monitor compliance with the competition requirement. The CMA will typically also seek views from the SMS firm on practical issues associated with the proposed form of compliance reports and reporting periods. The CMA will take into account representations received from all stakeholders before

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<sup>359</sup> Section 84(3) of the Act.

<sup>360</sup> Section 25 of the Act in respect of CRs; section 35 in respect of EOs; sections 37 and 56(8)(b) in respect of commitments; section 45 in respect of final offer orders; and section 55 in respect of PCOs.

<sup>361</sup> See paragraphs 3.41–3.47 in Chapter 3 of this guidance in relation to CRs. See paragraphs 4.55–4.56 in Chapter 4 of this guidance in relation to PCOs. See paragraph 7.84 in Chapter 7 of this guidance in relation to commitments.

issuing a compliance reporting notice in respect of the competition requirement.

- 6.47 The CMA may specify in a compliance reporting notice that the nominated officer in relation to the relevant competition requirement must sign a declaration in a specified form confirming that they have taken reasonable steps to satisfy themselves that the information contained in the compliance report is complete and accurate.
- 6.48 The CMA may amend the requirements specified in a compliance reporting notice by giving an SMS firm a further notice (**'further compliance reporting notice'**).<sup>362</sup> Before issuing a further compliance reporting notice, the CMA may consult on proposed changes to compliance reporting requirements but will not necessarily do so. This will depend on the nature and extent of the changes to the compliance reporting requirements.
- 6.49 The CMA will publish compliance reporting notices and any further compliance reporting notices on its website.

#### *Publication of compliance reports and summaries of compliance reports*

- 6.50 The CMA may give a firm a notice requiring it to publish a compliance report or a summary of a compliance report (**'summary compliance report'**).<sup>363</sup> This may include a requirement for the firm to publish a copy of the compliance report or summary compliance report on the SMS firm's website and/or make it available in hard copy at the firm's registered office.
- 6.51 The CMA will typically require an SMS firm to publish a summary compliance report in relation to those relevant competition requirements to which it is subject. As well as being an important source of information for the CMA as it monitors an SMS firm's compliance with a competition requirement, compliance reports may also contain information that is of interest to third parties who may be adversely impacted by a failure of an SMS firm to comply with the relevant requirement. By requiring SMS firms to publish summary compliance reports, the CMA aims to promote transparency and assist third parties to independently verify compliance with competition requirements.
- 6.52 The CMA will specify information that the SMS firm must include in the summary compliance report. The CMA will consider what is appropriate on a case-by-case basis. In making this assessment, the CMA will have regard to

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<sup>362</sup> Section 84(4) of the Act.

<sup>363</sup> Section 84(5) of the Act.

the likely value of information in assisting third parties to monitor an SMS firm's compliance with the competition requirement, as well as the sensitivity of the information and any adverse consequences that may result from publication of that information.

- 6.53 Summary compliance reports should contain sufficient information to allow third parties to assess the extent to which an SMS firm is complying with a competition requirement, including by identifying any failures of compliance and the steps the SMS firm has taken or is planning to take to resolve the concerns.

#### *Adequacy of compliance reports and fines for non-compliance*

- 6.54 Where the CMA has concerns about the adequacy of a compliance report, the CMA will typically raise these concerns with the nominated officer responsible for the compliance report in the first instance. The CMA may require that the SMS firm provide an updated compliance report in response to the CMA's concerns. The CMA may also issue a written request for further information.
- 6.55 The CMA may impose penalties in relation to a failure to comply with compliance reporting requirements. The CMA may impose a penalty on a nominated officer where the CMA considers that the nominated officer has failed, without reasonable excuse, to prevent the SMS firm from failing to comply with a compliance reporting requirement.<sup>364</sup> The CMA may also impose a penalty on the SMS firm that appointed the nominated officer in these circumstances.<sup>365</sup> For more information on the circumstances in which the CMA may impose a penalty in relation to breach of an investigative requirement, including a compliance reporting requirement, and the CMA's approach to considering 'reasonable excuses', refer to Administrative Penalties: Statement of Policy on the CMA's approach (CMA4).<sup>366</sup>

#### *Proactive reporting of compliance issues*

- 6.56 In addition to statutory compliance reporting requirements, the CMA expects SMS firms to proactively notify the CMA of any issues relating to their compliance with competition requirements.

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<sup>364</sup> Section 87(3) of the Act.

<sup>365</sup> Section 87(3) of the Act.

<sup>366</sup> The CMA will be consulting in due course on an updated version of CMA4 that, among other things, sets out the CMA's approach to penalties for breaches of certain of the Act's digital markets provisions.

6.57 Where a relevant nominated officer becomes aware that an SMS firm may not be fully complying with a competition requirement, or that there is a risk that the firm may not continue to comply with a competition requirement, the nominated officer should inform the CMA of this. The nominated officer should provide a detailed explanation of the circumstances giving rise to non-compliance (or risk of non-compliance) and outline the steps the firm plans to take to bring itself into compliance or address the risk of non-compliance. The nominated officer should notify the CMA of any compliance concerns and provide all necessary details as quickly as possible.

### ***Responding to compliance concerns***

6.58 The CMA expects SMS firms to directly engage their users and other stakeholders to seek to resolve compliance concerns in the first instance. However, the CMA may intervene, including where this does not occur or is not effective. This may take the form of participative resolution or enforcement (which is discussed further in Chapter 7).

6.59 Where it is possible and appropriate to do so, the CMA will seek to achieve a participative resolution of compliance concerns identified by its monitoring activities through engagement with the relevant SMS firm. In considering whether participative resolution is appropriate, the CMA may, for example, take the following factors into account:

- (a) the extent to which the firm has engaged in good faith with its users and/or other stakeholders in relation to the concerns;
- (b) the extent and nature of any cooperation by the relevant SMS firm with the CMA, including (i) whether the SMS firm promptly informed the CMA of the concern; and (ii) the extent to which the SMS firm has engaged openly and constructively with the CMA;
- (c) the extent to which conduct by the SMS firm giving rise to the compliance concern is isolated and/or inadvertent in its nature;
- (d) the extent to which resolution without enforcement action is likely to achieve timely, durable and effective changes in conduct by the firm and/or positive outcomes for affected market participants;
- (e) the likely effectiveness and practicability of monitoring the SMS firm's compliance.

6.60 Where the CMA considers it is appropriate to resolve compliance concerns in this manner, it may take one or more of a range of actions as appropriate in the circumstances, including:

- (a) **Engagement:** The CMA may seek to resolve concerns through bilateral dialogue with the SMS firm and/or multilateral dialogue with the SMS firm and relevant third parties.
- (b) **Letter of concerns:** The CMA may write to an SMS firm setting out its compliance concerns and potentially suggesting ways that the firm may be able to resolve its concerns.
- (c) **Voluntary undertakings:** The CMA may accept from an SMS firm undertakings in relation to resolution actions.<sup>367</sup> The CMA may require that the firm appoint a Monitoring Trustee to oversee and report to the CMA in relation to the firm's compliance with undertakings. The CMA recognises that the actions of SMS firms will often have significant implications for market participants. In seeking to resolve compliance concerns, the CMA may require SMS firms to consult with affected stakeholders in relation to a proposed resolution before the CMA agrees to accept the undertakings.

6.61 The CMA has enforcement powers in relation to breaches of competition requirements under the Act. The CMA will use these powers where it is appropriate to do so, which may include where it considers it is not appropriate to address a concern through participative resolution, where a firm does not commit in a timely manner to suitable resolution steps in relation to a breach of a competition requirement, or where it does not adhere to agreed resolution steps. Further information about the CMA's approach to enforcement of competition requirements is provided in Chapter 7.

## Monitoring effectiveness

6.62 Monitoring effectiveness will allow the CMA to understand whether its competition requirements are working as intended or if they need changing. It will also assist the CMA in iterating its approach, learning from these cases.<sup>368</sup>

6.63 This section sets out:

- (a) how the CMA will design effective competition requirements;

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<sup>367</sup> A voluntary undertaking may be offered by an SMS firm in relation to a compliance concern prior to the CMA launching enforcement action in relation to a competition requirement. It is separate from a commitment given under section 36 of the Act.

<sup>368</sup> The CMA has no statutory duty to monitor commitments given under sections 36 and 56 of the Act for effectiveness, and as such the principles set out in this section may not apply directly to commitments. However, the CMA will nonetheless keep under consideration whether or not commitments remain appropriate, as required under section 37 of the Act.

- (b) when the CMA may conduct reviews of the effectiveness of competition requirements;
- (c) how the CMA will monitor and evaluate effectiveness of competition requirements; and
- (d) the potential outcomes of reviews into the effectiveness of competition requirements.

### ***Designing effective competition requirements***

- 6.64 The CMA will only impose competition requirements that it deems to be effective and under the Act, the CMA must keep under review the effectiveness of CRs, PCOs, EOs, IEOs, and final offer orders.<sup>369</sup>
- 6.65 To review effectiveness, the CMA will refer to the original purpose/aim of the competition requirement to understand whether it is having the intended impact. The following chapters explain the purpose/aim of each competition requirement:
- (a) CRs, Chapter 3, paragraphs 3.19 to 3.23;
  - (b) PCOs, Chapter 4, paragraph 4.21;
  - (c) IEOs, Chapter 7, paragraph 7.42;
  - (d) EOs, Chapter 7, paragraph 7.92; and
  - (e) Final offer orders, Chapter 7, paragraph 7.140 and 7.141.
- 6.66 In addition, the CMA explains how it will design effective CRs and PCIs:
- (a) How the CMA designs effective and proportionate CRs – Chapter 3, paragraphs 3.16 to 3.33; and
  - (b) identifying effective PCIs – Chapter 4, paragraphs 4.22 to 4.33.
- 6.67 In some cases, at the time of imposing a competition requirement, the CMA may consult on the metrics that it may consider in its review of effectiveness. Any consultation may also include reference to evidence that the CMA considers it requires on a regular basis to keep effectiveness under review (for example, data on user numbers for a given product/activity). This consultation may take place when the CMA consults on the proposed

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<sup>369</sup> Sections 25(c), 35(b), 45(b) and 55(4)(a) of the Act.



competition requirement<sup>370</sup> or separately. The CMA may also need to gather additional information that was not identified in any original consultation to assess effectiveness.

### ***Timing of effectiveness reviews***

- 6.68 The CMA must carry out a further SMS investigation before the end of the five-year designation period, allowing for a nine-month investigation period.<sup>371</sup> A further SMS investigation is an investigation whether to revoke an SMS designation, re-designate a firm as having SMS in respect of the same digital activity, consider whether a firm should be designated as having SMS in respect of a similar or connected digital activity, or to make provision in respect of existing obligations.<sup>372</sup>
- 6.69 The CMA may decide to seek views specifically on effectiveness as part of the further SMS investigation invitation to comment or consultation process,<sup>373</sup> including input on how competition requirements should be adjusted if there are concerns about effectiveness.
- 6.70 In addition to the CMA's duty to keep the effectiveness of PCOs under review on an ongoing basis, at the time of imposing a PCO, the CMA is required<sup>374</sup> to ensure that the PCO includes a review date.<sup>375</sup> The review date set out in the PCO is the latest date by which the CMA will carry out its review and it will seek input from the SMS firm and relevant stakeholders prior to that date.
- 6.71 An earlier review of any competition requirement may be appropriate if the CMA identifies sufficient reason to do so through its ongoing monitoring described above, for instance in response to well-evidenced submissions regarding effectiveness.

### ***Monitoring and evaluating effectiveness***

- 6.72 The CMA will rely on a mix of qualitative and quantitative evidence in its assessments of effectiveness, described in general above, as well as any evidence gathered specifically to support its review of effectiveness (as per

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<sup>370</sup> See paragraphs 3.41–3.47 in Chapter 3 of this guidance in relation to CRs. See paragraphs 4.55–4.56 in Chapter 4 of this guidance in relation to PCOs. See paragraph 7.84 in Chapter 7 of this guidance in relation to commitments.

<sup>371</sup> Section 10(2) of the Act.

<sup>372</sup> Section 10(3) of the Act. See paragraphs 2.94–2.96 in Chapter 2 of this guidance.

<sup>373</sup> See paragraphs 2.82–2.85 in Chapter 2 of this guidance.

<sup>374</sup> Section 51(5) of the Act.

<sup>375</sup> Section 55(1)–(3) of the Act.

paragraph 6.10 above). The specific type of information that is most relevant for the CMA to monitor may vary by competition requirement and it may take some time for there to be a sufficient body of evidence to facilitate a meaningful review of the effectiveness of the intervention.

- 6.73 The approach the CMA will take to review effectiveness will depend on the specifics of the competition requirement being reviewed. However, it is likely that the CMA will review an updated version of the same or similar type of evidence to that which was provided in its investigation, and which led to it imposing the competition requirement.<sup>376</sup>
- 6.74 The CMA also recognises that there are likely to be various factors driving market dynamics and behaviours, meaning it may not be possible to directly relate competition requirements to specific changes in underlying competitive conditions. The CMA will therefore assess the evidence on effectiveness in the round.
- 6.75 The CMA may impose multiple competition requirements on each SMS firm to address a single competition concern or a range of issues. In these cases, it is likely that the CMA will consider the effectiveness of these competition requirements both individually and collectively.

### ***Outcomes from effectiveness reviews***

- 6.76 As a result of the CMA's reviews of effectiveness it may decide to:<sup>377</sup>
- (a) Leave the competition requirement unchanged where the review has found that it is effective.
  - (b) Vary the competition requirement (or in the case of a PCO, replace it with a new PCO) to make it more effective at meeting its aim/purpose or to take account of market developments (eg changes in technology) that could reduce the effectiveness of the competition requirement.<sup>378</sup>
  - (c) Revoke the competition requirement – for instance if the competition requirement is ineffective and it is not possible to vary the competition requirement.<sup>379</sup>

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<sup>376</sup> See also paragraph 6.87.

<sup>377</sup> See paragraph 6.88 below which sets out the references in this guidance to the procedure impose, vary or revoke competition requirements.

<sup>378</sup> This does not apply to final offer orders which cannot be varied.

<sup>379</sup> Where an EO is revoked, the Act requires the CMA to consider whether to make a new one (section 35(d) of the Act).

## Monitoring whether to impose, vary or revoke competition requirements

6.77 This section sets out:

- (a) how monitoring may lead to the CMA deciding to vary, replace or revoke competition requirements for reasons other than effectiveness;
- (b) the evidence the CMA may consider in deciding whether to vary, replace or revoke competition requirements; and
- (c) the procedure for varying, replacing or revoking competition requirements where the CMA's monitoring indicates this is necessary.

6.78 Monitoring digital markets on an ongoing basis (as described above for compliance and effectiveness) will help the CMA to determine whether there is sufficient evidence to support the CMA in:

- (a) Beginning new SMS investigations, for example if the CMA considers there are new digital activities that have the potential to cause harm or opportunities to open up competition.
- (b) Beginning or bringing forward further SMS investigations, to assess whether to revoke a designation or replace it with a new designation applying to a similar or connected activity, for example if the CMA identifies developments in relation to existing designated digital activities.
- (c) Imposing new CRs or opening a new PCI investigation if there is evidence that additional competition requirements are needed.<sup>380</sup>
- (d) Deciding whether there is a reason to vary or revoke existing competition requirements.

6.79 In accordance with the Act, the CMA must keep under review:

- (a) In relation to a firm, whether to impose, vary or revoke a CR;<sup>381</sup>
- (b) whether to vary or revoke an EO,<sup>382</sup> and where an EO is revoked, whether to make a new EO;<sup>383</sup>

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<sup>380</sup> Including the duty to review whether to impose CRs under section 25(a) of the Act.

<sup>381</sup> Section 25(a) of the Act. Keeping under review whether to impose CRs is covered at paragraph 6.78.

<sup>382</sup> Section 35(c) of the Act.

<sup>383</sup> Section 35(d) of the Act.

(c) the appropriateness of a commitment, or whether to release a firm from a commitment;<sup>384</sup> and

(d) whether to revoke a final offer order.<sup>385</sup>

6.80 In addition, as explained in Chapter 4, paragraph 4.70, when the CMA makes a PCO it must set a date to review it. As part of the review, the CMA will determine whether to make a replacement order or revoke the PCO without making a replacement order.<sup>386</sup>

### ***Varying and revoking competition requirements***

6.81 Where it may be appropriate for the CMA to vary or revoke/release<sup>387</sup> competition requirements it will need to consider, among other things, whether there has been a change of circumstances rendering the competition requirement no longer appropriate since it was put in place, and if so, what action, if any, should be taken.

6.82 Reasons that the CMA may decide<sup>388</sup> to vary or revoke its competition requirements could be:

(a) in response to changes in the market (including changes in technology) or other changes in circumstances which mean the competition requirement is no longer appropriate to achieve its intended aim;

(b) where the CMA considers the competition requirement is having unintended consequences, including for example, imposing undue burdens on an SMS firm or third parties, or reducing incentives for an SMS firm to innovate or provide benefits to users or consumers;

(c) new legislation or regulation is introduced that means the competition requirement in its current form is no longer appropriate;

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<sup>384</sup> Section 37(a) and 56(8)(b) of the Act.

<sup>385</sup> Section 45(c) of the Act.

<sup>386</sup> Section 55(1) and 55(2) of the Act.

<sup>387</sup> 'Release' is the terminology used in the Act with respect to commitments (sections 37(a) and 56(8)(b)). Any further references in this section to 'revoking' competition requirements includes releasing commitments.

<sup>388</sup> The CMA is unable to unilaterally vary a commitment. Where an SMS firm initiates a request for a variation to, or a release from a commitment, it may do so for similar reasons to those described in this paragraph. See paragraphs 4.103–4.105 in Chapter 4 of this guidance which describes the procedure associated with a commitment variation request.

- (d) where there is a change in market conditions as a result of a competition requirement (eg where barriers to entry are reduced) such that competition concerns no longer arise; and/or
- (e) in the case of final offer orders, where the parties have reached an agreed resolution outside of the final offer mechanism ('FOM').<sup>389</sup>

6.83 In the case of CRs that the CMA is concerned may no longer be appropriate, the CMA is likely to consider whether it would be appropriate to vary the CR before deciding if it should be revoked. Similarly, when the CMA reviews a PCO as referred to above, it is likely to consider whether it would be appropriate to replace the PCO before deciding it should be revoked.<sup>390</sup>

6.84 If the CMA revokes the SMS designation following a further SMS investigation, the competition requirements will expire, unless the CMA makes transitional, transitory or saving provisions in relation to those competition requirements to manage the impact on the competition requirement's beneficiaries.<sup>391</sup> This may be appropriate where, for example, the CMA considers the competition requirement should be wound down over a period of time.

### ***Evidence the CMA may consider***

6.85 The CMA expects it will become aware of the need to consider making such changes to competition requirements as a result of:

- (a) Its ongoing monitoring work including compliance and effectiveness monitoring (as described above).
- (b) Submissions from SMS firms subject to the competition requirements, or third parties, including other market participants (see paragraphs 6.11 and 6.12).

6.86 The approach the CMA will take to reviewing submissions on variations and revocations will depend on the specifics of the competition requirement in question, and as referred to above in paragraph 6.65, what the original purpose/aim of the requirement was. The CMA also maintains broad

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<sup>389</sup> The FOM is explained from paragraph 7.112 onwards in Chapter 7 of this guidance.

<sup>390</sup> As explained in paragraph 4.72 in Chapter 4 of this guidance, the CMA can replace a PCO if it is appropriate to do so, having regard in particular to any change of circumstances since the PCO was made.

<sup>391</sup> Section 17 of the Act.

discretion in determining the appropriate course of action in response to submissions as explained in paragraph 6.14 above.

- 6.87 The exact scope of the CMA's review and related level of evidence required for the purposes of its review (including when considering effectiveness) will be determined on a case-by-case basis. For example, a material variation to a competition requirement (for example to improve its effectiveness by imposing a different and more intrusive remedy), or a suggestion for revocation, will typically require a more detailed review and more supporting evidence than a minor or technical variation to a competition requirement.

***Procedure to impose, vary or revoke competition requirements***

- 6.88 If the CMA's monitoring or effectiveness reviews indicate that it is necessary or appropriate to take further action, the procedures set out in other chapters of the guidance will be followed, including meeting the legal thresholds to impose new, vary or revoke any competition requirement:
- (a) Launching SMS investigations and further SMS investigations – Chapter 2, paragraphs 2.70 and 2.94;
  - (b) imposing, varying and revoking CRs – Chapter 3, paragraphs 3.34, 3.78 and 3.83;
  - (c) imposing PCIs and replacing and revoking PCOs – Chapter 4, paragraphs 4.60, 4.72 and 4.76;
  - (d) varying and releasing commitments – Chapter 4, paragraphs 4.103 and 4.106;
  - (e) varying or revoking EOs and IEOs – Chapter 7, paragraphs 7.107 to 7.109; and
  - (f) revoking or partially revoking final offer orders – Chapter 7, paragraph 7.145.

## 7. Enforcement of competition requirements

### Introduction

- 7.1 The CMA may investigate and take enforcement action where it suspects that there has been a breach of a requirement imposed under the digital markets competition regime. This includes a suspected breach of a competition requirement (as defined in paragraph 7.3 below), as well as a suspected breach of certain investigative requirements (as set out in section 87 of the Act).
- 7.2 This chapter sets out the CMA's approach to taking enforcement action against breaches of competition requirements. The CMA's policy in relation to the imposition of penalties in respect of certain investigative requirements under section 87 of the Act is set out in *Administrative Penalties: Statement of Policy on the CMA's approach (CMA4)*.<sup>392</sup>
- 7.3 '**Competition requirements**' refers to the following requirements:
- (a) Conduct requirements ('**CRs**');
  - (b) requirements imposed by interim enforcement orders ('**IEOs**');
  - (c) requirements imposed by enforcement orders ('**EOs**');
  - (d) requirements imposed by final offer orders;
  - (e) requirements imposed by pro-competition orders ('**PCOs**');
  - (f) requirements to comply with commitments; and
  - (g) merger reporting requirements.<sup>393</sup>

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<sup>392</sup> The CMA will be consulting in due course on an updated version of CMA4 that, among other things, sets out the CMA's approach to penalties for breaches of certain of the Act's digital markets provisions.

<sup>393</sup> These requirements are referred to in section 85 of the Act (penalties for failure to comply with competition requirements). An investigation into a suspected breach of a competition requirement also falls within the definition of 'breach investigation' under Section 118(1) of the Act (ie 'an investigation (including a conduct investigation) into whether an undertaking is breaching or has breached a requirement imposed on the undertaking under Part 1 (Digital Markets) of the Act by virtue of the undertaking being, or having been, a designated undertaking.') Note that in this chapter, merger reporting requirements are not covered. For more information on merger reporting requirements please see the CMA's *Guidance on the merger reporting requirement for SMS firms*.

- 7.4 Section 1 below describes the approach and procedure the CMA will follow in relation to investigations into suspected breaches of competition requirements generally.
- 7.5 The Act contains certain provisions that are only applicable to investigations into suspected breaches of CRs (which it refers to as '**conduct investigations**').<sup>394</sup> Section 2 sets out the CMA's approach to these additional elements in the Act applicable only to the enforcement of CRs.
- 7.6 Where the CMA's investigation concludes that a firm is breaching or has breached<sup>395</sup> a competition requirement, the actions that the CMA may take include the imposition of an order or directions addressing the breach, financial penalties (including on senior managers and nominated officers) and/or the CMA applying for a court order requiring compliance with the requirement.<sup>396</sup> Where appropriate, the CMA may also take other enforcement action against persons (including senior managers and nominated officers) such as proceedings for criminal offences,<sup>397</sup> and using its power to seek a competition disqualification order against a director of a firm or accept a competition disqualification undertaking.<sup>398</sup>
- 7.7 The rest of this chapter is structured as follows:
- (a) Section 1 provides an overview of investigations into suspected breaches of competition requirements, in particular the following stages of investigation:
- i. initial assessment;
  - ii. launching an investigation;
  - iii. provisional findings;

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<sup>394</sup> Section 26 of the Act.

<sup>395</sup> The CMA may carry out investigations into suspected breaches of competition requirements by firms that are no longer designated as having SMS, in relation to historic suspected breaches.

<sup>396</sup> See section 100 of the Act. Breach of any court orders may lead to contempt of court. The CMA's approach to penalties for breaches of competition requirements referred to in section 85 of the Act (with the exception of IEOs and merger reporting requirements) is set out in Chapter 8 of this guidance. Its approach to penalties for breaches of IEOs and merger reporting requirements and penalties for individuals (including named senior managers and nominated officers) are set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

<sup>397</sup> See sections 92–98 of the Act and *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

<sup>398</sup> See section 99 of the Act. General information on competition disqualification orders can be found in [Guidance on Competition Disqualification Orders](#) (CMA102).



- iv. disclosure of evidence; and
  - v. investigation outcomes.
- (b) Section 2 explains the following areas that apply only to the enforcement of CRs:
- i. IEOs;
  - ii. the countervailing benefits exemption ('**CBE**');
  - iii. commitments;
  - iv. EOs; and
  - v. the final offer mechanism ('**FOM**').

## **Investigations into suspected breaches of competition requirements**

### ***Initial assessment***

- 7.8 Where the CMA has compliance concerns in relation to a competition requirement, it may carry out an initial assessment to determine whether to open an investigation.<sup>399</sup> This may include whether a case would be an administrative priority, in light of the CMA's Prioritisation Principles.<sup>400</sup>
- 7.9 An initial assessment may follow prior engagement with the firm where the CMA has already sought to address compliance concerns identified through its monitoring functions without resorting to use of its enforcement powers. More information on the CMA's approach to monitoring compliance with competition requirements, and seeking to address compliance concerns without enforcement action, is set out in Chapter 6.
- 7.10 The CMA's approach to carrying out initial assessments (including the timeframe and scope of an assessment) will depend on factors such as the nature and circumstances of the compliance concerns and the competition requirement concerned.

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<sup>399</sup> As explained in paragraphs 6.15 and 6.27 in Chapter 6 of this guidance, one way that the CMA expects it will become aware of compliance concerns is from submissions and complaints from third parties.

<sup>400</sup> [CMA Prioritisation Principles](#)

- 7.11 During an initial assessment, the CMA will generally provide the firm with an opportunity to comment on its compliance concerns, and to provide relevant representations or evidence, unless for example there are reasons of particular urgency not to do so. The CMA will also engage with complainants and/or other relevant third parties to the extent it considers it appropriate to do so.
- 7.12 In deciding whether to open an investigation into a suspected breach of a competition requirement, the information to which the CMA may have regard includes: (a) information received through its ongoing compliance monitoring (including compliance reports provided by the firm);<sup>401</sup> (b) information gathered from SMS firms or other organisations using the CMA's statutory information gathering powers;<sup>402</sup> and (c) information from third parties (for example complaints from users or other stakeholders).

### ***Launching an investigation***

- 7.13 The CMA may open an investigation where it has reasonable grounds to suspect that a firm has breached a CR,<sup>403</sup> or where it suspects that one of the other competition requirements has been breached.
- 7.14 When the CMA opens an investigation, it will give a notice to the firm which it suspects has breached the competition requirement concerned. The notice will:
- (a) state the competition requirement which the CMA suspects has been breached; and
  - (b) describe the conduct which the CMA suspects constituted the breach.
- 7.15 Paragraph 7.14 above applies to all investigations into suspected breaches of competition requirements. The Act sets out specific requirements for what must be included in such a notice in a conduct investigation (a '**conduct investigation notice**'), which must be provided to the firm when the CMA begins such a conduct investigation.<sup>404</sup> Accordingly, in addition to the

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<sup>401</sup> See Chapter 6 of this guidance for further discussion of the CMA's use of compliance reports.

<sup>402</sup> See Chapter 5 of this guidance for further discussion of the CMA's information gathering powers under the Act.

<sup>403</sup> Section 26(1) of the Act.

<sup>404</sup> As soon as reasonably practicable after issuing a conduct investigation notice, the CMA must publish the notice (section 26(6) of the Act).

requirements set out at paragraph 7.14 above, a conduct investigation notice must state:

- (a) the period within which the firm may make representations in relation to the conduct investigation;<sup>405</sup>
- (b) the period by the end of which the CMA must give a notice of findings to the firm;
- (c) the circumstances in which the conduct investigation period may be extended;<sup>406</sup> and
- (d) the effect of the provisions of the Act on closing a conduct investigation without making a finding, notices of findings and commitments.<sup>407</sup>

7.16 A notice under paragraph 7.14 or 7.15 above, in addition to the factors set out above in relation to the notice, will include any further information the CMA considers relevant to the matters at issue.

7.17 Following the launch of an investigation, the CMA will conduct evidence gathering and review as needed to assess whether the firm is breaching or has breached the competition requirement concerned. The CMA will make use of its investigatory powers as appropriate in the circumstances of a case. This may also build on or supplement any information gathering carried out by the CMA at the initial assessment stage. Chapter 5 provides further detail on the CMA's investigatory powers under the digital markets competition regime.

7.18 Where appropriate to do so, the CMA will also publish an invitation to comment at the outset of the investigation, inviting submissions from all interested parties on topics where it would welcome views.

### ***Provisional findings***

7.19 Before reaching its final findings in an investigation, the CMA will notify the firm under investigation of its provisional findings in relation to the suspected

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<sup>405</sup> This period will be at the CMA's determination (section 26(5) of the Act). As such, the CMA may provide for an indicative period, and the period may be subject to further notice on the applicable period being provided by the CMA. The CMA must consider any representations made by the firm during the period specified in the notice for representations, before making a finding that the firm has breached or is breaching a CR (section 27 of the Act).

<sup>406</sup> Extension periods are explained in Chapter 9 of this guidance.

<sup>407</sup> Section 26(4) of the Act.

breach of the competition requirement.<sup>408</sup> The provisional findings will include the CMA's reasons on which its findings are based.<sup>409</sup>

- 7.20 The CMA will provide the firm with an opportunity to make representations in response to provisional findings. The deadline for submitting written representations on provisional findings will be set on a case-by-case basis having regard to the individual circumstances, including the statutory deadline for the CMA to provide a notice of findings in the case of conduct investigations, and any other timing imperatives.<sup>410</sup> In appropriate cases, the CMA may also seek representations on provisional findings directly from relevant third parties.
- 7.21 The CMA will typically offer the firm the opportunity to make any representations orally, unless it considers there is a reason not to do so, in light of, for example, the nature of the alleged breach or other circumstances of the particular case at hand.
- 7.22 The CMA will consider whether a financial penalty should be imposed on the firm for breach of a competition requirement. Where the CMA provisionally considers that a financial penalty should be imposed on the firm, the CMA will typically provide its provisional penalty notice to the firm at the same time as the provisional findings on breach. The CMA's procedure in respect of penalties for breaches of competition requirements (including the contents of provisional penalty notices) is set out at Chapter 8 of this guidance.<sup>411</sup>
- 7.23 The CMA will typically publish an update on its website when it issues a firm with its provisional findings in relation to an investigation into a suspected breach of a competition requirement. This update will include a summary of the CMA's provisional findings and will state that the firm will be able to make representations on the provisional findings, together with any further information as appropriate.

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<sup>408</sup> The CMA may also issue supplementary provisional findings to a firm, where new information or evidence leads the CMA to consider making a material change to the nature of its provisional findings.

<sup>409</sup> Prior to issuing its provisional findings to a firm, the CMA will consider the need to appropriately protect any confidential information. Further information on the CMA's approach to identifying and protecting confidential information is set out at Chapter 5 of this guidance, at paragraphs 5.85–5.91.

<sup>410</sup> The process for the firm providing representations on provisional findings may in practice be combined with representations in response to any provisional penalty notice issued to the firm in relation to the suspected breach, where appropriate.

<sup>411</sup> With the exception of procedure in respect of penalties for breaches of IEOs and merger reporting requirements, which is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

## **Disclosure of evidence**

- 7.24 To assist the firm in making representations on the CMA's provisional findings, the CMA will, as appropriate, provide copies of documents or other information<sup>412</sup> relevant to the provisional breach finding to the firm under investigation.
- 7.25 It is expected that the majority of relevant documents or information will have been provided to the CMA by the firm itself or will already be in its possession. Where this is the case, rather than providing copies of those documents or information back to the firm, the CMA may instead reference them in its provisional findings and/or provide the firm with a list of them to allow it to cross-refer to its own copies.
- 7.26 Where the CMA holds documents from a third party (including a complainant) which the CMA considers to be relevant to its provisional findings and which the third party considers to be confidential, it may be necessary, prior to disclosure, to redact or withhold this information where appropriate in accordance with the relevant statutory framework.<sup>413</sup> The CMA recognises that third parties can play a valuable role by drawing issues and relevant information to the CMA's attention during an investigation and have a legitimate interest in ensuring that their confidential information is appropriately protected. The CMA will make disclosure decisions on a case-by-case basis, balancing the rights of the firm under investigation with the rights and legitimate interests of third parties and wider public interest considerations.<sup>414</sup> Redacted confidential information in a provisional breach finding (including any provisional penalty notice) and any accompanying documents will be marked accordingly.<sup>415</sup>
- 7.27 The CMA also recognises that in some cases complainants and other third parties may be directly affected by the outcome of an investigation. The CMA will involve third parties in an investigation to the extent the CMA considers it appropriate in order to carry out its functions fairly, transparently, and effectively.

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<sup>412</sup> References to documents and information in this context are intended to encompass documents and information which have been provided by a firm under investigation or otherwise gathered in the course of an investigation excluding: (i) certain confidential information (as set out in paragraph 7.26 of this guidance); (ii) the CMA's internal documents (including documents exchanged with a regulator or another authority); and (iii) routine administrative documents (eg routine correspondence).

<sup>413</sup> See Part 9 of the EA02.

<sup>414</sup> Within the meaning of section 244 of the EA02.

<sup>415</sup> Further information on the CMA's general approach to protecting confidential information is contained in Chapter 5 of this guidance.

- 7.28 The CMA will consider the most appropriate process for providing disclosure in the circumstances of each case, including the nature of the alleged breach and of the relevant documents, and the volume of gathered information. The CMA will discuss its proposed process with the firm under investigation at an appropriate stage of the investigation.<sup>416</sup> In all cases, the CMA will seek to ensure that the process is as efficient as practicable, having regard to applicable statutory deadlines for conducting investigations, as well as any need for the CMA to act on an urgent basis or other timing imperatives, while ensuring that the firm under investigation is able to exercise its rights effectively. For example, the CMA may consider one or more of the following options as appropriate:
- (a) Where the information gathered is not voluminous and has been provided predominantly by the firm under investigation, it may be practicable to provide the firm with the gist of the relevant information in a provisional breach finding and copies of any additional documents supplied by third parties subject to the CMA's confidentiality assessment as referred to in paragraph 7.26 above.
  - (b) In other cases where the volume of information is considerable and includes a substantial number of documents supplied by third parties, subject to the CMA's confidentiality assessment as referred to in paragraph 7.26 above, the CMA may provide the firm under investigation with one or more of the following: (i) the gist of the relevant information and/or copies of the documents directly referred to in the provisional breach finding; (ii) a list of other documents the CMA considers relevant, with the firm being able to make reasoned requests for access to specific listed documents. The CMA will set a reasonable and proportionate time period within which the firm will be able to make any such requests, taking into account the volume and nature of the information as well as applicable statutory deadlines, any need for the CMA to act on an urgent basis, and/or or any other timing imperatives.
  - (c) The CMA may also rely upon a confidentiality ring or data room to facilitate the provision of third party information, allowing the firm's

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<sup>416</sup> For example, in the context of conduct investigations which are subject to a statutory deadline, the CMA expects that such discussions will typically take place shortly after the opening of the CMA's investigation and before the issuance of any provisional breach findings.

external advisers to carry out an assessment of the documents.<sup>417</sup> In these circumstances:

- i. The CMA will consider the specific form and membership of the confidentiality ring or data room to be established. The CMA will set a reasonable and proportionate time period within which any requests for disclosure outside the confidentiality ring or data room must be made, taking into account the volume and nature of the information, applicable statutory deadlines for conducting investigations, any need for the CMA to act on an urgent basis or other timing imperatives. During this period, the firm may also request that additional external legal and economic advisers or technical experts be permitted access to the confidentiality ring or data room. The CMA will consider all such requests and will provide access as appropriate in order to ensure that the firm can effectively exercise its rights.
- ii. The CMA will provide the relevant parties with details of how the CMA proposes this will work in practice, including providing copies of the proposed data room rules and/or the confidentiality undertakings that will be required from those who are given access to the confidentiality ring or data room. It will be a condition of access to a confidentiality ring or data room that information reviewed by advisers is not shared with the firm without the consent of the CMA.

## ***Investigation outcomes***

### *Overview*

7.29 The potential outcomes of an investigation into a suspected breach of a competition requirement are:

- (a) the CMA closing the investigation without making a finding on breach (described at paragraphs 7.31 and 7.32 below); or
- (b) the CMA taking a final decision on whether or not the firm is breaching or has breached the competition requirement concerned by issuing a notice of findings (described at paragraphs 7.33 to 7.36 below).

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<sup>417</sup> Confidentiality rings and data rooms enable disclosure of data or documents to a defined group of external legal and/or economic advisers to the firm under investigation. The use of a confidentiality ring is subject to any restrictions in the Regulation (EU) 2016/679 (General Data Protection Regulation) and the Data Protection Act 2018 in relation to personal information.

7.30 In relation to a conduct investigation, the CMA may also:

- (a) accept a commitment from a firm under investigation (described at paragraphs 7.74 to 7.90 below);<sup>418</sup> or
- (b) where it has issued a notice of findings relating to breach of a CR, issue an EO imposing on the firm appropriate obligations to remedy the breach (described from paragraph 7.91 onwards).

### *Closing an investigation*

7.31 The CMA may close an investigation into a suspected breach of a competition requirement at any time without making a finding as to whether or not a breach of that requirement has occurred. For example, the CMA may decide that an investigation no longer merits the continued allocation of resources because it no longer fits within the CMA's administrative priorities and/or because the evidence it has gathered is insufficient to determine whether a breach has been committed, and the CMA considers that further investigation is not warranted.

7.32 Paragraph 7.31 above is applicable in all investigations into suspected breaches of competition requirements. The Act sets out specific requirements in relation to closing a conduct investigation without making a finding on breach:

- (a) When the CMA decides to close a conduct investigation, it must provide a notice to that effect to the firm to which the investigation related.<sup>419</sup> This notice must:
  - i. describe the firm in respect of which the CMA began the investigation;
  - ii. state the CR to which the investigation related; and
  - iii. include the CMA's reasons for closing the investigation.<sup>420</sup>
- (b) The CMA must publish the notice referred to in paragraph (a) above on its website as soon as reasonably practicable after giving the notice.<sup>421</sup>
- (c) The CMA must close a conduct investigation without making a finding where representations made by the firm under investigation lead the CMA

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<sup>418</sup> Section 36 of the Act.

<sup>419</sup> Section 28(2) of the Act.

<sup>420</sup> Section 28(3) of the Act.

<sup>421</sup> Section 28(4) of the Act.



to consider that the CBE applies.<sup>422</sup> The circumstances in which the CBE applies are set out at paragraph 7.58 below.

### *Notice of findings*

- 7.33 A notice of findings in an investigation into a suspected breach of competition requirement will state whether or not the CMA has found that a breach has occurred and will include reasons for the CMA's findings.<sup>423</sup>
- 7.34 Where the CMA imposes a penalty for failure to comply with a competition requirement, it will typically issue its penalty decision at the same time as giving notice of findings in relation to breach of the requirement. Further information about the CMA's procedure in respect of penalties for breaches of competition requirements is set out at Chapter 8 of this guidance.<sup>424</sup>
- 7.35 Paragraphs 7.33 and 7.34 above are applicable in all investigations into suspected breaches of competition requirements. The Act sets out specific requirements in relation to giving a notice of findings in a conduct investigation:
- (a) The CMA must give a notice of findings to the firm within six months beginning with the day it issued a conduct investigation notice to the firm.<sup>425</sup> This does not apply if the CMA has closed a conduct investigation without making a finding on breach, or in relation to any behaviour in respect of which the CMA has accepted a commitment.<sup>426</sup>
  - (b) A notice of findings in a conduct investigation must include the factors described at paragraph 7.33 above.<sup>427</sup>
  - (c) The CMA must publish the notice on its website as soon as reasonably practicable after issuing a notice of findings.<sup>428</sup>

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<sup>422</sup> Section 29(1) of the Act.

<sup>423</sup> Where necessary, the CMA will consider the need to protect any confidential information. Further information on the CMA's approach to how it will identify and protect confidential information is set out at Chapter 5 of this guidance, at paragraphs 5.85–5.91.

<sup>424</sup> With the exception of procedure in respect of penalties for breaches of IEOs and merger reporting requirements, which is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

<sup>425</sup> Section 30(1) and 30(2) of the Act. As explained in Chapter 9 of this guidance, the CMA can extend the timetable in certain circumstances.

<sup>426</sup> Section 30(5) of the Act.

<sup>427</sup> Section 30(3) of the Act.

<sup>428</sup> Section 30(4) of the Act.

- 7.36 Where it finds that a firm is breaching or has breached a competition requirement, in addition to its powers to impose a financial penalty, the CMA may:
- (a) in relation to conduct investigations, issue an EO imposing appropriate obligations on a firm for the purpose of remedying the breach (see paragraph 7.91 onwards below);<sup>429</sup> or
  - (b) in relation to breach of a PCO, impose directions requiring the firm to take action, or refrain from taking action, for the purpose of ensuring compliance with the PCO;<sup>430</sup> or
  - (c) in relation to breach of a commitment (see paragraphs 7.74 to 7.90 below), apply to court for a court order enforcing the commitment.
- 7.37 Where appropriate, the CMA may also take other enforcement action against persons (including senior managers and nominated officers) such as proceedings for criminal offences,<sup>431</sup> and using its power to seek a competition disqualification order against a director of a firm or accept a competition disqualification undertaking.<sup>432</sup>

## Enforcement of conduct requirements

### Overview

- 7.38 As described above at paragraph 7.5 investigations into suspected breaches of CRs are described under the Act as 'conduct investigations'.<sup>433</sup>
- 7.39 This section describes certain processes and procedures that apply only to the enforcement of CRs under the Act.
- 7.40 The remainder of this section addresses the following areas:
- (a) the making of, and procedure in relation to, IEOs;
  - (b) the CBE;

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<sup>429</sup> Section 31 of the Act.

<sup>430</sup> Section 51(1) of the Act.

<sup>431</sup> See sections 92–98 of the Act and *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

<sup>432</sup> See section 99 of the Act, General information on competition disqualification orders can be found in [Guidance on Competition Disqualification Orders](#) (CMA102).

<sup>433</sup> Section 26 of the Act.

- (c) a commitment being accepted by the CMA;
- (d) the making of, and procedure in relation to, EOs; and
- (e) the FOM.

## **IEOs**

### *Overview*

- 7.41 IEOs are orders imposed on an interim basis in conduct investigations in relation to a suspected breach of a CR.
- 7.42 The CMA may impose an IEO where it has begun a conduct investigation, and considers that it is necessary to act on an interim basis:
- (a) to prevent significant damage to a particular person or category of person;
  - (b) to prevent conduct which could reduce the effectiveness of any other steps the CMA might take in relation to the CR which it suspects the firm has breached (or is breaching); or
  - (c) to protect the public interest.<sup>434</sup>

### *Assessing IEOs*

- 7.43 In deciding whether to make an IEO, the CMA will have regard to all relevant circumstances including the nature of the suspected breaching behaviour, the potential damage or detriment that may arise and the extent to which an IEO might prevent this.
- 7.44 In particular, in considering whether the statutory criteria for imposing an IEO are met, the CMA will typically consider the following:
- (a) **Significant damage:** The CMA will assess whether, and to what extent, conduct is causing or is likely to cause significant damage to particular persons or categories of person. For example, conduct might give rise to significant damage where it causes persons or categories of person to suffer substantial financial losses, or to be restricted in their ability to compete effectively, such that this is causing or is likely to cause significant damage to their commercial position.

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<sup>434</sup> Section 32(1) of the Act.

- (b) **Reducing the effectiveness of CMA actions:** Conduct which could reduce the effectiveness of other steps the CMA might take may involve conduct that is prejudicing or impeding, or is likely to prejudice or impede, the imposition of any EO that the CMA might impose. This may involve, for example, imposing an IEO to require a firm to not make changes to its systems which would be very difficult to reverse if the CMA required this at the end of its investigation.
- (c) **Public interest:** The CMA may consider that it is necessary to act to protect the public interest, for example, to prevent damage being caused to a particular industry, to consumers, or to competition more generally as a result of the relevant behaviour.

#### *Procedural steps in relation to the imposition of IEOs*

- 7.45 Before imposing an IEO, the CMA must give the firm to which it would relate an opportunity to make representations about the IEO it proposes to impose, unless the CMA considers that doing so would substantially reduce the effectiveness of the order.<sup>435</sup> The CMA may decide not to provide this opportunity where it considers that doing so would risk undermining its ability to impose the order or ensure compliance with it, or would otherwise risk rendering the order ineffective, for example by enabling a firm to take steps to frustrate the effective implementation of an IEO before it can be imposed.
- 7.46 Where the CMA provides the firm with an opportunity to make representations about an IEO it proposes to impose, the period it will allow may necessarily be short given the time-critical nature of the IEO process.
- 7.47 The CMA will engage with complainants and/or other relevant third parties to the extent appropriate to do so, when considering imposing an IEO.
- 7.48 An IEO must specify the suspected breach to which it relates<sup>436</sup> and may include transitional, transitory or saving provision.<sup>437</sup> When imposing an IEO, the CMA will also provide its reasons for imposing it. As soon as reasonably practicable after making the IEO, the CMA must publish it on its website.<sup>438</sup>

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<sup>435</sup> Section 32(3) and 32(4) of the Act.

<sup>436</sup> Section 32(2) of the Act.

<sup>437</sup> Section 31(3) of the Act.

<sup>438</sup> Section 31(6) of the Act.

- 7.49 Where the CMA makes an IEO without giving the firm an opportunity to make representations on the proposed order, the CMA must, as soon as reasonably practicable after making the order, give the firm a notice including:
- (a) the reasons for the CMA's decision to make the order without providing this opportunity; and
  - (b) the period within which the firm may make representations in relation to the IEO.<sup>439</sup>
- 7.50 The CMA must consider representations it receives following a notice described in paragraph 7.49 above as soon as reasonably practicable.<sup>440</sup> As soon as reasonably practicable after giving a notice, the CMA must also publish the notice on its website.<sup>441</sup>
- 7.51 The CMA may consent to a firm acting in a way that would otherwise constitute a breach of an IEO.<sup>442</sup> The circumstances in which it may be appropriate for the CMA to provide such a consent, and the CMA's approach to doing so, will (insofar as is relevant) follow the same principles which apply to such consents in relation to EOs (see paragraphs 7.100 and 7.101 below).

#### *Entry into force and expiry of IEOs*

- 7.52 An IEO will come into force at such time as the CMA may specify in the order.<sup>443</sup> Given the time-critical nature of IEOs, the CMA expects that obligations imposed by such an order will typically enter into force immediately or otherwise within a short period of imposing an order.
- 7.53 An IEO will expire:
- (a) when it is revoked by the CMA;
  - (b) subject to provision made in reliance on section 17<sup>444</sup>, the designation to which it relates ceases to have effect;<sup>445</sup> or

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<sup>439</sup> Section 32(5) of the Act. This period will be at the CMA's determination (section 32(7) of the Act).

<sup>440</sup> Section 32(8) of the Act.

<sup>441</sup> Section 32(6) of the Act.

<sup>442</sup> Section 31(8) of the Act.

<sup>443</sup> Section 33(1) of the Act.

<sup>444</sup> For further information regarding the provision that the CMA may make under section 17 of the Act, see paragraphs 2.103–2.107.

<sup>445</sup> A designation ceases to have effect at the end of the designation period, or when the CMA decides, following a further SMS investigation, to revoke a firm's designation in respect of a relevant digital activity.

- (c) when one of the following events occurs in relation to the suspected CR breach to which the order relates:
- i. the CMA gives a notice of findings stating that it has found that no breach has occurred;
  - ii. the CMA accepts a commitment from the firm;
  - iii. the CMA makes an EO;<sup>446</sup> or
  - iv. the CMA notifies the firm that it has decided not to make an EO.

7.54 An IEO ceasing to have effect will not affect the CMA's exercise of any functions in relation to a breach or possible breach of the order.<sup>447</sup> This enables the CMA to investigate and enforce against historic breaches of orders.

#### *Keeping IEOs under review*

7.55 The CMA must keep under review:

- (a) the extent to which a firm is complying with an IEO;
- (b) the effectiveness of an IEO;
- (c) whether to vary or revoke an IEO;
- (d) where an IEO is revoked, whether to make a new one; and
- (e) whether to take enforcement action in respect of a firm which does not comply with an IEO.<sup>448</sup>

7.56 The approach the CMA will take to keeping IEOs under review for effectiveness and monitoring compliance with IEOs is set out in Chapter 6. The CMA's approach to carrying out these functions will, insofar as is relevant, follow the same principles which apply to keeping EOs under review.

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<sup>446</sup> Section 33(2) of the Act.

<sup>447</sup> Section 33(4) of the Act.

<sup>448</sup> Section 35 of the Act.

## **The CBE**

### *Summary of key statutory requirements*

7.57 The CMA must close a conduct investigation where representations made by the firm under investigation lead the CMA to consider that the CBE applies.<sup>449</sup>

7.58 The CBE applies where all of the following conditions are satisfied:

- (a) the conduct to which the investigation relates gives rise to benefits to users or potential users of the digital activity in respect of which the CR in question applies;
- (b) those benefits outweigh any actual or likely detrimental impact on competition resulting from a breach of the CR;
- (c) those benefits could not be realised without the conduct;
- (d) the conduct is proportionate to the realisation of those benefits; and
- (e) the conduct does not eliminate or prevent effective competition.<sup>450</sup>

7.59 Where the CMA closes a conduct investigation on this basis:

- (a) it will give a notice to the firm explaining that the CMA has decided to close the investigation on the basis that it considers the CBE applies,<sup>451</sup> and
- (b) the firm is to be treated as if the CMA had found that the conduct did not constitute a breach of the relevant CR.<sup>452</sup>

### *Assessing the CBE*

7.60 In order for the CBE to apply, the firm under investigation must provide representations that lead the CMA to consider that the criteria referred to in paragraph 7.58 above are met. The firm's representations should be supported by clear and compelling evidence. The CMA will consider all relevant evidence including evidence provided by the firm under investigation, by third parties, and/or evidence it has gathered itself.

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<sup>449</sup> Section 29(1) of the Act.

<sup>450</sup> Section 29(2) of the Act.

<sup>451</sup> Section 28(3)(c) of the Act.

<sup>452</sup> Section 29(3) of the Act.

- 7.61 Assessment of whether the CBE applies entails consideration of both benefits and detrimental impacts arising from conduct to which a conduct investigation relates. In carrying out this assessment, the CMA will consider such benefits and detrimental impacts in both the shorter and/or longer term.
- 7.62 As set out in paragraph 3.31, when formulating and imposing a CR, the CMA would expect to take into account loss, if the given CR were imposed, of any benefits to users or potential users that may be generated by conduct which the CR is directed at. As such, where a firm seeks later to rely on the CBE in a conduct investigation, and benefits of conduct have already been taken into account by the CMA, the CMA will expect the firm to provide new evidence going beyond any previous submissions or representations it has made on the relevant matters.

*Condition 1: Benefits to users or potential users*

- 7.63 The first condition of the CBE criteria requires that the conduct under investigation gives rise to benefits to users or potential users of the digital activity in respect of which the relevant CR applies.<sup>453</sup>
- 7.64 Examples of benefits to users or potential users may include protecting user security or privacy, lower prices, higher quality goods or services, or greater innovation in relation to goods or services.
- 7.65 To satisfy this condition, the firm should provide the CMA with evidence of benefits arising from the conduct to a substantial number, or significant category, of users or potential users of the digital activity. The appropriate evidence will vary depending on the circumstances of each case. Where appropriate it might include, for example, a report by an independent expert verifying the existence and/or extent of the claimed benefits. The CMA will consider the scope and impact of claimed benefits in considering whether this condition is met. Where benefits have not yet been realised, the CMA will expect them to be sufficiently timely and likely to do so.

*Condition 2: Benefits must outweigh detrimental impact on competition*

- 7.66 The second condition of the CBE criteria requires that the benefits to users or potential users of the conduct under investigation outweigh any actual or likely detrimental impact on competition resulting from a breach of the CR.<sup>454</sup>

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<sup>453</sup> Section 29(2)(a) of the Act.

<sup>454</sup> Section 29(2)(b) of the Act.



7.67 This means that the greater the detrimental impact on competition resulting from the conduct, the greater the benefits to the relevant users or potential users will need to be in order for the CBE to apply.

*Condition 3: Benefits could not be realised without the conduct.*

7.68 The third condition of the CBE criteria requires that the benefits could not be realised without the conduct.<sup>455</sup> This condition imposes a standard that is akin to the 'indispensability' test in section 9(1)(b) of the CA98. Therefore, the CMA will have regard to the interpretation of that test when applying condition 3.

7.69 This condition means that the CMA must be satisfied that there is no other reasonable or practical way for the firm to achieve the benefits with less anti-competitive effect.

7.70 Where there is a reasonable or practical alternative to the conduct in question, the firm should explain why this could not give rise to the benefits with less anti-competitive effect.

*Condition 4: Proportionality*

7.71 The fourth condition of the CBE criteria requires that the conduct is proportionate to the realisation of the benefits, including that the conduct must be no more detrimental to competition than necessary to give rise to the relevant benefits.<sup>456</sup>

*Condition 5: No elimination or prevention of effective competition*

7.72 The fifth condition of the CBE criteria requires that the conduct does not eliminate or prevent effective competition.<sup>457</sup>

7.73 In considering whether this condition is met, the CMA will consider the extent to which the conduct in question eliminates or prevents current, or potential, competition (including eliminating or preventing innovation by third parties in anticipation of possible entry or expansion). Whether effective competition is likely to be eliminated or prevented depends on the extent to which such competition is impacted, both in the short and long term. As a general principle, the CMA considers that effective dynamic competition is key to delivering better outcomes for users in the long term.

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<sup>455</sup> Section 29(2)(c) of the Act.

<sup>456</sup> Section 29(2)(d) of the Act.

<sup>457</sup> Section 29(2)(e) of the Act.

## **Commitments**

### *Introduction*

- 7.74 Under the Act, the CMA may accept an appropriate commitment from an SMS firm subject to a conduct investigation as to its behaviour in respect of a CR to which the investigation relates.<sup>458</sup> The CMA will have discretion to determine which cases are suitable for commitments and the circumstances in which an appropriate commitment will be accepted.
- 7.75 The ability to accept an appropriate commitment in relation to a conduct investigation will provide the CMA with the flexibility, where it considers it appropriate, to conclude a conduct investigation (without issuing a notice of findings)<sup>459</sup> or change the scope of a conduct investigation (where a commitment is offered in relation to some, but not all of the behaviour which is subject to investigation).
- 7.76 Where the CMA has concerns about an SMS firm's compliance with a CR, it may engage with the SMS firm in order to understand whether participative resolution of the concerns is possible (see Chapter 6 on Monitoring). Given this, and the short statutory time period for conduct investigations, the CMA's acceptance of a commitment once a conduct investigation has been launched will likely be rare in practice.

### *Assessing the acceptability of a proposed commitment*

- 7.77 The Act provides that a commitment is appropriate where the CMA considers that compliance with the commitment by the SMS firm would mean that it would not be necessary to carry out a conduct investigation so far as relating to the behaviour to which the commitment relates.<sup>460</sup>
- 7.78 A commitment can be structural or behavioural in nature, or a combination of both. It is open to the SMS firm offering a commitment to do so in any form it chooses, including in relation to all of, or only part of, the behaviour which is subject to investigation.<sup>461</sup>

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<sup>458</sup> Section 36(1) of the Act.

<sup>459</sup> In accordance with Section 36(3)(b) of the Act, 'following the acceptance of a commitment by the CMA as to the behaviour of an undertaking, so far as relating to that behaviour, the CMA may not give a notice to the undertaking under section 30 (notice of findings).'

<sup>460</sup> Section 36(2) of the Act.

<sup>461</sup> In accordance with section 36(4)(a) of the Act, the acceptance of a commitment does not prevent a conduct investigation from continuing so far as it relates to other behaviour in relation to the same or a different CR. A

7.79 Where the CMA considers that the conduct investigation is, in principle, suitable to conclude or rescope by accepting commitments, the CMA must be confident that the proposed commitment is well-specified and clearly effective in addressing the behaviour of concern. The need for confidence reflects the fact that, following acceptance of a commitment, the CMA is prevented from issuing a notice of findings in relation to the behaviour which is the subject of the proposed commitment and would therefore close (or narrow) its conduct investigation potentially before all evidence has been gathered and assessed. As a result, the CMA may require a more extensive commitment than might be needed if the CMA were to impose an EO at the end of a conduct investigation.

7.80 In deciding whether or not to accept a proposed commitment, the CMA will assess:

- (a) the effectiveness of the proposed commitment; and
- (b) the effects of the proposed commitment on relevant third parties.

#### *Effectiveness*

7.81 To assess whether the proposed commitment will be effective such that it would not be necessary for the CMA to carry out a conduct investigation so far as relating to the behaviour to which the proposed commitment relates, the CMA will have regard to a range of factors, including:

- (a) the likely impact of the proposed commitment in addressing the concern identified by the CMA;
- (b) the timescale over which the proposed commitment is likely to have effect (ie how timely its impact is expected to be);
- (c) the risk of the proposed commitment not being effective, and/or giving rise to unintended consequences; and
- (d) practical considerations associated with the proposed commitment, including relating to effective implementation, monitoring and enforcement.

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partial commitment is therefore a commitment which only seeks to address part of the behaviour which is subject to investigation. The CMA will assess whether a partial commitment is appropriate in light of the specific circumstances of the case.

### *Effects of the proposed commitment on relevant third parties*

- 7.82 Where the CMA has determined that the proposed commitment will be effective, the CMA will take into account the potential effects, both positive and negative, of the proposed commitment on those most likely to be affected by it, including for example, third parties (eg competitors, potential competitors, customers and/or suppliers), consumers or business users. The CMA will consider those effects in the round, rather than seeking necessarily to quantify them precisely.
- 7.83 As explained above, the decision to accept a proposed commitment will be at the CMA's discretion, and will depend on the facts and circumstances of each case and the detail of the proposed commitment, including for example:
- (a) the scope of the proposed commitment, and whether and how it addresses the behaviour which is subject to investigation;<sup>462</sup>
  - (b) whether the proposed commitment is capable of being negotiated and implemented within a short timeframe;
  - (c) the timing of the commitment offer in the context of the investigation (see paragraphs 4.92 to 4.94 of Chapter 4 on commitments given in a PCI investigation on the appropriate timing of commitment discussions);
  - (d) whether the CMA issuing a notice of findings in relation to the behaviour of concern is important for the purposes of deterrence; and
  - (e) whether the proposed commitment includes an offer to appoint a Monitoring Trustee to oversee compliance by the SMS firm with the commitment.

### *Consultation and third party engagement*

- 7.84 Where the CMA considers that, subject to consultation, a proposed commitment is likely to be appropriate, it will follow the same process that applies where commitments are given in a PCI investigation,<sup>463</sup> as set out in paragraphs 4.95 to 4.99 of Chapter 4.

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<sup>462</sup> When a partial commitment is offered to address some, but not all of the behaviour which is subject to investigation, the CMA will need to consider the interaction between the proposed commitment and any other remedy which it may wish to impose to address the behaviour at the end of the conduct investigation.

<sup>463</sup> In respect of a commitment given during a conduct investigation, the Act provides that the notice must include: (a) the requested variation to the commitment that the CMA proposes to accept; (b) the CR to which the

### *Decision to accept a commitment*

7.85 Following the consultation, the CMA must publish on its website a notice of its decision on whether to, and the form in which it will accept, a commitment as soon as reasonably practicable.<sup>464</sup>

### *Duration of a commitment*

7.86 A commitment will come into force when a notice of its acceptance is published by the CMA.<sup>465</sup> The CMA will publish this notice on its website. In respect of the duration of a commitment, paragraphs 4.101 and 4.102 of Chapter 4 on commitments given in a PCI investigation will apply.<sup>466</sup>

### *Varying and releasing a commitment*

7.87 Where a variation to a commitment is requested, the CMA will follow the same procedure as explained in paragraphs 4.103 to 4.105 of Chapter 4 on commitments given in a PCI investigation. Please also refer to Chapter 6 on Monitoring.

7.88 The CMA may also release an SMS firm from the requirement to comply with a commitment where it considers that it would be appropriate to do so.<sup>467</sup> In such circumstances, paragraphs 4.106 to 4.110 of Chapter 4 on commitments given in a PCI investigation will apply.

### *Launching a new investigation where a commitment has previously been accepted*

7.89 The acceptance of a commitment does not prevent the CMA beginning a new conduct investigation in relation to the behaviour to which the commitment relates where it has reasonable grounds:

- (a) to believe that there has been a material change of circumstances since the commitment was accepted;<sup>468</sup>

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commitment relates, (c) the CMA's reasons for its proposed decision; and (d) the period within which representations may be made in relation to the requested variation (Paragraph 2(2) Schedule 1 of the Act).

<sup>464</sup> Paragraph 4 Schedule 1 of the Act.

<sup>465</sup> Section 36(5) of the Act.

<sup>466</sup> Save that the reference to '*when the designation to which the commitment relates ceases to have effect*' in paragraph 4.102(a)(ii) should be read as referring to '*when the CR to which the commitment relates ceases to have effect*' in line with section 36(6)(a)(ii) of the Act.

<sup>467</sup> Section 36(8) of the Act.

<sup>468</sup> Section 36(4)(b)(i) of the Act.

- (b) to suspect that the SMS firm has not complied with one or more of the terms of the commitment;<sup>469</sup> or
- (c) to suspect that information which led the CMA to accept the commitment was incomplete, false or misleading in a material particular.<sup>470</sup>

7.90 In such circumstances, paragraph 4.111 of Chapter 4 on commitments given in a PCI investigation will apply.

## **EOs**

### *Introduction*

7.91 EOs are orders imposing obligations on a firm for the purpose of remedying a breach of a CR.

7.92 Where, following a conduct investigation, the CMA issues a notice of findings that a firm has breached or is breaching a CR, it may make an EO imposing on the firm such obligations as the CMA considers appropriate for one or more of the following purposes:

- (a) in a case where the breach is ongoing, stopping the breach;
- (b) preventing the breach from happening again; and/or
- (c) addressing any damage caused by the breach.<sup>471</sup>

### *Content of EOs*

7.93 EOs may involve positive or negative obligations (ie requiring a firm to do or not do certain things).

7.94 An EO issued by the CMA will be specific to the relevant firm and the particular breach. The types of obligation in an EO may include, for example:

- (a) taking specific steps to bring a breach to an end;
- (b) changes to policies, processes and/or procedures to prevent further breaches;

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<sup>469</sup> Section 36(4)(b)(ii) of the Act.

<sup>470</sup> Sections 36(4)(b)(iii) of the Act.

<sup>471</sup> Section 31(1) of the Act.

- (c) auditing internal processes and procedures;
- (d) enhanced compliance measures or monitoring;
- (e) informing affected users about a breach; and/or
- (f) providing compensation or other redress to adversely affected stakeholders.

### *Procedural steps in relation to EOs*

- 7.95 The CMA must make any EO as soon as reasonably practicable after giving the firm its notice of findings that a CR has been breached.<sup>472</sup>
- 7.96 The CMA may consult such persons as it considers appropriate before making an EO<sup>473</sup> and will typically share with the firm any draft EO that it intends to impose in parallel with issuing a notice of findings in relation to the CR breach.<sup>474</sup> This will enable a firm to provide any comments on the intended EO. The CMA will typically also consult third parties before making an EO, in particular where third parties are directly impacted by an EO, or where there are particular questions around design or compliance of the EO on which third party views may be useful.
- 7.97 An EO must (a) specify the breach to which it relates, and (b) include the CMA's reasons for imposing the obligations in the order.<sup>475</sup>
- 7.98 An EO may also include transitional, transitory or saving provision<sup>476</sup> which may, for example, specify that different obligations in respect of an EO come into effect at different times.
- 7.99 As soon as reasonably practicable after making an EO the CMA must publish the order on its website.<sup>477</sup>
- 7.100 The CMA may consent to a firm acting in a way that would otherwise constitute a breach of an EO<sup>478</sup> where, for example, a firm provides compelling evidence that it should be able to continue particular aspects of its behaviour which could breach the EO, but which would not result in harm; or

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<sup>472</sup> Section 31(6) of the Act.

<sup>473</sup> Section 31(5) of the Act.

<sup>474</sup> The CMA will provide this opportunity unless it is not appropriate to do so (eg where the CMA needs to intervene urgently to remedy a CR breach, or EO obligations are straightforward in nature).

<sup>475</sup> Section 31(4) of the Act.

<sup>476</sup> Section 31(3) of the Act.

<sup>477</sup> Section 31(7) of the Act.

<sup>478</sup> Section 31(8) of the Act.

where there has been a material change of circumstances. The CMA will not give such consent retrospectively to approve actions that have already occurred and may have been in breach of an EO; nor does the granting of consent preclude the CMA from taking action against any steps in breach of an EO prior to consent having been granted.

7.101 The CMA will be more likely to grant consent if requests by the firm are fully specified, reasoned and supported by relevant evidence. The CMA may publish granted consents in appropriate cases, such as where it wishes to provide clarity to impacted third parties as to why a firm is acting in a way that would otherwise be contrary to its EO obligations.

#### *Entry into force and expiry of EOs*

7.102 An EO will come into force at a time specified by the CMA in the order.<sup>479</sup> In most cases EOs will have immediate effect, although the CMA may allow a firm a defined period to prepare for compliance with obligations under an EO, where appropriate to do so.

7.103 Unless revoked by the CMA (see paragraphs 7.109 to 7.111 below), an EO will expire when the designation to which it relates ceases to have effect, subject to any provision made in reliance on section 17 of the Act.<sup>480</sup> A designation will cease to have effect:

- (a) at the end of the designation period (see paragraph 2.90 in Chapter 2 on SMS); or
- (b) when the CMA decides, following a further SMS investigation, to revoke a firm's designation in respect of a relevant digital activity (see paragraphs 2.101 and 2.102 in Chapter 2 on SMS).

7.104 The fact that an EO ceases to have effect will not affect the exercise of any functions in relation to a breach or possible breach of that order.<sup>481</sup> This enables the CMA to investigate and enforce against historic breaches of orders.

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<sup>479</sup> Section 33(1) of the Act.

<sup>480</sup> For further information regarding the provision that the CMA may make under section 17 of the Act, see paragraphs 2.103–2.107.

<sup>481</sup> Section 33(4) of the Act.



### *Keeping EOs under review*

7.105 The CMA has a duty to keep under review:

- (a) the extent to which a firm is complying with an EO;
- (b) the effectiveness of an EO;
- (c) whether to vary or revoke an EO;
- (d) where an EO is revoked, whether to make a new one; and
- (e) whether to take enforcement action in respect of a firm which does not comply with an EO.<sup>482</sup>

7.106 The approach the CMA will take to keeping EOs under review for effectiveness and monitoring compliance with EOs is set out in Chapter 6.

### *Varying EOs*

7.107 The CMA may vary an EO by making a revised version of the order.<sup>483</sup> The procedural requirements which apply where the CMA imposes a new EO on a firm also apply where the CMA varies an existing EO. In particular:

- (a) the CMA may consult such persons as it considers appropriate before making the revised order,<sup>484</sup> and
- (b) the CMA must publish the revised EO on its website as soon as reasonably practicable.<sup>485</sup>

7.108 See Chapter 6, paragraph 6.82 for further detail on reasons why the CMA may decide to vary a competition requirement.

### *Revoking EOs*

7.109 The CMA can revoke an EO by giving a notice to the firm.<sup>486</sup> The notice must include the reasons for the CMA's decision to revoke the EO, and may include transitional, transitory or saving provision in relation to the revocation.<sup>487</sup> The

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<sup>482</sup> Section 35 of the Act.

<sup>483</sup> Section 31(2) of the Act.

<sup>484</sup> Section 31(5) of the Act.

<sup>485</sup> Section 31(7) of the Act.

<sup>486</sup> Section 34(1) of the Act.

<sup>487</sup> Section 34(2) and 34(3) of the Act.

CMA may also consult such persons as it considers appropriate on any proposal to revoke an EO.<sup>488</sup>

7.110 The CMA must publish the notice referred to in paragraph 7.109 above on its website as soon as reasonably practicable after revoking the EO.<sup>489</sup>

7.111 See Chapter 6, paragraph 6.82 for further detail on reasons why the CMA may decide to revoke a competition requirement.

## ***The FOM***

### *Introduction*

7.112 The CMA may resolve breaches of CRs relating to payment terms between an SMS firm and a third party or third parties (in this section the SMS firm and third party are individually referred to as '**a party**', and together as '**the parties**') by exercising its power to adopt the FOM.<sup>490</sup>

7.113 The FOM seeks to resolve such breaches by obtaining final offers from each party, in relation to payment terms that each party regards as fair and reasonable for the transaction(s) in question. The CMA will choose one of those two offers and make an order to give effect to the terms of that preferred offer.

7.114 The FOM may only be initiated after a conduct investigation finding a breach of a CR and the subsequent breach of an EO (see below for more details as to the conditions for initiating FOM). The timeline for progressing through each of these steps may vary. This could be for a number of reasons, including the complexity of the transaction(s), the number of parties involved and the conduct of the SMS firm in attempting to reach an agreement with a third party or parties.

7.115 This section provides guidance on the CMA's approach to the application of the FOM including:

- (a) the circumstances in which the CMA may initiate the FOM; and
- (b) the FOM process.

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<sup>488</sup> Section 34(5) of the Act.

<sup>489</sup> Section 34(4) of the Act.

<sup>490</sup> Section 38 of the Act.

## *Circumstances in which the CMA may initiate the FOM*

7.116 The Act provides that the CMA may exercise its power to adopt the FOM where it considers that the following three conditions are met:<sup>491</sup>

- (a) the transaction(s) is one in which the SMS firm would (i) provide goods or services to the third party, or (ii) acquire goods or services from, or use goods and services of, the third party;
- (b) by failing to agree fair and reasonable payment terms for the transaction(s), the SMS firm has breached an EO made in relation to a breach of a CR; and
- (c) the CMA could not satisfactorily address the breach within a reasonable time frame by exercising any of its other digital markets functions.

7.117 This section sets out the above conditions in greater detail, and the additional factors the CMA will consider when exercising its discretion to initiate the FOM.

*Condition 1: the transaction(s) is one in which the SMS firm would provide goods or services to the third party, acquire goods or services from, or use the goods and services of, the third party*<sup>492</sup>

7.118 Goods or services in this context includes digital content.<sup>493</sup> The Act also provides that 'transaction' means both a future transaction or the future performance of an ongoing transaction, whether in accordance with a contract or otherwise.<sup>494</sup>

*Condition 2: by failing to agree fair and reasonable payment terms for the transaction(s), the SMS firm has breached an EO made in relation to a breach of a CR*<sup>495</sup>

7.119 This describes a situation where: (a) the CMA has imposed a CR which requires an SMS firm to trade on fair and reasonable terms (including payment terms), (b) the CMA finds that the SMS firm has breached the CR

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<sup>491</sup> Sections 38(2)–(4) of the Act.

<sup>492</sup> Section 38(2) of the Act.

<sup>493</sup> Section 118(2)(c) of the Act.

<sup>494</sup> Section 38(5) of the Act.

<sup>495</sup> Section 38(3) of the Act. The CMA's approach to CR setting is set out at Chapter 3 of this guidance.

and imposes an EO, and (c) the SMS firm breaches the EO by failing to agree fair and reasonable payment terms for the transaction(s).

7.120 The FOM is therefore intended to be used at a late stage of the enforcement process if other steps prior to and during the enforcement process have not succeeded in securing compliance.

7.121 The Act also provides that the FOM may only be used in relation to ‘terms as to payment’ for the relevant transaction(s).<sup>496</sup> Payment terms in this context will include terms providing for a specific price, as well as broader payment or compensation structures.

*Condition 3: the CMA could not satisfactorily address the breach within a reasonable timeframe by exercising any of its other digital markets functions*<sup>497</sup>

7.122 The following digital markets functions are likely to be most appropriate for the CMA to consider in place of or alongside the FOM as to whether they may satisfactorily address the breach within a reasonable timeframe (though may not be suitable alternatives in many cases):

- (a) PCIs or CRs, for example, to address any bargaining power imbalance between the parties by targeting the source of market power underpinning the SMS firm’s imposition of unfair or unreasonable payment terms;<sup>498</sup>
- (b) varying an EO to direct the SMS firm to take a particular action to ensure compliance; or<sup>499</sup>
- (c) enforcing an EO that has been breached by an SMS firm by imposing financial penalties or through court enforcement to encourage compliance.<sup>500</sup>

7.123 In assessing whether the above functions are likely to be suitable alternatives to the FOM (or for use alongside the FOM), the CMA will likely consider the complexity of the transaction (see below for further detail) and how long the alternative measures may take to have effect.

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<sup>496</sup> Sections 38(1) and (3) of the Act. Note that breaches in relation to non-payment terms could be dealt with using the CMA’s other enforcement powers as explained earlier in this chapter.

<sup>497</sup> Section 38(4) of the Act.

<sup>498</sup> The CMA’s approach to imposing CRs and PCIs is set out at Chapters 3 and 4 of this guidance.

<sup>499</sup> The CMA’s approach to varying EOs is set out in paragraph 7.107 of this chapter.

<sup>500</sup> The CMA’s approach to imposition of financial penalties is set out at Chapter 8 of this guidance.

### *Additional factors*

7.124 In addition to the statutory conditions, in exercising its discretion to initiate the FOM, the CMA will consider the following additional factors in determining whether the FOM is an appropriate way of addressing the breach:

- (a) **whether payment terms are the key terms under dispute.** The CMA will consider using the FOM where it takes the view that agreement of payment terms are the main outstanding barrier to agreeing and implementing the relevant transaction(s), and that it is likely that any other outstanding issues can be resolved alongside or subsequent to the FOM process; and
- (b) **whether the nature of the transaction(s) is complex,** meaning that it is difficult to determine appropriate payment terms without using the FOM. As noted above, if the nature of the transaction(s) is more straightforward, the CMA may prefer to address the dispute using one of its other digital markets functions.

7.125 The CMA will also consider whether initiating the FOM aligns with its Prioritisation Principles.<sup>501</sup>

### *The FOM process*

7.126 This section sets out the key steps involved in the FOM process as described in the Act.<sup>502</sup>

7.127 The CMA must make a final offer order (an order requiring that the chosen payment terms must be given effect to) on or before six months from the day on which the '**final offer initiation notice**' (which starts the FOM process) is given to the parties (the '**final offer period**').<sup>503</sup> The precise timeline of the FOM and its intermediate steps will depend on the transaction in question however, the CMA anticipates that the process will involve broadly the following steps, which are outlined in further detail in the sections below:

- (a) the CMA must issue the final offer initiation notice;
- (b) the CMA may consider whether collective submissions are appropriate;

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<sup>501</sup> [CMA Prioritisation Principles](#)

<sup>502</sup> Sections 39–45 of the Act.

<sup>503</sup> Section 41(3) of the Act. Chapter 9 of this guidance discusses the circumstances in which this period can be extended.

- (c) the parties will prepare and submit their bids;
- (d) the CMA will assess the parties' bids;
- (e) the CMA must issue the final offer order, giving effect to the chosen bid;
- (f) the final offer order will remain in force unless revoked; and
- (g) final offer orders will be kept under review.

*Initiating the FOM*

7.128 The FOM is initiated by giving a final offer initiation notice to the parties.<sup>504</sup>

7.129 The Act requires that the final offer initiation notice must:<sup>505</sup>

- (a) specify the SMS firm, the third party (or third parties) and the digital activity in respect of which the power is being exercised;
- (b) describe the breach of the EO in relation to which the second condition (described at paragraph 7.119 above) is met;
- (c) summarise the transaction(s);
- (d) specify a date on or before which final offer payment terms are to be submitted to the CMA;
- (e) state the period by the end of which the CMA must make any final offer order; and
- (f) state the circumstances in which that period may be extended.

7.130 The CMA may also provide further guidance at this stage on the suggested content or format of the parties' bids if appropriate. This will be considered on a case-by-case basis.

7.131 The CMA must publish a statement of the final offer initiation notice as soon as reasonably practicable after the notice has been issued.<sup>506</sup> The CMA will publish this on its website. This statement may contain redactions in order to protect any confidential information. This statement must include the information summarised in paragraph 7.129 above. If the CMA is considering taking any other action relating to the underlying cause of the breach of EO,

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<sup>504</sup> Section 40(1) of the Act.

<sup>505</sup> Section 40(2) of the Act.

<sup>506</sup> Section 40(3) of the Act.

then the statement must also include a summary of, and explanation for considering, that action.<sup>507</sup>

7.132 The Act provides that after giving the final offer initiation notice, the CMA may do the following, by giving the parties a revised final offer initiation notice (a summary of which must also be published on its website as soon as practicable after giving the revised notice):

- (a) change its view of the transaction(s) or the third party (or third parties), provided that the new transaction(s) or third party/parties remains substantially the same;
- (b) revise any list of joined third parties or grouped third parties (see below for further information); or
- (c) change the submission date.<sup>508</sup>

#### *Collective submissions*

7.133 Under the Act, the CMA has the power to invite multiple third parties to make a single submission of payment terms as part of a FOM process. These submissions are known as collective submissions and can be used in relation to the FOM in the following two scenarios:

- (a) where the CMA considers that (a) the conditions outlined at paragraph 7.116 above are met in relation to a single transaction between the SMS firm and two or more third parties, and (b) the third parties are capable of acting jointly in relation to final offer payment terms relating to the transaction. These third parties are referred to in the Act as **'joined third parties'**,<sup>509</sup> or
- (b) where the CMA considers that (a) the conditions outlined at paragraph 7.116 above are met in relation to two or more transactions between the SMS firm and two or more third parties,<sup>510</sup> (b) the same terms as to payment are capable of applying to the transactions,<sup>511</sup> and (c) the third parties are capable of acting jointly in relation to final offer payment terms

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<sup>507</sup> Section 40(3) of the Act.

<sup>508</sup> Section 40(4)–(7) of the Act.

<sup>509</sup> Section 39(1) of the Act.

<sup>510</sup> These transactions can involve single counterparties (eg a transaction between the SMS firm and party A) or multiple counterparties (eg between the SMS firm and parties B and C).

<sup>511</sup> 'Same terms as to payment' does not necessarily mean the same price applies for all the transactions; it also encompasses scenarios where, for example, a common formula for determining a price could apply to all the transactions.

relating to the transactions. These third parties are referred to in the Act as **'grouped third parties'**.<sup>512</sup>

7.134 If the CMA considers that either of the above scenarios applies, it may exercise the power to adopt the FOM and invite the third parties to make a single submission of final offer payment terms to the CMA that they collectively regard as fair and reasonable for the transaction(s).<sup>513</sup> In considering whether (a) third parties are capable of acting jointly or (b) the same payment terms could apply to more than one transaction, and whether to invite third parties to make a joint or grouped bid, the CMA will have regard to the following considerations in particular:

- (a) any key differences in the third parties' circumstances or bargaining power which is likely to lead to a difference of views between them on what are considered 'fair and reasonable' payment terms; and
- (b) any differences in the goods or services being provided, acquired, or used which would necessitate a difference in payment terms.

7.135 Parties in a FOM process, particularly joined or grouped third parties seeking to make collective submissions, may opt to appoint a representative to act on their behalf in the process. As noted above, the CMA may revise any list of joined third parties or grouped third parties after giving a final offer initiation notice,<sup>514</sup> which may allow third parties to join or leave a FOM process. In doing so, the CMA will have regard to the statutory time period for making a final offer order.

#### *Preparation and submission of bids*

7.136 As set out above, the CMA will specify in its final offer initiation notice the date by which final offer payment terms (or **'bids'**) should be submitted to the CMA. The CMA will also issue transaction-specific guidance on the appropriate substance of and format in which bids should be submitted, in addition to any necessary accompanying evidence. Parties may only submit a single bid, and any engagement by the CMA on the appropriate format and substance of bids will not enable parties to submit 'initial' or 'draft' bids to the CMA for review and comment.

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<sup>512</sup> Section 39(3) of the Act.

<sup>513</sup> Sections 39(1) and (3) of the Act.

<sup>514</sup> Section 40(4) of the Act.



7.137 To facilitate the submission of bids, the CMA may (among other things) use an information notice to require a party to give information to the CMA (for instance, to provide supplementary evidence used to inform their bids or aid the CMA's consideration of those bids) or specify the form or manner in which bids must be submitted.<sup>515</sup>

7.138 In addition, the CMA may share information between the parties.<sup>516</sup> For example, it may do so where necessary to facilitate the formation and submission of bids, for instance where information asymmetry is limiting the parties' ability to submit meaningful bids, or where necessary to ensure comparability of bids and supplementary evidence and analysis. When sharing such information, the CMA will consider the need to protect any confidential information.<sup>517</sup>

#### *Assessment of bids*

7.139 Following the submission of bids, the CMA will assess the bid(s) and select its preferred bid. Where only one party submits a bid and the other fails to submit a bid by the submission date the CMA will by default select the bid that has been submitted. Otherwise, the CMA's selection will be based on an assessment of the strength of the evidence and the methodology provided by each party.

#### *Issuing a final offer order*

7.140 Before the end of the final offer period, the CMA must make a final offer order, which requires that its chosen payment terms must be given effect to for the purposes of the transaction(s) and any other transaction(s) between the parties which is substantially the same.<sup>518</sup> The CMA may extend the six-month window for making a final offer order (a) by a period of up to three months, where it considers there are 'special reasons' to do so<sup>519</sup> and/or (b) where the CMA considers that a person has failed to comply with investigatory requirements.<sup>520</sup> Extension periods are explained in Chapter 9 (Administration).

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<sup>515</sup> Section 40(8)(a) and (c) of the Act.

<sup>516</sup> Section 40(8)(b) of the Act.

<sup>517</sup> See Chapter 5, paragraphs 5.85–5.91 for additional information about how the CMA will handle confidential information.

<sup>518</sup> Section 41(2) of the Act. Chapter 9 of this guidance discusses the circumstances in which this period can be extended beyond six months.

<sup>519</sup> Section 104(1) of the Act.

<sup>520</sup> Section 104(3) of the Act.

- 7.141 A final offer order must impose on the SMS firm such obligations as the CMA considers appropriate for the purpose of securing compliance with the requirement to give effect to the chosen payment terms (summarised in paragraph 7.140 above) and preventing the SMS firm from making an agreement with the third party which conflicts with that requirement.<sup>521</sup>
- 7.142 At the same time as making a final offer order, the CMA must give the SMS firm and the third party a notice:
- (a) summarising the transaction(s);
  - (b) including the reasons for the order; and
  - (c) enclosing a copy of the order.<sup>522</sup>
- 7.143 As soon as reasonably practicable after making a final offer order, the CMA must publish a statement summarising the contents of the order on its website and the notice referred to at paragraph 7.142 above.<sup>523</sup> Information on the approach the CMA will take to identifying and protecting confidential information is set out at Chapter 5 of this guidance, from paragraphs 5.84 onwards.
- 7.144 The CMA may decide not to make a final offer order at any time during the FOM process where it has reasonable grounds to believe there has been a material change of circumstances since the final offer initiation notice was given.<sup>524</sup> A material change of circumstances may occur, for example, as a result of a market change which leads the CMA to consider that the final offer order is no longer appropriate, or if the CMA has reasonable grounds to believe that one of the parties has submitted an offer under duress. It may also encompass a situation where the parties have reached an agreement with respect to payment terms in relation to the transaction(s) outside of the FOM process.<sup>525</sup> Where the CMA decides not to make a final offer order, it must give notice to that effect to the parties, and this notice must include the reasonable grounds for believing that there has been a material change of circumstances.<sup>526</sup> The CMA must then publish on its website a statement summarising this notice as soon as reasonably practicable thereafter.<sup>527</sup>

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<sup>521</sup> Section 42(1) of the Act.

<sup>522</sup> Section 42(2)(c) of the Act.

<sup>523</sup> Section 42(3) of the Act.

<sup>524</sup> Section 43 of the Act.

<sup>525</sup> Section 43(2) of the Act.

<sup>526</sup> Section 43(3) and (4) of the Act.

<sup>527</sup> Section 43(5) of the Act.

### *Duration and revocation of final offer orders*

7.145 Final offer orders will come into force at such time as the CMA may specify in the order and will cease to have effect either where revoked (as described below) or when the designation to which the final offer order relates ceases to have effect (subject to any provision made in reliance on section 17).<sup>528</sup> A designation will cease to have effect:

- (a) at the end of the designation period (see paragraph 2.90 in Chapter 2 on SMS); or
- (b) when the CMA decides, following a further SMS investigation, to revoke an SMS firm's designation in respect of a relevant digital activity (see paragraphs 2.101 to 2.102 in Chapter 2 on SMS).

7.146 The CMA may revoke, or partially revoke a final offer order where it has reasonable grounds to believe there has been a material change of circumstances since the order was made.<sup>529</sup> See Chapter 6 for further detail on reasons why the CMA may decide to vary or revoke a competition requirement. In relation to the FOM, material change of circumstances may also encompass a situation where the parties have reached an agreed resolution outside of the FOM.

7.147 The CMA must give notice to the parties if it decides to revoke or partially revoke a final offer order, giving reasons for its decision.<sup>530</sup> It must also publish on its website a statement summarising the contents of the notice as soon as reasonably practicable thereafter.<sup>531</sup> The notice may also include transitional, transitory or saving provision in relation to the revocation or partial revocation of the final offer order.<sup>532</sup>

7.148 The fact that a final offer order ceases to have effect will not affect the exercise of any digital markets functions in relation to a breach or possible breach of that order.<sup>533</sup> This enables the CMA to investigate and enforce against historic breaches of final offer orders.

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<sup>528</sup> Section 44(1) and (2) of the Act. Note that the fact the final offer order ceases to have effect does not mean that the transaction(s) to which it relates also ceases. For further information regarding the provision that the CMA may make under section 17 of the Act, see paragraphs 2.103–2.107.

<sup>529</sup> Section 44(3) of the Act.

<sup>530</sup> Section 44(4) and 44(5) of the Act.

<sup>531</sup> Section 44(7) of the Act.

<sup>532</sup> Section 44(6) of the Act.

<sup>533</sup> Section 44(8) of the Act.

*Keeping final offer orders under review*

7.149 The CMA must keep under review:

- (a) the extent to which the firm to which it has given a final offer order is complying with that order;
- (b) the effectiveness of the final offer order;
- (c) whether to revoke the final offer order; and
- (d) whether to take enforcement action in respect of a firm which does not comply with a final offer order.<sup>534</sup>

7.150 The approach the CMA will take to keeping final offer orders under review for effectiveness and monitoring compliance with final offer orders is set out in Chapter 6.

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<sup>534</sup> Section 45 of the Act.

## 8. Penalties for failure to comply with competition requirements

### Introduction

- 8.1 The CMA may impose penalties on undertakings for failure, without reasonable excuse, to comply with competition requirements in the Act.
- 8.2 This chapter sets out how the CMA will exercise its powers to impose (and the procedure for) penalties for failure to comply with competition requirements under section 85(2) (excluding IEOs) and (3) of the Act.<sup>535</sup> The CMA's approach to imposing penalties and procedure for failure to comply with investigative requirements, IEOs and merger reporting requirements is set out in separate guidance.<sup>536</sup>
- 8.3 The decision to impose a penalty is separate from a decision as to whether there has been a breach. Enforcement mechanisms other than penalties are also available to the CMA where it finds a breach. These are summarised in Chapter 7 on enforcement of competition requirements.
- 8.4 The CMA will apply the principles in this chapter flexibly according to the circumstances of each case.
- 8.5 This chapter is structured as follows:
- (a) Section 1 provides an overview of the statutory background and framework.
  - (b) Section 2 sets out the role of penalties and how the CMA will approach them.

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<sup>535</sup> Section 91 of the Act requires the CMA to prepare and publish a statement of policy in relation to the exercise of powers to impose a penalty under sections 85 and 87 of the Act. The CMA must have regard to the statement of policy most recently published when deciding whether to impose a penalty, and if so the amount of the penalty (section 91(6) and (7)). The CAT also must have regard to the CMA's published guidance (section 89 of the Act). This chapter serves as the CMA's statement of policy in relation to penalties for failures referred to in section 85(2) (excluding IEOs) and (3).

<sup>536</sup> The CMA's policy in relation to penalties for failures under section 85(2) (IEOs only), 85(4) and section 87 (administrative penalties) is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course. Where a business fails to comply with a requirement covered by this chapter and an investigative requirement in respect of the same investigation the CMA may impose both a penalty under this chapter and an administrative penalty where appropriate.

- (c) Section 3 sets out the procedure the CMA will follow when imposing a penalty.

## Statutory background

- 8.6 The CMA may impose penalties for failure to comply, without reasonable excuse, with:<sup>537</sup>
- (a) a requirement imposed by virtue of an enforcement order ('**EO**') under section 31;
  - (b) a requirement imposed by virtue of a final offer order under section 41, including a requirement imposed in reliance on section 42;
  - (c) a requirement imposed by virtue of a pro-competition order ('**PCO**') under section 46;
  - (d) the requirement to comply with a commitment given under section 36 or 56; and
  - (e) a conduct requirement ('**CR**') under section 19.
- 8.7 The CMA may impose a fixed amount (ie a fixed penalty), an amount calculated by reference to a daily rate (ie a daily penalty), or a combination of both in respect of the above failures (with the exception of penalties for failure to comply with a CR which must be a fixed amount).<sup>538</sup> The penalties the CMA may impose are subject to the statutory maximums of:
- (a) in the case of a fixed penalty, 10% of the total value of the worldwide turnover of the undertaking, or where the undertaking is part of a group, the worldwide turnover of the group;
  - (b) in the case of a daily penalty, for each day 5% of the total value of the daily worldwide turnover of the undertaking, or where the undertaking is part of a group, the daily worldwide turnover of the group; and
  - (c) in the case of a combination of a fixed penalty and a daily penalty, each of the respective amounts specified above.<sup>539</sup>

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<sup>537</sup> Section 85(1), (2) and (3) of the Act.

<sup>538</sup> Section 86(2) and (3) of the Act.

<sup>539</sup> Section 86(4) and (5) of the Act.

## The role of penalties and the CMA's approach

### Overview

- 8.8 It is essential that all firms subject to the digital markets competition regime take their responsibilities seriously and comply fully with the requirements placed on them. The CMA's powers to impose penalties play a critical role in ensuring this and avoiding harm to competition and consumers from non-compliance.
- 8.9 The CMA will therefore not hesitate to impose substantial penalties – both to deter individual businesses that breach specific requirements from further breaches, and to ensure that all those subject to the regime understand the consequences of non-compliance.
- 8.10 The CMA will not, however, apply a mechanistic or one-size-fits-all approach. When assessing whether to impose a penalty, what type and in what amount, the CMA will take into account all relevant circumstances in each case.

### *Whether to impose a penalty and the type of penalty imposed*

- 8.11 The CMA may be more likely to impose a penalty where it considers any of the following factors applies:
- (a) the failure to comply is serious in nature and/or significant in impact (whether actual or potential);
  - (b) the failure to comply is intentional<sup>540</sup> or negligent;<sup>541</sup>
  - (c) the undertaking did not swiftly report the failure to comply to the CMA when it became aware of it;
  - (d) the imposition of a penalty is important to ensure compliance by the undertaking with the relevant requirement and/or cooperation with the CMA;
  - (e) the imposition of a penalty is appropriate to deter the undertaking in question and/or others from further failures (generally and/or of the same or similar nature);

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<sup>540</sup> The CMA is of the view that a failure to comply is 'intentional' if the undertaking knew, must have been aware, or could not have been unaware, that a failure to comply would occur or is occurring.

<sup>541</sup> The CMA is of the view that a failure to comply is 'negligent' if the undertaking ought to or should have known that a failure to comply would occur or is occurring.

- (f) the undertaking obtained or would have been expected to obtain an advantage or benefit from the failure (whether or not it sought to do so); or
- (g) an undertaking has previously failed to comply with a requirement under the Act, whether in the current investigation or previously.

8.12 These factors are non-exhaustive – the CMA may consider it appropriate to impose a penalty because of other factors.

8.13 Where the CMA has a choice as to the type(s) of penalty that may be imposed (ie a fixed penalty, daily penalty, or a combination of the two), it will have regard, among other factors, to the need to incentivise timely compliance. A daily penalty (whether alone or in combination with a fixed amount) may create greater incentives for undertakings to comply swiftly since the penalty level will be directly related to the time the undertaking takes to comply. This may be particularly important, for example, where the failure to comply is resulting or risks resulting in, ongoing harm or loss to third parties or consumers.

8.14 However, where a failure has been remedied (ie is no longer occurring), it will often still be appropriate to impose a penalty (including potentially both a fixed penalty and daily penalty amount where available) to reflect the nature, gravity, duration or seriousness of the failure, to achieve deterrence, and/or to account for any gain or benefit.

### *Reasonable excuse*

8.15 The CMA may only impose a penalty where it considers that a failure to comply with a requirement is ‘without reasonable excuse’.<sup>542</sup>

8.16 The circumstances that constitute a reasonable excuse are not fixed. The CMA will apply an objective test as to whether an excuse put forward by an undertaking is reasonable. In doing so, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or a significant factor or event beyond the undertaking’s control has caused the failure, without which the failure would not otherwise have occurred. The CMA expects undertakings to draw such events or factors, or the potential for them to occur, to its attention at the earliest opportunity and not to raise them for the first time in response to an investigation into a suspected breach of competition requirements.

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<sup>542</sup> Section 85(1) and (3) of the Act.



- 8.17 The CMA is unlikely to accept an excuse as reasonable where an undertaking has not made reasonable efforts to comply with a requirement notwithstanding the circumstances giving rise to the excuse. In addition, the fact that an undertaking considered there were good commercial reasons for non-compliance with a requirement is unlikely to constitute a reasonable excuse.
- 8.18 The CMA is unlikely to accept as a reasonable excuse for non-compliance any claim that such non-compliance is required under an agreement or contract, or data protection laws.<sup>543</sup>

### ***Steps for determining the level of penalty***

#### *Method*

- 8.19 The CMA will use a four-step approach to assess the amount of a financial penalty to impose:<sup>544</sup>
- (a) Step 1: Assessment of the starting penalty having regard to relevant turnover and seriousness.
  - (b) Step 2: Adjustment for deterrence.
  - (c) Step 3: Adjustment for aggravating and/or mitigating factors.
  - (d) Step 4: Check to ensure the penalty is proportionate and does not exceed the statutory maximum.
- 8.20 The assessment at each step is not a mechanistic process and each individual step is one element towards arriving at an overall penalty figure which is appropriate in the circumstances of each case.
- 8.21 The stepped approach will be applied for both a fixed penalty and a daily penalty with factors specific to either type of penalty taken into account (eg

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<sup>543</sup> For example, in the UK, the Data Protection Act 2018 allows processing of personal data for the purposes of a legal obligation: see paragraph 3, Schedule 9 Data Protection Act 2018.

<sup>544</sup> The CMA understands that the government intends to consult on, and make, statutory instruments under section 90(2) of the Act which make provision for determining the turnover of a person for the purposes of calculating the maximum amounts of penalties that can be imposed under the Act (ie Step 4 in this chapter). Once the government consultation has concluded and these statutory instruments have been finalised, the CMA will consider and reflect them as necessary in the final digital markets competition regime guidance.

the need for swift enforcement in cases where a daily penalty may be appropriate).<sup>545</sup>

### *Step 1 – Assessment of the starting penalty having regard to relevant turnover and seriousness*

8.22 The CMA will arrive at the starting penalty at the end of Step 1 having regard to:

- (a) the relevant turnover of the undertaking; and
- (b) the seriousness of the failure.

#### *Determination of relevant turnover*

8.23 The relevant turnover will be the undertaking's UK turnover in the relevant period. This will be the amounts derived by the undertaking from the sale or provision of products<sup>546</sup> to customers (businesses or consumers) in the United Kingdom after the deduction of sales rebates, value added tax and other taxes directly related to turnover.<sup>547</sup>

8.24 For the purpose of this step, the CMA will typically base relevant turnover on figures from an undertaking's audited accounts but may also rely on other relevant information, including information obtained using the CMA's information gathering powers.<sup>548</sup> The relevant period will typically be the most recent year (the financial year preceding the date non-compliance ceased or of the provisional penalty notice for ongoing non-compliance) for which the undertaking has published consolidated financial statements.

8.25 Turnover will be expressed in pounds sterling. Where in the undertaking's accounts or other information used by the CMA, any figure is expressed in a currency other than pounds sterling, the CMA will determine the equivalent in

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<sup>545</sup> The CMA has discretion to impose both a fixed penalty and a daily penalty for failure to comply with certain requirements in section 85(2) of the Act.

<sup>546</sup> As defined in section 118 of the Act.

<sup>547</sup> To avoid double counting, UK turnover only includes external sales and does not include amounts that are derived from transactions involving the sale or provision of products between undertakings under same common ownership or common control (ie a group of companies).

<sup>548</sup> For example, the CMA will consider a number of factors, in particular: (a) where the undertaking or group of undertakings are situated (if outside the United Kingdom); (b) where businesses or consumers of the product or services resides; and (c) the number of businesses or consumers of the product or services within the United Kingdom. This list is not exhaustive. The CMA may also consider the undertaking's management accounts, business plans, key performance indicators, and executive compensation plans in relation to its activities within the United Kingdom.

pounds sterling, applying relevant rate or rates of exchange<sup>549</sup> and rounding of the resulting figure (up or down) as it considers appropriate.

- 8.26 In addition, the CMA notes that specific situations for the assessment of relevant turnover may arise in the areas of credit, financial services and insurance. The CMA expects these circumstances to be relatively uncommon and, in any case, expects generally accepted accounting principles and practices to address these issues in most cases.
- 8.27 Where it considers it appropriate to do so, the CMA may depart from its typical approach to determining relevant turnover and substitute an alternative figure and/or relevant period.<sup>550</sup>

*Assessment of seriousness – application of percentage starting point to relevant turnover*

- 8.28 The CMA will then apply a percentage starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular failure (and ultimately the actual or potential harm to competition and consumers). This is a case-specific assessment, taking into account overall:
- (a) how likely it is for the type of failure at issue, by its nature, to harm competition and consumers; and
  - (b) the extent and likelihood of harm (potential and/or actual) to competition and consumers in the circumstances of each case.
- 8.29 In making its assessment of seriousness and harm for the percentage starting point, the CMA will take account of all relevant circumstances and a range of factors, including culpability and intent, and any of the factors referred to in this chapter. For example, these may include:
- (a) the nature<sup>551</sup> of the products<sup>552</sup> associated with or related to the failure;
  - (b) the duration of the failure;

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<sup>549</sup> In doing so, the CMA will have regard to published reference rates.

<sup>550</sup> In such circumstances the CMA may use its information gathering powers to obtain relevant information from the undertaking and undertake additional enquiries to enable it to form its own view of a turnover figure or period which more accurately reflects the nature and scale of an undertaking's activities in the UK.

<sup>551</sup> This includes but is not limited to both intrinsic and extrinsic characteristics and features such as number of users, terms of access and use, effective price, demand and interconnections to or with other products.

<sup>552</sup> As defined in section 118 of the Act.

- (c) the approximate actual or potential benefits or gain from the failure for the undertaking; and
- (d) the approximate actual or potential effect or harm caused to competition and consumers (including competitors and users), whether directly or indirectly.

8.30 There is no pre-set ‘tariff’ of percentage starting points for different types of failure given the range of conduct that will be encountered in different cases and to which the CMA will have regard in setting an appropriate penalty amount.

### *Step 2 – Adjustment for deterrence*

8.31 After Step 1, the CMA may increase the penalty to ensure it is sufficient to achieve effective deterrence of non-compliance. In this context, deterrence includes that the level of penalty is sufficient to deter the undertaking in the particular case at hand from future non-compliance as well as other undertakings or third parties (current and future) from non-compliance with the same or similar requirements.

8.32 Where the CMA considers it is appropriate to do so, it may increase the penalty at this step, in order to ensure that the penalty achieves effective deterrence in view of the undertaking’s size, economic power and financial position, as well as any other relevant circumstances. The need for and the amount of any increase for deterrence will be based on a case-specific assessment.

8.33 An important part of deterrence is that an undertaking should not be able to profit from failing to comply, even after having paid any penalty imposed (ie disgorgement). Effective deterrence requires that a penalty imposed materially exceeds rather than simply neutralises any likely or potential gains from a failure to comply such that there is a strong economic incentive to comply. In this context, in addition to the specific area related to the failure, gains may include those which may accrue to the undertaking in areas or activities beyond those associated with the failure. The CMA also considers that it is likely to be necessary to impose significant penalties on undertakings to achieve the required deterrent effect given the significant financial position required of an undertaking by the SMS turnover condition.

8.34 For the purposes of assessing size, economic power and financial position, the CMA will typically take into account the undertaking’s total worldwide turnover as the primary indicator, unless the circumstances indicate that other metrics are more appropriate. The CMA will consider indicators and assess

financial position at the time the penalty is being imposed unless the circumstances indicate a different period may be appropriate. The CMA may also consider multi-year averages for turnover where appropriate.

### *Step 3 – Adjustment for aggravating and/or mitigating factors*

8.35 The CMA may increase the amount of the penalty at Step 3 where there are aggravating factors and/or decrease the amount of the financial penalty where there are mitigating factors. The CMA will consider whether any adjustments are appropriate (and the amount) in the round on the facts of each case.

8.36 Where both aggravating and mitigating factors are present in a case, the CMA may both increase the penalty for any aggravating factors and decrease the penalty for any mitigating factors. The net adjustment in such cases will depend on the specific circumstances of the failure and the case at hand.

8.37 The CMA may consider evidence of the following non-exhaustive list of factors as aggravating:

- (a) unreasonable behaviour or attempts to frustrate that delays the CMA's enforcement action;<sup>553</sup>
- (b) the undertaking having attempted (whether successfully or not) to conceal the failure or its actual or potential impact;
- (c) involvement of directors, senior management or officers;
- (d) retaliatory or other coercive measures taken against any third party aimed at ensuring the continuation of the failure or conduct at issue;
- (e) retaliatory measures taken or commercial reprisal sought by the undertaking against any party reasonably impacted by the failure; and
- (f) repeated failures by the same undertaking or other undertakings in the same group (ie recidivism).

8.38 The CMA may consider evidence of the following non-exhaustive list of factors as mitigating:<sup>554</sup>

- (a) cessation of the failure as soon as possible after the CMA intervenes;

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<sup>553</sup> The CMA will not treat the full exercise of the party's rights of defence as unreasonable behaviour.

<sup>554</sup> In determining whether a reduction for a mitigating factor is appropriate, the CMA will also take into account engagement and discussions on compliance with the undertaking that occurred before enforcement action.

- (b) meaningful cooperation over and above statutory or CMA deadlines and timeframes or which enables the enforcement process to be concluded more effectively and/or swiftly than otherwise would have been the case; and
- (c) where an undertaking has voluntarily made appropriate redress to parties impacted by a failure.<sup>555</sup>

*Step 4 – Check to ensure penalty is proportionate and does not exceed the statutory maximum*

8.39 At this step the CMA will:

- (a) check whether the overall penalty proposed is appropriate and proportionate; and
- (b) check, and if necessary, adjust the penalty to ensure that it does not exceed the maximum allowed by statute.

*Assessment and adjustments to ensure the penalty is proportionate*

8.40 The CMA will consider whether the overall penalty reached after Steps 1 to 3 is proportionate in the circumstances. Where the CMA intends to impose both a fixed penalty and a daily penalty, this includes considering proportionality in relation to each penalty individually as well as both in totality. The CMA may decrease the penalty at this step to ensure that it is not disproportionate or excessive. This assessment of proportionality is not a mechanistic assessment but one of evaluation and judgement.

*Check that the penalty does not exceed the statutory maximum*

8.41 The final amount of the penalty assessed according to the approach set out above may not in any event exceed the relevant statutory maximum of:

- (a) in the case of a fixed penalty, 10% of the total value of the worldwide turnover of the undertaking, or where the undertaking is part of a group, the worldwide turnover of the group;

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<sup>555</sup> The CMA will not consider redress as a mitigating factor where it was required by the CMA in respect of the same matter, for example, as part of an EO.

- (b) in the case of a daily penalty, for each day 5% of the total value of the daily worldwide turnover of the undertaking, or where the undertaking is part of a group, the daily worldwide turnover of the group; and
- (c) in the case of a combination of a fixed penalty and a daily penalty, each of the respective amounts specified above.

8.42 In this context, worldwide turnover will typically be based on figures from an undertaking's audited accounts. The year on the basis of which worldwide turnover is determined will be that prescribed by any statutory instrument made under section 90(2) of the Act. The final penalty amount/s will be adjusted, if necessary, to ensure they do not exceed the relevant maximum. This adjustment will be made after all the relevant adjustments have been made in the steps above.

## Penalties procedure

### *General*

8.43 Section 89 of the Act applies a number of sections from the EA02 to penalties under the Act as they apply to a penalty imposed under section 110(1) of EA02:<sup>556</sup>

- (a) Section 112 EA02 sets out the main procedural requirements for a penalty including the provision and contents of provisional and final penalty notices, the right of the undertaking to apply to the CMA for it specify an alternative date or dates for payment, and the requirement to have regard to representations received on a provisional penalty notice.
- (b) Section 113 EA02 sets out payment and interest requirements including the application of interest to any unpaid penalty balance and that the CMA may require unpaid amounts that are capable of being paid, to be paid immediately.
- (c) Section 114 EA02 sets out a party's rights of appeal to the CAT in relation to the imposition or nature of a penalty, the amount or amounts of the penalty, or the date/s by which the penalty or (as the case may be) the

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<sup>556</sup> Procedure for penalties under section 85(2) (IEOs only), 85(4) and 87 of the Act are covered in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

different dates by which different portions of the penalty are required to be paid.<sup>557</sup>

- (d) Section 115 EA02 sets out that an unpaid penalty and any unpaid interest not subject to an ongoing appeal may be recovered from the person it was imposed on, and in England and Northern Ireland may be recovered as a civil debt due to the CMA.

8.44 Daily penalties will be calculated and imposed in accordance with the requirements set out in section 90 of the Act and section 112(A1) of EA02 (as applied by section 89 of the Act).

### ***Provisional penalty notice***

8.45 Where practicable, the CMA will seek to run a penalty case and an investigation into a suspected breach of competition requirements together and issue a provisional penalty notice at the same time as provisional findings of the breach (and where practicable take representations on both together).

8.46 Before making a final decision to impose a penalty, the CMA must give the undertaking a provisional penalty notice. The provisional penalty notice must:

- (a) contain a draft of the final penalty notice the CMA is minded to give the undertaking;
- (b) invite the undertaking to make representations about the proposed final penalty notice; and
- (c) specify the means and time by which the undertaking must make such representations.<sup>558</sup>

8.47 The CMA will typically publish a non-confidential update in relation to a provisional penalty notice provided to an undertaking on its website.

8.48 Undertakings will be given a reasonable opportunity to make written representations on the provisional penalty notice to the CMA. The period within which representations must be received will be determined on a case-by-case basis having regard to the nature of the failure to comply and the constraints of any relevant statutory or administrative timetable. The CMA must have regard to any representations received before imposing a

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<sup>557</sup> The decision to impose a penalty and the nature and amount of such penalty is separate from the preceding decision that there has been a breach of a competition requirement, and from which the power to impose a penalty derives. Different appeal rights apply in respect of that finding of breach (see section 103 of the Act).

<sup>558</sup> Section 112(A2) EA02 as applied by section 89 of the Act.



penalty.<sup>559</sup> The CMA may not impose a penalty before the time specified in the provisional notice for making representations has expired.<sup>560</sup>

### ***Final penalty notice***

- 8.49 If the CMA decides to impose a penalty for non-compliance, it must give the undertaking a final penalty notice as soon as practicable thereafter.<sup>561</sup> The final penalty notice shall at a minimum, state:<sup>562</sup>
- (a) that the CMA has imposed a penalty on the undertaking;
  - (b) whether the penalty is a fixed penalty, a daily penalty, or both;
  - (c) the amount of the penalty, and where calculated by reference to a daily rate, the day on which the amount starts to accumulate and might cease to accumulate;
  - (d) the act or omission in question which the CMA considers gave it the power to impose a penalty;
  - (e) any other facts which the CMA considers justify the imposition of a penalty and the amount or amounts of the penalty;
  - (f) the manner in which, and the place at which, the penalty is required to be paid to the CMA;
  - (g) the date or dates by which the penalty or (as the case may be) different portions of it are required to be paid;<sup>563</sup>
  - (h) that the penalty or (as the case may be) different portions of it may be paid earlier than the date or dates by which it or they are required to be paid; and

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<sup>559</sup> Section 112(A3) EA02 as applied by section 89 of the Act. The CMA may also issue a supplementary provisional penalty notice to a firm, where new information or evidence leads the CMA to consider making a material change to the nature of its provisional findings and notice.

<sup>560</sup> Section 112(A3) EA02 as applied by section 89 of the Act.

<sup>561</sup> Section 112(1) EA02 as applied by section 89 of the Act.

<sup>562</sup> Section 112(2) EA02 as applied by section 89 of the Act.

<sup>563</sup> If the whole or any portion of a penalty is not paid by the date by which it is required to be paid, interest will be payable on the unpaid balance at the rate specified in section 17 of the Judgments Act 1838. See section 113 EA02 as applied by section 89 of the Act. Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal against the decision, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA. See section 115 EA02 as applied by section 89 of the Act.

- (i) details of the undertaking's rights to apply to have the dates on which payments are due varied or to appeal the imposition or nature of the penalty, or the amount of the penalty or the specified date or dates of payment.

## 9. Administration

### Introduction

- 9.1 This chapter explains the administrative processes the CMA will follow when carrying out its digital markets functions across the regime. It is structured as follows:
- (a) Section 1 explains the CMA's ability to extend relevant investigation periods and final offer periods in certain circumstances.
  - (b) Section 2 explains the approach the CMA will take to consultation and publication of statements.
  - (c) Section 3 explains the CMA's approach to transparency.
  - (d) Section 4 explains the CMA's duty of expedition.
  - (e) Section 5 explains the CMA's decision-making procedures.
  - (f) Section 6 explains the CMA's relationship with other relevant regulators.
  - (g) Section 7 explains the provisions relevant to the CMA's power to charge a levy.
  - (h) Section 8 explains the extra-territorial application of the Act.

### Extension periods

#### *Extension period for special reasons*

- 9.2 The CMA may publish a notice extending an SMS investigation period, a conduct investigation period, or a PCI investigation period (the '**relevant investigation period**') or a final offer period by a period of up to three months where it considers that there are special reasons for doing so.<sup>564</sup> The CMA will publish such notice on its website.
- 9.3 'Special reasons' include occasions where there are specific reasons which justify an extension of the normal time limits. These may include matters such as illness or incapacity of members of an investigation team that has seriously

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<sup>564</sup> Section 104(1) and (8) of the Act.

impeded its work, an unexpected event such as a merger of competitors, or new relevant information.

- 9.4 The notice must specify how long the extension is for.<sup>565</sup> The CMA will publish the notice on its website and the extension period begins the day of its publication.<sup>566</sup>
- 9.5 The CMA can only grant one three-month extension for special reasons for any single relevant investigation period or final offer period.<sup>567</sup>

### ***Extension period for failure to comply***

- 9.6 The CMA may also publish a notice extending a relevant investigation period or a final offer period where it considers that:
- (a) a person has failed to comply with any requirement of a notice under section 69 (power to require information) or under section 72 (power to interview), which was given in relation to an SMS investigation, a conduct investigation or a PCI investigation and the failure is preventing the CMA from properly discharging the digital markets functions to which the investigation relates;<sup>568</sup> or
  - (b) a person has failed to comply with any requirement of a notice under section 69, and the failure is preventing the CMA from properly discharging any of its functions under sections 38 to 45 of the Act (final offer mechanism).<sup>569</sup>
- 9.7 In these circumstances, the extension comes into force on the day that the CMA publishes the notice referred to in paragraph 9.6 above.<sup>570</sup> The CMA must publish a notice of its decision to end the extension once it is satisfied that the firm has complied with the relevant requirement.<sup>571</sup>

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<sup>565</sup> Section 104(2) of the Act.

<sup>566</sup> Section 104(6) of the Act.

<sup>567</sup> Section 105(2) of the Act.

<sup>568</sup> Section 104(3)(a)(i) and (ii) of the Act.

<sup>569</sup> Section 104(3)(b)(i) and (ii) of the Act.

<sup>570</sup> Section 104(6) of the Act.

<sup>571</sup> Section 104(4)–(5) of the Act.

- 9.8 This ‘stop the clock’ extension may be applied by the CMA multiple times. If more than one extension is active at the same time, they run concurrently rather than cumulatively.<sup>572</sup>
- 9.9 In addition to making an extension for failure to comply, the CMA may also impose a penalty on a person, where it considers that they have failed to comply with an investigative requirement without reasonable excuse which gave rise to the extension.<sup>573</sup> Further information on administrative penalties is set out in Administrative Penalties: Statement of Policy on the CMA’s approach (CMA4).<sup>574</sup>

## Consultation and publication of statements

- 9.10 The CMA must comply with any duty to consult in respect of its digital markets functions in such a manner as it considers practicable, having regard to (a) any need to keep information confidential, and (b) the timetable for making a final decision or taking any action following consultation.<sup>575</sup>
- 9.11 Any consultation that the CMA carries out in respect of its digital markets functions must include the reasons for the finding, decision or proposal to which the consultation relates, and such other information as the CMA considers necessary to allow a proper understanding of those reasons.<sup>576</sup>
- 9.12 The CMA recognises that respondents to a consultation may have concerns about submitting views and evidence which they consider to be confidential or business sensitive. The CMA has a statutory obligation to protect confidential information which comes to it in connection with the exercise of its digital markets functions<sup>577</sup> and will consider the need to protect confidentiality in respect of how responses to the consultation may be published. For example, the CMA may request that parties identify confidential information in a submission and/or provide a separate non-confidential version. Further detail

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<sup>572</sup> Section 105(4) of the Act. For example, if a nine-month SMS investigation had been extended for two months under Section 104(3), and one month into that extension a further two-month extension under Section 104(3) occurs, then those extensions would run concurrently for one month, and that period of overlap would be ignored when calculating the total length of the extension made. The total length of that investigation would be nine months plus two months for the initial extension, plus one month for the remainder of the second extension, for a total of 12 months.

<sup>573</sup> Section 87 of the Act.

<sup>574</sup> The CMA will in due course be consulting on an updated version of CMA4 that, among other things, sets out the CMA’s approach to penalties for breaches of certain of the Act’s digital markets provisions.

<sup>575</sup> Section 113(1) of the Act.

<sup>576</sup> Section 113(2) of the Act.

<sup>577</sup> See paragraphs 5.85–5.87 in Chapter 5 of this guidance on the CMA’s statutory obligations in respect of protecting confidential information.

on the CMA's approach to confidentiality is set out at paragraphs 5.85 to 5.91 in Chapter 5 of this guidance.

- 9.13 The CMA will have regard to the government's 'Consultation Principles'<sup>578</sup> when considering the length of a consultation period and will ensure that it is sufficient to give parties the opportunity to put their concerns and arguments to it. In determining the period for which it will consult, the CMA will also have regard to the overall statutory timetable subject to which an investigation or decision must be undertaken.<sup>579</sup> Where appropriate, the CMA will seek to give relevant parties advanced notice of the timetable for consultation.
- 9.14 Typically, the CMA will invite written responses to its consultations. It may also use a range of other methods including conducting one-to-one telephone calls, video conferences, surveys or hosting in-person meetings to receive views and comments.
- 9.15 The CMA may publish a summary of responses or non-confidential versions of submissions received in response to its consultations.

## Transparency

- 9.16 The CMA will exercise its functions under the digital markets competition regime as transparently as possible by providing appropriate information about the CMA's activities and decisions to the range of stakeholders with an interest in and who are affected by its work, whilst working to protect the confidentiality of those who provide the CMA with sensitive information.
- 9.17 Transparency is a means of achieving due process and ensuring that parties directly impacted by the exercise of the CMA's digital markets functions are treated fairly.
- 9.18 Transparency includes ensuring the parties directly involved and other interested persons (if appropriate) are informed during the course of an investigation of key developments.
- 9.19 The CMA must comply with any duty to publish a notice or any other document under the digital markets competition regime by publishing the notice or document online, having regard to any need to keep information confidential.<sup>580</sup>

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<sup>578</sup> [HMG Consultation Principles \(March 2018\)](#)

<sup>579</sup> Section 113(1)(b) of the Act.

<sup>580</sup> Section 113(3) of the Act.

- 9.20 The CMA will also publish the following information on its website:
- (a) Announcements in respect of the launch of any invitation to comment or consultation.
  - (b) A summary, on an annual basis, of how many times the CMA has used its power to request a report by skilled persons.<sup>581</sup>
- 9.21 Where it carries out an investigation in relation to its digital markets functions, the CMA will also aim to provide to the firm to which it relates at an early-stage information on the investigation process, including where appropriate who the decision-maker(s) will be for relevant decisions.
- 9.22 The steps outlined above are the minimum steps the CMA will take to ensure transparency. The CMA will seek to operate the regime in a transparent and participative manner, engaging with a wide range of stakeholders as part of its invitation to comment or consultation processes, in order to inform its decision-making. This is likely to involve other transparency mechanisms as the regime develops.

## Duty of expedition

- 9.23 The CMA will have regard to its duty of expedition<sup>582</sup> in carrying out its digital markets competition functions and the need to make decisions, or otherwise take action, as soon as reasonably practicable. Accordingly, there will be circumstances where the CMA progresses its investigations more quickly than general guidance on timelines or statutory deadlines may indicate.
- 9.24 The CMA expects SMS firms and other stakeholders engaged with digital markets functions, to cooperate promptly with administrative timetables. It will be important for the CMA to gather information it requires for its analysis at an early stage in each process, notwithstanding that it may need to make further requests for information as particular investigations progress. The CMA will be fair and reasonable in its requests for information and when setting deadlines for parties to respond.<sup>583</sup>
- 9.25 Where parties or their advisors act in a manner which runs counter to this requirement, for example seeking to delay the process by making late,

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<sup>581</sup> See paragraphs 5.65–5.74 in Chapter 5 of this guidance on investigatory powers.

<sup>582</sup> Section 327 of the Act provides that in making any decision, or otherwise taking action, for the purposes of any of its functions within Schedule 4A of the Enterprise and Regulatory Reform Act 2013 the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable.

<sup>583</sup> Further information on the CMA's investigatory powers is set out in Chapter 5 of this guidance.

duplicative or unnecessarily lengthy submissions, the CMA may be less able to engage as fully with such submissions, particularly where they risk undermining the effective exercise of the CMA's functions.

- 9.26 The CMA may impose administrative financial penalties for non-compliance with the CMA's statutory information gathering powers in relation to its digital markets functions.<sup>584</sup>

## Exercise and delegation of functions

- 9.27 This section sets out how decisions will be taken across the digital markets competition regime.

### ***Decisions that must be taken by the CMA Board***

- 9.28 The CMA Board must take the following decisions:<sup>585</sup>

- (a) whether to begin an initial SMS investigation;<sup>586</sup>
- (b) whether to begin a further SMS investigation;<sup>587</sup> and
- (c) whether to begin a PCI investigation.<sup>588</sup>

### ***Decisions that may be taken by the Digital Markets Board Committee***

- 9.29 The Act provides that certain other decisions can be made by the CMA Board or a committee or sub-committee of the Board.<sup>589</sup> As such, the CMA will establish a Digital Markets Board Committee (the '**Board Committee**') and authorise it to take the following decisions:<sup>590</sup>

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<sup>584</sup> More information is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4), an updated version of which the CMA will be consulting on in due course.

<sup>585</sup> Section 106(7) of the Act and paragraph 29(2) Schedule 4, Enterprise and Regulatory Reform Act 2013. Note: the list of functions that are reserved either solely for the Board or for the Board or a Board committee or sub-committee under section 106 can be added to or have functions removed by the Secretary of State by regulations made by statutory instrument.

<sup>586</sup> Section 9 of the Act.

<sup>587</sup> Section 10 of the Act.

<sup>588</sup> Section 47 of the Act.

<sup>589</sup> Section 105(8) of the Act and paragraph 29(2A) Schedule 4, Enterprise and Regulatory Reform Act 2013. Note: under the Act, the CMA Board has discretion to delegate any of the Board or Board committee or sub-committee functions and non-reserved functions. The Board authorisations are published and maintained on the CMA's website at [Authorisation of staff of the CMA](#).

<sup>590</sup> The Board reserves the right to elect to take any decision/s it has delegated for itself from time to time.



- (a) whether to make an SMS designation;<sup>591</sup>
- (b) whether to make transitional, transitory, saving provisions or apply any existing obligation to an SMS firm in respect of a new designation;<sup>592</sup>
- (c) whether to impose a CR<sup>593</sup> and/or revoke a CR;<sup>594</sup>
- (d) whether to make, and the form of, an EO;<sup>595</sup>
- (e) whether to accept commitments in respect of a conduct investigation;<sup>596</sup>
- (f) whether to accept commitments in respect of a PCI investigation;<sup>597</sup>
- (g) whether to adopt the FOM;<sup>598</sup>
- (h) whether to make, and the form of, a PCI and the contents of a PCI decision notice;<sup>599</sup>
- (i) whether to replace or revoke a PCI;<sup>600</sup> and
- (j) whether to impose a penalty on a person under section 85 or section 87 of the Act and the amount of any such penalty.<sup>601</sup>

9.30 In addition, the Board may authorise the Board Committee to take other decisions in relation to these functions as it sees fit, in accordance with the Board Committee's Terms of Reference.

9.31 A Board committee or sub-committee authorised to take decisions in the regime must:<sup>602</sup>

- (a) include the Chair and at least one other member of the Board who is not a member of the CMA's staff (ie Non-Executive Directors), or two or more of such non-staff members of the Board; and

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<sup>591</sup> Section 2 of the Act.

<sup>592</sup> In reliance on section 17 of the Act.

<sup>593</sup> Section 19 of the Act.

<sup>594</sup> Section 22 of the Act.

<sup>595</sup> Section 31 of the Act.

<sup>596</sup> Section 36 of the Act.

<sup>597</sup> Section 56 of the Act.

<sup>598</sup> Section 38 of the Act.

<sup>599</sup> Section 46 and 50 of the Act, respectively.

<sup>600</sup> Section 52 and 53 of the Act, respectively.

<sup>601</sup> Section 106(8) of the Act.

<sup>602</sup> Section 106(8) of the Act.

(b) have at least half of its members be:

- i. members of the Board who are not members of the CMA's staff (ie the Chair and/or Non-Executive Directors), or
- ii. members of the CMA panel.

9.32 Such an authorised Board committee or sub-committee is subject to the general requirements of committees and sub-committees set out in the Enterprise and Regulatory Reform Act 2013.<sup>603</sup>

9.33 The Board Committee Terms of Reference, which will be published on the CMA's website, will set out further detail concerning the composition, operation and remit of the Board Committee.

### ***All other decisions***

9.34 Aside from those set out at 9.29 and 9.30, the CMA Board has discretion to delegate all other decisions as it considers appropriate. The Board authorisations are published and maintained on the CMA's website at Authorisation of staff of the CMA.

## **Coordination with relevant regulators**

9.35 Where the CMA proposes to use its digital markets functions, it has a statutory duty to consult the regulators specified in the Act where their remits and responsibilities might be impacted by the exercise of its functions. The regulators to which the duty to consult applies (in specified circumstances) are Ofcom, the Financial Conduct Authority ('FCA'), the Information Commissioner, the Bank of England and the Prudential Regulatory Authority.

9.36 The Act also creates a statutory mechanism for the FCA and Ofcom to make recommendations to the CMA regarding the exercise of its regulatory digital markets functions in relation to an undertaking and a digital activity.<sup>604</sup>

9.37 The principles and arrangements which the CMA proposes to adopt in order to give effect to the statutory provisions on regulatory coordination will be set out in published bilateral Memoranda of Understanding between the CMA and the relevant regulators. These coordination arrangements will complement

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<sup>603</sup> Schedule 4, Enterprise and Regulatory Reform Act 2013.

<sup>604</sup> As set out at section 108 of the Act.

other existing coordination mechanisms, including through the Digital Regulation Cooperation Forum.

- 9.38 In recognition of the broad reach of digital issues, and in order to ensure effective coordination with different regulatory regimes, the CMA will also be open to input from the wider regulatory community outside those regulators with which it is required by the Act to consult. The CMA will seek input from other regulators via public consultations undertaken in the course of exercising its functions, or by direct bilateral engagement.

## Power to charge levy

- 9.39 The CMA will require SMS firms pay a levy to cover the costs of its digital markets functions.<sup>605</sup> The CMA will produce ‘levy rules’ that will establish how the levy will be calculated and collected and the time from which it will take effect.<sup>606</sup> The CMA is required to consult on the levy rules before they are made.<sup>607</sup> At the same time as beginning the consultation on the levy rules, the CMA must arrange for the draft of the proposed levy rules to be laid before Parliament.<sup>608</sup>

## Extra-territorial application

- 9.40 Unless otherwise stated in the Act, the digital markets competition regime applies to persons outside the United Kingdom.<sup>609</sup>
- 9.41 The CMA can only give notice (such as a penalty notice) to those outside of the United Kingdom if they are (or are part of):
- (a) an SMS firm or a firm to which an obligation applies by virtue of provision made in reliance on section 17(1) (existing obligations);<sup>610</sup>
  - (b) a firm that is the subject of a digital markets investigation;<sup>611</sup>

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<sup>605</sup> Section 110(1) of the Act.

<sup>606</sup> Section 110(2) and 110 (4).

<sup>607</sup> Section 110(8) of the Act.

<sup>608</sup> Section 110(10) of the Act.

<sup>609</sup> Section 111(1) of the Act.

<sup>610</sup> Section 111(3)(a) of the Act. See paragraphs 2.103-2.107 of Chapter 2 of this guidance for information on section 17 existing obligations.

<sup>611</sup> Section 111(3)(b) of the Act.

- (c) an individual who is named as a senior manager under section 70<sup>612</sup> or appointed as a nominated officer under section 83,<sup>613</sup> and on whom the CMA has imposed or is considering imposing a penalty under section 87(2) or 87(3), as the case may be;<sup>614</sup>
- (d) a United Kingdom national;<sup>615</sup>
- (e) an individual who is habitually resident in the United Kingdom;<sup>616</sup> or
- (f) a body incorporated under the law of any part of the United Kingdom, or carries on business in the United Kingdom.<sup>617</sup>

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<sup>612</sup> See paragraphs 5.23–5.28 in Chapter 5 of this guidance.

<sup>613</sup> See paragraphs 6.28–6.39 in Chapter 6 of this guidance.

<sup>614</sup> More information is set out in *Administrative Penalties: Statement of Policy on the CMA's approach (CMA4)*, an updated version of which the CMA will be consulting on in due course.

<sup>615</sup> Section 111(5)(a) of the Act.

<sup>616</sup> Section 111(5)(b) of the Act.

<sup>617</sup> Section 111(5)(c) and (d) of the Act. See paragraphs 2.22–2.23 in Chapter 2 of this guidance for explanation of 'carries on business' in the United Kingdom.