

# Guidance on the mergers reporting requirements for SMS firms

CMA 195con DRAFT

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# 1. Introduction

## Overview

- 1.1 This guidance provides general information and advice to companies and their advisers on the merger reporting duty set out by the Digital Markets, Competition and Consumers Act (the **DMCC Act**).
- 1.2 The DMCC Act establishes a new digital markets competition regime, giving the Competition and Markets Authority (**CMA**) functions in relation to the regulation of competition in digital markets. Strategic market status (**'SMS'**) designation is the gateway into the digital markets competition regime – only an undertaking designated as having SMS in respect of a digital activity will be within the scope of the regime (an **SMS firm**). In order to designate a firm as having SMS, the CMA must undertake a formal investigation.<sup>1</sup>
- 1.3 SMS firms and, where an SMS firm is part of a group, any member of that group,<sup>2</sup> have a duty to report certain acquisitions of shares and/or voting rights in targets that have a UK nexus. This duty includes a standstill requirement that prevents completion of these transactions for a short period of time, during or after which the CMA may decide to open an investigation. An SMS firm, and any member of the group to which that SMS firm belongs, are collectively referred to in this guidance as **SMS Acquirers**.
- 1.4 Since the CMA would conduct any merger investigation under the Enterprise Act 2002 (the **Act**), this guidance should be read alongside the [Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#)<sup>3</sup> and the CMA's guidance on [Interim measures in merger investigations \(CMA108\)](#).

## Content of the guidance

- 1.5 This guidance sets out which undertakings are covered by the duty to report (Section 2) and what amounts to a reportable event (Section 3). It then outlines the process for submitting a report (Sections 4 and 5) and describes the provisions for enforcing the reporting requirement under the DMCC Act (Section 6).

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<sup>1</sup> For information on the SMS designation, see Chapter 1 of the [Digital Markets competition regime guidance](#).

<sup>2</sup> Section 117 of the DMCC Act explains the concept of a group for the purposes of the DMCC Act.

<sup>3</sup> The CMA will in due course be consulting on an updated version of CMA2.

## 2. Scope of duty to report mergers

- 2.1 The duty to report only applies to SMS Acquirers.<sup>4</sup> This duty can be discharged by any member of the SMS firm's group or by their authorised representative (such as a legal representative).<sup>5</sup>
- 2.2 Where more than one SMS firm is required to submit a report in relation to the same transaction, they can choose to comply with their obligations by submitting a joint report to the CMA.<sup>6</sup>
- 2.3 The duty to report is not limited to acquisitions related to the digital activity in respect of which an SMS firm is designated.<sup>7</sup> Rather, it applies to all reportable events carried out by SMS Acquirers, regardless of the area of activity.

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<sup>4</sup> Section 57(1) of the DMCC Act.

<sup>5</sup> Section 65(1) of the DMCC Act. A notice of the authorisation signed by an officer of the relevant undertaking (or group) must be given to the CMA. Such authorisation may be revoked at any time (section 65(2) and (3) of the DMCC Act).

<sup>6</sup> Section 61(1) of the DMCC Act.

<sup>7</sup> See Chapter 1 of [Digital markets competition regime guidance](#).

### 3. Reportable events

- 3.1 SMS Acquirers must report certain transactions (a ‘reportable event’) to the CMA before the transaction takes place. The criteria under the DMCC Act to determine what qualifies as a reportable event aim to capture sizeable transactions involving UK-connected bodies corporate over which the CMA may have jurisdiction.<sup>8</sup> The assessment as to whether a transaction is a reportable event is distinct from the assessment as to whether the CMA has jurisdiction to review a transaction. The duty to report applies to any transaction that meets the reporting requirements, although the CMA may ultimately conclude that the transaction does not meet the jurisdictional thresholds. Similarly, the CMA may have jurisdiction to review a transaction where that transaction is not a reportable event.

#### Categories of reportable events

- 3.2 Two broad types of transaction may be subject to the reporting requirements, provided they meet the relevant thresholds:
- (a) An acquisition of an interest<sup>9</sup> in a target; and
  - (b) An acquisition of an interest in a new joint venture.
- 3.3 These transactions will be subject to the duty to report where the transaction:<sup>10</sup>
- (a) results in SMS Acquirers having ‘qualifying status’;
  - (b) has a nexus to the UK; and
  - (c) meets the consideration value threshold.
- 3.4 Each of these requirements is addressed below.

#### *Qualifying status*

- 3.5 A transaction may be reportable where it results in SMS Acquirers having ‘qualifying status’. Qualifying status is determined based on the percentage of shares or voting rights the SMS Acquirers will hold following the transaction.

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<sup>8</sup> See Chapter 4 of [CMA2](#), including guidance on what constitutes a ‘relevant merger situation’.

<sup>9</sup> Schedule 2 of the DMCC Act includes additional information on the holding of interests and rights.

<sup>10</sup> Section 57(2) of the DMCC Act.

### *Acquisition of shares or voting rights in a target*

3.6 Section 57(2)(a) of the DMCC Act provides that SMS Acquirers will have qualifying status if the relevant transaction would result in them acquiring a certain level of shares or voting rights in a target. The percentage of the shares<sup>11</sup> or voting rights<sup>12</sup> that SMS Acquirers will hold following the transaction must increase as set out below:

- (a) from less than 15% to 15% or more,
- (b) from 25% or less to more than 25%, or
- (c) from 50% or less to more than 50%.

3.7 Successive transactions between the same parties may trigger the duty to report more than once. For instance, SMS Acquirers will have to submit a report to the CMA before they acquire 15% or more shares/voting rights in a target. Should SMS Acquirers complete this acquisition and subsequently decide to increase their shareholding/voting rights to more than 25% in the same target, irrespective of whether this involves the same seller or not, this would result in a new reportable event triggering a duty to submit a new report to the CMA.

### *Acquisition of shares or voting rights in a new joint venture*

3.8 SMS Acquirers may have qualifying status if they decide to form a new joint venture vehicle<sup>13</sup> together with at least one other person that is not part of the SMS Acquirers.

3.9 SMS Acquirers will have qualifying status if the relevant transaction would result in them holding at least 15% of the shares or voting rights in the new joint venture vehicle.<sup>14</sup>

3.10 Once the joint venture has been created, the approach set out above with respect to an acquisition of an interest in a target will apply to any future

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<sup>11</sup> References to holding a percentage of shares are defined in Section 58(3) of the DMCC Act.

<sup>12</sup> Voting rights are the rights conferred on shareholders in respect of their shares to vote at general meetings of the body corporate on all or substantially all matters (for a body corporate that has a share capital) and the rights conferred on members to vote at general meetings of the body corporate on all or substantially all matters (for a body corporate that does not have a share capital – section 58(3) of the DMCC Act). Where a body corporate does not have general meetings, this includes any rights in relation to the body corporate that have the equivalent effect – section 58(5) of the DMCC Act.

<sup>13</sup> Bodies corporate formed by two or more unconnected parties for the purpose of working together (see the [Explanatory notes to the DMCC Act](#), paragraph 307).

<sup>14</sup> Section 58(2) of the DMCC Act.

increase in the shareholding/voting rights that SMS Acquirers gain in the joint venture.

## **UK Nexus**

- 3.11 In transactions involving the acquisition of a target, the reporting requirement only arises where the target (including any of its subsidiaries) whose shares or voting rights are being acquired is 'UK-connected', meaning that it has a nexus to the UK.
- 3.12 In transactions involving the creation of a new joint venture, the reporting requirement arises where SMS Acquirers expect or intend that the joint venture will be UK-connected. In determining whether SMS Acquirers 'expect or intend' the joint venture to supply goods or services in the UK (or in a wider market that would include the UK), the CMA considers that all available evidence in the round will be relevant, including R&D projects, pipeline products and business plans.
- 3.13 The DMCC Act specifies that a body corporate will be UK-connected if either (a) it carries on activities in the UK; or (b) it supplies goods or services (whether for consideration or otherwise) to a person (or persons) in the UK.<sup>15</sup>

### ***Carrying on activities in the UK***

- 3.14 The first way in which the UK nexus test can be met is if, pre-transaction, the target carries on activities in the UK.<sup>16</sup> In the case of the formation of a joint venture, the UK nexus test can be met if SMS Acquirers expect or intend that the joint venture will carry on activities in the UK.<sup>17</sup>
- 3.15 Paragraph [X] of CMA2, the CMA's guidance on merger jurisdiction and procedure, sets out an indicative, but non-exhaustive, list of factors which would suggest that the target carries on activities in the UK.<sup>18</sup>

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<sup>15</sup> Section 57(5) and (6) of the DMCC Act.

<sup>16</sup> Section 57(5)(a) of the DMCC Act.

<sup>17</sup> Section 57(3)(a) of the DMCC Act.

<sup>18</sup> As noted in footnote 3, the CMA will in due course be consulting on an updated version of CMA2 that, among other things, sets out guidance on what might constitute 'carrying on activities in the UK'.



## **Supply of goods or services in the UK**

- 3.16 The second way in which the UK nexus can be met is if, pre-transaction, the target supplies goods or services (directly<sup>19</sup> or indirectly,<sup>20</sup> for consideration or otherwise<sup>21</sup>) to a person or persons in the UK. In the case of the formation of a joint venture, the UK nexus can be met if SMS Acquirers expect or intend that the joint venture will supply goods or services in the UK.<sup>22</sup>
- 3.17 The CMA considers that the concept of supplying goods and services in the UK should be assessed in the same way as it is assessed under the Act. Guidance on the concept of supplying goods or services in the UK in the context of the share of supply test is set out in CMA2.<sup>23</sup>

## **Value of the consideration**

- 3.18 The duty to report only arises in relation to transactions or the formation of joint ventures where the total value of all consideration (whether provided before or as part of the ‘reportable event’) is at least £25 million.
- 3.19 Consideration encompasses all assets or other measurable economic benefits that (1) transfer from a buyer (ie SMS Acquirers) to a seller, whether directly or indirectly, in relation to an acquisition of shares or voting rights, and/or (2) are contributed by SMS Acquirers to a new joint venture.<sup>24</sup> Consideration is defined in the DMCC Act as meaning fees, remuneration, assets of any description,<sup>25</sup> liabilities assumed<sup>26</sup> and any other kind of consideration,<sup>27</sup> however provided,<sup>28</sup> including conditional and deferred consideration. Accordingly, this includes, but is not limited to:

(a) cash;

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<sup>19</sup> Eg through employees.

<sup>20</sup> Eg through subsidiaries or agents.

<sup>21</sup> For the avoidance of doubt, the UK nexus test can be met if the target or joint venture supplies goods or services free of charge.

<sup>22</sup> Section 57(3)(a) of the DMCC Act.

<sup>23</sup> CMA2, paragraph 4.60(b).

<sup>24</sup> Where an SMS firm forms part of a group, the consideration contributed by all group members in relation to a transaction is relevant in calculating the total value of consideration.

<sup>25</sup> Meaning assets transferred from the buyer to the seller to bring about a reportable event.

<sup>26</sup> Meaning debt liabilities assumed (for example, interest bearing liabilities) in line with generally accepted M&A practice.

<sup>27</sup> For example, other kinds of consideration may include arrangements such as the provision by SMS Acquirers of ‘payments-in-kind’ (ie the provision of goods or services in lieu of cash or other consideration).

<sup>28</sup> Other payments to shareholders in connection with a reportable event may form part of the value of consideration. This may include, for example, significant remuneration packages offered by SMS Acquirers to employ founding teams and other staff who are shareholders in the target prior to the transaction.

- (b) publicly traded securities (for example options, warrants or other instruments allowing a holder future access to securities);
- (c) non-publicly traded securities (for example shares, bonds, or other instruments);
- (d) deferred payment or transfer of assets;
- (e) any debt liabilities assumed by the buyer;<sup>29</sup> and
- (f) any other tangible or intangible assets transferred from buyer to seller in relation to the reportable event.<sup>30</sup>

3.20 The CMA would typically expect SMS Acquirers to assess the value of the consideration as at the time the transaction agreement (such as a Share Purchase Agreement) is signed.

3.21 Some elements of consideration may be variable in nature and have changing values over time,<sup>31</sup> such as in the case of the transfer of (1) non-publicly traded shares, bonds or other instruments from buyer to seller, (2) other tangible or intangible assets from buyer to seller, and (3) debt liabilities assumed by the buyer. For the purposes of the consideration assessment, the value should generally be determined at the time of the finalisation of any transaction agreement and on the basis of global financial reporting standards relating to the principle of fair value.<sup>32</sup>

3.22 For the purpose of calculating the value of consideration under the reporting requirement, the DMCC Act is cumulative. This means that the value of the consideration includes all consideration that will be provided in exchange for the target's shares or voting rights.<sup>33</sup> As such, this includes:

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<sup>29</sup> When acquiring a majority shareholding, an acquiring firm will generally assess the 'enterprise value' of a business, which means the value of the business to all of funders (including debt holders and shareholders) regardless of the 'mix' of that funding, ie whether predominantly debt or equity. Adjustments are subsequently made to this 'headline' value to account for the debt of the target business, its cash, and its 'ordinary' working capital position, producing an 'equity value' (representing the value of the business only to shareholders). To the extent that SMS Acquirers assume the debt liabilities of the target, this should be included in the value of consideration. Where this is not the case (such as in the acquisition of some minority shareholdings), debt value may not be included.

<sup>30</sup> Ancillary costs which do not form part of the benefit transferred from buyer to seller to acquire the business, such as legal fees, are not considered to be part of consideration.

<sup>31</sup> In such cases, SMS Acquirers should ensure they provide a short summary of how the value of such elements was determined as part of their report (in response to 4(c) on the transaction value).

<sup>32</sup> See International Financial Reporting Standards (IFRS), in particular IFRS 13 Fair Value Measurement.

<sup>33</sup> Section 59(1) of the DMCC Act.

- a) the value of the consideration to be provided by SMS Acquirers in relation to a reportable event; and
- b) the value of any previous consideration provided by SMS Acquirers in relation to any shares or voting rights already held in the target,<sup>34</sup> regardless of whether the transaction(s) resulting in the acquisition of those shares or voting rights qualified as a reportable event.

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<sup>34</sup> To be measured as at the time of the historic transaction(s) through which SMS Acquirers acquired their holding of shares or voting rights.

## 4. When to submit a report

- 4.1 SMS Acquirers have a duty to inform the CMA of reportable events before they take place. The DMCC Act sets out that a reportable event is to be treated as taking place when SMS Acquirers become unconditionally obliged to acquire the shares/voting rights (or form the joint venture).<sup>35</sup> SMS Acquirers must self-assess when to submit a report to the CMA.
- 4.2 SMS Acquirers should not submit a report for transactions that remain hypothetical. Arrangements potentially leading to a reportable event should be sufficiently advanced and likely to proceed prior to submitting a report. This is to ensure that the CMA does not commit resources to reviewing reports on transactions that may not ultimately be agreed or are agreed in a materially different form that requires the CMA to reassess the deal.<sup>36</sup>
- 4.3 As a deal progresses, SMS Acquirers should regularly assess whether there are any material changes to the transaction that could affect whether it is a reportable event or not. For example, if there are changes to the consideration paid for the target or to the level of shareholding or voting rights acquired by SMS Acquirers, this may trigger a reportable event that may not have been envisaged at the outset of the transaction.
- 4.4 The duty to report does not apply in relation to a reportable event if:
- a) It does not differ in any material extent from an event already reported under section 57(1) of the DMCC Act;
  - b) It has already been notified to the CMA through a merger notice under section 96(1) of the Act;
  - c) The CMA has formally begun a phase 1 investigation in relation to it (or a reportable event that does not differ in any material extent), or
  - d) It (or a reportable event that does not differ in any material extent) is subject to a public interest intervention notice or special public interest intervention notice issued by the Secretary of State.<sup>37</sup>
- 4.5 The CMA may engage with parties prior to SMS Acquirers reporting the transaction, just as they sometimes do prior to merger parties formally

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<sup>35</sup> Section 64 of the DMCC Act.

<sup>36</sup> In assessing whether a transaction is sufficiently advanced to submit a report, SMS Acquirers may refer to the CMA's guidance on submitting a case team allocation form ([CMA2](#), paragraph 6.14).

<sup>37</sup> See section 61(4) of the DMCC Act. The Secretary of State may make regulations about the duty to report a reportable event – at which point this guidance will be updated.

notifying the CMA of a merger. However, it is for SMS Acquirers to determine when to submit a report, and any earlier engagement with the CMA will not constitute the fulfilment of their duty to report.

## 5. Reporting requirement process

- 5.1 This section explains what information should be included in a report for a qualifying transaction and the process for submitting the report to the CMA.

### Content of a report

- 5.2 The DMCC Act requires the CMA to set out by notice the information that must be contained in a report and the form in which the report should be made. The CMA's notice under section 60(1) of the DMCC Act (the **Notice**) can be found [here](#).
- 5.3 As set out in the Notice, a report submitted by SMS Acquirers must include information on:
- (a) the parties to the transaction;
  - (b) the transaction arrangements;
  - (c) rationale for the transaction;
  - (d) the activities of SMS Acquirers and the target; and
  - (e) competitors to the target.
- 5.4 In addition to the information required under the Notice, the CMA would encourage SMS Acquirers to submit any other information that may help the CMA to determine whether to investigate the transaction or to make an initial enforcement order. This can be submitted as an Annex or short note accompanying the report.<sup>38</sup>
- 5.5 The report should be sent by email to the CMA at [SMS.Mergerreporting@cma.gov.uk](mailto:SMS.Mergerreporting@cma.gov.uk). The email should clearly state that the report is submitted under the DMCC Act by using a clear subject line such as 'SMS Transaction Report – [Acquirer / Target]'.

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<sup>38</sup> In line with the CMA's process when receiving briefing papers from merger parties, any additional information provided by SMS Acquirers in addition to the report should be no more than five pages. (Paragraph 3.2 and footnote 5 of Guidance on the CMA's merger intelligence function ([CMA56](#))).

## Process

- 5.6 A reportable event must not take place:<sup>39</sup>
- (a) without a report in relation to the event having been submitted to the CMA; and
  - (b) before the end of the waiting period in relation to the event.<sup>40</sup>
- 5.7 The CMA will give notice confirming whether it accepts that a report is sufficient within five working days (the **Review Period**).<sup>41</sup> The Review Period begins on the first working day after the CMA receives the report (ie the date when the CMA receives the report is Day 0).
- 5.8 Once the CMA has confirmed that the report is sufficient, there is a waiting period of five working days during which the reportable event cannot take place (the **Waiting Period**).<sup>42</sup> The Waiting Period begins on the first working day after the day on which the CMA confirms that the report is sufficient.

### ***The Review Period***

#### *Acceptance of a report*

- 5.9 Upon receipt of a report, the CMA will consider whether a report is sufficient and can be accepted. A report will be considered sufficient if it contains all the information and in the form as specified in the Notice. The CMA will inform SMS Acquirers via email within the Review Period that the report is accepted.

#### *If a report is not accepted*

- 5.10 The CMA will consider a report to be insufficient if it does not contain the information requested in the Notice. If the report is insufficient, the CMA will inform SMS Acquirers via email within the Review Period. The CMA will include the reason(s) why it considers the report to be insufficient, for example, by identifying what requested information SMS Acquirers have failed

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<sup>39</sup> An agreement to acquire shares or voting rights, or to form a joint venture, will be treated as taking place when SMS Acquirers become unconditionally obliged to acquire the shares or voting rights, or to form the joint venture (see Section 64 of the DMCC Act).

<sup>40</sup> Section 63 of the DMCC Act.

<sup>41</sup> Any day other than (1) a Saturday or a Sunday, or (2) a day that is a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971.

<sup>42</sup> This starts the first working day after the CMA accepted that the report relating to the event was sufficient (Section 63(2) of the DMCC Act).

to produce or what information is unclear and requires clarification. SMS Acquirers will be required to rectify and resubmit the report to the CMA.

- 5.11 Once the report is resubmitted, a new Review Period will restart on the following working day (ie the date that the CMA receives the resubmitted report is Day 0).

### ***The Waiting Period***

- 5.12 Once a report is accepted by the CMA, the five working day Waiting Period will commence. SMS Acquirers cannot complete the transaction during this Waiting Period unless the CMA gives its consent.<sup>43</sup> In some cases, the CMA may request additional information from SMS Acquirers in order to decide whether to open an investigation,<sup>44</sup> either during the Waiting Period or after (see below).

### ***Outcomes from the reporting process***

- 5.13 By the end of the Waiting Period, the CMA will inform SMS Acquirers whether (i) it has decided to open an investigation into the transaction, (ii) it is continuing to assess whether to open an investigation, or (iii) where the CMA has been able to determine that it has no further questions about the transaction at that stage.

### ***CMA decision to investigate during the Waiting Period***

- 5.14 The CMA will decide to investigate a transaction if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met.<sup>45</sup> The threshold for the CMA to open an investigation is therefore lower than the threshold for reference.
- 5.15 If the CMA decides to investigate a transaction, it may allow SMS Acquirers the option to notify the transaction. Alternatively, the CMA will send SMS Acquirers an enquiry letter under section 109 of the Act. The decision on whether to allow notification or to send an enquiry letter will depend on the anticipated timing of the transaction and the timeframe under which SMS

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<sup>43</sup> Section 63(4) of the DMCC Act gives the CMA the ability to give consent to a reportable event happening before the end of the Waiting Period, and to revoke that consent before the reportable event happens.

<sup>44</sup> The CMA may request information from SMS Acquirers using its existing information gathering powers under the Act, or by using the information gathering powers set out under section 69 of the DMCC Act.

<sup>45</sup> This is consistent with the test used by the CMA's mergers intelligence function to determine whether to investigate a transaction, see [CMA56](#), paragraph 1.2.



Acquirers propose to notify the transaction. If completion is imminent, the CMA would typically send an enquiry letter under section 109 of the Act.

- 5.16 Where the CMA decides to initiate an investigation, and where the CMA is not satisfied that the risk of pre-emptive action<sup>46</sup> is low, it is likely the CMA will impose an Initial Enforcement Order (**IEO**).<sup>47</sup>

#### *No decision to investigate during the Waiting Period*

- 5.17 If the CMA has not opened an investigation by the end of the Waiting Period, SMS Acquirers can complete the transaction. The CMA will nonetheless inform SMS Acquirers whether it may have additional questions about the transaction.
- 5.18 In some cases, the CMA will inform SMS Acquirers by the end of the Waiting Period that it is continuing to assess whether to open an investigation. In these cases, the CMA may ask the parties to provide further information after the Waiting Period has expired in order to help it determine whether to open an investigation.<sup>48</sup>
- 5.19 In other cases, the CMA will inform SMS Acquirers by the end of the Waiting Period that it has no further questions at that stage. This does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act.

#### ***Role of third parties***

- 5.20 The CMA will rarely send questions to third parties about a reportable event during the Review Period or Waiting Period. Any such requests will likely relate to information necessary to enable the CMA to understand the nature of the businesses of the merger parties and the sectors in which they operate. As a general rule, the CMA will only contact third parties in relation to transactions that are in the public domain.
- 5.21 Third parties are welcome to set out their concerns about a transaction to the CMA. Complainants should clearly explain why they believe the transaction

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<sup>46</sup> Pre-emptive action is action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. This is described in the CMA's guidance on Interim Measures in merger investigations ([CMA108](#)).

<sup>47</sup> For further information on the CMA's approach to IEOs, see [CMA108](#).

<sup>48</sup> For additional guidance on the CMA's information gathering in deciding whether to open an investigation, see [CMA56](#).

raises competition concerns and, where possible, provide supporting evidence. The CMA may then follow up with the complainant to understand the submission better.

- 5.22 Any information received by the CMA from merging parties or third parties as part of the reporting requirement process will be subject to Part 9 of the Act. The CMA is under a general statutory obligation to protect confidential information relating to individuals and businesses that comes to the CMA in connection with the exercise of its statutory functions (including the reporting requirement functions). Only disclosure falling within one of the 'information gateways' set out in Part 9 is permitted.<sup>49</sup>

#### *Other regulators*

- 5.23 Where a transaction is subject to review by competition authorities outside the UK, the CMA may request information related to the status of proceedings in those jurisdictions. Merger parties may also be invited to provide waivers to facilitate the discussion of the transaction between the CMA and those competition authorities.
- 5.24 The CMA routinely consults the sectoral regulators about any transactions in which they are likely to have industry specific knowledge. The CMA will take any views it receives from the sectoral regulators into account, although it is ultimately for the CMA to decide whether the reported transaction requires a formal phase 1 investigation.

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<sup>49</sup> Further information regarding the CMA's confidentiality obligations is contained in: [Transparency and disclosure - statement of CMA's policy and approach: CMA6 - GOV.UK \(www.gov.uk\)](#).

## 6. Enforcement

- 6.1 The DMCC Act identifies the following forms of non-compliance in relation to the reporting requirement: (1) failure to comply with the reporting requirement;<sup>50</sup> (2) failure to comply with the standstill obligation;<sup>51</sup> (3) failure to comply with a formal information request;<sup>52</sup> and (4) the submission of a false or misleading report.<sup>53</sup>
- 6.2 Where SMS Acquirers have decided not to report a transaction because they consider that it does not meet the criteria for a reportable event (eg because SMS Acquirers consider that the transaction lacks a UK nexus, falls below the relevant shares or voting rights thresholds, or involves a level of consideration below £25 million), the CMA may request detailed explanations and evidence to substantiate SMS Acquirers' decision not to submit a report.<sup>54</sup>
- 6.3 More detailed guidance on enforcement and penalties for non-compliance can be found 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.

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<sup>50</sup> Section 85(4) of the DMCC Act.

<sup>51</sup> Sections 64(3) and 85(4) of the DMCC Act provide that if a reportable event takes place without a report having been submitted or before the end of the waiting period, each person to whom the duty to report applied in relation to the event is to be treated as having breached the standstill obligation.

<sup>52</sup> Section 87(1)(a) of the DMCC Act. Section 69 in Chapter 6 of the DMCC Act provides the CMA the power to require information for the purpose of exercising, or deciding to exercise, any of its digital markets functions, which includes the merger reporting requirements.

<sup>53</sup> Section 87(1)(b) and (c) of the DMCC Act.

<sup>54</sup> Per Section 68 of the DMCC Act, the CMA has a duty to keep compliance with the merger reporting requirement under review.