CMA consultation: Digital markets competition regime guidance

General comments

We are a company active in the UK market for digital activities that fall within the regime.

Consultation:

- The approach to consultation in the draft guidance is very thoughtful and Chapter 3 contemplates a range of consultation methods.
- o In addition, the guidance should be expanded to include steps to ensure the process is equitable between the parties by engaging competing firms at the same stages in the process it engages designated firms and by sharing essential information. The CMA should consider how to ensure that designated firms cannot unreasonably use commercial confidentiality to prevent such sharing. In particular, it is fundamental to the effectiveness of the digital markets regime that third parties have access to sufficient information to be able to meaningfully engage with the process. If the CMA is satisfied that the information, or part of it, is truly confidential to the designated (or potential designated) firms, similar mechanisms (e.g. confidentiality rings) should be used to those used to give designated firms access to third party information, so that third parties (and/or their advisors) can properly engage with the CMA.
- While the DMCCA does not set out explicitly how the proposed participatory process should operate, it was a key pillar of Government policy that informed the Bill and it would be appropriate to expand the consultation section of the guidance to clarify this. In particular, there should also be sufficient time and space for informal engagement with competing firms at any stage, and specifically in respect of the decision making-process for designation of particular firms and/or digital activities; during the design phase of conduct requirements and PCIs; and the consideration of commitments. The participatory process should be sufficiently flexible to anticipate flash points and complex discussions that will inevitably be iterative and more resource-intensive, allowing sufficient time for meaningful third party engagement at each point.
- The guidance should clarify that stakeholders should also be consulted on the effectiveness metrics and information that should be included in compliance reports.
- The creation of an external relations team within the CMA to lead and structure engagement is very welcome.

• Information gathering:

- The draft guidance recognises the impact RFIs can have on firms. The approach to information requests outlined in paras 5.16-5.22 covers the key areas of concern.
- The careful balance between making the process manageable and the CMA's duty of expedition is recognised in para 9.24. The CMA should keep this under review and seek regulator feedback from stakeholders. The CMA should set out an indicative timetable for implementation as soon as possible after commencement to allow third parties to plan and resource ahead of information requests.

Confidentiality:

- The draft guidance proposes consistency with established CMA protocols on confidentiality as outlined in paras 5.81-5.9. This is welcome.
- Additional safeguards to protect the identity of complainants is important to minimise the risk of retaliation by a designated firm and avoid disincentivising complaints.
 However, this safeguard relies on Part 9 of Enterprise Act and the guidance could go further in providing reassurance for competing firms, including with respect to protecting anonymity.
- O Given the CMA's duty of expedition, we would propose that a standardised approach to confidentiality, where possible, would not only support third parties but also speed up consultations and other engagement for example, where it is clear that there will be a need for a confidentiality ring, we would encourage the CMA to establish one from the outset, to avoid the delays and administrative burden of first engaging in iterative confidentiality requests/put-backs.
- Finally, we are grateful for the CMA's suggestion that it will offer summaries of third
 party responses to its invitations to comment and consultations and we consider that
 aggregating third party responses will expedite the process both for the CMA and third
 parties, as well as giving confidence that anonymity can be protected.

Monitoring:

 There should be a bias towards leveraging the CMA's own resources to inform market monitoring and using information gathering powers sparingly in order to minimise the burden on firms in line with the approach outlined in paras 5.16-5.22.

Conduct requirements:

- The process set out in Chapter 3 is broadly in line with expectations. In particular, the flexibility as to the form of a conduct requirement (i.e.: a specific outcome or a specific action to achieve an outcome) and the option to consult on CRs in parallel with an SMS investigation. The intention to consult with stakeholders in a range of ways is also welcome.
- The draft guidance mirrors existing public law guidance on the consideration of proportionality and is consistent with the CMA's current practice as Parliament intended. This is welcome.
- The guidance should clarify that the consumer benefit step set out in para 3.10 will
 consider the benefits to current and future consumers, and direct and indirect benefits
 in line with para 3.23. The guidance should also make explicit that this is not intended
 to be equivalent to a countervailing benefits assessment.

• Role of other regulators:

 SMS investigations and other processes envisage a role for other statutory regulators set out in paras 9.35-9.38. This engagement must be transparent to all parties and there should be a bias in favour of publishing submissions from these regulators to the CMA.

- These matters should be covered in the proposed MoUs with other regulators. The CMA and ICO should jointly consult on a draft.
- The CMA should clarify the involvement, if any, of DRCF and ensure transparency in this regard also.

<u>Terminology</u>:

 The CMA might consider adding a glossary of terms in annex to the guidance to establish a common understanding of key terms used throughout the document.

Detailed comments

SMS investigations:

The approach set out in Chapter 2 is well thought through and broadly welcome. In particular we agree that the application of regulation should be a factor (para 2.62) and that the assessment does not require a market definition or proof of dominance (as in other areas of CMA's work including Competition Act 1998 investigations).

• Countervailing benefit exemption:

 The draft guidance makes explicit that the amendment to the Bill merely clarifies the assessment process and that legislators did not intend the CMA to change it. In particular, the burden of proof should rest with the designated firm.

Enforcement and appeals:

- The DMCCA regime is intended to deliver effective remedies from the outset in order to address anti-competitive practices more quickly and flexibly than the existing ex-post regime. It is therefore crucial that the operation of the regime treats enforcement as a very last resort, principally by ensuring that the implementation phase (of CRs and/or PCIs) is closely supervised and adequately resourced by skilled teams with the CMA and that there is also an actively-managed participatory process throughout this phase. KPIs for these new CRs and/or PCIs should reflect these objectives.
- The guidance should make clear that, where the CMA publishes provisional findings in relation to an investigation into a suspected breach of a competition requirement, the public summary will provide sufficient reasoning to allow third parties to understand why the CMA has made a provisional finding of non-/compliance. Similarly, where the CMA publishes its reasons on case closure (paragraph 7.33), the protection of confidentiality should not prevent third parties from understanding the specifics of non-/compliance.
- The CMA should have a bias towards behavioural remedies which provide the quickest and most effective remediation for competing firms and avoid cycles of fines which can be appealed on the merits.

• <u>Prioritisation</u>:

 The draft guidance omits to propose criteria on how the CMA will set its priorities, including how it will select which activities to investigate first and how it will avoid administrative bottlenecks with formal Board decisions about designations and remedies. It will be important that this process is not only transparent and adequately resourced, but that the CMA's internal decision-making process is timely and can withstand the likely volume of decisions.